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CREDIT FOR JAIL TIME UPON REVOCATION OF DEFERRED IMPOSITION OF SENTENCE OR SUSPENDED EXECUTION OF SENTENCE

Dave Kinnard

The origin of the modern concept of pre-conviction jail time credit upon the term of the ultimate sentence of imprisonment is of legislative grace and not a constitutional guarantee.¹

I. INTRODUCTION

Two options a judge may utilize in sentencing a criminal defendant under Montana law are: 1) to defer imposition of sentence, and 2) to suspend execution of sentence.² The sentencing statute also allows a court to impose reasonable restrictions or conditions, including jail base release or jail time not exceeding ninety days,

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1. Petition of Gray, 523 F.2d 989, 990 (9th Cir. 1975).
 2. REVISED CODES OF MONTANA (1947) [hereinafter cited as R.C.M. 1947], § 95-2206 (Supp. 1975), which states in part:

Whenever any person has been found guilty of a crime or offense upon a verdict or a plea of guilty the court may:

(1) Defer imposition of sentence for a period not to exceed one (1) year for any misdemeanor; for a period not to exceed three (3) years for any felony. The sentencing judge may impose upon the defendant any reasonable restrictions or conditions during the period of the deferred imposition. Such reasonable restrictions or conditions may include:

- (a) jail base release;
- (b) jail time not to exceed ninety (90) days;
- (c) conditions for probation;
- (d) restitution;
- (e) any other reasonable conditions deemed necessary for rehabilitation or for the protection of society;
- (f) any combination of the above.

(2) Suspend execution of sentence up to the maximum sentence allowed for the particular offense. The sentencing judge may impose on the defendant any reasonable restrictions during the period of suspended sentence. Such reasonable restrictions may include:

- (a) jail base release;
- (b) jail time not to exceed (90) [sic] days;
- (c) conditions for probation;
- (d) restitution;
- (e) any other reasonable conditions deemed necessary for rehabilitation or for the protection of society;
- (f) any combination of the above.

If any restrictions or conditions are violated, any elapsed time, except jail time, shall not be a credit against the sentence, unless the court shall otherwise order.

- (3) Impose a fine as provided by law for the offense.
- (4) Commit the defendant to a correctional institution with or without fine by law for the offense.
- (5) Impose any combination of subsections (2), (3), or (4) above

during the period of the deferred imposition or suspended execution of sentence. It is common for a court to employ one of these statutory options when the defendant is young or a first offender.³ In all too many cases, however, the defendant either subsequently violates the conditions of such a sentence or is convicted of another offense. If, as a result, the deferred imposition or suspended execution of sentence is revoked, and the defendant is sentenced to a prison term for the original crime, the question arises whether the defendant is entitled to credit, applied against the prison term finally imposed, for time spent in jail as a condition of the deferred imposition or suspended execution of sentence.

In 1976 the Montana Supreme Court, in the case of *In re LeDesma*,⁴ addressed this issue with regard to the revocation of a suspended sentence, and found that R.C.M. 1947, § 95-2215, is controlling in such situations. This decision, when coupled with earlier rulings in which the court arrived at the same conclusion concerning the deferred imposition of sentence,⁵ mandates judges in Montana to grant to a defendant credit for time spent incarcerated after arrest and prior to revocation of either a deferred imposition or suspended execution of sentence, against any sentence subsequently imposed for the original offense. It is the purpose of this note to discuss the developments which preceded *LeDesma*, the decision itself, and the impact of these developments on the authority of the sentencing judge in Montana.

II. BACKGROUND

In 1967 the Montana legislature enacted R.C.M. 1947, § 95-2215, which provides in part:

- (a) Any person incarcerated on a bailable offense and against whom a judgment of imprisonment is rendered shall be allowed credit for each day of incarceration prior to or after conviction except that in no case shall the time allowed as a credit exceed the term of the prison sentence received.⁶

This section was enacted concurrently with the original version of the sentencing statute.⁷ One subsection of the original sentencing

3. See Revised Commission Comment to R.C.M. 1947, § 95-2206. For instance, R.C.M. 1947, § 54-133(d) (Supp. 1975), provides that the trial court's discretion in sentencing a person under 21 is limited by the presumption of entitlement to a deferred imposition of sentence, if convicted of a first offense of possession of dangerous drugs.

4. ___ Mont. ___, 554 P.2d 751 (1976).

5. State *ex rel.* Bovee v. District Court, 162 Mont. 98, 508 P.2d 1056 (1973); Maldonado v. Crist, 162 Mont. 240, 510 P.2d 887 (1973); 36 MONT. L. REV. 345 (1975).

6. R.C.M. 1947, § 95-2215.

7. Laws of Montana (1967), ch. 196, § 1. As enacted in 1967, former § 95-2206 read in part:

statute granted the judge authority to impose any restrictions or conditions on the enumerated sentencing options which he deemed necessary. The district courts construed this authority as permitting them to condition a deferred imposition or suspended execution of sentence upon the defendant's serving a short term in the county jail. This practice, apparently an outgrowth of conditions attached to probation under prior law,⁸ was upheld by the Montana Supreme Court.⁹

In 1973, two cases, *State ex rel. Bovee v. District Court*¹⁰ and *Maldonado v. Crist*,¹¹ called on the court to consider whether R.C.M. 1947, § 95-2215(a), was applicable to a defendant requesting credit for time spent incarcerated prior to revocation of a deferred imposition of sentence.

In *Bovee* the petitioner pleaded guilty to the crime of possession of dangerous drugs and received a deferred imposition of sentence on the condition that he serve four months in the state prison. After serving the four months, the petitioner was released on probation, but the deferred imposition of sentence was subsequently revoked and the petitioner sentenced to five years in the state prison. Although the district court allowed him credit for forty days confinement in the county jail prior to sentencing, it refused to credit him with the four months served as a condition of the deferment of sentence. In opposing Bovee's petition to the supreme court, the State contended that serving a period of time in the county jail or state prison as a condition to deferment of sentence could not be considered a judgment of imprisonment within the meaning of R.C.M. 1947, § 95-2215, or a term of imprisonment in any sense.¹²

Whenever any person has been found guilty of a crime or offense upon a verdict or plea the court may impose any of the following sentences:

- (1) Release the defendant on probation;
- (2) Defer the imposition of sentence for a period not to exceed three (3) years;
- (3) Suspend the execution of the sentence up to the maximum sentence allowed for the particular offense. However, if any restrictions or conditions are violated, any elapsed time shall not be a credit against the sentence, unless the court shall otherwise order.
- (4) Impose a fine as provided by law for the offense;
- (5) Commit the defendant to a correctional institution with or without a fine as provided by law for the offense;
- (6) Impose any combination of the above. The court may also impose any restrictions or conditions on the above sentences which it deems necessary

8. See *Petition of Williams*, 145 Mont. 45, 399 P.2d 732 (1965); 27 MONT. L. REV. 98 (1965).

9. *State ex rel. Woodbury v. District Court*, 159 Mont. 128, 495 P.2d 1119 (1972), *distinguishing State v. Drew*, 158 Mont. 214, 490 P.2d 230 (1971).

10. 162 Mont. 98, 508 P.2d 1056 (1973).

11. 162 Mont. 240, 510 P.2d 887 (1973).

12. The state cited *Petition of Williams*, 145 Mont. 45, 399 P.2d 732 (1965), and *State*

The supreme court felt this contention missed the point of the case, concluding:

The sole issue in this case is whether the prison time previously served by relator as a condition of deferment must be credited against the prison time subsequently imposed. Relator was clearly "incarcerated on a bailable offense" under the statute when he served four months in the state prison as a condition of deferment of sentence on a plea of guilty to the crime of possession of dangerous drugs. A "judgment of imprisonment" was subsequently imposed against him following a revocation of deferment. Accordingly, he "shall be allowed credit for each day of incarceration prior to or after conviction" pursuant to the statute (emphasis supplied).¹³

The petitioner in *Maldonado* originally pleaded guilty to second degree assault, and the district court deferred imposition of sentence, placing the defendant on probation for three years. This original order was modified eleven months later, and the defendant was ordered to serve six months in the county jail on a work release program as a condition of a continuation of the deferment. Maldonado served the six month sentence but was charged with burglary prior to the completion of probation. Thereupon, the district court, having found that he had violated the conditions of the deferment, revoked the deferred imposition of sentence and sentenced the defendant to five years and nine months in the state prison for his original offense. Maldonado filed a petition for a writ of habeas corpus with the supreme court, requesting credit for the six months served under the work release program against his prison sentence. Applying its decision in *Bovee*, the supreme court agreed with the petitioner and ordered that he be given the credit.¹⁴

In a later decision the court emphasized that jail time credit cannot be applied until a judgment has actually been entered.¹⁵ Thus, under an order deferring imposition of sentence, a judgment of imprisonment does not occur until the court revokes the order deferring imposition of sentence.¹⁶

Although *Bovee* and *Maldonado* were both sentenced pursuant to the provisions of the sentencing statute as originally enacted,¹⁷

ex rel. Woodbury v. District Court, 159 Mont. 128, 495 P.2d 1119 (1972), in support of its contention.

13. State *ex rel.* Bovee v. District Court, 162 Mont. 98, 508 P.2d 1056, 1057 (1973).

14. Maldonado v. Crist, 162 Mont. 240, 510 P.2d 887, 888 (1973).

15. Petition of Gray, 163 Mont. 321, 517 P.2d 351 (1973). The petitioner in that case sought a writ of habeas corpus in the federal courts on the same grounds but was denied relief. Petition of Gray, 523 F.2d 989 (9th Cir. 1975).

16. Petition of Gray, 163 Mont. 321, 517 P.2d 351, 352 (1973).

17. Laws of Montana (1967), ch. 196, § 1, set forth in note 7 *supra*.

that section was not mentioned by the court in either case. The 1973 legislature rewrote the sentencing statute,¹⁸ and repealed the old section.¹⁹ One of the changes made in the new section was the exception of "jail time" from the term "elapsed time."²⁰ As the supreme court noted in *LeDesma*, a reasonable interpretation of this legislative action is that "the legislature intended to clarify the earlier language of section 95-2206 to place the credit of jail time within the mandate of section 95-2215."²¹ This conclusion found support in a case decided prior to *LeDesma*,²² in which the defendant, under the new statute, was denied credit for jail time served upon revocation of a suspended sentence. The supreme court ruled that the provision of the rewritten sentencing statute excepting "jail time" from "elapsed time" was a clear indication that "time spent in jail while a defendant is under a suspended sentence *must* be credited to the defendant's sentence."²³

III. IN RE LEDESMA

A. *The Facts of the Case*

Robert J. LeDesma pleaded guilty to the crime of burglary, and on October 2, 1972, received a five year suspended sentence, upon the condition that he serve nine months in the county jail. Pursuant to that order, he was incarcerated from August 24, 1972, through May 23, 1973, before being released on probation. In March 1975, LeDesma was arrested for carrying a concealed weapon. On April 7, 1975, after a hearing on the revocation of the suspended sentence, the order suspending execution of the sentence was set aside due to the violations of its terms and conditions, and LeDesma was sentenced to serve the full five year term in the state prison. He was credited only with the fifty-four days of jail time he had served from the day of his arrest to the day he was given a suspended sentence. LeDesma thereafter filed with the district court a motion, *pro se*, for time served, requesting credit against his prison sentence for *all* elapsed time from the day of his arrest to the day he received his prison sentence. He improperly based his contentions on a case

18. Laws of Montana (1967), ch. 513, § 31.

19. *Id.*

20. Subsection (2) of R.C.M. 1947, § 95-2206 (Supp. 1975), reads in part:

(2)

If any restrictions or conditions are violated, *any elapsed time, except jail time*, shall not be a credit against the sentence, unless the court shall otherwise order (emphasis supplied).

21. *In re LeDesma*, ___ Mont. ___, 554 P.2d 751, 753 (1976).

22. *In re Hanson*, ___ Mont. ___, 544 P.2d 816 (1976).

23. *Id.* at ___, 544 P.2d at 817.

decided under prior law²⁴ and not applicable to his case. The court denied the motion. LeDesma then filed the same motion, *pro se*, with the supreme court, making the same request and argument. This motion was also denied in a memorandum opinion.²⁵

At that time LeDesma sought legal counsel from the Montana Defender Project of the University of Montana Law School. On his behalf a petition was filed with the Sentence Review Division of the Montana Supreme Court, requesting credit for jail time only, under R.C.M. 1947, § 95-2215. This petition was denied on the basis of the sentencing statute. Thereupon a petition for post-conviction relief requesting credit for jail time only was filed with the district court, and was also denied. The case then came before the supreme court as an original proceeding seeking post-conviction relief, seeking credit only for the time spent in jail prior to the revocation of the suspended sentence.

B. The Opinion

As LeDesma had been originally sentenced prior to the effective date of the rewritten sentencing statute,²⁶ the court recognized the potential conflict between that statute prior to its "amendment," and the provisions of R.C.M. 1947, § 95-2215:

The question for the Court is whether the legislature, prior to their amendment to section 95-2206, R.C.M. 1947, in 1973, intended that in the event of a revocation of a suspended sentence, "elapsed time" as stated therein excluded "jail time." Or, does section 95-2215, R.C.M. 1947, govern the credit of time spent in jail prior to the revocation? Or did it intend that section 95-2215 only be applicable in situations other than a suspended sentence.²⁷

Considering that both statutes were enacted at the same time,²⁸ the court felt it was the intent of the legislature, in rewriting the sentencing statute in 1973, to place the credit of jail time within the mandate of R.C.M. 1947, § 95-2215.²⁹ Although the court recognized that it had never addressed the question of the effect of this latter section on the case of a request for jail time credit prior to the revocation of a suspended sentence, such a determination had pre-

24. *Wetzel v. Ellsworth*, 143 Mont. 54, 387 P.2d 442 (1963), was decided under the provisions of former R.C.M. 1947, § 94-7821, which was repealed by Laws of Montana (1967), ch. 196, § 2.

25. *In re* Petition of LeDesma, 167 Mont. 536, 542 P.2d 1226 (1975).

26. January 1, 1974, by the Laws of Montana (1973), ch. 513, § 33.

27. *In re* LeDesma, ___ Mont. ___, 554 P.2d 751, 752 (1976).

28. Laws of Montana (1967), ch. 196, § 1.

29. *In re* LeDesma, ___ Mont. ___, 554 P.2d 751, 753 (1976); and note 21 *supra*.

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viously been made with regard to deferred imposition of sentence.³⁰ The court believed the same rationale was applicable to the case at bar, reasoning:

In each instance [*Bovee* and *Maldonado*] the Court said that section 95-2215 was controlling and that the only issue involved should be whether defendant was incarcerated on a bailable offense within the meaning of that statute. If so, he was entitled to credit for the time spent in jail as a condition of the deferment when the deferment was revoked.

From a practical point of view a suspended sentence and a deferred imposition of sentence are very similar. In each instance the defendant must adhere to certain conditions to avoid a more severe sentence. It seems unlikely that the legislature intended that a person receiving a deferred imposition of sentence be entitled to credit for the time spent in jail as a condition of the deferment if such deferment is revoked, but the person receiving a suspended sentence is not so entitled.³¹

Based upon this determination, the supreme court remanded the case with directions to grant the defendant credit for the jail time he had served.

IV. CONCLUSION

Pursuant to R.C.M. 1947, § 95-2215, a sentencing judge in Montana must give credit against a prison sentence for all days during which a criminal defendant: 1) is incarcerated on a bailable offense, and 2) has a judgment of imprisonment rendered against him. This statutory mandate has been interpreted in *LeDesma* and prior cases to include credit for time spent in jail or under a jail base release program prior to the revocation of either a deferred imposition of sentence or a suspended execution of sentence. Yet this right to jail time credit is not without limits.³² R.C.M. 1947, § 95-2215, is applicable only to Montana offenses and sentences and has no application to time served in prisons or jails of other states.³³ Furthermore, there is some doubt about the scope of the term "incarceration" in the statute. It appears that certain sentences, such as commitment to the Pine Hills School, may not be "incarceration" within the meaning of R.C.M. 1947, § 95-2215.³⁴ In addition, it is clear that credit

30. *State ex rel. Bovee v. District Court*, 162 Mont. 98, 508 P.2d 1056 (1973); *Maldonado v. Crist*, 162 Mont. 240, 510 P.2d 887 (1973).

31. *In re LeDesma*, ___ Mont. ___, 554 P.2d 751, 753 (1976).

32. *See, e.g.,* *Petition of Gray*, 163 Mont. 321, 517 P.2d 351 (1973), discussed at note 15 *supra*.

33. *Petition of Woods*, 166 Mont. 537, 535 P.2d 173 (1975).

34. *Petition of Sewell*, 155 Mont. 505, 474 P.2d 146 (1970).

for elapsed time other than jail time - that is, "street time" - is still a matter of discretion for the sentencing court.³⁵

To insure that the statutory right of criminal defendants to credit for jail time is protected as the legislature clearly intended, the attorneys and, in particular, the sentencing judges in Montana must familiarize themselves with the developments in criminal law outlined in this note. The statute mandates that such time be credited against the prison sentence. Receipt of credit for a month or two of jail time may not seem urgent to one who is free, but it can be an eternity to one who is incarcerated in the state prison.

35. *Petition of Doney*, 164 Mont. 330, 522 P.2d 92 (1974). In *Doney* the petitioner argued that he should receive credit against his prison sentence for 482 days which had elapsed between the time when he received a suspended sentence and the revocation of the same.