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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)
)
 Plaintiff-Respondent,)
)
 vs.)
)
 STERLING GENE BRAND,)
)
 Defendant-Appellant.)
)

No. 43441

Ada Co. Case No.
CR-2014-9261

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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

HONORABLE RICHARD D. GREENWOOD
District Judge

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DEC 29 2015
Supreme Court _____ Court of Appeals _____
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STATEMENT OF THE CASE

Nature Of The Case

Sterling Gene Brand appeals from the district court's order denying his Rule 35 motion requesting credit for time served.

Statement Of The Facts And Course Of The Proceedings

The state charged Brand with one count of grand theft. (R., pp. 5-6, 58-59.) Brand pled guilty. (R., pp. 61-69.) The district court imposed a sentence of 14 years with two years determinate, to run concurrently with sentences imposed in two prior cases in, respectively, Ada and Valley Counties. (R., pp. 73-76.) The district court granted credit for four days served. (R., p. 74.)

Brand moved for credit for 190 days served, "from the time he was arrested in this case on November 4th, 2014 to May 12th, 2015, when he was sentenced." (R., p. 79.) The district court denied the motion, reasoning that Brand's custody was attributable to the other sentences, not this case. (Tr., p. 9, L. 13 – p. 12, L. 19; R., p. 85.) Brand filed a notice of appeal timely from the denial of his Rule 35 motion. (R., p. 87.)

ISSUE

Brand states the issue on appeal as:

Did the district court err by denying Mr. Brand's motion for credit for time served when the plain language of Idaho's credit for time served statute, I.C. § 18-309, mandates credit for Mr. Brand's prejudgment incarceration?

(Appellant's brief, p. 5.)

The state rephrases the issue as:

The record in this case shows that Brand was at all times relevant to this case incarcerated in the penitentiary, serving sentences for controlled substances convictions in a different case. Has Brand failed to show that the district court erred by concluding Brand was not entitled to credit in this case for time spent in the penitentiary as the result of his convictions in the other case?

ARGUMENT

Brand Has Failed To Show Error In The District Court's Determination That He Was Not Entitled To Credit In This Case For Time Spent In The Penitentiary As The Result Of A Conviction In Another Case

A. Introduction

The district court concluded that a defendant “in custody on separate charges and then unrelated charges are filed” is not entitled to “credit for that time ... on the new charges” because he is being held on “the original charges.” (Tr., p. 12, Ls. 6-11.) Finding the case very similar to State v. Brashier, 130 Idaho 112, 937 P.2d 424 (Ct. App. 1997), because the defendant was incarcerated in the penitentiary on the original charges and was therefore not entitled to credit for time served on the new charges, the district court denied the motion. (Tr., p. 9, L. 13 – p. 12, L. 19.)

Brand contends he was entitled to credit for time served from service of the arrest warrant until sentencing under the “plain language” of I.C. § 18-309(1).¹ (Appellant’s brief, pp. 6-12.) This argument, however, is based on the false factual claim that “Brand was incarcerated in county jail for the entirety of the grand theft criminal proceedings.” (Appellant’s brief, p. 6.) Application of the “plain language” of I.C. § 18-309 to the actual facts of this case, which are that Brand was in the penitentiary serving the Valley County sentences, shows that Brand was not entitled to additional credit for time served in this case.

¹ Brand cites to “I.C. § 18-309(1).” A second subsection was added to I.C. § 18-309 and the existing statute was designated subheading (1) in 2015, effective July 1. Because the events relevant to this appeal predate the amendment, the state will cite the statute as it existed prior to amendment. There was no change to the language relevant to this case.

B. Standard Of Review

“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)).

C. Brand Was Not Entitled To Prejudgment Credit For Time Spent In The Penitentiary Because Of A Conviction In A Different Case

The award of credit for time served is governed by I.C. § 18-309, which provides in relevant part:

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 the 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 the sentence

(emphasis added). The italicized phrase means that the right to credit is conferred only if the prejudgment incarceration is a consequence of or attributable to the charge or conduct for which the sentence is imposed. State v. Horn, 124 Idaho 849, 850, 865 P.2d 176, 177 (Ct. App. 1993); State v. Hale, 116 Idaho 763, 765, 779 P.2d 438, 440 (Ct. App. 1989). Accordingly, when a defendant seeks credit for prejudgment incarceration, “the applicable inquiry is whether the incarceration was for the same offense or an included offense for which the judgment was entered.” State v. McCarthy, 145 Idaho 397, 399, 179 P.3d 360, 362 (Ct. App. 2008) (citing I.C. § 18-309; State v. Vasquez, 142 Idaho

67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005)); see also I.C. § 20-209A (“A person who is sentenced may receive credit toward service of his sentence for time spent in physical custody pending trial or sentencing, or appeal, *if that detention was in connection with the offense for which the sentence was imposed.*” (emphasis added)). “If a particular period of confinement served prior to the imposition of sentence is not attributable to the charge or conduct for which a sentence is to be imposed, the offender is not entitled to credit for such confinement; neither does the sentencing judge err by denying credit under such circumstances.” State v. Hale, 116 Idaho 763, 765, 779 P.2d 438, 440 (Ct. App. 1989) (citations omitted).

Review of the facts of this case shows that Brand’s incarceration was *not* for the grand theft offense on which judgment in this case was entered. Although the district court did not make specific factual findings, the following can be gleaned from the record:

1. The arrest warrant in this case was served on November 4, 2014. (R., p. 9.) Brand was sentenced on May 12, 2015. (R., p. 73.) That is a period of 189 days (inclusive of the first and exclusive of the last, which is the first day of post-judgment credit).
2. Brand was ordered to serve the sentences in his Valley County case on October 23, 2014. (PSI, p. 10.) He was therefore in the custody of the Idaho Department of Correction on that sentence at all times relevant to this case.
3. The four days for which Brand was given credit appear to be for time spent in the Ada County Jail on this charge when he was transported from the penitentiary. (E.g., R., pp. 29-30, 46-47, 61.)

Because the record is clear that Brand was incarcerated in the penitentiary on a different offense, the district court correctly held that his incarceration in the

penitentiary was not for the grand theft offense on which it entered judgment. See State v. Brashier, 130 Idaho 112, 113-14, 937 P.2d 424, 425-26 (Ct. App. 1997) (defendant in penitentiary due to prior conviction not entitled to credit for time served on new charge).

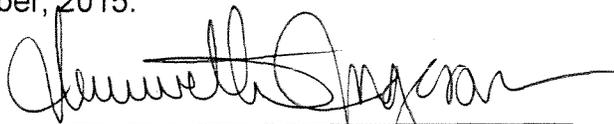
Brand contends he was entitled to “credit on his sentence for the time he served in jail before he was convicted of or pled guilty to his crime.” (Appellant’s brief, p. 7 (quoting State v. Owens, 158 Idaho 1, 3, 343 P.3d 30, 32 (2015).) This argument is apparently premised on the false factual claim that he “was incarcerated in county jail for the entirety of the grand theft criminal proceedings.” (Appellant’s brief, p. 6.) Regardless of the merit of his legal argument, because his factual claim is demonstrably false on the record, and because his legal argument has no bearing on the facts as they actually exist, Brand’s argument fails.

The record shows that Brand was incarcerated in the penitentiary as a result of Valley County convictions. The charges in this case were legally and factually irrelevant to his incarceration in the penitentiary. His incarceration in the penitentiary prior to judgment in this case was therefore not “for the offense” of grand theft “for which judgment was entered” in this case.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Brand's Rule 35 motion.

DATED this 29th day of December, 2015.



KENNETH K. JORGENSEN
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of December, 2015, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JENNY C. SWINFORD
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.



KENNETH K. JORGENSEN
Deputy Attorney General

KKJ/vr