

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DAVID A. BURLEW,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant,

Respondent.

**DOCKET NUMBER WD72135
MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

Date: April 5, 2011

Appeal from:
Cole County Circuit Court
The Honorable Patricia S. Joyce, Judge

Appellate Judges:
Division One: Victor C.Howard, P.J., Thomas H. Newton and Alok Ahuja, JJ.

Attorneys:
Edward S. Thompson, for appellant.
Shaun J. Mackelprang, Chris Koster, Stephen D. Hawke, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY
COURT OF APPEALS -- WESTERN DISTRICT

DAVID A. BURLEW

Appellant,

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Respondent.

WD72135

Cole County

David Burlew was convicted in July 2007 on three offenses: a felony driving while intoxicated (“DWI”) offense, and two separate offenses of violating orders of protection. Burlew was sentenced to a four-year sentence for the felony DWI. He was sentenced to a consecutive four-year sentence for the first order of protection violation. On the second order of protection violation, he was also sentenced to four years, although the sentence on that charge was to run concurrently to the sentences in the first two cases.

The trial court subsequently vacated Burlew’s felony DWI conviction, and a conviction for misdemeanor DWI was substituted in its place. As opposed to the four-year sentence Burlew had received for the felony DWI, he was instead sentenced to six months on the misdemeanor DWI.

Burlew filed this declaratory judgment action contending that his consecutive order of protection sentence should begin to run immediately after the conclusion of his sentence for the misdemeanor DWI conviction. Burlew’s petition alleges that the Department has instead held that his consecutive order of protection sentence cannot begin to run prior to the date on which his felony DWI conviction was actually vacated, because until the actual vacation of that conviction, Burlew was serving the four-year sentence on the felony DWI. The circuit court granted the Department’s motion to dismiss Burlew’s petition, agreeing with the Department that Burlew could not receive credit for time served on his consecutive order of protection sentence prior to the actual vacation of his felony DWI conviction.

REVERSED AND REMANDED.

Opinion Holds:

Under our decision in *Calvin v. Missouri Department of Corrections*, 277 S.W.3d 282 (Mo. App. W.D. 2009), where one conviction and sentence in a consecutive sequence is later

vacated, the other sentences in the sequence should be recalculated to run as if the vacated sentence had never existed. Applied to this case, the running of Burlew's consecutive order of protection sentence must be calculated as if the four-year sentence for the felony DWI had never existed. Instead, Burlew's consecutive order of protection sentence begins to run as soon as his misdemeanor DWI sentence concludes, even if that includes time prior to the date on which the felony DWI conviction was actually vacated.

To the extent Burlew seeks credit for time in custody prior to his original conviction and sentencing, however, he must establish that such pre-conviction custodial time was "related to" the order of protection offense in order to be entitled to credit for that time. *See* § 558.031.1, RSMo. Whether the pre-conviction custodial time was "related to" the order of protection offense would depend on, among other things, the causes of Burlew's arrest and incarceration, and whether he was subject to release on bail for the offenses for which he was being held.

Before: Division One: Victor C. Howard, P.J., Thomas H. Newton and Alok Ahuja, JJ.

Opinion by: Alok Ahuja, Judge

April 5, 2011

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