

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0398

---

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JASON DANIEL SHEWALTER,

Defendant and Appellant.

---

**BRIEF OF APPELLEE**

---

On Appeal from the Montana Twentieth Judicial District Court,  
Lake County, The Honorable Deborah Christopher, Presiding

---

APPEARANCES:

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

JAMES A. LAPOTKA  
Lake County Attorney  
106 4th Avenue East  
Polson, MT 59860

ATTORNEYS FOR PLAINTIFF  
AND APPELLEE

TAMMY A. HINDERMAN  
Division Administrator  
DEBORAH S. SMITH  
Assistant Appellate Defender  
Office of State Public Defender  
Appellate Defender Division  
P.O. Box 200147  
Helena, MT 59620-0147

ATTORNEYS FOR DEFENDANT  
AND APPELLANT

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	2
I. The offense .....	2
II. Procedural history .....	3
A. The original conviction and sentence.....	3
B. The first revocation and sentence.....	4
C. The second revocation and sentence .....	6
SUMMARY OF THE ARGUMENT .....	17
ARGUMENT .....	18
I. Standard of review.....	18
II. Relevant authority.....	18
III. The district court erred by not reducing Shewalter’s sentence for the days he spent in a detention center during the revocation proceedings, but Shewalter is not entitled to credit for time that he was not in jail.....	20
IV. The district court correctly denied elapsed time credit because the probation officer’s records and recollections show Shewalter had continually violated his conditions during his entire suspended sentence.....	26
V. Shewalter’s ineffective assistance of counsel argument is unnecessary and without merit.....	32
CONCLUSION .....	33
CERTIFICATE OF COMPLIANCE.....	34

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Adams v. State</i> , 2007 MT 35, 336 Mont. 63, 153 P.3d 601 .....	33
<i>Baca v. State</i> , 2008 MT 371, 346 Mont. 474, 197 P.3d 948 .....	33
<i>Killam v. Salmonsens</i> , 2021 MT 196, 405 Mont. 143, 492 P.3d 512 .....	19
<i>State v. Crazy mule</i> , 2024 MT 58, 415 Mont. 536, 545 P.3d 66 .....	passim
<i>State v. Jardee</i> , 2020 MT 81, 399 Mont. 459, 461 P.3d 108 .....	passim
<i>State v. Lenihan</i> , 184 Mont. 338, 602 P.2d 997 (1979) .....	32
<i>State v. Risher</i> , 2024 MT 309, 419 Mont. 395, 560 P.3d 1203 .....	18
<i>State v. Seals</i> , 2007 MT 71, 336 Mont. 416, 156 P.3d 15 .....	18
<i>State v. Souther</i> , 2022 MT 203, 410 Mont. 330, 519 P.3d 1.....	18, 32
<i>Whitlow v. State</i> , 2008 MT 140, 343 Mont. 90, 183 P.3d 861 .....	32

### **Other Authorities**

Montana Code Annotated	
§ 45-9-103 .....	3
§ 45-10-103 .....	3
§ 46-18-201(9) .....	19
§ 46-18-203 .....	18, 19
§ 46-18-203(7)(b) .....	passim
§ 46-18-403(1)(a) .....	19
§ 53-30-101 .....	19
§ 61-8-346 .....	3

## **STATEMENT OF THE ISSUES**

1. The State concedes that the district court erred by not reducing the Appellant's revocation sentence for credit for time served in a detention center, but the State contests credit for time served for days that the record shows he was not incarcerated.

2. Whether the district court correctly denied the Appellant elapsed time credit when the records and recollections of the probation officer show he was in constant violation of numerous probation conditions throughout the entire duration of his suspended sentence.

## **STATEMENT OF THE CASE**

On September 21, 2006, the district court sentenced the Appellant, Jason Shewalter (Shewalter), for his conviction of felony possession of dangerous drugs with intent to distribute. (Docs. 27, 29.) The district court twice revoked the suspended portion of Shewalter's sentence. (Docs. 42, 69.) During its oral pronouncement of sentence for the second revocation, the district court denied Shewalter's request for elapsed time credit and said it had reduced his sentence for time served in a detention center. (10/13/22 Tr. at 20-33.) In the written judgment, the district court did not include a credit reduction for time served in a detention center. (Doc. 69.)

On appeal, Shewalter argues the district court erred by not reducing his sentence by credit for time served in a detention center and for elapsed time credit, pursuant to Mont. Code Ann. § 46-18-203(7)(b). The State does not agree with Shewalter's calculation of credit for time served in a detention center, but it concedes the district court erred by not reducing Shewalter's sentence on those grounds by 136 days. The State maintains that the district court correctly denied Shewalter's request for elapsed time credit.

## **STATEMENT OF THE FACTS**

### **I. The offense**

On January 3, 2006, a Montana Highway Patrol trooper stopped Shewalter in Lake County for his failure to yield to an emergency vehicle. (Doc. 2 at 3.)<sup>1</sup> The trooper smelled marijuana in the vehicle, and Shewalter appeared very nervous and had bloodshot eyes. (*Id.* ) Shewalter did not provide a driver's license, and he could not provide a complete social security number. (*Id.* at 3-4.) He first provided a name that the trooper could not verify, then provided a slightly different name. (*Id.*) The trooper removed Shewalter from the vehicle and patted him down for the officer's safety. (*Id.* at 4.) Shewalter was shaking. (*Id.*)

---

<sup>1</sup> Shewalter pleaded guilty to the underlying offense, so the State has relied primarily on the State's assertions in the affidavit for leave to file the Information to describe the offense. (Docs. 2, 24-25.)

As a Lake County deputy arrived on the scene, Shewalter immediately identified himself, provided his correct name, and told the trooper that he had three pounds of marijuana in the vehicle and at least \$10,000 cash in two duffle bags. (*Id.*) He told the trooper that he was a drug dealer, he had a warrant for his arrest, and he was going to go to prison. (*Id.*) Shewalter showed the trooper the bags. (*Id.*) The trooper discovered a \$35,000 arrest warrant for Shewalter out of Flathead County, arrested Shewalter, and towed the vehicle pending a search warrant application, which was later granted. (*Id.* at 5.) During a search of the vehicle, officers discovered 1,189.8 grams of marijuana in five separate containers, \$16,920 in cash, two scales, and glass pipes. (*Id.*)

## **II. Procedural history**

### **A. The original conviction and sentence**

On March 24, 2006, the State charged Shewalter with felony drug possession with the intent to distribute, in violation of Mont. Code Ann. § 45-9-103, failure to yield to emergency vehicles, in violation of Mont. Code Ann. § 61-8-346, and misdemeanor possession of drug paraphernalia, in violation of Mont. Code Ann. § 45-10-103. (Docs. 2-4.) On August 24, 2006, Shewalter pleaded guilty pursuant to an agreement with the State. (Docs. 24-25.) Shewalter agreed to plead guilty to felony drug possession with the intent to distribute in exchange for the State's

dismissal of the remaining two charges. (Doc. 24 at 7-9.) The parties agreed to jointly recommend a ten-year commitment to the Department of Corrections (DOC) with eight years suspended. (*Id.*)

On September 21, 2006, the district court imposed the jointly recommended sentence consecutive to the sentences imposed for prior Flathead County convictions.<sup>2</sup> (Doc. 27.) The district imposed various conditions for the suspended portion of Shewalter's sentence and reduced the sentence by 261 days for credit for time served. (*Id.* at 2-7.)

#### **B. The first revocation and sentence**

Shewalter began serving the suspended portion of his sentence on March 14, 2017. (Doc. 33 at 1.) On July 26, 2018, the State filed a petition to revoke Shewalter's suspended sentence. (Docs. 33-34.) The probation officer reported that Shewalter had failed on community supervision. (Doc. 33 at 1.) He had failed to make an effort to maintain employment and he was an absconder. (*Id.*) The probation officer specified that Shewalter deliberately made his whereabouts unknown and failed to report to avoid supervision. (*Id.*)

---

<sup>2</sup> On March 16, 2006, Shewalter had been sentenced to a 15-year DOC commitment with 10 years suspended in a Flathead County case. (Doc. 26 at 2-3.)

On July 27, 2018, the district court issued an arrest warrant for Shewalter. (Doc. 35.) Three months later, law enforcement arrested Shewalter and served him with the warrant. (Doc. 36.)

On November 19, 2018, Shewalter's probation officer filed an addendum to the report of violation. (Doc. 40.) He reported that Shewalter had been arrested in Spokane on August 8, 2018, and charged with two felonies. (*Id.*) On October 10, 2018, Shewalter was convicted in Spokane County Superior Court for felony possession of a stolen vehicle and misdemeanor making false or misleading statements. (*Id.*) The Spokane court sentenced him to 90 days in jail. (*Id.*) The probation officer recommended that Shewalter not receive credit for elapsed time. (*Id.*)

During the adjudication hearing on December 6, 2018, Shewalter admitted to the alleged violations. (Doc. 41.) The district court revoked Shewalter's suspended sentence and imposed an 8-year DOC commitment with 5 years suspended. (Docs. 41-42.) The district court reduced Shewalter's sentence by 49 days for time served in jail but denied any reduction for elapsed time credit. (Doc. 42 at 1.)

On March 20, 2019, Shewalter filed an application with the Sentence Review Division (SRD). (Doc. 45.) The SRD affirmed Shewalter's sentence. (Docs. 47-48.)



### **C. The second revocation and sentence**

On June 9, 2022, the State filed a petition to revoke the suspended portion of Shewalter's sentence. (Docs. 49-50.) Shewalter had begun serving the suspended portion of his sentence on October 17, 2021. (Doc. 49 at 1.) Shewalter's probation officer, Ron Linn (Officer Linn), dated his initial report of violation as June 8, 2022. (Doc. 49 at 1.) In that report, Officer Linn indicated that Shewalter's present address was the Flathead County Detention Center. (*Id.*) Officer Linn alleged three violations, all stemming from Shewalter's arrest on June 3, 2022, in Flathead County for criminal trespass, felony possession of methamphetamine and heroin, and misdemeanor possession of drug paraphernalia. (Docs. 49-50.) On June 16, 2022, the district court issued an arrest warrant for Shewalter and set bond at \$25,000. (Doc. 51.)

In his initial report of violation, Officer Linn included numerous violations that Shewalter had committed throughout the duration of his suspended sentence and the actions that he had taken to address Shewalter's noncompliance. (Doc. 49 at 1-3.) Officer Linn noted that Shewalter began his suspended sentence by returning from Washington State for violating interstate compact rules. (*Id.* at 1.) He said he had made "Multiple" verbal reprimands to address Shewalter's violations. (*Id.*) Officer Linn summarized, Shewalter "has failed in several key areas of community supervision. Reporting in as directed, employment, residence,

on-going illegal substance use and failing to attend outpatient chemical dependency treatment to name a few. [Shewalter] is not suitable for community supervision at this time.” (*Id.* at 3.) He also said Shewalter had consistently maintained that he only used marijuana but was now requesting help for his addictions to harsher drugs, including methamphetamine, heroin, and fentanyl. (*Id.* at 2.) Officer Linn recommended that Shewalter not receive any credit reduction for elapsed time. (*Id.* at 3.)

Officer Linn noted multiple jail sanctions, an intervention hearing, and two referrals to chemical dependency treatment for Shewalter. (*Id.* at 2-3.) On March 17, 2022, Officer Linn issued a pick up and hold order due to Shewalter’s failure to report to the probation office and a failure to appear warrant. (*Id.* at 2.) On April 17, 2022, the Montana Highway Patrol took Shewalter into custody after it had discovered a broken methamphetamine pipe in the passenger door of a vehicle that Shewalter had been riding in. (*Id.*) While at the jail, Shewalter signed a substance use admission form admitting to using fentanyl and asking for help with his addiction. (*Id.*)

On April 19, 2022, Officer Linn conducted an intervention hearing, which allowed him 30 days to get Shewalter into the Connection Corrections Program. (*Id.*) The program rejected Shewalter because he had failed to provide medications he was taking. (*Id.*) On May 18, 2022, the jail released Shewalter, and Shewalter

reported to Officer Linn that he would try to get into the Recovery Centers of Montana Program in Columbia Falls. (*Id.*)

On May 23, 2022, Officer Linn suspected that Shewalter had been using illegal substances, so he and another officer conducted a home check on Shewalter at an address where Officer Linn believed Shewalter had been staying. (*Id.* at 3.) The officers found Shewalter hiding under some covers, and he admitted to having used methamphetamine the previous night. (*Id.*) At the jail, Shewalter tested positive for methamphetamine and amphetamine and again admitted to using methamphetamine. (*Id.*) The jail released Shewalter on May 26, 2022. (*Id.*)

On July 7, 2022, the State filed an amended petition to revoke and attached Officer Linn's addendum to the initial report of violation. (Doc. 53.) Officer Linn had dated the addendum June 28, 2022, and indicated that Shewalter's present address was the Flathead County Detention Center. (Doc. 52 at 1.) He also noted that Shewalter had previously been released from the Flathead County Detention Center on his own recognizance on June 13, 2022. (*Id.*) Officer Linn noted the concern of Shewalter's brother that without intervention Shewalter would "continue to couch surf and stay with people whom are engaged in using illegal substances." (*Id.* at 2.) Officer Linn said Shewalter was resistant to seeking treatment himself and his "illegal substance use seems to be steady, constant use." (*Id.*) He again recommended that Shewalter not receive any credit for elapsed time. (*Id.*)

In the addendum, Officer Linn reported that on June 23, 2022, Shewalter was a passenger in a vehicle pulled over by law enforcement in Flathead County. (Docs. 52-53.) Shewalter pushed his foot against the inside of the car door, tried to kick the officer, and ran away, only to be arrested after a short chase. (*Id.*) Officers found methamphetamine in his front pocket inside a Carmex container. (*Id.*) Shewalter later admitted that he had run away because he knew the officers would find drugs on him. (*Id.*)

On July 10, 2022, a Columbia Falls police officer served Shewalter with the Lake County arrest warrant that the district court had issued on June 16, 2022. (Doc. 56.) On July 13, 2022, law enforcement delivered him to the custody of Lake County. (Doc. 54.) During Shewalter's initial appearance on the petition to revoke on July 21, 2022, he denied the allegations. (Doc. 58.) On August 18, 2022, Shewalter posted bond and was released pursuant to conditions. (Docs. 54-55, 61.)

On August 24, 2022, Shewalter filed an unopposed motion to appear by Zoom for the adjudication hearing. (Doc. 62.) The district court rejected his request and specified that if Shewalter was actively in treatment, it would reschedule the adjudication hearing. (Doc. 63.) If not, it would require Shewalter to personally appear for the hearing as scheduled on August 25, 2022. (*Id.*)

Shewalter did not appear at the hearing. (Doc. 64; 8/25/22 Tr. at 3.) Shewalter's counsel said that Shewalter had informed her that he had been

admitted to a treatment center in Columbia Falls. (8/25/22 Tr. at 2.) The State had a witness present for the scheduled hearing. (*Id.* at 3.) The district court had reservations about calling a substantive witness without Shewalter present, but it allowed the State to proceed with the caveat that the witness might need to be called again at a subsequent hearing. (*Id.*)

The State called Columbia Falls Police Officer Wayne Stufflebeem (Officer Stufflebeem). (*Id.* at 4.) Officer Stufflebeem testified that he had responded to a call at 4 a.m. that morning for a woman who had overdosed. (*Id.* at 4-5.) The woman had previously been in a romantic relationship with Shewalter, and Shewalter had repeatedly trespassed on her property in violation of a court order. (*Id.* at 5.) Officer Stufflebeem found Shewalter in the bathroom of the residence. (*Id.*) He described Shewalter's demeanor as "the same as every time I have encountered him, very talkative, fidgety, didn't want to listen to what I had to say. I don't know if he was under the influence of drugs, but possible." (*Id.* at 5.) Shewalter told the officer that he had enrolled in a treatment plan and that he had court later that morning. (*Id.* at 6.) Although Shewalter had been trespassing again, Officer Stufflebeem declined to issue him a citation based on the circumstances.<sup>3</sup> (*Id.*)

---

<sup>3</sup> Contrary to Shewalter's assertions in his brief (Br. at 6, 19), Officer Stufflebeem did not testify that he had arrested Shewalter that morning. (8/25/22 Tr. at 4-6.)

The State asserted that Shewalter had been lying to the court and asked for an arrest warrant with a \$150,000 bond. (*Id.* at 6-7.) The district court acknowledged that Shewalter had failed to take advantage of the opportunities given to him and indicated it would issue an arrest warrant. (*Id.*) No one present during the hearing appeared to know of Shewalter's whereabouts or why he had failed to appear. (*Id.* at 6-8.)

The district court signed the arrest warrant for Shewalter on August 26, 2022 and set bond at \$150,000. (Docs. 64-65.) On September 1, 2022, the Flathead County Sheriff's Office served the Lake County warrant on Shewalter. (Doc. 66.)<sup>4</sup> The State transferred Shewalter to Lake County on September 6, 2022. (*Id.*)

The district court held Shewalter's adjudication hearing on October 13, 2022. (Doc. 68.) The State called Officer Stufflebeem, who testified that he arrested Shewalter on June 3, 2022, for trespassing. (10/13/22 Tr. at 5.) Shewalter had a glass pipe, which later tested positive for methamphetamine residue, and an aluminum foil bindle with a substance inside that later tested positive as heroin. (*Id.* at 5-6, 11.) During his arrest, Shewalter admitted that he had meth and heroin in his possession. (*Id.* at 6, 11.)

Officer Stufflebeem testified that he had arrested Shewalter a second time on June 23, 2022. (*Id.* at 6-8.) Officer Stufflebeem had stopped a vehicle that he knew

---

<sup>4</sup> Various documents are included in Doc. 66. None of those documents provide any indication that Shewalter had been in custody at any time prior to September 1, 2022. (Doc. 66.)

had been involved in a theft earlier in the day. (*Id.* at 7-8, 11.) He and another officer found Shewalter as a passenger in the vehicle and identified him as a suspect for the theft. (*Id.*) The second officer arrested Shewalter and found a substance in his pocket that later tested positive for methamphetamine. (*Id.* at 8-9, 11.) The second officer secured Shewalter with handcuffs initially. (*Id.* at 8.) Because Shewalter was compliant, the officer took off the handcuffs when he placed Shewalter in the back of the patrol vehicle. (*Id.*) The officer cracked the rear window to give Shewalter some fresh air. (*Id.*) As the officers were speaking near the driver's side door of the patrol vehicle, Shewalter reached out the cracked window, opened the door, and ran away. (*Id.*) Officer Stufflebeem ran after Shewalter and apprehended him again. (*Id.*)

Officer Stufflebeem revisited his testimony about his interaction with Shewalter in the early morning hours of August 25, 2022, which was the day of the prior hearing that Shewalter had missed due to his failure to appear. (*Id.* at 9.) Officer Stufflebeem recalled the overdosed woman, whom he had provided Narcan to and revived from a perceived opiate overdose. (*Id.* at 9-10.) He reiterated his testimony that he had found Shewalter in the bathroom of the residence and that Shewalter had acknowledged that he was trespassing at the residence. (*Id.* at 10.) However, Shewalter had also told Officer Stufflebeem that he was only at the residence to address the medical emergency of his girlfriend, that he had court later that day, and that he was going to go to treatment. (*Id.*) In response to questions

from the State, Officer Stufflebeem confirmed that he had come to the August 25, 2022 hearing while Shewalter had not shown up.<sup>5</sup> (*Id.*)

The State called Officer Linn, who testified that he had been supervising Shewalter since October 17, 2021. (*Id.* at 13.) He had the following exchange with the State. (*Id.*)

[State:]        Okay. In that time has [Shewalter] been a compliant, model probationer?

[Officer Linn:]    No.

[State:]        Okay. When was the first time that he caused a problem for you or needed to be sanctioned?

[Officer Linn:]    To be sanctioned—the sanctions can be as little as a verbal warning. And I’ve given him many to try to work with him and get him to comply with little conditions that the court wants him to do.

[State:]        Okay. Has that noncompliance existed throughout the year that you’ve been supervising him, or was it something that just most recently happened in June, I guess, is what I’m getting at?

[Officer Linn:]    The serious violations were—began on June 3rd. But the ones that just required minor sanctions, like verbal warnings and redirect (*sic*), happened the whole year.

---

<sup>5</sup> Contrary to Shewalter’s assertions in his brief (Br. at 6, 19), Officer Stufflebeem never testified that he had arrested Shewalter that morning. (8/25/22 Tr. at 4-6; 10/13/22 Tr. at 5-12.)



[State:] Throughout the whole—

[Officer Linn:] Right.

(*Id.* at 13-14.) Officer Linn testified that he eventually felt obligated to file a report of violation to prevent Shewalter from committing any new crimes, which he believed was necessary in these circumstances. (*Id.* at 14.)

After the State concluded, the district court acknowledged Shewalter's ability to make an argument, but it continued and said the officers' testimony was more than sufficient to support the revocation of Shewalter's sentence. (*Id.* at 15-16.) The district court ruled accordingly and proceeded to sentencing. (*Id.* at 16.)

Officer Linn recommended a five-year DOC commitment with prerelease and 24/7 reporting requirements. (*Id.* at 17.) The district court had the following exchange with Officer Linn regarding elapsed time credit. (*Id.* at 17-18.)

[District court]: In regards to credit for street time, you indicated that he has required redirection, and verbal reprimanding, and other interventions throughout the entirety of the year that he's been on probation with you. Do you believe he's entitled to any street time?

[Officer Linn]: I put—I put none. And that is I reviewed his case a couple of times and I tried to look and give him the benefit of a doubt, even one instance per month, and I couldn't find any. Very difficult to work with. If he would have shown some compliance with me to want to work with the minor things I wanted him to do, I would—I'd be giving him—requesting that he get street time. But none is welcomed in this case.

(*Id.*)

The State recommended a five-year DOC commitment with no time suspended and that Shewalter attend NEXUS followed by prerelease. (*Id.* at 20-21.) The State argued against suspended time because of the apparent inevitability of further revocations based on Shewalter's history of repeatedly violating the conditions of his release. (*Id.*) The State said Shewalter needed the best program to address his mental health and substance abuse issues, which was the DOC NEXUS program. (*Id.*)

Shewalter's counsel recommended five years with three suspended with a focus on less intensive treatment at Connections/Corrections. (*Id.* at 21-22.) Shewalter personally argued that a five-year DOC sentence was too harsh for a marijuana conviction. (*Id.* at 22-26.) The district court pointed out that Shewalter's conviction was for felony possession of marijuana with the intent to distribute and noted its concern was about the more dangerous drugs that Shewalter had admitted to using.<sup>6</sup> (*Id.* at 25-27.) Shewalter acknowledged his methamphetamine and fentanyl use, but he said he did not need the intensive rehabilitation provided by NEXUS. (*Id.* at 22-26.)

---

<sup>6</sup> Shewalter had 1,189.8 grams of marijuana in five separate containers, \$16,920 in cash, and had admitted that he was a drug dealer. (Doc. 2 at 3-4.)

The district court imposed the five-year DOC commitment and recommended NEXUS to ensure that Shewalter had a place to work on his mental health and recovery from substance abuse. (*Id.* at 28-29.)

Shewalter personally said he believed he was entitled to elapsed time credit up until the date the State filed the petition to revoke. (*Id.* at 30-31.) The State informed the district court that it was required to provide a reduction for elapsed time credit for the time Shewalter had complied with the conditions of his suspended sentence, but it noted the record showed he had never complied. (*Id.* at 31.) The district court said it would consider suggestions otherwise, but it denied elapsed time credit based on the testimony that probation and parole had needed to be continuously involved to address Shewalter's noncompliance. (*Id.* at 32.) The district court said it had "given credit for any time that has been served." (*Id.* at 20-33.)

The district court filed its written judgment on October 24, 2022, and did not include any reduction of Shewalter's sentence for any credit for time served. (Doc. 69.) On November 7, 2022, Shewalter filed an application for sentence review. (Doc. 72.) The SRD affirmed Shewalter's sentence. (Docs. 74-75.)

On July 20, 2023, Shewalter filed a pro se petition for an out-of-time appeal. (Doc. 76.) This Court granted Shewalter's request and appointed the Appellate Defender's Division as counsel. (*Id.*)

## **SUMMARY OF THE ARGUMENT**

The State concedes the district court erred by not reducing Shewalter's sentence by 136 days for credit for time served in a detention center, pursuant to Mont. Code Ann. § 46-18-203(7)(b). But Shewalter is not entitled to a credit reduction for days that he was not incarcerated. Based on the record, Shewalter is entitled to a credit reduction of 136 days for the time he served in a detention center, not the 149 that he has requested.

The district court correctly denied Shewalter's request to reduce his sentence for elapsed time credit. The records and recollections of Shewalter's probation officer show that he had numerous, constant, and actual violations throughout the entire duration of his suspended sentence, and the district court relied on those records and recollections to deny a reduction for elapsed time credit.

Shewalter's ineffective assistance of counsel argument is unnecessary and unavailing. Shewalter personally objected to the denial of elapsed time credit, which preserved the issue for appeal, and this Court has authority to review it regardless because it impacts the legality of his sentence. To the extent this Court addresses Shewalter's claim, he cannot prove his counsel was deficient or that he was prejudiced by it.

## **ARGUMENT**

### **I. Standard of review**

“Calculating credit for time served is not discretionary, but a legal mandate.” *State v. Crazy mule*, 2024 MT 58, ¶ 8, 415 Mont. 536, 545 P.3d 66. “A district court’s calculation of credit for time served is reviewed for legality and [this Court] exercise[s] de novo review.” *State v. Risher*, 2024 MT 309, ¶ 6, 419 Mont. 395, 560 P.3d 1203.

### **II. Relevant authority**

This Court has long held that “sentencing upon the revocation of a suspended or deferred sentence is particularly and expressly governed by § 46-18-203, MCA.” *State v. Seals*, 2007 MT 71, ¶ 15, 336 Mont. 416, 156 P.3d 15. In *State v. Souther*, 2022 MT 203, ¶ 12, 410 Mont. 330, 519 P.3d 1, this Court explained “if the sentence is imposed pursuant to a revocation proceeding, § 46-18-203(7)(b), MCA, expressly delineates the sentencing court’s authority and available options.” It provides:

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.

Mont. Code Ann. § 46-18-203(7)(b).

The statute creates two categories of credit for time served in revocation cases: elapsed time and time served in a detention center or for home arrest. *Id.* It is the only statutory authority for elapsed time. *Id.* The Legislature amended the elapsed time language in 2017, which this Court explained in *State v. Jardee*, 2020 MT 81, ¶¶ 9-11, 399 Mont. 459, 461 P.3d 108.

This Court addressed revocation credit for time served in a detention center in *Crazymule*, ¶¶ 9-14. This Court acknowledged its prior holdings that sentencing in revocation proceedings is “particularly and expressly” governed by Mont. Code Ann. § 46-18-203, but it explained that two general sentencing statutes are also relevant in an appeal challenging revocation credit. This Court included Mont. Code Ann. § 46-18-403(1)(a), which provides:

A person incarcerated on a bailable offense against whom a judgment of imprisonment is rendered must be allowed credit for each day of incarceration prior to or after conviction, except that the time allowed as a credit may not exceed the term of the prison sentence rendered.

It also included Mont. Code Ann. § 46-18-201(9), which provides:

When imposing a sentence under this section that includes incarceration in a detention facility or the state prison, as defined in 53-30-101, the court shall provide credit for time served by the offender before trial or sentencing.

By extension, this Court included its holding in *Killam v. Salmonsens*, 2021 MT 196, ¶¶ 14, 17, 405 Mont. 143, 492 P.3d 512, which applied these two general

sentencing statutes. Despite these references, this Court rested its analysis and holding in *Crazymule*, ¶ 14, exclusively on Mont. Code Ann. § 46-18-203(7)(b).

**III. The district court erred by not reducing Shewalter's sentence for the days he spent in a detention center during the revocation proceedings, but Shewalter is not entitled to credit for time that he was not in jail.**

In *Crazymule*, ¶ 4, the offender committed multiple drug and child welfare offenses on the Northern Cheyenne Reservation while she was serving the suspended portion of a prior state sentence. The tribal court convicted Crazymule and imposed sentences that included incarceration in a tribal detention center. *Id.* ¶¶ 4-5. While Crazymule served her tribal sentences, the State initiated revocation proceedings in state district court, and the district court issued an arrest warrant. *Id.* ¶ 5. The State did not serve the warrant on Crazymule until she was discharged from tribal custody. *Id.* ¶¶ 5-7. The State transported Crazymule from the tribal jail to the county for the revocation proceedings. *Id.*

This Court held that the defendant was entitled to a credit reduction of her revocation sentence from the date the district court issued the revocation arrest warrant. *Crazymule*, ¶¶ 13-14. This included the days Crazymule had served in a tribal detention center for her tribal sentences. *Id.* This Court explained that Crazymule could not do anything to move her revocation proceedings forward while in the tribal detention system and denying her credit would have effectively

lengthened her sentence by six months. *Id.* ¶ 13. This Court’s analysis relied exclusively on the plain language of the revocation credit statute, which provided that “[c]redit must be allowed for time served in [a] detention [center].” *Id.* ¶ 14 (quoting Mont. Code Ann. § 46-18-203(7)(b)).

Based on Mont. Code Ann. § 46-18-203(7)(b) and this Court’s holding in *Crazymule*, ¶¶ 13-14, the State concedes that the district court failed to reduce Shewalter’s sentence for time he served in a detention center, but the State does not agree with all the dates Shewalter has provided. The record shows Shewalter served four periods of time in a detention center that supported a total sentence reduction of 136 days.

On March 17, 2022, the DOC issued a pick up and hold order for Shewalter’s failure to report to his probation officer. (Doc. 49 at 2.) On April 17, 2022, a Montana Highway Patrol trooper arrested Shewalter, and the DOC held him for an intervention hearing until he was released from jail on May 18, 2022. (*Id.*) The district court should have reduced Shewalter’s revocation sentence by 32 days for the time he served in a detention center during this period. *See Crazymule*, ¶ 14; Mont. Code Ann. § 46-18-203(7)(b). Shewalter provided the same calculation for these days in his credit request. (Br. at 20.)

On May 23, 2022, Officer Linn and another probation officer arrested Shewalter for illegal drug use. (Doc. 49 at 3.) Shewalter remained in jail until his



release on May 26, 2022. (*Id.*) The district court should have reduced Shewalter's sentence by four days for the time he served in a detention center during this period. *See Crazy mule*, ¶ 14; Mont. Code Ann. § 46-18-203(7)(b). Shewalter provided the same calculation for these days in his credit request. (Br. at 20.)

On June 16, 2022, the district court issued an arrest warrant for Shewalter's arrest pursuant to the revocation proceedings. (Doc. 51.) On June 23, 2022, Columbia Falls police officers arrested Shewalter for potential drug offenses and resisting arrest. (Doc. 52 at 1.) Shewalter remained incarcerated until he posted bond on August 18, 2022. (Doc. 61.) Pursuant to this Court's application of Mont. Code Ann. § 46-18-203(7)(b) in *Crazy mule*, ¶ 14, the district court should have reduced Shewalter's sentence by 57 days for time served in a detention center.

Shewalter claims his sentence should be reduced from the date the district court issued the arrest warrant on June 16, 2022. (Br. at 18-19.) However, Shewalter bases this argument on his incorrect assertion that he was incarcerated on June 16, 2022. (*Id.*) Shewalter accurately notes that he was incarcerated in the Flathead County Detention Center on June 8, 2022. (Doc. 49 at 1.) However, he has failed to acknowledge that he was released on his own recognizance on June 13, 2022. (Doc. 52 at 1.) Nothing in the record indicates Shewalter was in custody at any point from his release on June 13, 2022, to his arrest on June 23, 2022. The credit reduction for "time served in a detention center" in Mont. Code Ann. § 46-18-203(7)(b) cannot

apply to time that Shewalter was not in a detention center, and this Court has never endorsed that result. The appropriate credit reduction is 57 days for the time period between Shewalter's arrest on June 23, 2022, and his release on August 18, 2022. *See Crazy mule*, ¶ 14; Mont. Code Ann. § 46-18-203(7)(b).

On August 26, 2022, the district court issued an arrest warrant for Shewalter after he failed to appear at his scheduled adjudication hearing. (Doc. 65.) The record shows that the State served this warrant on Shewalter on September 1, 2022, and Shewalter remained in jail until his adjudication and disposition hearing on October 13, 2022. (Doc. 66.) The district court should have reduced Shewalter's sentence by 43 days for the time he served in a detention center during this period. *See Crazy mule*, ¶ 14; Mont. Code Ann. § 46-18-203(7)(b).

Shewalter argues his sentence reduction should begin on August 25, 2022. (Br. at 6, 19.) Shewalter correctly asserts that he did not appear at the scheduled adjudication hearing that day. (*Id.*) But his assertion that his failure to appear was due to his incarceration is not supported by the record. (*Id.*) Officer Stufflebeem did not testify that he arrested Shewalter on August 25, 2022. (8/25/22 Tr. at 4-6.) Officer Stufflebeem testified that he found Shewalter hiding in the bathroom of a residence where Shewalter had been trespassing. (*Id.*) Shewalter told Officer Stufflebeem "that he was enrolling in a treatment plan and that he had court this morning." (*Id.* at 6.) Officer Stufflebeem testified:

[State:] Okay. Was [Shewalter] violating the law by being in that apartment last night?

[Officer Stufflebeem:] He was.

[State:] Could you have written him a citation for trespassing?

[Officer Stufflebeem:] I could have.

[State:] Did you decline to do that because of circumstances?

[Officer Stufflebeem:] I did.

*(Id.)*

Officer Stufflebeem testified again during the October 13, 2022 adjudication and disposition hearing, and he never said that he arrested Shewalter on the morning of August 25, 2022. (10/13/22 Tr. at 5-12.) Again, Officer Stufflebeem's testimony undermines Shewalter's assertion that he missed the hearing because he had been arrested.

[State:] The day after this, after you were up all night doing your job and Narcanning [Shewalter's] girlfriend, you were here in court, weren't you?

[Officer Stufflebeem:] That's correct.

[State:] Okay. And was he here?

[Officer Stufflebeem:] No.

*(Id. at 10.)*

The only conclusion supported by the record is that Shewalter was not in custody on August 25, 2022. During the August 25, 2022 hearing, the State indicated that it did not know why Shewalter did not show up. (8/25/22 Tr. at 2-8.) Shewalter’s counsel said that Shewalter had previously told her that he had enrolled in treatment, but she had no other information of his whereabouts. (*Id.*) The district court issued another arrest warrant and noted that the bondsman would also be “very interested in where [Shewalter] is and why he didn’t show up.” (*Id.* at 7.) The only other evidence in the record regarding Shewalter’s custodial status during that time period is the arrest warrant documents that indicate the State served and arrested Shewalter on September 1, 2022. (Doc. 66.)

Without any fact in the record to show that Shewalter was in custody prior to September 1, 2022, he cannot be entitled to “credit for time served in a detention center,” pursuant to Mont. Code Ann. § 46-18-203(7)(b). The appropriate credit reduction is 43 days for the time period between Shewalter’s arrest on September 1, 2022, and his adjudication and disposition hearing on October 13, 2022. *See Crazy mule*, ¶ 14; Mont. Code Ann. § 46-18-203(7)(b).

The State concedes that the district court erred by not reducing Shewalter’s revocation sentence by 136 days of “credit for time served in a detention center,” pursuant to Mont. Code Ann. § 46-18-203(7)(b), and this Court should remand this case and instruct the district court to revise Shewalter’s sentence accordingly.

**IV. The district court correctly denied elapsed time credit because the probation officer's records and recollections show Shewalter had continually violated his conditions during his entire suspended sentence.**

The statute requires a district court to “allow all of the elapsed time served *without any record or recollection of violations* as a credit against the sentence.”

Mont. Code Ann. § 46-18-203(7)(b) (emphasis added). Shewalter requests elapsed time credit from the beginning of his suspended sentence on October 17, 2021, to March 16, 2022.<sup>7</sup> (Br. at 26.) But the district court correctly denied that elapsed time credit because Officer Linn's testimony and two reports of violation show there was not any period of elapsed time during Shewalter's suspended sentence without any record or recollection of violations. *See* Mont. Code Ann. § 46-18-203(7)(b).

Officer Linn testified, based on his recollection, that Shewalter had failed to comply with his sentence conditions throughout the entire duration of his suspended sentence, and he gave Shewalter multiple sanctions to get him to comply with the conditions of his sentence prior to filing his initial report of violation. (10/13/22 Tr. at 13-14.) He specifically responded to the district court's question regarding elapsed time, and said:

I put—I put none. And that is I reviewed his case a couple of times and I tried to look and give him the benefit of a doubt, even one instance per month, and I couldn't find any. Very difficult to work

---

<sup>7</sup> Shewalter acknowledges that he is not entitled to a sentence reduction for elapsed time credit for time after Officer Linn issued the pick up and hold warrant for his noncompliance on March 17, 2022. (Br. at 26.)

with. If he would have shown some compliance with me to want to work with the minor things I wanted him to do, I would—I'd be giving him—requesting that he get street time. But none is welcomed in this case.

(*Id.* at 18.) These recollections of Shewalter's probation officer support the district court's denial of elapsed time credit because they show that there was no "elapsed time served without any record or recollection of violations." *See* Mont. Code Ann. § 46-18-203(7)(b). In addition to his recollections, Officer Linn's records further support the district court's denial of elapsed time credit. *Id.*

In the first report of violation, Officer Linn summarized: Shewalter "has failed in several key areas of community supervision. Reporting in as directed, employment, residence, on-going illegal substance use and failing to attend outpatient chem[ic]al dependency treatment to name a few. [Shewalter] is not suitable for community supervision at this time." (Doc. 49 at 3.) Officer Linn specifically reported:

- Shewalter began his suspended sentence by returning from Washington State for violating interstate compact rules;
- Shewalter did not have a permanent residence;
- Shewalter was difficult to contact;
- Shewalter failed to obtain or maintain employment;
- Shewalter had difficulty keeping up with probation officer appointments due to transportation issues;

- He issued a pick up and hold warrant for Shewalter on March 17, 2022 for his failure to report;
- At that same time, Shewalter had a failure to appear warrant with a \$650 bond;
- Shewalter evolved from consistently stating he only used marijuana to asking for help for his addiction to harsher drugs including methamphetamine, heroin, and possibly fentanyl; and
- He had issued multiple verbal reprimands to Shewalter.

(Doc. 49 at 1-3.) In the addendum to the report of violation, Officer Linn reported that Shewalter’s “current illegal substance use seems to be steady, constant use,” and that Shewalter’s brother was concerned that without intervention Shewalter would “continue to couch surf and stay with people whom are engaged in using illegal substances.” (Doc. 52 at 2.)

In *Jardee*, ¶ 11, this Court explained that the denial of elapsed time credit must be based on “actual” violations. The conditions of Shewalter’s suspended sentence required him to not change his place of residence without first obtaining permission from his probation officer, maintain employment or approved programming, personally report as directed, abstain from intoxicants, obey all laws, participate in counseling as recommended, and not knowingly associate with persons who use drugs, abuse alcohol, or otherwise violate the law. (Doc. 29 at 2-6.) Officer Linn’s records and recollections support numerous, constant, and actual violations of these conditions throughout the entire duration of Shewalter’s

suspended sentence. Shewalter minimizes these violations, but Mont. Code Ann. § 46-18-203(7)(b) does not require a district court to ignore violations because they did not result in an immediate report of violation. Officer Linn recommended that the district court not reduce Shewalter's sentence for elapsed time because of Shewalter's actual violations throughout his entire suspended sentence. Both the records and recollections of Officer Linn support that recommendation and the district court's ruling. *See* Mont. Code Ann. § 46-18-203(7)(b).

The district court acknowledged Officer Linn's records and recollections in its denial of elapsed time credit. It said, "the officer did testify that he used lesser degrees of redirection and verbal warnings during the time and things just continued to get worse." (10/13/22 Tr. at 32.) It summarized, "I'm not going to grant any street time just because there's just been a continued involvement of Probation and Parole for purposes of trying to keep everybody straight and appropriate." (*Id.*) This Court in *Jardee*, ¶¶ 12-13, held that a district court's reference to a violation during the relevant period was sufficient to satisfy its obligations under Mont. Code Ann. § 46-18-203(7)(b). Here, the district court referenced Shewalter's constant violations throughout the entire duration of his suspended sentence. Those persistent violations were supported by Officer Linn's records and recollections and supported the district court's denial of elapsed time credit. *See id.*



Shewalter does not address most of these violations. (Br. at 20-26.) Rather, he argues that his minor violations prior to March 17, 2022, do not support the denial of elapsed time credit based on this Court’s explanation of the statutory requirements in *Jardee*, ¶¶ 10-11. (Br. at 24.) But the district court did not deny elapsed time credit solely based on a “pattern” of criminal behavior or expand specific violations to unrelated periods of elapsed time because they “permeated” the entire sentence duration. *See Jardee*, ¶¶ 10-11. The district court based its denial on actual violations during the relevant time period, as this Court required in *Jardee*, ¶¶ 10-12.

In *Jardee*, ¶¶ 9-10, this Court explained that the prior version of Mont. Code Ann. § 46-18-203(7)(b) granted a district court discretion to allow or reject all or part of the elapsed time credit once a suspended sentence had been revoked. The 2017 amendments removed that discretion and required credit be allowed “if there have been no violations.” *Id.* ¶ 10. This Court rejected a district court’s ability to deny elapsed time based “merely upon the State’s argument that Jardee’s many probation violations ‘permeated’ the entirety of his time on supervision.” *Id.* It continued, “it is now insufficient for a district court to base a denial of street time credit solely on a ‘pattern’ of criminal behavior.” *Id.* ¶ 11. Similarly, this Court rejected the State’s argument that “Jardee’s history with his girlfriend

‘demonstrat[ed] a pattern of manipulation [and] abuse . . . consistent with non-compliance while under supervision[.]’” *Id.* (alterations in original).

However, this Court affirmed the denial of elapsed time credit because the record and recollection of the probation officer showed that Jardee had incorrectly reported his address throughout the period in question, which was a violation of his probation conditions. *Id.* ¶ 12. Here, Officer Linn testified to Shewalter’s numerous violations of his probation conditions between the beginning of his supervision and the pick up and hold warrant issued on March 17, 2022. Included in those violations were Shewalter’s failure to obtain or report changes to his permanent residence and failure to gain or maintain employment or approved programming. Shewalter does not dispute these facts, which were constant violations of his supervision conditions throughout the disputed time period similar to the violation this Court relied on to affirm the denial of elapsed time credit in *Jardee*, ¶ 12.

This Court should affirm the district court’s denial of elapsed time credit because Officer Linn’s records and recollections show Shewalter had actual violations of his probation conditions throughout the entire duration of his suspended sentence. *See* Mont. Code Ann. § 46-18-203(7)(b).

**V. Shewalter's ineffective assistance of counsel argument is unnecessary and without merit.**

Shewalter argues his counsel was ineffective for not addressing elapsed time credit. (Br. at 27-29.) This Court does not need to address this issue. Shewalter's argument is unnecessary to preserve his challenge to the district court's denial of elapsed time credit because Shewalter did not waive it. He personally raised the elapsed time issue with the district court, which preserved it for appeal. Even if he had not, the denial of elapsed time credit would have been reviewable by this Court because an alleged error based on the calculation of credit for time served is sufficient to support review under *State v. Lenihan*, 184 Mont. 338, 341-45, 602 P.2d 997, 1000-01 (1979). *See Souther*, ¶ 12 (this Court will review a court's calculation of credit even if it is not preserved because it affects the legality of a sentence).

To the extent this Court chooses to address Shewalter's ineffective assistance of counsel argument, it is unavailing. He can prove neither deficient performance nor prejudice. *See Whitlow v. State*, 2008 MT 140, ¶¶ 10-11, 343 Mont. 90, 183 P.3d 861 (describing the two-part test that a defendant must meet for ineffective assistance of counsel claims). The conduct of Shewalter's counsel was not deficient because Officer Linn's records and recollections show that Shewalter had actual violations of his probation conditions throughout the duration of his suspended sentence. *Id.* ¶¶ 12-21. It is not deficient performance if

counsel chooses not to raise an unavailing argument. *See Adams v. State*, 2007 MT 35, ¶ 43, 336 Mont. 63, 153 P.3d 601 (“An attorney’s failure to object does not constitute ineffective assistance of counsel if the objection lacked merit and would have been properly overruled.”).

Moreover, his counsel’s choice not to address elapsed time credit did not prejudice Shewalter. *See Baca v. State*, 2008 MT 371, ¶ 17, 346 Mont. 474, 197 P.3d 948 (to prove prejudice a defendant must show a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different). In addition to the argument’s lack of merit, Shewalter personally addressed elapsed time credit, which caused the district court to address it and allows this Court to review the issue without any action from his counsel. Shewalter cannot show the result of the proceedings would have been different because the circumstances would not have changed if his counsel had offered an argument in support of elapsed time credit. *Id.*

### **CONCLUSION**

The State concedes the district court erred by not reducing Shewalter’s revocation sentence by 136 days for credit for time served in a detention center, pursuant to Mont. Code Ann. § 46-18-203(7)(b), and requests this Court remand to the district court to amend his sentence accordingly.

The State respectfully requests this Court affirm the remainder of Shewalter's sentence because the district court correctly denied his request for elapsed time credit.

Respectfully submitted this 11th day of February, 2025.

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

By: /s/ Brad Fjeldheim  
BRAD FJELDHEIM  
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 7,685 words, excluding cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signatures, and any appendices.

/s/ Brad Fjeldheim  
BRAD FJELDHEIM

## **CERTIFICATE OF SERVICE**

I, Brad Fjeldheim, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 02-11-2025:

James Allen Lapotka (Govt Attorney)  
106 4th Ave E  
Polson MT 59860  
Representing: State of Montana  
Service Method: eService

Deborah Susan Smith (Attorney)  
555 Fuller Avenue  
P.O. Box 200147  
Helena MT 59620-0147  
Representing: Jason Daniel Shewalter  
Service Method: eService

Electronically signed by LaRay Jenks on behalf of Brad Fjeldheim  
Dated: 02-11-2025