10-22-2015

State v. Taylor Appellant's Reply Brief Dckt. 42774

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LANCE TYRELL TAYLOR AKA GREEN, Defendant-Appellant.	)	NO. 42774 ADA COUNTY NO. CR 2012-12658 REPLY BRIEF

REPLY BRIEF OF APPELLANT

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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STATEMENT OF THE CASE

Nature of the Case

Lance Taylor appeals contending the district court erred in denying his motion for credit for time served. Specifically, he argues the 2015 amendments to the credit statutes, which provide that time for periods of incarceration served as a condition of probation are to be credited against the sentence, are, by their plain language, retroactive, and should apply to his case. Under those amended statutes, he is entitled to credit for the jail time served during his period of probation. He also contends that, under the old credit regime, he is entitled to credit because there was no provision in his probation agreement authorizing discretionary jail time as a term of probation.

The State makes several responses, none of which are persuasive. Its attempts to procedurally default Mr. Taylor's argument are based on misrepresentations of the relevant facts. Similarly, its arguments on the merits should either be estopped as they are contradictory to positions and concessions made by the prosecutor below or rejected because they misconstrue the language of the 2015 amendments to the credit statutes. Regardless, this Court should reject those arguments.

As such, Mr. Taylor is entitled to credit for all the periods of time he was incarcerated during his probation. Thus, this Court should reverse the order for credit for time served and remand this case so that an order for the credit to which Mr. Taylor is actually entitled might be entered. The record in this case is clear, and the State does not contest on appeal, that Mr. Taylor is entitled to 396 days of credit for time served.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Taylor's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Whether the district court erred in its calculation of the credit for time served to which Mr. Taylor was entitled.

ARGUMENT

The District Court Erred In Its Calculation Of The Credit For Time Served To Which Mr. Taylor Was Entitled

A. The Issue Of Whether Mr. Taylor Should Get Credit For The Periods Of Incarceration Served In The Drug Court Program Was Preserved For Appeal

Mr. Taylor has included, as part of his argument on appeal, that he should receive credit for the periods of time he was incarcerated as part of the drug court program. (*See* App. Br., p.13.) The State responds that this argument was not properly preserved for appeal because it believes Mr. Taylor did not request credit for those periods of incarceration and there was no ruling on his motion by the district court. (Resp. Br., p.5.) The State is incorrect in both respects.

In fact, Mr. Taylor did specifically request credit for the period of time he was incarcerated in the drug court program in his motion for credit, as he requested "credit for all local, county and state time served in conjunction with this charge, and the resulting sentence imposed by the Court." (R., p.167.) In his affidavit in support of that motion, he specifically asserted, "On July 21, 2013, I was arrested and released on September 13, 2013 (Totaling 54 days)," and requested credit for that period of incarceration as well as several others. (R., pp.169-70.) The prosecutor below acknowledged that period of incarceration from July 21, 2013, to September 13, 2013, was served as part of the drug court program. (R., p.175.) Therefore, Mr. Taylor did actually request credit for this particular period of time in his motion, and the State's representation to the contrary – that "such incarceration was not within the scope of the pending motion" (Resp. Br., p.5) – is disproved by the record.

And, if Mr. Taylor's motion and affidavit were not sufficient to preserve the question of whether he should get credit for time served during the drug court program for appeal, the district court's express ruling on that precise question certainly was. While the appellate courts usually do not consider issues for the first time on appeal, there is "[a]n exception to this rule." *State v. DuValt*, 131 Idaho 550, 553 (1998). That exception allows the appellate court to consider an issue for the first time on appeal "when the issue was argued to *or decided by* the trial court." *Id.* (emphasis added); *cf. State, ex rel. Wasden v. Maybee*, 148 Idaho 520, 532 (2010); *Northcutt v. Sun Valley Co.*, 117 Idaho 351, 356 (1990).

As was the case in *DuValt*, the record shows the district court expressly addressed the question of credit for time served during the drug court program, and it affirmatively ruled against Mr. Taylor on that question. (R., pp.189-90.) Specifically, the district court determined:

> There are four periods of time at issue in this case. First is the time Mr. Taylor spent in custody before sentencing; *second is the time Mr. Taylor spent in custody as a participant in drug court*; third is the time Mr. Taylor spent in custody following arrest on the warrant issued after he absconded from drug court but before the motion for probation violation was filed; and fourth the time following the motion for probation violation before disposition.

(R., p.189 (emphasis added).) It proceeded to decide that "[t]he times that Defendant spent in custody while participating in drug court were sanctions imposed as part of the drug court regime to which Defendant consented at the time of accepting drug court as a condition of probation. He does not get credit for time in custody served as a sanction for violation of drug court rules." (R., pp.189-90.) Since the district court expressly decided the question about whether Mr. Taylor would get credit for the periods of

incarceration served during the drug court program, that question is properly raised on appeal. *DuValt*, 131 Idaho at 553. The fact that the district court made such a ruling in the Order Re: Motion to Amend Judgment also disproves the State's argument that "[t]here was no ruling in the record on [Mr.] Taylor's second *pro se* motion." (Resp. Br., p.5.)

Since the State's attempt to procedurally bar Mr. Taylor's argument for credit is based on misinterpretations of the relevant facts of this case, its argument that the claim was not preserved for appeal is frivolous. As such, it should be disregarded and this Court should consider the merits of Mr. Taylor's claim.

B. Precedent Is Clear That, When There Is No Term Authorizing Discretionary Incarceration In The Probation Agreement, The Defendant Is Entitled To Credit For Periods Of Incarceration Served During That Period Of Probation

Mr. Taylor contends that, even if the 2015 amendments to the credit statutes are not retroactive, he is still entitled to credit for the periods of incarceration served during his period of probation under the old credit regime. (App. Br., pp.15-20.) That argument is based on the decision in *State v. Buys*, which identified an exception to the general rule in the old credit regime: that, without a term in his probation agreement which authorized discretionary jail time as a condition of probation, the defendant is entitled to credit for periods of incarceration during his probation. *State v. Buys*, 129 Idaho 122, 127-28 (Ct. App. 1996). In fact, the prosecutor conceded below, "[i]t is difficult to distinguish Mr. Taylor's order of probation and the Court's subsequent orders to incarcerate him from those in *State v. Buys*." (R., p.185.)

On appeal, the State simply responds that the general rule – that no credit is usually given for periods of incarceration served during a period of probation – should

apply in this case. (*See* R., pp.7-8.) However, the language in *Buys* is clear – the analysis properly focuses on the terms to which the defendant agreed in order to obtain probation in the first place. *Buys*, 129 Idaho at 127-28 ("Buys' probation conditions were set out in the order withholding judgment . . . and Buys signed an agreement by which he accepted those terms. Those conditions included no provision" that would authorize the incarceration for which he sought credit).

The State does not challenge the validity of the *Buys* exception. (*See generally* Resp. Br.) Instead, it attempts to distinguish *Buys*, arguing that "[t]he record, however, clearly establishes that the court ordered completion of drug court as a condition of probation and the drug court notices clearly provided that sanctions, including incarceration, could be imposed as a function of probation," and so, contends Mr. Taylor's argument based on *Buys* is disproved by the record. (Resp. Br., p.8.) However, that argument is directly contradictory to the arguments the prosecutor made below. (R., pp.178-80.)

Parties are prevented from "taking a position in one proceeding and then taking an inconsistent position in a subsequent proceeding." *PHH Mortg. Services Corp. v. Perreira*, 146 Idaho 631, 638 (2009). This prohibition is part of the doctrine of estoppel, which has two related aspects relevant to this case: quasi-estoppel and judicial estoppel. Quasi-estoppel is meant to prevent one party flip-flopping positions in an attempt to gain an advantage over, or cause detriment to, the other party. *See, e.g., Allen v. Reynolds*, 145 Idaho 807, 812 (2008). Judicial estoppel is similar, but it is aimed at "prevent[ing] a litigant from playing fast and loose with the courts." *Heinze v. Bauer*, 145 Idaho 232, 235 (2008). As the State's argument on appeal about

Buys does both of these, it should be estopped from raising that argument for the first time on appeal.

Below, the State conceded that the drug court agreements were ambiguous in regard to which periods of incarceration Mr. Taylor may or may not have agreed as a condition of his probation:

> Clearly he agreed to these conditions [in the drug court advisory documents]. Does that mean he agreed to serve jail as a condition of probation? If so, he is not entitled to credit for jail he served while in Drug Court because he voluntarily agreed to serve it as a condition of receiving probation. If he agreed to serve jail, how much did he agree to serve? Or perhaps more precisely, which of the 4 distinct periods for which he was incarcerated were periods that Mr. Taylor agreed to serve as conditions of receiving probation and which were not, or what portions of which were not? *The language in the advisory form does not clearly resolve these questions.*

(R., p.179 (emphasis added).) Furthermore, the prosecutor below conceded that the provisions in the drug court agreement were likely not properly applicable to Mr. Taylor at all because those provisions were designed to address issues faced by "front end" drug court participants (*i.e.*, people participating in the drug court program prior to having their sentences imposed). (R., p.180.) Thus, the prosecutor admitted: "It is not clear to the author of this brief whether or not the Court could properly continue to require Mr. Taylor to comply with [those conditions] after his sentence[] was imposed and suspended. *The author suspects not* . . . ." (R., p.180 (emphasis added).)

Finally, the prosecutor admitted, "the State is troubled by the lack of any reference to discretionary jail in Mr. Taylor's order of Probation." (R., p.185.) Thus, it conceded, "[i]t is difficult to distinguish Mr. Taylor's order of probation and the Court's subsequent orders to incarcerate him from those in *State v. Buys*." (R., p.185.) Therefore, although the prosecutor ultimately argued that Mr. Taylor should not be

credited the time he served pursuant to the drug court judge's orders based on its particular interpretation of the record, the State conceded that the record *was not clear* as to whether the periods of incarceration addressed in the drug court documents could be considered terms of Mr. Taylor's probation agreement. (*See, e.g.*, R., p.185.)

Based on those admissions, particularly the admission that this case is difficult to distinguish from *Buys*, Mr. Taylor advanced his argument for credit on appeal pursuant to *Buys*. However, despite those previous concessions, the State now tries to distinguish *Buys* from this case on appeal by arguing:

> The record, however *clearly* established that the court ordered completion of drug court as a condition of probation and the drug court notices *clearly* provided that sanctions, including incarceration, could be imposed as a function of drug court. [Mr.] Taylor's argument that he was serving his sentence or was arrested on a probation violation warrant or its equivalent is *disproved* by the record which shows he was in custody on drug court sanctions.

(Resp. Br., p.8 (emphasis added).) This argument – that the record is *clear* and so, *clearly* refutes Mr. Taylor's argument under *Buys* – is directly contradictory to the position the State took below based on the prosecutor's concessions. (*See* R., pp.179-80.) Thus, the flip-flopping of positions to gain an advantage over Mr. Taylor's argument on *Buys*, which also plays fast and loose with the courts in regard to the application of relevant precedent, is improper. *Allen*, 145 Idaho at 812; *Heinze*, 145 Idaho at 235. Thus, the State should be estopped from raising these new arguments on appeal under both the quasi-estoppel and judicial estoppel theories.

At any rate, the State has not shown that *Buys* is distinguishable from Mr. Taylor's case. (*See generally* Resp. Br., pp.6-8.) It merely cites the general rule that a probationer was generally not entitled to credit for the time he served during a

period of probation. (Resp. Br., p.6.) However, *Buys* was decided while those same rules were in place – in fact, it was affirmatively distinguishing the general rule based on the facts of that case. *Buys*, 129 Idaho at 127-28. Thus, even under the general rule, the absence of a term which authorized a certain period of incarceration in the actual agreement of probation to which the defendant agreed in order to get probation was critical. *Id.* Without such a term, the period of incarceration could not properly be said to be served as a term of probation, and so, the defendant is entitled to credit for that period of incarceration. *Id.* Therefore, this Court should reject the State's argument on its merits as well.

C. The 2015 Amendments To The Credit Statutes Are, By Their Plain Language, Retroactive

Ultimately, however, even if the periods of incarceration during drug court, and the other periods of incarceration identified below (*see* R., p.189), were served as conditions of Mr. Taylor's probation, he is still entitled to credit for those periods of incarceration under the retroactive 2015 amendments to the credit statutes. *See* I.C. §§ 18-309 and 19-2603. The State responds to that point, arguing that those amendments were not retroactive because it believes the focus of the 2015 amendments was on "the time the court calculated time served imposing judgment." (Resp. Br., pp.10-11 (emphasis omitted).) Thus, under the State's reading, the only time credit is properly calculate is at the time the judgment is originally entered or ordered into execution: "the time the statute [I.C. § 18-309] applies is upon entry of judgment after the probation violation has been found. . . . Again, the contemplated time-frame for the awarding of

credit for time served [under I.C. § 19-2603] is at the time the court revoked the probation." (Resp. Br., p.11.) The State is mistaken.

First, the fact that the criminal rules specifically provide that a defendant may file a motion to correct the calculation of credit at any time affirmatively demonstrates that the time the judgment is entered or executed is not the critical factor in the credit calculation. *See* I.C.R. 35(c). Rather, as the Court of Appeals has recently made clear, "the language of I.C. § 18-309 is mandatory and requires that, in sentencing a criminal defendant or (as in this case) when hearing an I.C.R. 35(c) motion for credit for time served, the court give the appropriate credit . . . ." *State v. Moore*, 156 Idaho 17, 20-21 (Ct. App. 2014). "This means that the defendant is *entitled* to credit *for all time spent incarcerated*," as defined by the statute.[1] *Id.* (emphasis added). Thus, the focus of the credit statutes is not on the judgment itself, but rather, on the person against whom that judgment was entered. *See, e.g., id.* If *the person* is incarcerated in relation to a judgment, *the person* is entitled to credit in that judgment.

This conclusion is borne out by the language of the credit statutes themselves. For example, relevant to the factual scenario in Mr. Taylor's case, "In computing the time of imprisonment when . . . [the] sentence has been suspended and is later imposed, *the person against whom the judgment is entered or imposed* shall receive credit in the judgment . . . ." I.C. § 18-309(2) (emphasis added). Similarly, when the court is reviewing a violation of the terms of probation, "[*t*]*he defendant* shall receive credit for time served . . . for any time served as a condition of probation under the

[1] In *Moore*, the defendant was seeking credit for prejudgment incarceration. *Moore*, 156 Idaho at 20-21. However, the language in *Moore* applies equally to all periods of incarceration identified in the credit statutes.

withheld judgment or suspended sentence." I.C. § 19-2603 (emphasis added). As a result, the operative clause in both statutes is that "the person shall receive credit." The other explanatory clauses upon which the State tries to focus – those dealing with how and where the defendant gets that credit (*i.e.*, "in the judgment of conviction") – "do[] not limit or expand the scope of the operative clause." *Dist. of Columbia v. Heller*, 554 U.S. 570, 577-78 (2008) (discussing the interplay of this sort of "operative" and "prefatory" or explanatory clauses in reading statutes and constitutional provisions).

The same is true about the State's emphasis on the phrase "*when* the court finds that the defendant has violated the terms of probation . . . ," in I.C. § 19-2603. (Resp. Br., p.11 (emphasis from original).) While that, as a prefatory clause, may "resolve an ambiguity in the operative clause[,] . . . apart from that clarifying function, a prefatory clause does not limit or expand the scope of the operative clause." *Heller*, 554 U.S. at 577-78.

At any rate, that particular provision of I.C. § 19-2603 addresses when the district court is authorized to revoke probation: "When the court finds that the defendant has violated the terms and conditions of probation, it may . . . revoke probation." I.C. § 19-2603. As such, the provision about when the court revokes probation does not impact on the credit calculation, since the credit calculation is addressed in a different part of the statute. Regardless of whether the court revokes probation, I.C. § 19-2603 unequivocally provides, "The defendant shall receive credit . . . for any time served as a condition of probation under the withheld judgment or suspended sentence." I.C. § 19-2603.

The final point demonstrating the State's argument is misconstruing the credit statutes is that this Court, like the district court in *Moore*, is obligated to ensure the defendant is receiving "credit for the correct amount of time actually served . . . . The [courts *do*] *not have discretion* to award credit for time served that is either more or less than that." *Moore*, 156 Idaho at 21 (citing *Law v. Rasmussen*, 104 Idaho 455, 456-57 (1983); *State v. Rodriguez*, 119 Idaho 895, 897 (Ct. App. 1991)) (emphasis added). Therefore, the State's argument – which is essentially that this Court should affirm an improper calculation of credit because of the time at which the judgment was entered or executed – is wholly inappropriate.

Since the State's reading of the statute, focusing on the time the judgment was entered, misconstrues the statutes, it is necessary to return to the plain language of those statutes to determine if they have retroactive effect. As discussed in depth in the Appellant's Brief, the plain language of the 2015 amendments, by referring to past and future events (*i.e.*, "*any* period of incarceration"), are retroactive by their plain language. (App. Br., pp.9-13.)

The State's response to that point, which does not cite authority in support, simply contends that nothing in the language of the credit statutes indicates they are to be retroactive. (Resp. Br., pp.11-12.) Therefore, since the State's unsupported argument about the retroactivity of these statutes is inconsistent with Idaho Supreme Court precedent, that argument should be rejected.

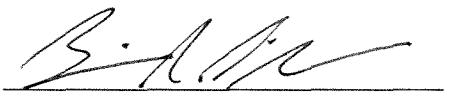
As such, this Court should remand this case for an order for credit for all the time Mr. Taylor actually served and to which he is entitled under either the old regime or the 2015 amendments to the credit statutes. The State does not contest Mr. Taylor's

calculation on appeal of the time he actually served in this case – 396 days. (*See* App. Br., pp.13-15 (detailing the relevant calculations); *see generally* Resp. Br.)

CONCLUSION

Mr. Taylor respectfully requests this Court reverse the erroneous order for credit for time served and remand this case for entry of an order for all the credit to which he is entitled.

DATED this 22nd day of October, 2015.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 22nd day of October, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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