

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

KENNETH RAY HOWARD

APPELLANT,

v.

**MISSOURI DEPARTMENT OF
CORRECTIONS**

RESPONDENT.

DOCKET NUMBER WD72520

DATE: May 31, 2011

Appeal From:

Cole County Circuit Court
The Honorable Paul C. Wilson, Judge

Appellate Judges:

Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

Attorneys:

Kenneth Ray Howard, Appellant Pro Se.

Stephen D. Hawke and Terrence M. Messonnier, Jefferson City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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No. WD72520

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Before Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

On December 5, 1997, Kenneth Ray Howard was convicted of murder in the second degree, burglary in the first degree and armed criminal action in St. Charles County Circuit Court for crimes committed on August 21, 1991. Based on these convictions, Howard was sentenced to life imprisonment for murder, fifteen years for burglary, and one hundred years for armed criminal action. Howard was ordered by the Court to serve these sentences consecutively. He is currently incarcerated in the Missouri Department of Corrections (“MDC”).

After committing the above crimes in 1991, Howard left the United States and moved to Canada. On October 18, 1991, Howard was arrested by the Canadian authorities for violating certain laws within that country. On March 27, 1992, Howard was convicted of most of the Canadian charges and Howard was sentenced to a total term of forty-five days of incarceration for his Canadian crimes.

On November 21, 1991, the State of Missouri filed a warrant for Howard’s arrest with the appropriate Canadian authorities for his extradition back to the United States. Howard fought extradition. Subsequently, Howard was delivered from the Canadian authorities to the custody of St. Charles County on December 28, 1995 to face his 1991 charges.

On February 4, 2009, Howard, filed his Petition for Declaratory Judgment. The gravamen of Howard’s Petition was that he was entitled as a matter of law to receive credit on his Missouri sentences for the time he served in custody in Canada. MDC subsequently filed a Motion for Summary Judgment. The trial court issued its “Memorandum, Order and Judgment” granting MDC’s motion for summary judgment, and dismissing Howard’s Petition.

REVERSED AND REMANDED.

Division One holds:

Howard brings seven Points on appeal, all of which contend that the trial court erred in granting MDC’s motion for summary judgment. Here, the trial court concluded that pursuant to

the applicable version of Section 558.031 in 1991, Howard was not entitled to credit for any of the time that he was incarcerated in Canada (from October 18, 1991 to December 28, 1995), and thus it granted MDC's motion for summary judgment. In so concluding, the trial court found that Howard was not entitled a credit while "in Canadian custody after the Missouri detainer was filed and while he was not serving his Canadian sentence because that time was not spent 'awaiting trial'" but rather Howard "was being held in Canadian jail, pending his extradition proceedings to the United States."

The Missouri Supreme Court has made it clear that the trial court has no discretion in calculating credit for jail time awaiting trial pursuant to Section 558.031. Furthermore, a prisoner is entitled to time served under Section 558.031 in a foreign jurisdiction if the confinement is *because of* a Missouri detainer.

While the trial court concluded that Howard was not "awaiting trial" (as required by Section 558.031) when fighting extradition, the court overlooked that this was the very purpose of the detainer that was lodged against Howard, so that the State could eventually try him on the charges for which he is now incarcerated. A trial on the Missouri charges was in store for Howard as he fought extradition, and he was otherwise subject to release by Canadian authorities.

Therefore, we conclude that MDC was not entitled to summary judgment on Howard's declaratory judgment action. We agree with the trial court that Howard is not entitled to *all* the relief he seeks in his Petition, but this alone is insufficient for MDC to demonstrate that it is entitled to summary judgment.

Because of the likelihood of success on the merits of Howard's claims ***based on the undisputed facts as found by the trial court***, it would seem prudent for MDC to recalculate the credit Howard is entitled to while he was incarcerated in Canada, after he had completed his Canadian sentence. However, because of the procedural posture of this case, it is not this Court's role to resolve the final merits of Howard's declaratory judgment action.

The judgment of the trial court is hereby reversed and remanded.

Opinion by Gary D. Witt, Judge

May 31, 2011

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