

No. DA 22-0059

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STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT AYRES DASILVA JR,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Eighth Judicial District Court,  
Cascade County, the Honorable Elizabeth Best, Presiding

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## **STATEMENT OF THE ISSUES**

1. Did the District Court impose an illegal sentence when it designated DaSilva as a Tier 1 Sex Offender?
2. Did the District Court incorrectly deny Defendant credit for time he served on a previous judgment for the same criminal act pursuant to §46-18-402, MCA?

## **STATEMENT OF THE CASE**

Appellant/Defendant Robert DaSilva Jr. (DaSilva) appeals from his convictions on two counts of felony failure to register as a sexual offender “failure to register.” This case was originally brought on appeal as two separate cases: DA 22-0059 and DA 22-0060. Upon motion by Defendant, the two cases were consolidated under Cause No. DA-22-0059.

DaSilva was charged with failure to register on September 6, 2019. (Information - DC. Doc. 2.)<sup>1</sup> In April of 2021, while his 2019 case was pending, DaSilva received a second charge for failure to register. (Information - BDC-21-296, DC. Doc. 3.) DaSilva pleaded guilty to two

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<sup>1</sup> All DC Docs. are in reference to district court documents in cause no. BDC-19-613, unless specifically noted within the citation.

counts of failure to register and on both counts was sentenced to five years DOC with all five years suspended. (Plea Agreement - DC Doc. 147, Judgment - attached as [Appellant's App. A].) The sentences run concurrently to one another. The district court also designated DaSilva a tier I sexual offender. *Id.*

Prior to sentencing, DaSilva filed a Motion for Credit for Time Served, arguing that pursuant to §46-18-402, MCA, he should receive credit for time served under a previous conviction for the same offense, because that judgment was vacated. (Motion - DC Doc. 174.) The district court denied DaSilva's request for time served under §46-18-402, MCA. (12/06/2021 Sentencing Hearing Transcript: 32, Attached as [Appellant's App. B.]

### **STATEMENT OF FACTS**

The requirement that DaSilva register as a sexual offender in Montana stems from a Washington conviction dating back to 1998 for Assault in the Second Degree with Sexual Motivation<sup>2</sup>. When DaSilva

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<sup>2</sup> DaSilva maintains that his Washington assault conviction was not a sex offense, because the court failed to make a specific finding of "sexual motivation" as required by statute. *See* Rev. Code Wash. (ARCW) §§ 9A.36.021 & 9.94A.835. DaSilva's convictions in this matter are based on the assumption that his WA sentence was, in fact, a sexual offense as defined by Montana law.

Assault in the Second Degree with Sexual Motivation<sup>2</sup>. When DaSilva returned to Montana following his Washington conviction, he registered as a sexual offender. (Affidavit, Motion, and Order for Leave to File Information Direct - DC Doc. 1.) DaSilva has periodically updated his registration by submitting change of address forms and appearing for phone and in-person check-ins. *Id.*

Between January 1, 2019 and December 31, 2021, DaSilva was charged with three counts of failure to register in Cause Nos. BDC-19-613, CDC-20-087 and BDC-20-087. (Acknowledgment of Waiver of Rights - DC Doc. 146.) On September 3, 2021, DaSilva pleaded guilty to two counts of failure to register. (Minutes RE: COP Hearing - DC Doc. 142, Plea Agreement - DC Doc. 147.) Pursuant to the Plea Agreement, the State dismissed a third count for failure to register in CDC 20-087. (Appellant's App. A.) The Plea Agreement did not include a sexual offender tier designation. (DC Doc. 147.)

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<sup>2</sup> DaSilva maintains that his Washington assault conviction was not a sex offense, because the court failed to make a specific finding of "sexual motivation" as required by statute. *See* Rev. Code Wash. (ARCW) §§ 9A.36.021 & 9.94A.835. DaSilva's convictions in this matter are based on the assumption that his WA sentence was, in fact, a sexual offense as defined by Montana law.

On December 6, 2021, DaSilva was sentenced two counts of failure to register in BDC 19-613 and BDC 21-296. On both counts, he received five years' DOC, all suspended, to run concurrently and was designated a tier I offender. (Appellant's App. A.)

### **Facts Relevant to Issue 2 - Credit for Time Served:<sup>3</sup>**

In 2010, DaSilva was convicted at trial of failure of a sex offender to provide notice of change of address and was sentenced to five years' incarceration at Montana State Prison with no time suspended.<sup>4</sup> (PSI-DC Doc. 171, *see also DaSilva v. Law*, 2014 U.S. Dist. (D. Mont. May 15, 2014). DaSilva filed a direct appeal with this Court, which was unsuccessful. *See State v. DaSilva*, 2011 MT 183, 361 Mont. 288, 258 P.3d 419.

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<sup>3</sup> Below is a basic timeline of events relevant to DaSilva's Motion for Credit for Time Served:

- 1998: Conviction for underlying offense allegedly requiring DaSilva's sex offender registration & the basis for the charges on appeal here.
- 2009: Prior charge for failure to notify re: change of address in DDC 09-137.
- 2009-2014 DaSilva serves sentence in Cause No. DDC 09-137 for failure to register.
- 2014: Molloy grants writ of habeas corpus and vacates 2010 judgment but permits state to refile.
- 2014: State refiles, but Judge Sandefur dismisses with prejudice.
- 2019: DaSilva charged with failure to register BDC-19-613.
- 2021: DaSilva charged with failure to register BDC-21-296.

<sup>4</sup> Although charge titled differently, his 2009 conviction alleges violation of the same statutes as those on appeal here.

Ultimately, DaSilva, filing pro se, sought Habeas Corpus relief with the United States District Court for the State of Montana, Great Falls Division. *DaSilva v. Law*, 2014 U.S. Dist. (D. Mont. May 15, 2014). U.S. District Court Judge, Donald Molloy granted DaSilva's petition and vacated the judgment entered against him in Cause No. DDC 09-137, resulting in his release from Montana State Prison. *DaSilva v. Law*, 2014 U.S. Dist. (D. Mont. May 15, 2014). At the time of his release, Dasilva had served approximately four years and nine months of his five-year sentence for the statutory equivalent of failure to register. (DC Doc. 641 and DC Doc. 174 at 2.)

In the instant case, DaSilva argued that the nearly five years of time he served in DDC 09-137 should be credited toward his current sentence pursuant to §46-18-402, MCA. (Motion for Credit for Time Served - D.C. Doc. 174.) The State responded to DaSilva's Motion for Credit for Time Served in oral argument at sentencing but did not file a written response. (Appellant's App. B at 7:19-9:5.) The Court denied



DaSilva's §46-18-402 request for time served at sentencing.<sup>5</sup> *Id.* at 32 and DC Doc. 175 at 2.

### **STANDARD OF REVIEW**

“This Court generally reviews a criminal sentence longer than one year for legality only; that is, whether it falls within the statutory parameters.” *State v. Holt*, 2011 MT 42, ¶ 7, 359 Mont. 308, ¶ 310, 249 P.3d 470, ¶ 472. The Court reviews de novo whether the sentence falls within statutory parameters and whether a court had statutory authority to impose the sentence and adhered to statutory mandates. *State v. Claassen*, 2012 MT 313, ¶ 14, 367 Mont. 478, ¶ 481, 291 P.3d 1176, ¶ 1179.

“Calculating credit for time served is not a discretionary act, but a legal mandate. As such, a lower court's determination of credit for time served is reviewed for legality and the Montana Supreme Court exercises de novo review.” *State v. Tippetts*, 2022 MT 81, ¶ 1, 408 Mont. 249, ¶ 251, 509 P.3d 1, ¶ 2.

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<sup>5</sup> The district court partially granted DaSilva's Motion for Credit for Time Served by crediting him with 39 days re: a miscalculation but rejected his motion as to time served for the prior offense.

A district court's statutory interpretation is a question of law that that is reviewed de novo. *State v. Harrison*, 2016 MT 271, ¶5, 385 Mont. 227, ¶ 229, 383 P.3d 202, ¶ 204.

### **SUMMARY OF THE ARGUMENTS**

1. The District Court exceeded its statutory authority when it designated DaSilva a tier I sexual offender. DaSilva was charged with failure to register, which does not meet the definition of sexual offense under §46-23-502(9), MCA. DaSilva's plea agreement did not include a tier designation. Therefore, the District Court lacked the authority to impose a sexual offender tier designation in this case. *Holt*, ¶ 21, *State v. Greene*, 2015 MT 1, ¶ 30, 378 Mont. 1, ¶ 9, 340 P.3d 551, ¶¶ 556-557. Because the District Court lacked authority to designate DaSilva as a tier I sex offender, his case should be remanded to the district court for the purpose of striking the sex offender tier designation from his judgment.
2. The district court erred in denying DaSilva's Motion for Credit for Time Served under §46-18-402, MCA. DaSilva should have received credit for the approximately four years and nine months he served on a sentence for the same criminal act before the judgment was vacated and

he was released on a successful motion for habeas corpus. Therefore, DaSilva's case should be remanded to the district court for the purpose of correcting the judgment to include credit for the time he served in Cause No. DDC 09-137 before his sentence was vacated.

### **ARGUMENT**

#### **I. The District Court exceeded its statutory authority when it designated DaSilva a tier I sexual offender upon conviction for failure to register, which is not a sexual offense under Montana Law.**

This Court has consistently held that a sex offender tier level designation attached to a conviction for an offense that is not a "sexual offense" as defined in Mont. Code Ann. § 46-23-502(9), is illegal. *State v. Leyva*, 2012 MT 124, ¶ 21, 365 Mont. 204, ¶ 210, 280 P.3d 252, ¶ 258 *citing Holt*, ¶ 21.

A district court's authority to impose tier level designations is limited to offenders "convicted of a sexual offense, as defined in §46-23-502." §46-18-207, MCA. Montana law specifically enumerates the offenses which constitute a "sexual offense" to include: unlawful restraint, kidnapping, aggravated kidnapping, sexual assault, sexual intercourse without consent, indecent exposure, aggravated sexual intercourse without consent, prostitution, promoting prostitution,

aggravated promotion of prostitution, sexual abuse of children, sexual servitude, patronizing victim of sexual servitude. § 46-23-502(9), MCA.

In this case, DaSilva was convicted of two counts of failure to register as a sexual offender, which is not a sexual offense enumerated in 46-23-502(9), MCA. Therefore, under the plain language of the statute, and this Court's prior holdings on the issue, the district court's designation of DaSilva as a tier I sex offender was illegal. *Leyva*, ¶ P21, *citing Holt*, ¶ 21. Therefore, DaSilva's case should be remanded for the purpose of striking the portions of the judgment that designate him as a tier I sexual offender.

This Court will generally review a sentence that "is alleged to be illegal or in excess of statutory mandates" even when the appellant failed to object to the sentence at the trial court level. *State v. Kotwicki*, 2007 MT 17, ¶ 8, 335 Mont. 344, ¶ 347, 151 P.3d 892, ¶893, *citing State v. Lenihan*, (1979) 184 Mont. 338, 343, 602 P.2d 997, 1000.

The *Lenihan* rule allows "an appellate court to review any sentence imposed in a criminal case, if it is alleged that such sentence is illegal or exceeds statutory mandates, even if no objection is made at the time of sentencing." *Id.*

Although DaSilva's counsel did not object to the tier I designation at the time of sentencing, this Court may still review DaSilva's sentence under the *Lenihan* Rule, because it was illegal and exceeded the district court's statutory authority. *Id.*

**II. The District Court erred by refusing to credit DaSilva with time served on a previous sentence for the same offense, which was subsequently vacated.**

Mont. Code Ann. §46-18-402 requires that a defendant be granted credit for time served under the following conditions:

If a defendant has served any portion of the defendant's sentence under a commitment based upon a judgment that is subsequently declared invalid or that is modified during the term of imprisonment, the time served must be credited against any subsequent sentence received upon a new commitment for the same criminal act or acts.

In 2010, following a jury trial in Cause No. DDC 09-137, DaSilva was convicted, of "Failure of Sex Offender to Provide Notice of Address Change" in violation of §§ 46-23-505, 504(5), (507), (502)(9)(b), MCA. DaSilva was sentenced to five years' incarceration at Montana State Prison. (DC Doc. 171 at 3.) DaSilva sought federal Habeas Corpus relief, arguing the trial court should have allowed him to present evidence tending to show that his underlying 1998 conviction for assault with sexual motivation was not a sexual offense which required

his registration as a sexual offender in Montana. *DaSilva v. Law*, 2014 U.S. Dist. (D. Mont. May 15, 2014).

The federal district court agreed with DaSilva, finding that “the...state court’s decision to prevent DaSilva from presenting evidence as to the ambiguity of the 1998 Washington Judgment denied his right to a fair trial...” and ordered that “[t]he judgment entered in Cascade County Cause No. DDC-09-117 on April 30, 2010 is VACATED.” *DaSilva v. Law*, 2014 U.S. Dist. (D. Mont. May 15, 2014). Pursuant to the U.S. District Court’s order, DaSilva was released after serving approximately four years and nine months of his sentence at Montana State Prison. (DC Doc. 171 at 4 and DC Doc. 174 at 2.)

The criminal act alleged in DDC 09-137 was the same as the alleged act in this matter: failure to register as a sexual offender.<sup>6</sup> Pursuant to the plain language of §46-18-402, MCA, DaSilva is entitled to credit for time served in this matter for the nearly 5 years he was incarcerated in DDC 09-137 before his judgment was vacated.

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<sup>6</sup> While the title of the offense charged in DDC 09-137 is not identical to DaSilva’s charges for failure to register in this case, the offenses are identical criminal acts alleged to have violated the same statutes: §46-23-505, 504(5), (507) & (502(9)(b), MCA.

## CONCLUSION

The district court exceeded its statutory authority when it designated DaSilva as a Tier I sexual offender, resulting in an illegal sentence. Further, pursuant to §46-18-402, Dasilva is entitled to credit for time he served on his sentence for the same criminal act in DDC 09-137 before his sentence was vacated.

Therefore, DaSilva respectfully requests that this Court remand for the purposes of 1) striking all portions of the judgment containing a sexual offender tier designation and 2) re-calculating his eligibility for time served pursuant to §46-18-402, MCA.

Respectfully submitted this 15th day of May 2023.

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By: /s/ Layla A. Turman  
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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Century Schoolbook text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 2594 excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/Layla Turman

LAYLA A. TURMAN



## **APPENDIX**

Sentencing Order and Judgment DC. Doc. 175.....App. A

Hr’g Tr., Dec. 6, 2021, Sentencing.....App. B

## **CERTIFICATE OF SERVICE**

I, Layla Turman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 05-15-2023:

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