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IN THE SUPREME COURT OF THE STATE OF MONTANA

No. OP 24-0065

JOHNNY RAY COX,

Petitioner,

v.

MIKE LINDER, Sheriff,

Respondent.

**ATTORNEY GENERAL'S RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS**

In compliance with this Court's February 21, 2024 Order, the Attorney General's Office responds to the Petition for Writ of Habeas Corpus filed by Johnny Ray Cox (Cox), challenging the amount of credit he should receive in Thirteenth Judicial District Court Cause Nos. DC-11-0162 and DC-11-0370.

As part of its response, the State submits, and incorporates by reference, the following: relevant documents from Cox's Thirteenth Judicial District Court Cause Nos. DC-11-0162, DC-11-0370, DC-13-0825, DC-14-0663, and DC-18-1147; and relevant documents obtained from the Department of Corrections (DOC), namely Cox's Location Report and current Sentence Calculation. (See Apps. 1-18.)

STATEMENT OF THE CASE AND FACTS

I. Original judgments and sentences

In 2011, Cox was charged with felony privacy in communications in DC-11-0162 and felony violation of a protective order in DC-11-0370 (hereinafter referenced collectively as "2011 Cases"). (Apps. 1, 4.) Cox pleaded guilty to both offenses. (App. 5.) On December 19, 2011, the district court committed Cox to the DOC for two, concurrent periods of five years, suspended. (*Id.*) Cox entered the Veterans Court Program in December 2011, but he was released early from that program because he absconded, failed to report for drug testing, and did not participate in treatment. (*Id.*)

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II. Probation holds and revocation proceedings

After admitting to using drugs and alcohol, Cox was jailed on a probation violation (PV) hold in his 2011 Cases in the Yellowstone County Detention Center (YCDC) from September 4, 2013, to September 7, 2013. (Apps. 2, 5, 17.)

On September 10, 2013, another PV hold was placed on Cox after he threatened his ex-girlfriend over the phone, consumed alcohol, and refused to submit to a breath test as requested by his supervising officer. (Apps. 5, 17.) The State filed a petition to revoke Cox's sentences on September 20, 2013, and he remained in custody. (*Id.*)

On October 8, 2013, Cox was charged in DC-13-0825 with two felony counts of privacy in communication related to the threats he made in September. (Apps. 5, 12.) Cox remained in YCDC until December 16, 2013, when he posted bond in that case and his 2011 Cases. (Apps. 1, 4, 17.)

On June 8, 2014, while his 2011 Cases were still pending, Cox threatened his ex-girlfriend's sister. (Apps. 6, 10, 17.) On August 11, 2014, Cox was served with a PV warrant. (*Id.*) On August 12, 2014, Cox's probation officer lifted the PV hold because Cox had been served a warrant for felony partner/family member assault (PFMA) and misdemeanor tampering with a communication device in DC-14-0663. (Apps. 10, 13, 17.)

Cox pleaded guilty to felony PFMA in December 2014, and on July 28, 2015, after Cox admitted violating his suspended sentences in the 2011 Cases, the court conducted a combined sentencing and revocation and dispositional hearing. (Apps. 2, 6, 7, 14.) Cause No. DC-13-0825 was dismissed pursuant to a plea agreement. (Apps. 6, 12.)

In DC-14-0663, the court committed Cox to the DOC for a period of 5 years and ordered that sentence to run consecutively to the dispositions in the 2011 Cases, which were as follows: in DC-11-0162, Cox was committed to the DOC for a period of 4 years and 83 days, all suspended; and in DC-11-0370, Cox was committed to the DOC for a period of 4 years and 169 days, all suspended and concurrent to DC-11-0162. (Apps. 2, 6, 7, 14.) The district court ordered each suspended period of commitment to run consecutively to DC-14-0663. (*Id.*)

In DC-14-0663, Cox received credit for 350 days (8/13/14 to 7/28/15). (App. 14.) In the 2011 Cases, the court ordered that Cox should receive credit for 97 days served from September 10, 2013, to December 16, 2013. (Apps. 2, 7.) The district court ordered that “[d]enial of credit for elapsed time is based on Defendant’s failure to comply with the terms and conditions of the sentence while under supervision.” (*Id.*) The court did not reference any time Cox may have served on “PV holds” related to the revocations. (*Id.*) Cox did not appeal these dispositions.

III. State Habeas Petition (Case No. OP 17-0692)

In November 2017, while serving his five-year sentence in DC-14-0663, Cox petitioned this Court for state habeas relief, asking for additional credit for time served in his 2011 Cases. *Cox v. Fender*, Case No. OP 17-0692, 391 Mont. 537, 414 P.3d 760 (Feb. 6, 2018) (hereinafter *Cox I*). The State agreed Cox was entitled to credit for the days he had been incarcerated on PV holds (9/4/13 to 9/7/13 and 8/11/14 to 8/12/14), so this Court remanded the matter for determination of additional credit. *Id.*

The district court conducted a hearing on July 26, 2018, and concluded that Cox was entitled to a total of 104 days of credit in the 2011 Cases. (App. 8.) However, the court's subsequent written orders stated that Cox "shall be given credit for time served from August 11, 2013, to August 12, 2013,¹ and from September 4, 2013, to September 10, 2013, for an additional seven days." (Apps. 3, 9.) Cox's 2011 sentences remained in place, running consecutively to his custodial sentence in Cause No. DC-14-0663.

IV. New felony charges filed in Cause No. DC 18-1147

On September 14, 2018, Cox was charged in Cause No. DC-18-1147 with felony privacy in communications for making a threatening phone call. (Apps. 15,

¹ These dates should have read "August 11, 2014 to August 12, 2014."

16.) The State did not seek to revoke Cox's suspended sentences he had received in his 2011 Cases. (Apps. 1, 4.)

On May 21, 2019, Cox pleaded "no contest" to the charges and the court committed Cox to the DOC for a period of two years. (App. 16.) The court further ordered this sentence to run consecutively to Cox's other sentences and gave him credit for 250 days. (*Id.*)

Cox discharged his sentence in DC-14-0663 on August 11, 2019, and began serving his two-year custodial sentence in DC-18-1147. (App. 18.) After accounting for his 250 days of credit, Cox's discharge date for that sentence was December 2, 2020. (*Id.*)

V. State Habeas Petition (Case No. OP 19-0592)

Cox filed another petition for state habeas relief in late 2019, asserting he was entitled to 15 months of additional credit for time served and arguing that the court did not have authority to order his 2011 Cases to run consecutively to his more recent conviction. *See Cox v. Guyer*, Case No. OP 19-0592, at *5, 2019 Mont. LEXIS 634 (Oct. 22, 2019) (hereinafter *Cox II*).

The State opposed and refuted Cox's arguments but agreed that the district court's July 31, 2018 dispositional orders created confusion with the actual days of credit Cox should receive. *Cox II*. This Court concurred with the State. *Id.* This

Court directed the DOC to correct Cox's sentence calculation to reflect 104 days of credit and denied all other requested relief. *Id.*

Cox discharged his DC-18-1147 sentence on December 2, 2020. (App. 18.) According to his Sentence Calculation, after applying the 104 days of credit to Cox's 2011 Cases, those sentences "commenced" on August 20, 2020. (*Id.*) Thus, as long as those sentences are not revoked, Cox will discharge his DC-11-162 sentence on November 10, 2024, and his DC-11-370 sentence on February 4, 2025. (*Id.*)

VI. Subsequent events

Cox's Location Report shows that he has been incarcerated on PV Holds several times since he began serving his probationary sentences. (App. 17.) Additionally, reports of violation set forth examples of Cox not complying with the terms of probation. (Apps. 10, 11.) The State petitioned to revoke his sentence in September 2021, but dismissed that petition in December 2022. (Apps. 1, 4.) In September 2023, Cox allegedly committed felony intimidation and failure to register, and the State petitioned to revoke his sentences again. (Apps. 1, 4, 11.) However, that petition was dismissed on December 27, 2023. (*Id.*) Thus, Cox's suspended sentences have continued to run.

STANDARD OF REVIEW AND APPLICABLE LAW

Montana Code Annotated § 46-22-101(1) allows a person who is incarcerated or restrained of liberty to apply for a “writ of habeas corpus to inquire into the cause of imprisonment or restraint and, if illegal, to be delivered from the imprisonment or restraint.” The fundamental purpose of habeas corpus is to remedy “illegal” restraints or imprisonments (*e.g.*, a sentence that exceeds statutory or constitutional limits). *Lott v. State*, 2006 MT 279, 334 Mont. 270, 150 P.3d 337.

This Court reviews a criminal sentence *de novo* for legality to determine whether the sentence is within statutory parameters. *State v. Seals*, 2007 MT 71, ¶ 7, 336 Mont. 416, 156 P.3d 15. Even if not objected to below, this Court has concluded that it may review the issue of credit for time served. *See Campbell-Kelsey v. Mahoney*, Case No. OP 06-0501, 2006 Mont. LEXIS 776, ¶ 3 (Nov. 29, 2006).

Cox bears the burden of demonstrating sufficient legal cause to persuade this Court to grant the writ of habeas corpus. *Miller v. Dist. Court*, 2007 MT 58, ¶ 14, 336 Mont. 207, 154 P.3d 1186. Therefore, Cox must present “to this Court a record that is sufficient to make a *prima facie* showing” that he is entitled to relief.” *In re Hart*, 178 Mont. 235, 249-50, 583 P.2d 411, 418-19 (1978).

ARGUMENT

I. Cox is not entitled to any additional credit for time served.

Cox is seeking an order from this court awarding credit against sentences that have not been revoked.

Credit for time spent in jail is awarded by sentencing courts at two distinct periods: first, when imposing an initial criminal sentence under Mont. Code Ann. §§ 46-18-201(9), -403(1); and second, when imposing a disposition following revocation of a sentence pursuant to Mont. Code Ann. § 46-18-203.

This Court has already granted relief to Cox relative to his July 28, 2015 dispositional orders when it granted, in part, his petitions for state habeas relief in *Cox I* and *Cox II*. *See* Mont. Code Ann. § 46-18-203. Those orders ensured that when calculating his sentence, DOC applied 104 days of credit. Cox's most recent Sentence Calculation demonstrates that his discharge dates account for those 104 days of credit.

In his current petition, Cox asserts that he has been denied credit for days served "in the past 2 years." Cox's claim is not accurate. First, since there has been no order revoking his probationary sentences and imposing a new disposition, there has been no opportunity for the court to "deny" him credit. *See* Mont. Code Ann. § 46-18-203(7)(b). Second, Cox's suspended sentences have continued to "run" since he began serving them in August 2020, and his discharge dates have

not changed. Thus, there is no need to calculate credit for actual time served at this point because every day since August 2020 has “counted” while Cox’s sentences have continued to run.

Credit for time served will become relevant in Cox’s 2011 Cases only if his sentences are revoked and the court imposes new dispositions. It is at that juncture that Mont. Code Ann. § 46-18-203(7)(b) would require the discharge date for the new sentence to be reduced by the number of days Cox has served in jail.

Cox’s petition effectively seeks an order from this Court granting prospective credit. That is not the purpose of habeas corpus. Habeas proceedings allow this Court to inquire into the cause of imprisonment or restraint and determine if a person is serving an illegal sentence. Mont. Code Ann. § 46-22-101(1). Cox is serving the legal sentence imposed by the court on July 28, 2015. The DOC has applied the correct amount of credit pursuant to the district court’s July 26, 2018 order and *Cox II*.

Cox is serving a valid sentence since the credit for time served awarded to him was accurate. Because Cox has not met his burden to demonstrate that he is illegally incarcerated in his 2011 Cases, he is not entitled to habeas corpus relief. *Lott, supra*; *Miller*, ¶ 14; *Seals*, ¶ 7.

II. Cox is not entitled to any elapsed time credit.

Pursuant to Mont. Code Ann. § 46-18-203(7)(b),

If a suspended or deferred sentence is revoked, the judge shall consider any elapsed time, consult the records and recollection of the probation and parole officer, and allow all of the elapsed time served without any record or recollection of violations as a credit against the sentence. If the judge determines that elapsed time should not be credited, the judge shall state the reasons for the determination in the order. Credit must be allowed for time served in a detention center or for home arrest time already served.

To the extent that Cox is requesting elapsed time credit from August 2020 (date he began serving 2011 probationary sentences) to the date of his Petition, his request is improper for the same reasons cited in Section I; this Court does not issue orders granting prospective elapsed time credit. Rather, that determination will be made by the district court only if his sentences are revoked and new dispositions are entered.

To the extent Cox is requesting elapsed time credit from the date of his original sentence (12/19/11) to the date of revocation/disposition (7/28/15), Cox's claim is equally unpersuasive.

First, the district court explicitly denied any elapsed time credit, as explained in the August 28, 2015 orders of revocation and disposition. At the time of his 2015 revocation, sentencing courts were granted the discretion to allow or reject credit for elapsed time. *See* Mont. Code Ann. § 46-18-203(7)(b) (2015). Since elapsed time credit is driven by statute, any alleged error with regards to that issue

gives rise to an “objectionable sentence,” which must be raised to the sentencing court. *See State v. Kotwicki*, 2007 MT 17, ¶¶ 13, 21, 335 Mont. 344, 151 P.3d 892 (court’s “failure to abide by a statutory requirement rises to an objectionable sentence, not necessarily an illegal one that would invoke the [*State v. Lenihan*, 184 Mont. 338, 602 P.2d 997 (1979),] exception.”).

Second, pursuant to Mont. Code Ann. § 46-18-203(7)(b) (2015), a defendant was not automatically entitled to elapsed time credit. Given Cox’s consistent and continued criminal activity, the district court would have been more than justified in not awarding elapsed time credit to Cox.

Cox did not appeal the dispositions. A writ of habeas corpus is not available to attack the sentence of a person who has been adjudged guilty of an offense and has exhausted the remedy of appeal. Mont. Code Ann. § 46-22-101(2); *Lott*, ¶¶ 4, 19. Cox’s claim that he was denied elapsed time credit could have been raised in a direct appeal, so he is barred from attacking the validity of his sentence through state habeas proceedings.

The writ of habeas corpus is not a substitute for the remedy of appeal. *State v. Wright*, 2001 MT 282, ¶ 13, 307 Mont. 349, 42 P.3d 753. “A consequence of exhausting the remedy of appeal by either filing an appeal or *failing to do so* is that the procedural bar in 46-22-101(2), MCA, precludes raising the claim in a petition for habeas corpus.” *Ommundson v. Green*, 364 Mont. 549, ¶ 4, 286 P.3d

247 (2012) (citing *Lott*, ¶¶ 18-19) (emphasis added). As this Court explained, “[we are] careful not to allow a petitioner to substitute our original jurisdiction for the normal appellate process.” *Ommundson*, ¶ 5.

As this Court recently explained, a state habeas petitioner is not entitled to elapsed time credit if he failed to assert a timely objection. *See Youpee v. Bludworth*, Case No. OP 23-0614, 2023 Mont. LEXIS 1237, at *3 (Dec. 12, 2023); *Goodrie v. Lester*, Case No. OP 23-0534, 2023 Mont. LEXIS 1247, at *6 (Dec. 19, 2023). Cox’s failure to appeal alleged error related to elapsed time credit constitutes a waiver of such claims.

Cox’s attempt to assert any error related to elapsed time credit in his 2015 dispositional order should not be considered by this Court. Since Cox has not met his burden to demonstrate that he is illegally incarcerated in his 2011 Cases, he is not entitled to habeas corpus relief. *Lott, supra*; *Miller*, ¶ 14; *Seals*, ¶ 7.

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CONCLUSION

This Court should dismiss Cox's Petition.

Respectfully submitted this 14th day of March, 2024.

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By: /s/ Katie F. Schulz
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this response 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 2,694 words, excluding caption, signatures, certificate of compliance, certificate of service, and any exhibits.

/s/ Katie F. Schulz
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IN THE SUPREME COURT OF THE STATE OF MONTANA
No. OP 24-0065

JOHNNY RAY COX,

Petitioner,

v.

MIKE LINDER, Sheriff,

Respondent.

APPENDICES

Thirteenth Judicial District Court Cause No. DC-11-162

Case Register Report App. 1

Order of Revocation and Imposition of Sentence
Doc. 60; filed 8/28/15 App. 2

Order (granting additional credit for time served)
Doc. 73; filed 7/31/18 App. 3

Thirteenth Judicial District Court Cause No. DC-11-370

Case Register Report App. 4

Petition to Revoke and Notice for Revocation of
Sentence and Affidavit in Support
Doc. 45; filed 9/20/13 App. 5

Acknowledgement of Waiver of Rights and Plea Agreement
Doc. 62; filed 12/12/14 App. 6

Order of Revocation and Imposition of Sentence
Doc. 79; filed 8/28/15 App. 7

Minute Entry; July 26, 2018
(Hearing after remand re: additional credit for time served)
Doc. 90 App. 8

Order (granting additional credit for time served)
Doc. 91; filed 7/31/18 App. 9

Report of Violation
Doc. 135; filed 9/14/23 App. 10

Petition for Revocation of Sentence and
Affidavit in Support
Doc. 9137; filed 10/2/23 App. 11

Thirteenth Judicial District Court Cause No. DC-13-825

Case Register Report App. 12

Thirteenth Judicial District Court Cause No. DC-14-663

Case Register Report App. 13

Judgment
Doc. 38; filed 8/28/15 App. 14

Thirteenth Judicial District Court Cause No. DC-18-1147

Case Register Report App. 15

Judgment
Doc. 23; filed 6/6/19 App. 16

Documents from Department of Corrections

Location Report for J. Cox..... App. 17

Sentence Calculation for J. Cox App. 18

CERTIFICATE OF SERVICE

I, Kathryn Fey Schulz, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Petition for Writ to the following on 03-14-2024:

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