

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
)	
Plaintiff/Appellee,)	
)	
vs.)	Supreme Court No. 20140401
)	
Johnny Lowe,)	
)	
Defendant/Appellant.)	

APPELLANT'S BRIEF

APPEAL FROM THE OCTOBER 21, 2014
ORDER DENYING 2ND MOTION FOR CREDIT FOR TIME SERVED
BURLEIGH COUNTY DISTRICT COURT
IN BISMARCK, NORTH DAKOTA
THE HONORABLE BRUCE A. ROMANICK PRESIDING

ATTORNEY FOR APPELLANT
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ISSUES PRESENTED

- I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.
- II. WHETHER THE COURT ERRORRED IN NOT GRANTING DEFENDANT'S CREDIT FOR TIME SERVED?

STATEMENT OF THE CASE

[¶1] This is an appeal from the Order Denying 2nd Motion for Credit for Time Served on October 21, 2014. [Appendix page 41; hereinafter A. 41].

[¶2] On December 29, 2013, the Defendant was booked into Morton County Detention Center on four different cases. [A. 4]. He was picked up on an order to apprehend that was issued on October 14, 2013. [A. 5]. On January 28, 2014, the Defendant wrote a letter requesting to waive his appearance on the warrant in Burleigh County. [A. 6]. On March 11, 2014 a revocation of probation hearing was held and on March 13, 2014, an Amended Criminal Judgment and Order Revoking Probation was filed. [A. 7-9]. Additionally, a Criminal Judgment in Burleigh County case no. 08-2013-CR-2288 was entered on March 11, 2013. [A. 10].

[¶3] On March 31, 2014, the Defendant filed a letter requesting credit for time served. [A. 11]. On May 2, 2014 a transcript was filed from the revocation of probation hearing on March 11, 2014. [A. 12-25]. On May 21, 2014, an Order Denying Motion for Credit for Time Served was filed. [A. 26-27]. On September 25, 2014, the Defendant filed a Motion for Credit for Time Served and served it upon the State. [A. 28-36]. On October 1, 2014 the State filed its response to Motion for Credit Time Served. [A. 37-38]. On October 21, 2014 the Court issued an Order Denying 2nd Motion for Credit for Time Served. [A. 39-40].

[¶4] A Notice of Appeal was filed on November 6, 2014. [A. 41].

STATEMENT OF THE FACTS

[¶5] On or about October 15, 2013 an order to apprehend was issued for the Defendant's arrest for violating his probation in Burleigh County case no. 08-2011-CR-1792. [A. 5]. He was subsequently arrested and booked into the Morton County Detention Center on December 29, 2013. [A. 4]. He was also picked up on warrants for 3 other cases. On January 28, 2014, the Defendant filed a letter requesting to waive his appearance on the Burleigh County warrant because he was incarcerated in Morton County. [A. 6].

[¶6] On March 11, 2014 a hearing was held on the petition to revoke the Defendant's probation. His probation was revoked and he was resentenced to 3 years with the 18 months credit for time served from the original judgment without additional credit from December 29, 2013. [A. 7-9].

[¶7] The Defendant requested credit for the time served by letter on March 31, 2014. [A. 11]. He was denied by the Court on May 21, 2014. [A. 26-27]. Subsequently, on September 25, 2014, the Defendant filed a Motion requesting credit for the time served and served it upon the State. [A. 28-36]. The State filed a response October 1, 2014, agreeing that the Defendant should have been granted credit for time served from December 29, 2013. [A. 37-38]. The Court disagreed and denied the motion for credit for time served resulting in the appeal before the Court. [A. 39-40].

LAW AND ARGUMENT

I. THE DEFENDANT HAS THE RIGHT TO APPEAL TO THE SUPREME COURT.

[¶8] Pursuant to NDCC § 29-28-03, a defendant may appeal from any or all verdicts, judgments, or orders enumerated in NDCC § 29-28-06. See also N.D.R.Crim.P. Rule 37. Accordingly, Otto’s appeal of the Order on Motion to Suppress is appropriately before the Court. State v. Jenkins, 339 N.W.2d 567 (N.D. 1983).

II. WHETHER THE COURT ERRORRED IN NOT GRANTING DEFENDANT’S CREDIT FOR TIME SERVED?

[¶9] Under NDCC § 12.1-32-02(2), 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 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. The total amount of credit the defendant is entitled to for time spent in custody must be stated in the criminal judgment.

[¶10] Section 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. Credit under section 12.1-32-02(2) is mandatory. State v. Trudeau, 487 N.W.2d11, 15 (N.D. 1992).

[¶11] The application of presentence credit statutes such as section 12.1-32-02(2), N.D.C.C., to fact situations involving presentence custody on multiple charges and multiple sentencing proceedings is not a simple matter. The California Court of Appeals for the 5th District explained some of the issues

that arise as follows: "If the defendant is arrested and charged with multiple offenses, the presentence time is credited against the term imposed on each crime where concurrent sentences are imposed. Thus, if the multiple crimes are prosecuted in a single proceeding and concurrent sentences are ordered, it makes no difference that the crimes were committed at different times. The credits become effective 'together' on each crime at the time of sentencing." State v. Trudeau, 487 N.W.2d 11, 16, note 4 (N.D. 1992) citing People v. Adrian, 191 Cal.App.3d 868, 236 Cal.Rptr. 685, 689-690 (5th Dist. 1987).

[¶12] In North Dakota, in light of a trial court's broad discretion in fashioning an appropriate sentence, many of these rather obtuse issues could be avoided by simply resolving any doubt in the defendant's favor with an eye toward ensuring that indigents receive the same total sentence package as those able to post bail. Id.

[¶13] In the present case the Defendant was arrested on the order to apprehend on December 29, 2013. He remained in continuous custody until his revocation of probation proceeding on March 11, 2014. He was resentenced to 3 years with credit for the 18 months served from the original sentence, without credit for time served from December 29, 2013 until March 11, 2014. During the sentencing phase of the Defendant's revocation proceeding the Court ordered, "It'll be three years with credit for time served. So the 18 months, anything else you have served since arrested on that warrant." [A. 23]. There is no disputing that the Defendant was arrested on December 29, 2013 on the warrant for the revocation of probation. [A. 4].

[¶14] Additionally, the Court had sentenced the Defendant during the same proceeding on Burleigh case no. 08-2013-CR-2288 to 30 days incarceration with credit for 30 days served. [A. 10]. The warrant was also served on December 29, 2013 for that case. [A. 4]. The Court ordered credit for time served in that case of 30 days for time spent in custody prior to the Defendant's change of plea.

[¶15] In the present case the Court ordered, "It'll be three years with credit for time served. So the 18 months, anything else you have served since arrested on that warrant." [A. 23]. Consistency would indicate that the Amended Judgment should have included the additional credit for time served from December 29, 2013, because the Court was aware of the previous time spent in custody after the execution of the arrest warrant.

CONCLUSION

[¶16] WHEREFORE, for the reasons stated herein, the Appellant respectfully prays that the Court finds that the Appellant should receive credit for time served from the execution of the warrant and that the Order Denying 2nd Motion Credit for Time Served be reversed and remanded.

Respectfully submitted this 14th day of January, 2015.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	Supreme Court No. 20140401
)	
Plaintiff/ Appellee,)	District Court No. 08-2011-CR-1792
)	
vs.)	CERTIFICATE OF SERVICE
)	
Johnny Lowe,)	
)	
Defendant/Appellant.)	
STATE OF NORTH DAKOTA)	
) ss.	
COUNTY OF BURLEIGH)	

Thomas Glass, the attorney for Petitioner/Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on January 14, 2015, he served the attached:

Appellant's Brief and Appellant's Appendix

upon the following person(s) by emailing a copy of the same to:

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upon the following person(s) by mailing a copy of the same to:

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