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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,	)	
	)	Nos. 39484, 39485, 39486
Plaintiff-Respondent,	)	
	)	Ada Co. Case Nos.
vs.	)	CR-2003-5577, CR-2003-589,
	)	CR-2003-379
SHAWN M. KESLING,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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District Judge

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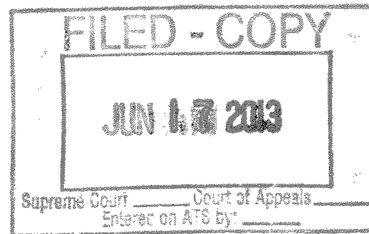

ATTORNEY FOR
DEFENDANT-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

In these consolidated cases, Shawn M. Kesling appeals from the district court's order revoking probation in Docket No. 39486, and denying his requests for credit for time served in Docket Nos. 39484 and 39485.

Statement Of Facts And Course Of Proceedings

In 2003, pursuant to plea agreements, Kesling pled guilty to one felony count in each of three criminal cases as follows:[1] Docket No. 39484 -- forgery; Docket No. 39485 – grand theft by deception; Docket No. 39486 -- issuing a check without sufficient funds. (R., pp.45-51, 212-214, 399-401.) On November 24, 2003, the district court sentenced Kesling to concurrent unified nine-year sentences with two years fixed, all suspended, and placed him on probation for nine years in each case. (R., pp.61-67, 228-234, 418-424.) On December 6, 2004, Kesling's probation officer "issued a travel permit to allow Mr. Kesling to move to Florida to live with his father and mother" (R., p.431), and his probation was transferred to Florida through an Interstate Compact agreement (PSI, p.16).

While living in Florida, Kesling was convicted of five Florida felonies. (PSI, pp.130-131.) In response, on March 26, 2008, Idaho authorities filed a Motion for Bench Warrant for Probation Violation against Kesling based on four of his five Florida convictions. (R., pp.90-92, 251-253, 447-449.) Four days later, the district court filed a

[1] The remaining counts in each case were dismissed pursuant to the plea agreements.

Bench Warrant for Probation Violation. (R., pp.95-96, 256-257, 452-453.) On his Florida convictions, Kesling was ordered to serve five concurrent sentences of 45 months, which sentences were imposed on March 4, 2008, and he was released from prison on March 23, 2011. (PSI, pp.130-132.) The Florida Department of Corrections' Inmate Record reflects that from March 4, 2008, until March 2, 2011, Kesling's record had an entry of "NOTIFY" under the heading "INMATE DETAINERS AS OF 09/30/11" and statement that "THE FOLLOWING REFLECTS DETAINERS AGAINST THIS RECORD, AND/OR REQUESTS TO BE NOTIFIED PRIOR TO RELEASE OF THE INMATE." (PSI, p.131; see R., p.141 ("NOTIFY" entry dated 03/04/2008 on "Corrections Offender Network" re: Kesling).) On March 2, 2011, the entry was changed to "DETAIN."[2] (PSI, p.131.)

After his release from prison in Florida, Kesling was transported to Idaho, where, on March 29, 2011, he was served bench warrants for violating probation in his three cases. (R., pp.95-96, 256-257, 452-453.) The state filed an Amended Motion for Probation Violation, alleging all five Florida convictions as bases for finding Kesling in violation of his probations. (R., pp.120-122, 282-284, 478-480.[3]) On August 18, 2011,

---

[2] As Kesling states, "[t]he record on appeal does not indicate (or include) the specific document(s) received by Florida from Idaho which apparently asked Florida officials to 'notify' Idaho officials when Mr. Kesling was due to be released, nor does the record contain the document(s) which served to 'detain' Mr. Kesling on the three Ada County cases after his release on the Florida charges." (Appellant's Brief, p.9 n.10.)

[3] In Docket No. 39486, the state alleged two additional probation violations, but they were dismissed upon Kesling's admissions to the first five allegations. (R., pp.478-480, 484-485.)

Kesling admitted violating probation by having been convicted in Florida of five felony offenses. (R., pp.125-126, 291-292, 484-485.)

Prior to the disposition hearing, Kesling, through counsel, filed a Motion for Additional Credit Time [sic] Served, requesting 1,121 more days of credit for time served "from the date the Probation and Parole detainer was lodged until the date that the Bench Warrant was officially served."[4] (R., pp.132-133, 298-299, 491-492.) In his Memorandum in Support of Motion for Additional Credit Time [sic] Served, Kesling argued that he should be given credit for serving 1,121 days in prison in Florida from March 4, 2008, to March 29, 2011, when he was finally served Idaho's bench warrants, explaining:

> *On March 4, 2008 a Probation and Parole detainer was lodged against Mr. Kesling.* (See Attachment A, Florida Department of Corrections, Corrections Offender Network Printout).

(R., pp.136, 302, 495 (emphasis added).)

. . . .

> Mr. Kesling asserts that as the reason for the probation violation was the exact same reason he was under Florida Department of Corrections custody *he is entitled to the credit from the lodging of the detainer until Mr. Kesling was officially served the bench warrant.* . . .
>
> The Detainer [sic] lodged by Probation and Parole acted as an Agent's Warrant and Mr. Kesling should be entitled to an additional One Thousand One Hundred and Twenty One (1121) days of credit time [sic] served.

(R., pp.138, 304, 497 (emphasis added).)

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[4] According to the Date Time Calculator (www.timeanddate.com),1,120 days elapsed from March 4, 2008, to (but not including) March 29, 2011.

At the second probation violation disposition hearing, Kesling, through counsel, argued that the March 4, 2008 "NOTIFY" entry on his Florida Inmate Record, which he described as a "detainer," was the functional equivalent of a bench warrant, and, therefore, he was entitled to post-judgment credit for time served from that date forward.[5] (12/8/11 Tr., p.11, L.18 – p.21, L.10.) After reviewing the legal basis for Kesling's claim following the first disposition hearing (see n.5), the prosecutor concluded Kesling should be given post-judgment credit for time spent in custody only after March 29, 2011, when Kesling was actually served with the Idaho bench warrants. (12/8/11 Tr., p.11, Ls.8-13.) At the end of the second disposition hearing, the district court ordered Kesling's probations revoked and imposed his original sentences. (R., pp.151-153, 317-319, 510-512.) The court gave Kesling post-judgment credit commencing March 22, 2011 – the day Kesling said he was released from the Florida Department of Corrections' custody, which was seven days before he was served with the three bench warrants from Idaho. (Id; 12/8/11 Tr., p.19, L.22 – p.20, L.5; PSI, pp.130-131.) Kesling timely appealed from the district court's orders revoking probation and entering judgments of conviction in his three cases. (R., pp.154-159, 320-325, 513-518.)

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[5] On April 24, 2013, the Idaho Supreme Court granted Kesling's motion to augment the record with a transcript of the first (i.e., November 3, 2011) probation violation disposition hearing, ordering the District Court Reporter to prepare and lodge the transcript within 28 days. However, a transcribed copy of that hearing was attached to Kesling's April 2, 2013 augmentation motion. At that hearing, Kesling's counsel argued that Kesling should be credited for time served from March 4, 2008 forward. (See generally 11/3/11 Tr.) The district court fluctuated between accepting Kesling's argument, noting that the state presented no contrary argument, and rejecting Kesling's argument. (Id.) At the close of the hearing, the court continued the matter so the state could review the legal basis of Kesling's claim. (11/3/11 Tr., p.35, L.22 – p.36, L.13.)

In Docket No. 39486, Kesling filed a Rule 35 motion to correct an illegal sentence, contending that his nine year sentence was illegal because the crime of issuing a check without sufficient funds, I.C. § 18-3106(a), carries a maximum penalty of three years, and suggested his sentence be modified to three years with two years fixed. (R., pp.529-532.) After the state filed a notice of non-objection to Kesling's Rule 35 motion (R., pp.538-539), the district court granted Kesling's motion and reduced his sentence as requested (R., pp.544-546).

ISSUES

Kesling states the issues on appeal as:

> 1. Did the district court have jurisdiction to revoke Mr. Kesling's probation in 39486?
>
> 2. Did the district court err when it denied Mr. Kesling's motion for credit for time served?

(Appellant's Brief, p.6.)

The State rephrases the issues as:

1. Should this Court vacate the district court's probation revocation order in Docket No. 39486 because it lost jurisdiction, under I.C. § 19-2601(7), after Kesling had been on probation for a period more than the maximum period for which he might have been imprisoned?

2. Has Kesling waived his "credit for time served" argument on appeal because he failed to raise the same argument below, and even if considered under fundamental error or otherwise, has he failed to establish he is entitled to an additional 20 days credit for time served?

ARGUMENT

I.

This Court Should Vacate The District Court's Probation Revocation Order In Docket No. 39486 Because It Lost Jurisdiction, Under I.C. § 19-2601(7), After Kesling Had Been On Probation For A Period More Than The Maximum Period For Which He Might Have Been Imprisoned

The district court entered an Order Revoking Probation, Judgment of Conviction, and Order of Commitment on December 13, 2011, in Docket No. 39484, in regard to Kesling's conviction for issuing a check without sufficient funds. (R., pp.510-512.) Because the district court no longer had jurisdiction over Kesling in that case, its revocation order was invalid and should be vacated.

The maximum penalty for the crime of issuing a check without sufficient funds is three years. I.C. § 18-3106(a). According to I.C. § 19-2601(7), a probationary period may not be longer than the maximum period a defendant might have been imprisoned; it states:

> The period of probation ordered by a court under this section under a conviction or plea of guilty for a misdemeanor, indictable or otherwise, may be for a period of not more than two (2) years; and *under a conviction or plea of guilty for a felony the period of probation may be for a period of not more than the maximum period for which the defendant might have been imprisoned.*

(Emphasis added.[6])

Kesling was placed on probation on November 25, 2003. (R., pp.418-424.) His maximum period of probation expired on November 25, 2006. Idaho authorities did not file a Motion for Bench Warrant for Probation Violation against Kesling based on his

[6] I.C. § 19-2601(7) was amended in 2012, but the highlighted part was modified to the extent necessary to make it an independent sentence (i.e., "Under a conviction . . .").

Florida convictions until March 26, 2008 (R., pp.447-449), and the district court filed a Bench Warrant for Probation Violation two days later (R., pp.452-453). Therefore, the district court lacked jurisdiction in 2011 when it ordered Kesling's probation revoked. See State v. Gamino, 148 Idaho 827, 832, 230 P.3d 437, 442 (Ct. App. 2010) ("Because the State's effort to revoke Gamino's probation was not timely commenced by filing with the district court during the term of Gamino's probation, the district court's order denying Gamino's motion to dismiss the probation violation proceedings and the order extending Gamino's probation are reversed.")

Based on the above analysis, and the argument presented in Kesling's Appellant's Brief, pp.7-9, the state does not dispute Kesling's contention that the district court lacked jurisdiction in 2011 to revoke his probation in Docket No. 39486. Therefore, the state requests that the district court's November 25, 2011 order revoking Kesling's probation be vacated.

II.
Kesling Has Waived His "Credit For Time Served" Issue On Appeal By Failing To Raise It Below, And Even If Considered Under Fundamental Error Or Otherwise, He Has Failed To Establish He Is Entitled To An Additional 20 Days Credit For Time Served

A. Introduction

Kesling argues for the first time on appeal that because an entry on his Florida Department of Corrections' Inmate Record (hereinafter "Florida Inmate Record") regarding detainers was changed from "NOTIFY" to "DETAIN" on March 2, 2011, he should have been given credit for time served between that day and March 22, 2011, when he was released on his Florida sentences. (Appellant's Brief, pp.9-19.)

However, because Kesling did not raise that issue in the district court he has waived it on appeal and this Court is precluded from reviewing it. Further, even if Kesling's issue is considered as a claim of fundamental error or otherwise, he has failed to show, under I.C. § 18-309,[7] that his incarceration in a Florida prison from March 2, 2011, until March 22, 2011, was also "for the offense[s] . . . for which the [Idaho] judgment[s] [were] entered." Therefore, Kesling is not entitled to credit for any time served during that 20-day period.

B. Standards Of Review

"'A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate court's] attention and should be addressed prior to considering the merits of an appeal.'" State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

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[7] I.C. § 18-309 states:

> **Computation of term of imprisonment.** – In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

"The question of whether a sentencing court has properly awarded credit for time served to the facts of a particular case is a question of law, which is subject to free review by the appellate courts." State v. Vasquez, 142 Idaho 67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005) (citing State v. Hale, 116 Idaho 763, 779 P.2d 438 (Ct. App. 1989)). The construction and application of a statute also presents a question of law over which the appellate court exercises free review. State v. Robinson, 143 Idaho 306, 307, 142 P.3d 729, 730 (2006); State v. Schwartz, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003).

"It is a fundamental tenet of appellate law that a proper and timely objection must be made in the trial court before an issue is preserved for appeal." State v. Carlson, 134 Idaho 389, 398, 3 P.3d 67, 76 (Ct. App. 2000). Whether the issue was preserved is a "threshold" inquiry. State v. Stevens, 115 Idaho 457, 459, 767 P.2d 832, 834 (Ct. App. 1989). If an issue has not been preserved, this Court must decline to address it absent a showing of fundamental error. State v. Perry, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010).

C. Kesling Has Waived His Issue On Appeal By Failing To Present It To The District Court

This Court is precluded from considering Kesling's "credit for time served" issue because he failed to present it to the district court. It is well-settled that the failure to raise an issue before the trial court generally waives that issue for purposes of appeal. State v. McAway 127 Idaho 54, 60, 896 P.2d 962, 968 (1995); State v. Beard, 135 Idaho 641, 645-46, 22 P.3d 116, 120-21 (Ct. App. 2001). "An issue is different if it is not

substantially the same or does not sufficiently overlap with an issue raised before the trial court." State v. Voss, 152 Idaho 148, 150, 267 P.3d 735, 737 (Ct. App. 2011) (citing State v. Sheahan, 139 Idaho 267, 277-278, 77 P.3d 956, 966-967 (2003)). Kesling presented a different issue to the district court than the issue he raises on appeal.

In the district court, Kesling argued at the disposition hearing and in his Memorandum in Support of Motion for Additional Credit Time [sic] Served that the March 4, 2008 "NOTIFY" entry on his Florida Inmate Record commenced the time period for which he was entitled to credit, ending March 29, 2011, when he was served with the Idaho bench warrants – for a total of 1,121 days. (R., pp.132-133, 135-139, 301-305; 12/8/11 Tr., p.11, L.18 – p.21, L.10; see R., pp.132-133, 298-299 (Motion for Additional Credit Time [sic] Served, requesting 1,121 days additional credit).) However, on appeal, Kesling presents an entirely different argument; he claims that the "DETAIN" entry made on his Florida Inmate Record on March 2, 2011, proves that the district court should have credited him for the ensuing twenty days served in a Florida prison, until he was released on his Florida sentences on March 22, 2011.[8] (Appellant's Brief, pp.9-19; see 12/8/11 Tr., p.19, Ls.22–24; PSI, pp.130-131.)

Because Kesling's "credit-for-time-served" motion and argument in the district court requested 1,121 days additional credit based on a Florida Inmate Record entry

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[8] Kesling acknowledges that the district court gave him credit for the seven-day period between March 22, 2011 (when he said he was released from a Florida prison) and March 29, 2011, when he was served the Idaho bench warrants after being transported to Idaho. (Appellant's Brief, p.19.)

made on March 4, 2008, and his appellate argument seeks 20 days of credit based on an entry made on March 2, 2011, Kesling presents a different issue on appeal than he did in the district court. Therefore, Kesling has waived his "credit-for-time-served" issue by failing to present the same issue below, and this Court is precluded from reviewing that issue on appeal absent a showing of fundamental error. McAway 127 Idaho at 60, 896 P.2d at 968; Beard, 135 Idaho at 645-646, 22 P.3d at 120-121; Perry, 150 Idaho at 226, 245 P.3d at 978.[9]

D. Even If Kesling's Issue Is Considered, Under Fundamental Error Or Otherwise, He Has Failed To Establish He Is Entitled To An Additional 20 Days Credit For Time Served

Even if Kesling's "credit-for-time-served" issue is considered on appeal, under fundamental error or otherwise, he failed to provide any viable support for his claim that while he was completing his prison term on his Florida sentences from March 2, 2011, to March 22, 2011, such incarceration was also for the offenses for which the Idaho judgments were entered. I.C. § 18-309.

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[9] In order to prevail on his credit for time served under fundamental error, Kesling must satisfy the three-part test articulated by the Idaho Supreme Court in Perry:

> (1) the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated, (2) the error must be clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the defendant must demonstrate that the error affected the defendant's substantial rights meaning (in most instances) that it must have affected the outcome of the trial proceedings.

150 Idaho at 226, 245 P.3d 978.

Kesling correctly points out that, under I.C. § 19-2603,[10] credit for time served "shall accrue after the *service* of a bench warrant," and that an agent's warrant may serve as the "functional equivalent" of a bench warrant. (Appellant's Brief, pp.16-17 (emphasis added)); see State v. Covert, 143 Idaho 169, 171, 139 P.3d 771, 773 (Ct. App. 2006) Kesling contends that the "DETAIN" entry placed on his Florida Inmate Record on March 2, 2011, was a "detainer *warrant*" which, in turn, was the functional equivalent of a bench warrant.[11] (Appellant's Brief, p.17 ("Here, like the facts in *Covert*, the detainer warrant was the functional equivalent of a bench warrant, as Mr. Kesling's freedom was affected.").)

However, Kesling's assertions are more than can be known based on the record developed in the district court and provided to this Court. Kesling failed to present the district court with any evidence explaining what type of document(s), if any, were sent by Idaho to the Florida Department of Corrections that caused the latter to change the

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[10] I.C. § 19-2603 states:

> When the defendant is brought before the court in such case, it may, if judgment has been withheld, pronounce any judgment which it could originally have pronounced, or, if judgment was originally pronounced but suspended, the original judgment shall be in full force and effect and may be executed according to law, and the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence, but the time of the defendant's sentence shall count from the date of service of such bench warrant.

[11] Without any supporting authority, Kesling assumes that when Florida changed the entry on his prison record from "NOTIFY" to "DETAIN," he was placed in the custody of the Idaho Department of Correction. However, it is much more reasonable to conclude that the entries on Kesling's Florida prison record signify, in advance, what Florida was supposed to do with Kesling after he completed his Florida sentences.

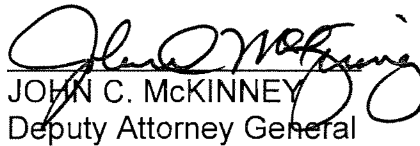
entry on Kesling's Florida Inmate Record from "NOTIFY" to "DETAIN" on March 2, 2011. (See generally 12/8/11 Tr.) Therefore, it would have been impossible (even if asked) for the district court to have made the determinations Kesling appears to regard as facts – i.e., that the "DETAIN" entry on March 2, 2011, was caused by Florida's receipt of a "detainer warrant" which was the "functional equivalent" of a bench warrant. Without any evidence explaining what legal hold, if any, Idaho may have placed on Kesling on March 2, 2011, Kesling's argument is baseless. Moreover, as required by I.C. § 19-2603, Kesling has not shown, or even alleged, that he was *served* with the "functional equivalent" of an Idaho bench warrant on March 2, 2011.

In sum, Kesling failed to develop any evidentiary basis in the district court to support his argument that he is entitled to credit for time served during the last 20 days he was serving his Florida sentences. As a result, the appellate record provides no basis for this Court to find, pursuant to I.C. § 18-309, that Kesling was being held by Idaho during those 20 days by a functional equivalent to a bench warrant from Idaho, i.e., that such incarceration was for the offenses for which the Idaho judgments were entered. Kesling has failed to show that the district court erred, much less committed fundamental error, in not granting him credit for time served in a Florida prison from March 2, 2011, to March 22, 2011.

CONCLUSION

The state respectfully requests that the district court's order revoking Kesling's probation in Idaho Supreme Court No. 39486 be vacated, and that the district court's orders denying Kesling's requests for additional credit for time served in Idaho Supreme Court Case Nos. 39484 and 39485 be affirmed.

DATED this 17th day of June, 2013.



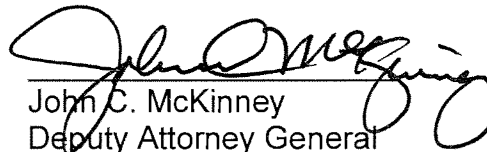
JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 17th day of June, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

SALLY J. COOLEY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



John C. McKinney
Deputy Attorney General

JCM/pm