

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1154

September Term, 2014

PATRICK CORNELIUS McCORMICK

v.

STATE OF MARYLAND

Meredith,
Berger,
Davis, Arrie W.
(Retired, Specially Assigned),

JJ.

Opinion by Berger, J.

Filed: June 3, 2015

* 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.

Convicted of first-degree burglary in 2010 by the Circuit Court for Wicomico County, Patrick Cornelius McCormick challenges the previously suspended sentence imposed by the trial court as illegal for failing to give him credit for time served. We reject the merits of his challenge, holding that McCormick's sentence was never set aside and that he received credit for all time he served on his sentence for burglary. We affirm.

BACKGROUND

On October 26, 2010, McCormick pleaded guilty to first-degree burglary, and on December 3, 2010, the circuit court imposed a sentence of fifteen years' incarceration with all but ten years suspended and three years' probation. Thereafter, on December 16, 2011, the court decreased his sentence to six years suspended and three years' probation, releasing McCormick from incarceration and giving him credit for all time served since his initial guilty plea in 2010.

Just over six months into his probation, McCormick was arrested and charged in Dorchester County with an array of criminal charges arising from an incident that took place in July 2012. Following this arrest, a petition for violation of probation was filed in the Circuit Court for Wicomico County against McCormick for failure to obey all laws, noting the charges pending against him in Dorchester County. McCormick was later found guilty in the Circuit Court for Dorchester County of theft less than \$1,000 value and sentenced to eighteen months' incarceration.

On October 25, 2013, McCormick admitted to violating his probation in the Circuit Court for Wicomico County. As a result of this guilty plea, the court revoked McCormick's

probation and imposed the previously suspended sentence. The court reduced the sentence from six to three years' incarceration to be served consecutive to "any sentence [McCormick] was currently serving." Additionally, the court expressly denied McCormick any credit for time served prior to the date of the sentence.

McCormick filed a motion to correct an illegal sentence on April 9, 2014; the circuit court denied this motion without a hearing. McCormick filed this timely appeal.

DISCUSSION

On appeal, McCormick contends that the sentence imposed on October 25, 2013 was illegal, because it did not credit him for time he served for the burglary conviction before he was placed on probation.¹ He asserts that this failure by the sentencing court violated Maryland Code (2001, 2008 Repl. Vol.), § 6-218(b) of the Criminal Procedure Article ("CP") and resulted in an illegal sentence.

Ordinarily, we would review *de novo* whether the circuit court erred in denying appellant's motion to correct an illegal sentence. *Carlini v. State*, 215 Md. App. 415, 443 (2013). In the present case, however, we do not need to address whether the contentions McCormick raises on appeal are cognizable under Rule 4-345. Assuming the arguments made in connection with his motion to correct an illegal sentence were appropriate for consideration of a Rule 4-345 motion, the court did not err in failing to grant McCormick

¹ McCormick claims that he was incarcerated for 378 days because of the burglary conviction and that he was committed for treatment to the Department of Health and Mental Hygiene for an unspecified amount of time.

credit for time served. McCormick’s sentence was never set aside, and all time that he spent incarcerated was credited to the sentence he received from his original burglary conviction. For these reasons, we affirm the decision of the circuit court to deny McCormick’s motion to correct an illegal sentence.

I. Credit For Time Served

A sentence executed against a criminal defendant must credit the defendant all time he or she spent incarcerated or confined for medical reasons because of the charge and conduct for which the sentence was imposed. CP § 6-218(b) provides:

(b)(1) A defendant who is convicted and sentenced 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 the custody of a correctional facility, hospital, facility for persons 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.

CP § 6-218(b).

McCormick seeks to use this statute to attack the sentence levied against him by the circuit court on October 25, 2013 after he was found to have violated his probation. He analogizes his circumstance to that of the appellant in *Smith v. State*, 31 Md. App. 310 (1976). In *Smith*, this Court held that CP § 6-218(b) required a sentence imposed by the

circuit court to account for the time the defendant had already served in connection with the original conduct leading to her sentence. *Id.* at 315-16.

The link McCormick requests us to identify between *Smith* and the present case is flawed. To understand why *Smith* is not an apt comparison for the present case, we look to one of the purposes of CP § 6-218 and the effect that probation has on appellant’s sentence.

A. Eliminating Dead Time

One of the purposes for which CP § 6-218 was created was to ensure that convicted persons received credit for time served while avoiding the undesirable outcome of “dead” time. *Fleeger v. State*, 301 Md. 155, 165 (1984)); *see also Haskins v. State*, 171 Md. App. 182, 196 (2006). “‘Dead time’ is ‘time spent in custody that will not be credited to any valid sentence.’” *Gilmer v. State*, 389 Md. 656, 664 n.12 (2005) (quoting *Fleeger*, 301 Md. at 165).

By enacting [the predecessor to CP § 6-218], 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. Simply stated, we believe that no legitimate legislative policy is advanced by maximizing dead time or by withholding credit that is due a defendant under the crediting statute.

Fleeger, 301 Md. at 165. In other words, the statute provides a mechanism of ensuring that a defendant receives credit for time spent in custody and that all such time is attributable to a valid conviction.

In the context of CP § 6-218(b), this purpose is achieved by matching time spent in custody with specific convictions. “The statute’s plain meaning is that, upon conviction, a defendant must be credited for time he has served in custody ‘because of’ that crime.” *Lawson v. State*, 187 Md. App. 101, 107 (2009) (quoting CP § 6-218(b)). Every sentence is traceable to an underlying criminal act and conviction; CP § 6-218(b) helps to ensure that a defendant’s time spent in custody is similarly credited to an underlying criminal act and conviction.

B. Effect Of Probation On A Sentence

When a sentence is suspended in favor of a period of probation, there can be an effect on the calculus for determining the credit associated for time served. To explain what happens when a court executes a previously suspended sentence against a defendant who violated probation, we look to the authority granted to our courts by the governing statutory framework.

The circuit court has the authority to “suspend the imposition or execution of [a] sentence and place the defendant on probation on the conditions that the court considers proper.” CP § 6-222. If the court subsequently finds that the defendant violated a condition of his or her probation, the court may:

- (1) revoke the probation granted or the suspension of sentence;
- and

(2) impose any sentence that might have originally been imposed for the crime of which the probationer or defendant was convicted[.]

CP § 6-223(d). When a trial court revokes the probation of an individual, the court does not levy “a second punishment upon the original sentence;” rather, it withdraws the “favorable treatment previously accorded the defendant.” *Gibson v. State*, 328 Md. 687, 690 (1992) (citing *Clipper v. State*, 295 Md. 303, 313 (1983)). “The effect of the court’s action is simply to lift the previously ordered suspension and direct execution of the now unsuspended part.” *Moats v. Scott*, 358 Md. 593, 597 (2000). Probation does not wipe out the original sentence; it suspends the sentence by providing a “conditional exemption from punishment for the original crime.” *Williams v. State*, 72 Md. App. 233, 235-36 (1987) (footnote omitted) (superseded by statute on other grounds); *see also Maus v. State*, 311 Md. 85, 106 (1987) (describing the reinstatement of a suspended sentence after revocation of probation as “activation of a conditionally-suspended portion of the original punishment”).

II. McCormick’s Sentence Was Never Vacated. He, Therefore, Received Credit For All Time Served.

We view McCormick’s sentence through a lens accounting for the purpose of CP § 6-218 and the effect of probation on his sentence. Accordingly, our decision in *Smith* is inapplicable here.

In *Smith*, the defendant was convicted of second-degree murder and sentenced to thirty years’ incarceration, a sentence which was later reduced to twenty four years’

incarceration. 31 Md. App. at 311. Almost two years after the defendant’s original conviction, the conviction was reversed on appeal, the sentence was vacated, and the case was remanded for a new trial. *Id.* at 312. In lieu of a new trial, the defendant pled guilty to second-degree murder and received a sentence of twelve years’ incarceration. The sentence did not formally credit her for the time she had previously served under her original conviction and sentence. *Id.* at 312-13, 317.

On appeal, we held that imposition of a sentence that did not give credit to the time served under the original sentence violated the statutory predecessor to CP § 6-218. We acknowledged that “[c]redit is required to be given for time spent in custody . . . before conviction [and] against a subsequent sentence when a sentence is set aside.” *Smith*, 31 Md. App. at 315-16. Under these guidelines drawn from the statutory predecessor to CP § 6-218, we held that the court in *Smith* erred by not granting the defendant credit for time served after resentencing her on a previously vacated conviction. *Id.* at 317, 320. In other words, the second sentence was illegal because it did not give the defendant credit for the “actual time [she] spent in custody on the charge of which she was [originally] convicted,” resulting in a period of dead time. *Id.* at 320.

Unlike the defendant’s sentence in *Smith*, McCormick’s sentence was never set aside. In *Smith*, the conviction imposed in the defendant’s original sentence was vacated, and, after the defendant’s guilty plea upon remand, the trial court reimposed a sentence. *Id.* at 311-13. In the present case, McCormick’s original conviction and sentence from the 2010 burglary

charge were never vacated. The execution of McCormick’s sentence was suspended by the court granting the appellant the benefits of probation in 2011. Nevertheless, the sentence itself remained in place since its imposition in 2010.

Because McCormick’s sentence was never set aside, all time that he had spent incarcerated had been credited to a lawful conviction. As a result, he served no dead time. At the time McCormick was placed on probation, every day he was incarcerated was attributable to the same sentence he had received for his burglary conviction. When the circuit court in 2013 violated McCormick’s probation, the court had the option to strike probation and reinstate his original sentence, *i.e.*, execute the previously suspended six year term. The court elected to revoke the appellant’s probation and execute a sentence of three years’ incarceration. Indeed, this resulted in the appellant serving less than the full six year term the court could have executed. The circuit court, therefore, did not err in denying McCormick’s motion to correct an illegal sentence.

**JUDGMENT OF THE CIRCUIT COURT FOR
WICOMICO COUNTY AFFIRMED. COSTS TO BE
PAID BY APPELLANT.**