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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-918**

State of Minnesota,
Respondent,

vs.

Robert John Novak,
Appellant.

**Filed January 25, 2011
Affirmed
Stoneburner, Judge**

Anoka County District Court
File No. 02K699010847

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robert M. A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard A. Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Toussaint, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's denial of jail credit for time he spent serving a Wyoming sentence after he requested execution of his prior Minnesota sentences. We affirm.

FACTS

In 2001, the Anoka County District Court sentenced appellant Robert John Novak to 60 months in prison for a conviction of felony possession of a firearm by an ineligible person and a concurrent 27 months for a conviction of terroristic threats. The district court stayed execution of the sentences and placed Novak on probation. In September 2002, a warrant was issued for Novak's arrest for alleged probation violations. Soon after the warrant was issued, the district court authorized out-of-state execution of the warrant.

In April 2006, Novak received stayed sentences in Wyoming for convictions of burglary and prescription fraud. Those sentences were executed in February 2008, after Novak violated probation. Novak was sent to prison in Wyoming. In October 2008, and several times thereafter, Novak wrote to the Anoka County Attorney and district court seeking execution of his Minnesota sentences concurrent with his Wyoming sentences. He was informed by the county attorney that what he sought was not possible. In March 2009, Novak moved for modification of his Minnesota sentences and requested a hearing. The district court denied the motion without a hearing.

Novak was returned to Minnesota after serving his sentences in Wyoming. In April 2010, the district court revoked Novak's probation and executed the Minnesota sentences. The district court awarded Novak 295 days of jail credit for time spent in jail in Minnesota in connection with the Minnesota offenses. And the court awarded him an additional 365 days based on its rationale that Minnesota detainers kept Novak from participating in beneficial and otherwise available prison programming in Wyoming.¹ Novak appeals the district court's denial of his request for jail credit for all of the time that he was incarcerated in Wyoming.

DECISION

"[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). The decision whether or not to grant jail credit is not discretionary with the district court. *State v. Doyle*, 386 N.W.2d 352, 354 (Minn. App. 1986). "A district court's decision whether to award credit is a mixed question of fact and law; the [district] court must determine the circumstances of the custody the defendant seeks credit for, and then apply the rules to those circumstances." *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). Accordingly, appellate courts review the district court's factual findings underpinning jail-credit decisions for clear error and its legal conclusions de novo. *Id.*; see *Asfaha v. State*, 665 N.W.2d 523, 525–28 (Minn. 2003) (reviewing fact findings in a jail-credit determination

¹ The state does not agree with this award of jail credit but has not challenged it on appeal.

under the clearly erroneous standard). Because the jail-credit issue in this case turns on applying the proper legal test, which is a matter of law, the standard of review is de novo.

Under Minnesota caselaw, a defendant incarcerated in another jurisdiction for an offense committed in that jurisdiction is not entitled to jail credit in Minnesota for the out-of-state offense. *State v. Parr*, 414 N.W.2d 776, 779 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). “[J]ail credit should be given for time spent in jail in another state solely in connection with the [Minnesota] offense of sentencing while awaiting extradition for prosecution” but not for jail time spent out of state in connection with an out-of-state charge. *Willis*, 376 N.W.2d at 428–29.

In *Willis*, the State of Minnesota requested that the defendant be extradited to face Minnesota charges while he was in Illinois custody pending the resolution of Illinois charges. *Id.* at 428. The supreme court granted Willis jail credit only for the time he spent in custody in Illinois on a hold from Minnesota after he had been acquitted of the Illinois charges. *Id.* at 428–29. Willis did not receive jail credit for the custody in Illinois while the Illinois charges and the Minnesota hold were pending. *Id.*

In this case, Novak concedes that the few days he spent in out-of-state custody on a hold from Minnesota after expiration of his Wyoming sentence were included in the 295 days of jail credit that he received. And Novak has not shown that any additional time he spent in out-of-state custody was connected in any way to his Minnesota offenses. Therefore, Novak is not entitled to the additional jail credit he seeks.

Novak relies on *State v. Jennings*, 448 N.W.2d 374 (Minn. App. 1989). In that case, Jennings received a stay of execution for a Minnesota offense. *Id.* at 374. He was

later convicted and sentenced in California for a California offense. *Id.* Under *Willis*, Jennings would not have been entitled to credit against his Minnesota sentence for time served in California. But Jennings demanded execution of his Minnesota sentence while serving his California sentence so the sentences would, in effect, run concurrently. *Id.* The district court denied his demand for execution. *Id.* This court reversed based on (1) the preference for concurrent sentencing expressed in the Minnesota Sentencing Guidelines; (2) a recognition that “[i]t is the second sentencing court which specifies whether the sentences run concurrently or consecutively;” and (3) California’s “preference for concurrent sentencing in the multi-state sentencing context.” *Id.* at 375.

Here, the Wyoming court ordered that Novak’s felony prescription-fraud sentence be consecutive to another Wyoming sentence. And, unlike California, Wyoming has not expressed a preference for concurrent sentencing in the multi-state sentencing context. *Apodaca v. State*, 891 P.2d 83, 85 (Wyo. 1995) (stating that “[Wyoming’s] rule is clear that, when an individual is convicted for separate crimes in separate cases, the sentencing judge has discretion to determine whether the sentences shall be served consecutively or concurrently and there is no presumption of a concurrent sentencing”). We conclude that *Jennings* does not support an award of jail credit for Novak’s incarceration for Wyoming offenses.

Novak also argues that principles of fairness entitle him to additional jail credit under *State v. Bauman*, 388 N.W.2d 795 (Minn. 1986), *review denied* (Minn. Aug. 20, 1986). In that case, the defendant was arrested on a Minnesota charge and later released to federal authorities in connection with a federal indictment. *Id.* at 795–96. The

defendant pleaded guilty to the federal charge and was committed to a federal correctional facility. *Id.* at 796. Approximately two years later, the defendant pleaded guilty to the Minnesota charge, which was filed while he was in federal custody. *Id.* The district court specifically imposed a sentence to run concurrently with the defendant's federal sentence, but denied the defendant's request for jail credit for his federal-custody time. *Id.* On appeal, this court recognized that "[defendant] was continuously in custody from his arrest partly because of the federal charge and partly because of a hold placed on him by federal authorities at the direction of Anoka County." *Id.* at 797. Nevertheless, without referencing the *Willis* rule, this court held that defendant was entitled to jail credit for the *entire* time he spent in federal custody since his arrest. *Id.* This court reasoned that the failure to award credit transformed the defendant's *concurrent* sentence into a de facto consecutive sentence. *Id.*

Novak argues that, similar to *Bauman*, the failure to award him full credit for the time he spent in out-of-state custody turns his sentences into partial de facto consecutive sentences. But *Bauman* is factually distinguishable from the instant case because the Wyoming court did not make Wyoming's sentences concurrent to any prior sentences. Therefore, Novak's argument that *Bauman* supports an award of jail credit is not persuasive. We conclude that the district court did not err by denying Novak's request for jail credit for additional time served on his Wyoming sentences.

Affirmed.