

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN VINCENT JONES,

Defendant-Appellee.

UNPUBLISHED

August 25, 2009

No. 284670

Wayne Circuit Court

LC No. 96-004431-2

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

The prosecution appeals by leave granted a trial court order granting defendant credit against his state sentence for time served in federal custody from May 12, 2006, until he is turned over from federal custody to the Michigan Department of Corrections. We vacate the trial court's order and remand for further proceedings consistent with this opinion.

On appeal, the prosecution argues that the trial court erred by granting defendant credit for the time he was in federal custody before he received his federal sentence. We agree.

The issue of whether defendant was entitled to credit for the time he was in federal custody is an issue of law which this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). Statutory construction also presents an issue of law that this Court reviews de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

In particular, the prosecution argues that the trial court erred by relying on *People v Gallagher*, 404 Mich 429; 273 NW2d 440 (1979), because it is a distinguishable and does not provide a justification for giving defendant sentencing credit for the time he was in federal custody prior to his federal sentencing.

In *Gallagher*, *supra* at 439, the defendant argued that he was entitled to credit for time served in a federal prison against his state sentence. Specifically, the facts are as follows:

[The defendant] was sentenced to one to five years imprisonment for the conviction in this case on August 30, 1974 and was released after posting an appeal bond. While his appeal bond was in effect, he served from January 20, 1975 to June 4, 1975 in the Detroit House of Correction on a sentence imposed in an unrelated case and from June 25, 1975 to February 11, 1976 in Federal prison

for Federal income tax violations. . . . [The trial court] ordered that the defendant receive credit for time served on the other state conviction but denied credit for time served on the Federal conviction.” [Id.]

The Court in *Gallagher, supra* at 440, quoted *In re Carey*, 372 Mich 378, 381; 126 NW2d 727 (1964), by stating:

“A defendant who is sentenced in a state court after receiving sentence in a federal court is subject to the same ‘undefined and uncertain contingencies’ about when state sentence begins, as he is in the case of 2 or more state sentences. The reason for the rule aptly applies in both types of cases. Therefore, we hold that where a defendant has been sentenced in Federal court, and is subsequently sentenced in a State court or courts, sentence may not be imposed to commence at the completion or expiration of Federal sentence, in the absence of statutory authority.”

The Court in *Gallagher* held that the order in which a defendant is sentenced in state and federal court did not matter when the actual imprisonment on the federal conviction began before imprisonment on the state conviction and concluded that the defendant was due credit on his state sentence for time served on the federal conviction. *Gallagher, supra* at 440. In other words, the principle underlying the decision in *Gallagher* is that all sentences in Michigan run concurrently unless there is statutory authority requiring otherwise. *People v Prieskorn*, 424 Mich 327, 354; 381 NW2d 646, 657 (1985).

The prosecution argues that *Gallagher* should be distinguished on the ground that defendant in this case had not yet been sentenced in federal court when the trial court awarded credit. This is unlike the defendant in *Gallagher*, because the defendant in that case had already been sentenced and served time. The instant case presents the anomalous situation where defendant absconded when his appeal bond was revoked, was later arrested by federal authorities pursuant to the state capias warrant, but then held by federal authorities to face separate federal charges. At the time defendant requested credit, he was yet to be sentenced by a federal court.

We agree that *Gallagher* is distinguishable on its facts because defendant had not been sentenced in federal court at the time the trial court credited him. However, it is clear, and the prosecution does not dispute, that defendant is entitled to credit against his state sentence for however much time he spends serving his federal sentence under *Gallagher*. The prosecution’s primary concern with the trial court order is that defendant will receive credit on both his federal and state sentences for the time he was in custody from his arrest by federal authorities until his federal sentencing. The prosecution bases this rationale on 18 USC 3585(b), which provides:

A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences--

(1) as a result of the offense for which the sentence was imposed; or

(2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence.

The prosecution contends that under this statute defendant will be awarded credit against his federal sentence for the time he was in custody before his federal sentencing. But, the record lacks any information on defendant's federal sentence, and the prosecution does not provide any authority for whether its interpretation of 18 USC 3585(b) is accurate. Further, the last provision of 18 USC 3585(b), which states, "that has not been credited against another sentence," has been held by federal courts to mean that a defendant will not be granted credit for the time spent in custody prior to sentencing if that time has been credited against another sentence, including state sentences. See *United States v Wilson*, 503 US 329, 337; 112 S Ct 1351; 117 L Ed 2d 593 (1992); *McClain v Bureau of Prisons*, 9 F3d 503, 505 (CA 6, 1993). In effect, the prosecution is requesting that this Court vacate the trial court's order and assume that the Federal Bureau of Prisons, which makes sentence credit decisions in coordination with the Attorney General, *Wilson*, *supra* at 334-35, will credit defendant for his time federal custody before his federal sentencing.

Generally a defendant is not entitled to sentence credit in cases where he is incarcerated as a result of charges arising out of an unrelated offense or circumstance. *People v Ovalle*, 222 Mich App 463, 468-469; 564 NW2d 147 (1997). But, according to the federal criminal complaint, the federal authorities arrested defendant because of the outstanding warrant pursuant to his state conviction and his having absconded. Federal charges were subsequently brought, but the trial court also found and we agree that defendant was held on the basis of the warrant even though federal charges were also brought.

As this Court noted in *People v Cantu*, 117 Mich App 399, 403; 323 NW2d 719 (1982), it is improper for a defendant to receive multiple credit. Also, this Court has held that an absconding defendant should not be allowed to benefit from his wrongful conduct. *People v Ritter*, 186 Mich App 701, 711; 464 NW2d 919 (1991). Further, this Court has repeatedly held that a defendant is not entitled to credit for so-called "dead time," i.e. where a parolee is arrested for a new criminal offense but is held on a parole detainer. See *People v Johnson*, 283 Mich App 303, 307-309; ___ NW2d ___ (2009).¹ Therefore, it is untenable for this Court to affirm the trial court's order without knowing whether defendant has received credit on his federal sentence for the time he spent in federal custody before his federal sentence.

Additionally, the other basis the trial court's decision cites does not justify granting sentence credit. The trial court reasoned that because the United States Marshals were contravening state law under *Gallagher*, *supra*, defendant was entitled to be turned over to the Michigan Department of Corrections to serve his state sentence, but there is no authority for this conclusion. As analyzed above, *Gallagher* is distinguishable. Also, a writ of habeas corpus ad prosequendum, which is a writ for temporary custody of a prisoner and was issued for defendant in this case, has no binding extraterritorial effect. *People v Gaval*, 96 Mich App 708, 711; 294

¹ See, also, *People v Idziak*, ___ Mich ___; ___ NW2d ___ (Docket No. 137301, July 31, 2009).

NW2d 215 (1980). Generally, federal policy is to recognize such writs as a matter of comity. *Id.* However, “[f]ederal authorities have previously honored or refused such writs and may continue to honor or refuse such writs in the future.” *Id.* at 712

Further, the prosecution persuasively points to a case out of the Ninth Circuit, which stated:

If defendant escapes, is released on bail or probation or parole and does not present himself in court, the proceedings must, in strict construction, cease. The only method by which the tribunal may reassert jurisdiction is by ‘arrest.’ In the meantime, if the accused comes within the territorial jurisdiction of another sovereign, the latter may seize his body and continue him in physical custody if he be accused of an offense against the peace and dignity thereof. Seizure of the body by the latter postpones all claims based upon prior initiation of the proceedings or previous arrest by another sovereign until in some way possession may be resumed by the latter. [*Strand v Schmittroth*, 251 F2d 590, 599-600 (CA 9, 1957).]

Therefore, we conclude that the appropriate remedy is to vacate the trial court order and remand for a finding regarding whether defendant has been granted credit against his federal sentence for the time he was in federal custody until his federal sentencing which is not permitted. Based on that finding, the trial court can avoid awarding multiple credits for the time defendant spent in federal custody before his federal sentencing.

We vacate and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Alton T. Davis