COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7428

STATE OF ARIZONA

Appellee,

vs

DENNIS MONTGOMERY,

Appellant.

MARICOPA COUNTY
SUPERIOR COURT
No. CR-133773

TRANSMITTAL DATE:

ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. DENNIS FRANK MONTGOMERY, Appellant.	)	No. 1 CA-CR 7428 Maricopa County Superior Court No. CR-133773

APPELLANT'S OPENING BRIEF

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED JAN 5 1984

GLEN D. CLARK, CLERK
By W.S.

1-30-84

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STATEMENT OF THE CASE

The appellant, Dennis Frank Montgomery, was charged by an Indictment returned on May 19, 1983, with three counts of Armed Robbery as class 2 felonies, and 6 counts of Kidnapping as class 2 felonies. Appellant was arraigned on May 27, 1984, and his trial was scheduled for July 14, 1984, before the Honorable Ed W. Hughes. The pre-trial conference was set for June 24, 1983.

The Maricopa County Attorney's Office filed an allegation of dangerousness on June 2, 1983. On that same date the County Attorney also filed an allegation of prior and/or repetitive convictions. On June 29, 1983, the County Attorney filed a Notice of Change of Judge. Appellant's case was transferred to the Honorable Rufus C. Coulter, Jr. Prior to trial appellant entered a plea agreement with the Maricopa County Attorney's Office. Appellant agreed to plead guilty to the three counts of Armed Robbery as dangerous, class 2 felonies. The State agreed to dismiss all of the Kidnapping charges and to not file any other possible Robbery and Kidnapping charges if "cleared" by appellant with the police prior to sentencing. The Honorable Howard V. Peterson accepted appellant's pleas and set sentencing for August 12, 1983. The sentencing was continued until September 7, 1983, before Judge Coulter.

Judge Coulter sentenced appellant to serve 15 years in the Department of Corrections on each count. The court gave appellant credit for 40 days of pre-sentence incarceration on Counts 1 and 4 and 39 days on Count 6. All sentences were ordered to run concurrently. A timely Notice of Appeal was filed on September 13, 1983. This appeal is taken from the judgments of guilt entered and the sentences imposed on September 7, 1983.

ARGUMENT

THE TRIAL COURT ERRED IN SENTENCING APPELLANT.

The pre-sentence report filed by the Maricopa County Adult Probation Department in appellant's case indicates he spent 118 days in custody on all three charges prior to sentencing. The trial court, in sentencing appellant, gave him credit for 40 days on two counts and 39 days on the other count. Appellant submits that he should be given credit for the full 118 days on each count. State v. Cruz-Mata, No. 5717, Arizona Supreme Court (filed 12/2/83).

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CONCLUSION

The sentences imposed should be modified to give appellant credit for all of his pre-sentence incarceration.

Respectfully submitted,

ROSS P. LEE
Maricopa County Public Defender

By
MICHAEL G. SULLIVAN
Deputy Public Defender
Attorney for Appellant

TWO COPIES of Appellant's Opening Brief mailed this 5th day of January, 1984, to ROBERT K. CORBIN, Attorney General of Arizona, 1275 West Washington, Criminal Division - Second Floor, Phoenix, AZ 85007.

ONE COPY of Appellant's Opening Brief mailed this 5th day of January, 1984, to DENNIS FRANK MONTGOMERY, Arizona State Prison, Box B-48304, Florence, Arizona 85232.

ROSS P. LEE
Maricopa County Public Defender

By Michael G. Sullivan
MICHAEL G. SULLIVAN
Deputy Public Defender
Attorney for Appellant

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, -vs- DENNIS FRANK MONTGOMERY, Appellant.	)	NO. 1 CA-CR 7428 MARICOPA COUNTY SUPERIOR COURT NO. CR-133773

APPELLEE'S ANSWERING BRIEF

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DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA
FILED JAN 26 1984
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QUESTION PRESENTED FOR REVIEW

Is the appellant entitled to credit on each of his concurrent sentences for the 118 days he spent in jail waiting for his case to be adjudicated?

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STATEMENT OF THE CASE

On May 19, 1983, the Maricopa County Grand Jury returned an indictment charging the appellant with three counts of armed robbery and six counts of kidnapping, all class 2 felonies. (Indictment filed May 19, 1983.) The state also alleged the above crimes had been committed with a dangerous instrument -- a gun. (Allegation, filed June 2, 1983.) In addition, the state alleged that the counts of the indictment were repetitive offenses under Ariz.Rev.Stat.Ann. § 13-604(H) and 13-604(K). (Allegation, filed June 2, 1983.)

On August 10, 1983, appellant entered into a plea agreement with the state. The appellant pled guilty to the three counts, numbers I, IV, and VI, of armed robbery, a dangerous offense. The state dismissed the kidnapping counts and agreed not to file any other "possible robbery and kidnapping charges" if cleared by the defendant with the police before sentencing. The sentence on the counts were to run concurrent with each other. There were no other agreements about the sentence. (Plea agreement filed August 10, 1983.)

At the change of plea, in reference to Count I, appellant admitted that on November 9, 1982, he and a companion entered Vern's Liquor Store on 1819 East Washington and took various items from an employee with the aid of a loaded gun. (R.T. of Aug. 10, 1983, at 5-7.)

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Appellant told the court that on April 28, 1983 (Count IV), he and a friend "put a gun" on a man sitting in a car and took the victim's money. This occurred at approximately 5130 North 15th Street. (Id. at 9.)

Finally, appellant admitted that on April 29, 1983 (Count VI), he entered an apartment at [redacted] and used a gun to take a T.V. and stereo from the victim. (Id. at 11-12.)

The court informed the appellant of the range of sentence and possible fine. He also informed the appellant that he would have to serve 2/3 of the sentence imposed and that he was not eligible for probation. (Id. at 15-16.)

The court advised the appellant of his right to trial by jury, right to cross-examine witnesses, right to testify and compel witnesses to appear and testify, his right to remain silent, and right to counsel. (Id. at 17-18.) Appellant told the court he had not been threatened or promised anything to induce the plea. (Id. at 18-19.)

The court found that the appellant understood the terms of the plea agreement. The court further found the plea was knowingly and voluntarily entered into by the appellant. The court reserved accepting the plea until the time of entry of judgment and pronouncement of sentence. (Id. at 20.)

Appellant was sentenced on Septmenber 7, 1983. The plea was accepted at that time. (R.T. of Sept. 7, 1983.) Appellant was sentenced to an aggravated sentence of 15 years on each count. The court found the following aggravating circumstances: (1) use, threatened use, or possession of a deadly weapon or dangerous instrument during the commission of the crime; (2) the presence of an accomplice; (3) the offense was committed in the expectation of pecuniary gain. (Id. at 5.) The sentences were concurrent to each other. (Sentence, filed Sept. 7, 1983.) The appellant was given 40 days credit on Counts I and IV. He received 39 days credit on Count VI. (Id. at 5.) According to the presentence report, the appellant had been in custody for 118 days on the aforementioned charges. (Presentence Report, p. 7, filed Sept. 19, 1983.)

Appellant filed a timely notice of appeal. (Notice filed Sept. 7, 1983.) This Court has jurisdiction to hear this appeal pursuant to Ariz.Rev.Stat.Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

ARGUMENT

DEFENDANTS ARE ENTITLED TO HAVE ALL OF THEIR CONCURRENT SENTENCES CREDITED WITH ALL THE TIME THEY SPEND IN JAIL WAITING FOR THEIR CASES TO BE ADJUDICATED.

Appellant was originally charged by indictment with three counts of armed robbery and six counts of kidnapping. He pled guilty to three counts of armed robbery. (R.T. of Aug. 10, 1983, at 4-12.) He was

sentenced to 15 years on each count. The sentences were concurrent to one another. (Sentence, filed Sept. 7, 1983.) Appellant spent 118 days in custody waiting for the matter to be adjudicated.

The trial court, apparently relying on State v. Wallis, 132 Ariz. 445, 646 P.2d 876 (1982), divided the pretrial incarceration time among the three convictions by crediting appellant with 40 days on Counts I and IV and giving appellant 39 days credit on Count VI. However, the Supreme Court reversed State v. Wallis, supra, in State v. Cruz-Mata, No. 5717 (Ariz.Sup.Ct., Dec. 2, 1983, at 10-11) and held:

> Last year in State v. Wallis, 132 Ariz. 445, 646 P.2d 876 (1982), we accepted Division Two's approach. In Wallis defendant had committed three separate robberies, but his sentences were concurrent. We 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.
>
> Id. at 447, 646 P.2d at 878.

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> Upon further reflection, we think that our holding in Wallis is incorrect. If our holding in Wallis were strictly followed, the results could run afoul of the holdings in Warde, supra, and Sutton, supra. That holding can also lead to cases such as the instant one, in which the credit is illusory and the effect of the statute is without meaning.
>
> In the case at bar, as the sentence has been imposed, appellant must spend 25 years and 260 days behind bars before he is eligible for parole. This is longer than the people, through the legislature, have determined is necessary to prohibit individuals who have been sentenced to life imprisonment from parole consideration.
>
> We think the remedy is to credit appellant's time spent in presentence custody to each concurrent sentence.

In Cruz-Mata, supra, the Supreme Court did not remand the matter to the trial court but modified the sentence pursuant to Ariz.Rev.Stat.Ann. § 13-4037. This Court has the same authority. See State v. Henderson, 133 Ariz. 259, 263, 650 P.2d 1241, 1245 (Ct.App. 1982).

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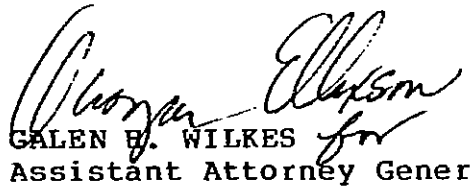
CONCLUSION

In light of the Supreme Court's recent opinion in State v. Cruz-Mata, supra, appellee would request this Court to enter the appropriate order causing appellant's sentences to confirm with State v. Cruz-Mata, supra.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



GALEN H. WILKES for
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GALEN H. WILKES, 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:

MICHAEL G. SULLIVAN
Deputy Public Defender
132 South Central, 2nd Floor
Phoenix, Arizona 85004
Attorney for APPELLANT

this 26th day of January, 1984.

Susan Ellerson for
GALEN H. WILKES

SUBSCRIBED AND SWORN to before me this 26th day of January, 1984.

Chris L. Piske
CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:
October 28, 1985

CR51-10
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