Circuit Court for Baltimore City
Case Nos. 116154016 & 113260007

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

Nos. 2084 & 2085

September Term, 2021

DEMETRIC RICO SIMON

v.

STATE OF MARYLAND

Berger,
Shaw,
Ripken,

JJ.

Opinion by Shaw, J.

Filed: January 26, 2023

*At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

**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.

This is an appeal from an order by the Circuit Court for Baltimore City denying Appellant's motion requesting credit for time served while in custody. Appellant timely appealed and presents the following rephrased question for our review:[1]

1. Did the circuit court err in denying Appellant's motion for credit for time served in custody under CP § 6-218?

For reasons discussed below, we conclude there was no error or abuse of discretion, and we affirm.

[1] Appellant's original questions presented are stated as follows:

1. Whether the Circuit Court erred in not awarding relief to Appellant Simon for 317 Days Incarceration Credits under Criminal Procedure § 6-218, Under the "Mandatory" And/Or "Discretionary" Provisions, When: (1) Under Maryland Cases, Courts are Required to Provide Defendants "As Much Credit as Possible for Time Spent in Custody," (2) Simon Had 317 Days "Convictionless Time" Spent in Jail in 2014 Awaiting Trial For Charges *Nol Prossed*, with Said Charges "Related" to the 2016 Plea Agreement At Issue, (As It was On Same VOP Charge from the 2013 Case in the Present Appeal), and (3) It Was Later Confirmed to Be an Unusual Procedural Concern of "Actual Innocence" Proof Developing While Appellant Was Already In Jail (and thus not a "Bankable" Time or Public Policy Concern), *Inter Alia* Through Guilty Pleas in Federal Court and the State Vacating Convictions of Criminal Defendants with the Same Police Officers who Earlier Framed Appellant.

2. Whether the Circuit Court erred in its Final Judgment Decision from 2022, when It Demurred Against Issuing the Relief Requested of Credit for 317 Days, For the Petition Apparently Not Including as a Matter of "Standing" the Department of Corrections (DOC) as a Named Party under *Wilson v. Simms*, 157 Md. App. 82, 96, 100 (2004), despite the Court of Appeals' decision in *Bratt v. State*, 468 Md. 481, 507-508 (2020) Clarifying Recently, "[F]ailure to award credit [for time served] is a procedural error that is clearly subject to correction [. . . and] appropriately addressed under Rule 4-351 [Correction of Commitment Record After Sentencing]," Which Remains Consistent with *Wilson's* Admonition for Courts to Work with DOC in "Investigating" Credit Concerns to Help Ensure Accuracy.

BACKGROUND

On October 16, 2013, Appellant pled guilty to possessing cocaine with the intent to distribute in Baltimore City Circuit Court Case No. 113260007 (Case 113). The court sentenced him to sixteen years' incarceration, all but one day suspended, and four years' probation.

On March 26, 2014, police arrested Appellant on allegations that he possessed drugs and a BB gun. Appellant was charged in Baltimore City Circuit Court Case No. 114111008 (Case 114). A Violation of Probation (VOP) warrant with no bail was issued in Case 113 by the court on April 4, 2014, based on the allegation that Appellant committed a crime in Case 114. Appellant was served with the VOP warrant on April 8, 2014. On January 16, 2015, the State entered a *nolle prosequi* in Case 114 and dismissed the VOP charge in Case 113. Appellant was released from custody the next day, February 6, 2015. Appellant was in custody for both the VOP in Case 113 and charges in Case 114 for 317 days, from March 26, 2014 to February 6, 2015.

A second VOP warrant in Case 113 was issued in October 2015, and in December 2015, an arrest warrant for second-degree assault was issued. Appellant was arrested on the VOP warrant on May 9, 2016 and served with the arrest warrant the next day. The State later indicted Appellant on the second-degree assault charges (Case 116).

Appellant entered into a global resolution of the cases on December 19, 2016, at a hearing before a circuit court judge. In Case 116, Appellant pled guilty to second-degree assault and received a ten-year sentence. In Case 113, Appellant admitted violating his probation and received a concurrent ten-year sentence. The third unrelated case, Case 115,

was *nolle prossequied* by the State pursuant to the parties' agreement. The hearing involved a discussion about Appellant's "backup time" in Case 113 but made no mention about credit for time served in Case 114 or the first VOP in Case 113. The court issued a commitment order reflecting concurrent ten-year sentences for the conviction in Case 116 and the VOP sentence in Case 113. Appellant's start date for the sentences was May 9, 2016, the date he was arrested on the second VOP warrant.

Beginning in 2019, it was discovered through admissions in a recently unsealed plea agreement involving former BPD Officer Keith Gladstone in U.S. District Court, that Appellant's incarceration in Case 114 and the subsequent VOP charges in Case 113, resulting in 317 days of confinement, were the result of Civil Rights violations by Baltimore City Police Officers assigned to the Gun Trace Task Force (GTTF). Gladstone admitted that another sergeant called him after striking Appellant with his car, that an officer brought Gladstone a BB gun, and he planted the BB gun at the scene of Appellant's arrest.

Appellant, on December 14, 2020, filed a motion in the Baltimore City Circuit Court, under CP § 6-218, requesting "equitable credit" for time served in Case 114 and the first VOP charge in Case 113. Appellant argued that the Circuit Court should award mandatory credit under CP § 6-218(b)(2) or, in the alternative, that the court had discretion to grant credit under CP § 6-218(b)(3). Appellant further claimed relief under CP § 6-218(c) and (d), which addresses credit for sentences set aside due to direct or collateral attacks.

The State opposed Appellant's request, arguing that Cases 113 and 116 were "completely unrelated" to the incident underlying the charges in Case 114 and "unsupported by Maryland law or controlling federal law[.]" In February 2021, Appellant's motion was denied in a written order without a hearing.

Appellant filed a reply to the State's Opposition on May 13, 2021, asserting that he was entitled to 317 days' additional credit, characterized as "dead time." An Order dated August 18, 2021, was subsequently issued scheduling a Zoom hearing on both Case 113 and Case 116 for December 22, 2021. Appellant later filed a Supplement to his motion.

At the hearing on December 22, 2021, Appellant argued that CP § 6-218 was designed "to eliminate to the maximum extent possible what is called 'convictionless crime,'" and thus the Circuit Court must award credit. In the alternative, Appellant requested discretionary credit under CP § 6-218(b)(3). The State argued that the issue of credit should have been addressed at the time of sentencing:

> And it's the State's position that despite the 317 days that counsel's arguing for, this issue has already been litigated. On December 19, 2016, Mr. Simon did receive credit for time served for the case that is related to the global plea [in Case 116] where the VOP warrant was filed – was issued and served on May 9 of 2016. And at that time, where we entered the global agreement, he was given 225 days of credit for those cases.

Appellant responded that the police misconduct in Case 114 was unknown at the time of the plea and argued that he should still be able to secure 317 days' credit under CP § 6-218.

Ultimately, the Motion for credit under CP § 6-218 was denied in a written order entered on January 28, 2022.

> On December 16, 2016, the Defendant appeared before this Court on [Cases 113, 115, and 116]. The Defendant tendered a guilty plea in [Case 116] and was sentenced to ten years with a start date of May 9, 2016. Following the court's acceptance of the guilty plea and sentencing, the Defendant tendered an admission to a Rule 4 violation in [Case 113] and received a ten-year sentence to run concurrently with the sentence imposed in [Case 116]. The State then dismissed all charges in [Case 115].
>
> The record is also clear that on December 19, 2016, no request was made of the court for the awarding of any credit for time served prior to May 9, 2016. What is not clear, however, from either the pleadings or the arguments of counsel made on the record on December 22, 2021, is whether the Defendant was in custody on [Case 114] when a warrant or commitment was lodged against him in [Case 115] or [Case 113]. At the time of sentencing, [Case 114] was not before the court. Additionally, because the Defendant chose to proceed with a motion, the Department of Public Safety and Correctional Services is not a party to this case, and none of their records are available to demonstrate which, if any, credits were awarded to the Defendant by the Division of Correction[] for time spent detained on [Case 114].
>
> Therefore, having determined that the Defendant has failed to meet his burden of providing that he was detained on [Case 114] at the time that a warrant was lodged against him in [Case 116], the Defendant's motion that the Court award him 'equitable credits' in the amount of ten months is respectfully denied.

Appellant noted this timely appeal.

STANDARD OF REVIEW

In examining a denial of a motion for credit for time served under Maryland Criminal Procedure § 6-218, we review the trial court's decision *de novo*. *See Gilmer v. State*, 389 Md. 656, 662-63 (2005) ("The construction of [§ 6-218] of the Criminal Procedure Article implicate[s] a *de novo* review."). We "review [] without deference the issue of whether a sentence is illegal." *Nicholas v. State*, 461 Md. 572, 598 (2018). That is because "the only question is whether the ultimate sentence itself is or is not inherently

illegal. That is quintessentially a question of law calling for *de novo* appellate review." *Carlini v. State*, 215 Md. App. 415, 443 (2013).

When the trial court has discretion to grant credit, its ruling is assessed for abuse of discretion. *See Livingstone v. Greater Washington Anesthesiology & Pain Consultants, P.C.*, 187 Md. App. 346, 388 (2009) ("A trial court's discretionary rulings will be disturbed only upon a finding of an abuse of discretion." (citation omitted)). The Supreme Court of Maryland[2] has explained that, under § 6-218(b)(3), a trial court has discretion to allow credit for time served prior to trial on a charge that is disposed of in some manner other than dismissal or acquittal. *Haskins v. State*, 171 Md. App. 182, 194 (2006) (citing *Gilmer*, 389 Md. at 677 n.17).

A trial court's "ruling reviewed under an abuse of discretion standard will not be reversed simply because the appellate court would not have made the same ruling." *North v. North*, 102 Md. App. 1, 15 (1994). Rather, "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Id.*

DISCUSSION

Appellant seeks credit for 317 days served in custody on Cases 114 and the first VOP charge in Case 113 against his current sentences in the second VOP in Case 113 and Case 116 under CP § 6-218. Appellant asserts that the plain language of CP § 6-218(b)(2),

[2] At the November 8, 2022, general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

(c), and (d) and the General Assembly's intent require that credit be given for time served, and the failure to award credit is a procedural error, subject to correction. In the alternative, Appellant asserts the court failed to exercise its discretion and grant credit under CP § 6-218(b)(3). Specifically, Appellant claims the time spent in custody as a result of civil rights violations was reasonably related to the existing VOP charges.

The State claims that Appellant's sentences did not trigger mandatory credit under CP § 6-218(b)(2), as the warrants are unrelated and were not filed while Appellant was in custody for Case 114 or the first VOP in Case 113. Next, the State asserts that CP § 6-218(c) and (d) are not applicable, as this case does not involve a sentence set aside through direct or collateral attack. Lastly, the State contends that the Circuit Court did not abuse discretion in declining to award credit under CP § 6-218(b)(3).

I. The Circuit Court did not err in denying Appellant's motion for credit for time served in custody under CP § 6-218.

CP § 6-218(b)(1) and (2) require mandatory credit for time served and (3) permits credit for time served:

> (b)(1) A defendant who is convicted and sentenced shall receive credit against a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all time spent in the custody of a correctional facility, hospital, facility for person with mental disorders, or other unit because of:
>
> (i) the charge for which the sentence is imposed; or
> (ii) the conduct on which the charge is based.
>
> (b)(2) If a defendant is in custody because of a charge that results in a dismissal or acquittal, the time that would have been credited if a sentence had been imposed **shall be credited** against any sentence that is based on a charge for which a warrant or commitment was filed **during that custody**.

> (b)(3) In a case other than a case described in paragraph (2) of this subsection, the sentencing court **may apply credit** against a sentence for time spent in custody for another charge or crime.

(emphasis added).

In enacting the credit statute, "the General Assembly sought to ensure that a defendant receive as much credit as possible for time spent in custody as is consistent with constitutional and practical considerations. An obvious corollary is that the General Assembly sought to minimize the amount of dead time." *Fleeger v. State*, 301 Md. 155, 165 (1984). The purpose and intent of CP § 6-218 is "to minimize the possibility that 'an accumulated reserve of time could be used to offset a sentence for a future, yet uncompleted crime.'" *Wilson v. Simms*, 157 Md. App. 82, 96 (2004) (quoting *Fleeger*, 301 Md. at 163). Essentially, the statute serves to avoid "banked time." *Fleeger*, 301 Md. at 163. *See also Blankenship v. State*, 135 Md. App. 615, 617 (2000) ("It is to prevent a defendant from accumulating in advance 'banked time' that might give him, in effect, a partial or total 'get out jail free' card against some yet unperpetrated crime." (citing *Fleeger*, 301 Md. at 163-65)). The statute aims "to eliminate time spent in custody that will not be credited to any valid sentence," *Wilson*, 157 Md. App. at 96, known as "dead time." *Fleeger*, 301 Md. at 165.

This Court has further explained the provisions of CP § 6-218(b)(1) and (2):

> Subsection (b)(1) addresses those situations where a defendant is in custody before trial and is subsequently convicted on the charge for which he was held. The time spent in custody prior to the imposition of sentence must be credited against the sentence imposed. Subsection (b)(2) addresses those situations where a defendant is in custody and a warrant or commitment is lodged against him. If the original charge results in a dismissal or acquittal, and the defendant is convicted of the charge for which the warrant or

> commitment was lodged against him, the time spent in custody must be credited against the sentence imposed for the conviction.

Wilson, 157 Md. App. at 95 (citations omitted).

Appellant argues he is entitled to mandatory credit under subsection (b)(1) and (b)(2) for time served in Case 114 and the dismissed VOP in Case 113. As the legal issues here turn on the timing of events in Cases 113, 114, and 116, we note the following timeline:

> August 25, 2013: Appellant arrested for allegations of possession of marijuana and possession of heroin and cocaine with the intent to distribute in Case 113.
>
> August 26, 2013: Appellant released on bail in Case 113.
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> September 17, 2013: Appellant indicted for possession of cocaine with the intent to distribute in Case 113.
>
> October 16, 2013: Appellant pleaded guilty and was sentenced to sixteen years' incarceration, all but one day suspended, and four years' probation in Case 113.
>
> March 26, 2014: Appellant arrested on allegations of marijuana possession and possession of a BB gun in Case 114. Start date for time in custody.
>
> April 4, 2014: Court issued first VOP warrant in Case 113 as a result of charges in Case 114.
>
> April 8, 2014: Appellant served with first VOP warrant in Case 113.
>
> January 16, 2015: The State entered a *nolle prosequi* in Case 114.
>
> February 5, 2015: Circuit Court dismissed the first VOP petition in Case 113.
>
> February 6, 2015: Appellant released from custody.
>
> March 26, 2014 → February 6, 2015: Time frame Appellant was in custody on the first VOP warrant in Case 113 and Case 114.

October 20, 2015: Court issued second VOP warrant in Case 113.

December 13, 2015: Arrest warrant issued for new criminal charges, second-degree assault in Case 116.

May 9, 2016: Appellant arrested on second VOP warrant in Case 113.

May 10, 2016: Appellant served with the assault warrant in Case 116.

June 2, 2016: Appellant indicted on assault charge in Case 116.

December 16, 2016: Hearing before Circuit Court. Appellant pleaded guilty to second-degree assault in Case 116 and received a ten-year sentence. Appellant admitted violating his probation in Case 113 and received a concurrent ten-year sentence.

May 9, 2016: Start date for concurrent sentences in Case 116 and Case 113.

CP § 6-218(b)(2) requires that in order to receive credit, a defendant must spend time "in custody because of a charge that results in a dismissal or acquittal." We note that the first condition is satisfied here because Appellant spent time in custody for Case 114, a case that the State later *nolle prossequied*, and Case 113 VOP, which the circuit court dismissed. *See Gilmer*, 389 Md. at 677 (holding that *nolle prosequi* amounts to "dismissal").

However, subsection (b)(2) also requires that a defendant receive a sentence "based on a charge for which a warrant or commitment was filed during that custody," that is, filed while defendant was in custody on the dismissal or acquittal charge. CP § 6-218(b)(2); *see also Fleeger*, 301 Md. at 162. Appellant's sentences here do not satisfy the second condition, as they were not "based on a charge for which a warrant or commitment was filed" while Appellant was in custody. In Case 116, the arrest warrant did not issue until

December 2015, after both Case 114 and the first VOP in Case 113 had been dismissed. As a result, the sentence in Case 116 does not trigger subsection (b)(2).

The VOP sentence in Case 113 also does not satisfy the second condition of subsection (b)(2). The "charge" for purposes of subsection (b)(2) analysis is the violation of probation charge for which Appellant received his ten-year sentence. Treating the alleged probation violation as the "charge" ensures that defendants receive credit for custody between his arrest on the VOP warrant and the VOP sentence, analogous to credit for pretrial incarceration, limiting "dead time." It also ensures that defendants cannot "bank" time on a dismissed VOP against a future, independent violation. *See Fleeger*, 301 Md. at 164 ("the possibility that an accumulated reserve of time could be used to offset a sentence for a future, yet uncompleted crime would destroy the deterrent value against the commission of such a crime.").

In this case, the combined period of custody for the dismissed cases ended on February 6, 2015. There then existed a break in custody before the second VOP warrant in Case 113 in October 2015 and the arrest warrant in Case 116 in December 2015. Granting credit for time spent in custody on matters that were dismissed before the charges on which he was sentenced arose or "banked time" is inconsistent with the purposes behind subsection (b)(2) and cannot be applied retroactively to benefit Appellant. Ultimately, credit under subsection (b)(2) turns on the timing of the charges and custody. As the "warrants" for Case 116 and the second VOP "charge" postdated Appellant's custody for the dismissed charges, Appellant's sentence does not trigger mandatory credit under subsection (b)(2).

Appellant also argues that he is entitled to mandatory credit for time served under CP § 6-218(c) and (d).

CP § 6-218(c) mandates credit when the defendant's sentence is set aside and later receives another sentence for the same crime or conduct:

> A defendant whose sentence is set aside because of a direct or collateral attack and who is reprosecuted or resentenced **for the same crime or for another crime based on the same transaction** shall receive credit against and a reduction of the term of a definite or life sentence, or the minimum and maximum terms of an indeterminate sentence, for all time spent in custody under the prior sentence, including credit applied against the prior sentence in accordance with subsection (b) of this section.

(emphasis added).

CP § 6-218(d) mandates credit when a defendant serving multiple sentences has one of those sentences set aside:

> A defendant who is serving multiple sentences, one of which is set aside as the result of a direct or collateral attack, shall receive credit against and a reduction of the remaining term of a definite or life sentence, or the remaining minimum and maximum terms of an indeterminate sentence, for all time spent in custody under the sentence set aside, including credit applied against the sentence set aside in accordance with subsection (b) of this section.

Both subsections (c) and (d) under § 6-218 are triggered when a "sentence" is "set aside" through "direct or collateral attack."

Here, Appellant was never sentenced in Case 114 or the dismissed VOP in Case 113. Rather, Appellant's charges were *nolle prossequied* and unrelated to the current sentence imposed for which credit is sought. Thus, CP § 6-218(c) and (d) cannot provide the relief sought and are inapplicable to Case 116 and the second VOP in Case 113. For that reason, no such sentences could be "set aside," and the circuit court did not err.

Appellant also asserts that the court erred by stating that the Department of Public Safety and Correctional Services (DPSCS) was required to be named as a party. The judge stated:

> What is not clear, however, from either the pleadings or the arguments of counsel made on the record on December 22, 2021, is whether the Defendant was in custody on [Case 114] when a warrant or commitment was lodged against him in [Case 115] or [Case 113]. At the time of sentencing, [Case 114] was not before the court. Additionally, because the Defendant chose to proceed with a motion, the [DPSCS] is not a party to this case, and none of their records are available to demonstrate which, if any, credits were awarded to the Defendant by the Division of Corrections for time spent detained on [Case 114].

In our view, the judge did not require Appellant to name DPSCS in order to prevail. Rather, the judge explained the limited information available regarding Case 114. The record simply does not support Appellant's claim.

Appellant further claims that this Court in *Wilson* required the circuit court to direct the Division of Corrections to investigate any factual gaps in the record. *Wilson*, 157 Md. App. at 100. *Wilson* does not support Appellant's assertion and in *Wilson*, DPSCS was a party to the case. 157 Md. App. at 85. Further *Wilson* does not hold that, whenever a trial court encounters a factual gap regarding credit, the court must order a Division of Corrections investigation through exercise of the court's supervisory power, whether DPSCS is a party or not to the proceeding. *Id*. at 100. Appellant seeks to place the burden on the court to investigate. Under the circumstances presented here, we hold the court did not err in denying credit.

II. The Circuit Court did not abuse its discretion in denying Appellant's motion for credit for time served in custody under CP § 6-218.

Appellant claims the Circuit Court should have awarded discretionary credit under CP § 6-218(b)(3). CP § 6-218(b)(3) provides, "In a case other than a case described in paragraph (2) of this subsection, the sentencing court **may apply credit** against a sentence for time spent in custody for another charge or crime." (emphasis added). This Court has held, "the sentencing court has **discretion** to apply credit for time spent in custody for another charge or crime." *Wilson*, 157 Md. App. at 95 (citations omitted) (emphasis added).

As a preliminary matter, Appellant failed to raise the issue of discretionary credit related to Case 114 or the first VOP in Case 113 against the sentences in Cases 113 and 116 at the sentencing hearing in May 2016. Under CP § 6-218(b)(3), "the sentencing court" is permitted to award discretionary credit, but under subsection (e), the sentencing court "shall award the credit required by this section **at the time of sentencing**." CP § 6-218(e)(1) (emphasis added). In doing so, the court "shall tell the defendant" and "state on the record the amount of the credit and the facts on which the credit is based." CP § 6-218(e)(2).

In this case, Appellant filed his motion seeking credit in December 2020, four years after his sentence was imposed. As a result, the court was barred by statute from awarding discretionary credit.

Assuming *arguendo* that Appellant can seek relief under subsection (b)(3) subsequent to the sentencing date, we hold the court did not abuse its discretion in declining

to award the credit. Appellant asserts the judge did not address the discretionary credit sought under subsection (b)(3) because the judge's order did not explicitly cite subsection (b)(3), and her analysis focused on issues of timing pertinent to mandatory credit. However, the judge's order expressly denied the request for "equitable credits"[3] and it was clear that Appellant sought discretionary credit. We affirm the long-standing principle that judges are presumed to know and correctly apply the law, *see State v. Chaney*, 375 Md. 168, 181 (2003), and are not required to "spell out every step in weighing the considerations that culminate in a ruling." *Wisneski v. State*, 169 Md. App. 527, 556 (2006) (citation omitted). The judge's order reflects an implicit finding that discretionary credit was not merited. In sum, we hold the court did not err or abuse its discretion in declining to award mandatory or discretionary credit under CP § 6-218.

While we are cognizant of the police misconduct in this case, "[i]t is not our function to substitute our judgment for that of the fact finder, even if we might have reached a different result." *Nicholson Air Servs. v. Bd. of Cnty. Comm'rs of Allegany Cnty.*, 120 Md. App. 47, 67 (1998). It is further not our role to create policy. Unless and until the legislature creates a statutory remedy for the relief sought, this Court "may not extend statutes to make them say what the legislature, by choice or oversight, did not say." *Dep't of Nat. Res. v. Adams*, 37 Md. App. 165, 173 (1977).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[3] The term "equitable credits" was asserted by Appellant seeking discretionary credit under § 6-218(b)(3) as a result of police misconduct in Case 114.