

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff / Appellee,

vs.

Michael A. Salvesson,

Defendant / Appellant.

SUPREME COURT CASE NO . 20110138

DISTRICT COURT NO . 2007-K-0782

APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT

OF WILLIAMS COUNTY

NORTHWEST JUDICIAL DISTRICT

THE HONORABLE JOSH B. RUSTAD, JUDGE

BRIEF OF APPELLANT

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1. STATEMENT OF THE ISSUES

2. 1. Whether Salveson should be granted credit for time served in the amount of 120 days criminal case no. 07-K-0782, dating from November 15, 2009 in the Williams County Correctional Center (WCCC).
3. 2. Whether Salveson should be granted credit in the amount of 100 days for time served in the Tompkins Rehabilitation and Corrections Center (TRCC) in Jamestown, North Dakota from February 20, 2009 to May 30, 2009.

4. STATEMENT OF THE CASE

5. A. Nature of the Case:

6. Michael A. Salveson (Salveson) maintains that he should be granted credit for time served in the amount of 120 days in criminal case no. 51-07-K 0782, dating from November 15, 2009 when he first entered the Williams County Correctional Center (WCCC) in Williston until his release therefrom.

7. Salveson further maintains that he should be granted credit for time served in the amount of 100 days in the Tompkins Rehabilitation and Corrections Center (TRCC) in Jamestown, North Dakota from February 20, 2009 until May 30, 2009.

8. B. Course of Proceedings:

9. On May 14, 2008, Salveson pleaded guilty to the offense of Possession of Marijuana with Intent to Deliver Within 1,000 Feet of a School, Class A Felony in 2007-K-0782. Judgment was entered and a sentence of five (5) years all suspended was pronounced.

10. On approximately November 13, 2009, Salveson's probation was revoked and he was resentenced to serve 120 days in the Williams County Correctional Center

(WCCC) as a “wake-up call”. Salveson states in his Rule 30 (a) motion filed March 10, 2011 that his sentence started on November 15, 2009. His motion provides no ending date for release.

11. On November 29, 2010, Salveson’s probation was once again revoked and he was sentenced to three (3) years with the department of Corrections with credit for the thirty-six (36) days he sat during the revocation proceedings. At the time of the second revocation, approximately nineteen (19) years were available for re-sentencing on the Class A Felony.

12. On or around January 24, 2011, Salveson filed a motion in the form of a letter for reduction of sentence. The District Court denied Salveson’s Rule 35 (a), N.D.R.Crim.P. motion for reduction of sentence on February 2, 2011.

13. Salveson then filed a Rule 35(a), N.D.R.Crim.P. motion on or around March 10, 2011 seeking to correct the sentence by claiming that he was entitled to extra credit for time served. The State responded that as Salveson had been resentenced in an amount less than what was available after deducting time previously served, the resentenced was proper.

14. On March 11, 2011 the State filed a response to Salveson’s Rule 35(a), N.D.R.Crim.P. Motion.

15. The District Court denied Salveson’s Rule 35(a), N.D.R.Crim.P. motion for credit for time served by Order dated March 15, 2011.

16. On April 26, 2011, the State received a letter from Salveson which appeared to be a hand-written notice of appeal from the March 15, 2011 order denying his Rule 35(a) motion. The State transmitted the letter to the Williams County Clerk of District Court's office on April 27, 2011. No notice of appeal was served by Salveson on the District Court.

17. A letter to Salveson from Ms. Lorraine Scanson, Deputy Clerk of the North Dakota Supreme Court dated May 11, 2011 stated that she received a copy of the Notice of Appeal in this matter which was filed in the trial court on April 27, 2011. It was further stated that according to the Rules of Appellate Procedure, the clerk of the trial court shall certify the record on appeal to her office by May 27, 2011. It was stated that the file does not indicate whether the Appellant filed an Order for Transcript in accordance with the rules. If an Order for Transcript was not filed with the Notice of Appeal, the Appellant's brief is due in the Supreme Clerk's office 40 days after the Notice of Appeal was filed in the trial court. According to Ms. Scanson's calculation the 40th day expires June 6, 2011.

18. On May 11, 2011 the State filed a Motion to Dismiss or Remand Appeal dated May 10, 2011.

19. A letter to Salveson from Ms. Penny Miller, Clerk of the North Dakota Supreme Court dated May 12, 2011 stated that an electronically filed State's Motion to Dismiss or Remand Appeal was received and filed in her office on May 11, 2011 in this matter.

It was further stated that a Response to the Motion should be served and received in the Supreme Court Clerk's office no later than Tuesday, May 24, 2011 at 4 p.m.

20. A letter to Salveson from Ms. Petra H. Mandigo Hulm, Chief Deputy Clerk of the North Dakota Supreme Court dated May 23, 2011 stated that Supreme Court Clerk's office received and filed Salveson's request for an extension of time to file his Appellant's Brief and Appendix. It was stated that in Salveson's request, he refers to waiting for his court appointed attorney to respond to him. It was further stated that the record did not reflect that Salveson filed a request for court-appointed counsel for this appeal. It is further stated in this letter that Salveson's "... request for an extension of time to file your Appellant's Brief and Appendix is granted, provided you file a request for court-appointed counsel for this appeal by June 6, 2011."

21. Salveson completed and submitted an "Application for Indigent Defense Services: Criminal Cases" dated May 17, 2011. This application was approved the Honorable Joshua B . Rustad, Judge of the District Court on May 27, 2011, and was filed in the office of the Williams County Clerk of District Court on May 27, 2011 at 4:10 p.m.

22. Mark S. Douglas, attorney with the North Dakota Commission on Legal Counsel for Indigents was appointed to serve as counsel in this appeal on June 1, 2011.

23. A Motion for Extension of Time was filed with the Supreme Court of North Dakota by counsel for Salveson on June 2, 2011.

24. An e-mail was sent to counsel for Salveson by Ms. Penny Miller, Clerk of the North Dakota Supreme court dated June 3, 2011. This e-mail stated in relevant part that (the Williams County Assistant State's Attorney) Mr. Madden filed a Motion to Dismiss or Remand Appeal on May 11, 2011, and that a response to that should be filed before the Court considers any further extensions for the briefing in this matter. Counsel for Salveson was requested to electronically file a Response to the pending Motion to Dismiss by noon on (Tuesday) June 14, 2011.

25. An e-mail was sent to counsel for Salveson by Ms. Petra H. Mandigo Hulm, Chief Deputy Clerk of the North Dakota Supreme court dated June 9, 2011. This e-mail stated in relevant part that an Order for Transcript was filed in the trial court on May 23, 2011. The 50-day period for filing the transcript expires July 12, 2011. Inasmuch as the Appellant did not file the Order for Transcript in accordance with the rules of procedure, the Appellant's Brief remains due June 26, 2011.

26. C. Disposition in the Court Below:

27. An Order Denying Motion for Credit for Time Served dated March 15, 2011 by the Honorable Josh B. Rustad, Judge of the District Court in criminal case no. 53-07-K-0782 stated that the Defendant's motion for credit for time served under Rules 35 (a) and 36, N.D.R.Crim.P. was denied, in that Salveson had failed to meet his burden of showing that he is entitled to additional credit.

28. Specifically, the district court stated that there was no showing that this was an illegal sentence, or that the sentence resulted from arithmetical, technical, or other clear error, or that there was an error arising from oversight or omission.

29. The district court stated that the record reflects that on November 29, 2010 the defendant was sentenced to three years incarceration for five allegations of probation violation, occurring after the previous revocation in which the defendant was sentenced to 120 days, and that the (then) present judgment was clear that the defendant was receiving credit for 36 days spent in custody and that the sentence began as of the date of judgment.

30. D. Chronological Statement of the Facts Relevant to the Issues Presented for Review:

31. On May 14, 2008, Salveson pleaded guilty to the offense of Possession of Marijuana with Intent to Deliver Within 1,000 Feet of a School, Class A Felony in 2007-K-0782. Judgment was entered and a sentence of five (5) years all suspended was pronounced.

32. Salveson stated in his Rule 35 (a), N.D.R.Crim.P. motion that he served 100 days in the Tompkins Rehabilitation and Corrections Center (TRCC) in Jamestown, North Dakota from February 20, 2009 until May 30, 2009.

33. On approximately November 13, 2009, Salveson's probation was revoked and he was resentenced to serve 120 days in the Williams County Correctional Center (WCCC) as a "wake-up call". Salveson stated in his Rule 35 (a) motion that he served

120 days in “county jail” (WCCC) starting on November 15, 2009. He provided no ending date for release.

34. On November 29, 2010, Salveson’s probation was once again revoked and he was sentenced to three (3) years with NDDOCR with credit for the thirty-six (36) days he sat during the revocation proceedings.

35. Salveson stated in his Rule 35 (a) motion that he was sentenced to three years with the North Dakota Department of Corrections and Rehabilitation (NDDOCR) on November 29, 2010. At that time, Salveson received credit for 36 days served from October 24, 2010 to November 29, 2010. Salveson is currently incarcerated with NDDOCR.

36. SUMMARY OF THE ARGUMENT

37. On November 29, 2010 Salveson was sentenced to three years with the North Dakota Department of Corrections and Rehabilitation (NDDOCR) in 07-K-0782. At that time, Salveson received credit for 36 days served from October 24, 2010 to November 29, 2010. Salveson states in his Rule 35 (a), N.D.R.Crim.P. motion filed on or around March 10, 2011 that at that time, he forgot to ask for his previous time served for this same case.

38. Salveson stated in his Rule 35 (a) motion that he began serving 120 days in WCCC on November 15, 2009. He provided no release date. Salveson also stated that he served six days in November of 2006. Salveson stated that he also served 100 days at the Tompkins Rehabilitation and Corrections Center in Jamestown, North Dakota

from February 20, 2009 until May 30, 2009. Salveson stated that this is all time was served for case no. 07-K-0782.

39. Rule 35(a), N.D.R.Crim.P. provides for correction of and illegal sentence, or for correction of a sentence that resulted from arithmetical, technical, or other clear error. Rule 36, N.D.R.Crim.P. provides that after appropriate notice, the court may at any time correct a clerical error in a judgment, order, or other part of the record, **or correct an error in the record arising from oversight or omission.** (Boldface added). Salveson stated in his Rule 35(a) motion and continues to maintain that under these rules, he may request time previously served that was not credited at sentencing due to a sentencing error or simple oversight.

40. Per N.D.C.C. 12.1-32-02 (2), Salveson must be given credit for all time spent in custody as a result of the criminal charge for which sentence was imposed, or as a result of the conduct on which charge was based. The 100 days in the Tompkins program was time spent in custody as a result of the criminal charge in 07-K-0782. The time served in WCCC beginning November 15, 2009 was time spent in custody as a result of the criminal charge in 07-K-0782.

41. ARGUMENT

42. 1. Salveson should be granted credit for time served in the amount of 120 days in criminal case no. 07-K-0782, dating from November 15, 2009 in the Williams County Correctional Center (WCCC).

43. As stated in his Rule 35 (a) motion filed on or around March 10, 2011, Salveson maintains that when he was sentenced to three (3) years with NDDOCR on November

29, 2010, he received credit for thirty-six (36) days that he served from October 24, 2010 to November 29, 2010. He further stated in his motion that at that time he forgot to ask for his previous time served for this same case. Salveson thus wishes to correct this oversight or omission by his request for credit for time served to which he believes he is entitled.

44. Salveson further stated in his Rule 35(a) motion that he served 120 days in WCCC that started on November 15, 2009 and six days in November of 2006. Salveson has indicated to counsel that he is not concerned about receiving credit for those six days. Salveson maintains that this time was served for case no. 07-K-0782.

45. In addition to the credit he received at his sentencing on November 29, 2010 for 36 days he served from October 24, 2010 to November 29, 2010, Salveson requests that he also receive credit for time served for 120 days in WCCC , which he maintained in his 35(a) motion began on November 15, 2009 with no ending date being provided.

46. Rule 35(a), N.D.R.Crim.P. provides for correction of and illegal sentence, or for correction of a sentence that resulted from arithmetical, technical, or other clear error. Rule 36, N.D.R.Crim.P. provides that after appropriate notice, the court may at any time correct a clerical error in a judgment, order, or other part of the record, **or correct an error** in the record **arising from oversight or omission**. (Boldface added). Salveson stated in his Rule 35(a) motion and continues to maintain that under these rules, he may request time previously served that was not credited at sentencing due to a sentencing error or simple oversight.

47. “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.” (Boldface added). N.D.C.C. 12.1-32-02 (2).

48. The word “must” as ordinarily used indicates a mandatory and not merely a directory or nonmandatory duty. Federal Land Bank v. Waltz, 423 N.W.2d 799 (N.D. 1988), citing In Interest of D.S., 263 N.W.2d 114, 119 (N.D. 1978).

49. The plain unambiguous language of N.D.C.C. 12.1-32.02 (2) requires that time spent in jail as a result of the conduct relating to the charge “must” be credited to a defendant’s sentence. (Quotation marks in the original). State v. Sorensen, 482 N.W.2d 596 (ND 1992).

50. The plain language of the statute [i.e., N.D.C.C. 12.1-32-02 (2)] provides that credit for time served is given for “time spend it custody as a result of the criminal charge for which the sentence was imposed, or as a result of the conduct on which such a charge was based.” (Parenthetical notation added; quotation marks and underscore in the original). Sorensen, Id. The language of N.D.C.C. 12.1-32-02 (2) is unambiguous. Sorensen, Id.

51. Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears. N.D.C.C. 1-02-02. In interpreting a statute, words must be given their plain, ordinary and commonly understood meaning. Coldwell Banker-First Realty v. Meide & Son, 422 N.W.2d 375 (1988). Words in a statute must

be understood in their ordinary sense. Christianson v. City of Bismarck, 476 N.W.2d 688 (N.D. 1991).

52. A defendant is not entitled to credit “for time served in connection with wholly unrelated charges based on conduct other than for which the defendant is ultimately sentenced.” (Quotation marks in the original). State v. Trudeau, 487 N.W.2d 11 (ND 1992), citing and quoting State v. Eugene, 340 N.W.2d 18 (N.D. 1983).

53. “A criminal defendant’s sentence must be credited for time served in custody on that charge. N.D.C.C. 12.1-32-02 (2). However, a defendant is not to be credited for time spent in custody for an unrelated charge.” State v. Schrum, 2006 ND 18, 709 N.W.2d 348, citing Trudeau at 487 N.W.2d 11 at 14.

54. It is a well-settled rule of statutory construction that criminal statutes are strictly construed in favor of the defendant and against the government. State v. Plentychief, 464 N.W.2d 373 (N.D. 1990), citing City of Bismarck v. Sholy, 430 N.W.2d 337, 338 (N.D. 1988). Therefore, if there is any doubt as to interpretation in this case, it should be resolved in favor of Salveson.

55. 2. Salveson should be granted credit for time served in the amount of 100 days in the Tompkins Rehabilitation and Corrections Center in Jamestown, North Dakota from February 20, 2009 to May 30, 2009.

56. Salveson also stated in his Rule 35(a) motion filed on or around March 10, 2011 that he served 100 days at the Tompkins Rehabilitation and Corrections Center in Jamestown, North Dakota from February 20, 2009 to May 30, 2009. Salveson maintains that this time was also served for case no. 07-K-0782. . As noted earlier, he further

stated in his motion that at that time he forgot to ask for his previous time served for this same case. Salveson thus wishes to correct this oversight or omission by his request for credit for time served to which he believes he is entitled.

57. In addition to the credit he received at his sentencing on November 29, 2010 for 36 days he served from October 24, 2010 to November 29, 2020, Salveson requests that he also receive credit for time served for the 100 days he was in the Tompkins Rehabilitation and Corrections Center in Jamestown from February 20, 2009 to May 30, 2009. The legal argument in support of this request is the same as that stated above in conjunction with his request for time served in WCCC beginning in November, 2009.

58. CONCLUSION

59. For the afore stated reasons, Salveson maintain s that he should be granted credit for time served in the amount of 120 days in criminal case no. 53-07-K 0782 dating from November 15, 2009 in the Williams County Correctional Center (WCCC).

60. Salveson additionally maintains that he should be granted credit for time served in the amount of 100 days in the Tompkins Rehabilitation and Corrections Center(TRCC) in Jamestown, North Dakota from February 20, 2009 to May 30, 2009.

Respectfully submitted this 21st day of June, 2011.

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