

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 6694

STATE OF ARIZONA

v.

TERRY LEE DALE

MARICOPA COUNTY
SUPERIOR COURT
NO. CR-128730

TRANSMITTAL DATE

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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
)
 Appellee,)
)
 v.)
)
 TERRY LEE DALE,)
)
 Appellant.)

No. 1 CA-CR 6694

Maricopa County
Superior Court
No. CR-128730

APPELLANT'S OPENING BRIEF

ROSS P. LEE
Maricopa County Public Defender

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED MAR 22 1983

GLEN D. CLARK, CLERK
By W.S. [Signature]

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STATEMENT OF THE CASE

Appellant was charged by Information filed September 1, 1982, with two counts of Theft, class 3 felonies. (Record on Appeal, p. 16). On September 23, 1982, the State filed an Allegation of Prior and/or Repetitive Convictions. (Record, p. 18). On November 2, 1982, Appellant entered into a plea agreement whereby he agreed to plead guilty to both counts of Theft with one prior conviction alleged. (Record, pp. 22 & 23; Reporter's Transcript 11/2/82). There was a stipulation that Appellant would receive no more than the presumptive sentence, and the State agreed to dismiss the remaining prior convictions. (Id.).

On November 30, 1982, Appellant was sentenced to imprisonment for the presumptive term of 7.5 years as to each count, to be served concurrently. (R.T., 11/30,82). He was given credit for 73 days time served as to Count I and 72 days time served as to Count II. (Id., p. 4). Appellant had actually spent 145 days in presentence incarceration. (Record, p. 25). Appellant was at all times during this matter an indigent, and unable to post any bond. (Record, p. 9).

A timely Notice of Appeal was filed on December 1, 1982.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING
APPELLANT BY FAILING TO GIVE HIM FULL CREDIT
FOR HIS PRESENTENCE INCARCERATION.

It is provided in A.R.S. §13-709(B):

All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter.

Appellant submits that the trial court did not comply with A.R.S. §13-709(B) in sentencing Appellant, because Appellant was in effect not given credit for half of his presentence incarceration. Appellant is well aware that the trial court was merely complying with the dictates of State v. Wallis, 132 Ariz. 445, 646 P.2d 876 (1982). In Wallis, as this Court is aware, our Supreme Court held that, even when concurrent sentences are imposed, presentence incarceration time may be applied "only once", i.e., when multiple convictions occur, the time may only be applied to one of them, or divided among them as the trial court sees fit. Appellant respectfully submits that Wallis was wrongly decided and should be reconsidered. The Wallis decision is contrary to the clear intent of A.R.S. §13-709(B), and, at least in Appellant's case, amounts to a denial of equal protection.

The intent of §13-709(B) is clear and simple: that each defendant receive credit for presentence incarceration on the charge for which he was incarcerated. The statute does not order credit for "half the time spent in custody" or "the time spent in custody divided by the number of charges" or any other such variation. It simply states that credit shall be received for, "All time actually spent in custody

pursuant to an offense. . . ." The effect of the Wallis decision is to deny to defendants in Appellant's position credit for some or all of their back time. This is in contravention of §13-709(B). For example, in Appellant's case, 145 days were served in presentence incarceration, but since he was given credit for only 73 days as to one count, and 72 days as to the other, concurrently, he has in reality received credit for less than half his presentence incarceration. He will on each sentence serve 7.5 years, plus the 72 uncredited days on the first sentence and the 73 uncredited days on the second.

The Wallis decision did not offer an extensive discussion of this issue, but rather relied upon a decision of Division Two of this Court, State v. Williams, 128 Ariz. 415, 626 P.2d 145 (App., 1981). Williams likewise provides no reasoning to support its holding, merely citing a Florida case, Miller v. State, 297 So.2d 36 (Fla. App. 1974). (626 P.2d at 146). The Miller case, then, lies at the heart of this controversy. Appellant submits that the Miller case was misinterpreted in State v. Williams, supra.

In Miller v. State, supra, a somewhat confusing factual situation is presented. The defendant in Miller was charged with two counts grand larceny and two counts petit larceny. He pled guilty to four counts petit larceny and received 60 days in jail on each, consecutively, with credit for 33 days. The defendant claimed the time credit should have been 147 days. He had been arrested on the larceny charges and posted bond. He was charged with new offenses in another county, and the bondsman withdrew the bond. The defendant made bond again, was charged with more new offenses, and the bondsman withdrew the bond a second time. It is not related in the Miller opinion how much

time was spent in jail on each arrest, or whether the second and third sets of offenses were made to run concurrently with or consecutively to the larceny sentences. Regardless of the precise facts in Miller, the Florida court held that under the Florida statute governing credit for presentence incarceration:

[A] defendant should, of course, be given full credit on his sentence or sentences by the court for time spent in jail awaiting disposition of a charge or charges against him; but where a defendant is held to answer for numerous charges, he is not entitled to have his jail time credit pyramided by being given credit on each sentence for the full time he spends in jail awaiting disposition of multiple charges of cases.

297 So.2d at 38

The concern of the Florida court, was only that a defendant should not get his jail time credit "pyramided", or stacked up, by getting the full credit on each charge when the sentences thereon are made consecutive. Miller was thus interpreted by the Idaho Supreme Court in State v. Hoch, 102 Idaho 351, 630 P.2d 143 (1981), where the court states:

We hold that the purpose of I.C. § 18-309 is clearly to give a person convicted of a crime credit for such time as he may have served prior to the actual sentencing upon conviction. We find no intent of the legislature that a person so convicted should have that credit pyramided simply because he was sentenced to consecutive terms for separate crimes. See, Miller v. State, 297 So.2d (Fla. App. 1974).

630 P.2d at 144 [Emphasis added]

In Hoch, the defendant had been sentenced to consecutive terms of five years each on two burglaries. He received credit for the 383 days actually spent in presentence incarceration, but claimed he should have received credit for 383

days on each count, for a total of 766 days. The court held he was entitled to full credit for his 383 days served, but was not entitled to have that credit "pyramided".

When the sentences for multiple offenses are made concurrent, as in State v. Williams, supra, State v. Wallis, supra, and the present case, there is no danger of the "pyramiding" effect referred to in Miller v. State, supra, and State v. Hoch, supra. The problem of "pyramiding" credit for time served was resolved by this Court in State v. Soddors, 130 Ariz. 23, 633 P.2d 432 (1981) in which it is stated:

We do not believe, however, that the legislature intended that a criminal defendant would receive compounded credit time when consecutive sentences are imposed.

633 P.2d at 439

Likewise, Appellant submits that this Court cannot believe the legislature intended that a defendant would receive only partial credit when concurrent sentences are imposed. That in effect is what has happened to Appellant.

Logically analyzed, Appellant has served 145 days of presentence incarceration on each count at the same time, i.e. concurrently, just as he will serve his concurrent 7.5 year sentences at the same time. Each of the two counts was equally responsible for Appellant's presentence incarceration, since the bond was set on both of them. In giving Appellant credit for approximately half of his presentence jail time on each count, concurrently, the trial court has failed to give Appellant credit for, "All time spent in custody . . .", and has violated A.R.S. §13-709(B).

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Even if the trial court's action were not a violation of §13-709(B), it would nonetheless be a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Under the old Arizona criminal code, prior to the existence of §13-709(B), there was no statutory requirement that a defendant receive credit for presentence incarceration. It was, however, held that presentence jail time must be credited when such time, added to the sentence imposed, would exceed the maximum statutory sentence. State v. Warde, 116 Ariz. 598, 570 P.2d 766, 768-769 (1977); State v. Sutton, 21 Ariz. App. 550, 521 P.2d 1008, 1009-1010 (1974). The rationale of that holding was that a rule to the contrary would discriminate against those financially unable to post bond. Those who could post bond would face only the statutory maximum sentence; those who could not afford to post bond would face that same maximum plus whatever time they had been incarcerated prior to sentencing. This Court stated in Sutton, supra:

In making this application, we are persuaded that where the statutory scheme of sentencing places a greater burden on those who are unable to make bond, in bailable offenses, than on those who are financially able is to deny the equal protection mandated by the 14th Amendment.

521 P.2d at 1009

The same rule is applicable to Appellant's case. Appellant received the presumptive sentence on each charge, to be served concurrently. Under the present criminal code, the trial court has no discretion to vary from the statutory presumptive sentence unless certain aggravating or mitigating circumstances are found. A.R.S. §13-701, 13-702(C). Appellant served 145 days in jail before sentencing, and after sentencing will serve two concurrent 7.5 year terms, less 73

days credit on one count, and 72 days on the other. Adding together the sentence plus the remaining actual days of presentence incarceration, Appellant's "presumptive" sentence is 7.5 years plus 73 days. Another defendant in precisely the same situation as Appellant, who is able to post bond, and who is given the same concurrent statutory presumptive sentences, is facing a presumptive sentence of only 7.5 years. Thus, under Wallis, supra, defendants unable to post bond face a more severe presumptive sentence than those able to post bond. This is precisely the sort of denial of equal protection addressed in State v. Sutton, supra.

A further example is this: "A" and "B" are each arrested on January 1, 1982, and are unable to make bail; "C" is also arrested but is able to make bail. All three are sentenced to the presumptive term of four years for Theft, class 4. "A" has one count of Theft and gets credit for his 90 days of presentence incarceration. "B" has two counts and his sentences are concurrent; the court allows him 45 days credit on each count. "C" has five counts, and also receives concurrent sentences. He, however, has spent no time in presentence incarceration.

"A", having received full credit for his presentence incarceration, will simply serve his 4 year sentence. "C", who was out on bail, will also serve only his concurrent 4 year sentences. However "B", who had the misfortune to have two counts and no money, will serve his 4 years plus 45 days. If the court had chosen arbitrarily to credit all 90 days to one count, "B" would serve his 4 years plus 90 days.

Of the three defendants, only "B" will end up spending more time in custody than the statutory presumptive.

Appellant respectfully submits that pursuant to A.R.S. §13-4037, Appellant's sentences must be modified to grant credit for 145 days presentence incarceration as to each count.

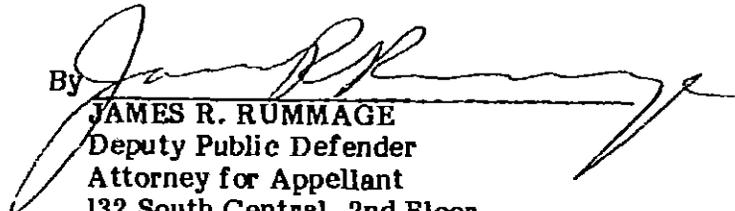
CONCLUSION

The provisions of A.R.S. §13-709(B), as well as the concept of equal protection, require that Appellant receive credit for the full 145 days of presentence incarceration as to each of his two sentences. Appellant respectfully requests this Court to so modify his sentences.

Respectfully submitted this 22nd day of March, 1983.

ROSS P. LEE
Maricopa County Public Defender

By

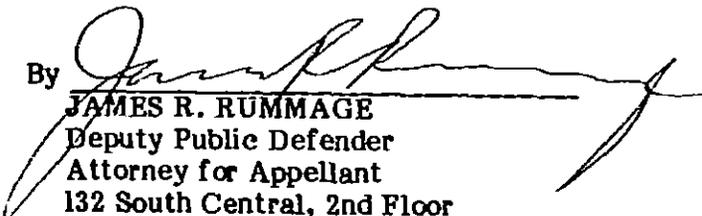

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Deputy Public Defender
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Phoenix, Arizona 85004

TWO COPIES of Appellant's Opening Brief delivered this 22nd day of March, 1983, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 West Washington, Criminal Division, Second Floor, Phoenix, Arizona, 85007.

ONE COPY of the Appellant's Opening Brief mailed this 22nd day of March, 1983, to TERRY LEE DALE #46190, Arizona Correctional Training Facility, 10000 South Wilmot Road, Santa Rita Unit, Tucson, Arizona 85706.

ROSS P. LEE
Maricopa County Public Defender

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ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,)	
)	
Appellee,)	NO. 1 CA-CR 6694
)	
-vs-)	MARICOPA COUNTY
)	SUPERIOR COURT
TERRY LEE DALE,)	NO. CR-128730
)	
Appellant.)	

APPELLEE'S ANSWERING BRIEF

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DIVISION I
COURT OF APPEALS
STATE OF ARIZONA
FILED APR 11 1983
GLEN D. CLARK, CLERK
By W J Schaffer

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4-26-83

QUESTIONS PRESENTED FOR REVIEW

When appellant was given concurrent presumptive sentences on two counts, and his presentence incarceration time was divided between the two counts, was there a violation of Ariz.Rev.Stat.Ann. § 13-709(B) or equal protection of laws?

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STATEMENT OF THE CASE

Appellant was charged with two counts of theft, both class 3 felonies. The state alleged that appellant had three previous felony convictions. Appellant entered into a plea agreement by the terms of which he was to plead guilty to the two alleged counts, and also to one prior felony conviction. The other two prior felony convictions were to be dismissed. On November 2, 1982, the trial court took appellant's pleas. On November 30, 1982, the trial court ordered appellant to serve two concurrent terms of 7.5 years (the presumptive sentence). Presentence incarceration credit was given in the amount of 73 days on Count I, and 72 days on Count II. This Court has jurisdiction pursuant to Ariz.Rev.Stat. Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

ARGUMENT

APPELLANT WAS GIVEN DUE CREDIT FOR HIS
PRESENTENCE INCARCERATION.

Appellant asserts that the 145 days of presentence incarceration should have been credited in full to each of his concurrent terms. Appellant urges that the trial court's failure to proceed in this fashion resulted in a violation of Ariz.Rev.Stat. Ann. § 13-709(B) and equal protection of laws. Appellee disagrees that the trial court improperly gave appellant credit for his presentence incarceration.

Ariz.Rev.Stat. Ann. § 13-709(B) states:

All time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense shall be credited against the term of imprisonment otherwise provided for by this chapter.

The correct interpretation of Ariz.Rev.Stat. Ann. § 13-709(B) was settled in State v. Wallis, 132 Ariz. 445, 447, 646 P.2d 876, 878 (1982), in which the court said:

We hold that, pursuant to statute, presentence incarceration time may be applied only once, and once applied, may not be applied again. How this will be applied in the case of multiple convictions is up to the sentencing judge. In the instant case, for example, the trial court could have given the defendant credit for the 130 days presentence incarceration to one count of robbery but not to both. The court could have also divided the presentence incarceration between the two robbery sentences, for example 65 days credit for each of the two convictions. In no event, however, may the credit for presentence incarceration be applied twice.

132 Ariz. at 447, 646 P.2d at 878. Wallis specifically sanctions the procedure followed by the court in the instant case. Wallis, a recent decision of the Arizona Supreme Court, controls this issue.

Appellant, though, asserts that the Wallis approach violates equal protection of laws by placing a greater burden on the poor than on the financially capable. Appellant contends that this discriminatory effect is

reflected in the facts of our case. Appellant posits that, had he been a person of financial means, he could have posted bail, and thereby would only have had to serve 7.5 years. However, since he was indigent, and so could not post bail, he must now serve 7.5 years plus 73 days (his sentence on Count II: 7.5 years plus 145 days presentence incarceration minus 72 days credit).

Appellee would offer the following analysis in place of appellant's. Appellee had 145 days of presentence incarceration. This 145 days was allocated between his two counts, 73 days of it going to Count I, and the remaining 72 days to Count II. Thus, when appellant was given credit for 73 days on Count I, he was left with 7.5 years to serve on this count (7.5 years plus 73 days presentence incarceration minus 73 days credit). When he was given credit for 72 days on Count II, he again was left with 7.5 years to serve (7.5 years plus 72 days minus 72 days). Thus, appellant must serve the same amount of time as a financially capable person in his position would have had to serve.

Nor would the result be any different had the 145 days presentence incarceration been allocated entirely to one of the counts. Assume that this time had been applied solely to Count I. Then, on Count I, appellant would have had to serve 7.5 years (7.5 years plus 145 days minus 145 days). On Count II, with the presentence incarceration already

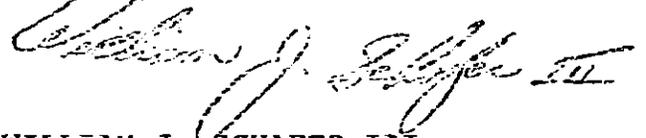
removed from the picture, appellant again would have to serve 7.5 years. Thus, once more the result would be no different for appellant than for a financially capable person in his shoes.

CONCLUSION

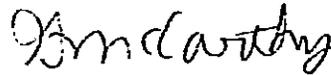
Since the trial court gave appellant proper and full credit for his presentence incarceration, this Court should affirm appellant's sentence.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



GREG A. McCARTHY
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GREG A. McCARTHY, being first duly sworn upon oath,
deposes and says:

That he served the attorney for the appellant in the
foregoing case by forwarding two (2) copies of APPELLEE'S
ANSWERING BRIEF, in a sealed envelope, first class postage
prepaid, and deposited same in the United States mail,
addressed to:

JAMES R. RUMMAGE
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85003
Attorney for APPELLANT

this 11th day of April, 1983.

G. A. McCarthy

GREG A. McCARTHY

SUBSCRIBED AND SWORN to before me this 11th day of
April, 1983.

Barbara J. Aulbrecht

NOTARY PUBLIC

My Commission Expires:

September 28, 1986

CR38-004
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ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)	
)	
Appellee,)	No. 1 CA-CR 6694
)	
v.)	Maricopa County
)	Superior Court
TERRY LEE DALE,)	No. CR-128730
)	
Appellant.)	

APPELLANT'S REPLY BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED APR 26 1983

GLEN D. CLARK, CLERK

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ARGUMENT

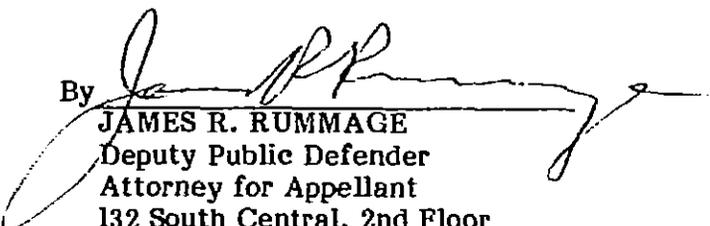
THE TRIAL COURT ERRED IN SENTENCING APPELLANT BY FAILING TO GIVE HIM FULL CREDIT FOR HIS PRESENTENCE INCARCERATION.

Appellee, in the Answering Brief, engages in some interesting logical and mathematical machinations to support his statement that the amount of time served by Appellant will be no different than it would be for a person who received the same sentences, but was able to post a bond and gain release pending trial and sentencing. However, regardless of how Appellee tries to explain it away, Appellant will be physically incarcerated seventy-three days longer than a person who was able to post a bond. That is a reality that remains unchanged no matter how Appellee chooses to describe it or excuse it. Appellant respectfully submits that he should receive credit for the full amount of time served as to each concurrent sentence.

Respectfully submitted this 26th day of April, 1983.

ROSS P. LEE
Maricopa County Public Defender

By

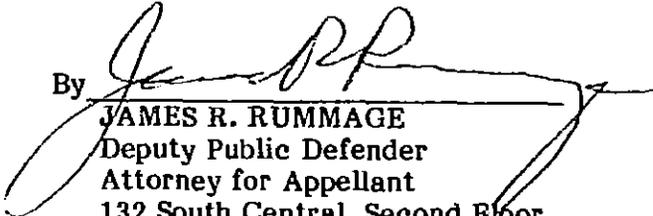

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TWO COPIES of Appellant's Reply Brief mailed this 26th day of April, 1983, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 West Washington, Criminal Division - Second Floor, Phoenix, Arizona 85007.

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