

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 44212

STATE OF IDAHO,)	2017 Unpublished Opinion No. 337
)	
Plaintiff-Respondent,)	Filed: January 27, 2017
)	
v.)	Stephen W. Kenyon, Clerk
)	
MARCO ANTONIO RIOS-LOPEZ,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Blaine County. Hon. Robert J. Elgee, District Judge.

Judgment denying motion for credit for time served, affirmed.

Eric D. Fredericksen, State Appellate Public Defender; Sally J. Cooley, Deputy Appellate Public Defender, Boise, for appellant.

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

GRATTON, Chief Judge

Marco Antonio Rios-Lopez appeals from the district court’s order denying his motion for credit for time served. Rios-Lopez argues the district court erred when it denied his request for credit for time served because the district court did not give credit for prejudgment incarceration on each count. The Idaho Supreme Court did not retroactively apply its interpretation of Idaho Code § 18-309 in *State v. Owens*, 158 Idaho 1, 343 P.3d 30 (2015) and Rios-Lopez’s case was not on direct review at the time the *Owens* opinion was issued; therefore, we affirm the district court’s denial of Rios-Lopez’s motion for credit for time served.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Rios-Lopez was convicted on three counts of trafficking in cocaine and three counts of failure to affix illegal drug tax stamps. The district court sentenced him to fourteen years with

seven years determinate on each of the trafficking counts, and two years with one year determinate on each of the failure to affix tax stamp counts. The district court ordered the sentences to be served consecutively, for an aggregate unified sentence of forty-eight years, with twenty-four years determinate. At the time of judgment, the district court gave Rios-Lopez two hundred fifty-three days credit for time served. Rios-Lopez appealed from the judgment of conviction, and this Court affirmed his judgment of conviction and sentences in an unpublished opinion issued in 2003. A remittitur was issued on October 29, 2003.

On March 4, 2016, Rios-Lopez filed an Idaho Criminal Rule 35 motion for credit for time served, asserting that pursuant to the Idaho Supreme Court's recent ruling in *Owens*, he is entitled to two hundred fifty-three days credit on each of the six counts, for a total of an additional one thousand two hundred sixty-five days of credit. The district court denied the motion. Rios-Lopez timely appeals.

II.

ANALYSIS

We exercise free review when the issue is whether the district court properly applied the law governing credit for time served. *State v. Covert*, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006). We defer to the trial court's findings of fact "unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous." *Id.* Whether the district court properly applied this statutory provision to the facts in this case is a question of law, which we freely review. *State v. Dorr*, 120 Idaho 441, 443-44, 816 P.2d 998, 1000-01 (Ct. App. 1991).

The award of credit for time served is governed by I.C. § 18-309. The language of I.C. § 18-309 is mandatory and requires that, in sentencing a criminal defendant or when hearing an I.C.R. 35(c) motion for credit for time served, the court shall give the appropriate credit for pre-judgment incarceration. *State v. Moore*, 156 Idaho 17, 20-21, 319 P.3d 501, 504-05 (Ct. App. 2014). This means that the defendant is entitled to credit for all time spent incarcerated before judgment. *Id.* at 21, 319 P.3d at 505. The converse is also true--the defendant is not entitled to credit under I.C. § 18-309 for any time not actually spent incarcerated before judgment. *Moore*, 156 Idaho at 21, 319 P.3d at 505. *See also State v. Hernandez*, 120 Idaho 785, 792, 820 P.2d 380, 387 (Ct. App. 1991) (stating that I.C. § 18-309 does not allow the defendant to receive credit for more time than he or she has actually been in confinement). Accordingly, a district

court may only give credit for the correct amount of time actually served by the defendant prior to imposition of judgment in the case; the district court does not have discretion to award credit for time served that is either more or less than that. *Moore*, 156 Idaho at 21, 319 P.3d at 505. Thus, the defendant is entitled to credit for time actually served prior to entry of judgment in the case. *Id.*

Rios-Lopez argues the district court erred when it denied his request for credit for time served.¹ Although an I.C.R. 35(c) motion seeking credit for time served may be filed at any time, unless the underlying case was on direct review at the time the *Owens*' opinion was issued, the holding in *Owens* is inapplicable.

In *Owens*, the Idaho Supreme Court overruled precedent regarding the calculation of credit for time served in cases in which the sentences were ordered to run consecutively. *Owens*, 158 Idaho 1, 343 P.3d 30. In that case, Owens pleaded guilty to eight counts of issuing a check without funds, and the district court issued a unified sentence of fifteen months, with six months determinate, for each charge. *Id.* at 2, 343 P.3d at 31. The district court ordered the eight counts to run consecutively to each other and to run concurrently with one count of grand theft in an unrelated case. *Id.* Owens argued he should receive credit for the prejudgment time he served on each of the eight counts, not just the one count for which he received credit. *Id.* at 3, 343 P.3d at 32.

The *Owens* Court analyzed I.C. § 18-309 and prior Idaho Supreme Court precedent, especially *State v. Hoch*, 102 Idaho 351, 630 P.2d 143 (1981). The *Owens* Court focused only on the first sentence of I.C. § 18-309, which states: "In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered." The Court acknowledged its previous holding that this section of I.C. § 18-309 prohibits a court from crediting confinement to more than one count of a sentence. *Owens*, 158 Idaho at 3, 343 P.3d at 32 (citing *Hoch*, 102 Idaho at 351, 630 P.2d at 143). However, the Court overruled the holding in *Hoch* and the subsequent Idaho Court of Appeals' opinions because, "Idaho Code section 18-309's language plainly gives credit for prejudgment time in custody against each count's sentence. The statute does not limit

¹ This Court recently addressed this issue in *State v. Young*, ____ Idaho ____, ____ P.3d ____ (Ct. App. Jan. 11, 2017).

that credit in any way.” *Owens*, 158 Idaho at 4, 343 P.3d at 33. When applied, the Court held that Owens should receive credit for the time he served on each of the eight separate offenses. *Id.*

However, the *Owens* Court clearly limited the application of its holding: “Therefore, we apply this Court’s new interpretation of Idaho Code section 18-309’s plain language only prospectively and to cases now on direct review.” *Id.* at 7. Rios-Lopez argues his motion for credit for time served is, in essence, a direct review since I.C.R. 35(c) provides that a motion may be filed at any time, and therefore, the issue regarding credit for time served is directly raised to the court. The State responds there was no error in the district court’s computation of credit for time served, and to allow Rios-Lopez to raise this claim through an I.C.R. 35(c) motion after his underlying conviction was final would render the non-retroactivity aspect of *Owens* meaningless.

The issue in this case is not whether Rios-Lopez’s case is currently on direct review or is a collateral challenge. Instead, the issue is whether Rios-Lopez’s case was on direct review at the time the *Owens* opinion was issued. If a timely direct appeal is filed, the judgment becomes final when the appeal is final, which occurs when the appellate court issues a remittitur. *Peregrina v. State*, 158 Idaho 948, 951, 354 P.3d 510, 513 (Ct. App. 2015). A remittitur was issued on October 29, 2003, thereby making the judgment final at that time. For Rios-Lopez to obtain the benefit of the new interpretation of I.C. § 18-309, Rios-Lopez’s underlying case must have been pending on direct review when the rule was announced. Because it was not, he is unable to avail himself of the holding announced in *Owens* and the district court did not err in denying Rios-Lopez’s I.C.R. 35 motion for credit for time served.

III.

CONCLUSION

Rios-Lopez’s judgment of conviction was final and not on direct review at the time *Owens* was announced. *Owens* applies only to cases on direct review at the time the *Owens*’ opinion was issued; therefore, we affirm the district court’s order denying Rios-Lopez’s I.C.R. 35 motion for credit for time served.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**