

No. SC88231

IN THE
SUPREME COURT OF MISSOURI

JOSHUA DONALDSON,

Petitioner/Appellant,

v

LARRY CRAWFORD, Director

Missouri Department of Corrections,

Respondent

Appeal from the Grant of Summary Judgment
to Respondent, Dana Thompson, in a Declaratory Judgment Action by the
Circuit Court of Cole County Missouri,
The Honorable Richard G. Callahan, presiding.

RESPONDENT'S SUBSTITUTE BRIEF
ON POST-OPINION TRANSFER FROM THE
MISSOURI COURT OF APPEALS WESTERN DISTRICT

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
(573)751-3825
Fax (573) 751-7406
Mike.Spillane@ago.mo.gov
Attorneys for Respondent

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STATEMENT OF THE CASE

This case presents the issue of how credit for time spent on probation is to be calculated when the probationer is in prison serving a different sentence during the period of probation and subsequently has his probation revoked. The Department of Corrections believes that §558.031.1(3) RSMo 2000 and §559.100 RSMo 2000 dictate that whether to credit time spent on probation on a sentence as time served on that sentence is a matter left to the discretion of the sentencing court. Donaldson argues that in a case in which the inmate was serving another sentence in the Department of Corrections while on probation, and then had his probation revoked, the Department of Corrections should credit the time spent on probation as time served on the sentence for which the inmate was on probation, if the time in custody was related to the offense for which the inmate was on probation under the test in §558.031.1 RSMo 2000.

This case presents the secondary issue of whether under the specific fact pattern of this case the time Donaldson spent in prison while on probation would be sufficiently related to the offense for which he was on probation to entitle him to credit on the sentence backing up the probation under the relationship test in §558.031.1 RSMo 2000. This secondary issue only arises if Donaldson is correct in arguing that the decision of whether to award credit for the time spent on probation is not left to the discretion of the sentencing court by §558.031.1 (3) RSMo 2000 and §559.100 RSMo 2000.

STATEMENT OF FACTS

On January 7, 1998 Donaldson committed the offense of sale of a controlled substance in Camden County, Missouri (L.F. 57). Donaldson was arrested for that offense on January 7, 1998 and was released on bond two days later (L.F. 46).

Following a plea of guilty, the Circuit Court of Camden County, Missouri sentenced Donaldson to ten years imprisonment in case CR298-46FX, (Case 1) for sale of a controlled substance (L.F. 14). The Circuit Court of Camden County suspended execution of the sentence and placed Donaldson on five years probation (L.F. 14).

On or about January 30, 2002 Donaldson was arrested in Phelps County, Missouri and transported to Maries County based on warrants for his arrest for forcible rape and armed criminal action (L.F. 69). On January 30, 2002, Donaldson escaped from the Maries County jail but quickly was recaptured in an alley near the jail (L.F. 70). On January 30, 2002, Maries County charged Donaldson with the Class D felony of escape (Case 2). Donaldson's probation officer issued a violation warrant charging Donaldson with violation of the condition of his probation on Case 1 that he not violate the law while on probation (L.F. 70). On February 15, 2002 the Circuit Court of Camden County issued a capias warrant for Donaldson for violating his probation on the sale of controlled substance sentence in Case 1 (L.F. 68).

Following a plea of guilty, in case CR202-29FX, Case 2, the Circuit Court of Maries County sentenced Donaldson to three years for escape on October 1, 2002 (L.F. 22).¹ Donaldson was held in the Maries County jail from January 30, 2002, the date of his escape, until October 2, 2002, the day after his sentencing on the escape charge, 245 days (L.F. 67). Donaldson was held in the Department of Corrections serving the escape sentence from October 2, 2002 until he was conditionally released on January 29, 2004 (L.F. 56-57). The Department of Corrections credited the 245 days Donaldson spent in Maries County jail as time served on the escape sentence in Case 2 (L.F. 57).

On January 29, 2004 the Department of Corrections conditionally released Donaldson to a Camden County detainer for his probation violation on Case 1, the sale of a controlled substance case (L.F. 21, 58). On February 9, 2004 the Circuit Court of Camden County revoked Donaldson's probation on the sale of a controlled substance case, Case 1, both for the escape from confinement in Maries County and for unrelated reporting and residency violations that predated the Maries County escape (L.F. 72).

The Department of Corrections received Donaldson on February 11, 2004 for service of the ten-year sale of a controlled substance sentence in Case 1 (L.F. 49). The sheriff of Camden County endorsed twenty-seven days jail-time credit for time spent in the Camden County jail in connection with Case 1 the sale of a controlled substance offense (L.F. 73).

¹ The record does not reflect that Donaldson was ever committed to the Department of Corrections in connection with the rape and armed criminal action allegations which were the cause of Donaldson's presence in the Maries County jail in the first place.

The Department of Corrections credited only this twenty-seven day period as time served on the sale of a controlled substance sentence, Case 1. The Department did not credit the time from January 30, 2002 to January 29, 2004 while Donaldson was on probation on the sale of controlled substance sentence but in the Camden County jail and then the Department of Corrections as time served on Case1. The Department counted that only as time served on Case 2 but not time served on Case 1, because Donaldson was still on probation on Case 1 (L.F. 57, 73).

Donaldson sought administrative relief within the Department of Corrections alleging entitlement to credit on his Camden County sentence in Case 1 for the entire period from January 30, 2002 to February 9, 2004 even though he was on probation on that sentence for the entire period following January 30, 2002 (L.F. 26, 46-47). The Department of Corrections denied Donaldson's claim finding among other things that "the judge will have to order credit for time served on probation" (L.F. 43).

Donaldson filed a petition for declaratory judgment in the Circuit Court of Cole County on June 6, 2005 seeking a declaration that the Department of Corrections should credit Donaldson's Camden County sentence for the time from January 30, 2002 that to February 9, 2004 while Donaldson was incarcerated in the Maries County jail and the Department of Corrections, even though he was on probation on the Camden County sentence in Case 1 during that period (L.F. 1, 4-11).

The Director of the Department of Corrections filed an answer, a motion for summary judgment, and a legal memorandum in support of the motion for summary judgment (L.F. 2, 34-63). The thrust of these pleadings was that Missouri statutory law excludes time spent on

probation on a sentence from the administrative determination of jail-time to be awarded on that sentence, and leaves the determination of how much credit for time spent on probation should be awarded to the discretion of the sentencing judge (L.F. 34-63).

Donaldson filed an answer to the motion for summary judgment which also functioned as a cross-motion for motion summary judgment, and a legal memorandum in support of that pleading (L.F. 64-82). The thrust of those pleadings was that the Department of Corrections, not the sentencing judge, is responsible for determining the credit to be awarded on the Camden County sentence for the time period from January 30, 2002 until February 11, 2004² when Donaldson was on probation on the Camden County sentence in Case 1 but incarcerated in the Maries County jail and the Department of Corrections serving the Maries County sentence in Case 2, but under detainer for the Camden County probation violation allegation on the sentence in Case 1 (L.F. 64-82). Donaldson argued that the Department of Corrections had the power to award credit for this time period on the Camden County sentence and should do so (L.F. 64-82).

The Circuit Court of Cole County granted summary judgment for the Director of the Department of Corrections on October 12, 2005 (Appendix A1). The Circuit Court found that 558.031.1(3) RSMo 2000 and §559.100.2 RSMo 2000 left the decision of whether to award the credit Donaldson sought on Case 1 to the discretion of the sentencing court because Donaldson was on probation on Case 1 during the period he seeks to have credited

² The probation was actually revoked on February 9, 2004 and Donaldson's brief uses the February 9, 2004 date (Appellant's Brief at 3-4).

to that sentence, and those statutes reserve the award of credit for time spent on probation to the discretion of the sentencing court (Appendix A1). Donaldson filed a timely notice of appeal on November 18, 2005 (L.F. 83).

STANDARD OF REVIEW

The case below was a declaratory judgment action in which there were no genuinely disputed issues of material fact. The parties filed cross-motions for summary judgment and the case was decided based on the interpretation and application of Missouri statutory law. Therefore the standard of review to be used by this Court is *de novo* review. *Cody v. Missouri Board of Probation and Parole*, 111 S.W.3d 547, 549 (Mo. App. W.D. 2003).

ARGUMENT

The Circuit Court of Cole County acted correctly in denying Donaldson's motion for summary judgment and granting the Director of the Department of Corrections' motion for summary judgment for two reasons. First, 558.031.1(3) RSMo 2000 excludes time spent on probation on a sentence from the jail or prison time the Department may count as time served under that sentence, leaving the decision to award credit for time spent on probation with the sentencing court. Second, the time Donaldson spent in custody serving an escape sentence following his escape from charges of rape and armed criminal action is not related to the offense, sale of a controlled substance, the sentence for which Donaldson seeks to have credited.

(Addresses Appellant's points I and II).

**SECTION 558.031.1(3) DOES NOT PERMIT THE DEPARTMENT OF
CORRECTIONS TO AWARD DONALDSON CREDIT ON A SENTENCE FOR
TIME HE SERVED ON PROBATION ON THE SAME SENTENCE.**

This is a case about the interpretation and application of the Missouri jail-time credit statute §558.031.1, RSMo 2000, and §559.100, RSMo 2000, the Missouri statute giving circuit courts the power to place individuals on probation and revoke probation. Donaldson argues that the Department of Corrections can and should credit his Camden County sentence, in Case 1, for the period between January 30, 2002 and February 9, 2004 while he was incarcerated, awaiting trial and serving his sentence on Case 2 even though his probation had not been revoked in connection with Case 1, the Camden County controlled substance case. The Department of Corrections argued in circuit court that §558.031.1(3), RSMo 2000 explicitly excludes time spent on probation for a crime from time the Department of Corrections can count as time served on the sentence for that crime under §558.031.1, RSMo 2000 and leaves the determination of credit for time spent on probation to the discretion of the revoking judge. The Department awarded all this time as time served on Donaldson's Case 2 but found it could not award time served on the sentence for Case 1 for the time Donaldson was still on probation on the sentence for Case 1 because the decision on whether to award that credit is by law a matter for the discretion of the sentencing court (L.F. 43). The Circuit Court of Cole County agreed with the Department's application of the statute (Appendix at A1).

Section 558.031.1, RSMo 2000 reads as follows:

- a. A sentence of imprisonment shall commence when a person convicted of a crime in this state is received into the custody of the department of corrections or other place of

confinement where the offender is sentenced.

Such person shall receive credit toward the service of a sentence of imprisonment for all time in prison, jail or custody after the offense occurred and before the commencement of the sentence, when the time in custody was related to that offense, except:

- (1) Such credit shall only be applied once when sentences are consecutive;
- (2) Such credit shall only be applied if the person convicted was in custody in the state of Missouri, unless such custody was compelled exclusively by the state of Missouri's action, and
- (3) As provided in section 559.100, RSMo.

The statute provides that as a general rule, the Department of Corrections is to credit time in custody as time served on the sentence for an offense when the custody occurred before the commencement of the sentence and the custody was related to the offense. Therefore the general rule is that the Department is to use a relationship test to determine whether credit is to be awarded for custody in jail or prison prior to the commencement of the sentence for an offense. The credit is awarded if and only if the time spent in custody was related to the offense that resulted in the sentence on which credit is sought. In such a

general case the Missouri Supreme Court has held that “[t]his statutory scheme contemplates an administrative and not a judicial determination of jail time to be credited with no sharing of jurisdiction” and that “[a]s a matter of law the sentencing court has no discretion in crediting jail time.” *Murphy v. State*, 873 S.W.2d 231, 232 (Mo. banc 1994).

But the statute sets out three exceptions to the general rule that the Department of Corrections should calculate credit based on the relationship test of whether the time in custody is related to the offense on which the inmate seeks to have the sentence credited. The exceptions explicitly prohibit the Department from (1) awarding credit on consecutive sentences, (2) awarding credit for custody outside Missouri unless the actions of Missouri exclusively compelled the custody and (3) awarding credit on cases controlled by 559.100, RSMo 2000, the statute on granting and revoking probation. The last exception is implicated here. Section 559.100.2, RSMo 2000 in pertinent part states that “The Circuit Court may in its discretion, credit any period of probation as time served on a sentence.” Thus, the Department of Corrections cannot itself determine based on the relationship test whether to credit the time Donaldson was on probation on his Camden County sentence, but in custody, as time served on the Camden County sentence. Subparagraph three of §558.031.1, RSMo 2000 explicitly reserves the decision on whether the time spent on probation on a sentence is to be credited as time served on that sentence to the discretion of the sentencing and revoking court.

In interpreting the statute, each word, clause, section, and sentence should be read to have meaning See *Hadlock v. Director of Revenue*, 860 S.W.2d 335, 777 (Mo. banc 1996). One cannot read the exception in subparagraph three of the statute to apply only in cases in

which the person seeking credit was on probation but otherwise subject to no custody, without reading the subparagraph to be meaningless surplusage. In a case in which the inmate is not in jail or prison while on probation there is no jail or prison time to credit under §558.031.1, RSMo 2000 and the exception to the general rule of awarding credit for time in custody related to an offense is unnecessary.

Similarly, the argument that §558.031.1(3), RSMo 2000 exists solely to compel the Department of Corrections to respect awards of probation time credit made by the sentencing courts in cases in which a probationer was not in jail or prison, is without merit. Section 559.100 RSMo 2000 gives sentencing courts the power to award probation time credit as part of the judgment imposing or executing sentence. The Department must comply with such a sentence including probation time credit. No separate exclusionary language needs to exist in the jail-time credit statute for this purpose. In fact, prior to August 28, 1995 the current subparagraph three was not part of the jail-time credit statute. See §558.031.1 RSMo 1994. Neither Donaldson, nor the Court of Appeals in its pre-transfer opinion cited any case showing that there has ever been a problem with the Department ignoring awards of probation time credit under §559.100 RSMo or its predecessor 559.036.3 RSMo 1986, which also allowed a discretionary award of probation time credit.

The addition of subparagraph three in current version of the statute and its application in cases in which an inmate was both incarcerated and on probation is in fact a tool that harmonized, the jail-time credit statute and the probation statute, in light of another change to the jail time credit statute. The earlier jail-time credit statute read as follows:

558.031. Calculation of terms of imprisonment – credit for jail time awaiting trial. 1. A person convicted of a crime in this state shall receive as credit toward service of a sentence of imprisonment all time spent by him in prison or jail both while awaiting trial for such crime and while pending transfer after conviction to the department of corrections or the place of confinement to which he was sentenced. Time required by law to be credited upon some other sentence shall be applied to that sentence alone, except that

(1) Time spent in jail or prison awaiting trial for an offense because of a detainer for such offense shall be credited toward service of a sentence of imprisonment for that offense, even though the person was confined awaiting trial for some unrelated bailable offense; and

(2) Credit for jail or prison time shall be applied to each sentence if they are concurrent.

558.031.1 RSMo 1994.

Under this older statute the general rule was that an inmate did not receive jail-time credit unless he fit into the exception of subparagraph one or subparagraph two. A probationer was not awaiting trial for the offense that caused the probation, and was not serving a concurrent sentence. Therefore a probationer did not fit into either exception. Therefore, the calculation of credit for time spent on probation, while the probationer was

incarcerated fell to the discretion of the trial court under §559.100, RSMo and its predecessor.

The current statute §558.031.1 RSMo 2000 as a general rule requires that Department of Corrections award credit on an offense for time in custody related to that offense unless the time fits one of the specified exceptions to the general rule. By creating the exception in subparagraph three the legislature avoided conflict between the traditional discretionary award of probation time credit by the Circuit Courts under §559.100 RSMo and the expanded definition of situations in which the Department of Corrections could award credit under §558.031.1 RSMo 2000. The provision is not meaningless surplusage. It is an exception to the general rule in favor of the calculation of credit by the Department of Corrections, which preserves the traditional discretion of the sentencing courts in awarding or denying credit for time spent on probation.

If subparagraph three is read, as it must be, as a meaningful exception to the Department of Corrections' authority to award jail and prison time credit, then the circuit court correctly granted summary judgment for the Director of the Department of Corrections, as the decision whether or not to award the credit Donaldson seeks rests with the sentencing court.

THE TIME DONALDSON SPENT IN CUSTODY SERVING HIS ESCAPE SENTENCE WAS NOT RELATED TO THE OFFENSE OF SALE OF A CONTROLLED SUBSTANCE AND THEREFORE COULD NOT BE CREDITED AS TIME SERVED ON THE SALE OF A CONTROLLED SUBSTANCE SENTENCE

**UNDER §558.031.1 RSMo 2000, EVEN IF THE CREDIT WERE NOT EXCLUDED
BY THE EXCEPTION IN SUBPARAGRAPH THREE**

Section 558.031.1 requires the award of credit on the sentence for an offense for time spent in prison jail or custody between the commission of an offense and the commencement of sentence for that offense “when the time in custody was related to that offense”. §558.031.1, RSMo 2000. The time in custody for which credit is sought must be related to the offense that resulted in the sentence on which the time is to be credited *See State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 518-519 (Mo. banc 2001).

In this case Donaldson committed the offense of sale of a controlled substance in 1998 resulting in Donaldson being placed on five years probation (L.F. 141, 46, 57). In 2002 Donaldson was arrested for rape and armed criminal action and then escaped from jail (L.F. 69-70). He then pled guilty to and served part of a sentence for escape while still on probation for the 1998 offense (L.F. 69-70). The time Donaldson spent in custody serving the escape sentence is not related to the 1998 narcotics offense and cannot be credited as time served on that offense under §558.031.1 RSMo 2000. Donaldson would have been in prison serving his escape sentence regardless of his 1998 offense. The prison time is simply not related to the offense for which Donaldson seeks to have the time credited.

Goings v. Missouri Department of Corrections, 6 S.W.3d 906 (Mo. Banc 1999) does not support Donaldson’s position. In *Goings* the inmate was on parole for offense 1 when he was arrested for offense 2. Because of his arrest for offense 2 the parole was revoked on the sentence for offense 1. The Missouri Supreme Court held that the spent in prison after the revocation on the sentence for offense 1 should be credited under 558.031.1 RSMo to the

sentence ultimately imposed for offense 2. That is so because the time in custody serving the sentence for offense 1 after the revocation of parole was related to offense 2 in that, offense 2 was the reason parole was revoked on offense 1. In short in *Goings* the time spent in custody was related to the offense that resulted in the sentence on which credit was sought. That is not the case here. *See State ex rel. Nixon v. Kelly*, 58 S.W.3d 513, 518 (Mo. banc 2001) (distinguishing *Goings* from a fact pattern in which no such relationship existed.). Donaldson was in jail on rape and armed criminal action charges when he escaped, ultimately causing the escape sentence in case 2. The 1998 offense of selling a controlled substance is not related to the time in custody that was caused by the escape. Were Donaldson's request for credit not barred by the exception in §558.031.1(3) 2000, it would fail under the relationship test under §558.031.1 RSMo 2000. For this reason also the Circuit Court acted correctly in granting summary judgment for the Director of the Department of Corrections.

CONCLUSION

The judgment of the Circuit Court of Cole County should be affirmed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
(573)751-3321
Fax (573)751-2096
Mike.spillane@ago.mo.gov
Attorneys for Respondent

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains ___ words, excluding the cover, this certification and the appendix, as determined by Microsoft Office Word 2003 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 12th day of March, 2007, to:

William P. Nacy#52576
522 E. Capitol Ave.
Hanrahan & Trapp
PO Box 362
Jefferson City, Missouri 65101

JEREMIAH W. (JAY) NIXON
Attorney General

MICHAEL J. SPILLANE
Assistant Attorney General
Missouri Bar No. 40704
P.O. Box 899
Jefferson City, MO 65102
(573)751-3321
Fax (573)751-2096
Mike.spillane@ago.mo.gov
Attorneys for Respondent

RESPONDENT'S APPENDIX

The Judgment of the Circuit Court of Cole County A1

Section 558.031, RSMo (2000) A2

Section 559.100 RSMo (2000) A3