

NOT DESIGNATED FOR PUBLICATION

No. 125,797

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

ERIC T. BROWN,
Appellant.

MEMORANDUM OPINION

Appeal from Douglas District Court; AMY J. HANLEY, judge. Submitted without oral argument. Opinion filed December 8, 2023. Sentence vacated and case remanded with directions.

Patrick H. Dunn, of Kansas Appellate Defender Office, for appellant.

Jon Simpson, senior assistant district attorney, *Suzanne Valdez*, district attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before BRUNS, P.J., COBLE and PICKERING, JJ.

PER CURIAM: In February 2022, Eric T. Brown was arrested in Douglas County and charged with various crimes. He spent one day in jail and was released on bond. While on pretrial release for this first case, he was arrested and charged in a second criminal case and spent 35 more days in jail. Eventually, Brown pled guilty to the charges in the first case, and the State dismissed the second case and other matters pursuant to a plea agreement. At sentencing, Brown asked the district court to "take note" of the days already spent in jail. However, the sentencing court declined to award Brown credit for the 35 days he spent in jail related to the second arrest, believing it was without power to

do so under our appellate courts' interpretation of K.S.A. 2022 Supp. 21-6615(a). Brown timely appeals.

Fortune is on Brown's side, as after his appeal, the Kansas Supreme Court overruled its prior interpretation of K.S.A. 2022 Supp. 21-6615(a), now allowing for jail time credit for all time a defendant has spent incarcerated pending the disposition of his or her case. See *State v. Hopkins*, 317 Kan. ___, Syl., 537 P.3d 845 (2023). Application of this new rule causes us to rule in Brown's favor and remand this case to the district court for resentencing, allowing him credit for his entire presentencing jail time.

FACTUAL AND PROCEDURAL BACKGROUND

On February 1, 2022, Brown was arrested in Douglas County for allegedly assaulting his girlfriend, taking her phone, and damaging her property. He was charged in Douglas County case No. 22-CR-99 (Case 1) with various felonies and misdemeanors, including domestic battery, criminal restraint, and criminal damage to property. Brown spent one day in jail and was released on bond on February 2, 2022, and was ordered to have no contact with the victim.

On July 2, 2022, the victim reported to police that Brown had beaten her again the previous night. Brown was arrested on July 19, 2022, and charged in Douglas County case No. 22-CR-650 (Case 2) with aggravated battery, criminal restraint, and eventually violation of a protective order. The State moved to revoke Brown's pretrial release in Case 1, though that motion was never addressed. Brown bonded out of jail on August 23, 2022, after having spent 35 days in jail.

On September 2, 2022, pursuant to an plea agreement, Brown pled no contest to attempted aggravated battery, aggravated intimidation of a witness or victim, and criminal threat in Case 1, in exchange for the State dismissing Case 2. The district court

sentenced Brown to a total of 42 months in prison. Brown requested that 1 day of jail credit for Case 1 and 43 days of jail credit from Case 2 be applied to his sentence. The State corrected defense counsel that Brown actually served 35 days on Case 2, and defense counsel conceded at sentencing that 35 days was served. After being advised that Brown's 35-day stint in jail was the result only of Case 2, the district court declined to give him credit for the dismissed case and instead gave Brown just the single day of credit from Case 1.

It appears that Brown timely appealed his sentence on November 2, 2022, based on the case summary and this court's docketing notice included in the district court's certified record on appeal.

DID THE DISTRICT COURT ERR IN DECLINING TO
GIVE BROWN CREDIT FOR ALL TIME SPENT IN JAIL?

Brown argues on appeal that the sentencing court erred in failing to award him the jail credit from Case 2 because (1) decisions resulting in "dead time" served in prison are discouraged and courts should be wary of allowing such a result; (2) he was not incarcerated on "other, distinct, and wholly unrelated charges"; and (3) his case is distinguishable from other cases this court has addressed.

Appellate review of K.S.A. 2022 Supp. 21-6615, which directs sentencing courts in how to allocate served time in reference to a sentence, is unlimited. See *State v. Harper*, 275 Kan. 888, 891, 69 P.3d 1105 (2003). Under K.S.A. 2022 Supp. 21-6615(a): "In any criminal action in which the defendant is convicted," the resulting sentence "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."

Until recently, for the past 45 years, Kansas Supreme Court precedent interpreted prior versions of K.S.A. 21-6615(a) as requiring sentencing judges "to award a defendant credit for all time spent in custody 'solely' on the charge for which the defendant is being sentenced while awaiting disposition of his or her case, and that a defendant is not entitled to credit for time "which he has spent in jail upon other, distinct, and wholly unrelated charges.'" *Hopkins*, 537 P.3d at 849 (quoting *State v. Smith*, 309 Kan. 977, 981, 441 P.3d 1041 [2019], and *Campbell v. State*, 223 Kan. 528, Syl. ¶ 2, 575 P.2d 524 [1978]). Appellate courts' primary inquiry under this precedent was whether the defendant was in jail *because of* the pending charges against him. If so, the defendant was entitled to jail credit toward his sentence on that case. See *State v. Davis*, 312 Kan. 259, 287, 474 P.3d 722 (2020) (noting that K.S.A. 2019 Supp. 21-6615[a] requires a defendant be awarded credit for all time spent in custody "solely on the charge for which he is being sentenced"). Although this rule supposedly "required credit be given only for the time a defendant spent time in custody 'solely' on the charge for which he or she was being sentenced, in practice, defendants were often awarded credit even if they had other charges pending" *Hopkins*, 537 P.3d at 851.

On October 20, 2023, after the parties in this case submitted their briefs on appeal, the Kansas Supreme Court abrogated its long-held rule in favor of a much simpler interpretation of K.S.A. 2022 Supp. 21-6615(a). *Hopkins*, 537 P.3d at 850 (finding its prior rule not only "unworkable, more fundamentally it is not a proper plain reading of the statutory language"). In *Hopkins*, the defendant was held in Cherokee County Jail on murder charges and the State moved to revoke his probation in a prior matter. After 358 days in jail, the defendant escaped for a short period. Once returned to jail, the State filed new charges against him related to the escape. After 214 more days in jail, the defendant pled guilty to the murder charges in exchange for the State's dismissal of the motion to revoke probation, escape charges, and a third matter. At sentencing, the district court declined to give the defendant credit for the 572 days spent in jail because he was not

jailed "solely" on account of the charges for which he was being sentenced. 537 P.3d at 847.

The *Hopkins* court held that, rather than limiting the award of jail credit to only the case in which the defendant was held in custody, "[u]nder the obvious and plain meaning of the words chosen by the Legislature, a defendant shall be awarded jail time credit for all time spent in custody pending the disposition of his or her case." *Hopkins*, 537 P.3d at 850. Under this new rule, it is unnecessary for judges to make factual determinations about whether a defendant's "incarceration was 'solely' a result of the crime of conviction," and instead need only identify how much time the defendant spent in jail while his or her case was pending. 537 P.3d at 849-51 (finding that defendant spent 572 days in jail while his case was pending and must be awarded that credit).

This new holding in *Hopkins* applies to Brown's case. "The general rule in Kansas is that an overruling decision is applied retroactively to all similar cases pending as of the date of the overruling decision, regardless of when the cause of action accrued." *State v. Waterberry*, 248 Kan. 169, 172, 804 P.2d 1000 (1991); see also *State v. Sims*, 306 Kan. 618, 622, 395 P.3d 413 (2017) (applying the rule from *Waterberry*). *Hopkins* was an "overruling decision" because it expressly overruled prior caselaw. Cf. *State v. Barnes*, 278 Kan. 121, 125, 92 P.3d 578 (2004) (describing a new case that did not overrule prior caselaw and thus did not apply retroactively to all similar cases pending on appeal).

Additionally, the facts in this case and *Hopkins* are similar in that Brown pled guilty to the charges in his original case, he requested the time spent in jail on his second case be applied to his original case, and the second case was dismissed pursuant to a plea agreement. Although it appears Brown was jailed for 35 days due "solely" to his Case 2 charges, this previously distinguishing circumstance no longer matters. See *Hopkins*, 537 P.3d at 850 (abrogating the holding in *State v. Prebble*, 37 Kan. App. 2d 327, 152 P.3d

1245 [2007], where the court found a defendant was entitled to jail time credit because he was jailed "solely" for one case and not pending charges in another county).

So, instead of determining whether Brown was in jail "solely" due to Case 1 or Case 2, we must now simply conclude that because Brown spent a total of 36 days in jail while Case 1 was pending, he must be awarded 36 days in jail time credit against his sentence. See *Hopkins*, 537 P.3d at 851 (finding the "updated rule is a much easier endeavor; we simply conclude that because Hopkins spent 572 days in jail while his case was pending, Hopkins must be awarded 572 days in jail time credit against his" sentence). For this reason, we must vacate the district court's decision and remand for resentencing.

Sentence vacated and case remanded with directions.