NOT DESIGNATED FOR PUBLICATION

No. 125,073

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

LORENA GUTIERREZ,
Appellant.

MEMORANDUM OPINION

Appeal from Finney District Court; CHRISTOPHER D. SANDERS, judge. Opinion filed September 8, 2023. Affirmed in part, vacated in part, and remanded with directions.

Kai Tate Mann, of Kansas Appellate Defender Office, for appellant.

Isaac LeBlanc, assistant county attorney, *Susan Lynn Hillier Richmeier*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before MALONE, P.J., GREEN and ISHERWOOD, JJ.

PER CURIAM: Lorena Gutierrez pled no contest to one count of violating the Kansas Offender Registration Act (KORA). At sentencing, the district court awarded 37 days of jail time credit and ordered Gutierrez to pay $500 to the Board of Indigents' Defense Services (BIDS). On appeal, Gutierrez argues the district court erred when it calculated the amount of jail credit to which she was entitled and imposed BIDS fees without making the necessary statutory findings. Our review of the record reveals that the district court properly denied Gutierrez' request for additional jail time credit. However, because the district court did not state on the record how it weighed the factors required

for a BIDS assessment, that order must be vacated, and the case is remanded for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

On January 31, 2022, Gutierrez entered into a plea agreement that encompassed all three of her pending Finney County cases. First, she agreed to plead no contest to a KORA violation, a severity level 6 nonperson felony, in violation of K.S.A. 2020 Supp. 22-4903(a)(1). Additionally, the State agreed to dismiss the felony theft charge that made up her second case and terminate as unsuccessful the probation she was serving in her third case. The district court accepted the plea, adjudged Gutierrez guilty of a single KORA violation, and ordered completion of a presentence investigation (PSI) report. It also accepted the State's dismissal, with prejudice, of Gutierrez' remaining charges and, with respect to her probation, noted it was "going to be terminated unsuccessful for—so for all intents and purposes that case is gone as well."

The PSI report listed a sentence begins date of January 31, 2022, which translated to 33 days of jail time credit as of the date of sentencing. The report also reflected that Gutierrez faced a presumptive prison sentence that would be imposed consecutive to the offense from her third case given that she committed the KORA violation while on probation in that matter.

Gutierrez disputed the PSI report's jail credit calculation and argued she was instead entitled to receive credit for 167 days as that more accurately reflected the extent of her time in custody. As support for her assertion, she provided the district court with a report from the Finney County Sheriff's Office which listed an arrest date of September 22, 2021, and reflected that she remained in custody until the date of the sentencing hearing.

The State countered that Gutierrez should only receive credit from the date of the plea agreement to the date of sentencing because for a segment of that time (September

23, 2021, through January 31, 2022), she was also in custody for a probation violation in a separate case, and that range coincided with the time she was held for the KORA offense. The State also argued that a special rule required the sentence for her KORA violation to run consecutive to the sentence in the case for which she had been serving probation, so awarding her jail time credit in the KORA case for time served in the probation matter would essentially circumvent K.S.A. 2020 Supp. 21-6606(c), which required consecutive sentencing when a new felony is committed while on probation.

The district court agreed with the State and limited Gutierrez's jail credit to 37 days. It explained that when a probation term is terminated as "unsuccessful" that does not mean it did not happen nor does it mean no credit was given for that time. The court added:

> "[B]ecause of the special rule . . . the [probation] case was going to get the first crack at all the days, and then once that was terminated unsuccessfully . . . those other days . . . were credited to that one notwithstanding the fact that it was terminated unsuccessfully. Had it not been terminated unsuccessfully, she would still have been getting credit in that case."

The district court imposed a 39-month prison sentence for the KORA violation. When calculating costs, it asked defense counsel what the attorney fees would be, and counsel estimated it was "less than $500." The court in turn assessed "$100 BIDS fee [on the] administrative side [and] then $500 attorney's fees."

Gutierrez now timely brings the matter before our court to determine whether the district court accurately calculated the amount of jail credit she was entitled to and undertook the proper analysis when ordering her to pay attorney fees.

LEGAL ANALYSIS

The district court properly awarded Gutierrez all the jail credit to which she was entitled.

Gutierrez first argues that the district court erred by declining to award what she characterizes as the full amount of jail credit to which she was entitled. The State counters and argues that is precisely what she received given that a portion of the time she spent in jail was also attributable to matters arising out of a separate case.

The right to jail time credit in Kansas is statutory. *State v. Hopkins*, 295 Kan. 579, 581, 285 P.3d 1021 (2012). Accordingly, resolution of this issue requires us to engage in statutory interpretation, which presents a question of law subject to unlimited review. 295 Kan. at 581.

K.S.A. 2020 Supp. 21-6615(a), provides, in relevant part:

> "In any criminal action in which the defendant is convicted, the judge, if the judge sentences the defendant to confinement, shall direct that for the purpose of computing defendant's sentence and parole eligibility and conditional release dates thereunder, that such sentence is to be computed from a date, to be specifically designated by the court in the sentencing order of the journal entry of judgment. Such date shall be established to reflect and shall be computed as an allowance for *the time which the defendant has spent incarcerated pending the disposition of the defendant's case*." (Emphasis added.)

The provisions governing jail time credit are mandatory and afford the district court no discretion in assessing when it is due. *State v. Harper*, 275 Kan. 888, 890, 69 P.3d 1105 (2003); *State v. Babcock*, 226 Kan. 356, 363, 597 P.2d 1117 (1979). The provision quoted above clearly states that a defendant is entitled to credit for time spent in jail "pending the disposition of [their] case." Our Supreme Court has interpreted that phrase to mean "the time held in custody solely on account of, or as a direct result of,

those charges for which [they are] now being sentenced." *State v. Calderon*, 233 Kan. 87, 98, 661 P.2d 781 (1983) (citing *Campbell v. State*, 223 Kan. 528, 530-31, 575 P.2d 524 [1978]). In other words, an offender "is not entitled to credit on a sentence for time which [they have] spent in jail upon other, distinct, and wholly unrelated charges." *Campbell*, 223 Kan. 528, Syl. ¶ 2. Stated another way, if a defendant is entitled to jail time credit in one case, they have no right to credit for the same jail time in any other case. See *State v. Prebble*, 37 Kan. App. 2d 327, 332-33, 152 P.3d 1245 (2007).

That being said, where Gutierrez was already being held on a probation violation in a different case when she was arrested on the KORA violation, the question becomes how to properly award credit in those situations when a defendant is serving time on multiple cases in the same county and then one or more of those cases is ultimately dismissed.

The parties focus on whether awarding additional jail time credit would result in "double credit," and both direct this court's attention to decisions by other panels of this court in *Prebble*, 37 Kan. App. 2d at 327, and *State v. Whiteeagle*, No. 122,617, 2021 WL 3042412 (Kan. App. 2021) (unpublished opinion), *rev. denied* 314 Kan. 859 (2022). But neither decision precisely addresses the issue we must resolve.

Prebble involved a defendant who was held in the McPherson County Jail for 231 days pending disposition of the felony case charged against him in that jurisdiction. At sentencing, the district court denied jail credit for the time Prebble spent in custody for that case because a detainer Rice County posted for him predated the charges filed in McPherson County. On appeal, a panel of this court reversed and held that Prebble was entitled to jail credit for the time served in McPherson County because during that time frame he was held solely on account of the charges pending against him in that county. 37 Kan. App. 2d at 331. The panel explained that Prebble could still be returned to Rice County on its pending detainer and he simply would not be entitled to receive credit in

that case for the time he spent in custody in McPherson County. 37 Kan. App. 2d at 332-33. Contrary to Gutierrez' suggestion, *Prebble* merely holds only that a defendant should not be denied jail credit simply because of outstanding warrants or detainers in other jurisdictions. Moreover, it is not that the district court in this case refused to grant Gutierrez *any* jail time credit as the district court did in *Prebble*. Rather, Gutierrez received 37 days for the time she spent in jail solely related to the KORA violation.

Whiteeagle involved a defendant who was charged with drug possession while he was in jail awaiting disposition of an unrelated case concerning a charge for aggravated indecent liberties with a child. Whiteeagle ultimately entered into a plea agreement under which the State agreed to dismiss the drug charge in exchange for Whiteeagle's guilty plea to aggravated kidnapping in the sex crimes case. At sentencing, the court awarded 98 days of jail credit instead of the full amount Whiteeagle requested—294 days between being charged and sentenced. The district court was of the mindset that the 98 days properly reflected the actual amount of time Whiteeagle spent in jail solely on the aggravated kidnapping case. Whiteeagle appealed and a panel of this court affirmed, finding that strict adherence to Kansas Supreme Court precedent in *Calderon* and *Campbell* mandated that Whiteeagle only receive 98 days of credit because that was the amount of time he spent in custody *solely* on charges associated with the sentence imposed. *Whiteeagle*, 2021 WL 3042412, at *3.

To help resolve the precise question presented by this appeal, we believe another decision issued by this court helps to inform our decision, although it was not cited by either party. In *State v. Wheeler*, 24 Kan. App. 2d 616, 949 P.2d 634 (1997), the court was asked to analyze an issue that nearly mirrors the question Gutierrez brings to us. In that case, Wheeler was arrested and charged in Johnson County for an incident of indecent solicitation of a child that allegedly occurred on January 9, 1995. Roughly six months later, Wheeler was charged with multiple counts of aggravated indecent liberties with a child in Sedgwick County for acts perpetrated against the same child. He was

arrested on the Sedgwick County charges while in the Johnson County Jail on July 27, 1995, and transported to Sedgwick County the following day. The Johnson County charges were apparently dismissed, and Wheeler eventually pleaded guilty in the Sedgwick County case. At sentencing, Wheeler requested jail credit for the entire time he was in custody in Johnson County. The district court declined and only granted him credit for two days of that period.

Wheeler appealed, and a panel of this court affirmed with the explanation that it was adhering to prior Kansas Supreme Court precedent which stated that a defendant is only entitled to jail credit "for the time spent in jail *solely on account* of the offenses for which the defendant is being sentenced. [Citations omitted]." (Emphasis added.) 24 Kan. App. 2d at 617-18. The court added that while such a result is "sometimes troubling,"—"[j]ail time credit is not earned under K.S.A. 21-4614 [the predecessor to K.S.A. 2020 Supp. 21-6615(a)] for time spent in jail solely on account of charges *which are then dismissed*." (Emphasis added.) 24 Kan. App. 2d at 620.

In arriving at its decision, the *Wheeler* panel referenced *Campbell*, in which the Kansas Supreme Court addressed the concept of "dead time," which arises out of "earlier sentences served or partially served as a result of convictions later vacated, time spent awaiting trial on charges which were dismissed, and the like." *Campbell*, 223 Kan. at 531. Other panels of this court have followed *Wheeler* in tandem with the "dead time" concept to conclude there is no constitutional or statutory remedy when a defendant finds themselves in a situation where they are not awarded any credit for time spent incarcerated pending disposition of a case because the case ultimately results in no criminal sentence. See, e.g., *Brodie v. State*, 1 Kan. App. 2d 540, 542-43, 571 P.2d 53 (1977) (affirming denial of jail time credit for time spent in jail pending disposition of murder charges in California that arose while defendant had escaped from Kansas prison); *State v. Shirley*, No. 112,398, 2015 WL 5009711, at *2-3 (Kan. App. 2015) (unpublished opinion) (affirming denial of jail time credit for time spent in jail on a case

dismissed as part of a plea bargain in the present case); *State v. Rains*, No. 94,385, 2006 WL 1668773, at *2 (Kan. App. 2006) (unpublished opinion) (affirming denial of jail time credit for time spent in jail on homicide charge that resulted in an acquittal); but see *State v. Veales*, No. 124,320, 2022 WL 17544752, at *6 (Kan. App. 2022) (unpublished opinion) (reversing denial of jail time credit for time spent in jail on three cases from same county later consolidated and concurrent sentences imposed).

There is nothing about Gutierrez' case that demands a different result. A district court has complete discretion to terminate a defendant's probation "at any time." K.S.A. 2020 Supp. 21-6608(a); *State v. White*, 51 Kan. App. 2d 1121, 360 P.3d 484 (2015). The termination of her probation as unsuccessful is no different from the State's dismissal of her felony theft charge, with prejudice, as part of the plea agreement in that she will not face further incarceration related to either case.

Thus, the time Gutierrez spent in jail between September 23, 2021, and January 31, 2022, amounts to an unfortunate loss of "dead time" since one of the cases for which she was held in custody was later terminated. The only charge she was ever held solely on account of was the case involving the KORA violation, and the district court correctly awarded her the 37 days of jail credit she was entitled to in that case.

The district court failed to make the necessary statutory findings prior to ordering Gutierrez to pay BIDS attorney fees.

Gutierrez next challenges the district court's assessment of BIDS attorney fees at sentencing. She contends that the district court failed to explicitly consider her financial resources and the burden such payment would impose, as required by K.S.A. 22-4513(b). See *State v. Robinson*, 281 Kan. 538, Syl. ¶ 1, 132 P.3d 934 (2006). The State agrees with this assertion, as do we.

Gutierrez acknowledges that she did not contest to the imposition of BIDS below, but that does not preclude her from raising the issue on appeal. K.S.A. 22-4513 places mandatory duties upon the district court that must be fulfilled before BIDS fees can properly be imposed. *State v. Garcia-Garcia*, 309 Kan. 801, 822-23, 441 P.3d 52 (2019) (also finding that consideration of issue is necessary to serve ends of justice); *Robinson*, 281 Kan. at 541 (reviewing unpreserved BIDS fees claim as a question of law arising on proven or admitted facts and that was finally determinative of the case).

This issue requires interpretation of K.S.A. 22-4513, which presents a question of law subject to unlimited review. *State v. Stoll*, 312 Kan. 726, 736, 480 P.3d 158 (2021). K.S.A. 22-4513(b) provides, in relevant part: "In determining the amount and method of payment of such [BIDS] sum, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of such sum will impose." As both parties note, the Kansas Supreme Court's decision in *Robinson* controls here. In *Robinson*, our Supreme Court held that under the plain language of the statute: "[T]he sentencing court, at the time of initial assessment, *must* consider the financial resources of the defendant and the nature of the burden that payment will impose *explicitly*, stating on the record how those factors have been weighed in the court's decision." (Emphasis added.) 281 Kan. at 546.

The record before us undeniably reflects that the district court failed to conduct the proper inquiry. That noncompliance with K.S.A. 22-4513(b) requires that we vacate its assessment of BIDS attorney fees and remand Gutierrez' case for further proceedings.

Affirmed in part, vacated in part, and remanded with directions.