

NO. SC85818

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. ERIC BEAVER,

Petitioner,

v.

WILLIAM BURGESS and DENIS AGNIEL,

Respondents.

ORIGINAL PROCEEDING IN MANDAMUS

RESPONDENTS' STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This case is an original proceeding in mandamus. This Court has jurisdiction to determine original writs pursuant to Article V, §4, of the Missouri Constitution (as amended 1976).

STATEMENT OF FACTS

A. Factual history

On May 23, 1997, petitioner Eric Beaver pled guilty to two counts of driving while intoxicated in the Circuit Court of Buchanan County, case numbers CR397-0654 and CR397-0675, and was sentenced to five-years imprisonment in the custody of the Missouri Department of Corrections on each count. Pet. Ex. E, O. Both these cases involved one count of driving while intoxicated as a persistent offender, and these felony convictions imply that petitioner had at least prior two convictions for driving while intoxicated. *See* §577.023(2)(a), RSMo 2000; §577.023.3, RSMo 2000; Pet. Ex. E, O. Petitioner was sentenced pursuant to §559.115, RSMo 2000, and the court granted probation for a period of five years on September 12, 1997. Pet. Ex. E, F, O, and P.

Petitioner's probation in both cases was revoked on January 16, 1998. Pet. Ex. G and Q. Petitioner was again sentenced pursuant to §559.115, RSMo 2000, and the court placed petitioner on a four-year term of probation on May 15, 1998. Pet. Ex. G, H, Q, and R. On August 13, 1999, the court again revoked petitioner's probation in both cases and sentenced petitioner pursuant to §559.115, RSMo 2000. Pet. Ex. J, T. The court placed petitioner on a three-year term of probation in both cases on December 22, 1999. Pet. Ex. K, U. The court revoked this term

of probation on September 4, 2001, and executed petitioner's five-year sentences.

Pet. Ex. L, V.

During this time, petitioner also received a new sentence in Buchanan County case no. CR0397-2425. On January 16, 1998, petitioner pled guilty in case no. CR0397-2425 to one count of driving while intoxicated, persistent offender,¹ and was sentenced to five years in the Missouri Department of Corrections consecutive to the sentences in Buchanan County cases CR397-0654 and CR397-0675. Pet. Ex. X. The circuit court placed petitioner on a four-year term of probation on May 15, 1998. Pet. Ex. Y. On August 13, 1999, the court revoked petitioner's probation and executed petitioner's sentence pursuant to §559.115, RSMo 2000. Pet. Ex. Z. The court placed petitioner on a three-year term of probation in December 22, 1999. Pet. Ex. BB. The court revoked this term of probation on September 4, 2001, and executed petitioner's five-year sentence. Pet. Ex. CC .

Petitioner has been imprisoned in the Missouri Department of Corrections' Western Diagnostic, Reception, and Correctional Center continuously since September 4, 2001. Petitioner completed his prison term on sentences in case numbers CR397-0654 and CR397-0675 on June 20, 2003. Pet. Ex. A. Petitioner will complete the prison term of his sentence in case number CR0397-2425 on

¹This conviction is, at a minimum, petitioner's fifth DWI conviction.

October 19, 2006. Pet. Ex. A. The October 19 date is commonly referred to as a “conditional release” date. *See* §558.011.3, RSMo 2000.

B. Procedural history

Petitioner filed a petition for writ of habeas corpus in the Buchanan County Circuit Court which was denied on July 1, 2003. Pet. Ex. DD. Petitioner then filed a writ of habeas corpus in the Missouri Court of Appeals, Western District, which was denied on December 29, 2003. Pet. Ex. EE. Petitioner filed his petition for a writ of habeas corpus in this Court on February 10, 2004. This Court issued its alternative writ of mandamus on March 30, 2004. Respondents filed a return to the writ on April 29, 2004. This Court appointed counsel for petitioner Beaver and activated the briefing schedule on May 13, 2004.

ARGUMENT

This Court should quash its alternative writ of mandamus ordering respondents to grant petitioner Beaver 662 days of credit against his sentences in Buchanan County cases CR397-0654 and CR397-0675 for the time period between December 24, 1999, and September 4, 2001, and change the conditional release date accordingly because petitioner lacks a clearly established right to this time credit in that petitioner was not in the custody of the Department of Corrections and was not serving his sentence during this time period.

Petitioner contends that he is entitled to a writ of mandamus ordering William Burgess, the superintendent of the Department of Corrections, and Denis Agniel, chairman of the Missouri Board of Probation and Parole, to credit his sentences in Buchanan County case numbers CR397-0654 and CR397-0675 with 620 days of credit for the time period between December 24, 1999, and September 4, 2001, and thus to change petitioner's conditional release date on Buchanan County sentence

CR397-2425 to April 15, 2003.² Petitioner is not entitled to credit for this time because he was not in the custody of the Missouri Department of Corrections.

A. Legal standard for mandamus relief

Mandamus is a discretionary writ, and there is no right to obtain a writ of mandamus. State ex rel. Missouri Growth Ass’n v. State Tax Comm’n, 998 S.W.2d 786, 788 (Mo. banc 1999); State ex rel. Johnson v. Griffin, 945 S.W.2d 445, 446 (Mo. banc 1997). The purpose of mandamus is “to execute, not adjudicate.” Missouri Growth Ass’n, *supra*. Mandamus is appropriate only when “there is a clear, unequivocal, right to be enforced,” and is “only appropriate to require the performance of a ministerial act.” *Id.* Further, mandamus will not lie to compel the performance of a discretionary act. Missouri Growth Ass’n, *supra*; State ex rel. Bd. of Health Ctr. Trustees v. Clay County Comm’n, 896 S.W.2d 627, 631 (Mo. banc 1995).

B. Petitioner’s third term of probation was improper

The record clearly shows that the sentencing court sentenced petitioner to three terms of probation in Buchanan County cases CR397-0654 and CR397-0675. Pet.

²This Court’s alternative writ dated March 20, 2004, indicated that the conditional release should be February 7, 2004. Respondent addresses this dichotomy in section E, *infra*.

Ex. F, H, K, P, R, U. The sentencing court lacked authority to place petitioner on a third term of probation under Missouri law. §559.036.3, RSMo 2000; State ex rel. Brown v. Combs, 994 S.W.2d 69, 71 (Mo.App., W.D. 1999). Respondent concedes that the court's placing petitioner on a third term of probation was improper. The issue in this case thus is whether petitioner should receive credit against his sentences in Buchanan County case numbers CR397-0654 and CR397-0675 with the 62 days that he spent on probation during the improper third term. The 62 days represents the period between December 24, 1999, and September 4, 2001.

C. Petitioner should not benefit from an extra chance to avoid prison

This Court should exercise its discretion and quash its alternative writ because petitioner had the clear opportunity to benefit from the circuit court's decision to place him on a third term of probation in cases CR397-0654 and CR397-0675. In fact, under the terms of that probation, petitioner could have successfully completed probation seventeen months ago on December 24, 2002, by operation of law. Thus, the circuit court was offering petitioner every opportunity available to use community release and noninstitutional treatment options to overcome his addiction to alcohol and his corresponding problem of driving while intoxicated.

The Buchanan County Circuit Court tried every option within its power to impress upon petitioner the need to change his behavior. In fact, the circuit court offered petitioner Beaver, without any objection from Mr. Beaver or his attorney, more chances to participate in probation and other community programs than the court perhaps should have. The circuit court tried to keep Mr. Beaver out of the Department of Corrections. Petitioner should not now use the circuit court's attempts to aid petitioner as a means of eluding the full punishment for his offenses.

This case does not involve an attempt to prolong probation past the legal time limits in §559.016, RSMo 2000. This case instead highlights a concerted attempt by the circuit court to assist Mr. Beaver with his alcohol problem through noninstitutional means within the five-year period suggested by §559.016. This case therefore is one in which this Court should exercise discretion and not order mandamus relief.

D. Petitioner does not have a right to time credit

In order to prevail in this mandamus action, petitioner must demonstrate a clearly established right to credit under a jail-time credit theory, *see* §558.031, RSMo 2000, or a theory that time spent on probation must be credited, *see* §559.036.3, RSMo 2000, or the theory that petitioner's sentence continued to run

during the third probationary period. Petitioner is not entitled to relief under any of these theories.

1. Petitioner's sentence did not run during the third probationary period

Petitioner was sentenced to five years in the custody of the Missouri Department of Corrections for five years on each of his three Buchanan County DWI sentences. Pet. Ex. E, O, and X. However, petitioner was not in the custody of the Missouri Department of Corrections from December 24, 1999, until September 4, 2001, the period of time that this Court appears to order credited in its alternative writ. Petitioner cannot receive credit against a sentence in the custody of the Missouri Department of Corrections for time that petitioner was not in the Department's custody.

Petitioner was not in prison, on parole, or in any other way in the custody of the Missouri Department of Corrections between December 24, 1999, and September 4, 2000. Under Missouri law, a sentence of years in the Missouri Department of Corrections is a sentence of imprisonment. §557.011.2(1), RSMo 2000. The clear implication of a sentence of imprisonment in the custody of the Missouri Department of Corrections is that the criminal defendant will serve a certain amount

of time in the custody of the Missouri Department of Corrections. §558.011.3(1), RSMo 2000.³

Conversely, probation is not a sentence or a part of a sentence. A “sentence” under Missouri law is “punishment that comes within the particular statute designating the permissible penalty for the particular offense.” McCulley v. State, 486 S.W.2d 419, 423 (Mo. 1972). This Court has held that “it is clear that the sentence is the penalty--the confinement for a period of time or the fine--and does not include as part of its definition such conditional orders as the court makes for

³In addition to custody during imprisonment, an offender is in the custody of the Missouri Department of Corrections during a parole term, §217.690.2, RSMo 2000, and under the supervision of the Missouri Board of Probation and Parole for a conditional release term, §558.011.4(2), RSMo 2000.

the amelioration of the punishment--probation or parole.”⁴ Id. Thus, “probation or parole is not part of the sentence imposed upon a defendant.” Id.

Petitioner was not incarcerated in the Missouri Department of Corrections or on parole or conditional release between December 24, 1999, and September 4, 2001. The Department of Corrections released petitioner from its custody on December 24, 1999, to the supervision of the circuit court. Resp. Ex. A; *see* §559.012, RSMo 2000. Petitioner was free in the community during this time. Petitioner was not subject to the Department of Corrections in any fashion during this time period. Petitioner was subject only to the orders of the Circuit Court of Buchanan County. Petitioner’s situation was identical to probation status and petitioner and the circuit court both believed that petitioner was on probation. Further, the fact that the term of probation may have been improper does not change the fact that petitioner’s status between December 24, 1999, and September 4, 2001, was probation. A

⁴McCulley v. State examined the effect of §549.071, RSMo 1969. 486 S.W.2d at 423. Section 549.071 is the direct predecessor of §559.100, RSMo 2000, and examined judicial probation and judicial parole under the 1969 statute. Parole authorized by the Board of Probation and Parole obviously is part of the sentence and is calculated as such. *See* §217.730, RSMo 2000.

person on probation is not in the custody of the Department of Corrections, and thus could not be serving his sentence. Thus, petitioner is not entitled to time against his sentence in the Missouri Department of Corrections for time that he did not serve in the Department's custody. Petitioner's sentence could not have continued to run while he was not in the Department's custody. Petitioner's claim thus fails on this basis.

2. Petitioner does not have a right to credit for time spent on probation

Petitioner is not entitled to relief on a theory that he should be credited with the time spent on probation. Section 559.036.3, RSMo 2000, provides that a grant of time credit against a criminal sentence for time spent on probation is discretionary with the sentencing court. Missouri courts have consistently held that “§559.036(3), RSMo 1986⁵], is dispositive regarding the granting of credit to sentences for time spent on probation. Mitigation of sentences for time spent on probation is completely within the discretion of the trial court.” Holman v. State, 772 S.W.2d 722, 723 (Mo.App., E.D. 1989); *see also* Wuebbels v. State, 770 S.W.2d 479, 481 (Mo.App., S.D. 1989); Norman v. State, 740 S.W.2d 369, 371

⁵The language in §559.036.3 governing the trial court's discretion in granting credit for time served on probation is unchanged from the 1986 version. This footnote is not part of the quoted opinion.

(Mo.App., S.D. 1987); Amsden v. State, 699 S.W.2d 54, 57 (Mo.App., E.D. 1985); State v. Gilmore, 617 S.W.2d 581, 584 (Mo.App., W.D. 1981). Thus, petitioner Beaver has no right to credit for time spent on probation because the trial court had complete discretion to grant or not to grant credit for this time.

Mandamus relief is therefore is inappropriate under a probation-time credit theory because any grant of probation time against a sentence is discretionary and mandamus relief is not available to control the discretion of a public official. State ex rel. Missouri Growth Ass'n v. State Tax Comm'n, 998 S.W.2d 786, 788 (Mo. banc 1999). Further, respondents William Burgess and Denis Agniel are not the sentencing judge and only the sentencing judge can grant credit for time spent on probation. §559.036.3, RSMo 2000. Thus, even if mandamus were permissible in this case, respondents Burgess and Agniel cannot afford petitioner the relief he seeks. Only the sentencing judge can grant petitioner the relief he seeks. Mandamus relief therefore is inappropriate in this case under a probation time-credit theory.

3. Petitioner is not entitled to jail-time credit

An offender may receive credit for all time spent in “prison, jail, or custody” that is related to the offense. §558.031.1, RSMo 2000. However, §558.031.1 also contains three exceptions limiting the award of jail-time credit in cases where the

sentences are consecutive, the offender was confined outside the State of Missouri and the State of Missouri did not exclusively compel custody, and as provided by §559.100, RSMo 2000. The first two exceptions do not apply to this case.⁶ The third exception does.

Section 559.100, RSMo 2000, grants circuit courts power to place an offender on probation after conviction of certain offenses, including driving while intoxicated. Section 559.110.2 clearly establishes that “[t]he circuit court may, in its discretion, credit any period of probation or parole as time served on a sentence.” Thus, credit against a sentence for time spent on probation is purely discretionary with the sentencing court. Thus, credit for time spent on probation is excepted from the mandate of §558.031.1, and petitioner cannot prevail on this theory.

As discussed in the preceding section, mandamus relief does not lie to control the discretion of a public official. State ex rel. Missouri Growth Ass’n v. State Tax Comm’n, 998 S.W.2d 786, 788 (Mo. banc 1999). Further, the named respondents

⁶If this Court were to determine that petitioner is entitled to credit, the consecutive sentence exception would apply. Respondent addresses that issue in section E of this point.

in this case are not the sentencing court, who has the sole power to credit probation time against a sentence. Thus, mandamus relief on this theory is barred.

E. The Department of Corrections should determine petitioner's proper conditional release date

If this Court were to determine that petitioner is correct in his assertions, petitioner would be entitled to credit against his sentences in case numbers CR397-0654 and CR397-0675 for the time period between December 24, 1999, and September 4, 2001. This Court thus should order that the Department of Corrections credit this period of time against these two sentences. Ordering the time credit will, of its own accord, require the Department of Corrections to adjust the conditional release dates and final release dates on all of petitioner's sentences. Allowing the Department of Corrections to calculate the relevant dates will allow those persons with the most experience to determine the correct release date.

However, if this Court wishes to determine the date, this Court's previous determination is correct. This Court calculated the date to be February 7, 2005, in the alternative writ issued on March 30, 2004. Petitioner in his brief contends that, if he is entitled to relief, he should be granted a conditional release date of April 15, 2005. Respondents disagree with petitioner and agree with this Court's conclusion. In order to make this fairly in-depth analysis more clear, respondent will utilize a

table format to list the numbers. The following table lists petitioner's time in jail, on probation, and in the Department of Corrections. The jail credit dates come from Petitioner's Exhibit O. The prison numbers come from Respondent's Exhibit A, a letter of incarceration prepared by the Department of Corrections and found in the appendix to this brief.

<u>Status</u>	<u>Dep't of</u>	<u>Dep't of Corrections</u>	<u>Start date</u>
Buchanan Co. Jail	Corrections	Probation	4/5/1997
Dep't of	Probation	Buchanan Co. Jail	5/30/1997
Corrections	Buchanan Co. Jail	Dep't of Corrections	9/19/1997
Probation			11/30/1997
Buchanan Co. Jail			1/23/1998

6/3/1998	<u>End date</u>	<u>Total time</u>
7/8/1999	5/30/1997	55 days
8/23/1999	9/19/1997	112 days
12/24/1999	11/30/1997	119 days
7/26/01	1/23/1998	54 days
9/7/01	6/3/1998	131 days
	7/8/1999	446 days
	8/23/1999	46 days
	12/24/1999	123 days
	7/26/01	620 days
	9/7/01	43 days
	present day	not applicable

Petitioner was received by the Department of Corrections on September 7, 2001. Petitioner's total jail-time, taken from the above chart, was 198 days. Petitioner also spent 366 days in the Department of Corrections. The disputed time credit in this case, between December 24, 1999, and July 26, 2001, constitutes 620 days. When these time periods are subtracted from the date the Department of Corrections received petitioner, the sentence start date is June 8, 1998.

Petitioner must serve two concurrent five-year terms in the custody of the Department of Corrections on Buchanan County cases CR397-0654 and CR397-0675, followed by a consecutive term in Buchanan County case CR397-2425. The Department of Corrections' rules provide that an inmate may be conditionally released only after completing the prison terms of all consecutive sentences. 14 C.S.R. 80-2.040(4). The conditional release term for a sentence less than nine years is one-third of the total sentence; the prison term is two-thirds of the total sentence. §558.011.4(1)(a), RSMo 2000.

Applying this law to petitioner's case yields the following results. The start date for the two concurrent sentences is June 8, 1998. The prison term for these sentences is two-thirds of five years, or 1,218 days. The conditional release date on the concurrent sentences is therefore October 8, 2001. This date is also the start date for the consecutive sentence (case no. CR397-2425). Adding the prison term of 1,218 days to this date yields a conditional release date of February 7, 2005, which is the date that this Court ordered in its alternative writ. Respondent notes that the sentence completion dates for the concurrent sentences then would be October 7, 2006, and the sentence completion date for the consecutive sentence would be June 5, 2008.

The main disagreement between petitioner's calculations and the above calculations seems to be that petitioner relied on erroneous dates for the commencement of petitioner's sojourns in the Department of Corrections. *See* Pet. Br. at 20-21; *compare with* Resp. Ex. A and Pet. Ex. O.⁷ However, as the dates in Petitioner's Exhibit O (sheriff's jail-time credit endorsement) and Respondent's Exhibit A (Department of Corrections incarceration dates) agree with each other, the basis for petitioner's calculation, *see* Pet. Br. at 20 n.6, is flawed. Thus, the above calculations, as well as those by this Court, are correct if this Court were to provide petitioner relief.

⁷Respondent has included petitioner's exhibit O in the appendix to this brief.

CONCLUSION

For the aforementioned reasons, respondent prays that this Court quash its alternative writ of mandamus.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06 and contains _____ words, excluding the cover and this certification, as determined by WordPerfect 9 software; that the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses, using McAfee Anti-virus software, and is virus-free; and 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 ____ day of _____, 2003, to:

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Respondent's Appendix

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Respondent’s Exhibit A, letter of incarceration A1

Petitioner’s Exhibit O, Buchanan County jail-time credit certification A2