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IN THE
COURT OF APPEALS OF INDIANA

Donald L. Keene,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

January 30, 2023

Court of Appeals Case No.
22A-CR-1335

Appeal from the
LaPorte Circuit Court

The Honorable
Thomas J. Alevizos, Judge

Trial Court Case No.
46C01-2111-F5-1588

Shepard, Senior Judge.

[1] In credit time calculations, how should a trial court treat pre-trial confinement served solely for an offense that is dismissed pursuant to a plea agreement?

Two decisions from this Court appear to offer differing analyses on how to calculate credit time for pre-trial confinement served solely for an offense that is dismissed pursuant to a plea agreement. *See Glover v. State*, 177 N.E.3d 884 (Ind. Ct. App. 2021), *trans. denied*; *Purdue v. State*, 51 N.E.3d 432 (Ind. Ct. App. 2016). We write to clarify that the test for awarding credit for pre-trial confinement remains whether the defendant's pre-trial confinement is the result of the criminal charge for which the sentence is being imposed, including where plea agreements involving multiple cases are involved.

[2] Here, the State agrees with Donald L. Keene that he is entitled to credit for more time spent in pre-trial confinement than was awarded by the trial court, but argues that he is only entitled to an additional nine days of credit. Finding that the reasoning in this Court's decision in *Glover* informs our decision here, we reverse and remand with instructions to award Keene an additional nine days of credit for his pre-trial confinement for his conviction after pleading guilty to one count of Level 6 felony auto theft.[1]

Facts and Procedural History

[3] On October 19, 2021, Keene was arrested on an allegation that he had committed Level 6 felony auto theft as charged under Cause Number 4601-2106-F6-714, and he was released on his own recognizance on November 3,

[1] Ind. Code § 35-43-4-2(a)(1)(B) (2021).

2021. On November 10, 2021, Keene was again arrested and was later charged under Cause Number 46C01-2111-F5-1531 with Level 5 felony auto theft.

[4] Next, on November 15, 2021, a notice of violation of pre-trial release was filed under F6-714; on the next day an arrest warrant was issued; and, on November 17, 2021, the warrant was served. On November 22, 2021, the State charged Keene with one count of Level 5 felony auto theft, and added an habitual offender sentencing enhancement filed under Cause Number 46C01-2111-F5-1588. F5-1588 contained the same factual allegations as those of F6-714, and F6-714 was later dismissed on November 24, 2021.

[5] On April 6, 2022, Keene entered into a plea agreement, pleading guilty under F5-1588, to the amended charge of auto theft as a Level 6 felony. A pre-sentence investigation report was filed with the court on May 9, 2022, including a calculation of credit time for F5-1531 and F5-1588. The PSI report represented that for F5-1531, which was dismissed pursuant to the plea agreement reached in F5-1588, Keene received 185 days of credit from November 10, 2021 through May 13, 2022. As for F5-1588, the PSI report showed a credit to Keene of 170 days from November 25, 2021 through May 13, 2022.

[6] On May 13, 2022, per the plea agreement's terms, the court sentenced Keene to serve thirty months in the Department of Correction. The State fulfilled the agreement by dismissing F5-1531 and the habitual offender allegation.

[7] The court asked the parties if there were any mistakes in the PSI report, and they replied there were none. The court's statements about the credit time awarded and the class level of the credit awarded conflicted in ways that are not pertinent to our decision. However, the written abstract of judgment and sentencing order represented that Keene was awarded credit for 184 actual days "under Credit Class A" for time served from November 10, 2021 to May 12, 2022. Appellant's App. Vol. II, p. 64-65. Keene appeals from that order.

Discussion and Decision

[8] Keene argues that the trial court failed to award him the correct amount of credit time and the State agrees. The parties disagree, however, with the number of days to which Keene is entitled.

[9] By statute, a person in pre-trial confinement earns one day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing. *See* Ind. Code § 35-50-6-3.1 (2020). When calculating the pre-trial credit to which a defendant is entitled, that number is dependent upon (1) pre-trial confinement; and (2) the pretrial confinement resulting from the criminal charge for which the sentence is being imposed. *See Bischoff v. State*, 704 N.E.2d 129 (Ind. Ct. App. 1998), *trans. denied* (1999). Trial courts have no discretion in awarding or denying that credit. *Glover*, 177 N.E.3d 884.

[10] Here, Keene pleaded guilty to one count of auto theft, first charged under F6-714, which was later dismissed, and subsequently refiled under F5-1588. The State agrees that Keene should receive credit for his pre-trial confinement as to

that charge leading to his conviction and sentence as the factual basis alleged for both charges was the same. The trial court, however, indicated in its abstract and sentencing order that it was not crediting Keene with the sixteen days he served between October 19, 2021 to November 3, 2021. This was error.

[11] However, the court awarded Keene credit time for November 10, 2021 through November 16, 2021. Keene served pre-trial confinement during that time for F5-1531, a charge that was dismissed pursuant to the plea agreement. Appellant's App. Vol. 2 Conf., pp. 40 (plea agreement), 64 (judgment of conviction and sentencing order). The State argues that the court erred by awarding Keene those seven days of credit. We agree. Keene should be awarded a net gain of nine days for his pre-trial confinement on his sentence under F5-1588.

[12] Keene relies on language from our decision in *Purdue* to support his claim that he is entitled to those seven days of credit under F5-1531. In particular, Keene seizes on the language "wholly unrelated," used in *Purdue*, 51 N.E.3d at 438, to suggest that a different test for awarding credit time applies, because the pre-trial confinement was served for a "case [that] was dismissed pursuant to a plea agreement," arguing its reference in the plea agreement makes it not "wholly unrelated." Reply Br. p. 3. Agreeing with the analysis in *Glover*, we believe *Purdue* is factually distinguishable and did not supplant the statutorily created test where multiple cases are mentioned in a plea agreement.

[13] The *Purdue* defendant's pre-trial confinement included three days which were not disputed and 128 days that were. Purdue, though not yet formally charged, spent three days in pre-trial confinement for Case #1. Weeks later Purdue was arrested and charged with three new crimes and then was released in Case #2. Next, he was charged with, but not arrested for Case #1. A short time later, Purdue was charged and arrested for new crimes in Case #3. Purdue's 128-day pre-trial confinement commenced upon the filing of charges under Case #3. Purdue subsequently filed a pleading which referenced Purdue's three criminal cases and the same trial date was established by the court for those three cases. Purdue pleaded guilty to two of the charges alleged in Case #2 in exchange for dismissal of all other counts against him including those in Case #1 and Case #3. The parties disputed whether Purdue should receive 128 days of credit with Purdue arguing he was incarcerated awaiting trial on all three cases at the time, while the State argued that he was incarcerated solely for Case #3 which was dismissed under the plea.

[14] The trial court agreed with the State and declined to award the credit. On appeal, a panel of this Court reversed and remanded to the trial court to award the 128 days of credit, citing *Dolan v. State*, 420 N.E.2d 1364, 1373 (Ind. Ct. App. 1981).

[15] In *Dolan*, a panel discussed legislative changes to what is now Indiana Code section 35-50-6-3.1(b), concluding that,

> Although IC 35-50-6-3 allows a defendant credit for time 'confined awaiting trial or sentencing,' we conclude the

> Legislature clearly intended the credit to apply only to the sentence for the offense for which the presentence time was served. Any other result would allow credit time for time served on *wholly unrelated offenses*.

(emphasis added). The *Dolan* defendant's pre-trial confinement began with "wholly unrelated" charges. We held that he was not entitled to credit for those days against the sentence imposed on the charges for which he was sentenced, because the statute allowed pre-trial confinement credit to be awarded only for the offense for which a sentence was imposed. We stated the long-standing rule applicable when a defendant is confined and faces several charges that,

> Where a defendant is confined during the same time period for multiple offenses and the offenses are tried separately, the defendant is entitled to a "full credit" for each offense for which he is sentenced. Each "full credit" is determined by the number of days the defendant spent in confinement for the offense for which the defendant is sentenced up to the date of sentencing for that offense.

420 N.E.2d at 1373.

[16] In *Purdue*, while the charges that were filed in Case #3 initiated the 128 days of pre-trial confinement, all three cases against Purdue pended during that time. We found the causes not to be wholly unrelated and ordered the award because Purdue's pre-trial confinement was for the cause to which he pleaded guilty, Case #2, though he was confined as well but not sentenced for the other cases. At the end of the day, what ultimately mattered was whether the pre-trial confinement related to the offense to which Purdue was sentenced.

Concluding, that under the facts of that case his pre-trial confinement did relate to the offense for which he was sentenced, we reversed and remanded. *Purdue*, 51 N.E.3d at 438-39.

[17] The *Glover* panel put it best, however, while distinguishing *Purdue* and explaining what was meant by "wholly unrelated" charges, when describing pre-trial confinement awards when separate charges are involved in a single plea negotiation.

> But explaining that the inclusion of separate charges in a single plea negotiation is one reason the charges are not wholly unrelated and therefore credit time is not inconsistent with legislative intent does not mean that the test for granting credit time is whether the charges are wholly unrelated. Nor does it mean that every time multiple charges are included in a single plea negotiation, pre-trial confinement time for all of those charges must be credited for the charge that ultimately results in a sentence, which is the rule Glover proposes.
>
> Instead, the test remains whether the confinement was the result of the criminal charge for which the sentence was imposed.
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> * * *
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> [C]redit time does not work like store credit where it can be redeemed with the next crime. Instead, credit time protects against double jeopardy by precluding two punishments—first pre-conviction confinement and then post-conviction confinement—for the same offense.

177 N.E.3d at 887 (internal citations omitted).

[18] We conclude that the test remains whether the pre-trial confinement results from the criminal charge for which the sentence was imposed. As such, Keene is entitled to a net gain of nine days of credit for his pre-trial confinement.

Conclusion

[19] Based on the foregoing, the decision of the trial court is reversed and remanded with instructions to award credit time consistent with this opinion.

[20] Reversed and remanded with instructions.

Bailey, J., and Bradford, J., concur.