Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-012

OCTOBER TERM, 2008

State of Vermont	}	APPEALED FROM:
	}	
v.	}	District Court of Vermont,
	}	Unit No. 2, Addison Circuit
	}	
Peter Nelson	}	DOCKET NO. 675-11-05 AnCr
		Trial Judge: Helen M. Toor

In the above-entitled cause, the Clerk will enter:

Defendant appeals from the trial court's denial of his pro se motion to correct a clerical error in his sentence. He argues that he was "in custody" within the meaning of 13 V.S.A. § 7031(b) while released on conditions and living at his mother's residence, and thus, he was entitled to credit for time served. The trial court rejected this argument, and we affirm its decision.

The record indicates the following. In November 2005, defendant was charged with driving under the influence, death resulting, and leaving the scene of a fatal accident. Defendant posted bail and he was released on conditions, including a requirement that he live at his mother's home and that he leave the residence only when accompanied by his mother or stepfather. At defendant's request, the court added a third individual who could accompany defendant from the home as well. In May 2006, the parties entered into a plea agreement. Defendant agreed to plead guilty to the DUI-death resulting charge, and the State agreed to dismiss the remaining charge. The parties agreed that defendant would serve a minimum of four years and a maximum of ten years. On the plea agreement form, the parties indicated that "credit for time served" was "N/A." The court accepted the plea agreement in June 2006, and sentenced defendant to serve four to ten years.

In January 2007, over a year and a half later, defendant filed a pro se motion under Vermont Rule of Criminal Procedure 36 to correct a clerical mistake in his sentence. Defendant asserted that his original mittimus did not reflect the actual amount of presentence credit that he deserved. Specifically, he argued that he had been subject to very stringent bail conditions and that he was thus entitled to credit for time spent in "home incarceration." The court denied the motion on the day it was filed, finding that defendant was not entitled to credit for time spent living at his mother's home. This appeal followed.

On appeal, defendant reiterates his assertion that he is entitled to credit for the six-month period that he lived at his mother's house. He maintains that because strict restrictions were imposed on his movement during this period, he was "in custody" within the meaning of 13 V.S.A. § 7031(b).

Before turning to the merits, we agree with the State's assertion that defendant filed his motion under the wrong rule of criminal procedure. This case plainly does not involve an allegation that a "clerical mistake" was made. Cf. V.R.Cr.P. 36 ("Clerical mistakes in judgments, orders, or other parts of the record and error therein arising from oversight or omission may be corrected by the court at any time."); see also 3 C. Wright, N. King & S. Klein, Federal Practice & Procedure § 611, at 806-07 (discussing similar federal rule and explaining that any error arising from oversight or omission by court, rather than through clerical mistake, is not within purview of rule). Instead, defendant raised a substantive legal issue, alleging for the first time in his pro se motion that the court should construe the term "in custody" to include the time that he spent living at his mother's home. Rule 36 was not the appropriate means to seek such relief. Nonetheless, given defendant's pro se status below, and in light of the trial court's ruling on the merits on his request, we address defendant's argument.

Under 13 V.S.A. § 7031(b), the court must give an individual "credit toward service of his sentence for any days spent in custody in connection with the offense for which sentence was imposed." In In re McPhee, 141 Vt. 4 (1982), we concluded that a defendant was "in custody" within the meaning of § 7031 when he was ordered by the court to stay at a residential alcohol facility as a condition of release, and the defendant was placed under the supervision of the director of that facility. In reaching our conclusion, we considered whether the restraints involved were sufficient, as a matter of law, to warrant application of § 7031(b), and found that they were, reasoning that the defendant's freedom had been much more restricted than that of one who walked out of a courtroom having furnished bail. Id. at 9. We declined to identify a minimum level of restrictions that would be sufficient to support credit for time served, however, noting that "each case will require an independent determination of the facts." Id.

In State v. Platt, 158 Vt. 423 (1992), we held that a defendant was not "in custody" for purposes of § 7031 while released on conditions and living at home. In that case, the defendant's conditions of release required him to remain in Windham County, where he lived, to be at his residence between 11:00 p.m. and 6:00 a.m., and to check in with probation officers three times per week. Platt, 158 Vt. at 430. The defendant was permitted, on his occasional requests, to deviate from these requirements for certain medical needs and family events. The trial court concluded that the defendant's conditions of release did not involve "a significant imposition on the defendant's freedom and were not the functional equivalent of incarceration." Id. at 431 (quotation omitted). We affirmed this decision, finding that the restrictions at issue did not approach those involved in McPhee. We noted that the defendant in Platt was not in the custody of any other person, was not in an institutional setting, and while he was restricted to his home for seven hours each night, he was permitted to choose his residence and he was free to spend his days how and where he wished, within the confines of the county, as long as he did not violate the law. We thus concluded that he was not "in custody" within the meaning of § 7031(b).

The circumstances presented in the instant case are analogous to Platt, not McPhee. Unlike the defendant in McPhee, defendant in this case was not confined in an institution, nor

was he subject to the type of supervision inherent in a residential treatment facility. Instead, he was allowed to live at his mother's home, and generally free to do whatever he pleased inside her residence. While his movement outside the home was subject to restrictions, that does not lead to a conclusion that he was therefore "in custody" within the meaning of § 7031. As numerous courts have recognized,

> Home confinement, though restrictive, differs in several important respects from confinement in a jail or prison. An offender who is detained at home is not subject to the regimentation of penal institutions and, once inside the residence, enjoys unrestricted freedom of activity, movement, and association. Furthermore, a defendant confined to his residence does not suffer the same surveillance and lack of privacy associated with becoming a member of an incarcerated population.

People v. Ramos, 561 N.E.2d 643, 647 (Ill. 1990)); see also State v. Fellhauer, 943 P.2d 123, 126-27 (N.M. Ct. App. 1997) (same).

Indeed, it appears that the majority of courts that have considered the issue conclude that home confinement does not satisfy the "in custody" requirement. See State v. Climer, 896 P.2d 346, 349 (Idaho Ct. App. 1995) ("The majority of courts interpreting whether the term house arrest constitutes being 'in custody' have held that it does not.") (citing cases); see also Platt, 158 Vt. at 431 (noting that federal courts interpreting a similarly worded statute hold that statute requires "imprisonment or some comparable institutional confinement for credit to be earned"), citing United States v. Figueroa, 828 F.2d 70, 70-71 (1st Cir. 1987) (per curiam) (noting that all of the circuit courts that had addressed the issue had concluded that the "in custody" requirement "means detention or imprisonment in a place of confinement and does not refer to the stipulations imposed when a defendant is at large on conditional release") (citing cases); Fellhauer, 943 P.2d at 126 (concluding that, with due regard to statutory differences, the weight of non-federal authority supports position that a defendant is not entitled to credit for time spent under "house arrest" or in home detention) (citing cases). We agree with these courts, and find their reasoning persuasive.

Defendant does not argue these cases are distinguishable—with the exception of Platt, he does not mention them at all in his brief. We find the cases defendant does cite to be unpersuasive. Several involve situations where a defendant was required as a condition of release to reside in an institutional facility, such as a residential drug treatment facility, which we have already concluded is not akin to the situation presented here. See Lock v. State, 609 P.2d 539, 545 (Alaska 1980) (concluding that individual entitled to credit against sentence for time spent, as a condition of probation, in an institutional rehabilitation program that imposed substantial restrictions on his freedom of movement and behavior); see also Nygren v. State, 658 P.2d 141, 146 (Alaska App. 1983) (defendant entitled to credit for the time spent in various residential treatment facilities, where her stay in these facilities had been ordered by the court). As previously discussed, this case does not involve a court-ordered stay at a residential treatment facility, nor the imposition of the type of restrictions inherent in a stay at such an institutional facility. Defendant also cites State v. Speaks, 829 P.2d 1096, 1097 (Wash. 1992) (en banc), but as defendant acknowledges, the court's decision in that case rested on the terms of a state statute that specifically allowed credit for "home confinement." See also Climer, 896 P.2d at 350 (finding Sparks distinguishable on same ground).

Defendant's reliance on Dedo v. State, 680 A.2d 464 (Md. Ct. App. 1996), is equally misplaced. In that case, the court afforded a defendant credit for home confinement where, among other conditions, the defendant was: committed to the custody of the warden of the local detention center and subject to his control; the defendant's movements and activities were monitored through video surveillance equipment; and pursuant to a home confinement agreement, the defendant was subject to prosecution for escape for any unauthorized absence from his home. Id. at 465. The Dedo court concluded that

> [w]here a defendant is punishable for the crime of escape for an unauthorized departure from the place of confinement, the custody requirement of [the state statute] is met. A defendant is not in "custody" for purposes of [the state statute] 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.

Id. at 468 (finding this approach apparently consistent with majority of jurisdictions that had considered issue and citing cases); see also State v. Duhon, 122 P.3d 50, 53 (N.M. Ct. App. 2005) (under New Mexico law, credit for time served will be awarded only where defendant is punishable for crime of escape for any unauthorized departure from place of confinement or other noncompliance with court order, among other requirements). Applying this reasoning to the instant case, defendant was not "in custody." He could not be prosecuted for the crime of escape if he left his mother's home without supervision. See 13 V.S.A. § 1501 (defining crime of escape). The fact that he could be prosecuted for violating the conditions of his release does not distinguish him from any other defendants released on conditions; it does not establish that defendant was "in custody" for purposes of § 7031 while living at his mother's house.

We do not foreclose the possibility that there may be some cases where home confinement is sufficiently restrictive to be akin to incarceration in a penal facility. This is not such a case, however, and defendant was not entitled to credit for time spent living at his mother's house while awaiting trial.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice