

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JOHN RAYMOND WELZEL,

Defendant and Appellant.

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**BRIEF OF APPELLANT**

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On Appeal from the Montana Eleventh Judicial District Court,  
Flathead County, the Honorable Dan Wilson, Presiding

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## **STATEMENT OF THE ISSUE**

*Whether Welzel is entitled to additional credit for time served under Mont. Code Ann. § 46-18-403(1)?*

## **STATEMENT OF THE CASE**

On November 14, 2022, Flathead County charged Mr. John Raymond Welzel by Information of Assault with a Weapon, a felony in violation of Mont. Code Ann. § 45-5-213(1)(b) and punishable under Mont. Code Ann. § 45-5-213(2). (DC Doc. 3).

On April 4, 2023, Welzel pled no contest to the charged offense, with the District Court granting Welzel's release on his own recognizance pending sentencing. (DC Doc. 28). No pre-trial motions had been pled or reserved. The District Court found that Welzel pled voluntarily. (*Change of Plea Transcript*, p. 2-10).

On June 15, 2023, the District Court sentenced Welzel, committing Welzel to the Department of Corrections for a five-year term, with credit for 142 days and waiving all fees due to a financial inability to pay. (*Sentencing Transcript*, p. 18); (DC Doc. 36); (Judgment and Sentence, DC Doc 38, attached as App. A.)

Welzel timely appeals. (DC Doc. 41).

## **STATEMENT OF THE FACTS**

On April 5, 2023, with hired counsel, Welzel pled no contest to the charged offense. (DC Doc. 28). The District Court took judicial notice of the affidavit filed in support of leave to file an information. (*Change of Plea Transcript*, p. 11).

Both parties stipulated the release of Welzel pending sentencing on the condition that Welzel reside at either Recovery Centers of Montana (RCM) or his father's residence. (*Change of Plea Transcript*, p. 12-13, 15); (DC Doc. 28.1). Welzel reported to and resided at RCM for 30-days. (*Sentencing Transcript*, p. 13); (DC Doc. 32, p. 5).

On June 15, 2023, the District Court sentenced Welzel, committing Welzel to the Department of Corrections for a five-year term, with credit for 142 days and waiving all fees due to a financial inability to pay. (*Sentencing Transcript*, p. 18); (DC Doc. 36). Including the District Court, all parties acknowledged at sentencing that Welzel had completed thirty days of inpatient treatment at RCM. (*Sentencing Transcript*, p. 10, 11-13, 16).

## **STANDARD OF REVIEW**

This Court reviews de novo a district court's calculation of credit

for time served for legality because calculating credit for time served is a legal mandate. *State v. Crazy mule*, 2024 MT 58, ¶ 8, 415 Mont. 536, 545 P.3d 66 (citing *State v. Gudmundsen*, 2022 MT 178, ¶ 8, 410 Mont. 67, 517 P.3d 146 and *State v. Tippetts*, 2022 MT 81, ¶ 10, 408 Mont. 249, 509 P.3d 1). *See also State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979).

### **SUMMARY OF THE ARGUMENT**

The District Court failed to credit Welzel for the thirty days he spent at RCM pending sentencing. After the court accepted Welzel's no contest plea, the court released Welzel on his own recognizance, on the condition that he reside at his father's house or RCM. As acknowledged by the PSI writer, Welzel, the State, and the court, Welzel completed 30-days of treatment pending disposition. This matter should be remanded to correct that error.

### **ARGUMENT**

#### **The district court failed to credit Welzel an additional 30-days of credit for time served for his treatment at RCM**

When imposing incarceration as a sentence, the sentencing court "shall" and "must" provide credit for all "incarceration" incurred prior to and after conviction. Mont. Code Ann. § 46-18-201(9); § 46-18-403(1)(a).

The Legislature provides no discretion for sentencing courts to deviate from this “clear and unambiguous” mandate. *Killam v. Salmonsens*, 2021 MT 196, ¶¶ 13, 16, 405 Mont. 143, 492 P.3d 512. Consistent with the correctional policy under Mont. Code Ann. § 46-18-101(2)(d), “incarceration includes time spent in a residential treatment facility under the order of a court.” Mont. Code Ann. § 46-18-403(1)(b). *C.f.*, *State v. Byrd*, 2015 MT 20, ¶ 18, 378 Mont. 94, 342 P.3d 9 (holding the opposite prior to the Legislature amending Mont. Code Ann. § 46-18-403).

Here, the District Court failed to credit Welzel for his time spent at RCM. There is no question that following Welzel’s change of plea, the court ordered Welzel to reside at his father’s residence or attend treatment “at the Columbia Falls facility of Recovery Centers of Montana.” (DC Doc. 28.1); (*Change of Plea Transcript*, p. 15, 17). At sentencing, all parties acknowledged that Welzel completed thirty days of treatment at RCM. (*Sentencing Transcript*, p. 10-13, 16). *See also* DC Doc. 32). Perhaps due to simple oversight, the District Court failed to credit Welzel an additional thirty days of credit as applied to his sentence, in violation of the legal mandate of Mont. Code Ann. §46-18-

201(9) and § 46-18-403(1). In total at sentencing, the District Court should have granted Welzel 172 days of credit for time served pre-sentencing. This matter should be remanded to amend the judgment reflecting an accurate accounting of credit for time served.

### **CONCLUSION**

Below the District Court incorrectly calculated credit for time served by omitting Welzel's 30-day period at RCM. The District Court did not follow the legal mandate of Mont. Code Ann. § 46-18-201(9) and § 46-18-403(1). This matter should be remanded to amend the judgement to accurately apply 172 days of credit for time served to Welzel's sentence.

Respectfully submitted this 22nd day of January, 2025.

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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 892, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Joshua James Thornton  
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## **APPENDIX**

Judgment and Sentence .....	App. A
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## **CERTIFICATE OF SERVICE**

I, Joshua James Thornton, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Opening to the following on 01-22-2025:

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