IN THE COURT OF APPEALS OF THE STATE OF ALASKA

XAVIER MIGUEL COLLINS, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-13329 Trial Court No. 3AN-17-03397 CR MEMORANDUM OPINION No. 6956 — June 30, 2021

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael D. Corey, Judge.

Appearances: Glenda J. Kerry, Law Office of Glenda J. Kerry, Girdwood, under contract with the Public Defender Agency, and Samantha Cherot, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Kevin G. Clarkson, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Judge WOLLENBERG.

Pursuant to a plea agreement, Xavier Miguel Collins pleaded guilty to third-degree assault and was sentenced to 2 years to serve.[1] Prior to entering into this plea agreement and before he remanded to serve his sentence on Department of Corrections electronic monitoring, Collins spent time on conditions of release that required him, among other things, to be under house arrest (with limited passes) and supervised at all times by one of two third-party custodians (his mother as the primary third-party custodian, and a family friend as the secondary custodian). Collins filed a motion requesting credit against his sentence for the time he spent under these conditions of release. The superior court denied Collins's request, and he now appeals that denial.

Alaska Statute 12.55.027 authorizes credit against a defendant's sentence for time spent in qualifying treatment programs and under electronic monitoring.[2] The current version of this statute does not directly address credit for time spent under house arrest with third-party custodian supervision. Accordingly, Collins argues that he is entitled to credit for the time he spent under these conditions based on a line of cases that preceded the enactment of AS 12.55.027 — namely, our decision in *Nygren v. State* and the cases that followed.

In *Nygren*, we held that a defendant was entitled to credit, under AS 12.55.025(c), for time spent in residential treatment as a condition of bail if the defendant was subject to restrictions approximating incarceration.[3] In a later case, *Matthew v. State*, we analyzed whether a defendant whose conditions of release required him to be on electronic monitoring and house arrest (except while at, or commuting to,

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[1] AS 11.41.220(a)(1)(A).

[2] AS 12.55.027(a) & (d).

[3] *Nygren v. State*, 658 P.2d 141, 146 (Alaska App. 1983).

work) was entitled to *Nygren* credit for the time spent on these conditions of release.[4] We concluded that Matthew's conditions did not approximate incarceration:

> Matthew's day-to-day activities were unencumbered by the kind of institutional rules and routines that are the hallmark of correctional or residential rehabilitative facilities. The conditions of release did not subject him to the kind of structured, regimented life style that is the central feature of both incarceration and residential treatment programs. As long as Matthew was either at home or at work, he could do whatever he wanted to do (except for consume alcohol) and was free to associate with whomever he wanted. Additionally, Matthew did not suffer the same lack of privacy experienced by an offender in an incarcerative facility or residential treatment program.[5]

Relying in our decision in *Matthew v. State*, the trial court in this case found that the restrictions on Collins's freedom of movement and the decrease in his privacy as a result of his bail conditions did not approximate conditions of imprisonment. For the reasons we expressed in *Matthew*, we agree.

Collins argues that we must reconsider our decision in *Matthew* in light of the fact that the legislature has now statutorily authorized credit for electronic monitoring.[6] He contends that his conditions of release — house arrest, monitored by third-party custodians — were more stringent than the electronic monitoring authorized

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[4] *Matthew v. State*, 152 P.3d 469, 472 (Alaska App. 2007).

[5] *Id.* at 472-73 (citations omitted); *see also Milazzo v. State*, 2014 WL 6092149, at *3 (Alaska App. Nov. 12, 2014) (unpublished) (upholding denial of credit for defendant on conditions of release requiring electronic monitoring and a third-party custodian, noting that "the restrictions on Milazzo's movement and behavior [were] not materially different from those in *Matthew*").

[6] AS 12.55.027(d).

by the legislature. And he notes that, unlike a prior version of AS 12.55.027, the version of AS 12.55.027 currently in effect does not expressly prohibit credit "for time spent in a private residence."

Collins is correct that, when the legislature first enacted AS 12.55.027 in 2007, the statute provided that "[a] court may not grant credit against a sentence of imprisonment for time spent in a private residence or under electronic monitoring."[7] The credit Collins seeks would clearly have been barred under that statute. But in 2015, the legislature deleted this provision and rewrote the statute to authorize credit for electronic monitoring under certain conditions.[8] The statutory language is now silent on the question of credit for time spent in a private residence while not on electronic monitoring.[9]

We acknowledge that the legislatively-authorized electronic monitoring may allow for some of the freedoms that Collins claims were lacking in his own release order. But the fact that the legislature has authorized credit for electronic monitoring, regardless of whether it qualifies as "custody" under our *Nygren* line of cases, does not necessarily mean that Collins is entitled to credit for other forms of release.

Moreover, Collins has not cited any authority that suggests the legislature intended to allow credit for time spent in a private residence or on third-party custodian supervision — other than in situations where the defendant was *also* on electronic monitoring. When we interpret a statute, we do not rigidly rely upon the statute's plain meaning; instead, we employ a sliding scale approach incorporating both legislative

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[7] SLA 2007, ch. 24, § 20.

[8] SLA 2015, ch. 20, § 2.

[9] *See* AS 12.55.027.

history and the plain text of the statute in order to discern the legislature's intent.[10] The legislative history of the 2015 amendments to AS 12.55.027 — authorizing sentencing credit for time spent on electronic monitoring — demonstrates that the legislature did not intend to authorize credit for time spent on house arrest or third-party custodianship unaccompanied by electronic monitoring.

At a House Judiciary Committee hearing on the bill (House Bill 15) in February 2015, Representative Wes Keller asked why the bill did not authorize credit for time spent on house arrest.[11] The bill sponsor — Representative Tammie Wilson — stated that the new law was not intended to credit such time, when that time was not otherwise accompanied by electronic monitoring.[12] Representative Wilson also expressed concern that supervision by a third-party custodian (which sometimes accompanied house arrest) was not as reliable as supervision by electronic monitoring.[13]

Later in the legislative session, in April 2015, the House Finance Committee considered an amendment proposed by Representative Les Gara that would have codified credit for time spent supervised by a third-party custodian.[14]

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[10] *See State v. Fyfe*, 370 P.3d 1092, 1094-95 (Alaska 2016); *see also Hayes v. State*, 474 P.3d 1179, 1183 (Alaska App. 2020).

[11] Audio of House Judiciary Comm., Remarks of Rep. Wes Keller, House Bill 15, at 2:10:31 – 2:10:55 p.m. (Feb. 20, 2015).

[12] *Id.*, Remarks of Rep. Tammie Wilson, at 2:10:57 – 2:11:40 p.m.

[13] *Id.* at 2:11:40 – 2:11:50 p.m. (suggesting that "courts have also been concerned sometimes that . . . the third party is really not monitoring the person as well as they should").

[14] Audio of House Finance Comm., House Bill 15, at 2:29:30 – 2:33:20 p.m.; 2:33:35 – 2:35:20 p.m.; 2:38:03 – 2:40:19 p.m.; 2:46:35 – 2:47:30 p.m. (Apr. 10, 2015). Representative Gara expressed his concern that there are places in rural Alaska that do not have adequate GPS coverage to support electronic monitoring. *Id.* at 2:31:50 – 2:33:20 p.m.
(continued...)

Representative Wilson expressed concern that third-party custodians are not able to continuously monitor as effectively as electronic monitors because they must sleep.[15] The legislators, differentiating between the two forms of monitoring, ultimately rejected the proposed amendment.[16]

For these reasons, we uphold the superior court's decision denying Collins's motion for credit. The judgment of the superior court is therefore AFFIRMED.

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[14] (...continued)
In a footnote in his brief, Collins notes this point and suggests that the absence of credit for time spent on house arrest and third-party custodianship raises equal protection concerns. But he does not argue the point in relation to Collins, who was on house arrest in Anchorage.

[15] Audio of House Finance Comm., House Bill 15, Remarks of Rep. Tammie Wilson, at 2:33:54 – 2:35:02 p.m. (Apr. 10, 2015).

[16] *See* Audio of House Finance Comm., House Bill 15, at 2:33:54 – 2:35:02 p.m.; 2:39:16 – 2:40:18 p.m.; 2:45:40 – 2:45:52 p.m.; 2:46:35 – 2:47:30 p.m. (Apr. 10, 2015); *see also id.*, Testimony of Nancy Meade, General Counsel, Alaska Court System, at 2:44:24 – 2:44:38 p.m. & 2:45:55 – 2:46:09 p.m.; *Belknap v. State*, 426 P.3d 1156, 1161 (Alaska App. 2018) (Allard, J., concurring).