

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

JAMES YOWELL,

Respondent

v.

MISSOURI DEPARTMENT OF CORRECTIONS,

Appellant

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DOCKET NUMBER WD79200

DATE: May 3, 2016

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Appeal From:

Circuit Court of Cole County, MO  
The Honorable Daniel Richard Green, Judge

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Appellate Judges:

Division Three  
James Edward Welsh, P.J., Alok Ahuja, C.J., and Thomas H. Newton, J.

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Attorneys:

Caroline Coulter, Jefferson City, MO

Counsel for Appellant

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Attorneys:

Rachel Russell, St. Peters, MO

Counsel for Respondent

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**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

JAMES YOWELL, Respondent, v.  
MISSOURI DEPARTMENT OF CORRECTIONS, Appellant.

**WD79200**

**Cole County**

Before Division Three Judges: Welsh, P.J., Ahuja, C.J., and Newton, J.

In 2002, Yowell was placed on probation for driving while intoxicated as a persistent offender in Crawford County. In 2007, Yowell was charged with DWI as a chronic offender in Phelps County. (2007 Phelps). In 2011, Yowell received three probation-violation reports. The third violation resulted in the revocation of Yowell’s probation and the charging of two Phelps County cases. (2011(1) Phelps and 2011(2) Phelps). On January 4, 2012, Yowell’s Crawford County probation was revoked and a four-year sentence was executed. On February 6, 2012, Yowell was sentenced in all three Phelps County cases, receiving three consecutive seven year sentences. (2007 Phelps, 2011(1) Phelps, 2011(2) Phelps). On September 6, 2013, all three Phelps County sentences were vacated. On July 17, 2014, Yowell was resentenced in all three Phelps County cases receiving new concurrent sentences of five, six, and seven years, respectively. The Department of Corrections granted jail-time credit to Yowell’s 2007 Phelps County case for the time served between February 6, 2012, and September 6, 2013. The Department refused to grant Yowell any jail-time credit on his 2011 Phelps County cases for this time period.

In May 2015, Yowell filed a petition for declaratory judgment requesting credit for all three Phelps County cases from January 4, 2012, until October 13, 2013. After a hearing, the circuit court entered judgment stating Yowel was entitled to jail-time credit on all three Phelps County cases from January 4, 2012, until September 6, 2013. The Department appeals.

**AFFIRMED IN PART AND REVERSED IN PART**

**Division Three holds:**

In the first point, the Department argues that the trial court erred in awarding Yowell jail-time credit from January 4, 2012, until February 5, 2012, on his 2007 and 2011 Phelps County cases. The Department claims Yowell is not entitled to this credit because his probation revocation was not caused by his Phelps County offenses, meaning his time in custody was not related to the 2007 and 2011 Phelps County cases under section 558.031. We disagree in part.

Section 558.031.1 states that a person is entitled to “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.” For time in custody to be “related” to an offense, “there must be some right to be free from

custody absent the subsequent offense.” Here, Yowell’s probation revocation was based on the consumption of alcohol in violation of probation special condition #11 on March 17, 2011. This violation, the third violation of special condition #11, was the only violation of the three that relinquished Yowell’s right to be free from custody. Because Yowell cannot successfully prove that the violations leading to the 2007 and 2011(1) Phelps County cases prevented him from remaining free on probation in the Crawford County case, his conduct underlying his probation revocation is not related to these cases. Thus credit should be awarded only to Yowell’s 2011(2) Phelps County case which is directly linked to Yowell’s violation of special condition #11 on March 17, 2011. Point affirmed in part and denied in part.

In the second point, the Department argues that Yowell should not be entitled to jail-time credit from February 6, 2012, until September 6, 2013, on his newly imposed sentences for his 2011 Phelps County sentences. The Department asserts that Yowell was only serving the vacated sentence for the 2007 Phelps County case during this time period due to the consecutive nature of the original sentences. We agree.

Generally, under section 558.031, when a sentence is vacated and replaced by a new sentence, all time served under the vacated sentence shall be credited against the new sentence. Here, from February 6, 2012, to September 6, 2013, Yowell was serving time under the vacated 2007 Phelps County sentence. The Department has granted Yowell credit against his 2007 Phelps County conviction for this time period.

Yowell has not, however, been granted jail-time credit for his 2011 Phelps County sentences for this time period. Yowell’s original sentences were ordered to run consecutively, so Yowell was not serving time on his 2011 Phelps County sentences during this time period. Although Yowell’s sentences were vacated and ordered to run concurrently, the court cannot retroactively order a sentence to run concurrently. Instead it becomes concurrent at the institution of the new sentence. Thus, Yowell was not entitled to credit on his 2011 Phelps County sentences. The Department’s second point is granted.

Therefore, we affirm in part and reverse in part.

Opinion by Thomas H. Newton, Judge

May 3, 2016

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