

THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

No. 2019-0103

State of New Hampshire

v.

Jason Candello

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Appeal Pursuant to Rule 7 from Judgment  
of the Cheshire County Superior Court

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BRIEF FOR THE DEFENDANT

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(Oral Argument Waived)

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### QUESTION PRESENTED

Whether the court erred by denying Candello's motion to amend his sentence.

Issue preserved by Candello's motions to amend sentence, Candello's answer to the State's objection, the supplement to his motion, his motion to reconsider, and the trial court's rulings. AD\* 17 - AD 18; A3-A5, A8-A11, A21-A29.

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\* Citations to the record are as follows:

"A" refers to the separately-filed appendix to this brief containing relevant pleadings and an order not being appealed;

"AD" refers to the attached appendix containing the appealed decisions.

## STATEMENT OF THE CASE AND OF THE FACTS

On December 6, 2007, Jason Candello was sentenced, after pleading guilty in the Cheshire County Superior Court, on two charges: possession of heroin (217-2007-CR-250, “charge 1”) and felon in possession (217-2007-CR-739, “charge 2”). A3, A6. On charge 2, he was given a stand-committed sentence of two and a half to nine years in prison.<sup>1</sup> A6. On charge 1, he was given a sentence of three and a half to seven years in prison, all suspended for ten years. Id. The sentences were consecutive to each other. Id.

Candello was later found guilty of second-degree assault, committed in November 2012 (217-2013-CR-99, “charge 3”). A3-A4, A6, A8. At the time of his arrest on charge 3, Candello was on parole for charge 2 and still under the suspended sentence for charge 1. A3. The State filed a motion to impose the suspended sentence in charge 1 based on the allegation underlying charge 3. A3, A6. Candello received a parole “setback” on charge 2, starting in mid-November 2012. A3, A11, A19, A29. He also was held, in lieu of \$10,000 cash-only bail, on charge 3 from March 6, 2013. A23, A26-A28.

On May 6, 2014, Candello was sentenced on charges 1 and 3. A3, A6. On charge 1, the three-and-a-half-to-seven-

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<sup>1</sup> This sentence was later amended to two and a half to seven years in prison. A6.

year sentence was imposed, consecutive to the sentence in charge 2. A6. On charge 3, Candello was sentenced to two to four years in prison, consecutive to both charges 1 and 2. Id. He was initially given seven days of pre-sentence confinement credit but that number was subsequently increased upon Candello's motion. A19.

In December 2018, Candello filed a motion to amend his sentence, citing cases 1, 2, and 3. A3-A5. He argued that charges 1 and 3 should run concurrently with each other and run from the date of sentencing. Id. The State objected, arguing that consecutive sentences are authorized under Duquette v. Warden, N.H. State Prison, 154 N.H. 737 (2017). A6-A7. Candello responded by citing State v. Allain, 171 N.H. 286 (2018), and arguing that he was entitled to pre-sentence confinement credit toward charge 1. A8-A9. Candello also filed another motion to amend his sentence, arguing that RSA 651:3 had recently been amended to allow for consecutive sentences only when the maximum is no greater than "twice the maximum sentence authorized . . . for the most serious offense charged." A10-A11. The State objected, arguing that Candello was citing a proposed amendment to RSA 651:3 which had not been enacted. A12-A15.

The court (Ruoff, J.) asked the State to respond to Candello's argument about Allain. A16. The State filed a supplement, arguing that the facts of Allain differed from the

facts of Candello's cases. A17-A21. Candello also filed a supplement, arguing that Allain controlled and asking the court to "[g]rant the Defendant pretrial credit as it sees fit." A21-A29.

The court denied Candello's request to amend his sentences. AD 17. Candello moved to reconsider, asking the court to award him pre-sentence confinement credit on charge 1. AD 18. The court denied the motion to reconsider. Id.

Candello filed a discretionary notice of appeal, raising as issues the denial of 540 days of pretrial confinement credit, the denial of his motion to amend sentence, and the denial of his motion to reconsider. This Court accepted his appeal.

### SUMMARY OF THE ARGUMENT

The court erred in denying Candello's motion to amend his sentences. Under the plain language of RSA 651:3, the imposed sentences in charges 1 and 3 commenced on the date of sentencing, because he was then in custody. This Court must reverse and remand so that those sentences can be amended to commence on May 6, 2014.



I. THE COURT ERRED IN DENYING CANDELLO'S MOTION TO AMEND SENTENCE.

Candello asked the court to amend his sentences in charges 1 and 3 to clarify that they commenced on the date of sentencing, May 6, 2014, arguing that that result was mandated by RSA 651:3, I. A3-A5.

RSA 651:3, I directs that a:

sentence of imprisonment commences when it is imposed if the defendant is in custody or surrenders into custody at that time. Otherwise, it commences when he becomes actually in custody. All the time actually spent in custody prior to the time he is sentenced shall be credited in the manner set forth in RSA 651-A:23 against the maximum term of imprisonment that is imposed and against any minimum term authorized by RSA 651:2 or 6.

RSA 651-A:23 mandates that any:

prisoner who is confined to the state prison, any house of correction, any jail or any other place shall be granted credit against both the maximum and minimum terms of his sentence equal to the number of days during which the prisoner was confined in jail awaiting and during trial prior to the imposition of sentence and not under any sentence of confinement.

“When the question before [the Court] is one of statutory construction, [the Court] review[s the question] *de novo*.”

State v. Fogg, 170 N.H. 234, 236 (2017). “In matters of statutory interpretation,” this Court is “the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole.” Id. (quotation omitted). The Court looks “first to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning.” Id. (quotation omitted). The Court interprets “legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.” Id. (quotation omitted). The Court construes “all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.” Id. (quotation omitted). Finally, the Court interprets “a statute in the context of the overall statutory scheme and not in isolation.” Id. (quotation omitted).

The Court construes “provisions of the Criminal Code according to the fair import of their terms and to promote justice.” State v. Allain, 171 N.H. 286, 287 (2018). “When the language of a statute is plain and unambiguous, [the Court does] not look beyond it for further indications of legislative intent.” Id. at 288.

This Court considered RSA 651:3 in Duquette v. Warden, N.H. State Prison, 154 N.H. 737 (2007), in determining whether consecutive sentences were authorized

by the legislature. Id. at 741. The Court concluded that consecutive sentences were not explicitly authorized by RSA 651:3, in addition to other cited statutes, and went on to consider legislative history, particularly the repeal of a statute that mandated concurrent sentences. Id. at 740-44. The Court ultimately concluded that the legislature intended, with that repeal, to reinstate the common law authority to pronounce consecutive sentences. Id. at 742-44. However, the Duquette Court did not at any point interpret RSA 651:3.

This Court interpreted RSA 651-A:23, along with RSA 651-A:19, in State v. Forest, 163 N.H. 616, 619-20 (2012). The Court determined that, when a person is held on a parole violation because of a new felony charge, the time “between the defendant’s return to prison after his arrest on the parole violation warrant and his conviction on [the new felony charge]” is credited to the old sentence and thus, the defendant was “under [a] sentence of confinement” under RSA 651-A:23 and not entitled to pre-sentence confinement credit on the new charge. Id. at 619-21.

Neither Duquette nor Forest answer the question before the Court in this case: whether a trial court is permitted, under RSA 651:3 and in the exercise of its discretion to allocate pre-sentence confinement credit, to sentence a defendant in custody to a term of custody starting at a future

date. Under the plain language of the statute, the trial court does not have authority to do so.

“A sentence of confinement,” under RSA 651:3, I, “commences when it is imposed if the defendant is in custody.” Candello was in custody at the time his sentences in charges 1 and 3 were imposed on May 6, 2014. Unlike RSA 651-A:23, RSA 651:3 does not mandate that the defendant be solely in custody on the matter for which he is being sentenced. Cf. RSA 651-A:23 (granting pre-sentence confinement credit for every day the defendant was in custody “awaiting and during trial prior to the imposition of sentence” only if he was “not under any sentence of confinement”); see also Allain, 171 N.H. at 286-89 (determining that defendant, held on new charges, was entitled to pre-sentence confinement credit on related motion to impose, when defendant had not been given that credit on any other sentence).

RSA 651:3 permits a stand-committed sentence to commence on a day other than the day it is imposed only if the defendant later “becomes actually in custody.” That provision does not apply here, as Candello was in custody on the date his sentences were imposed.

While this reading of RSA 651:3 may undermine the ability of courts to impose consecutive sentences, the Court found that ability only through resort to consideration of

legislative history in Duquette. This reading of RSA 651:3 comports with the plain meaning of the language used by the legislature and does not require this Court to add any language the legislature did not see fit to include. Under this reading, consecutive sentences are still permissible under several circumstances. For example, when stand-committed sentences are imposed on different dates, the sentence first imposed will run consecutively to the second until the second sentence is imposed. In addition, suspended or deferred prison or jail sentences can run consecutively to a stand-committed sentence imposed on the same day, because RSA 651:3 mandates only that the stand-committed sentence begin on the date of sentencing.

Because the plain language of RSA 651:3, I, mandates that stand-committed sentences begin on the date they are imposed when a defendant is in custody, the trial court erred in denying Candello's motion to amend his sentences in 213-2007-CR-250 (charge 1) and 213-2013-CR-99 (charge 3) to clarify that those sentences run as of the date of imposition, May 6, 2014. This Court must reverse.

## CONCLUSION

WHEREFORE, Jason Candello respectfully requests that this Court reverse and remand for further proceedings consistent with the Court's decision.

Undersigned counsel waives oral argument.

The appealed decisions are in writing and are filed in a dedicated appendix.

This brief complies with the applicable word limitation and contains no more than 2100 words.

Respectfully submitted,

By /s/ Stephanie Hausman  
Stephanie Hausman, 15337 Deputy  
Chief Appellate Defender Appellate  
Defender Program  
10 Ferry Street, Suite 202 Concord,  
NH 03301

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief has been timely provided to the Criminal Bureau of the New Hampshire Attorney General's Office through the electronic filing system's electronic service.

/s/ Stephanie Hausman  
Stephanie Hausman

DATED: August 19, 2019

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THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS.

SUPERIOR COURT

Docket #: 07 CR-280, 739 13-CR-099

State v. Jason Condello

ORDER ON Motions to Suspend Sentence

Upon Review of the pleadings, the Court concurs with the State's analysis. The Motions to Suspend (or Amend) sentences are Denied.

1-9-19  
Date

CLERK'S NOTICE DATED

1/10/19 AD 17  
cc: J. Webb / Def.

D. L. Ruoff  
David W. Ruoff, Presiding Justice

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THE STATE OF NEW HAMPSHIRE

JUDICIAL BRANCH

http://www.courts.state.nh.us

Court Name:

Cheshire County Superior

Case Name:

State v. Jason Candello

Case Number:  
(if known)

213-2007-CR-0250, and 213-2007-CR-739, and 213-2013-CR-00099

MOTION FOR: Reconsideration

The Defendant, Jason Candello, Pro Se,

states the following facts and requests the following relief:

1. Under RSA 651:3 and 651-A:23, The Defendant is entitled to presentence confinement credit toward the suspended sentence in case # 213-2007-CR-250, imposed for violating a good behavior order. If he had he been able to post the bail so tied with the November 18, 2012 assault, he would have been released from jail between the time of his arrest and the date of his sentencing on May 6, 2014. see State v. Allain, 194 A.3d 950

WHEREFORE, the Defendant requests that this Court:

- Reconsider its decision on Defendants motion to amend sentence;
- Hold a hearing if deemed necessary; and
- Grant such other and further relief as this Court deems equitable and just.

1-24-2019

Date

Signature

Jason M. Candello

Telephone

Address

P.O. Box 14, Concord, NH 03302

I certify that on this date I mailed/delivered a copy of this document to:

Clerk of Courts, James Peale

or

(other party)

(other party's attorney)

1-24-2019

Date

Signature

Jason M. Candello

ORDER

☐ Motion granted.

☒ Motion denied. See Status Report & Analysis

Recommended:

Date

Printed Name of Marital Master

Signature of Marital Master

So Ordered:

2-1-19

Date

Printed Name of Judge

Signature of Judge

CLERK'S NOTICE DATED

Page 1 of 1

David W. Ruoff, Presiding Justice

2/1/19  
cc: J. Webb / Def.

AD 18

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