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**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1580**

State of Minnesota, ex rel.,
Branden Lee Pollard, petitioner,
Appellant,

vs.

Tom Roy,
Commissioner of Corrections,
Respondent.

**Filed May 8, 2017
Affirmed
Jesson, Judge**

Anoka County District Court
File No. 02-CV-15-2514

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Rachel E. Bell, Kelly S. Kemp, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

JESSON, Judge

This case is on remand from the Minnesota Supreme Court for reconsideration in light of *State ex rel. Duncan v. Roy*, 887 N.W.2d 271 (Minn. 2016). This court previously

held that appellant Brandon Lee Pollard was not entitled to have the “maximum supervised release” portion of his sentence subtracted from his ten-year conditional-release term because he served his entire executed sentence in prison pursuant to a concurrent sentence. *State ex rel. Pollard v. Roy*, 878 N.W.2d 341, 350 (Minn. App. 2016). The supreme court granted review but stayed the proceedings pending the supreme court’s final disposition in *Duncan*. On November 16, 2016, the supreme court filed its decision in *Duncan*, concluding that “an inmate is not entitled to credit against a conditional-release term for any time the inmate spends in prison after the [Department of Corrections] has revoked the inmate’s supervised release.” 887 N.W.2d at 278. The supreme court dissolved the stay in this case, vacated this court’s decision, and remanded for reconsideration. Because Pollard is not a release violator, *Duncan* does not control the outcome of this case. Nonetheless, our decision in *Pollard* is still persuasive, and we affirm.

FACTS

While Pollard was serving a 60-month prison sentence for a 2007 first-degree aggravated robbery, it was discovered that DNA evidence connected him to a June 2006 sexual assault. Pollard was charged and eventually convicted of third-degree criminal sexual conduct for the June 2006 offense and sentenced to a 28-month prison term, concurrent with the aggravated-robbery sentence he was already serving. Pollard was also ordered to serve a ten-year conditional-release term. Minn. Stat. § 609.3455, subd. 6 (Supp. 2005). The district court awarded Pollard credit for 28 months served in prison from April 28, 2008, the date the state completed its investigation and had probable cause to charge him. Pollard’s criminal sexual conduct sentence expired on August 17, 2010.

Because Pollard was still serving the sentence for aggravated robbery, he was never released into the community on supervised release.

The Minnesota Department of Corrections (DOC) originally determined that Pollard's conditional-release and supervised-release terms ran concurrently, as this court held in *State v. Koperski*, 611 N.W.2d 569, 573 (Minn. App. 2000). *See Pollard*, 878 N.W.2d at 342 n.1. According to the sentencing guidelines, a 28-month sentence consists of two parts: a term of imprisonment of 18 2/3 months and a term of supervised release of 9 1/3 months. Minn. Sent. Guidelines 4.A.¹ Following *Koperski*, the DOC initially gave Pollard credit for his supervised-release term against his conditional-release term, and determined that his conditional-release term would expire on November 6, 2019. But on September 12, 2012, the DOC sent Pollard notice that his conditional-release term would expire on August 17, 2020, ten years from the date his criminal sexual conduct sentence expired. The DOC determined that, based on *State ex rel. Peterson v. Fabian*, 784 N.W.2d 843, 847 (Minn. App. 2010), his supervised-release term should not have been subtracted from his ten-year conditional-release term, because Pollard was not released from prison during his supervised-release term.

Pollard filed a petition for a writ of habeas corpus arguing that the DOC denied him credit for supervised release of 9 1/3 months. The district court denied his petition without an evidentiary hearing, concluding that the question of whether an offender receives credit

¹ Minnesota law divides an offender's total "executed sentence" into two parts: "(1) a specified minimum term of imprisonment that is equal to two-thirds of the executed sentence; and (2) a specified maximum supervised release term that is equal to one-third of the executed sentence." Minn. Stat. § 244.101, subd. 1 (2016).

for the supervised-release term against the conditional-release term depends on whether the offender is released from prison and serves supervised release in the community. *See State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003) (stating plain meaning of phrase “after the person has completed the sentence imposed” indicates conditional release cannot begin before the inmate is released from prison); *see also State v. Ward*, 847 N.W.2d 29, 34 (Minn. App. 2014), *review granted and stayed* (Minn. June 17, 2014), *stay vacated and review denied* (Minn. Mar. 17, 2015) (*Ward I*).

This court affirmed the district court, concluding that *Koperski* “no longer controls the outcome of this case,” and that Pollard is not entitled to have his supervised-release term subtracted from his conditional-release term. 878 N.W.2d at 349-50.

D E C I S I O N

“[H]abeas corpus is a [statutory] remedy available to a confined person to obtain relief regarding the custody, or the length of confinement,” and may be used to challenge the DOC’s administrative decision regarding the implementation of sentences. *State v. Schnagl*, 859 N.W.2d 297, 301, 304 (Minn. 2015). When the relevant facts are undisputed, as they are here, the reviewing court applies a de novo standard of review on an appeal from an order denying a petition for a writ of habeas corpus. *State ex rel. Guth v. Fabian*, 716 N.W.2d 23, 26 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006).

The supreme court mandated that we reconsider our prior decision affirming the district court’s order denying habeas relief in light of *Duncan*. In that case, the supreme court considered the question of whether an inmate who is released from prison on supervised release, but who violates a release condition and is returned to prison for

additional incarceration, is entitled to credit against his conditional-release term for the time served in prison on supervised release.² 887 N.W.2d at 275. The supreme court interpreted Minnesota Statutes section 609.019, subdivision 7(a) (2004), which provides that, after the inmate has completed the sentence imposed, “the commissioner of corrections shall place the [inmate] on conditional release . . . for five years, *minus the time the person served on supervised release.*” *Id.* (alteration in original).³ In its analysis, the supreme court in *Duncan* first considered section 244.05, subdivision 3(2), which gives the commissioner of corrections the power to revoke supervised release and re-incarcerate an inmate who violates the terms of supervised release. *Id.* at 276. “Once an inmate’s release has been revoked and the inmate has been returned to prison, the inmate is no longer on supervised release.” *Id.* at 277 (citing *Wukawitz*, 662 N.W.2d at 523).

Next, the supreme court considered the plain meaning of the words “revoke” and “release,” and concluded that an inmate whose supervised release is revoked, resulting in re-incarceration, is no longer serving time on supervised release. *Id.* The supreme court was also persuaded by the legislature’s use of different terms to describe conditional release in section 609.109, subdivision 7(a), and the DWI conditional-release statute, which

² The DOC’s decision to change from concurrent to consecutive treatment of supervised release and conditional release based on *Peterson* also occurred in *Duncan*, so that *Duncan* received no credit for the three years he served in prison after his supervised release was revoked for failing to find approved housing. 887 N.W.2d at 273-74.

³ Section 609.109, subdivision 7, was renumbered and is now in section 609.3455, subdivision 6. 2005 Minn. Laws ch. 136, art. 2, § 21, at 931, 933. The length of the conditional-release term was also increased from five to ten years. *Id.* For *Pollard*, whose offense was committed in June 2006, the conditional-release term is ten years, “minus the time the offender served on supervised release.” *Id.*

explicitly states that conditional release begins after the person is released from prison. *Id.* (citing Minn. Stat. § 169A.276, subd. 1(d) (2014)). The legislature’s use of different terms to describe conditional release for sex offenders and DWI offenders “indicates that these provisions should be administered differently and further supports [the supreme court’s] interpretation of the plain words of the statute.” *Id.* The supreme court also rejected Duncan’s argument that failing to give him credit for time served in prison after his supervised release was revoked results in an indeterminate sentence, because the overall length of Duncan’s sentence was not increased. *Id.* at 278.

Finally, the supreme court concluded that, under the “plain and unambiguous” language in section 609.109, subdivision 7, and section 244.05, subdivision 3, “[w]hen the DOC revokes an inmate’s supervised release and returns the inmate to prison, that inmate is no longer serving time on supervised release” and is not entitled to credit against his conditional-release term. *Id.* The supreme court did not decide, however, “whether an inmate who is incarcerated *never* can be serving time on supervised release.” *Id.* at 278 n.8 (alteration in original). The supreme court noted that the parties “discussed hypothetical situations in which an inmate could be incarcerated during the inmate’s supervised-release term even though the inmate’s supervised release has not been ‘revoked[,]’” but left this question “for another case.” *Id.* The supreme court did not decide if an offender is entitled to credit against a conditional-release term for time served in prison while incarcerated on a concurrent sentence for another offense.

Because *Duncan* involved a supervised-release violator, not an inmate who must serve the supervised-release portion of a sentence in prison because he is serving a longer

concurrent sentence, the parties agree that *Duncan* does not necessarily control Pollard's situation. But they offer different solutions. Pollard continues to rely on *Koperski* as the authority requiring supervised release to be credited against conditional release if the offender is not a release violator but is incarcerated on another sentence. 611 N.W.2d at 573. The state, on the other hand, contends that "some language in *Duncan* supports this court's earlier decision in the case" and that this court can rely on its prior decision. We agree with the state.

Although a decision may no longer be binding precedent, it may still have persuasive authority. *State v. Collins*, 580 N.W.2d 36, 43 (Minn. App. 1998) (finding logic of remanded court of appeals' decision persuasive where that decision's analysis relied on supreme court precedent); *review denied* (Minn. July 16, 1998). Because the reasoning in our *Pollard* decision is sound, we continue to follow it. We conclude that an offender is not on supervised release until the offender is actually released from prison. 878 N.W.2d at 346. This is consistent with the supreme court's plain language interpretation of "release" as "free from confinement" in *Duncan*. 887 N.W.2d at 277. We further conclude that an offender is not entitled to credit against the conditional-release term for time served in prison on a concurrent unrelated offense. *Pollard*, 878 N.W.2d at 349-50. This is consistent with the 2013 legislative change to section 609.3455, subdivision 6, which makes it clear that the conditional-release term does not start until "after the offender has been released from prison." *Id.* at 346 (citing 2013 Minn. Laws, ch. 96, § 3, at 744). Our interpretation of the statute is also consistent with the DOC's rules governing conditional and supervised release. *Id.* at 347-48. Finally, as addressed in *Pollard*, we conclude that

decisions of the supreme court decided after *Koperski*, as well as the 2013 statutory amendments, cast doubt on the continuing validity of that decision. *Id.* at 348-49. Because Pollard served his entire executed sentence in prison, he was not on supervised release, and he is not entitled to credit against his conditional-release term. *Id.* at 350.

Affirmed.