

Circuit Court for Saint Mary's County
Case No. C-18-CR-21-000179

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 2073

September Term, 2022

ALI LIN DEMARR

v.

STATE OF MARYLAND

Graeff,
Nazarian,
Zarnoch, Robert A.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 17, 2024

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B).

Ali Lin DeMarr’s children were sexually abused by their grandfather and a family friend. Although the children reported the abuse to Ms. DeMarr, she did little in response, and Ms. DeMarr was charged with three counts of sex abuse of a family member. Counts 1 and 3 later were amended to charge child neglect.

At the bond hearing, Ms. DeMarr was released on Level 2 pretrial detention. She was detained in that manner for 407 days and eventually pleaded guilty to the child neglect charges. During the sentencing hearing, Ms. DeMarr sought credit for the time she spent detained. The circuit court denied her request, reasoning that the detention did not qualify for credit under Maryland Code (2001, 2018 Repl. Vol.), § 6-218(b)(1) of the Criminal Procedure Article (“CP”), and gave her credit for the one day before her bond hearing that she had spent in custody.

Ms. DeMarr filed a motion for leave to appeal, which we granted, and she argues that the circuit court erred in not granting her credit for time spent in pretrial detention because its conditions were sufficiently incarcerative. We reverse and remand with directions that the circuit court give Ms. DeMarr credit for time spent at Level 2 supervision and amend her commitment record accordingly.

I. BACKGROUND

Between November 1, 2019 and May 11, 2021, Ms. DeMarr’s children were abused sexually by their grandfather and a family friend. In the summer of 2020, the children told Ms. DeMarr about their grandfather’s actions. When she confronted her father about the accusations, he admitted to the abuse. Ms. DeMarr felt conflicted because her father had

serious medical issues and had nowhere else to go, so she told her young children to stay away from their grandfather.

The abuse continued, but Child Protective Services (“CPS”) got involved and implemented a Safety Plan on May 11, 2021. The Safety Plan forced the grandfather to move out of Ms. DeMarr’s home. About a month later, on June 9, 2021, Ms. DeMarr was arrested and charged with three counts of child sex abuse. The next day, the court held a bond hearing and the circuit court released Ms. DeMarr on Level 2 pretrial detention. Under the terms of the home detention agreement (“Agreement”),¹ she was required to fulfill a series of conditions that included electronic monitoring and limits on her freedom of movement, and she faced apprehension and renewed detention for violating any of them:

Level 2

- Two in person meetings with the Community Supervision Officer per week.
- Electronic monitoring including Personal Tracking Unit (PTU)
- Mandatory urinalysis and breathalyzer on a random basis.
- Special conditions as ordered by the Court or required by Case Manager
- No contact w/ victims
- Not go to [Ms. DeMarr’s home]
- General conditions as stipulated in the Release

¹ Although the copy of the agreement on MDEC does not contain Ms. DeMarr’s signature, it does reflect the actual order created by the circuit court, so there is no issue because she was still subject to these conditions. The court even explained to Ms. DeMarr that “if you violate any of those conditions, the Detention Center is going to pull you back in the Detention Center and hold you until your trial date.”

Agreement

* * *

Any violation(s) of the above conditional release rules shall result in your immediate apprehension/detention pursuant to the Annotated Code of Maryland, Correctional Services Article, Title II, Local Correctional Facilities, Subtitle 11-803 Retake Warrant, CR9-405(b)(2) as well as any acts or infractions which jeopardize public safety.

On November 16, 2021, Ms. DeMarr pleaded guilty to two counts of child neglect. At the sentencing hearing, held on July 22, 2022, there was discussion about how much credit Ms. DeMarr was owed for time she spent detained:

THE COURT: [Counsel], do you know how much credit she has?

[COUNSEL FOR MS. DEMARR]: No, Your Honor. I want to say May is when it started. What was the arrest date?

[MS. DEMARR]: June 9th.

* * *

[THE STATE]: 2021.

THE COURT: And she's been on either Level-3 or incarcerated the entire time?

[THE STATE]: No. Your Honor released her on Level-2.

THE COURT: When did that happen?

[THE STATE]: You released her on Level 2 on June 10th.

THE COURT: So ten days credit?

[THE STATE]: No. One day credit. She got arrested June 9th.

THE COURT: I thought you said June 1st. I'm sorry.

[THE STATE]: No. June 10th you released her on Level-2, not to return to [her home] and no contact.

THE COURT: Okay.

[THE STATE]: And then we modified [Ms. DeMarr's residence] in August.

THE COURT: Okay. So one day credit?

[THE STATE]: Uh-huh.

[COUNSEL FOR MS. DEMARR]: Well, Your Honor. She's been on the electronic monitor.

THE COURT: She's been on Level-2. You don't get credit for Level-2 because there's no restriction on the movement. They know where you're going, but they don't restrict you.

In light of the court's determination, Ms. DeMarr was sentenced to two concurrent terms of five years of incarceration, all but one year suspended, followed by five years of supervised probation. On August 19, 2022, Ms. DeMarr filed a request for leave to appeal. We granted the request on February 1, 2023.

II. DISCUSSION

Ms. DeMarr presents one issue² on appeal, which we rephrase: whether the circuit court erred in denying Ms. DeMarr credit for the time she spent in pretrial detention. “The construction of [§ 6-218] of the Criminal Procedure Article implicate[s] a *de novo* review.” *Gilmer v. State*, 389 Md. 656, 662 (2005).

A. The Circuit Court Erred In Denying Ms. DeMarr Credit Because The Conditions Of Her Detention Were Sufficiently Incarcerative.

This appeal turns on whether the time Ms. DeMarr spent on Level 2 home detention was sufficiently incarcerative to entitle her to sentencing credit. She asserts that it was

² Ms. DeMarr phrased her Question Presented as: “Did the circuit court err in sentencing Appellant when it failed to credit her with the 407 days she served in Level 2 pretrial supervision, where the terms of her release were sufficiently incarcerative to qualify as custody?”

The State phrased its Question Presented as: “Did the trial court correctly decline to award credit for the time that DeMarr spent released under Level 2 supervision?”

because a violation of her home detention Agreement placed several limitations on her freedom and could result in prosecution for escape if she violated them. The State disagrees, claiming that the Level 2 conditions were supervisory rather than custodial. The State relies heavily on the fact that Ms. DeMarr wasn't restricted to a single location and had no curfew. That's true, but we agree with Ms. DeMarr.

When a defendant is sentenced, she is entitled to receive “credit against and a reduction of the term of a definite or life sentence . . . for all time spent in the custody of a correctional facility, hospital, facility for persons with mental disorders, or other unit.” CP § 6-218(b)(1). The original version of this statute sought to prevent “dead time,” time spent in custody with no impact against a later-imposed sentence. *See Dedo v. State*, 343 Md. 2, 12 (1996). Indeed, CP § 6-218 is meant to “ensure that a defendant receive as much credit as possible for time spent in custody as is consistent with constitutional and practical considerations.” *Johnson v. State*, 236 Md. App. 82, 89 (2018) (*quoting Fleegeer v. State*, 301 Md. 155, 165 (1984)).

The key question in these cases is whether the conditions of confinement are “sufficiently incarcerative” to qualify as custody for purposes of sentencing. The Supreme Court of Maryland ties this question primarily to the person’s liability for escape if they, well, escape or violate the conditions of their confinement, whatever the modality:

Where a defendant is punishable for the crime of escape for an unauthorized departure from the place of confinement, the custody requirement of [§ 6-218 of the Criminal Procedure Article, formerly § 638C of Article 27] is met A defendant is not “in custody” for purposes of [§ 6-218 of the Criminal Procedure Article, formerly § 638C of Article 27] if the

conditions of the defendant's confinement do not impose substantial restrictions on the defendant's freedom of association, activity and movement such that unauthorized absence from the place of confinement would be chargeable as the criminal offense of escape.

Dedo, 343 Md. at 11. Two things combine, then, to create an incarcerative state that entitles a defendant to credit: the ability to be prosecuted for the crime of escape and substantial restrictions on their liberty. *Id.* Although there is no exclusive list of restrictions that trigger a finding of custody, our courts have found substantial restrictions where the defendant is subject to a combination of limitations involving the monitoring and restriction of movement, random drug testing, and prohibition of legal activities such as consuming alcohol. *See Johnson*, 236 Md. App. at 92 (The defendant's confinement imposed "substantial restrictions on [his] freedom of association, activity and movement" because the agreement established that he: had a curfew, could be reported for violating his detention agreement, had his movements monitored twenty-four hours a day, had a home monitoring unit in his home, had to permit staff into his home whenever to inspect the equipment, could not use alcohol or controlled substances, and was subject to random drug and alcohol testing.); *Dedo*, 343 Md. at 6 (finding that the defendant was in custody because he: had a curfew, was subject to custodial and electronic monitoring, had to permit staff into his home whenever to check on equipment, was prohibited from possessing or using alcohol, was subject to random drug tests, and could be disciplined for being late or failing to check in). And although the ability to punish actual escape typically indicates a custodial

state, our Court has determined that any violation of the detention terms can create sufficiently incarcerative conditions:

[T]his is where CR § 9-405 comes in: according to the terms of the Agreement and the statutory definition of escape, [Appellant] *could* be prosecuted for escape if he violated the terms of the Agreement. A person is guilty of escape in the second degree if he or she ‘knowingly depart[s] from custody’ without authorization. CR § 9-405(a)(1) And § 9-405(b)(2) extends liability to violations of conditions in home detention agreements as well:

‘A person may not knowingly:

- (i) violate any restriction on movement imposed under the terms of a . . . home detention order or agreement;
- (ii) fail to return to a place of confinement under the terms of . . . home detention order or agreement.’

Johnson, 236 Md. App. at 92–93. So if, under the detention agreement or order, a defendant’s actions may be prosecuted for escape under Maryland Code (2002, 2021 Repl. Vol.), § 9-405(b)(2) of the Criminal Law Article (“CR”), the individual likely is in custody even if the action doesn’t literally require an escape from the confines of a physical area. *See id.*

In this case, Ms. DeMarr’s confinement amounted to custody for two reasons. *First*, her in-home detention imposed substantial limitations. Her restrictions were similar to those imposed on the defendants in *Johnson* and *Dedo* because she was subject to supervision, restrictions on where she could live, a prohibition from visiting her former home, twenty-four-hour monitoring via a personal tracking device, prohibition from using controlled or uncontrolled substances, and random drug tests and urinalysis. *See Johnson*, 236 Md. App. at 92; *Dedo*, 343 Md. at 6. Although Ms. DeMarr was not confined to her

home or had a curfew as the defendants in *Johnson* and *Dedo* were,³ the combination of her restrictions is substantial. *Second*, Ms. DeMarr could have been prosecuted for the crime of escape for violating the terms of the detention order as reflected in the Agreement. The terms of the Agreement made clear that “[a]ny violation(s) of the above conditional release rules shall result in your immediate apprehension/detention pursuant to [CR § 9-405(b)(2)].” (Emphasis added). Had Ms. DeMarr refused, for example, to take a urinalysis, she could have been punished for escape even though that act doesn’t involve her fleeing the confines of her new dwelling. And again, the possibility of prosecution for violating any term in a detention agreement or order is reflected in both CR § 9-405(b)(2) and *Johnson*, 236 Md. App. at 93. For these reasons, Ms. DeMarr’s detention was sufficiently incarcerative to entitle her to credit. We reverse the circuit court’s decision to deny Ms. DeMarr credit for the time she spent on Level 2 pretrial detention and remand the case with directions that the court award credit and amend her commitment record accordingly.

**JUDGMENT OF THE CIRCUIT COURT
FOR SAINT MARY’S COUNTY
REVERSED AND REMANDED WITH
DIRECTIONS. SAINT MARY’S COUNTY
TO PAY COSTS.**

³ *Johnson*, 236 Md. App. at 92; *Dedo*, 343 Md. at 6.