

STATE OF MONTANA,

Plaintiff and Appellee,

v.

ROGER MICHAEL KEECH,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana First Judicial District Court,
Lewis and Clark County, the Honorable Kathy Seeley, Presiding

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STATEMENT OF THE ISSUE

Upon revocation of a criminal sentence, Montana law requires a defendant receive credit for time already served. Roger Keech never received credit for 2,251 days he served since his initial arrest in 2002. Is Roger statutorily entitled to this credit?

STATEMENT OF THE CASE

Roger Keech appeals the 11-year sentence imposed in a revocation proceeding for Count II: Burglary, a felony, in violation of Montana Code Annotated § 45-6-204 (2001). (Doc. 93, Order Revoking Defendant's Sentence and Amended Judgment and Commitment, attached as Appendix A.) Roger specifically appeals the failure to grant him credit for all the time he served toward the 20-year burglary sentence, which is currently set to discharge in late 2030—roughly 26 years after it began.¹ (Doc. 29, 93.)

The Lewis and Clark County District Court imposed the original sentence of 20 years to the Department of Corrections (DOC), with 16

¹ With 1,230 days of jail and elapsed time credited toward the 11-year sentence, which began April 27, 2023, the sentence discharges on December 14, 2030. (Doc. 93.)

years suspended, and all lesser sentences to run concurrently, on January 9, 2003.² (Doc. 29.)

In mid-2007, the State petitioned to revoke Roger's suspended sentence. (Doc. 36.) Upon Roger's admission to violating probation, the court revoked the original sentence and imposed a new sentence of 16 years DOC with 11 suspended on March 12, 2009. (Doc. 56.)

In August of 2018, the State petitioned to revoke Roger's suspended sentence a second time, alleging Roger absconded. (Doc. 63.) Later, the State requested dismissal of the petition for failing to comply with the statutory revocation procedure, and the court dismissed the petition in April of 2019. (Doc. 68, 69.)

A day after the dismissal, the State filed a third petition and took no action for nearly two years, until March of 2021, when it filed a fourth petition to revoke. (Doc. 69, 70, 74.) Another two years passed before Roger admitted to absconding. (Doc. 93.) The court revoked his suspended sentence and imposed a new 11-year DOC sentence with six years suspended on April 27, 2023. (Doc. 93.)

² All lesser sentences have discharged and are not pertinent to this appeal.

Roger timely appealed. (Doc. 97.)

STATEMENT OF THE FACTS

Original Sentence

In July of 2002, Roger had been an adult for all of five months when, using his after-hours access as a janitor, he entered a DOC office building in Helena and stole some checks and credit cards. (Doc. 2, 12 at 1, 6.) The State arrested Roger on July 23, 2002, and the court imposed a \$10,000 bail at his initial appearance. (Doc. 6, 12.) Roger pled guilty to all charges stemming from the incident. (Doc. 29.) On January 9, 2003, Roger received an initial sentence of 20 years DOC, with 16 suspended, and credit for 59 days served. (Doc. 29.) The 59 days of credit reflected information in the PSI spanning Roger's July 23, 2002, arrest, to September 19, 2002. (Doc. 12, 29 at 4.)

However, Roger remained in jail until November 22, 2002,³ when the court released him pursuant to an order that he attend treatment at the Montana Chemical Dependency Center in Butte. (Doc. 20.) Roger remained in court-ordered treatment from November 23 to December

³ September 20, 2002, to November 22, 2002, is 64 days.

23, 2002.⁴ (Doc. 21 at 2.) He was arrested December 30 after leaving the treatment facility and remained in custody until being sentenced on January 9, 2003.⁵ (Doc. 24 at 3; 29 at 8.) Roger never received credit for these three periods totaling 106 days. (Doc. 29, 56, 93.)

Roger's original judgment made no mention of a two-year deferred sentence that he began serving on July 3, 2002, in a separate matter. (Doc. 12 at 3, 8; 29.) This rendered his 20-year burglary sentence consecutive to the deferred sentence. Mont. Code Ann. § 46-18-401(4) (Separate sentences for two or more offenses must run consecutively unless the court otherwise orders). Thus, Roger discharged the two-year deferred sentence and began the four-year custodial portion of the burglary sentence on July 3, 2004. (Doc. 12 at 3; 29.) Accounting for the 59 days of credit received toward the burglary sentence, Rogers' four-year custodial term ended, and the 16-year suspended term began, on May 4, 2008. (Doc. 12 at 3; 29.)

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⁴ November 23, 2002, to December 23, 2002, is 31 days.

⁵ December 30, 2002, to January 9, 2003, is 11 days.

First revocation sentence

On March 12, 2009, the court revoked the 16-year suspended term and imposed a new sentence of 16 years to the DOC with 11 suspended, and credit for 87 days served. (Doc. 56.)

However, Roger spent additional time in jail before and after this 87-day period for which he never received credit.⁶ (Doc. 38 at 2; 39; 41 at 9; 56; 63 at 5; 74 at 5; 93.) On July 10, 2007, the State filed a revocation petition and served Roger the accompanying arrest warrant in a Wyoming jail. (Doc. 36 at 1, 4; 38.) Roger remained incarcerated until receiving his new revocation sentence. (Doc. 39; 40; 41 at 9; 63 at 5; 74 at 5.) Roger did not receive jailtime credit from May 4, 2008, when the 16-year suspended term began, through September 22, 2008.⁷ (Doc. 36, 56, 93.) September 23, 2008, to December 18, 2008, covers the period for which he received 87 days of credit. (Doc. 56.) Roger did not receive credit for the period after this point, which spanned December 19, 2008,

⁶ Roger's incarceration during this period was, at least in part, due to sentences imposed in Butte-Silver Bow, Yellowstone, and Gallatin Counties, all of which were imposed concurrent to the instant sentence. (Doc. 63 at 4–5.) He also spent time in a Nebraska jail. (Doc. 74 at 5.)

⁷ May 4, 2008, to September 22, 2008, is 142 days.

to the revocation sentencing date of March 12, 2009.⁸ (Doc. 56; 63 at 5; 74 at 5; 93.)

Based on the revocation judgment with the 87 days of credit applied, Roger discharged the five-year custodial term and began the 11-year suspended term on December 15, 2013. (Doc. 56.)

Second revocation sentence

On April 27, 2023, the court revoked Roger's 11-year sentence and imposed a new sentence of 11 years DOC with six suspended, and credited him for 1,167 days of elapsed time, and 63 days of jail time. (Doc. 93.) The parties stipulated to 1,167 days of elapsed time, which spanned December 21, 2017, to March 1, 2021. (Doc. 93.) The 63 days of jail time spanned February 24, 2023, to April 27, 2023. (Doc. 93.)

However, Roger spent additional time incarcerated *prior* to December 21, 2017, for which he never received credit. (Doc. 74 at 5–6; 93.) He was incarcerated on December 15, 2013, when the 11-year suspended term began. (Doc. 74 at 5.) He remained incarcerated until December 2, 2014.⁹ (Doc. 74 at 5–6.) Roger was incarcerated again from

⁸ December 19, 2008, to March 12, 2009, is 84 days.

⁹ December 15, 2013, to December 2, 2014, is 353 days.

August 18, 2015, through December 20, 2017.¹⁰ (Doc. 74 at 6.) He never received credit for these time periods. (Doc. 93.)

Roger also spent additional time incarcerated in Washington *between* the 1,167 days of elapsed time and the 63 days of jail time for which he never received credit. (Doc. 75, 78, 79, 80, 81, 93.) On March 19, 2021, the court issued an arrest warrant pursuant to the State's revocation petition. (Doc. 74, 75.) The same day, authorities served Roger with the warrant at Nisqually Corrections Center in Washington. (Doc. 80 at 3.) A Minute Entry from June of 2021 confirmed Roger was still incarcerated in Washington. (Doc. 78.) Roger then made his initial appearance on the revocation petition in March of 2023. (Doc. 81.) He never received credit for the time served in Washington spanning the day he was served the warrant, March 19, 2021, through February 24, 2023, when he began the credited 63-day stretch in jail.¹¹ (Doc. 93.)

STANDARD OF REVIEW

Calculating credit for time served is not a discretionary act, but a legal mandate. *State v. Crazy mule*, 2024 MT 58, ¶ 8, 415 Mont. 536, 545

¹⁰ August 15, 2015, to December 20, 2017, is 859 days.

¹¹ March 19, 2021, to February 23, 2023, is 707 days.

P.3d 66; *State v. Spagnolo*, 2022 MT 228, ¶ 5, 410 Mont. 457, 520 P.3d

330. A district court’s determination of credit for time served is

reviewed de novo for legality. *Crazymule*, ¶ 8; *Spagnolo*, ¶ 5.

SUMMARY OF THE ARGUMENT

Roger never received credit for 2,251 days he served prior to his original conviction and during the suspended periods of his 20-year burglary sentence. Montana law requires he receive credit for each day of incarceration, which includes time spent in a treatment facility under court order. The judgment must be corrected to credit an additional 2,251 days Roger already served.

ARGUMENT

I. Roger must receive credit for an additional 2,251 days served.

A. Roger must receive credit for time served prior to his underlying conviction and during the suspended portions of the sentence.

“Once a district court revokes a suspended sentence, the sentence is ‘particularly and expressly’ governed by § 46-18-203[.]” *State v.*

Souther, 2022 MT 203, ¶ 10, 410 Mont. 330, 519 P.3d 1. Specifically, §

46-18-203(7)(b) controls revocation of a suspended sentence, which

states, “[c]redit must be allowed for time served in a detention center or

for home arrest time already served.” *Souther*, ¶ 10; *see also State v. Tippetts*, 2022 MT 81, ¶ 18, 408 Mont. 249, 509 P.3d 1; *State v. Kortan*, 2022 MT 204, ¶ 20, 410 Mont. 336, 518 P.3d 1283; *State v. Jardee*, 2020 MT 81, ¶ 9, 399 Mont. 459, 461 P.3d 108; *State v. Gudmundsen*, 2022 MT 178, ¶ 12, 410 Mont. 67, 517 P.3d 146. For purposes of granting credit, incarceration includes time spent in a residential treatment facility under the order of a court. Mont. Code Ann. § 46-18-403(1)(b).

Pre-conviction jail time credit toward a sentence granted by statute is a matter of right. *State v. Hornstein*, 2010 MT 75, ¶ 12, 356 Mont. 14, 229 P.3d 1206. A sentence that fails to award the proper amount of credit for time served violates statutory mandates and is subject to appellate review, even absent an objection. *State v. McCaslin*, 2011 MT 221, ¶ 8, 362 Mont. 47, 260 P.3d 403; *State v. Erickson*, 2005 MT 276, ¶ 27, 329 Mont. 192, 124 P.3d 119; *Killam v. Salmonsens*, 2021 MT 196, ¶ 12, 405 Mont. 143, 492 P.3d 512; *State v. Lenihan*, 184 Mont. 338, 602 P.2d 997, 1000 (1979).

“The provisions of [§ 46-18-203] apply to any offender whose suspended or deferred sentence is subject to revocation **regardless of the date of the offender's conviction** and regardless of the terms

and conditions of the offender's original sentence. Mont. Code Ann. § 46-18-203(12) (2021)¹² (emphasis added); *State v. Oropeza*, 2020 MT 16, ¶ 4, 398 Mont. 379, 456 P.3d 1023 (2017 criminal justice reforms are retroactively applied to all suspended sentences, regardless of the original conviction date); *see also State v. Little Coyote*, 2023 MT 243, ¶¶ 3, 10, 414 Mont. 299, 539 P.3d 1142. Additionally, this Court has held that §§ 46-18-401(1) and 46-18-203(7)(b), read together, require credit be granted for time spent in a detention center on all sentences being served concurrently. *State v. Tracy*, 2005 MT 128, ¶ 28, 327 Mont. 220, 113 P.3d 297.

Roger must be credited for the 106 days he served in jail and in a treatment facility under court order prior to his conviction. The 106 days includes time served from September 20, 2002, to November 22, 2002 (64 days), November 23, 2002, to December 23, 2002 (31 days), and December 30, 2002, to January 9, 2003 (11 days). Roger was held on bail for the burglary charge, or at Montana Chemical Dependency Center under court order, during these periods.

¹² This provision is § 46-18-203(11) in the 2023 version of Montana Code Annotated.

Roger served additional time during different periods of his suspended sentence for which he never received credit. He spent 226 days in jail over two stretches of the initial 16-year suspended term, from May 4, 2008, to September 22, 2008 (142 days), and December 19, 2008, to March 12, 2009 (84 days). He then served 1,212 more uncredited days over two different stretches after the court revoked his initial sentence, from December 15, 2013, to December 2, 2014 (353 days), and August 15, 2015, to December 20, 2017 (859 days).

Then, Roger remained incarcerated in Washington from March 19, 2021, to February of 2023, a total of 707 days for which he never received credit. Washington authorities served Roger the Montana arrest warrant on March 19, 2021, while in custody at Nisqually Corrections Center. Roger is entitled to that credit despite being incarcerated in another jurisdiction. *Crazymule*, ¶ 14 (granting credit for time served in tribal detention after issuance of an arrest warrant and the filing of a revocation petition in Montana case).

Added up, Roger never received credit for 2,251 days he served toward the burglary sentence. Montana law demands he receive that credit now. Mont. Code Ann. § 46-18-203(7)(b); *Kortan*, ¶ 20.

B. The miscalculation of Roger's credit for time served stems partly from the State erroneously running Roger's 2009 revocation sentence consecutive to his 2008 Yellowstone County sentence.

Record evidence indicates that the DOC erroneously treated Roger's first revocation judgment and sentence from 2009 as consecutive to the 2008 sentence imposed in Yellowstone County. Roger alleged this was happening in two letters to the court, one in 2009, another in 2010. (Doc. 58, 60.) This error appears to be one reason Roger failed to receive so much credit for time served.

Roger correctly explained that in 2008, Yellowstone County imposed its sentence concurrent to Roger's original burglary sentence in this matter. (Doc. 60, 74 at 5.) Roger's 2009 revocation judgment for the burglary sentence made no mention of the 2008 Yellowstone County sentence. (Doc. 56.) Roger alleged that the DOC "assumed [his 2009 revocation sentence ran] consecutive" to the 2008 Yellowstone County sentence, in conformity with the general rule that "[s]eparate sentences for two or more offenses must run consecutively unless the court otherwise orders." (Doc. 60; Mont. Code Ann. § 46-18-401(4).) This

Court’s denial of Roger’s habeas petitions confirms Roger’s allegations.¹³

Keech v. Kirkegard, No. OP 11-0622, Order (Feb. 7, 2012); *Keech v.*

Bragg, No. OP 23-0220, Order (Apr. 25, 2023).

Roger’s burglary sentence cannot run consecutive to any sentence imposed after the original burglary sentence was imposed in 2003. The general authority to designate a sentence as concurrent or consecutive to a separate sentence is not within the particulars of the revocation statutes, nor can be addressed during a revocation proceeding. *State v. Wolfblack*, 2024 MT 166, ¶ 10, ___ Mont. ___, 553 P.3d 9; *State v. Seals*, 2007 MT 71, ¶¶ 15, 18, 336 Mont. 416, 156 P.3d 15; *State v. Adams*, 2013 MT 189, ¶ 19, 371 Mont. 28, 305 P.3d 808. The rationale in 2007, prior to the DOC’s mistaken handling of Roger’s sentences, remains today: when revoking a suspended sentence, the court may “require the defendant to serve either the [original] sentence imposed or any lesser sentence[.]” *Seals*, ¶ 16; *Wolfblack*, ¶ 12. A sentence cannot be revoked

¹³ Roger asks this Court to take judicial notice of facts summarized in its own orders. A fact to be judicially noticed, which may be taken at any stage of the proceeding, must be one not subject to reasonable dispute in that it is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Mont. R. Evid. 201(b)(2), (f).

and then imposed to run consecutively to a sentence that did not exist when the original sentence was imposed. *Wolfblack*, ¶ 15.

Here, the DOC erroneously treated Roger's 2009 revocation sentence as consecutive to his 2008 Yellowstone County sentence. But Roger's 2009 revocation sentence began to run the day it was imposed, not after he discharged the Yellowstone County sentence. This error is the cause of at least some of Roger's missing credit for time served, which is worth explaining here to understand how so much jailtime went uncredited, and for any future sentence revocations or calculations.

CONCLUSION

Roger respectfully requests the Court remand this matter with instructions to amend the judgment to grant an additional 2,251 days of credit toward his sentence.

Respectfully submitted this 30th day of September, 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this primary 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 2,789, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/Jeff Wilson
Jeff Wilson

APPENDIX

Order Revoking Defendant's Sentence and Amended Judgement and Commitment.....	App. A
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CERTIFICATE OF SERVICE

I, Jeff N. Wilson, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 09-30-2024:

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