

VT SUPERIOR COURT  
STATE OF VERMONT

SUPERIOR COURT  
Washington Unit

CIVIL DIVISION  
Docket No. 23-1-16 Wncv

DW  
2016 DEC 27 P 1:02

KENNETH BAILEY  
Plaintiff

v.

LISA MENARD, Commissioner,  
Vermont Department of Corrections  
Defendant

FILED

DECISION  
Cross-Motions for Summary Judgment

Plaintiff Kenneth Bailey is an inmate in the custody of the Vermont Department of Corrections. He claims that the DOC has miscalculated his effective sentence by failing to give him credit for time served according to the law. He asks this court to recalculate his sentence properly and order him released from prison if the recalculation shows that his sentence now is fully served. The parties have filed motions for summary judgment addressing the sentence calculation issue.

The facts are undisputed. On August 30, 1996, Mr. Bailey was sentenced to 13 to 25 years to serve on a kidnapping charge (Sentence 1). He was given credit for time served, which resulted in an anticipated maximum release date of February 14, 2021.

On January 24, 2012, he was detained on an exploitation charge. On December 15, 2015, he was *resentenced* on that charge to 46 to 47 months (Sentence 2) concurrent to Sentence 1. He was given credit on *both* Sentences 1 and 2 starting on January 24, 2012, when he was first detained on the exploitation charge. At the time that Sentence 2 was imposed, there was so much presentence credit applied to it that it was fully satisfied immediately.<sup>1</sup> *It had no effect on the maximum effective sentence, which remained determined by Sentence 1.*

There was no point in time during which Mr. Bailey received credit on Sentence 2 but not on Sentence 1.

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<sup>1</sup> When initially calculated, the DOC applied so-called *Serre* credit to Sentence 2. *Serre v. Pallito*, No. 45-2-15 Bncv, 2015 WL 5176790 (Vt. Super. Ct. June 24, 2015), available at <https://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2015-8-25-5.pdf>. It removed the *Serre* credit following this court's decision in *Fleming-Pancione v. Menard*, No. 38-1-16 Wncv, 2016 WL 2770655 (Vt. Super. Ct. May 6, 2016), available at <https://www.vermontjudiciary.org/20112015%20Tcdecisioncvl/2016-5-9-1.pdf>. This makes no difference because even with less presentence credit on Sentence 2, Sentence 2 still had no effect on the effective maximum release date, at all times determined by Sentence 1.

*Analysis*

The undisputed facts make clear that once Mr. Bailey's second sentence was imposed concurrent to his first, all time served from the moment he was detained on the second sentence was applied to both. That is what concurrent means. Vermont law does not permit presentence credit to be allocated more generously than that. There was no error.

Nevertheless, Mr. Bailey objects that the proper application of time served, once Sentence 2 was imposed concurrent to Sentence 1, should have reduced his effective maximum release date. His rationale for this unclear. In effect, Mr. Bailey is claiming that some aspect of Sentence 2 *changed* Sentence 1 by shortening it.


The challenge presented by multiple sentences is determining how to allocate credit for time served. In this case, Mr. Bailey's sentences are concurrent and there is no time served on Sentence 2 that was not also credited to Sentence 1. Mr. Bailey's apparent belief that there is some way that the imposition of a subsequent sentence will change the terms of an earlier imposed sentence, or shorten the effective sentence, is simply wrong. Mr. Bailey's original 13 to 25-year sentence will always remain so despite any subsequent sentences or how time served is allocated. A subsequently imposed sentence could lengthen his *effective* sentence—or, as in this case, it could have no effect on the effective sentence at all—but there is no scenario in which a subsequent sentence will change the earlier sentence or reduce the effective sentence.

Mr. Bailey received all the credit to which he was entitled.

ORDER

For the foregoing reasons, the State motion for summary judgment is granted; Mr. Bailey's motion is denied.

Dated at Montpelier, Vermont this 27<sup>th</sup> day of December 2016.

  
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Mary Miles Teachout,  
Superior Judge