

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 22-0059

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROBERT AYRES DaSILVA, JR.,

Defendant and Appellant.

BRIEF OF APPELLEE

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

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
MARDELL PLOYHAR
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
mployhar@mt.gov

LAYLA TURMAN
KINDRED LEGAL, PLLC
P.O. Box 5789
Missoula, MT 59806-5789

ATTORNEY FOR DEFENDANT
AND APPELLANT

JOSHUA A. RACKI
Cascade County Attorney
AMANDA LOFINK
Deputy County Attorney
121 4th Street North, Suite 2A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUES

1. Whether the court erred in imposing a tier level designation when DaSilva, who had previously committed a sexual offense in Washington, was sentenced for failure to register.

2. Whether the court erred in denying DaSilva credit for time he served pursuant to a different conviction, committed at a different time than the offenses committed in these combined cases.

STATEMENT OF THE CASE

Appellant Robert Ayres DaSilva, Jr. pleaded guilty to failure to register as a sexual offender in Montana Eighth Judicial District Court Cause Nos. BDC-19-613 and BDC-21-296. (BDC-21-296 Doc. 26; 9/3/21 Tr. at 22-23.)¹ The court imposed five-year suspended sentences in both cases, designated DaSilva a level one sexual offender, and granted him credit for 160 days he had served in these cases. (12/6/21 Tr. at 30-32.)

On appeal, DaSilva challenges the court's imposition of a tier level designation and the court's denial of credit for time DaSilva had served in a prior case involving a failure to register conviction committed at a different time.

¹Where documents in both cases are identical, the State cites only the document from BDC-21-296.

STATEMENT OF THE FACTS

DaSilva was charged in Cause Nos. BDC-19-613 and BDC-21-296 with failure to register. (BDC-19-613 Doc. 2; BDC-21-296 Doc. 3.) The charges alleged that DaSilva was required to register based on his 1998 conviction from Washington for Assault in the Second Degree with Sexual Motivation. (BDC-19-613 Doc. 1; BDC-21-296 Doc. 1.)

DaSilva eventually pleaded guilty pursuant to a plea agreement. (BDC-21-296 Doc. 26; 9/3/21 Tr. at 22-23.) The court ordered that a psychosexual evaluation be completed pursuant to Mont. Code Ann. § 46-23-509. (BDC-21-296 Doc. 37.) The psychosexual evaluation noted that DaSilva was currently designated a level one sexual offender, but that current assessment results indicated that he should be designated a level two sexual offender. (BDC-21-296 Doc. 41 at 7.)

Before sentencing, DaSilva filed a Motion for Credit for Time Served in which he requested credit for time he had served in these two cases, in addition to credit for time he had served in a prior case. (BDC-21-296 Doc. 54.) DaSilva had previously been convicted of failure to register in Montana Eighth Judicial District Court Cause No. DDC 09-137. (*Id.* at 2.) His conviction was affirmed by this court in *State v. DaSilva*, 2011 MT 183, 361 Mont. 288, 258 P.3d 419 (*DaSilva*), but was reversed in a federal habeas proceeding in *DaSilva v. Law*, 2014 U.S. Dist. LEXIS 69188. DaSilva's counsel stated that DaSilva had served "approximately 4

years and 9 months” in that case, and he requested credit for the time he served in that case to be applied against his sentence in these cases. (BDC-21-296 Doc. 54.)

At the sentencing hearing, DaSilva’s counsel argued that DaSilva should be designated a level one offender, even though the psychosexual evaluation recommended that he be designated a level two offender. (12/6/21 Tr. at 5.) The State argued that DaSilva should be designated a level two sexual offender based on the psychosexual evaluation. (*Id.* at 17.)

Addressing credit for time served, DaSilva’s counsel argued that he was entitled to credit he served on his prior failure to register conviction based on the plain language of the statute, which states that offenders are entitled to credit for time served for the “same criminal act” not the “same criminal act committed on the same date.” (*Id.* at 9-11.)

The State argued that DaSilva’s argument was incorrect and explained that the statute refers to a “criminal act,” which means a specific criminal act committed at a specific time. (*Id.* at 7, 12.) The State explained that DaSilva’s conviction was reversed based on a legal error, and the State would have retried DaSilva, but the case was dismissed because he had already served the sentence that could have been imposed. (*Id.* at 8.)

The court expressed concern that DaSilva’s argument “would lead to an absurd result,” and asked DaSilva’s counsel whether he was arguing that if a

person was convicted of a prior assault, and convicted of a new assault, they would receive credit from the prior case against the new case. (*Id.* at 11.) He confirmed that that was his argument. (*Id.*)

The State explained to the court that it was no longer bound by the plea agreement because DaSilva had violated it. (*Id.* at 14.) Based on DaSilva's long history of failing to register, the State recommended that DaSilva be sentenced to prison for five years. (*Id.* at 14-17.) DaSilva's counsel argued for a five-year suspended sentence. (*Id.* at 23-24.) The court imposed five-year suspended sentences in both cases, designated DaSilva a level one sexual offender, and granted him credit for 160 days he had served in these cases. (*Id.* at 30-32.)

SUMMARY OF THE ARGUMENT

Because DaSilva was designated a level one sexual offender before he was sentenced in this case, the court's order designating him a level one sexual offender does not have any effect. It is therefore unnecessary for this Court to address DaSilva's challenge to his designation as a level one sexual offender. Further, the court correctly imposed a tier level designation when DaSilva was sentenced for failure to register because he qualifies as a person convicted of a sexual offense based on his Washington conviction. Montana Code Annotated § 46-23-509(2)-(3) require a court to designate a tier level when a court sentences

“a person convicted of a sexual offense.” Because DaSilva was a person convicted of a sexual offense, the district court correctly imposed a tier level designation.

The court correctly denied DaSilva credit for time he served on a prior conviction for failure to register before that conviction was reversed by a federal court. Montana Code Annotated § 46-18-402 entitles an offender to credit for time they served in a case if the conviction is reversed, and the offender is reconvicted of “the same criminal act or acts.” That statute does not apply in this case where DaSilva committed new offenses at a later time.

ARGUMENT

I. Standard of review

This Court reviews for legality a criminal sentence imposing over one year of incarceration. *State v. Moore*, 2012 MT 95, ¶ 10, 365 Mont. 13, 277 P.3d 1212. This Court reviews whether the district court adhered to the applicable sentencing statutes de novo. *Id.*

II. The court correctly gave DaSilva a tier level designation.

It is unnecessary for this Court to address this issue because the court’s designation of DaSilva as a level one sexual offender did not have any effect on DaSilva’s registration. DaSilva is required to register because of his 1998 conviction for a sexual offense in Washington. *DaSilva*, ¶¶ 10, 16. DaSilva was

designated a level one sexual offender before he was sentenced in these cases. (BDC-21-296 Doc. 41 at 7.) Although the district court could have increased his tier level designation based on the psychosexual evaluation, the court did not do so. Thus, the court's designation of DaSilva as a level one sexual offender did not change his tier level designation or have any effect on his registration.² Because the court's designation of DaSilva did not have any effect on his designation, which had already occurred, no effective relief can be granted, and this issue is moot. *See Wilkie v. Hartford Underwriters Ins. Co.*, 2021 MT 221, ¶ 8, 405 Mont. 259, 494 P.3d 892 (“The fundamental question to be answered in any review of possible mootness is whether it is possible to grant some form of effective relief to the appellant.” (citation and quotation marks omitted)).

If this Court does address this issue, the district court correctly imposed a sexual offender tier level designation. Montana Code Annotated § 46-18-111(1)(b)(i) requires a court sentencing a person for an enumerated sexual offense or for failure to register to “order a psychosexual evaluation of the defendant that includes a recommendation as to treatment of the defendant in the least restrictive environment,

²The State notes that if DaSilva did not have a tier level designation, the State could petition for him to be given a designation under Mont. Code Ann. § 46-23-509(8). It is possible that he would receive a higher tier level designation at that time.

considering the risk the defendant presented to the community and the defendant's needs”

Tier level designations are governed by Mont. Code Ann. § 46-23-509(2)-(3). Subsection (2) provides that “[p]rior to sentencing of *a person convicted of a sexual offense*, the department or a sexual offender evaluator shall provide the court with a psychosexual evaluation report recommending” designation of the offender as a level one, two, or three sexual offender. Mont. Code Ann. § 46-23-509(2) (emphasis added). Upon sentencing the offender, the court shall review the psychosexual evaluation report, any statement by a victim, and any statement by the offender, and shall designate the offender as a level one, two, or three sexual offender. Mont. Code Ann. § 46-23-509(3).

A “sexual offense” is defined as one of the offenses enumerated in Mont. Code Ann. § 46-23-502(9)(a) or, under Mont. Code Ann. § 46-23-502(9)(b), as “any violation of a law of another state, tribal government, or the federal government that is reasonably equivalent to a violation listed in subsection (9)(a) or for which the offender was required to register as a sexual offender after an adjudication or conviction.” Mont. Code Ann. § 46-23-502.

When the court sentenced DaSilva for failure to register in these cases, the court was sentencing a person convicted of a sexual offense because DaSilva was convicted of a sexual offense in Washington. Under Mont. Code Ann.

§ 46-23-509(2)-(3), the court was required to designate a tier level because it was sentencing “a person convicted of a sexual offense.” That is supported by the requirement that a court sentencing a person for failure to register order a psychosexual evaluation of the offender. Mont. Code Ann. § 46-18-111(1)(b)(i).

Further, DaSilva’s reliance on *State v. Leyva*, 2012 MT 124, 365 Mont. 204, 280 P.3d 252, is misplaced. In *Leyva*, this Court reaffirmed that an offender may not be required to register as a sexual offender unless the offender has committed a sexual offense, as defined by Mont. Code Ann. § 46-23-502(9), or the offender agrees to the condition in a plea agreement. *Leyva*, ¶ 21. This Court thus held that the sentencing court could not attach a sexual offender designation to Leyva’s conviction for burglary. *Id.* Unlike DaSilva, Leyva had never been convicted of a sexual offense. In contrast, DaSilva was convicted of a sexual offense in Washington. By pleading guilty to failure to register, he conceded that he was required to register. DaSilva thus qualified as “a person convicted of a sexual offense,” which must be designated a tier level under Mont. Code Ann. § 46-23-509(2)-(3).

III. The court correctly denied DaSilva credit for time he served in an unrelated case.

The district court correctly awarded DaSilva credit for time served in this case and denied him credit for time served in a prior case. Montana Code

Annotated § 46-18-402 provides that “[i]f 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.” Under the plain language of the statute, an offender is entitled to credit for time previously served if the State reconvicted the offender of “the same criminal act or acts” after reversal of the original conviction. The word “same” indicates that it has to be the same criminal act, meaning that it was committed at the same time. As the district court concluded, DaSilva’s interpretation of the statute would lead to an absurd result because it would allow an offender to commit a new offense without serving any time for the new offense.

Indeed, the Commission Comments to Mont. Code Ann. § 46-18-402 demonstrate that the statute was passed to remedy the outcome in *State ex rel. Nelson v. Ellsworth*, 141 Mont. 78, 375 P.2d 316 (1962), where an offender was not given credit for time served on his first conviction when he was later reconvicted of the same offense. Comm’n Comments to Mont. Code Ann. § 46-18-402.

While DaSilva was convicted of violating the same criminal statute in these cases that he had violated in his prior, reversed case, he was not convicted of “the

same criminal act or acts.” Therefore, the court correctly denied him credit for time he served in the prior case.

CONCLUSION

The district court correctly imposed a tier level designation and denied DaSilva credit for time he served in a prior case. His convictions and sentences for failure to register should be affirmed.

Respectfully submitted this 11th day of September, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: /s/ Mardell Ployhar
MARDELL PLOYHAR
Assistant Attorney General

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 Times New Roman 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 2,139 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Mardell Ployhar

MARDELL PLOYHAR

CERTIFICATE OF SERVICE

I, Mardell Lynn Ployhar, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 09-11-2023:

Chad M. Wright (Attorney)
P.O. Box 200147
Helena MT 59620-0147
Representing: Robert Ayres DaSilva
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Layla Turman (Attorney)
PO Box 3493
Missoula MT 59806
Representing: Robert Ayres DaSilva
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Mardell Lynn Ployhar
Dated: 09-11-2023