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JULY 20, 2011
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

State of North Dakota, Plaintiff – Appellee, vs. Michael Salveson, Defendant – Appellant.	)) Supreme Court No.: 20110138)) District Court No.: 53-2007-K-00782)

APPEAL FROM THE WILLIAMS COUNTY DISTRICT COURT'S
DENIAL OF SALVESON'S N.D.R.CRIM.P. 35(a) MOTION
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE JOSHUA B. RUSTAD, JUDGE

BRIEF OF APPELLEE
STATE OF NORTH DAKOTA

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Statement of the Issues

[¶1] I. THE DISTRICT COURT PROPERLY DENIED SALVESON'S MOTION FOR ADDITIONAL CREDIT.

Statement of the Facts

[¶2] Salveson was originally convicted on May 9, 2008, of Possession of Marijuana with Intent to Deliver within 1,000 feet of a school, Class-A Felony. This conviction carries with it a maximum incarceration period of twenty (20) years under N.D.C.C. §12.1-32-01. On the original conviction date, Salveson received a sentence of five (5) years suspended for five (5) years, and was placed on supervised probation.

[¶3] Subsequently, Salveson's probation was initially revoked on December 14, 2009, and he was resentenced to serve one-hundred-twenty (120) days in the Williams County Correctional Center as a "wakeup call."

[¶4] A second revocation was initiated by Salveson's probation officer on October 7, 2010, with an amended petition filed November 15, 2010. Following a hearing on November 29, 2010, Salveson's probation was revoked again, and he was resentenced to three (3) years at the Department of Corrections with credit for the thirty-six (36) days he sat on the second revocation petition.

[¶5] Salveson is seeking to claim 100 days for spent at TRCC along with "120 days" from the "wakeup call" and 6 miscellaneous days he claims he sat in 2006. Salveson did not provide the District Court with an end date for the "120 days" he claims the Court should have credited him. Salveson did not provide the Court with the start/end dates for the 6 days he claims in 2006.

[¶6] As of November 29, 2010, Salveson had over nineteen (19) years of possible incarceration time left on his Class-A Felony conviction. On that date, Salveson was resentenced to 3 of those 19 remaining years.

[¶7] To better clarify the probation revocations, the State notes the following:

November 13, 2009 Petition-

Allegation #1: Salveson not employed at August, 2009 meeting
Allegation #2: Salveson did not report for July, September, and October of 2009.
Allegation #3a: On September 27, 2009 Salveon used Hydrocodone without a prescription.
Allegation #3b: On July 28, 2008, Salveson admitted to smoking marijuana 2-3 weeks before that date.
Allegation #3c: On December 28, 2008, Salveson used marijuana

November 15, 2010 Amended Petition-

Allegation #1: On July 20, 2010 Salveson was not employed full time and failed to report new employment.
Allegation #2: On October 27, 2010, Salveson submitted a urinalysis sample positive for THC and synthetic cannabinoids.
Allegation #3: Salveson failed to meet face-to-face with probation officer for April, July, August, and September of 2010 and location was unknown at time of Petition.
Allegation #4: Salveson failed to pay required fines/fees.
Allegation #5: Salveson failed to pay supervision fees.

[¶8] The two petitions to revoke probation related to different acts or omissions by Salveson, which occurred at different times.

[¶9] Upon completion of the three (3) year sentence, Salveson would be released without probation to follow.

Standard of Review

[¶10] The State notes that Salveson has failed to provide any statement of the standard of review. As such, the State provides the following pursuant to N.D.R.App.P. 28(c)(5).

[¶11] These cases are typically factual in nature, and the standard of review when presented in an opinion is noted as clearly erroneous, except for any legal issues, which of course would be a *de novo* review. E.g. State v. Isom, 2009 ND 28, 767 N.W.2d 529; State v. Walstad, 2009 ND 7, 763 N.W.2d 799.

[¶12] To the extent that Salveson appears, in part, to be making a statutory interpretation argument, any questions of statutory interpretation would be subject to *de novo* review. State v. Blunt, 2010 ND 144, 785 N.W.2d 909.

Law and Argument

[¶13] Any defendant seeking additional credit for time served must show entitlement to that additional credit for time served. E.g. Gust v. State, 2006 ND 114, ¶5, 714 N.W.2d 826; Cue v. State, 2003 ND 97, ¶12, 663 N.W.2d 637. Unclear times/dates are insufficient. See. Cue, 2003 ND 97, 663 N.W.2d 637. Demands for duplicate credit for time served are insufficient. E.g. State v. Rodriquez, 2008 ND 157, 755 N.W.2d 102. Failure to show entitlement to the additional credit requires denial of the motion for additional credit. Walstad, 2009 ND 7, 763 N.W.2d 799.

[¶14] As a preliminary matter, probation revocations are governed in part by N.D.R.Crim.P. 32(f) and N.D.C.C. §§12.1-32-07(6) and 12.1-32-07(7). Specifically, at revocation, the District Court may impose any sentence which was available at the time of conviction. N.D.C.C. §12.1-32-07(6). For a Class-A Felony, the maximum available sentence would be twenty (20) years. N.D.C.C. §12.1-32-01(2). In this case, the District Court could have resentenced Salveson to a maximum of 20 years minus whatever time he had previously served. E.g. State v. Jones, 418 N.W.2d 782 (N.D. 1988). It is

important to note that Salveson was not resentenced to twenty (20) years, but was sentenced to three (3) years, a total far less than what was available.

I. THE DISTRICT COURT PROPERLY DENIED SALVESON'S MOTION FOR ADDITIONAL CREDIT.

[¶15] Salveson attempts to couch his demand for additional credit in terms of an error, oversight, or some sort of illegality. In actuality, it is simply a demand for duplicate credit; a demand which runs afoul of North Dakota law. When, such as here, there is no illegality or error in the sentence, denial of a N.D.R.Crim.P. 35(a) motion is entirely proper. State v. Lawson, 356 N.W.2d 893, 893-894 (N.D. 1984); State v. Neva, 2009 ND 127, 767 N.W.2d 879.

Salveson failed to show specific entitlement to additional credit.

[¶16] As Salveson himself admits, he did not provide an end date for the 120 day sentence he received as a "wakeup call." (Appellant's Brief para. 38). It was Salveson's job to provide the District Court with exactly the amount of time he was to be credited. Cue, 2003 ND 97, 663 N.W.2d 637. It is neither the State nor the Court's job to ferret out support for Salveson's claims. The District Court was under no obligation to go on an expedition to find data for Salveson. In short, Salveson utterly failed to meet his burden of showing entitlement to the additional time. Compare. State v. Schrum, 2006 ND 18, 709 N.W.2d 348 (detailed description of calculation error)

[¶17] Did he get good time? Was he released at the end of the 120 day period or sooner? There is no way to tell based on his motion. Salveson never provided an end date to the District Court when he demanded the 120 days credit.

[¶18] In his Appellant's Brief, Salveson effectively asks this Court to resurrect the stillborn claim and reverse the District Court's decision despite his own failure to provide necessary information. The State submits that the District Court was correct in its decision.

[¶19] Similarly, Salveson never provided start or end dates for the six days he wants credited from November, 2006. It was his obligation to provide the District Court with specifics as to how much time he claimed; he failed. Compare. Schrum, 2006 ND 18, 709 N.W.2d 348 (detailed description of calculation error).

The credit Salveson seeks would be duplicate credit.

[¶20] A non-habitual offender defendant convicted of any Class-A Felony faces a maximum period of incarceration of twenty (20) years. N.D.C.C. §12.1-32-01(2). If the defendant is sentenced to a probationary period, and the probation is revoked, the defendant can be resentenced up to twenty (20) years minus credit for time served. N.D.C.C. §§12.1-32-07(6); 12.1-32-02(2).

[¶21] For example: John Doe, is convicted of Class-A Felony Manufacturing of a Controlled Substance. Doe is sentenced to serve five (5) years followed by a probationary period (for the sake of the example, assume he serves the full 5 years). During the probationary period, Doe's probation is revoked and he is resentenced. Doe could be properly and legally resentenced to anywhere from fifteen (15) years maximum down to no jail time.

[¶22] As noted above, on November 24, 2010, Salveson had over nineteen (19) years of incarceration available for resentencing on the Class-A Felony. He was

resentenced to serve three (3) of those years with credit for the thirty-six (36) days he sat on the second revocation action.

[¶23] Assuming, for the sake of argument only, that Salveson's additional 226 day figure is the amount of time he had served originally and on the first revocation, 19 years and 139 days remained for resentencing. He sat 36 days on the second revocation action. That means under Salveson's claim for additional time, that he could have properly and legally be resentenced to serve up to 19 years and 103 days on November 24, 2010.

[¶24] Here, Salveson's three (3) year resentence is plainly legal and proper, even if this Court were consider Salveson's claim that he previously sat approximately 226 days. Salveson was resentenced to less than one-sixth of the amount of time remaining if one were to subtract 226 days from twenty (20) years.

[¶25] Salveson's position produces absurd results in interpreting N.D.C.C. §12.1-32-02(2). See. e.g. Blunt, 2010 ND 144, ¶38, 785 N.W.2d 909 (statutes to be construed so as to avoid ludicrous and absurd results). Based on his position, if he had been sentenced to say another 120 day "wakeup call," he would not have to serve any time because he had already served 120 days. The process would then repeat itself infinitely based on how many times his probation was revoked.

[¶26] A brief hypothetical demonstrates the absurd results from Salveson's position. John Doe is convicted of a Class-C Felony, and sentenced to five (5) years with two years suspended and three to serve. Doe serves the full three years, and is released on probation. Six months into probation, Doe violates his conditions and is resentenced to the remaining two (2) years left on his original sentence. Under Salveson's position,

Doe would not have to serve *any* of the remaining two (2) years, because he had already served three (3) and should get duplicate credit for those against the two unserved years. This is the type of absurd and ludicrous result which this Court rejects. See. Blunt, 2010 ND 144, ¶38, 785 N.W.2d 909; State v. Fasteen, 2007 ND 162, 740 N.W.2d 60; State v. Dennis, 2007 ND 87, 733 N.W.2d 241.

[¶27] Salveson's claim that he should get duplicate credit for time served is directly contrary to the entire body of credit for time served case law. Recently, this Court noted that credit for time served is like a bank account balance; once it's drawn down it is gone. Neva, 2009 ND 127, ¶11, 767 N.W.2d 879.

[¶28] If this were a situation where Salveson had been sentenced to twenty (20) years and he only received thirty-six (36) days credit, he would have a valid argument. However, this is not that case. Here, Salveson was resentenced to three (3) of the roughly nineteen (19) years remaining.

The sentence is not the product of an error or omission.

[¶29] As noted above, Salveson was resentenced to less than one-sixth the amount of time available even if all the credit Salveson wants was applied to the twenty (20) years available.

[¶30] Three years is clearly less than nineteen years so there is no error in the resentencing. Similarly, there was no omission as Salveson was sentenced to less than the maximum available minus credit for time served.

[¶31] When there is no error or omission in a sentence, denial of an N.D.R.Crim.P. 35(a) motion is appropriate. Neva, 2009 ND 127, 767 N.W.2d 879.

Conclusion

[¶32] Salveson's demand for 226 days of credit is improper. He failed to provide information such as start or end dates for some of the time he wants credited. He failed to show specific entitlement to the additional time. He failed to show why his request is not for duplicate credit.

[¶33] It is a defendant's job to show entitlement to additional credit; Salveson failed. Instead, he has presented a position which leads to ludicrous and absurd results.

[¶34] The District Court's order was proper. The sentence was well within statutory limits, and Salveson was resentenced to less than one-sixth the remaining time minus credit for time served. Any other decision would have resulted in duplicate credit. Therefore, the State respectfully requests this Court affirm the District Court's decision.

Dated this 20th day of July, 2011.

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Certificate of Service

I, Nathan Kirke Madden, hereby certify that on July 20th, 2011, a true and accurate copy of the State's Appellee's Brief was served on Attorney Mark Douglas via email at madouglas@nd.gov.

Dated this 20th day of July, 2011.

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