Circuit Court for Baltimore County
Case No: 03-K-07-005650

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 63

September Term, 2020

DWANE TAVONNE MCKENZIE

v.

STATE OF MARYLAND

Fader, C.J.,
Zic,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: April 2, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The Circuit Court for Baltimore County denied a motion to correct an illegal sentence and a motion to correct the commitment record filed by appellant, Dwane McKenzie, a ruling he appeals. For the reasons to be discussed, we shall remand the matter to the circuit court with instructions to amend the commitment record to clarify the start date of the sentence. Otherwise, we affirm the judgment.

BACKGROUND

In 2007, while serving a term of probation for a 2004 robbery conviction, Mr. McKenzie shot two people. Following a jury trial, Mr. McKenzie was convicted of attempted second-degree murder, first-degree assault, use of a handgun in the commission of a crime of violence, and related offenses. After his conviction, but before he was sentenced, the circuit court (Judge John Grason Turnbull, presiding) revoked his probation in the robbery case and ordered him to serve seven years of his previously suspended time in that case. Then on April 30, 2009, the circuit court (Judge Thomas Bollinger, Sr., presiding) sentenced Mr. McKenzie to 25 years' imprisonment without the possibility of parole for attempted second-degree murder, a consecutive term of 20 years for first-degree assault, and a concurrently run term of five years without parole for the handgun offense. Judge Bollinger ordered the sentencing package to run consecutively to "any sentence he's now serving" and specifically "consecutive to Judge Turnbull's sentence." The sentencing court acknowledged that Mr. McKenzie had been incarcerated since November 19, 2007, the date of his arrest and, accordingly, the commitment record reflected an award of 528 days credit for time served pre-sentencing. This Court affirmed the convictions on direct appeal. *McKenzie v. State*, No. 655, September Term, 2009 (filed February 21, 2012).

In 2014, Mr. McKenzie filed a Rule 4-345(a) motion to correct an illegal sentence in which he challenged the legality of the "without parole" portion of his 25-year sentence for attempted second-degree murder. The circuit court granted the motion and struck the parole ineligibility. Mr. McKenzie thereafter filed a motion to modify his sentence, which was held sub curia.

On March 12, 2018, the court convened a hearing on Mr. McKenzie's motion to modify his sentence. Although there was some discussion about how a reduction in his sentence might affect his parole eligibility date, the court made clear that it was willing to modify Mr. McKenzie's sentence, not to necessarily make him parole eligible anytime sooner, but so that he would be eligible for "some very good programs[.]" Defense counsel stated: "Not eligible for parole, for the programs." The court responded: "For the programs, right. That's what I want." The court then modified the 20-year sentence for first-degree assault by ordering that it run concurrently with, rather than consecutively to, the sentence for attempted second-degree murder, which reduced the total term of imprisonment from 45 years to 25 years. The court made clear that it was "only changing one" sentence and "everything else stays the same."

Following the modification hearing, the clerk of the circuit court issued an amended commitment record which accurately reflected that the sentence for first-degree assault was to run concurrently with the sentence for attempted second-degree murder. As the original and previously amended commitment records had, this commitment record stated that the total sentence in this case was consecutive "TO PRESENT SENTENCE NOW SERVING." The award of credit, however, was modified to reflect "3766 days credit for

time served prior to and not including date of sentence[.]" This commitment record was soon thereafter replaced with another, issued by the clerk on April 4, 2018, that reverted to the original award of credit, namely 528 days for time served prior to and not including the date of sentence.

Mr. McKenzie then personally wrote a letter to the court seeking clarification of the start date of his sentence and the calculation of time served, and he asked that his newly modified sentence "be made concurrent to [the] 7 year V.O.P." in the 2004 robbery case. The court responded with a "Chambers Ruling" that denied the request and noted that the commitment record "accurately reflects that Defendant is to receive credit for 528 days served."

In December 2019, Mr. McKenzie, through counsel, filed two nearly identical motions: a motion to correct an illegal sentence and a motion to correct the commitment record. In those motions he pointed out that, when the March 12, 2018 modification of sentence hearing was held, he had already served the seven-year violation of probation sentence in the 2004 robbery case, which had been ordered executed in 2008.[1] He, therefore, asserted that, when the court in this case modified his sentence to run the first-degree assault sentence concurrently with the attempted murder sentence, "[t]here was nothing to run [the sentencing package] consecutively with." Hence, he maintained that the modified sentence should run from November 17, 2007 (the date of his arrest and detention in this case) and, therefore, in addition to the 528 days credit for time served pre-

[1] In his appellate brief, Mr. McKenzie claims that the 7-year V.O.P. sentence had "expired" in July 2015.

sentencing, he should also have been awarded credit for time served "from April 30, 2009 [the original sentencing date] up to the date his sentence was modified . . . on March 12, 2018, which comes to an additional 3,285 days."

The circuit court disagreed and denied the motions. The court found that, when it modified the first-degree assault sentence to run it concurrently with the attempted second-degree murder sentence, it had "provided that all other aspects of [the] sentence remained unchanged." As for the credit awarded, the court stated:

> Defendant is due credit, from the Circuit Court for Baltimore County, only for his pretrial commitment, amounting to 528 days, from his initial incarceration on November 19, 2007[2] to his sentencing date of April 30, 2009. Since the sentence in [this case] was imposed to run consecutive to an existing seven-year sentence that Defendant was serving at the time, he is not entitled to credit for time served during the remainder of the seven-year sentence. Rather, he is entitled to credit for time served pretrial and after the expiration of the seven-year term he was serving for another case. Defendant is not entitled to receive credit, in this case, for the time served for a separate sentence to which this sentence was imposed to be served consecutively. Thus, the current commitment record issue on April 4, 2018, awarded Defendant the correct pretrial term of 528 days credit.

DISCUSSION

Mr. McKenzie, who is representing himself on appeal, asserts that the circuit court erred in denying his motion to correct his sentence "without any supporting facts"; that the clerk's signatures on the commitment records appear different, thus making the current commitment record "a fraudulent document"; and the court increased his sentence by removing the credit for 3,766 days because at the time of the 2018 modification, his V.O.P.

[2] As noted, the date of arrest was November 17, 2007.

sentence had been served and, therefore, the modified sentence should have begun running from his arrest date.

The State responds that Rule 4-345(a) does not require the court to make factual findings or provide a reason for its denial of a motion to correct an illegal sentence, but in any event, the court here did provide an explanation; even if the handwriting of the clerk's signatures on the March 13, 2018 and April 4, 2018 commitment records are different, that did not affect the legality of Mr. McKenzie's sentence or the accuracy of the commitment record; and Mr. McKenzie is not entitled to credit for time served beyond the 528 days because the 2018 modification "did not alter when the sentence began to run, *i.e.*, when his violation of probation sentence ended, and the time served calculation only credited his pre-sentencing confinement before the sentence started running."

In reply, Mr. McKenzie, for the first time, asserts that he is entitled "to all time credit days that he spent in custody for the V.O.P." sentence because the violation of probation was the result of the convictions for attempted second-degree murder and first-degree assault and, therefore, he was incarcerated in this case "for the conduct on which the charge is based[.]" He claims, however, that "the Division of Corrections treated [his] violation [of probation in case no, 03-K-04-000055] as a brand new criminal charge/conviction which was illegal and improper." He further maintains that his violation of probation sentence was an "illegal sentence in its origin as it was an illegal plea deal sentence that was given by Judge Turnbull" because his agreement with the State provided for a "3yr. plea deal" but "Judge Turnbull gave [him] a 10 year sentence w/ all but 3 years suspended[.]"

We begin with the contentions Mr. McKenzie raises in his Reply brief. First, the legality of the sentence imposed in the 2004 robbery case is not properly before us and we shall not address it. Second, we need not address his contention that he is entitled to credit for the entire time he spent serving his V.O.P. sentence because the convictions in this case triggered the violation of probation. *See Anderson v. Burson*, 196 Md. App. 457, 476 (2010) ("We shall decline to address any of the issues raised . . . for the first time in their reply brief."); *Strauss v. Strauss*, 101 Md. App. 490, 509 n 4 (1994) ("[T]he scope of a reply brief is limited to the points raised in appellee's brief, which, in turn, addresses the issues originally raised by appellant. . . . A reply brief cannot be used as a tool to inject new argument."). Nonetheless, we note that Mr. McKenzie is incorrect. The V.O.P. sentence was based on his failure to comply with conditions of probation in the 2004 robbery case and his service of his previously suspended time in that case was separate and distinct from the sentences imposed for the 2008 convictions. *See Maus v. State*, 311 Md. 85, 106 (1987) (Ordering a probationer to serve previously suspended time is "merely activation of a conditionally-suspended portion of the original punishment."). In short, Mr. McKenzie is not entitled to credit in this case for the time he served in the 2004 case, regardless of the fact that the convictions in this case may have caused the court to revoke his probation in the other case.

Moving on, we agree with the State that the circuit court was not required to provide a reason for its decision to deny Mr. McKenzie's motions, but nonetheless did so. We also agree that the clerk's signature on the commitment records do not support Mr. McKenzie's claim that the April 4, 2018 document is fraudulent.

The only real issue before us is whether the 2018 modification of Mr. McKenzie's sentence did anything more than order that the first-degree assault sentence run concurrently with the attempted second-degree murder sentence, which we conclude it did not. When modifying the sentence, the court was clear that "everything else stays the same." In other words, the total sentence - reduced from an aggregate term of 45 years' incarceration to 25 years - continued to be consecutive to the sentence Mr. McKenzie was serving when he was originally sentenced on April 30, 2009. The credit for time served pre-sentencing remained the same.

What was left unclear, however, was when the sentence he was serving on April 30, 2009 - which no one disputes was the V.O.P. sentence in the 2004 robbery case - expired. The commitment record issued on April 4, 2018, following the modification of sentence in this case, confuses the issue by (1) noting on page 1 that the "Date Sentence Imposed" was "03/12/18" – the date the sentence was modified and (2) retaining the language on page 2 from the original commitment that the sentence is consecutive "TO PRESENT SENTENCE NOW SERVING." Assuming Mr. McKenzie is correct that his V.O.P. sentence had expired when the sentence in this case was modified, based on the current commitment record it would be difficult to determine when the sentence in this case began to run. Accordingly, we remand this case to the circuit court with instructions to amend

the commitment record to reflect that the sentence is consecutive to the sentence Mr. McKenzie was serving when he was originally sentenced on April 30, 2009.

CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY WITH INSTRUCTIONS TO AMEND THE COMMITMENT RECORD IN ACCORDANCE WITH THIS OPINION. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE SPLIT BETWEEN BALTIMORE COUNTY AND APPELLANT.