IN THE SUPREME COURT OF THE STATE OF NEVADA

UPUTAUA DIANA POASA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 76676

FAST TRACK STATEMENT

1. Appellant, Uputaua Diana Poasa.

2. John Reese Petty, Chief Deputy, Washoe County Public Defender's Office, 350 South Center Street, 5th Floor, P.O. Box 11130, Reno, Nevada 89520-0027; (775) 337-4827.

3. Same as above.

4. Second Judicial District Court in and for the County of Washoe, in District Court Case Number CR17-2063, Department No. 6.

5. The Honorable Lynne K. Simons, District Judge.

6. Ms. Poasa pleaded guilty to a felony.

7. Grand Larceny of Auto, less than $3500, a violation of NRS 205.228.2, a category C felony as charged in the information.

8. The district court sentenced Ms. Poasa to a term of 12 to 34 months in the Nevada Department of Corrections, with zero credit for time spent in predisposition custody. This sentence was suspended and Ms. Poasa was placed on probation for an indeterminate period of time not to exceed 60 months. The district court placed Ms. Poasa into the Adult Drug Court Specialty Court Program as a condition of probation. The district court also "forfeited" all of Ms. Poasa's "credit for time served." JA 46-47 (Judgment of Conviction); JA 50 (Order Admitting Defendant to Probation and Fixing the Terms Thereof) ("B. Special Conditions as follows: ... 3. The Defendant's previous credit for time served is forfeited."). Ms. Poasa appeals the district court's forfeiture of credit for 99 days served in predisposition custody.

9. August 8, 2018.

10. August 9, 2018.

11. Not applicable.

12. Not applicable.

13. On August 10, 2018, Ms. Poasa timely filed a notice of appeal. JA 52-53 (Notice of Appeal).

14. NRAP 4(b).

15. NRS 177.015(3).

16. Judgment upon a guilty plea.

17. Not applicable.

18. Not applicable.

19. Not applicable.

20. Ms. Poasa entered a guilty plea to a felony count and was sentenced as set forth in part 8 above.

21. Facts:

In an information the State charged Ms. Poasa with felony grand larceny of an automobile (Count I), and unlawful taking of a motor vehicle, a gross misdemeanor (Count II). JA 1-3 (Information). Ms. Poasa pleaded guilty to both counts pursuant to negotiations that conditioned her sentencing on her payment of $800 in restitution, and completion of substance abuse counseling, before sentencing. Specifically, the guilty plea memorandum provided,

> [i]f I pay $800 in restitution and complete substance abuse counseling before sentencing, the State will allow me to withdraw my guilty plea as to the felony and be sentenced on the gross misdemeanor and the State will not object to probation. However, if I do not pay $800 in restitution and/or do not complete substance

> abuse counseling, my plea to the gross misdemeanor will be withdrawn and I will be sentenced on the felony. The State and I will be free to argue for an appropriate sentence.

JA 6-7 (Guilty Plea Memorandum) (Paragraph 7); and see JA 12-13 (Transcript of Proceedings: Arraignment). The district court canvassed Ms. Poasa and accepted her guilty pleas. JA 13-21. Ms. Poasa was released on her own recognizance. *Id.* at 23. On February 7, 2018, the district court filed an order revoking Ms. Poasa's own recognizance release. JA 25 (Order Revoking Own Recognizance Pretrial Release).

Prior to sentencing, Ms. Poasa's counsel filed a request for diversion and a treatment program. JA 26-28 (Election of Assignment to a Program of Treatment Pursuant to NRS 458.300).

At the sentencing hearing Ms. Poasa withdrew her guilty plea to the gross misdemeanor count, and proceeded to be sentenced on the felony. JA 32-33 (Transcript of Proceedings: Sentencing). Her attorney asked for a diversion program or probation on the felony count based on Ms. Poasa's age (she was 19), substance abuse treatment needs, and her lack of criminal history (one misdemeanor conviction). *Id.* at 34-36.

Counsel also added that Ms. Poasa "has been in custody for almost 100 days." *Id.* at 36.

The prosecutor opposed both a diversion treatment program and a grant of probation; recommending instead a prison sentence of 12 to 30 months in the Nevada Department of Corrections. *Id.* 36-38. He added however, that if the court was inclined to grant probation to Ms. Poasa, then it was his "suggestion" that the district court "should forfeit the 99 days credit for time served that she has currently, and as a condition of probation, have her serve an additional 90 days in jail to understand the gravity of her actions[.]" *Id.* at 38.

The district court agreed with the prosecutor that a diversion program was not appropriate. *Id.* at 39. But concluded that Ms. Poasa's "lack of adult criminal history weighs in favor of probation[.]" *Id.* at 40. The district court imposed a suspended sentence of 12 to 34 months in the Nevada Department of Corrections and granted probation, with as a condition of probation, Ms. Poasa's participation in the court's specialty courts program. *Id.* 40-41. The district court also ordered that Ms. Poasa spend another 29 days in the Washoe County Jail. *Id.* at 41. Finally, the district court, over objection, forfeited Ms. Poasa's credit for

99 days for time served in predisposition custody. *Id.* 41-42. Hence, Ms. Poasa received zero credit for time served in the judgment of conviction.

22. The question presented is: Did the district court abuse its discretion by forfeiting Ms. Poasa's 99 days of predisposition jail credits?

23. Argument:

The district court abused its sentencing discretion when, contrary to law, it forfeited Ms. Poasa's credit for 99 days served in predisposition custody.

Standard of Review

This Court reviews a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious of if it exceeds the bounds of law or reasons." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted).

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Discussion

A.

In *Anglin v. State*, 90 Nev. 287, 290, 525 P.2d 34, 36 (1974), the Nevada Supreme Court observed that "[p]resentence detention is behind-bars confinement." And explained that:

> Legal categories do not remove the punitive aspects of the rigors and restraints of detention. As legal commentators have noted, *the denial of credit* for 'dead time'—time spent in incarceration before delivery of the defendant to the state prison—*is basically a failure to recognize the punitive aspect of predispositional confinement.* Sensitive to these concerns, our Nevada Legislature has afforded the district courts an opportunity to grant credit for presentence deprivation of liberty.

Id. (italics added).

As relevant here, NRS 176.055(1) states: "[W]henever a sentence of imprisonment in the ... state prison is imposed, the court *may* order that credit be allowed against the duration of the sentence, including any minimum term or minimum aggregate term, as applicable, thereof prescribed by law, for the amount of time which the defendant has actually spent in confinement before conviction[.]" (italics added). Although the statute uses the discretionary term "may," the Supreme

Court in *Anglin* held that NRS 176.055(1) "should also be construed to provide credit for confinement prior to [disposition], where (1) bail has been set for the defendant and (2) the defendant was financially unable to post bail. Under such circumstances, *the district courts must allow such credit.*" *Id.* 90 Nev. at 292, 525 P.2d at 37 (italics added).[1]

Consistent with *Anglin*, the Supreme Court in *Kuykendall v. State*, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996), held "[d]espite the discretionary language of NRS 176.055(1) ... the purpose of the statute is to ensure that *all time served* is credited towards a defendant's *ultimate* sentence." (italics added). Accord *Nieto v. State*, 119 Nev. 229, 231-32, 70 P.2d 747, 748 (2003) (noting that "granting credit for pretrial confinement is not necessarily limited to the situations discussed in *Anglin,*" and concluding that "a defendant is entitled to credit for time served in presentence confinement in another jurisdiction, when that confinement was solely pursuant to the charges for which he was

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[1] The Court reasoned: "If the moneyed defendant may secure release prior to trial. Then the indigent defendant who stands convicted should be able to offset his term of imprisonment in all respects as if the confinement served prior to sentencing was served after sentence." *Id.* 90 Nev. at 293, 525 P.2d at 37. Bail for Ms. Poasa was set at $5,000.00 JA 25 (Order Revoking Own Recognizance Pretrial Release).

ultimately convicted"); *Johnson v. State*, 120 Nev. 296, 299, 89 P.3d 669, 670-71 (2004) (applying statute's purpose to concurrent sentencing and holding that "credit for time served *may not* be denied to a defendant by applying it to only one of multiple concurrent sentences") (italics added); and *Haney v. State*, 124 Nev. 408, 413, 185 P.3d 350, 354 (2008) (noting that credit for time served is "mandatory").

In addition to these cases, a district court's mandatory obligation to credit all time served in predisposition custody towards a defendant's ultimate sentence is also found in cases where jail has been ordered as a direct condition of probation. The Nevada Supreme Court has recognized that "a short term of incarceration imposed as a condition of probation may in certain cases help rehabilitate a convicted person and has its place as a sentencing alternative[.]" *Miller v. State*, 113 Nev. 722, 725-26, 941 P.2d 456, 458 (1997) (internal quotation marks omitted) (quoting *Creps v. State*, 94 Nev. 351, 363, 581 P.2d 842, 851 (1978)). But where a court has ordered jail time as a condition of probation, a defendant must be given credit for that time if he or she ultimately fails probation and the previously suspended sentence is imposed. See *Merna v. State*, 95 Nev. 144, 145, 591 P.2d 252, 253 (1979)

(stating that "as a matter of fundamental fairness ... the more salutary rule is to grant appellant credit for time served as a condition of probation."); *Apodaca v. State*, 95 Nev. 217, 218, 591 P.2d 1133, 1133 (1979) (same).

B.

The power of the district court to award credit for time served is found in statute and case law. Our Supreme Court has consistently held that under the statute—NRS 176.055(1)—a defendant *must* be credited for all time served towards his or her ultimate sentence. Indeed, the Court has declared that the very purpose of the statute is to ensure that a defendant receive credit for *all time served* toward the *ultimate* sentence. Here Ms. Poasa's ultimate sentence is for a term of 12 to 34 months in the Nevada Department of Corrections. It is undisputed that at her sentencing hearing, she was entitled to 99 days credit for time served predisposition custody. The district court took that credit away.

There is no statutory authority or case law allowing a district court to "forfeit" a defendant's predisposition custody credits. And forfeiture is contrary to the purpose of NRS 176.055(1) and the controlling authority interpreting the statute. The district attorney

offered no legal reason in support of forfeiture, and the district court stated none. Rather, Ms. Poasa's predisposition custody credits were forfeited by the district court solely at the "suggestion" of the deputy district attorney. Notably, the deputy's suggestion to forfeit Ms. Poasa's credit of 99 days in custody was not "as a condition of probation." It was a pure forfeiture request. For example, in addition to the forfeiture, the deputy also suggested, *as a condition of probation*, "an additional ninety days in jail." JA 38.

The district court's pure forfeiture of Ms. Poasa's 99 days of predispositional credit served no legal purpose. More importantly, when the district court forfeited Ms. Poasa's 99 days of custody credits, it acted contrary to the principles enunciated in *Anglin*, and followed in *Johnson v. State*, 120 Nev. 296, 89 P.3d 669 (2004), *Nieto v. State*, 119 Nev. 229, 70 P.3d 747 (2003), and *Kuykendall v. State*, 112 Nev. 1285, 926 P.2d 781 (1996). This was an abuse of discretion necessitating this Court's correction.

Because Ms. Poasa experienced the "punitive aspects of the rigors and restraints of detention," this Court should remand this case back to the district court with instructions to file a corrected judgment of

conviction that restores Ms. Poasa's credit for 99 days served in predispositional custody, and credits her for all the custody time she has served.

24. Counsel objected.

25. This appeal presents an issue of first impression or public interest.

26. Routing Statement: This appeal is presumptively assigned to the Court of Appeals because it is a conviction based on a guilty plea. NRAP 17(b)(1). However, the question presented appears to be of first impression (albeit building on existing authority). As such, the Nevada Supreme Court should retain and decide this appeal. NRAP 17(a)(10).

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This fast track statement has been prepared in a proportionally spaced typeface using Century in 14-point font.

2. I further certify that this fast track statement complies with the page — or type — volume limitations of NRAP 3C(h)(2) because it

is: Proportionately spaced, has a typeface of 14 points, a total of 2,358 words and does not exceed 16 pages.

3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of knowledge, information and belief.

DATED this 21st day of September 2018.

/s/ John Reese Petty
JOHN REESE PETTY
Chief Deputy
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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 21st day of September 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jennifer P. Noble, Chief Appellate Deputy
Washoe County District Attorney's Office

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

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John Reese Petty
Washoe County Public Defender's Office