STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0760

State of Minnesota,
Respondent,

vs.

Ricky Antwon Osborne,
Appellant.

Filed May 12, 2009
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Olmsted County District Court
File No. 55-KX-01-004125

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Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

James R. Peterson, Acting Chief Appellate Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the denial of his motion for additional jail credit, arguing that the district court erred in declining to grant him (1) jail credit for time spent in juvenile

detention facilities prior to May 2001 and (2) jail credit for 62 days spent under the supervision of the Minnesota Department of Corrections in a work-release program. We affirm in part, reverse in part, and remand.

FACTS

Between August 1998 until his arrest in October 2001, appellant Ricky Antwon Osborne (Osborne) and his co-conspirators, Anthony Osborne, Sr. (Senior) and Anthony Osborne, Jr. (Junior), were involved in selling drugs and had numerous interactions with the police, including controlled purchases and various searches of vehicles and residences. On August 21, 1998, the Rochester Police Department searched an apartment in Rochester, where they found Junior with $1,175 in his pockets and determined that some of the money had been used by a confidential informant (CI) to buy drugs from Junior. In addition to finding Junior with cash used by the CI, the police interviewed T.S., who stated that Junior sold crack cocaine, that she had received crack cocaine from Junior that day, and that she had seen both Osborne and Junior carrying guns.

On January 26, 1999, Rochester police officers used a CI to conduct a controlled purchase of crack cocaine from Osborne. During a telephone conversation, Osborne reached an agreement with the CI on a price for six rocks of crack cocaine and arranged for the CI to purchase the drugs. On February 21, 1999, police conducted another controlled purchase of crack cocaine from Osborne. The CI called Osborne to arrange a meeting. Osborne could not meet with the CI but sent J.L.B. to meet with him. As a result of the sale, J.L.B. was charged with a controlled substance crime, and J.L.B. subsequently testified that Osborne asked her to sell the crack cocaine to the CI.

On July 13, 1999 and August 3, 2000, police conducted two vehicle searches and discovered drugs and money. During the first search, Junior was present but denied that the drugs found belonged to him. During the second search, Osborne was present but denied knowing that drugs were in the car. During this time period, police also conducted a search of a Rochester apartment at which S.A.B. was present. S.A.B. subsequently stated that Senior previously sold drugs from that apartment.

Between March 9, 1999 and May 20, 2001, Rochester police conducted four controlled purchases of crack cocaine—one implicating Junior and two implicating Senior. The fourth involved W.W.P, who appeared to be working for Senior. On May 20, 2001, Osborne and an accomplice robbed two people at gunpoint for $700. The victims told police that they had purchased drugs from Osborne in the past.

On July 11, 2001, Rochester police executed a search warrant for a Rochester residence and encountered Osborne, Junior and Senior together. The police also executed a search warrant for each of the individuals. From the searches, the police discovered seven cell phones, baggies with the corners cut off, three baggies with white residue, and a plate with a small amount of suspected cocaine. On August 22, 2001, Rochester police received a report that Osborne had taken $240 from an individual and punched the individual in the face three times. Osborne was arrested for this incident.

Between May 20, 2001, and Osborne's arrest on October 3, 2001, the police conducted eleven controlled purchases: six involving Junior; five involving Senior; and one involving Osborne. After his arrest on October 3, 2001, Osborne was charged with (1) racketeering, (2) first-degree conspiracy to commit controlled substance crime,

(3) third-degree controlled substance crime, (4) two counts of first-degree aggravated robbery, and (5) certain persons not to possess firearms.

Pursuant to a plea agreement, Osborne pleaded guilty to first-degree conspiracy to commit controlled substance crime, second-degree assault, and third-degree controlled substance crime. On October 29, 2002, Osborne began serving an executed sentence of 36 months for the amended second-degree assault conviction and a concurrent executed sentence of 27 months for the third-degree controlled substance crime. Osborne's 122-month sentence on his conviction of first-degree controlled substance crime (conspiracy) was stayed, pursuant to the plea agreement, and Osborne was placed on probation for 30 years. On September 30, 2003, Osborne began a work-release program, which lasted 62 days. On December 1, 2003, Osborne was placed on supervised-release from prison.

On February 18, 2005, the district court revoked Osborne's probation for failure to comply with the conditions of his supervised release and executed his 122-month sentence for first-degree controlled substance crime (conspiracy). The district court subsequently issued a resentencing order, granting Osborne jail credit for the entire time period of November 4, 2002 through November 27, 2004. The court later amended its resentencing order, reducing Osborne's jail credit for time spent in the custody of the Minnesota Department of Corrections (DOC) to the time periods of November 4, 2002 through September 30, 2003 and March 17, 2004 through July 6, 2004.

On August 29, 2007, Osborne moved the district court for additional jail credit, arguing that he should receive jail credit for time spent at Elmore Academy and Many Rivers Juvenile Detention Facility prior to May 2001, and also for time spent in a work-

release program before his supervised release on December 1, 2003. The district court denied the motion. This appeal follows.

D E C I S I O N

I

Respondent argues that Osborne's claims for jail credit prior to May 2001 are barred by *Knaffla.* We disagree.

If a petitioner directly appeals a conviction, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). The *Knaffla* rule bars claims the petitioner should have known about at the time of his direct appeal. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). Claims are not barred under *Knaffla* if (1) the claim "is so novel that its legal basis was not reasonably available at the time of the direct appeal" or (2) "fairness would require a review of the claim in the interest of justice and there was no deliberate or inexcusable reason for the failure to raise the issue on direct appeal." *Id.* at 905-06 (quotation omitted).

Osborne brought an appeal on May 17, 2005, arguing that the district court erred in revoking his probation and executing his prison sentence. By order opinion, this court affirmed the district court decision on April 12, 2006. *State v. Osborne*, No. A05-988 (Minn. App. Apr. 12, 2006). After review was granted, the Minnesota Supreme Court affirmed this court's decision on June 7, 2007. *State v. Osborne*, 732 N.W.2d 249 (Minn. 2007). Respondent argues that Osborne's failure to raise the issue of jail credit in that

appeal was deliberate and inexcusable and, therefore, Osborne's jail credit claim is *Knaffla*-barred. But the record contains no indication that Osborne's failure to raise this issue below was deliberate and inexcusable. He brought his direct appeal in May 2005, one month before the district court amended its resentencing order, denying him jail credit for time spent in a work-release program. Osborne therefore had no reason to raise a claim regarding jail credit that had been previously granted to him. Additionally, in his earlier appeal, Osborne argued a completely separate issue—that the district court erred in revoking his probation and executing his prison sentence—and the issue was not intertwined with the issue of jail credit. *Id.* at 251.

Moreover, the district court has jurisdiction at any time to "correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. And under rule 27.03, a district court has the power to correct a sentence despite an earlier denial of postconviction relief. *State v. Stutelberg*, 435 N.W.2d 632, 633-34 (Minn. App. 1989); *see also State v. Henderson*, 706 N.W.2d 758, 759-60 (Minn. 2005) (determining that failure to raise a sentencing issue did not waive its consideration on later review); *Pladson v. State*, 385 N.W.2d 406, 408 (Minn. App. 1986) (concluding that the defendant's prior petition did not bar his claim that the failure to give him credit for jail time was a denial of equal protection).

We conclude that because Osborne's failure to raise the issue of jail credit in his direct appeal was not deliberate or inexcusable, we may review the claim in the interests of justice.

II

The district court denied Osborne's motion for additional jail credit, finding that the state did not have probable cause to charge Osborne with conspiracy until May 21, 2001. According to the criminal complaint against Osborne, beginning in 1998, the police had numerous contacts with Osborne and his co-conspirators, Junior and Senior, through controlled purchases of crack cocaine and through various searches. Osborne argues that the state had probable cause to charge him with conspiracy to commit first-degree controlled substance crime on the first date of the first police contact noted in the criminal complaint, August 21, 1998, because the police had strong circumstantial evidence that he and his co-conspirators had a plan to sell a large amount of drugs and his co-conspirators had committed overt acts in furtherance of the plan by selling drugs prior to May 2001. We disagree.

A defendant is entitled to credit for all time spent in custody following arrest, including time spent in custody on other charges, beginning on the date the prosecutor acquires probable cause to charge defendant with the offense for which he or she was arrested. *See, e.g.*, *State v. Morales*, 532 N.W.2d 268, 270 (Minn. App. 1995); *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994). Probable cause exists where the facts would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person under consideration is guilty of a crime. *State v. Carlson*, 267 N.W.2d 170, 173 (Minn. 1978). "[T]he defendant carries the burden of establishing that he is entitled to jail credit . . ." *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). A reviewing court applies a clear-error standard to factual findings underlying jail-credit

determinations. *See Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003) (applying clear-error standard to district court's findings on "functional equivalency"). Questions of law, however, are subject to de novo review. *See id.* at 525-28 (reviewing de novo legal question of whether to grant jail credit for confinement in juvenile facility).

Here, the district court's determination that probable cause did not attach until after May 2001 is supported by the record. The bulk of the police investigation did not occur until the summer of 2001, and the state did not have probable cause to charge Osborne with conspiracy until after it gathered the evidence during that investigation, which included, among other things: (1) several contacts by Rochester police with Osborne, Junior and Senior; (2) the execution of a search warrant at a Rochester residence at which Osborne, Junior and Senior were also searched; and (3) eleven controlled purchases conducted through CIs during the summer of 2001.

The elements of conspiracy to commit a controlled substance crime are "(1) an agreement between two or more people to commit a crime and (2) an overt act in furtherance of the conspiracy." *State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001); *see also* Minn. Stat. § 607.175 (2008) (stating that "[w]hoever conspires with another to commit a crime and in furtherance of the conspiracy one or more of the parties does some overt act in furtherance of such conspiracy" is guilty of the offense of conspiracy). A "subjective meeting of the minds" is not necessary to prove the element of "agreement" but there must be "evidence that objectively indicates an agreement." *State v. Hatfield*, 639 N.W.2d 372, 376 (Minn. 2002). "Conspiracy need not be established by direct

evidence, but may be inferred from the circumstances." *State v. Watson*, 433 N.W.2d 110, 114-15 (Minn. App. 1988), *review denied* (Minn. Feb. 10, 1989).

In this case, while overt acts of Osborne and his co-conspirators selling crack cocaine occurred before May 2001, there is little evidence to show that a conspiracy existed between the individuals—only rarely was more than one individual present for the controlled purchases[1]; Osborne was never present with either co-conspirator for any of the controlled purchases; and not until July 2001 did the police encounter all individuals at the same residence. And the fact that Junior and Senior were together during controlled purchases, albeit rarely, could have been due to their relation, rather than their being part of a conspiracy. Further, the record contains no evidence that the co-conspirators shared a residence, and the complaint lists five separate addresses where the controlled purchases and searches occurred.

Osborne relies on *State v. Vereb* to argue that the police had probable cause to charge him with conspiracy in 1998. 643 N.W.2d 342 (Minn. App. 2002). There, the defendant appealed his conviction for conspiracy to manufacture methamphetamine, arguing that there was no evidence of an agreement between his co-conspirator and him to commit the crime. *Id.* at 348. But the *Vereb* court determined that the police had circumstantial evidence from which they could infer that there was an agreement between the co-conspirators because, among other reasons, the police officers knew at the time of the arrest that the defendant and his co-conspirator had entered a Wal-Mart *together* to

[1] There was a total of sixteen controlled purchases, and of those sixteen, only three of them occurred when more than one of the co-conspirators was present. Additionally, the police conducted six searches and all three co-conspirators were present at only one.

purchase supplies to make drugs. *Id.* Therefore, evidence of collusion between the two co-conspirators existed from the beginning of the investigation. *Id.* Here, in contrast, no evidence of collusion between the co-conspirators existed until July 2001, when the police encountered all three of the co-conspirators together at a residence.

We conclude in this case that the police did not have probable cause to charge Osborne with conspiracy until after the police investigation was heightened during the summer of 2001 and after the police encountered all members of the conspiracy together in July 2001. *See Morales*, 532 N.W.2d at 269-70 (determining that probable cause existed after the police obtained corroborating evidence). Thus, we hold that because the police lacked sufficient evidence to show that Osborne, Junior, and Senior were working together pursuant to an agreement prior to the summer of 2001, the district court did not err in denying Osborne jail credit for time spent in juvenile detention facilities prior to May 2001. We therefore decline to consider whether the level of confinement and limitations imposed in the juvenile detention facilities in which Osborne spent time were the functional equivalent of those imposed at a jail, workhouse, or regional correctional facility. *See Asfaha*, 665 N.W.2d at 528 (holding that a defendant is entitled to credit for time spent in institutions, including juvenile detention facilities, when the "confinements and limitations imposed" in the institution are the "functional equivalent of those imposed at a jail, workhouse, or regional correctional facility").

III.

Osborne asserts that prior to his supervised release on December 1, 2003, he served 330 days at correctional facilities in St. Cloud and Faribault and that he also

served 62 days in a work-release program. The district court awarded jail credit to Osborne for time spent in the custody of the DOC from November 4, 2002 to November 27, 2004, but later revoked some of the jail credit, awarding Osborne credit only for the following time periods: November 4, 2002 to September 30, 2003, and March 17, 2004 to July 6, 2004. Osborne argues that the district court erred in denying him jail credit, claiming that he is entitled to receive 62 days of additional jail credit for his time in a work-release program. We conclude that the district court's findings are insufficient to support the denial of jail credit for the 62 days Osborne spent in a work-release program.

"[T]he defendant carries the burden of establishing that he is entitled to jail credit . . ." *Willis*, 376 N.W.2d at 428 n.1. A reviewing court applies a clear-error standard to factual findings underlying jail-credit determinations. *Asfaha*, 665 N.W.2d at 528. Questions of law, however, are subject to de novo review. *Id.* at 525-28.

The district court shall assure that the record accurately reflects all time spent in custody. Minn. R. Crim. P. 27.03, subd. 4(B). Jail credit "shall reflect time spent in confinement . . . Such credit is limited to time spent in jails, workhouses, and regional correctional facilities." Minn. Sent. Guidelines III.C. And when computing jail credit, each day or portion of a day in jail should be counted as one full day of credit. Minn. Sent. Guidelines cmt. III.C.05.

The district court summarily denied Osborne's motion for 62 days of jail credit for time spent in a work-release program. The record lacks evidence regarding either the dates that Osborne spent in a work-release program, or more importantly, the specifics of the program—such as whether it was considered a workhouse or an out-of-jail living

situation—except for a brief mention in a 2004 Probation Violation Report of Osborne attending a work-release program in a halfway house on September 30, 2003. Moreover, the record lacks any explanation of why the district court initially awarded Osborne jail credit for the 62 days in question and then revoked it. We cannot ascertain the evidence upon which the district court relied or its reasoning in granting and then reducing the jail credit.[2]

Because the district court's findings and the record are insufficient to conduct a meaningful review, we reverse and remand for findings regarding Osborne's claim of jail credit for the 62 days he allegedly spent in a work-release program prior to his supervised release from prison in December 2003.

Affirmed in part, reversed in part, and remanded.

[2] The record contains a pre-sentence investigation report that was completed in 2002. For the time subsequent to 2002, the only information about time Osborne spent in jail or on work-release is contained in several DOC print-outs that are attached to Osborne's motion for additional jail credit. But the print-outs provide no explanation of why, in 2005, Osborne's jail credit was calculated to include the 62 days he spent in the work-release program, but in 2007, the 62 days were omitted as jail credit, along with other dates.