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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20070349 20070350

State of North Dakota, Plaintiff, vs. Shane P. Rodriquez, Defendant.	Supreme Court No. 20070349 & 20070350 Burleigh Co. No. 02-K-2293 & 02-K-2377

FILED
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MAR 20 2008

STATE OF NORTH DAKOTA

BRIEF OF APPELLANT RODRIQUEZ

APPEAL OF ORDER DENYING MOTION FOR CREDIT FOR TIME SERVED

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE ROBERT O. WEFALD, PRESIDING

Shane P. Rodriquez, pro se
Defendant/Appellant
N.D. State Penitentiary
P.O. Box 5521
Bismarck, North Dakota
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STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED BY DENYING RODRIQUEZ CREDIT FOR TIME SERVED.

STATEMENT OF THE CASE

On July 1, 2002, Shane Rodriquez was charged with (I) Count of Terrorizing in violation of N.D.C.C. 12.1-17-04, a class C felony, Criminal No. 02-K-2293. The Criminal Complaint is at R.A.#1 (App.P.1). The Information is at R.A. #10, (App.P.1). Rodriquez subsequently plead guilty to the charge on January 7, 2003. The Criminal Judgment is at R.A. #26, (App.P.1). Rodriquez was sentenced to the North Dakota Department of Corrections and Rehabilitation for a period of five (5) years, with four (4) years suspended for a period of five (5) years. On November 22, 2006, Rodriquez was re-sentenced on a Probation Revocation, R.A.#42, (App.P.1), to the Department of Corrections and Rehabilitation for a term of three (3) years. Rodriquez specifically asked his court appointed counsel (Robert V. Bolinske, Jr.) to ask for one hundred and eight (108) days credit for time already spent in custody. Even though Bolinske failed to do so, the judge, before closing the Revocation of Probation Hearing, granted Rodriquez credit for time served. See (Trans. of Revocation of Probation Hearing, at page 14, li.18-19).

On July 12, 2002, Shane Rodriquez was charged with (I) Count of Possession of Marijuana by a Driver in violation of N.D.C.C. 19-03.1-23 & 19-03.1-05(5)(t), a class A misdemeanor; and Count (II) Possession of Drug Paraphernalia in violation of N.D.C.C. 19-03.4-03, a class C felony, Criminal No. 02-K-2377. The Criminal Complaint is at R.A.#1 (App.P.3). The Information is at R.A.#5, (App.P.3). Rodriquez subsequently

plead guilty to the charges on January 7, 2003. The Criminal Judgment is at R.A.#18, (App.P.3). Rodriquez was sentenced to the North Dakota Department of Corrections and Rehabilitation for a period of one (1) year on Count I and five (5) years on Count II, with four (4) years suspended for a period of five (5) years. Both Counts to run concurrent with one another and concurrent with sentence in Crim. Case No. 02-K-2293. On November 22, 2006, Rodriquez was re-sentenced on a Probation Revocation, R.A.#31, (App.P.3), to the Department of Corrections and Rehabilitation for a term of three (3) years to be served concurrent with sentence in Crim. Case No. 02-K-2293. Rodriquez specifically asked his court appointed counsel (Robert V. Bolinske, Jr.) to ask for one hundred and eight (108) days credit for time already spent in custody. Even though Bolinske failed to do so, the judge, before closing the Revocation of Probation Hearing, granted Rodriquez credit for time served. See (Trans. of Revocation of Probation Hearing, at page 14, li.18-19).

Later in the same day of November 22, 2006, Rodriquez, again represented by court appointed counsel (Robert V. Bolinske, Jr.) was sentenced in Burleigh County, although a Morton County case, by the Honorable Judge Bruce Romanick, in Criminal Case No. 01-K-2098. There are two charges in this case, both are Possession of a Controlled Substance W/Intent to Deliver, one a class A felony and one a class C felony. Rodriquez was sentenced to two (2) years on the class A and one (1) year on the class C, to run concurrent

with one another and concurrent with the Burleigh County cases Rodriquez was sentenced for earlier that day. Here Bolinske did not forget to ask for the credit for time served and, the one hundred and eight (108) days of credit for time served was granted. Criminal Case No. 01-K-2098 is not a part of this appeal.

STATEMENT OF THE FACTS

The statement of the facts are incorporated into the statement of the case above. See N.D.R.App.P., Rule 28(b)(6).

STATEMENT OF JURISDICTION

The District court had jurisdiction under North Dakota Constitution, Art. VI, § 8, N.D.C.C. § 27-05-06(1). This Court has jurisdiction of this appeal under North Dakota Constitution, Art. VI, § 6, N.D.C.C. § 29-28-06(4). This appeal is timely under N.D.R.App.P., Rule 4(b)(1)(A).

STANDARD OF REVIEW

The standard of review for a motion for credit for time served is abuse of discretion.

LAW & ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED BY DENYING RODRIQUEZ CREDIT FOR TIME SERVED.

Rodriquez was incarcerated in Williston, N.D. when a bench warrant and order to hold was issued on August 6, 2006. See R.A.#37, (App.P.1 for case No. 02-K-2293) & R.A.#26, (App.P.3 for case No. 02-K-2377). Rodriquez was transported to Bismarck, N.D. and held until November 22, 2006, at which time he was re-sentenced in both cases. The District court judge said he would receive credit for time served. See (Trans. of Revocation of Probation Hearing, at page 14, li.18-19).

After Rodriquez realized that he did not get the credit for time served, he filed a Rule 35 asking for the credit. See R.A.#46, (App.P.2 for case No. 02-K-2293) & R.A.#34, (App.P.3 for case No. 02-K-2377). The Rule 35 was denied.

Rodriquez thereafter filed the proper motion for credit for time served. See R.A.#52, (App.P.2 for case No. 02-K-2293) & R.A.#34, (App.P.3 for case No. 02-K-2377). The motion is located at (App.P.5-12). The State resisted and the State's Response to Motion for Credit for Time Served is located at (App.P.13-14). The Order Denying Motion for Credit for Time Served is loacted at (Ap.P.15). The Notice of Appeal is located at (App.P.16).

Rodriquez was being held on these charges from the time the bench warrants were issued (August 6, 2006), until the time these charges were resolved (November 22, 2006).

The judge specifically said, "You will be given credit

for time served." See (Trans. of Revocation of Probation Hearing, at page 14, li.18-19).

In Cue v. State, 2003 ND 97, 633 N.W.2d 639, the North Dakota Supreme Court addressed credit for time served and stated in part:

> N.D.C.C. § 12.1-32-02(2) "requires a court to give a criminal defendant, upon sentencing, credit for all time spent in custody as a result of the criminal charge or conduct for which the sentence is being imposed." State v. Trudeau, 487 N.W.2d 11, 15 (N.D. 1992).

Cue, at ¶11.

> Section 12.1-32-02(2), N.D.C.C. provides:
>
> Credit against any sentence to term of imprisonment must be given by the court to a defendant for all time spent in custody as a result of the criminal charge for which the sentence was imposed or as a result of the conduct on which such charge was based. "Time spent in custody" includes time spent in custody in a jail or mental institution for the offense charged, whether that time is spent prior to trial, during trial, pending sentence, or pending appeal.

Cue, at ¶11.

Rodriquez spent one hundred and eight (108) days in custody prior to sentencing and accordingly is entitled to credit for time served.

CONCLUSION

Wherefore, Rodriquez respectfully asks this Court to reverse the lower court's denial of his motion for credit for time served.

Dated this 18th day of March 2008.

Shane P. Rodriquez

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AFFIDAVIT OF SERIVCE BY MAIL 20070349

20070350

RE: State v. Rodriquez
Supreme Court Nos. 2007349 & 2007350
Burleigh Co. Nos. 02-K-2293 & 02-K-2377

I, Shane P. Rodriquez (Appellant), in the above action do hereby certify that I deposited in the United States mail, in the State of North Dakota, County of Burleigh, City of Bismarck, one (1) true and correct copy of the BRIEF OF APPELLANT RODRIQUEZ and APPENDIX TO BRIEF OF APPELLANT RODRIQUEZ in the above entitled matter to the following individual:

Cynthia M. Feland,
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, North Dakota
58501

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MAR 24 2008

STATE OF NORTH DAKOTA

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party to be so served.

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Dated this 19th day of March 2008.

Subscribed and sworn to before me in the State of North Dakota, County of Burleigh, City of Bismarck.

NOTARY PUBLIC

Dec 19 2012
COMMISSION EXPIRES

KARLA MARSH
Notary Public
State of North Dakota
My Commission Expires Dec. 19, 2012
Burleigh