

IN THE COURT OF APPEALS OF IOWA

No. 1-639 / 11-0293
Filed September 8, 2011

KRIS KOLZOW,
Applicant-Appellee,

vs.

STATE OF IOWA,
Respondent-Appellant.

Appeal from the Iowa District Court for Henry County, Cynthia Danielson,
Judge.

The State appeals a district court decision that earned time credit and jail credit should be applied to reduce the revocation of release period of not more than two years for violating a special sentence. **REVERSED.**

Thomas J. Miller, Attorney General, William A. Hill, Assistant Attorney
General, for appellant.

Philip B. Mears of Mears Law Office, Iowa City, for appellee.

Considered by Eisenhauer, P.J., Doyle J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.**I. Background Facts & Proceedings**

In 2007, Kris Kolzow pled guilty to three counts of assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (2007), and dissemination of obscene material to a minor, in violation of section 728.2. He was sentenced to a term of imprisonment not to exceed two years on each of the assault charges and a period of one year on the dissemination charge, all to be served consecutively. The sentences were suspended and he was placed on probation for a period of two years on each of the assault charges; these periods would run consecutively.

For each of the three assault charges Kolzow was required to serve a special sentence under section 903B.2, committing him to the custody of the director of the Iowa Department of Corrections for ten years commencing at the end of his probation, with the sentences beginning under supervision as if on parole. His special sentences were to run concurrently.

Kolzow completed his probation in 2009. He began to serve his ten-year special sentence on parole on May 29, 2009. He was arrested on July 28, 2009, for violating his special sentence parole, and placed in jail. He remained there until August 18, 2009, when the board of parole ordered him to reside at a work release facility pending a determination of whether he had violated his parole. Kolzow was arrested again on December 8, 2009, and placed in jail.¹ He remained in jail until the revocation hearing on January 11, 2010.

¹ On November 6, 2009, the court had ordered that Kolzow would be released from the work release facility on December 11, 2009, and be returned to street parole status.

Kolzow's parole was revoked on January 11, 2010. He was "committed and returned to the Iowa Medical and Classification Center to serve a period not greater than two years as required by Iowa Code section 903B.2." His custody was transferred to the Iowa Department of Corrections. The order specified that no days had been lost. The department did not give him earned time credit for good conduct during the time he was serving the revocation of release period. He also did not receive jail credit for the time he spent in the work release facility or in jail prior to his parole revocation.

On October 25, 2010, Kolzow filed an application for postconviction relief, claiming the Iowa Department of Corrections had not properly calculated his earned time or his jail credit, that his "sentence [had] expired," and that he was unlawfully held in custody or other restraint.² The district court found that under section 903A.2, Kolzow "should be given earned time credit, at the appropriate rate, for each day he demonstrated good conduct and satisfactorily participated in any program or placement status identified by the director to earn the reduction." The court also found that under section 903A.5, he should receive the appropriate jail credit for the days he was confined prior to his final revocation hearing. The State appeals the decision of the district court.

However, before he was released he was arrested on December 8, 2009, and placed in jail.

² Kolzow, whose convictions and sentences had occurred in Mahaska County, filed his application in Henry County, an inappropriate venue. See Iowa Code § 822.3 (providing that applications for postconviction relief, subject to an exception not applicable in this case, are to be filed in the county where the conviction or sentence took place). However, as neither the State nor the court objected, the case proceeded to submission and judgment.

II. Standard of Review

Postconviction proceedings are law actions and are ordinarily reviewed for the correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Our review of the district court's interpretation of a statute is for the correction of errors at law. *State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003).

III. Merits

Kolzow received a special sentence pursuant to Iowa Code section 903B.2, which provides:

A person convicted of a misdemeanor or a class "D" felony offense under chapter 709, section 726.2, or section 728.12 shall also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for a period of ten years, with eligibility for parole as provided in chapter 906. . . . The person shall be placed on the corrections continuum in chapter 901B, and the terms and conditions of the special sentence, including violations, shall be subject to the same set of procedures set out in chapters 901B, 905, 906, and 908, and rules adopted under those chapters for persons on parole. *The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation.* A special sentence shall be considered a category "A" sentence for purposes of calculating earned time under section 903A.2.

(Emphasis added).

An offender's violation of the terms of a special sentence is addressed in section 908.5(2) as follows:

If the person is serving a special sentence under chapter 903B, the administrative parole judge may revoke the release. Upon the revocation of release, the person shall not serve the entire length of the special sentence imposed, and the revocation shall be for a period not to exceed two years in a correctional institution upon a first revocation and for a period not to exceed five

years in a correctional institution upon a second or subsequent revocation.

As noted above, this limitation on the period of a revocation of release while serving a special sentence is also stated in the special sentencing statute, section 903B.2: “The revocation of release shall not be for a period greater than two years upon any first revocation, and five years upon any second or subsequent revocation.”

The State contends the district court erred in holding that an offender incarcerated as a result of a special sentence revocation is entitled to earned time credit and jail credit to reduce the maximum period of the revocation. Under section 903A.2(1)(a), which addresses earned time, an inmate of the department of corrections who is serving a category “A” sentence “is eligible for a reduction of sentence equal to one and two-tenths days for each day the inmate demonstrates good conduct” Also, for jail credit, an inmate confined to jail prior to sentencing, “shall be given credit for the days already served upon the term of the sentence.” Iowa Code § 903A.5(1).

When considering the interpretation of statutes, the Iowa Supreme Court has stated:

“[O]ur primary goal is to give effect to the intent of the legislature.” *State v. Anderson*, 782 N.W.2d 155, 158 (Iowa 2010). “That intent is evidenced by the words used in the statute.” *State v. Kidd*, N.W.2d 764, 765 (Iowa 1997). “When a statute is plain and its meaning clear, courts are not permitted to search for meaning beyond its express terms.” *State v. Chang*, 587 N.W.2d 459, 461 (Iowa 1998). In the absence of legislative definition, we give words their ordinary meaning. In interpreting criminal statutes, however, we have repeatedly stated that provisions establishing the scope of criminal liability are to be strictly construed with doubts resolved therein in favor of the accused.

Anderson v. State, ___ N.W.2d ___, ___ (Iowa 2011) (quoting *State v. Hearn*, 797 N.W.2d 577, 583 (Iowa 2011) (other citations omitted) (internal quotation marks omitted)).

We first note that section 903B.2 refers to a “special sentence” for a period of ten years. Thus, the sentence that Kolzow is serving is this ten-year special sentence. The statutory provisions that refer to a revocation of release under the special sentence do not refer to the revocation period as a sentence. See Iowa Code § 903B.2 (“[t]he revocation of release shall not be for a period greater than two years upon any first revocation”); § 908.5(2) (“the revocation shall be for a period not to exceed two years in a correctional institution upon a first revocation”); see also *State v. Wade*, 757 N.W.2d 618, 628 (Iowa 2008) (“The consequences of a parole violation under section 903B.2 do not involve sentencing functions . . .”). The statutes provide for the revocation of release for a period up to two years, but this period is not designated as a “sentence.”

We also note that there is no specification in the statutes of a mandatory minimum time to be served for the period of revocation. Because of this, the Iowa Board of Parole may parole an offender on the first day of the period of revocation or on the last day of that period. See *Larsson v. Iowa Bd. of Parole*, 465 N.W.2d 272, 275-76 (Iowa 1991) (“[C]orrections officials have been given broad discretion with respect to the role parole rightly plays in an individual prisoner’s constructive reintegration into society”). The statutes only specify that if there is a revocation of release while serving a special sentence, an offender

may not be held in a correctional institution for longer than two years.³ *Id.* §§ 903B.2, 908.5(2). Unlike a sentence, the relevant statutes contain no requirement that, subject to time credits not forfeited and the possibility of pardon or other release, an offender be kept in a correctional institution for the full term of the revocation of release period. See *id.* § 903A.5(1) (directing that an inmate may not be discharged from custody “until the inmate has served the full term for which the inmate was sentenced, less earned time and other credits earned and not forfeited, unless the inmate is pardoned or otherwise legally released”). We conclude the period of revocation should not be considered a “sentence.”

Kolzow raises several arguments to support his claim that he should be granted earned time credit and jail credit during the period of revocation. He first contends that the statement in section 903B.2 that “[a] special sentence shall be considered a category ‘A’ sentence for purposes of calculating earned time under section 903A.2,” must also mean that a period of revocation is a category “A” sentence. While the statement Kolzow refers to comes immediately after the sentence in section 903B.2 referring to revocation of release, the statement specifically addresses a “special sentence.” The special sentence is for a period of ten years. *Id.* § 903B.2. The period of revocation is not the same as the special sentence.

Kolzow points out that this same statement is found in section 903B.1,⁴ which provides for a special sentence “for the rest of the person’s life, with

³ Furthermore, an offender may not be kept in a correctional institution past the discharge date for the ten-year special sentence. Iowa Code § 903B.2.

⁴ Like section 903B.2, section 903B.1 provides that the “revocation of release shall not be for a period greater than two years upon any first revocation,” and that a “special

eligibility for parole as provided in chapter 906.” He asserts that because a person who is serving a special sentence for the rest of that person’s life will not benefit from earned time, the statement must refer to the calculation of earned time during a period of revocation. Kolzow’s appellate brief, however, acknowledges that an offender’s earned time credit is calculated if the person’s sentence is commuted. Therefore, earned time credit may be calculated even though a person is subject to a special sentence for the rest of that person’s life under section 903B.1. *Cf.* Iowa Code § 903A.2(5) (providing that for inmates serving a life sentence under section 902.1, earned time “shall be credited against the inmate’s sentence if the life sentence is commuted to a term of years under section 902.2”).

Second, Kolzow contends that he should receive earned time credit while serving the period of revocation based on the language of section 903A.2(1), which provides “[e]ach inmate committed to the custody of the director of the department of corrections is eligible to earn a reduction of sentence in the manner provided in this section.” He states the only instance where the earned time reduction is not available is for a mandatory minimum sentence that is not listed in section 903A.5.⁵ Kolzow argues that because the revocation of release period of not more than two years is not a mandatory minimum sentence, his sentence should be reduced for earned time. The calculation of earned time credit under section 903A.2(1) applies to the reduction of a sentence. We have

sentence shall be considered a category ‘A’ sentence for purposes of calculating earned time.”

⁵ Under section 903A.5, “[e]arned time accrued and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to section 124.406, 124.413, 902.7, 902.8, 902.88, or 902.11.”

already determined the revocation of release period of not to exceed two years under section 908.5(2) is not a sentence. We conclude section 903A.2(1) does not apply.

Third, Kolzow asserts the language used in section 903B.2 is almost identical to the language found in section 903.1(2), providing for the sentence for an aggravated misdemeanor, and earned time is available for aggravated misdemeanors. Section 903.1(2) provides that when a person is convicted of an aggravated misdemeanor “and a specific penalty is not provided for, the maximum penalty shall be imprisonment not to exceed two years.” This case does not involve an aggravated misdemeanor or a sentence imposed under section 903.1. This code section has no application to the present case.

Fourth, Kolzow points out that statutes should be interpreted to avoid absurd results. See *Pickett*, 671 N.W.2d at 870 (“[S]tatutes are interpreted in a manner to avoid absurd results”). He states that because the ten-year special sentence under section 903B.2 is reduced by earned time a person is only required to serve about 4.54 years.⁶ Kolzow asserts that if a person served a full two-year period for a first revocation, and there were no reduction for earned time, the person could never be required to serve the full five-year period for a second revocation under section 908.5(2), because there would at most be only about two and one-half years remaining on the underlying sentence. He argues this would be an absurd result.

⁶ If a person qualifies for earned time under section 903A.2, the person will receive “a reduction of sentence equal to one and two-tenths days for each day the inmate demonstrates good conduct and satisfactorily participates in any program or placement status identified by the director to earn the reduction.” Ten years reduced by an additional 1.2 days for each day served results in a total of 4.545 years.

Kolzow's argument assumes that an offender would receive earned time credit for each day served on the ten-year special sentence. This is not necessarily true. An offender is entitled to earned time credit only for "each day the inmate demonstrates good conduct and satisfactorily participates in any program or placement status identified by the director to earn the reduction." Iowa Code § 903A.2(1)(a). There may very well be situations in which an offender would not earn good conduct credit and could serve a two-year period of revocation and a five-year period of revocation within the ten-year special sentence. We determine application of section 908.5(2) does not necessarily lead to absurd results.

Finally, Kolzow notes that one rule of statutory construction is that any ambiguity in criminal statutes or sentencing statutes should be resolved in favor of the offender. See *Anderson*, ___ N.W.2d at ___ ("In interpreting criminal statutes, however, we have repeatedly stated that provisions establishing the scope of criminal liability are to be strictly construed with doubts resolved therein in favor of the accused." (citation omitted)). He states that any ambiguity in section 903B.2 should be resolved in favor of requiring earned time.

We do not find the language in section 903B.2 to be ambiguous. This section states, "[a] special sentence shall be considered a category 'A' sentence for purposes of calculating earned time under section 903A.2." Iowa Code § 903B.2. The reference to earned time credit applies only to the ten-year special sentence. We again point out that section 908.5(2) provides for a revocation of release, and not a sentence. Because that period of revocation is not a

sentence, Kolzow is not entitled to earned time credit under section 903A.2(1)(a), or to jail credit under section 903A.5(1).

We reverse the decision of the district court.

REVERSED.