McLain v. Menard, No. 468-8-16 Wncv (Teachout, J., Dec. 9, 2016).
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STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Washington Unit **Docket No. 468-8-16 Wncv**

BRITT MCLAIN
Plaintiff

v.

LISA MENARD, Commissioner,
Vermont Department of Corrections
Defendant

DECISION
Cross-Motions for Summary Judgment

Plaintiff Britt McLain 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 seeks habeas relief, claiming a right to immediate release. The parties have filed cross-motions for summary judgment addressing this sentence calculation issue.

The material facts are undisputed. Four sentences frame the debate.[1] Each was imposed with credit for time served and "concurrent" to any other sentences.[2] In relation to probation revocation proceedings, Mr. McLain began serving two sentences (collectively, Sentence 1) on February 17, 2011: 11 to 12 months in No. 1364-11-08 Wrcr, and 26 months to 7 years in No. 1364-11-08 Wrcr. Because the former had both a shorter minimum and maximum, it merged fully into the latter. There is no dispute that Mr. McLain properly received credit for all time served until January 11, 2012.

On January 11, 2012, Mr. McLain was detained (from conditional reentry furlough) on new charges in No. 38-1-12 Wmcr. He was held until he was sentenced on December 18, 2012. On count 2, he received 14 to 20 years, all suspended but 7 years (Sentence 2). On count 3, he received 7 to 15 years, all suspended but 7 years (Sentence 3).

Once Sentences 2 and 3 were imposed, Sentence 1 no longer contributed to Mr. McLain's "effective" sentence (the minimums on the later sentences were longer than any remaining time on the maximum from Sentence 1 could have been). Accordingly, the DOC calculated the remaining incarcerative portion of his sentence as 7 years—with credit for time served—because both Sentences 2 and 3 are completely suspended but for 7 years.

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[1] Neither party asserts that any prior sentences have any impact on the calculation issue in this case.

[2] None of the mittimuses in the record indicates on its face that the respective sentence was imposed "concurrent" to other sentences, but the parties agree that each was.

The dispute in this case is how much credit for time served is Mr. McLain entitled to against Sentences 2 and 3, his current "effective" sentence. When the DOC initially calculated that credit, it included *all* time served in connection with Sentence 1 as credit against Sentences 2 and 3. It apparently did so based on the rationale of a Bennington Civil Division decision, *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. That calculation led to an anticipated release date of November 2, 2016.

The *Serre* court essentially ruled that the operative sentencing statute (13 V.S.A. § 7031(b) prior to its 2013 amendment) and relevant case law require credit for time served on an earlier sentence to be applied to a later *concurrent* sentence even if that time served preceded the later charge or any detention potentially "in connection with" it. *Serre* was never appealed but the DOC nevertheless apparently applied it to relevant inmates, including Mr. McLain, who was sentenced under the pre-amendment version of 13 V.S.A. § 7031(b).

Within months, the *Serre* ruling became a matter of dispute in an unrelated case, leading to 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%20 Tcdecisioncvl/2016-5-9-1.pdf. The *Fleming-Pancione* court rejected what it viewed as *Serre's* unsettling departure from Vermont law in the context of credit for time served and multiple concurrent sentences. It did not allow the sort of credit at issue in *Serre* to be applied against a later-imposed sentence. The *Fleming-Pancione* case currently is on appeal at the Vermont Supreme Court, No. 2016-186, and was recently argued. The argument is available at https://www.vermontjudiciary.org/LC/Oral%20Arguments/2016-186.zip.

Following *Fleming-Pancione*, the DOC apparently reversed course and started to apply it rather than *Serre*. This led to a recalculation of Mr. McLain's projected release date, which now is January 8, 2019. This reflects credit (a bit short of a year) from the time Mr. McLain was detained on the charges leading to Sentences 2 and 3. It does not reflect credit for *earlier* time served on Sentence 1.

In this case, Mr. McLain seeks so-called *Serre* credit, arguing that *Serre* correctly states the law.[3] The State argues that *Fleming-Pancione*, rather than *Serre*, correctly states the law. There is no dispute that the competing release dates, November 2, 2016 and January 8, 2019 were correctly calculated depending on whether one applies *Serre* or *Fleming-Pancione*.

The court has reviewed the relevant statutory and decisional law as well as *Serre* and *Fleming-Pancione* in depth. The court is persuaded that *Fleming-Pancione* is consistent with the applicable statutes and decisions of the Vermont Supreme Court. Accordingly, the court adopts *Fleming-Pancione* for purposes of this case.

Applying the law as described in that case demonstrates that the DOC has given Mr. McLain the credit for time served that he deserves on his current effective sentence.

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[3] The only issue in this case is whether *Serre* (leading to the November 2, 2016 release date) or *Fleming-Pancione* (leading to the January 8, 2019 release date) correctly states the law. No other issue has been raised or briefed.

ORDER

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

Dated at Montpelier, Vermont this ____ day of December 2016.

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Mary Miles Teachout
Superior Judge