IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 41697/41698

STATE OF IDAHO,	)	**2015 Unpublished Opinion No. 430**
	)	
Plaintiff-Respondent,	)	**Filed: March 24, 2015**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
TROY GORDON HARRIS,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bannock County. Hon. Stephen S. Dunn, District Judge.

Decision of the district court denying motion for credit for time served, vacated and case remanded.

Sara B. Thomas, State Appellate Public Defender; Eric D. Fredericksen, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Russell J. Spencer, Deputy Attorney General, Boise, for respondent.

SCHROEDER, Judge Pro Tem

Troy Gordon Harris appeals from the decision of the district court denying his third Idaho Criminal Rule 35(c) motion for credit for time served in two cases. The district court relied on the incorrect statute and did not make a factual finding as to when Harris was first served with the bench warrants. The decision of the district court is vacated and remanded for further proceedings consistent with this opinion.

I.
FACTS AND PROCEDURE

In 2009 Harris pled guilty to failing to register as a sex offender in two cases (the 3447 and 14021 cases) originating out of Bannock County. He was placed on probation. In January 2011, a probation officer submitted an allegation of a probation violation. On February 3, 2011, Harris was arrested and jailed for failing to register as a sex offender in Ada County. On

February 15, 2011, the Bannock County District Court issued two bench warrants for Harris' arrest, pursuant to Idaho Code § 19-2602, providing the authority for the court to issue a bench warrant with respect to a probation violation. According to Harris, he was served with the bench warrants at the Ada County jail on February 24, 2011, and February 25, 2011. He was acquitted of the failure to register charge in Ada County on November 8, 2011, and was returned to Bannock County on November 9, 2011. On that day he was served with the bench warrants. Harris bonded out on November 21, 2011. Subsequently, the district court revoked his probation, executed the original sentence, retained jurisdiction, and then relinquished jurisdiction.

In June 2013, Harris filed his first Rule 35(c) motion for credit for time served in both the 3447 and 14021 cases. He sought credit for time served from "1-25-11 [*sic*] thru 11-21-11." Included with this first motion was an incarceration report from Bannock County and an Ada County Sheriff's Office report of arrest history, along with a jail booking sheet. In July 2013, Harris filed his second Rule 35(c) motion for credit for time served in both the 3447 and 14021 cases. His affidavit averred that he was requesting credit for time served from February 2011 through November 2011, citing I.C. § 19-2603 and a Court of Appeals decision. He again attached an Ada County Sheriff's Office report of arrest history along with a jail booking sheet. The district court consolidated the cases and addressed the first and second Rule 35 motions in a single written decision which it later amended to correct dates. The district court credited Harris with time served from November 9, 2011, to November 21, 2011, but did not grant credit for time served beginning in February. After the district court issued its initial written decision, but prior to the amendment, Harris filed a third Rule 35(c) motion for credit for time served in both the 3447 and 14021 cases, the subject of this appeal. In the affidavit accompanying the motion Harris explained that he was served at the Ada County jail with the 3447 bench warrant on February 24, 2011, and served with the 14021 bench warrant on February 25, 2011. He claimed that he was entitled to credit for the time since he was served with the bench warrants in Ada County, citing I.C. §§ 18-309 and 19-2603, and citing a Court of Appeals decision. He also asserted that he had enclosed Ada County Sheriff's Office documents and a letter from the Ada County Sheriff's Office dated September 30, 2011, and swore that the enclosed documents were "100% authentic and true and correct." The enclosed documents included a copy of the 14021

bench warrant, a letter from the Ada County Sherriff's Office, and the public and nonpublic jail booking sheets with data concerning both the 3447 and 14021 bench warrants.

The district court denied the third Rule 35(c) motion for credit for time served while in Ada County because "the charges in Ada County were the cause of his incarceration." The district court relied on I.C. § 18-309 and further explained in a footnote that "When the Defendant was served with the bench warrant is not material to the decision in this case and the validity and/or admissibility of the bench warrant submitted by Defendant will not be addressed." Harris appeals from this decision.

II.

ANALYSIS

Harris argues that the district court erred in denying the motions for credit for time served, contending that the district court relied on the incorrect statute and asserting that he is entitled to credit for time served from the dates he was served with the bench warrants in February. The State agrees that the district court should have applied I.C. § 19-2603, but it claims that "any error committed by the district court by analyzing this case under Idaho Code § 18-309 is immaterial." The State further asserts that there was substantial evidence for the district court to find that Harris was served with the bench warrants on November 9, 2011.

This Court exercises free review over whether the district court properly applied the law governing credit for time served. *State v. Bitkoff*, 157 Idaho 410, 412, 336 P.3d 817, 819 (Ct. App. 2014). But this Court defers to the district court's findings of fact unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous. *Id.*

Under I.C.R. 35(c), a defendant may move, at any time, to correct a court's computation of credit for time served, granted under either I.C. §§ 18-309 or 19-2603. This Court recently reiterated that I.C. § 18-309 does not apply to incarceration *after* a judgment of conviction. *See Bitkoff*, 157 Idaho at 413, 336 P.3d at 820. Rather, it is I.C. § 19-2603 which applies to incarceration after a judgment of conviction. *See Bitkoff*, 157 Idaho at 413, 336 P.3d at 820 (citing *State v. Lively*, 131 Idaho 279, 280, 954 P.2d 1075, 1076 (Ct. App. 1998)). The plain language of I.C. § 19-2603 instructs that a defendant is entitled to credit for time served from the service of a bench warrant for a probation violation. *Bitkoff*, 157 Idaho at 413, 336 P.3d at 820. Idaho Code § 18-309 includes a limitation that the credited time served must be "for the

offense," but I.C. § 19-2603 does *not* include such a limitation. *Bitkoff*, 157 Idaho at 413, 336 P.3d at 820. The determinative issue when considering what credit for time served under I.C. § 19-2603 a defendant is entitled to is when the defendant was *first* served with the bench warrant. *See Bitkoff*, 157 Idaho at 413, 336 P.3d at 820.

In *Bitkoff*, the defendant was on probation when the district court issued a bench warrant. The next month the defendant was arrested in Nevada and entered a guilty plea to Nevada charges. After serving his Nevada sentence, the defendant was released and transferred to Idaho where the Valley County Sherriff's Department served the Idaho bench warrant. The defendant filed a Rule 35(c) motion, seeking credit for time served, claiming that he had been served with the Idaho bench warrant in Nevada on the date he was originally arrested. The defendant included an affidavit and certified copies of documents that appeared to have originated in the Idaho Interstate Compact Office. This Court, after discussing I.C. § 19-2603, determined that the case must be remanded to the district court. *Bitkoff*, 157 Idaho at 415, 336 P.3d at 822. Specifically, this Court held that the district court had to determine whether Bitkoff was served with the warrant in Nevada and commented that "if he was, he is entitled to the credit for time served that he requested." *Id.*

It is apparent from the district court's latest decision (on Harris' third motion) that the district court relied on I.C. § 18-309 when analyzing whether he was entitled to credit for time served from February 2011 through November 2011. As the parties agree, and this Court concludes, the district court should have relied on I.C. § 19-2603, because the incarceration at issue occurred after Harris' judgment of conviction. The remaining issue is what date Harris was first served with the bench warrants.

Harris argues that the only evidence in the record is that he was served with the bench warrants in February. His argument has some support. The record contains what is purported to be a copy of the signed 14021 bench warrant that certifies it was served on February 25, 2011, in Ada County. Further, a letter that appears to be from the Ada County Sherriff's Office and attached to Harris' third motion explains, "Also enclosed please find a copy of the booking sheets which serve as our warrant arrest reports *and confirmation of service on the bench warrants*." (Emphasis added.) These booking sheets indicate that Harris was originally

incarcerated on February 3, 2011, and that he was arrested and thus served[1] with the 3447 bench warrant on February 24, 2011, at 10:48 p.m. and served with the 14021 bench warrant on February 25, 2011, at 11:45 a.m. The district court's decision on Harris' third motion appears to credit the fact that Harris was served with the bench warrants in Ada County stating, "However, in this case [Harris] was already incarcerated in another county on separate charges when he was served with the Bannock County bench warrants."

The State contends that the district court made a factual finding of when the warrant was served and that this finding is supported by substantial evidence. The State does not cite to the record in support of its proposition. It cites a document included in its appendix to its brief. This document cannot be considered. *Kootenai Cnty. v. Harriman-Sayler*, 154 Idaho 13, 16, 293 P.3d 637, 640 (2012) ("This Court is bound by the record on appeal and 'cannot consider matters or materials that are not part of the record or not contained in the record.' Items attached to a party's opening brief are not part of the record and cannot be considered.") (citations omitted); *see Goodman Oil Co. v. Scotty's Duro-Bilt Generator, Inc.*, 147 Idaho 56, 59, 205 P.3d 1192, 1995 (2009) ("The motion for reconsideration and the subsequent April 26, 2007 order are not part of the record on appeal and are only found as an appendix to Appellant's brief. Therefore, this Court cannot consider those documents as part of the record on appeal and holds that the appeal was not timely filed."); *State ex rel. Ohman v. Ivan H. Talbot Family Trust*, 120 Idaho 825, 827, 820 P.2d 695, 697 (1991) (concluding that the appellants' challenge to jury instructions could not be considered because the jury instructions "were attached as an appendix to appellant[s'] opening brief . . . We are bound by the record and cannot consider matters or materials not part of or contained therein."). Nonetheless, the Idaho Supreme Court directed that this Court take judicial notice of the clerk's records in *State v. Harris*, Docket Numbers 40665 and 40667, and those records do contain copies of the 3447 and 14021 bench warrants that

---

[1] Idaho Criminal Rule 4(h)(3) describes how a warrant is served:

> Manner of service of warrant. The warrant shall be executed by the arrest of the defendant. The officer need not have the warrant in possession at the time of the arrest, but the officer shall show the warrant to the defendant as soon as possible. A telegraphic or other copy of the warrant of arrest may be used by the officer at the time of the arrest or for the purpose of showing the warrant to the defendant after the defendant's arrest. If the officer does not have the warrant in possession at the time of arrest, the officer shall then inform the defendant of the offense charged and of the fact that a warrant has been issued.

certify that the bench warrants were served on November 9, 2011. As the record of action sheets list, these were served by the Bannock County Sherriff's Office.

Although the State argues that the district court made a factual finding of the date upon which Harris was served with the bench warrants, the latest decision from the district court clarifies the earlier decision and expressly states that the date upon which Harris was served with the bench warrants was immaterial to its analysis. Specifically, the district court found that "to apply credit for time served to a sentence, the time served must *have been the direct result of the underlying offense* that is the basis for the sentence." This reasoning would be applicable under I.C. § 18-309, and the district court cited to a case analyzing I.C. § 18-309 in support of its discussion. But the determinative issue when considering the credit for time served under I.C. § 19-2603 to which a defendant is entitled is when the defendant was *first* served with the bench warrant. *See Bitkoff*, 157 Idaho at 413, 336 P.3d at 820. To the extent the district court made a factual finding, it found the date upon which Harris' time served was the direct result of the underlying offense. This is not the factual finding needed to analyze the time to which Harris is entitled under I.C. § 19-2603.

III.
CONCLUSION

The decision of the district court is vacated and the case remanded for further proceedings to determine the time served to which Harris is entitled consistent with this opinion.

Chief Judge MELANSON and Judge LANSING **CONCUR**.