IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0196

STATE OF MONTANA,

Plaintiff and Appellee,

v.

MICHAEL PAUL SULLIVAN,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Sixth Judicial District Court,
Park County, the Honorable Brenda R. Gilbert, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT IN REPLY

I. The court did not find, and the record does not support any finding, that Mr. Sullivan could afford to pay $480 in financial obligations. They should be stricken from the judgment.

Mr. Sullivan is a 55-year-old totally disabled man whose only income is Social Security Disability Insurance (SSDI) payments[1] and who will not even be eligible for release from prison on parole until he is 63. Without discussing Mr. Sullivan's financial circumstances at all—with the exception of noting he would be incarcerated for a long time—and without explicitly finding he was able to pay any particular financial obligations, the district court imposed $480 in financial obligations, including a $400 discretionary fine—while simultaneously waiving the $800 public defender fee, again, without any discussion of Mr. Sullivan's ability or inability to pay that amount—even though the prosecutor, when given the opportunity to do so, did not argue Mr. Sullivan was able to pay and did not request the imposition of any fines, fees, or surcharges. On appeal, the State takes an entirely different

[1] A person is considered disabled under the Social Security Act if he is unable to engage in any substantial gainful work which exists in the national economy by reason of any lasting medically determinable physical or mental impairment. *See* 42 U.S.C. § 423(d)(1)(A), (d)(2)(A).

tack, offering for the first time numerous justifications for the district court's unexpressed and unexplained alleged "factual finding" of Mr. Sullivan's alleged ability to pay. None of those justifications hold water.

First, the State argues the district court's (non)finding that Mr. Sullivan could afford to pay $480 in financial obligations was supported by substantial evidence in the record because the presentence investigation report (PSI) indicated he owned $5,000 in unspecified assets. Brief of Appellee at 14. Again, the district court did not rely on that fact when imposing the financial obligations here, instead only mentioning the length of Mr. Sullivan's sentence. Moreover, there is no indication in the PSI what those assets were, whether they were liquid assets, or whether they could be turned into cash now or in the near future, nor is there any indication that those assets were in Mr. Sullivan's possession on the day of sentencing. Yet, the court did not bother to impose a payment plan, rendering the $400 fine immediately due. *See* § 46-18-234, MCA. The State acknowledges this fact, but discounts it, arguing that Mr. Sullivan "will not be punished if he does not pay the fine immediately." Brief of Appellee at 14-15. While it's awfully nice of the State to make that promise on appeal, there is

nothing otherwise legally preventing the State from filing a petition to revoke the suspension of the execution of the last 10 years of Mr. Sullivan's 30-year sentence for violation of condition 12 in his judgment: "The Defendant shall pay all fines, fees, and restitution ordered by the sentencing court. . . . ." Brief of Appellant, App. A at 4. That Mr. Sullivan is in prison does not prevent the State from filing a petition to revoke at this time. *See* § 46-18-203(2), MCA (authorizing the filing of a petition to revoke before the period of suspension has begun).

The State further argues the court made a reasoned determination regarding Mr. Sullivan's ability to pay some financial obligations while waiving others. Brief of Appellee at 13-14. But, if the court actually decided to impose $480 in financial obligations based on the $5,000 in mystery assets, while waiving the $800 public defender fee for inability to pay, that would show quite the opposite: that the court's decision making was arbitrary and capricious and not based on the substantial evidence in the record. The reality is that the court did not explicitly find Mr. Sullivan had the ability to pay the $480 in financial obligations because it did not actually consider Mr. Sullivan's ability to pay that amount, and it certainly did not base its decision to

impose those fees and fines on the liquidity of the mystery assets listed in the PSI. Nor could it have done so as there was no evidence that any such assets could be used to satisfy the debt imposed.

Second, the State argues the court's (non)finding that Mr. Sullivan had the ability to pay the financial obligations imposed was not clearly erroneous because the PSI indicated Mr. Sullivan travelled out of town during the pendency of the case and had hoped to do so again. Brief of Appellee at 14. But the fact that Mr. Sullivan had some disposable cash months before sentencing in no way supported the court's (non)finding of his present or future ability to pay the financial obligations imposed by the court. Those funds were long gone and unrecoverable, and, they did not constitute substantial evidence supporting any alleged secret finding that Mr. Sullivan could pay $480 on the date of sentencing.

Third, the State argues the court's (non)finding of ability to pay was supported by the fact that Mr. Sullivan, prior to his convictions in these three related cases, received $1,350 per month in SSDI payments. Brief of Appellee at 14. The State correctly notes the court did not order Mr. Sullivan to pay the financial obligations from that source, acknowledging that doing so would be unlawful under the Social

Security Act. Brief of Appellee at 15. True enough. But the court also did not identify *any* other source from which Mr. Sullivan *could* pay those obligations. What's more, because Mr. Sullivan was already serving a prison sentence based on his Lewis and Clark conviction, those payments would have been indefinitely suspended. *See* Social Security Administration, Publication No. 05-10133, "What Prisoners Need to Know," (Jan. 2023), available at https://www.ssa.gov/pubs/EN-05-10133.pdf (last accessed Apr. 8, 2025). That is, he would no longer have any ability to supplement his other financial sources—of which he had none—with his disability payments.

Finally, the State argues Mr. Sullivan essentially admitted he had the ability to pay $80 in surcharges when he signed a binding plea agreement which indicated the parties agreed Mr. Sullivan "would pay court surcharges." Brief of Appellee at 14. Of course, the district court rejected that plea agreement and, thus, could not have imposed the surcharges pursuant to any alleged promise to pay contained therein. *See State v. Collins*, 2023 MT 78, ¶ 35, 412 Mont. 77, 528 P.3d 1106 (defendant's consent to register as a sexual offender as part of a plea agreement that the court rejected was not enforceable). The court never

deemed that provision an admission of any sort or mentioned it in any way, and, regardless, the district court imposed a $400 fine over and above any amount that Mr. Sullivan allegedly admitted he could pay in the plea agreement. In other words, the plea agreement could not justify the court's imposition of the fine and was not in reality the basis for any (non)finding that Mr. Sullivan could afford to pay the other $80 in financial obligations.

The district court's (non)finding that Mr. Sullivan had the ability to pay $480 is not supported by substantial evidence in the record. This totally disabled, middle-aged man essentially has been ordered to spend the rest of his life in prison. He cannot work. And he cannot collect SSDI payments. As such, the court clearly erred when it imposed these financial obligations and they should be stricken from the judgment. At a minimum, this Court should order the $400 fine, which the State did not request, Mr. Sullivan never agreed to pay under any plea agreement, and could not pay immediately—although it was due immediately—stricken from his judgment.

II. Mr. Sullivan is entitled to credit for all time served prior to his sentencing hearing.

The parties agree Mr. Sullivan is entitled to at least an additional 6 days of credit for time he served prior to his January 11, 2023, sentencing hearing in his Lewis and Clark County case. *See* Response Brief of Appellee at 17. What's more, the State does not dispute, and the record indisputably shows, that Mr. Sullivan served additional time in custody from the conclusion of his January 11, 2023, Lewis and Clark County sentencing hearing until his sentencing hearing in this case on January 23, 2023. *See* Response Brief of Appellee at 2-3.

The parties, however, dispute whether Mr. Sullivan is entitled to credit for that time served. But the Legislature has provided an answer to that question: the plain language of § 46-18-201(9), MCA, provides simply that when imposing a sentence that includes incarceration, a court "shall provide credit for time served by the offender before trial or sentencing." And § 46-18-403(1)(a), MCA, further explains that credit for time served must be given for "each day of incarceration prior to . . . a conviction." The plain meaning of these statutes is clear: a defendant is entitled to credit for each and every partial day of custody that he served before the court imposed the sentence on the charge.

Nonetheless, the State argues Mr. Sullivan was not entitled to any credit for time he served in jail after he posted bond in this case on April 28, 2022, because "he was no longer being detained subject to [the Park County court's] jurisdiction," and that status "remained unchanged even after he was sentenced in Lewis and Clark County and remanded to the custody of DOC." Appellee's Response Brief at 21. The State's argument is untethered to the plain language of the credit for time served statutes, none of which conditions the award of credit for time served upon the existence of an "active" warrant, or the absence of an order of conditional release. Nor do those statutes tie the duty to award credit for time served to the existence of the filing of a motion to revoke an offender's pretrial release or issuance of a revocation order before credit is due. The statutes simply require a court to award a defendant one day of credit for each day the defendant has served in detention prior to sentencing in his case—no more and no less.

Indeed, in *Killam v. Salmonsen*, 2021 MT 196, ¶ 16, 405 Mont. 143, 492 P.3d 512, this Court explained "[t]he language of § 46-18-201(9), MCA, is clear and unambiguous and makes the determination of credit for time served straight-forward," and "requires the court . . . to

provide credit for time served by the defendant before the defendant's trial or sentencing" "based solely on the record of the offense for which the defendant is being sentenced and does not require determination by the court as to whether defendant is also being held on another matter and, if so, which hold is primary." Ultimately, the Court held Mr. Killam was entitled to credit starting on the day that he was arrested, even though he was not served with the arrest warrant in the particular case at hand and was not technically being held on the warrant in that cause number. *Killam*, ¶ 19. Similarly, in *State v. Pitkanen*, 2022 MT 231, ¶ 26, 410 Mont. 503, 520 P.3d 305, the Court concluded "'causation' of a defendant's [pre-sentencing] incarceration" is now irrelevant. And in *State v. Risher*, 2025 MT 309, ¶ 16, 419 Mont. 395, 560 P.3d 1203, this Court held:

> Coalescing our precedents and reiterating the fundamental considerations for determining credit for time served, the sentencing court "must determine the amount of time to credit based on the record relating to the offense for which the defendant is being sentenced on *without considering other criminal proceedings or DOC incarcerations or holds*." *Killam*, ¶ 17 (emphasis added).

To be sure, none of this Court's prior cases directly holds that a defendant is entitled to credit for time served after he has been conditionally released in the case at hand, either after posting bond or on his own recognizance. But, contrary to the State's contention, none of the Court's prior decisions directly forecloses that conclusion either. Citing paragraph 18 of this Court's opinion in *Risher*, the State contends that this Court "held" that he was not entitled to credit for a period of time when he was remanded to the custody of DOC in a separate case if he remained released O/R in the case at hand. Appellee's Response Br. at 20. This Court held nothing of the sort. What the Court held in *Risher* was that he was "entitled to credit for time served from the date of his arrest on April 29, 2022, until his release" from custody on his own recognizance, regardless of the fact that he was never served with a warrant for his arrest. *Risher*, ¶ 17. The Court made no ruling regarding Risher's entitlement to any other credit and instead remanded the case to the district court for further development of the facts and "to determine whether Risher may be entitled for credit for time served" for that period. *Risher*, ¶ 20; *see also Risher*, ¶ 19 (containing no "holding" or instructions to the district court regarding

under what circumstances it should, or should not, grant Risher credit for time served for that period).

Ultimately, the State's argument rises or falls on the talismanic qualities the State attributes to the word "served" in the credit for time served statutes. The State would like the statutes to say that a defendant is entitled to credit for presentencing time spent in custody that is related, ideally, exclusively, or, perhaps, primarily, or, at a bare minimum, directly, to the charge for which the sentence is being imposed. But the statutes don't say that. To the contrary, Mr. Sullivan's interpretation of the statutes is wholly consistent with both the plain language of the credit for time served statutes and this Court's precedent interpreting and applying the credit for time served statutes, under which the cause of the defendant's incarceration is irrelevant and only the fact of the defendant's incarceration matters. Mr. Sullivan is entitled to credit for the time he served between January 11 and January 23, 2023.

CONCLUSION

The district court did not find, and the record does not support any finding that Mr. Sullivan is able to pay the $480 of financial obligations

imposed by the court. This Court must reverse Mr. Sullivan's sentence and remand this matter to district court with instructions to issue an amended judgment that deletes the provision requiring Mr. Sullivan to pay those financial obligations. Alternatively, at a minimum, this Court must reverse the district court's imposition of the $400 discretionary fine that Mr. Sullivan never agreed to pay, the State never requested, and Mr. Sullivan could not and did not pay on the day of his sentencing hearing.

In addition, Mr. Sullivan is entitled credit for each day he was in custody prior to his sentencing hearing in this case. This Court must reverse Mr. Sullivan's sentence and remand this matter to district court with instructions to issue an amended judgment granting him an additional 20 days of presentencing credit for time served, for a total of 21 days of credit for time served. At a minimum, pursuant to the State's concession, this Court must reverse his sentence and remand with instructions to issue an amended judgment including an additional 6 days of credit, for a total of 7 days of credit for time served.

Respectfully submitted this 8th day of April, 2025.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this reply 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 2,593, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

/s/ Tammy A. Hinderman
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CERTIFICATE OF SERVICE

I, Tammy Ann Hinderman, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 04-08-2025:

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