

IN THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
22ND JUDICIAL CIRCUIT - STATE OF MISSOURI

FILED
JUL 28 2015

22ND JUDICIAL CIRCUIT
CIRCUIT CLERK'S OFFICE
BY _____ DEPUTY

TRACY EUGENE McKEE,)
)
Movant,)
) Cause Number 1522-CC10205
v.)
) Division Number 11
STATE OF MISSOURI,)
)
Respondent.)

**ORDER DENYING DEFENDANT'S MOTION FOR PROBATION TIME CREDIT
AND APPOINTING ATTORNEY FOR MOVANT**

On July 23, 2015, Movant Tracy McKee filed his Motion to Vacate, Set Aside or Correct the Judgment or Sentence which the Court imposed on him on December 12, 2011, and which the Court ordered executed on January 16, 2015 after revoking Movant's probation in Cause Number 1122-CR06824. Tracy McKee reached the Missouri Department of Corrections to begin serving his concurrent sentences of ten years for one count of tampering with a motor vehicle in the 1st degree and seven years for one count of stealing as a 3rd offense on January 26, 2015.

Upon its review of Movant's Motion, the Court finds that Tracy McKee's request for relief asks the Court to grant him credit against his sentences for some or all of the time that he had served on probation. Since Movant's request does not fall under the authority of Rule 24.035 of the Missouri Rules of Criminal Procedure, the Court rules on Movant's motion.

1. On December 12, 2011, Movant Tracy Eugene McKee pled guilty to the charges of tampering with a motor vehicle in the 1st degree and to stealing as a 3rd offense in Cause Number 1122-CR06824. As a part of his guilty plea, Movant admitted to the Court that he had at least four prior felony convictions on his record. The Court accepted Movant's guilty pleas and sentenced him to concurrent sentences of ten years and seven years on December 12,

2011. On the same date, the Court suspended execution of both sentences and placed Movant on supervised probation for a period of three years.

2. On April 8, 2013, the Court suspended both probations. On January 10, 2014, the Court reinstated Movant on his probations and extended the length of each probation by two years.

3. On October 7, 2014, the Court again suspended both probations. On January 16, 2015, Movant Tracy McKee admitted that he had violated conditions 1 and 6 of his probations. Based on this admission and on the recommendation of his probation officer, the Court revoked Movant's probations and ordered his sentences executed. At the January 16, 2015 hearing, the Court told Movant that the Court would not give him any credit against his sentences for the time he had served on probation.

4. The Missouri Department of Corrections received Movant Tracy McKee on January 26, 2015. Movant filed his Motion to Vacate, etc., on July 23, 2015. Movant met the 180-day filing requirement set out in Rule 24.035(b).

5. In Paragraph 8 of Movant's Motion to Vacate, etc., Tracy McKee prays that the Court "afford all or part of time Movant served on Probation Supervision." In Paragraph 9 of Movant's Motion to Vacate, etc., Tracy McKee explains that he does not want the Court to reduce his two sentences but to give him credit against his sentences for the time he served on probation between 2011 and 2014. Tracy McKee notes in Paragraph 9 that the Court is required to credit all jail time against the time of Movant's sentences and so it makes sense that he would also get credit for "constructive/compliant time served on probation" against the time of his sentences.

6. Movant cites the case of Jones v. State, 767 SW2d 90 (Mo.App. W.D. 1989) in support of his position that the trial court can give credit for time served on probation against the defendant's sentence time through a motion filed under Rule 24.035.

However, the ruling of the Western District of the Missouri Court of Appeals in Jones v. State, supra, does not reach that conclusion. Instead, the Western District ruled that a motion under Rule 24.035 was appropriate to determine whether or not a defendant had been given credit for *jail time* spent outside the State of Missouri during which he was being held, at least in part, for the case that formed the basis of the Rule 24.035 proceeding. 767 S.W.2d 92-93. In Jones, the Western District did not address the issue of whether or not giving credit against a sentence for time spent on probation could be reviewed under Rule 24.035.

7. The Western District of the Missouri Court of Appeals did address the issue of granting credit for probation time against a defendant's sentence time in the recent case of State ex rel. Scroggins v. Kellogg, 335 S.W.3d 38 (Mo.App.W.D. 2011). The Western District concluded that this action of giving credit for probation time can only be done at the time that the trial court revokes probation and orders execution of sentence, that the decision of whether or not to give credit for probation time is completely discretionary with the sentencing court and that, because the issue is discretionary, it is not subject to review under Rule 24.035. 335 S.W.3d at 46.

8. The issue of the trial court having authority to give a defendant some or all of his or her probation time as a credit against his or her sentence time is addressed in Section 559.036.5 and in Section 559.100.2 of the Revised Statutes of Missouri. Each of these statutory provisions allows the sentencing court to give the defendant a reduction against his or her sentencing time "by all or part of the time the defendant was on probation." 559.036.5 RSMo.

("The circuit court may, in its discretion, credit any period of probation or parole as time served on a sentence." 559.100.2 RSMo.)

9. However, these provisions do not support Movant's prayer in this case for two reasons. First, the Court must award the credit for probation time at the time it sentences defendant and not sometime later. See State ex rel. Scroggins v. Kellogg, 335 S.W.3d at 46.

Second, since the granting of probation time as a credit against sentencing time is strictly discretionary on the part of the sentencing court, the court's decision is not subject to review under Rule 24.035 or under its predecessor, Rule 27.26. See Wuebbels v. State, 770 S.W.2d 479, 481 (Mo.App.S.D. 1989). And see Norman v. State, 740 S.W.2d 369, 371 (Mo.App.S.D. 1987).

10. Based on the current status of Missouri law concerning an award of probation time as a credit against sentencing time, the Court concludes that it could only make this decision at the time it sentenced Tracy McKee on January 16, 2015, that its decision about awarding credit for probation time was strictly discretionary and that Rule 24.035 does not allow a movant to challenge discretionary decisions made by the sentencing court.

The Court also notes that Tracy McKee's performance while on probation was neither constructive nor compliant.

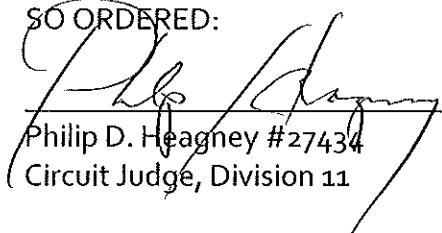
WHEREFORE, THE COURT ORDERS THAT:

1. Movant's Motion to Vacate, etc., is denied to the extent that it asks the Court to award credit against Movant's sentences for some or all of Movant's time on probation.

2. Based on the representations in his Motion to Vacate, etc., the Court finds that Movant is indigent and, pursuant to Rule 254.035(e), the Court appoints the Eastern Appellate/PCR Division of the Missouri State Public Defender's Office to represent Movant.

3. The Clerk of the Court shall notify Movant's counsel of this appointment and shall send one copy of this order and one copy of Movant's Motion to Vacate, etc., to Movant's appointed counsel. The Clerk shall also send one copy of this order to Movant at the Eastern Reception Diagnostic Correctional Center.

SO ORDERED:



Philip D. Heagney #27434
Circuit Judge, Division 11

July 28, 2015

Cc: Beth Orwick, Assistant Circuit Attorney
Scott Thompson, APD, Attorney for Defendant
Tracy E. McKee, #1175119 (Eastern Reception Diagnostic Correctional Center,
2727 Highway K, Bonne Terre, Missouri 63628)