IN THE COURT OF APPEALS OF IOWA

No. 0-486 / 09-0507
Filed November 10, 2010

MICHAEL ANDERSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh, Judge.

Applicant appeals the district court's postconviction relief order denying his request for credit for time spent wearing an electronic monitoring device. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Stephen Holmes, County Attorney, and Mary Howell Sirna, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Doyle, J., and Huitink, S.J.* Tabor, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

I. Background Facts & Proceedings

Michael Anderson was charged with two counts of sexual abuse in the second degree. He entered into a plea agreement whereby he entered an *Alford* plea to two counts of enticing away a minor, in violation of Iowa Code section 710.10(2) (2003). On April 15, 2004, Anderson was sentenced to a term of imprisonment not to exceed five years on each count, to be served consecutively. The sentences were suspended, and he was placed on probation for five years on each count.

As a condition of probation, Anderson was required to reside at the Marshalltown Residential Facility until maximum benefits had been derived. He was also prohibited from having any contact with anyone aged sixteen or younger. He was required to maintain employment and complete sex offender treatment.

Anderson remained at the residential facility until March 5, 2005, when he was discharged. He was permitted to reside in his home while wearing an electronic monitoring device on his ankle. The device kept track of when Anderson entered or left the home through his telephone system. Anderson went to work six days a week and was given time to go to the grocery store or engage in other errands on his way home. He could get permission to go to movies for example, and at times could stay out as late as 1:00 a.m. He could travel outside his county as long as he was home by his curfew. Anderson could watch what he wanted on television and had access to the Internet on his computer.

In March 2006, Anderson's probation officer received information that Anderson had met a sixteen-year-old girl, S.R., on the Internet. Anderson began meeting S.R. in person. The probation officer went to Anderson's home with a police officer, where they found S.R. naked, hiding under a bed. Anderson's computer showed he had accessed pornography and dating websites. He admitted he had engaged in a sexual relationship with S.R.

Anderson's probation was revoked on May 23, 2006. He was ordered to serve the two consecutive five-year terms of imprisonment. The Iowa Department of Corrections gave him credit for the time spent in the residential facility, but not the time spent at home with the electronic monitoring device.

Anderson filed an application for postconviction relief in March 2007, claiming he had been placed under house arrest and should receive credit for that time. At the postconviction hearing Anderson testified he wore the electronic monitoring device from March 5, 2005, until May 4, 2006. He stated he was confined to his home except for certain hours. Anderson argued that similar to the time he was in the residential facility, his freedom was curtailed while he wore the electronic monitoring device.

The district court denied Anderson's request for postconviction relief. The court determined that under section 903A.5(1) (2007) an inmate is given credit only for time in a county jail or other correctional or mental facility. The court also determined Anderson was not entitled to credit under section 907.3(3), finding "the Iowa Legislature intended to establish a system whereby a revoked probationer receives credit against his sentence for time spent in some type of restrictive facility." The court concluded, "[a]llowing credit for time spent merely

wearing an electronic monitoring device would be contrary to that legislative scheme." The court additionally concluded the record did not show Anderson had been under "house arrest." Anderson appeals the decision of the district court.

II. Standard of Review

Generally, postconviction relief actions are reviewed for the correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001); *Powell v. State*, 766 N.W.2d 259, 261 (Iowa Ct. App. 2008). "Statutory construction involves questions of law that we review without deference to the trial court." *State v. Canas*, 571 N.W.2d 20, 22 (Iowa 1997).

III. Merits

Credit for time served is authorized by sections 903A.5(1) and 907.3(3). *See* Iowa Code § 903A.5(1).

A. Under section 903A.5(1), an inmate is given credit for days "confined to a county jail or other correctional or mental facility at any time prior to sentencing, or after sentencing but prior to the case having been decided on appeal . . . ." This statute is plain and unambiguous and will "clearly only allow credit for time served in state correctional institutions or detention facilities." *State v. Rodenburg*, 562 N.W.2d 186, 189 (Iowa 1997). The Iowa Supreme Court has refused to attach a more "fluid concept" to terms in this statute, such as "jail," "detention facility," and "correctional facility." *Id*. We find no error in the district court's conclusion Anderson was not entitled to credit under section 903A.5(1) for time spent in his home wearing an electronic monitoring device. Anderson was not at that time in a correctional institute or detention facility.

B. Credit for time served is also authorized by section 907.3(3), which provides:

> By record entry at the time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require including commitment to an alternate jail facility or a community correctional residential treatment facility to be followed by a term of probation as specified in section 907.7, or commitment of the defendant to the judicial district department of corrections services for supervision or services under section 901B.1 at the level of sanctions which the district department determines to be appropriate and the payment of fees imposed under section 905.14. A person so committed who has probation revoked shall be given credit for such time served.

In general, "absent a specific provision allowing for it, a court does not err by denying credit for time served on probation." *Trecker v. State*, 320 N.W.2d 594, 595 (Iowa 1982). Section 907.3(3) specifically refers to "an alternate jail facility or a community correctional residential treatment facility." The term "alternate jail facility" is defined in chapter 356A. *See id.* at 596. Also, chapter 905 addresses community-based correctional programs. Neither an alternate jail facility or a community correctional residential treatment facility should be "construed to mean merely the equivalent of a jail, or a place where the defendant is confined." *Id.* Anderson's time wearing an electronic monitoring device was not a commitment to an alternate jail facility or a community correctional residential treatment facility, and thus he is not entitled to credit for time served under this part of section 907.3(3).[1]

C. Section 907.3(3) also refers to commitment of a defendant for services under section 901B.1. Section 901B.1 "sets forth a corrections continuum that

[1] We note that prior to the amendment of section 907.3(3) in 1996, the provision applied only to commitment to an alternative jail facility or a community correctional residential treatment facility. *See* 1996 Iowa Acts ch. 1193, § 19.

consists of five levels." *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003). These levels are: (1) noncommunity-based corrections sanctions; (2) probation and parole options; (3) quasi-incarceration sanctions; (4) short-term incarceration (less than thirty days); and (5) incarceration in excess of thirty days. Iowa Code § 901B.1(1); *Pickett*, 671 N.W.2d at 870. Level two includes intensive supervised sanctions than are less restrictive than those in level three and could involve electronic monitoring. Iowa Code § 901B.1(1)(b)(3). A quasi-incarceration sanction in level three could involve twenty-four hour electronic monitoring or "house arrest." *Id.* § 901B.1(1)(c).

Generally, we interpret a statute "to give effect to the general assembly's intent in enacting the law." *Pickett*, 671 N.W.2d at 870 (citation omitted). We ascertain the legislature's intent from the language of the statute. *Id.* "[W]e consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole." *Id.* (citation omitted). Furthermore, we interpret a statute in a manner to avoid unreasonable results and to avoid rendering any part of the statute superfluous. *Id.*

We agree with the district court's assessment that a person is not entitled to credit for time served under all levels of the corrections continuum set forth in section 901B.1. In level one, a person may be self-monitored and not subject to supervision. Iowa Code § 901B.1(1)(a). At the other end of the spectrum, in level five a person may be incarcerated in prison or jail for longer than thirty days. *Id.* § 901B.1(1)(e). The restriction of liberties vastly increases over the course of the correctional continuum. We do not interpret section 907.3(3) to mean that

time spent under any level of restriction or confinement results in a person being entitled to jail credit for that time.

The district court concluded, "the Iowa Legislature intended to establish a system whereby a revoked probationer receives credit against his sentence for time spent in some type of restrictive facility." We agree with the district court's conclusion. "Denial of credit is appropriate under circumstances where the restrictions imposed cannot be equated with incarceration." *Trecker*, 320 N.W.2d at 595. "There is no Iowa statutory provision for credit for 'street time' while on probation." *Canas*, 571 N.W.2d at 25. Minor restrictions, such as not contacting the victims, reporting to pre-trial services, and remaining in the county, do not amount to incarceration. *See Blanford v. State*, 340 N.W.2d 796, 798 (Iowa Ct. App. 1983).

Anderson's time wearing an electronic monitoring device does not rise to a level of loss of liberty that can be equated with incarceration. *See Trecker*, 320 N.W.2d at 595. The facts of this case show Anderson's activities were not restricted to any great extent. We conclude the district court did not err in its decision that Anderson was not entitled to credit for time served during the time he wore an electronic monitoring device.

Although courts of other jurisdictions operate within the context of the individual statutory framework of that jurisdiction, we note that in many other jurisdictions credit for time served has not been given to persons subject to electronic monitoring. *See, e.g., Matthew v. State*, 152 P.3d 469, 473 (Alaska Ct. App. 2007) (holding credit for time served should only be given when restrictions approximate those experienced by one who is incarcerated); *State v. Climer*, 896

P.2d 346, 350 (Idaho Ct. App. 1995) (finding no credit for a person under house arrest with an electronic monitoring device); *State v. Williams*, 856 P.2d 158, 163 (Kan. Ct. App. 1993) (noting a defendant under house arrest with an electronic monitoring device was not entitled to credit for time served); *State v. Muratella*, 483 N.W.2d 128, 129-30 (Neb. 1992) ("Being in one's home, subject to electronic monitoring, with the freedom to engage in employment and probation-related activities, is far less onerous than being imprisoned."); *State v. Faulkner*, 657 N.E.2d 602, 604 (Ohio Ct. App. 1995) (concluding a defendant under house arrest with an electronic monitoring device was not subject to confinement or detention); *Commonwealth v. Birney*, 910 A.2d 739, 741 (Pa. Super. Ct. 2006) (determining that time spent subject to electronic monitoring at home is not time spent in custody for purposes of credit for time served); *Tagorda v. State*, 977 S.W.2d 632, 634 (Tex. Ct. App. 1998) (holding there was no credit for wearing an electronic monitoring device because it was not the equivalent of jail time); *City of Bremerton v. Bradshaw*, 88 P.3d 438, 439 (Wash. Ct. App. 2004) (finding no statutory or constitutional basis for credit for time served under electronic monitoring). *But see State v. Speaks*, 829 P.2d 1096, 1098 (Wash. 1992) (noting that under that state's statutory scheme which provided for credit for all presentence confinement, credit should be given for time wearing an electronic monitoring device).

We affirm the decision of the district court denying Anderson's request for postconviction relief.

AFFIRMED.

Vogel, P.J., concurs; Doyle, J., dissents.

DOYLE, J. (dissenting)

I respectfully dissent. Although I agree with the majority that Anderson is not entitled to credit for time served under Iowa Code section 903.5(1) (2007), I part ways with the majority's conclusion that Anderson is not entitled to credit for time served under section 907.3(3).

Section 907.3(3) provides a court may suspend a defendant's sentence and place the defendant on probation subject to terms and conditions the court may require. These conditions may include commitment to an alternate jail facility or a community correctional residential treatment facility. *See* Iowa Code § 907.3(3). I concur that Anderson's time wearing an electronic monitoring device while residing at home was not a commitment to an alternate jail facility or a community correctional residential treatment facility. However, section 907.3(3) goes on to provide that conditions of probation may also include "commitment of the defendant to the judicial district department of correctional services for supervision or services under section 901B.1 at the level of sanctions which the district department determines to be appropriate. . . ." Furthermore, the very next sentence in the section 907.3(3) states: "A person *so committed* who has probation revoked *shall be given credit for such time served*." *Id*. § 907.3(3) (emphasis added).

Section 901B.1 sets forth a corrections continuum that consists of five levels.[2] "Level Two" of the continuum provides probation and parole options

[2] "Level One" sanctions under section 901B.1(1)(a) are not implicated here. Level One sanctions are "Noncommunity-based corrections sanctions including the following:

consisting of different types of sanctions, including intensive supervision sanctions. *Id*. § 901B.1(1)(b). The intensive supervision sanctions include "electronic monitoring . . . for persons on work release." *Id*. § 901B.1(1)(b)(3). "Level Three" of the continuum consists of "quasi-incarceration sanctions," which are sanctions supported by twenty-four hour electronic monitoring, including "[h]ouse arrest with electronic monitoring." *Id*. § 901B.1(1)(c)(4).

Here, when Anderson was originally sentenced, the court suspended his sentence in its entirety and placed him "upon probation to the Second Judicial District Department of Correctional Services for a period of five (5) years under such terms and conditions as the Court and [Anderson's] probation officer shall impose." One condition of probation imposed by the court required Anderson to reside at the Marshalltown Residential Facility "until such time as maximum benefits have been derived." Anderson remained at the residential facility until March 5, 2005. Still on probation and under the supervision of the department of correctional services, Anderson was then permitted to reside in his home while wearing an electronic monitoring device on his ankle.

As noted above, section 907.3(3) explicitly states: "A person *so committed* who has probation revoked *shall be given credit for such time served*."

> (1) Self-monitored sanctions. Self-monitored sanctions which are not monitored for compliance including, but not limited to, fines and community service.
>
> (2) Other than self-monitored sanctions. Other than self-monitored sanctions which are monitored for compliance by other than the district department of correctional services including, but not limited to, mandatory mediation, victim and offender reconciliation, and noncommunity-based correction supervision.

No reasonable reading of subsection one would include commitment to the department of correctional services for supervision or services since those sanctions are "self-monitored." Sanctions under subsection two specifically do not include involvement by the department of correctional services.

Id. § 907.3(3) (emphasis added). The statute's language is clear and unequivocal. It is not limited or qualified in any way. If one is placed on probation and committed to the department of correctional services for supervision or services under section 901B.1, as Anderson was, and probation is revoked, as Anderson's was, the court *shall* give credit for time served upon probation revocation. We are bound by what the legislature said, not what it might have said. *See State v. Reiter*, 601 N.W.2d 372, 373 (Iowa 1999); Iowa R. App. P. 6.904(3)(*m*) (2009).

The majority's reliance on *Trecker v. State*, 320 N.W.2d 594 (Iowa 1982), is misplaced. Concluding there was no statute expressly authorizing credit for time spent on probation, the *Trecker* court held that denial of credit was appropriate under circumstances where the probation restrictions imposed could not be equated with incarceration. *See Trecker*, 320 N.W.2d at 595. Additionally, recognizing that the statute provided that a defendant shall only be given credit for time served in an "alternate jail facility" or a "community correctional residential treatment facility," the court determined the district court's refusal to give Trecker credit for time spent at Oakdale for psychiatric examination was not in error. *Id*. at 596. The statute the *Trecker* court analyzed, Iowa Code section 907.3(2), then stated:

> By record entry at the time of or after sentencing, the court may suspend the sentence and place the defendant on probation upon such terms and conditions as it may require *including commitment to an alternate jail facility or a community correctional residential treatment facility for a specific number of days to be followed by a term of probation as specified in section 907.7. A person so committed who has probation revoked shall be given credit for such time served.*

Id. at 595 (emphasis in original). The legislature has since renumbered and amended the statute.[3] As noted above, section 907.3(3) now includes commitments to the department of correctional services for supervision or services under section 901B.1. Thus, unlike the statute considered in *Trecker*, the current statute's "so committed" language references not only commitments to an alternate jail facility or a community correctional residential treatment facility; it also references commitments to the department of correctional services under section 901B.1.

Similarly, *State v. Canas*, 571 N.W.2d 20 (Iowa 1997), is not dispositive of the case before us. *See Canas*, 571 N.W.2d at 25 ("There is no Iowa statutory provision for credit for 'street time' while on probation."). Unlike the present case, *Canas* did not involve a commitment to the department of correctional services for supervision or services while on probation. The court stated:

> The failure of the legislature to require that the court give credit for time served while on probation indicates the legislature did not intend to grant such credit. We conclude, absent a specific provision in our statutes, Canas is not entitled to credit on his sentence for time he served while on probation.

Id. The legislature has spoken and there is now a specific provision in our statutes requiring credit for time served when a defendant has been committed to the department for supervision or services while on probation.

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[3] Section 907.3(2) was renumbered as 907.3(3) in 1988. *See* 1988 Iowa Acts ch.1168, § 4. A 1996 amendment added to section 907.3(3) the following: "or commitment of the defendant to the judicial district department of correctional services for supervision or services under section 901A.1 [now 901B.1] at the level of sanctions which the district department determines to be appropriate." 1996 Iowa Acts ch. 1193, § 19.

For the above reasons, I would reverse the district court's decision and remand for an order giving Anderson credit for time served pursuant to Iowa Code section 907.3(3).