

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-6297-04T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

JAMES HEMPHILL,

Defendant-Appellant.

APPROVED FOR PUBLICATION

February 5, 2007

APPELLATE DIVISION

Submitted: September 27, 2006 – Decided: February 5, 2007

Before Judges Stern, A. A. Rodríguez and
Collester.

On appeal from the Superior Court of New
Jersey, Law Division, Ocean County, 93-05-
0373.

Yvonne Smith Segars, Public Defender,
attorney for appellant (Ruth Bove Carlucci,
Assistant Deputy Public Defender, of counsel
and on the brief).

Thomas F. Kelaher, Prosecutor, attorney for
respondent (Samuel Marzarella, Senior
Assistant Prosecutor, of counsel; William
Kyle Meighan, Assistant Prosecutor, on the
brief).

The opinion of the court was delivered by

A. A. RODRÍGUEZ, P.J.A.D.

One of the issues presented in this appeal is whether defendant, James Hemphill, is entitled to receive credit for time spent in custody, on this charge, in the United Kingdom. We hold that defendant is entitled to such credit for this period.

I

In August 1994, defendant entered a negotiated plea of guilty to second degree endangering the welfare of a child (a thirteen-year-old girl), N.J.S.A. 2C:24-4a. He admitted at the plea hearing that for a two-year period he sexually abused the girl by touching her breasts, buttocks and vagina, while he masturbated. The State agreed to recommend that defendant be sentenced as a third degree offender and to dismiss related charges. Defendant remained on bail pending sentence. He then fled to Scotland prior to sentence. According to the State, he lived there under an assumed name for almost a decade. Eventually, defendant was arrested in Scotland on a warrant stemming from this charge.

Defendant alleges that he was held at the Edinburgh Prison in Scotland for about six months, until he was extradited to New Jersey. Then he was lodged in the Ocean County jail pending sentence.

In anticipation of sentence, Mark Frank, PhD, a clinical psychologist, examined defendant at the request of the Adult Diagnostic and Treatment Center (ADTC). Dr. Frank opined that defendant's conduct was compulsive and repetitive, therefore, it came within the purview of N.J.S.A. 2C:47-3. Defendant challenged the ADTC's conclusion and presented the report of his own expert, John J. Verdon, Jr., M.D., a psychiatrist. Dr. Verdon opined that defendant's conduct was not compulsive. Following a Horne¹ hearing, the judge concluded that defendant's conduct required that he be sentenced as a sex offender pursuant to N.J.S.A. 2C:47-3. The judge imposed a five-year term to be served at the ADTC and ordered defendant to comply with Megan's Law, N.J.S.A. 2C:7-1 to -19. The judge gave defendant a 197-day jail credit for time spent in custody in the Ocean County jail. Defendant asked for credit for time spent in custody in Scotland. The State objected. Without addressing the issue, the judge denied credits for custodial time spent in Scotland.

II

On appeal, defendant contends that:

SINCE THE STATE FAILED TO MEET ITS BURDEN OF
PROVING THAT DEFENDANT WAS A REPETITIVE AND
COMPULSIVE SEX OFFENDER, DEFENDANT'S
SENTENCE SHOULD BE VACATED AND THE MATTER

¹ State v. Horne, 56 N.J. 372, 375 (1970).

REMANDED FOR RESENTENCING TO A TERM AT A
STATE PRISON FACILITY.

We disagree.

At the Horne hearing, Dr. Frank testified that, after reviewing the materials provided to him about this case, he conducted a clinical interview with defendant. Dr. Frank opined that defendant's sexual offense constituted conduct that can be characterized as a pattern of repetitive and compulsive behavior. Dr. Frank reported that defendant "spoke about continuing to engage in the behavior despite feeling guilty about it, despite understanding its wrongfulness, despite recognizing the negative consequences to himself and his relationship to [the victim]." Defendant described struggling with himself in attempts to inhibit the behavior. This effort was unsuccessful. Defendant reported being relieved when the victim finally disclosed these offenses.

On the other hand, Dr. Verdon opined that defendant was not a compulsive sex offender, but admitted that defendant's conduct was possibly repetitive in that it may have occurred on more than one occasion. Dr. Verdon indicated that Dr. Frank's only basis for the opposite opinion was defendant's statement that he felt guilty about his behavior, but was unable to stop himself even though he knew it was wrong. Dr. Verdon explained that defendant told him that he had only made this statement to Dr.

Frank because he thought it was being made in the course of treatment and that this fabrication would help him to be released from the ADTC sooner.

Dr. Verdon opined that defendant suffered from the disease of alcoholism and needed inpatient treatment for alcohol dependence. Dr. Verdon opined that defendant did not need any treatment for aberrant sexual behavior because the assaultive behavior would stop if defendant dealt with his alcohol dependence.

At a Horne hearing, the State must prove, by a preponderance of the evidence, that a defendant is a "repetitive and compulsive" sex offender. State v. Howard, 110 N.J. 113, 131 (1988). The judge is the factfinder. State v. Horne, supra, 56 N.J. at 377. Therefore, we must give deference to the findings made by the judge, if these findings "could reasonably have been reached on sufficient credible evidence present in the record." State v. Johnson, 42 N.J. 146, 161-62 (1964).

In the enactment of N.J.S.A. 2C:47-1 to -10, the Legislature did not define the terms "repetitive" and "compulsive." State v. N.G., 381 N.J. Super. 352, 361 (App. Div. 2005). However, because these are words of common understanding, they are given their ordinary and well-understood meanings in ADTC evaluations. Id. at 361 (citation omitted).

Thus, "repetitive" means "to do, experience, or produce again" and "compulsive" is defined as "caused by obsession or compulsion," with "compulsion" meaning "an irresistible impulse to act irrationally." Id. at 361-62 (citing Webster's II New Riverside Dictionary 292, 996-97 (1994)).

Applying that standard here, we conclude that the findings made by the judge were amply supported by credible evidence in the record. Moreover, the record shows that defendant's conduct was repetitive. It is undisputed that there were multiple incidents of sexual misconduct occurring over a period of two years. In several statements to Dr. Frank, defendant himself acknowledged the compulsive nature of his conduct. Therefore, the judge's decision to impose an ADTC sentence is affirmed.

III

The second contention is that:

DEFENDANT IS ENTITLED TO ADDITIONAL JAIL
CREDIT FOR TIME SPENT IN CUSTODY PENDING
EXTRADITION.

We agree.

The pertinent rule states:

Credit for Confinement Pending Sentence

The defendant shall receive credit on the term of a custodial sentence for any time served in custody in jail or in a state hospital between arrest and the imposition of sentence.

[R. 3:21-8.]

The credit is only permissible for a period of incarceration attributable to the crime for which the sentence is imposed. In re Hinsinger, 180 N.J. Super. 491, 499 (App. Div.), certif. denied, 88 N.J. 494 (1981). The credit is given for time served between the date of arrest and the imposition of sentence. State v. Garland, 226 N.J. Super. 356, 361 (App. Div.), certif. denied, 114 N.J. 288 (1988). When the rule applies, the credit is mandatory. State v. Grate, 311 N.J. Super. 544, 548 & n.3, 549-50 (Law Div. 1997), aff'd, 311 N.J. Super. 456, 458 (App. Div. 1998) (citation omitted). Where the rule does not apply, the credit may nevertheless be awarded based on considerations of fairness, justice and fair dealings. Ibid.

The credit is impermissible if the confinement is due to service of a prior-imposed sentence or another charge. State v. Hugley, 198 N.J. Super. 152, 160 (App. Div. 1985) (citing State v. Council, 137 N.J. Super. 306, 308-09 (App. Div. 1975)); State v. Lynk, 166 N.J. Super. 400 (Law Div. 1979). A defendant is entitled to credit for time spent in another state's penal institution as a result of a detainer filed by New Jersey authorities on the matter resulting in the sentence. State v. Beatty, 128 N.J. Super. 488, 490-91 (App. Div. 1974). In

Beatty, the court expressly rejected the argument that "R. 3:21-8 applies only to time spent in custody in New Jersey." Id. at 491. The court stated that, "R. 3:21-8 expresses the public policy of the State and should be liberally construed." Ibid.

We see no reason why the rule should not apply when a defendant is held in a foreign country on a New Jersey detainer with respect to the matter resulting in the sentence. From all parties' perspectives, confinement in another county, state or a foreign country fall within R. 3:21-8, as long as defendant is not being held on other charges.

Accordingly, defendant is entitled to additional credit for time spent in custody in Edinburgh Prison. Therefore, the sentence is affirmed. However, the matter is remanded to the Law Division, Ocean County for the entry of an amended judgment of conviction. The judge shall conduct a hearing to determine if, in fact, defendant was confined in Scotland solely on this charge and for what period. The judge shall then enter an amended judgment of conviction. The judge should give a statement of reasons, including findings of fact and conclusions of law, with respect to the subject of credits, where the issue is in dispute and has an impact on the sentence. State v. Alevras, 213 N.J. Super. 331, 339 (App. Div. 1986).

Affirmed and remanded.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION