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SUPREME COURT APR 2 2008

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota,

Appellee,

-VS-

Shane P. Rodriguez,

Appellant.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

APR - 2 2008

STATE OF NORTH DAKOTA

) Supreme Ct. No. 20070349 &  
) 20070350

) District Ct. No. 08-02-K-2293 & 08-  
) 02-k-2377

) SA File No. F 467-02-06 & F 488-02-  
) 07

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**BRIEF OF APPELLEE**

**APPEAL FROM ORDER DENYING MOTION FOR CREDIT FOR TIME  
SERVED**

Burleigh County District Court  
South Central Judicial District  
The Honorable Robert O. Wefald, Presiding

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Cynthia M. Feland  
Assistant, Burleigh County State's Attorney  
Courthouse, 514 East Thayer Avenue  
Bismarck, North Dakota 58501  
Phone No: (701) 222-6672  
BAR ID No: 04804  
Attorney for Appellee

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**STATEMENT OF THE ISSUES**

I. Rodriguez failed to affirmatively establish that he is entitled to additional credit for time served in connection with another case.

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**STATEMENT OF THE CASE**

On January 7, 2003, Rodriguez plead guilty to one count of terrorizing, a class C felony, in Burleigh County Criminal Case Number 02-K-2293 and one count of possession of drug paraphernalia, a class C Felony, and one count of possession of drug paraphernalia, a class A misdemeanor, in Burleigh County Criminal Case Number 02-K-2377. In both cases, Rodriguez was sentenced to 5 years with 4 years suspended for 5 years on the felony counts and 1 year on the misdemeanor count in Burleigh County Criminal Case Number 02-K-2377. Appellee's Appendix, Pp. 26-31.

On November 22, 2006, a hearing was held on a petition for revocation of probation. Appellee's Appendix, Pp. 22 and 25. At the revocation hearing, the district court sentenced the defendant to the five years originally imposed for the felony counts with credit for time served. Appellee's Appendix, Pp. 22 and 25. Thereafter, an amended judgment was filed giving Rodriguez credit for one year in each of the felony cases. Appellee's Appendix, Pp. 20-21 and 23-24.

In February of 2007, Rodriguez filed a Rule 35 motion seeking credit for time he had spent in custody between August 6, 2006 and November 22, 2006 on another charge as the credit would allow him to have the same release date as the criminal case in another jurisdiction. Appellee's Appendix, p. 19. The State filed a response to Rodriguez's motion on February 21, 2007, requesting the motion be denied on the grounds that Rodriguez had already received credit for the time requested on another charge. Appellee's

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Appendix. p. 18. On March 21, 2007. the district court issued an order denying Rodriguez's motion on the grounds that he has already received credit for the time requested on another charge. Appellee's Appendix, p. 17.

In September of 2007. Rodriguez filed a motion for credit for time served seeking exactly the same relief sought in his previous Rule 35 motion for sentence reduction. Appellant's Appendix. Pp. 5-7. On September 12, 2007. the State responded requesting denial of the same as the time Rodriguez sought credit for involved a different case and had been properly credited to that case. Appellant's Appendix, p. 13. On October 11, 2007. the district court issued an order denying Rodriguez's motion. Appellant's Appendix, Pp. 5-7. Appellant's Appendix, p. 15. Rodriguez filed a notice of appeal on November 21, 2007. Appellant's Appendix, p. 16.

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**ARGUMENT**

I. Rodriguez failed to affirmatively establish that he is entitled to additional credit for time served in connection with another case.

In post-conviction relief proceedings, a district court's findings of fact will not be disturbed unless they are clearly erroneous. Hill v. State, 2000 ND 143, ¶ 17, 615 N.W.2d 135, citing, DeCoteau v. State, 2000 ND 44, ¶ 10, 608 N.W.2d 240). "A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made." *Id.*

A defendant has the burden to affirmatively show he is entitled to additional credit for time served in custody. Cue v. State, 2003 ND 97, ¶ 12, 663 N.W.2d 637. Under N.D.C.C. Section 12.1-32-02, a criminal defendant must be credited for time served in custody. State v. Schrum, 2006 ND 18, ¶ 5, 709 N.W.2d 348. However, a defendant is not to be credited for time spent in custody on a wholly unrelated charge. *Id.*

Section 12.1-32-02(2), N.D.C.C., provides:

Credit against any sentence to a 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

1 in a jail or mental institution for the offense charged, whether  
2 that time is spent prior to trial, during trial, pending sentence,  
3 or pending appeal.  
4

5 For purposes of crediting time spent in custody, N.D.C.C Section 12.1-32-  
6 02(2) unambiguously refers to "conduct on which such charge was based."  
7 N.D.C.C. § 12.1-32-02(2). This Court has previously determined that "such  
8 charge" refers to the "charge for which the sentence was imposed." Gust v.  
9 State, 2006 ND 114, 714 N.W.2d 826. Thus, this court has previously held  
10 that it is inappropriate to receive credit on a sentence following a probation  
11 revocation relating to an earlier criminal conviction and to receive additional  
12 credit for a separate criminal offense as the two convictions are for separate  
13 conduct. State v. Eugene, 340 N.W.2d 18, 35 (N.D.1983).  
14

15 Applying the logic of Eugene to the present case, credit for time served is  
16 only required for the one year Rodriguez previously spent in custody. As the  
17 time spent in custody from August 6, 2006 to November 22, 2006 was on  
18 another matter and credit for the same was applied in that other unrelated case.  
19 the district court correctly denied Rodriguez credit for this time. To grant  
20 Rodriguez "credit for time served in both cases would constitute double  
21 credit." Gust v. State, 2006 ND 114 ¶ 9, 714 N.W.2d 826. Further,  
22 Rodriguez has provided neither evidence which would warrant credit for the  
23 time he is seeking nor how the application of the credit would not constitute  
24 double credit.  
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CONCLUSION

The district court made a finding that Rodriguez's credit for time served was correctly computed. "The presumption is that the district court's rulings were correct, and the burden is upon the appellant to show affirmatively by the record that the rulings were incorrect." Crosby v. Sande, 180 N.W.2d 164, 172 (N.D.1970), quoting. Erickson v. Wiper, 33 N.D. 193, 157 N.W. 592, 602 (1916). Rodriguez has not affirmatively established by the record that he is entitled to additional credit for time served in this case, and the record does not demonstrate that the sentencing court was clearly erroneous.

Based upon the foregoing, the State of North Dakota respectfully requests that this Court AFFIRM the decision of the district court.

Dated this 18<sup>th</sup> day of April, 2008.

  
Cynthia M. Feland  
Assistant, Burleigh County State's Attorney  
Courthouse, 514 East Thayer Avenue  
Bismarck, North Dakota 58501  
Phone No: (701) 222-6672  
BAR ID No: 04804  
Attorney for Plaintiff-Appellee

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-vs- )  
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SA File No. F 467-02-06 & F 488-02-  
07

STATE OF NORTH DAKOTA )  
COUNTY OF BURLEIGH ) ss

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the 2<sup>nd</sup> day of April, 2008, I deposited in a sealed envelope a true copy of the attached:

1. Brief of Appellee,
2. Appendix of Appellee, and;
3. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

SHANE P. RODRIQUEZ, PRO SE  
ND STATE PENITENTIARY  
PO BOX 5521  
BISMARCK, ND 58506-5521

which address is the last known address of the addressee.

Kim Bless  
Kim Bless

Subscribed and sworn to before me this 2<sup>nd</sup> day of April, 2008.

Jeanie Nagel  
JEANIE NAGEL, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 2-15-2013.  
JEANIE NAGEL  
Notary Public  
State of North Dakota  
My Commission Expires Feb. 15, 2013