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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-430**

State of Minnesota,
Respondent,

vs.

Julio Cesar Astudillo-Alvarado,
Appellant.

**Filed August 29, 2011
Reversed and remanded
Wright, Judge**

Cass County District Court
File No. 11-K6-99-000889

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

Christopher Strandlie, Cass County Attorney, Walker, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Wright, Judge; and Willis,
Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the custody credit he received after the execution of his sentence following a probation violation. Appellant argues that he is entitled to custody credit for time he spent (1) in the custody of the United States Immigration and Naturalization Service (INS) before his removal from the United States, (2) in federal custody for a federal criminal-immigration violation, and (3) in the custody of the New York City Department of Corrections while awaiting extradition to Minnesota for probation-violation proceedings. Because the district court erred by declining to grant custody credit for appellant's incarceration outside Minnesota that was solely in connection with the Minnesota offense, we reverse and remand.

FACTS

In November 1999, appellant Jose Astudillo-Alvarado pleaded guilty to first-degree possession of a controlled substance in Cass County. On December 6, 1999, the district court sentenced Astudillo-Alvarado to 98 months' imprisonment with 86 days' credit for time he spent in custody before sentencing. The district court stayed the execution of the sentence and placed Astudillo-Alvarado on unsupervised probation for 30 years. Because Astudillo-Alvarado, a native of Ecuador, was subject to removal from the United States, the principal condition of his probation was that he not unlawfully reenter the United States. Following the sentencing hearing, Astudillo-Alvarado was taken into INS custody, and he was removed from the United States on January 13, 2000.

In 2006, Astudillo-Alvarado returned to the United States. On June 30, 2009, a grand jury of the United States District Court for the Southern District of New York charged Astudillo-Alvarado by indictment with unlawful reentry into the United States by a deported alien, a violation of 8 U.S.C. § 1326(a), (b)(1) (2000). Astudillo-Alvarado was arrested on that charge on July 1, 2009, and detained in federal custody. While Astudillo-Alvarado was in federal custody, the Cass County District Court issued a warrant for his arrest for violating the conditions of his probation related to the 1999 controlled-substance offense.

Astudillo-Alvarado pleaded guilty to the federal unlawful-reentry charge, and on January 12, 2010, he received a sentence of time served. He was transferred to the custody of the New York City Department of Corrections, where he remained incarcerated while awaiting extradition to Minnesota. On February 2, 2010, he was transported to Minnesota. At a probation-violation hearing on February 11, 2010, the district court found that Astudillo-Alvarado had violated the terms of his probation by unlawfully reentering the United States. The district court revoked Astudillo-Alvarado's probation, ordered him to pay restitution, and executed the sentence of 98 months' imprisonment. The district court granted Astudillo-Alvarado custody credit for 94 days. Astudillo-Alvarado appealed the probation revocation, which we affirmed in *State v. Astudillo-Alvarado*, No. A10-856 (Minn. App. Nov. 23, 2010) (order).

On January 14, 2011, Astudillo-Alvarado moved the district court to correct the custody credit granted for the Minnesota offense, arguing that he was erroneously denied custody credit for 38 days spent in INS custody before his January 2000 removal from

the United States, 196 days of incarceration for the federal immigration offense after his reentry into the United States, and 21 days of incarceration after he satisfied his federal sentence and while he waited to be transferred to Minnesota. In sum, Astudillo-Alvarado sought 349 days of custody credit, including the 94 days of custody credit that the district court had already granted. The district court denied the motion, and this appeal followed.

DECISION

Astudillo-Alvarado argues that he is entitled to custody credit for time he spent in custody (1) while awaiting removal from the United States in 1999 and 2000, (2) while on federal charges of unlawful reentry in 2009 and 2010, and (3) while awaiting extradition to Minnesota in 2010. The defendant bears the burden of establishing that he is entitled to custody credit. *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). The decision whether to grant custody credit is not discretionary with the district court. *State v. Doyle*, 386 N.W.2d 352, 354 (Minn. App. 1986). Custody credit shall be awarded for all time “spent in custody in connection with the offense or behavioral incident being sentenced.” Minn. R. Crim. P. 27.03, subd. 4(B).

The district court’s decision to award custody credit presents a mixed question of fact and law. *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). The district court must first determine the factual circumstances of the custody for which the defendant seeks custody credit; after doing so, the district court applies the law governing custody credit to those circumstances. *Id.* Accordingly, we review the district court’s factual findings for clear error and its legal conclusions de novo. *Id.*

A defendant ordinarily is entitled to custody credit toward a Minnesota sentence for all time spent in custody after the defendant's arrest on the charge in the proceedings in which credit is sought until the execution of the sentence for that offense. *State v. Hadgu*, 681 N.W.2d 30, 32-33 (Minn. App. 2004), *review denied* (Minn. Sept. 21, 2004). A defendant ordinarily is not entitled to custody credit toward a Minnesota sentence for a period in which the defendant is detained outside Minnesota for an out-of-state offense. *State ex rel. Linehan v. Wood*, 397 N.W.2d 341, 342 (Minn. 1986). Custody credit is granted, however, if the out-of-state incarceration is "solely in connection" with the Minnesota offense. *Willis*, 376 N.W.2d at 428.

When the district court granted Astudillo-Alvarado custody credit for 94 days, it held that Astudillo-Alvarado would

receive credit for the eighty-six days prior to his plea in 1999, and he will receive credit for any time since he came back to Minnesota. He does not receive credit for the time that he was in the custody of the INS because he was not available to the State of Minnesota until he was delivered here.

Thus, the district court denied Astudillo-Alvarado's custody credit for any period of time after his December 6, 1999 sentencing on the Minnesota offense¹ until he returned to Minnesota on February 2, 2010.

We identify three periods of incarceration for which Astudillo-Alvarado claims the district court erroneously denied him custody credit: (1) the period in INS custody from

¹ Astudillo-Alvarado pleaded guilty to the controlled-substance offense on November 1, 1999. The record establishes that the 86 days of custody credit includes time served from the day after Astudillo-Alvarado's arrest on September 11, 1999, to his December 6, 1999 sentencing.

December 7, 1999, to January 13, 2000, while awaiting removal from the United States; (2) the period of incarceration on federal immigration charges from July 1, 2009, to January 12, 2010; and (3) the period from January 13, 2010, to February 2, 2010, while awaiting extradition to Minnesota.

Astudillo-Alvarado argues that he is entitled to custody credit for the time he spent in INS custody while awaiting removal from the United States following his 1999 Minnesota controlled-substance conviction. We agree. A defendant is entitled to custody credit for time spent in INS custody in connection with a Minnesota offense. *Hadgu*, 681 N.W.2d at 33. In *Hadgu*, after a jury found him guilty of a controlled-substance crime, but before sentencing, the defendant posted bail. *Id.* at 32. Shortly thereafter, INS placed him in custody for approximately two weeks, after which the district court stayed imposition of his sentence, ordered him to serve 90 days, and granted custody credit for the period during which he was incarcerated by INS. *Id.* We affirmed, concluding that custody credit is appropriate for time spent in INS custody when the time was served “in connection with” the offense on which the custody credit is sought. *Id.* (citing Minn. R. Crim. P. 27.03, subd. 4(B)). Because the INS custody was directly related to his Minnesota offense, we held that the district court properly granted custody credit for that period. *Id.*

Here, Astudillo-Alvarado was held in INS custody solely to facilitate his removal from the United States under the terms of his probation for the 1999 Minnesota offense. Because the time he spent in INS custody was in connection with his Minnesota offense, he is entitled to custody credit for that period.

Astudillo-Alvarado next argues that he is entitled to custody credit for the period he spent in federal custody between July 1, 2009, when he was arrested for violating federal immigration law, and January 12, 2010, when he pleaded guilty to the federal offense and was sentenced to time served. This argument is unavailing. Astudillo-Alvarado was held in federal custody for a federal immigration violation. He is not entitled to custody credit because the incarceration was not “solely in connection” with the Minnesota offense. *See Willis*, 376 N.W.2d at 428. In *Willis*, while the defendant was held in custody in Illinois pending the resolution of Illinois charges, Minnesota requested his extradition to face Minnesota charges. *Id.* The Minnesota Supreme Court held that custody credit should be given for a period of incarceration in another state that is “*solely in connection* with the [Minnesota] offense of sentencing while awaiting extradition for prosecution,” not for a period of incarceration in connection with an out-of-state charge. *Id.* (emphasis added). Thus, the defendant was entitled to custody credit toward his Minnesota sentence only for the time he spent in Illinois custody after he was acquitted of the Illinois charges because this period of incarceration was solely in connection with the Minnesota offenses. *Id.* at 428-29. But the defendant was not entitled to custody credit for the time he spent in Illinois custody while both the Minnesota extradition request and the Illinois charges were pending. *Id.*

Astudillo-Alvarado does not argue, and the record does not establish, that the time he spent in federal custody before pleading guilty to the federal immigration offense was “solely in connection” with the Minnesota offense or the violation of his probation associated with the Minnesota offense. Although his reentry into the United States

violated the terms of his probation for the Minnesota offense, and the district court issued an arrest warrant for the probation violation while Astudillo-Alvarado was in federal custody, Astudillo-Alvarado was held in federal custody because his reentry into the United States violated a federal criminal statute. Thus, because his custody was not solely in connection with the Minnesota offense, Astudillo-Alvarado is not entitled to custody credit toward the Minnesota sentence for the time he spent in federal custody before he was sentenced to time served for the federal offense.

After his sentence of time served was imposed for the federal offense, however, Astudillo-Alvarado remained incarcerated while awaiting extradition to Minnesota for probation-violation proceedings. Because the sole reason Astudillo-Alvarado was held in custody from January 13, 2010, to February 2, 2010, was to await extradition to Minnesota in connection with the Minnesota offense, he is entitled to custody credit for this time. *See State v. Brown*, 348 N.W.2d 743, 747-48 (Minn. 1984) (granting appellant custody credit for time incarcerated in Illinois awaiting extradition to Minnesota for Minnesota offense), *abrogated on other grounds by State v. Ramey*, 721 N.W.2d 294 (Minn. 2006).

Because Astudillo-Alvarado is entitled to custody credit for the time he spent in INS custody in 1999 and 2000 and the time he spent in custody awaiting extradition to Minnesota in 2010, we reverse the district court's custody-credit decision and remand for the district court to grant custody credit consistent with this opinion.

Reversed and remanded.