IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 24-0116

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JACOB TYLER POWELL,

Defendant and Appellant.

REPLY BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, the Honorable David J. Grubich, Presiding

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ARGUMENT

The State urges this Court to affirm the District Court's denial of Appellant Jacob Powell's elapsed time credit for two reasons. First, the State argues that the District Court correctly denied elapsed time credit because there was no period of time that Mr. Powell was not in violation of the conditions of his sentence. Second, the State attempts to distinguish authorities supporting Mr. Powell and argues that exhaustion of the Montana Incentives/Interventions Grid ("MIIG") is not a prerequisite to elapsed time credit. The State's first point is incorrect, and the second point is unavailing and misconstrues Mr. Powell's arguments. Because the State cannot rebut the fact that the District Court was presented with no proof of an "actual violation" between August 6, 2020, and January 6, 2023, Mr. Powell is entitled to elapsed time credit for that period.

I. There is No Evidence that Mr. Powell Committed an Actual Violation During the Relevant Time Period.

The State claims that Mr. Powell was not entitled to elapsed time credit because he made no payments toward his court costs or supervision fees, made no payments toward restitution since January 2020, was unemployed between December 2021 and 2023, and "had not

addressed" his chemical dependency issues. (Appellee's Br. 10–11.) According to the State, these alleged violations, as detailed in the Report of Violation ("ROV"), establish that "there was no period of time" since January 2020 "when [Mr.] Powell was not in violation of the conditions of his sentence." (Appellee's Br. 11.)

At the outset, the State's allegations about Mr. Powell's employment status and chemical dependency issues are not relevant because they were not cited by the District Court as grounds for denying credit. Under the revocation statute, the district court must "'state the reasons' for a denial of credit based upon the record or recollection of the probation officer to deny street time credit for the relevant time period." *State v. Jardee*, 2020 MT 81, ¶ 11, 399 Mont. 459, 461 P.3d 108 (quoting § 46-18-203(7)(b), MCA). In this case, the District Court stated just one reason for denying credit for the time period between August 6, 2020, and January 6, 2023: the failure to pay restitution and court-ordered fees and charges.

The District Court did not deny time credit on the basis of Mr. Powell's employment status. Nor did the State ever prove that Mr. Powell failed to hold down employment during the relevant time period,

as the District Court dismissed the count charging Mr. Powell with a compliance violation for lack of employment. (Evid. Tr. 12.)

Nor did the District Court specify that Mr. Powell failed to engage in chemical dependency treatment from August 6, 2020, to January 6, 2023. Though the District Court noted that Mr. Powell wasn't "following the recommendations in the chemical dependency evaluation" (Disp. Tr. 27), the ROV alleged that Mr. Powell failed to follow treatment recommendations after a January 6, 2023 intervention that directed him to obtain a chemical dependency evaluation (D.C. Doc. 24, at 3). This issue is therefore not relevant to the present appeal, as Mr. Powell does not claim that he deserves elapsed time credit for the period after January 6, 2023.

The only question, then, is whether the District Court correctly denied elapsed time credit for the period of August 6, 2020, to January 6, 2023, based on Mr. Powell's alleged failure to pay restitution and court-ordered fees and charges. Citing *State v. Jardee*, the State claims that Mr. Powell's alleged violations "did not constitute 'patterns' of noncompliance, but rather uninterrupted violations of the conditions of [Mr.] Powell's sentence." (Appellee's Br. 11.)

The State is incorrect, and its argument is belied by the District Court's own pronouncement. In *Jardee*, the Court held that "it is now insufficient for a district court to base a denial of street time credit solely on a 'pattern' of criminal behavior." *Jardee*, ¶ 11. Rather, the State "must now point to an actual violation by the defendant, in the relevant time period, found in the record or recollection of the probation officer, to establish a basis for denial of street time credit for that period." *Id.*

The State fails to explain how Mr. Powell's actions constitute an actual violation as opposed to a pattern of behavior. In *Jardee*, the probationer's report of a false address during the relevant period constituted an actual violation. *Id.* ¶ 12. In the present case, however, the District Court failed to identify an actual violation during the relevant period and expressly stated that it denied credit based on a "pattern." At the hearing, the District Court stated: "there appears to be a period of time where there aren't any specifically documented violations, and that's the period of time . . . between August 6th of 2020 to January 6th of 2023." (Disp. Tr. 26.) Rather than grant elapsed time credit for the period without documented violations, the District Court

denied the credit because Mr. Powell "showed a *pattern* of complete disregard to the Court-ordered rules." (Disp. Tr. 28 (emphasis added).) The District Court could not have been more explicit that the denial was based on a "pattern" of behavior, rather than an actual violation in the time period between August 6, 2020, and January 6, 2023. Under this Court's precedents, the District Court's finding constitutes an incorrect interpretation and application of the probation revocation statute. *Jardee*, ¶ 11.

II. The State's Remaining Arguments are Unavailing.

Having failed to rebut Mr. Powell's claim that the District Court relied on a pattern of behavior rather than an actual violation, the State attempts to distinguish the authorities cited in Mr. Powell's opening brief. However, the State points to superficial differences that have no bearing on the issue presented.

First, the State is of course correct that *State v. Puccinelli*, 2024 MT 114, 416 Mont. 444, 549 P.3d 441, concerned a revocation decision rather than an elapsed time credit determination. Mr. Powell cites *Puccinelli* for the general principle, expounded by this Court, that a probation officer is expected "to work with an offender and to make sure

the offender is apprised of any violations perceived or asserted by the supervising officer so the offender can take steps to address the deficiency." *Puccinelli*, ¶ 35. This principle is directly relevant because Mr. Powell's supervising officer presented no record or recollection of an actual violation during the relevant time period; *Puccinelli* therefore supports the inference that Mr. Powell did not commit an actual violation during that time. That *Puccinelli* dealt with the appeal of a revocation decision is beside the point.

Second, the State urges the Court to ignore *Hendrickson v. Salmonsen*, 556 P.3d 512, 2024 Mont. LEXIS 766, because the case relied upon *Puccinelli*. This attempt to distinguish *Hendrickson* is unsuccessful for several reasons. Even if *Puccinelli* were distinguishable in any meaningful sense, it would not automatically render *Hendrickson* inapplicable. And to the extent *Hendrickson* favorably cites *Puccinelli*, it is to note that in both cases the supervising officer "never provided . . . a clear directive as to an adequate monthly payment amount or a monthly due date for these payments." *Hendrickson*, at *9. The *Hendrickson* decision is therefore entirely on point. In the present case, as in *Hendrickson*, "the State cannot point to

an 'actual violation . . . found in the record or recollection of the probation officer' because the record does not contain any indication as to the point at which the lack of restitution payment became a violation." *Hendrickson*, at *11. The State fails to address the clear relevance of this holding.

Third, the State spends several pages addressing the claim that "exhaustion of the MIIG requirements is required to deny elapsed time credit." (Appellee's Br. 14.) But Mr. Powell does not argue that exhaustion of the MIIG is a prerequisite to denying elapsed time credit. The State's misunderstanding appears to stem from Mr. Powell's statement that "the MIIG was not used to correct the alleged failure to pay restitution and fees." (Appellant Br. 16.) Mr. Powell raised the MIIG in the opening brief for two reasons. First, to show that there is no record or recollection of the alleged failure to make payments by drawing a contrast to violations where the MIIG was utilized, and second, to support the argument that there is no record evidence regarding Mr. Powell's ability to make regular payments. The State's lengthy discussion of the MIIG and exercise in statutory construction has no bearing on the issue presented.

CONCLUSION

The State's brief in opposition provides no support for the District Court's erroneous decision to deny Mr. Powell's statutorily mandated elapsed time credit. This Court should vacate Mr. Powell's sentence and remand with instructions to resentence him with credit for two years, five months of elapsed time served.

Respectfully submitted this 5th day of May, 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 1,497, excluding Table of Contents, Table of Authorities, Certificate of Service, Certificate of Compliance, and Appendices.

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