STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1009

State of Minnesota,
Respondent,

vs.

Dezeray Marie Roblero-Barrios,
Appellant.

Filed November 3, 2009
Affirmed
Connolly, Judge

Carlton County District Court
File No. 09-CR-07-2264

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

Thomas H. Pertler, Carlton County Attorney, Dennis Genereau, Jr., Assistant County Attorney, Room 202, Courthouse, P.O. Box 300, Carlton, MN 55718-0300 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of custody credit relating to his sentence for fourth-degree assault on the basis that placement in protective isolation and on administrative restriction altered the terms of his civil commitment. Because we find the duration of appellant's civil commitment was not increased as a result of his new conviction, we affirm.

FACTS

Appellant Dezeray Marie Roblero-Barrios was committed to the Minnesota Sex Offender Program (MSOP) as a sexually dangerous person and a sexual psychopathic personality on June 5, 2001. Appellant resided at MSOP's Moose Lake facility (MSOP-Moose Lake). Appellant had been placed on administrative restriction, which included shortened breaks and limited request forms, because of a previous incident during which appellant assaulted two MSOP-Moose Lake security counselors by biting and scratching them.

On August 8, 2007, appellant began to argue with MSOP-Moose Lake staff members over his request forms and the duration of his break. When staff members directed appellant to stop shouting and return to his room, appellant refused and assistance was requested to escort appellant back to his room. As a security counselor turned away to use her radio, appellant attempted to punch her in the head, but the punch landed on her lower left abdomen, leaving a two-inch abrasion. The security counselor was seven months pregnant at the time. While trying to restrain appellant, other security

counselors were elbowed, bitten, scratched, and hit by appellant. Eventually, appellant was restrained and placed into the protective isolation (PI) unit of the MSOP-Moose Lake facility. As a result of this incident, appellant was charged with four counts of fourth-degree assault in violation of Minn. Stat. § 609.2231, subd. 3a(b)(1) (Supp. 2007).

Appellant subsequently pleaded guilty to one count of fourth-degree assault for biting a MSOP-Moose Lake security counselor. All other counts were dismissed. Appellant was ultimately committed to the commissioner of corrections for a mandatory minimum of one year and a day, with jail credit of 153 days.

Appellant then sought custody credit for additional time spent in the Carlton County Jail for court appearances and for time spent in protective isolation and on administrative restriction at MSOP-Moose Lake from January 4 through April 23, 2008. The district court granted the credit for time spent in jail, but denied credit for any time spent at MSOP-Moose Lake. Appellant moved for reconsideration supported by copies of appellant's medical records from MSOP-Moose Lake, documenting his placement in protective isolation and administrative restrictions. The district court again denied credit for his time spent at MSOP-Moose Lake.

Appellant appealed the reconsideration order. By order opinion, this court denied the appeal as untimely. *State v. Roblero-Barrios*, No. A09-63 (Minn. App. Feb. 3, 2009). Appellant filed a new Rule 27 motion for custody credit for the time spent in protective isolation and on administrative restriction. The district court again denied appellant's request. This appeal follows.

D E C I S I O N

"The decision to award custody credit is not discretionary with the district court." *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008) (citing Minn. R. Crim. P. 27.03, subd. 4(B)). "'Awards of jail credit are governed by principles of fairness and equity and must be determined on a case-by-case basis.'" *State v. Arend*, 648 N.W.2d 746, 748 (Minn. App. 2002) (quoting *State v. Bradley*, 629 N.W.2d 462, 464 (Minn. App. 2001), *review denied* (Minn. Aug. 15, 2001)). The "defendant bears the burden of establishing that [he] is entitled to jail credit." *State v. Garcia*, 683 N.W.2d 294, 297 (Minn. 2004).

When imposing a sentence, the district court is charged with "assur[ing] that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed." Minn. R. Crim. P. 27.03, subd. 4(B). Generally, custody credit is only awarded for time spent in jails, workhouses, and regional correctional facilities and will not be given for time spent in residential treatment facilities. Minn. Sent. Guidelines cmt. III.C.04 (2006).

In *Asfaha v. State*, the Minnesota Supreme Court held that fairness and equity require that jail credit be given when a residential treatment facility "imposes essentially the same limitations on a person's freedom as a jail, workhouse, or regional correctional facility." 665 N.W.2d 523, 527 (Minn. 2003). The program and facility at issue in *Asfaha* was the Intensive Treatment Center (ITC) program at the Bar-None juvenile facility in Anoka, Minnesota. *Id.* at 524. Completion of the ITC program was a condition of Asfaha's probation. *Id.* Agreeing with the district court that the security measures utilized by the facility and the restrictions imposed upon its residents were the

functional equivalent of a juvenile correctional facility for which credit had been previously awarded, the court emphasized that the proper focus was on the "level of confinement and limitations imposed," rather than the label attached to a particular facility. *Id.* at 528. The Minnesota Supreme Court reinstated the district court's decision, permitting Asfaha credit for the time spent in the ITC program. *Id.*

In *State v. Razmyslowski*, this court held that the restrictions imposed upon and the confinement of patients in the Intensive Treatment Program for Sexual Aggressives (ITPSA) at the Minnesota Security Hospital in St. Peter were substantially similar to those present in the ITC program at Bar-None and thus the functional equivalent of a jail, workhouse, or correctional facility. 668 N.W.2d 681, 684 (Minn. App. 2003). Accordingly, this court reversed the district court's decision denying jail credit and remanded the case for calculation of credit owed to Razmyslowski for time spent in the ITPSA program. *Id.* at 684. Like the defendant in *Asfaha*, completion of the ITPSA program had been a condition of Razmyslowski's probation. *Id.* at 682.

However, in *Johnson*, the Minnesota Supreme Court declined to award custody credit to a civilly-committed defendant, despite the fact that the facility at issue was "without dispute the functional equivalent of a jail," holding that "[t]here is no evidence in the record that the terms of Johnson's confinement under civil commitment have been altered because of the criminal charges." 744 N.W.2d at 380. Johnson was under civil commitment as a sexual offender in the Minnesota Security Hospital in St. Peter. *Id.* at 378. He was arrested for making terroristic threats against various staff members and subsequently transferred to MSOP-Moose Lake. *Id.*

Johnson pleaded guilty to one count of terroristic threats and was sentenced to 60 months in prison, which was stayed for five years. *Id.* Johnson was required to serve 60 days in jail as a condition of his probation. *Id.* Johnson sought custody credit for the time spent at MSOP-Moose Lake, arguing that his confinement was the functional equivalent of incarceration. *Id.* "The district court denied Johnson's request for custody credit for the time spent in Moose Lake because his civil commitment and the confinement in Moose Lake were unrelated to the crime for which he was being sentenced." *Id.* at 378.

Acknowledging that MSOP-Moose Lake is "a facility that is without dispute the functional equivalent of a jail," the Minnesota Supreme Court nevertheless opined:

> Johnson's case is different, however, because of the reasons for which he was in Moose Lake and St. Peter. Johnson was not sentenced to serve time at either facility, nor was he there as a condition of probation. He was in a secure treatment facility for purposes of treatment. Mindful of that purpose, we decline to conflate treatment and punishment.

Id. at 380. The court went on to distinguish Johnson's case from *Asfaha* and a similarly situated defendant in *State v. Arden*, 424 N.W.2d 293 (Minn. 1988), who was charged with terroristic threats while in prison for a prior offense. *Id.* at 379-80. "In contrast, the defendant in *Asfaha* was in a facility as a condition of probation, and the defendant in *Arden* was in prison on a determinant sentence for attempted second-degree murder." *Id.* at 380 (citations omitted).

Emphasizing the lack of any durational effects on the "terms" of Johnson's confinement, the court held that

> Johnson was not kept in jail longer because of inability to post bail; he could only be released to his previous living situation in the secure treatment facility. If he had pleaded guilty earlier, he might have served the 60 days earlier, but he would still have been returned to a secure treatment facility, because he was civilly committed.

Id.

Appellant argues that his circumstances are distinguishable from those present in *Johnson* because his placement in the PI unit at MSOP-Moose Lake and on administrative restriction following the incident up until his sentence was executed altered the "terms" of his civil commitment. We disagree. Appellant focuses on his separation from the normal living environment; "locked-door status"; loss of privileges; restricted access to his possessions; and limited escorted breaks as well as being subject to hourly checks in support of his altered "terms." While these are all factual considerations which may be considered when the question of whether a particular residential facility is the functional equivalent of a jail, workhouse, or correctional facility, the Minnesota Supreme Court in *Johnson* had already determined that MSOP-Moose Lake was the functional equivalent of a jail. *Id.*; *see also Asfaha*, 665 N.W.2d at 528 (holding that it is a factual determination whether "the level of confinement and limitations imposed are the functional equivalent of those imposed at a jail, workhouse, or regional correctional facility").

Moreover, the court's use of the word "terms" in *Johnson* was not in reference to the descriptive characteristics of the facility or the confinement itself, but rather the duration of Johnson's civil commitment. 744 N.W.2d at 380. The *Johnson* court was concerned with whether Johnson's confinement at MSOP-Moose Lake increased the

length of his civil commitment, not whether the characteristics of his confinement had changed from the St. Peter facility to the Moose Lake facility. *Id.* Because Johnson was indefinitely civilly committed, an award of custody credit would have no effect on the duration of Johnson's civil commitment. *Id.*

We find that appellant's circumstances are nearly identical to Johnson's. Like Johnson, appellant was civilly committed as a sex offender and charged while already committed to a secure treatment facility. Like Johnson, appellant's subsequent criminal sentence required him to serve time. And, like Johnson, appellant seeks custody credit for time spent at MSOP-Moose Lake. While it appears from the record that appellant was moved from the normal living population at MSOP-Moose Lake into the PI unit after charges were filed but prior to his guilty plea and the execution of his sentence, these factors did not increase the durational terms of his civil commitment.

Protective isolation may be used to "ensure a safe, secure, and orderly environment for the treatment program." Minn. R. 9515.3090, subp. 1 (2007). Protective isolation is "a way of defusing or containing dangerous behavior that is uncontrollable by any other means." *Id.*, subp. 4. Appellant had a history of assaulting staff. At the time of the August 8, 2007 assault, appellant was already on administrative restriction for scratching and biting two MSOP-Moose Lake security counselors. Notably, evidence in appellant's medical records shows that as appellant exhibited appropriate behavior control, his privileges increased.

Moreover, Minn. Stat. § 253B.02, subd. 24 (2008) authorizes administrative restriction for civilly committed patients who are suspected of or charged with

committing a crime; the subject of a criminal investigation; awaiting sentencing following a conviction; or awaiting transfer to a correctional facility. "Administrative restriction may include increased monitoring, program limitations, loss of privileges, restricted access to and use of possessions, and separation of a patient from the normal living environment . . . ." Minn. Stat. § 253B.02, subd. 24. Appellant returned to MSOP-Moose Lake prior to the resolution of the new assault charges—before he pleaded guilty and before he was sentenced. The very administrative restrictions complained of by appellant are expressly authorized by statute.[1] Furthermore, evidence in appellant's medical records similarly shows that once appellant exhibited appropriate behavior control, his restrictions were removed.

Additionally, evidence in appellant's medical records shows appellant's privileges were again restricted in response to an incident on March 29, 2008, involving another patient and being verbally abusive towards the MSOP-Moose Lake staff. Appellant's own behavior and individual choices were dispositive in determining the extent of his restrictions and loss of privileges.

Appellant also argues that his case is analogous to *State v. Bonafide*, 457 N.W.2d 211, 213-15 (Minn. App. 1990), in which this court permitted custody credit for presentence time spent under a civil commitment order once it was determined the defendant was not competent to proceed to trial. This court's opinion in *Bonafide* again

[1] Significantly, protective isolation is not the same as administrative restriction. Minn. Stat. § 253B.02, subd. 24. While protective isolation appears to be more of a behavioral management tool, *see* Minn. R. 9515.3090, subp. 1, administrative restriction applies only to those patients who are suspected of having committed a crime or are otherwise involved in criminal proceedings. Minn. Stat. § 253B.02, subd. 24.

rested on a concern for the length of time spent in confinement. *Id.* at 213 ("The rationale for crediting presentence confinement is that an indigent defendant held on a bailable offense might otherwise serve a longer sentence solely because of indigency, that is, the inability to post bail."). The Minnesota Supreme Court expressly distinguished the circumstances of individuals like appellant, who were charged while *already committed* to a secure treatment facility, from the defendant in *Bonafide*, who "was civilly committed under Rule 20 proceedings *after* being charged." *Johnson*, 744 N.W.2d at 380.

Similarly, in *Bonafide*, this court held that "[w]hether pretrial mental commitment is confinement 'in connection with' the offense should rest on a broader basis than whether the cluster of events triggering the proceedings are identical." 457 N.W.2d at 214. Appellant asserts that this language supports an award of custody credit for time spent in protective isolation and on administrative restriction at MSOP-Moose Lake. We disagree. This language merely reflects the fact that custody credit is governed by principles of fairness and equity and can only be addressed on a case-by-case basis. *State v. Dulski*, 363 N.W.2d 307, 310 (Minn. 1985). The broader basis in appellant's case is that appellant was already civilly committed when he was charged with four counts of fourth-degree assault. The length of his preexisting civil commitment was in no way altered on account of these charges or his subsequent conviction.

While appellant resided at a residential treatment facility that is the functional equivalent of a jail, his indefinite civil commitment and confinement at MSOP-Moose Lake preceded the fourth-degree assault conviction for which appellant now seeks

custody credit. The terms of appellant's civil confinement at MSOP-Moose Lake were not increased "durationally" on account of appellant's new conviction. Appellant's placement in protective isolation and on administrative restriction was in accordance with the statutory provisions governing administrative restriction and in response to appellant's continued abusive behavior, and utilized to ensure the safety and security of MSOP-Moose Lake's staff and patients.

Finally, as the Minnesota Supreme Court recognized in *Johnson*, Johnson "was in a secure treatment facility for purposes of treatment. Mindful of that purpose, we decline to conflate treatment and punishment." 744 N.W.2d at 380. Here, too, we emphasize that appellant was first and foremost confined to MSOP-Moose Lake for the purposes of treatment, not punishment. Further, MSOP-Moose Lake's treatment focus should not be lost. Awarding appellant custody credit for essentially abusive behavior while in treatment risks diminishing the incentive to cooperate with the MSOP-Moose Lake program. As noted by this court in *Bradley*,

> on a common-sense, practical basis, it could be argued that awarding jail credit for time spent in a treatment program would tend to diminish the incentive to succeed in treatment. Those who failed in treatment (the only individuals who would ever raise the jail credit issue we address here) would be assured that when the "need" arose, the time spent in "failed" treatment would be considered as time spent in "punishment" and fully credited against a prison sentence. Every incentive, it seems to us, should be invoked to make treatment successful; failure should not be rewarded.

629 N.W.2d at 466-67.

Affirmed.