SUMMARY
August 1, 2024

2024COA77

No. 21CA1450, *People v. Plotner* — Crimes — Assault in the Second Degree — While Lawfully Confined or in Custody; Criminal Law — Sentencing — Multiple Consecutive Sentences

In this appeal of the denial of a criminal defendant's Crim. P. 35(b) motion to reconsider a sentence, a division of the court of appeals interprets the phrase "being served," as used in section 18-3-203(1)(f), C.R.S. 2023. When defendant was sentenced in this case for second degree assault while lawfully confined or in custody under section 18-3-203(1)(f), he was serving two consecutive sentences from another case. The trial court determined that section 18-3-203(1)(f) required it to impose an assault sentence that was consecutive to *both* sentences he was serving, as opposed to consecutive to one of them and concurrent with the other.

Section 18-3-203(1)(f) provides that a sentence for second degree assault while lawfully confined or in custody "shall run consecutively with any sentences *being served* by the offender." (Emphasis added.) Defendant contends that, because he can only serve one consecutive sentence at a time, the inclusion of the words "being served" in the statute means that the trial court was only required to impose the assault sentence consecutively to *one* — but not both — of his consecutive sentences. As a matter of first impression, the division rejects defendant's contention and concludes that, when a defendant is serving multiple consecutive sentences, those sentences must be treated as one single sentence, such that they are both "being served" for the purposes of a later sentence imposed under section 18-3-203(1)(f).

COLORADO COURT OF APPEALS **2024COA77**

Court of Appeals No. 21CA1450
Fremont County District Court No. 16CR579
Honorable Ramsey L. Lama, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Aaron W. Plotner,

Defendant-Appellant.

ORDER AFFIRMED

Division VI
Opinion by JUDGE WELLING
Lipinsky and Gomez, JJ., concur

Announced August 1, 2024

Philip J. Weiser, Attorney General, William G. Kozeliski, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Casey Mark Klekas, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

¶ 1 Defendant, Aaron W. Plotner, appeals the trial court's order denying his Crim. P. 35(b) motion for reconsideration of his sentence for second degree assault while lawfully confined or in custody under section 18-3-203(1)(f), C.R.S. 2023. When he was sentenced in this case, Plotner was serving two consecutive sentences from another case. In his motion for reconsideration, he contended that the trial court erred by determining that section 18-3-203(1)(f) required it to impose an assault sentence that was consecutive to *both* sentences he was serving, as opposed to consecutive to one of them and concurrent with the other.

¶ 2 Section 18-3-203(1)(f) provides that a sentence for second degree assault while lawfully confined or in custody "shall run consecutively with any sentences *being served* by the offender." (Emphasis added.) Plotner contends that, because he can only serve one consecutive sentence at a time, the inclusion of the words "being served" in the statute means that the trial court was only required to impose an assault sentence that was consecutive to *one* — but not both — of his consecutive sentences. As a matter of first impression, we conclude that, when a defendant is serving multiple consecutive sentences, those sentences must be treated as

one single sentence, such that they are both "being served" for the purposes of a later sentence imposed under section 18-3-203(1)(f). Therefore, we affirm.

I. Background

¶ 3 In February 2016, while serving two consecutive sentences from a single case, Plotner was involved in an altercation with two correctional officers at the Centennial Correctional Facility. Based on allegations that he headbutted one officer and kicked the other, Plotner was charged with two counts of second degree assault while lawfully confined or in custody under section 18-3-203(1)(f). Following a jury trial, Plotner was convicted of one count and acquitted of the other.

¶ 4 After the trial, the court and the parties agreed to proceed to immediate sentencing. When asked for their sentencing recommendation, the prosecutor "deferred" to the court, while Plotner's attorney asked the court to impose the minimum sentence of four years in the custody of the Department of Corrections (DOC) "consecutive, as required by law, to his current sentence."

¶ 5 When describing the sentencing range on the record, the trial court also asked both the prosecutor and Plotner's counsel whether

they agreed that the sentence imposed "must run consecutive[ly], not concurrently with the sentence [Plotner's] currently serving." Both the prosecutor and Plotner's counsel agreed with this proposition. The trial court then turned to Plotner's counsel and said, "[S]o you know, I don't have discretion not to run [the sentence] consecutive[ly]."

¶ 6 The court then sentenced Plotner to "four years [in the] DOC consecutive to any sentence you're currently serving" followed by three years of mandatory parole. The mittimus issued by the court read: "DEF SENTENCED TO 4 YRS DOC, PLUS 3 YRS MANDATORY PAROLE, SENTENCE IS . . . CONSECUTIVE TO ANY SENTENCE THE DEF IS CURRENTLY SERVING OR HAS YET TO BE SERVED." At the time of sentencing, Plotner was approximately five years into serving a sixty-four-year sentence consisting of two consecutive sentences — a forty-eight-year sentence and a sixteen-year sentence.

¶ 7 Following the mandate of his direct appeal, Plotner filed a timely motion for sentence reconsideration under Crim. P. 35(b). In his motion, Plotner argued that the trial court misconstrued its sentencing discretion because it was only required to run the

assault sentence in this case consecutively to *one* of his pre-existing consecutive sentences. The trial court denied Plotner's motion, concluding that it was required to impose a sentence that was consecutive to both pre-existing sentences, as the statute necessitates the imposition of consecutive sentences to "any sentences" Plotner was serving at the time of sentencing.

II. Analysis

¶ 8 The task before us is interpreting section 18-3-203(1)(f). Our supreme court has interpreted the disputed clause of section 18-3-203(1)(f) on just one occasion. In *People v. Diaz*, the supreme court rejected the defendant's argument that section 18-3-203(1)(f)'s mandatory consecutive sentencing requirement applies only to a sentence that the defendant was serving at the time of the custodial assault. 2015 CO 28, ¶¶ 15-18. Instead, the supreme court held that "section 18-3-203(1)(f) requires a consecutive sentence if, *at the time of sentencing*, the defendant is serving any other sentence." *Id.* at ¶ 27 (emphasis added). Though the holding in *Diaz* makes clear that "being served" references the time of sentencing (not the time the charged assault was committed), it sheds no light on the question before us: When a defendant is incarcerated under

consecutive sentences at the time of sentencing, are all or just one of the consecutive sentences "being served" under section 18-3-203(1)(f)'s mandatory consecutive sentencing requirement? That is the issue we turn our attention to now.

A. Standard of Review and Principles of Statutory Construction

¶ 9 We review issues of statutory interpretation de novo. *Orellana-Leon v. People*, 2023 CO 34, ¶ 9. When interpreting a statute, our "primary purpose is to ascertain and effectuate the intent of the General Assembly." *People v. Raider*, 2022 CO 40, ¶ 9 (quoting *Diaz*, ¶ 12). To achieve this purpose, we look to the plain and ordinary meaning of the statute's language and "consider it within the context of the statute as a whole." *Lewis v. Taylor*, 2016 CO 48, ¶ 20; *accord Carrera v. People*, 2019 CO 83, ¶ 17. When "the statutory language is unambiguous, we effectuate its plain and ordinary meaning and look no further." *Carrera*, ¶ 18. If, however, the statute is "reasonably susceptible of multiple interpretations," then it is ambiguous, and we "may consider other aids to statutory construction." *Johnson v. People*, 2023 CO 7, ¶ 15; *see* § 2-4-203, C.R.S. 2023. Other aids of statutory construction include "the consequences of a given construction, the end to be achieved by the

statute, and the statute's legislative history." *McCoy v. People*, 2019 CO 44, ¶ 38; *see* § 2-4-203.

B. Interpretation of Section 18-3-203(1)(f)

1. Unambiguous Meaning of "Being Served"

¶ 10 Our first step in interpreting the statute at issue "is to examine the statutory language." *People v. Harrison*, 2020 CO 57, ¶ 16 (citing *Cowen v. People*, 2018 CO 96, ¶ 12). Section 18-3-203(1)(f) provides that a sentence imposed for second degree assault while lawfully confined or in custody "shall be served in the department of corrections *and shall run consecutively with any sentences being served by the offender*." (Emphasis added.) The term "being served" isn't defined anywhere in title 18 of the Colorado Revised Statutes, and neither party contends otherwise.

¶ 11 "In the absence of a definition, we must read statutory terms according to their plain and ordinary meaning." *Harrison*, ¶ 16 (citing *Cowen*, ¶ 14). Doing so in this case doesn't, however, advance the ball very far. The key word in the phrase is "being," which is the present participle of "be." Webster's Third New International Dictionary 199 (2002); *Cowen*, ¶ 14 (To ascertain the plain and ordinary meaning of a word in a statute, "we may

consider a definition in a recognized dictionary."). Plotner contends that "any sentences being served" includes only those sentences that have "commenced and [are] still active" at the time of sentencing; consecutive sentences, he argues, "by their very nature, are not 'being served' at the same time." The People, in contrast, point to the word "any" to contend that section 18-3-203(1)(f) plainly means that the sentence must be consecutive to "all" sentences that have been imposed on the defendant. *See Proactive Techs., Inc. v. Denver Place Assocs. Ltd. P'ship*, 141 P.3d 959, 961 (Colo. App. 2006) ("When a statute is interpreted, the adjective 'any' is generally understood to mean 'all.'" (quoting *Winslow v. Morgan Cnty. Comm'rs*, 697 P.2d 1141, 1141 (Colo. App. 1985))).[1]

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[1] The People's plain language argument also relies on the statute's inclusion of the plural "sentences," arguing that the legislature's use of the plural necessarily sweeps in consecutive sentences. We aren't persuaded, however, that the use of the plural tells us anything about the meaning of "being served." After all, if Plotner were serving *concurrent* sixteen- and forty-eight-year sentences, there would be no dispute that the court would have been required to impose an assault sentence that was consecutive to both of those concurrent sentences. Simply put, the statute's reference to any "sentences" doesn't shed any meaningful light one way or the other on the meaning of "being served" as it applies to previously imposed consecutive sentences.

¶ 12 At first blush, both contentions seem to have some merit. But on closer inspection, neither framing resolves the specific question presented here: When a court has imposed consecutive sentences on a defendant, how are those sentences *served* — all at once or serially? Plotner's argument is simply a tautology — consecutive sentences are served one at a time because they are served one at a time. And the People's contention doesn't illuminate what sentences are "being served" at any given time.

¶ 13 This apparent stalemate, however, isn't the end of the road for determining whether the disputed language of subsection (1)(f) is ambiguous. Although the text of section 18-3-203(1)(f) doesn't provide a clear answer to the question before us, article 22.5 of title 17 does. In endeavoring to effectuate the purpose of a legislative scheme, "we read that scheme as a whole, giving consistent, harmonious, and sensible effect to all of its parts, and we avoid constructions that would render any words or phrases superfluous or lead to illogical or absurd results." *Thompson v. People*, 2020 CO 72, ¶ 22 (citing *McCoy*, ¶ 38).

¶ 14 Title 17 is the organic statute for the DOC, and article 22.5 of the title governs "[i]nmate and [p]arole [t]ime [c]omputation."

§§ 17-22.5-101 to -407, C.R.S. 2023. Section 17-22.5-101 provides as follows: "For the purposes of this article, when any inmate has been committed under several convictions with separate sentences, *the department shall construe all sentences as one continuous sentence*." (Emphasis added.) If this statute applies in this context, it appears to resolve any ambiguity in favor of the People's urged interpretation. But Plotner contends that, because the reach of section 17-22.5-101 is limited by its own terms to "this article," it has no bearing on the meaning of "being served" in section 18-3-203(1)(f).

¶ 15 We aren't persuaded that the utility of section 17-22.5-101 is as constrained as Plotner contends. To be sure, the reach of section 17-22.5-101 is limited to article 22.5 of title 17. But article 22.5 provides the statutory framework for how sentences are served. It is the most logical place for a court to look in discerning how to characterize a DOC inmate's sentence at any given time. *Cf.* § 17-22.5-102, C.R.S. 2023 ("When any person is sentenced to any correctional facility, that person shall be deemed to be in the custody of the executive director or his designee and shall begin serving his sentence on the date of sentencing."). And it answers

the question before us definitively: when an inmate has been committed to the DOC on several sentences, he serves those sentences "as one continuous sentence." § 17-22.5-101. Thus, at the time of his sentencing in this case, Plotner was serving a single controlling sentence of sixty-four years in DOC custody, and section 18-3-203(1)(f) unambiguously required the trial court to impose the assault sentence in this case to run consecutively to all components of that controlling sentence, which it did.

¶ 16 We aren't persuaded otherwise by *In re Packer*, 18 Colo. 525, 33 P. 578 (1893); *Wells-Yates v. People*, 2019 CO 90M; or *People v. Clifton*, 69 P.3d 81 (Colo. App. 2001), *cert. granted, judgment vacated on other grounds, and case remanded*, No. 02SC80, 2003 WL 1906360 (Colo. Apr. 21, 2003) (unpublished order), on which Plotner relies.

¶ 17 Plotner points out that, in *Packer*, the supreme court recognized that "one term of imprisonment may be made to commence when another terminates," 18 Colo. at 531, 33 P. at 580, arguing that this supports his interpretation that sentences are served one at a time. But *Packer* involved the imposition of a sentence, not the service of a sentence. *Id.* at 529-30, 33 P. at

579-80 (holding that it is permissible for a court to impose consecutive sentences for convictions of multiple offenses tried in a single trial and entered as one judgment). Indeed, the supreme court in *Packer* recognized that multiple "successive" sentences are served as a single aggregated sentence. *Id.* at 532, 33 P. at 580. If anything, *Packer* supports our reading of the statute.

¶ 18 Plotner's reliance on *Wells-Yates* fares no better. *Wells-Yates* and its progeny stand for the proposition that courts must evaluate each triggering offense separately, and not the aggregate sentence, when conducting an Eighth Amendment proportionality review. *Wells-Yates*, ¶¶ 24, 74. This is so "because each sentence represents a separate punishment for a distinct and separate crime." *Id.* at ¶ 24. *Wells-Yates* says nothing about how sentences are served once imposed.

¶ 19 Plotner also directs our attention to *Clifton* for the proposition that "[i]n Colorado, consecutive sentences are not considered to be a single sentence. Each sentence is to be served separately." 69 P.3d at 86. The context for this statement was the division's determination that the imposition of consecutive sentences didn't violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Clifton*, 69

P.3d at 86. *Clifton*, however, offers no direction or analysis regarding how sentences are served once they have been imposed.

¶ 20 Simply put, though sentences may have been imposed as consecutive sentences, once imposed, for purposes of sentencing under section 18-3-203(1)(f), they are *served* as a single sentence. This conclusion is consistent with the overall statutory scheme. *See UMB Bank, N.A. v. Landmark Towers Ass'n*, 2017 CO 107, ¶ 22 ("[W]e look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts . . . ."). Accordingly, the trial court didn't err by denying Plotner's Crim. P. 35(b) motion.

¶ 21 Moreover, even if we were persuaded that the statute is ambiguous, we would still reach the same interpretation of section 18-3-203(1)(f). We turn to that analysis next.

2. Other Aids to Statutory Construction

¶ 22 If we were to conclude that the statute is ambiguous, we could then "consider other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history." *Thompson*, ¶ 22; *see* §

2-4-203. All these considerations support the conclusion we reached above.

¶ 23 The legislative history surrounding the adoption of the consecutive sentencing requirement of section 18-3-203(1)(f) unequivocally supports an interpretation that requires a defendant to serve additional time for a second degree assault committed while lawfully confined or in custody. The General Assembly added the consecutive sentencing requirement to section 18-3-203(1)(f) during a special session held in September 1976. Ch. 3, sec. 2, § 18-3-203(1)(f), 1976 Colo. Sess. Laws 1st Extra. Sess. 8-9. In his executive order calling the special session, Governor Lamm cited "a breakdown in the security and morale in our prisons" as the "extraordinary occasion" warranting convening the General Assembly. Colo. Exec. Order, 1976 Colo. Sess. Laws 1st Extra. Sess. 1 (Sept. 14, 1976); *see also* H. Journal, 50th Gen. Assemb., 1st Extra. Sess. 9 (Sept. 15, 1976) (Governor Lamm addressed the General Assembly, stating, "The 'extraordinary occasion' that lies behind today's session involves a breakdown in the security, the morale and the sense of purpose of our prisons."). Indeed, the supreme court recognized that the 1976 special session was

"focused on ways to curb inmate violence," and the object of the revisions to section 18-3-203(1)(f) was "clearly deterrence of assaults on jail and prison staff" by "maximiz[ing] the potential for additional time based on assaultive conduct against detention personnel while a defendant is in confinement or custody." *Diaz*, ¶ 20.

¶ 24 Plotner's urged interpretation defeats this clear purpose of ensuring that convictions for these offenses carry additional prison time. *See People v. Benavidez*, 222 P.3d 391, 394 (Colo. App. 2009) ("Interpreting the statute to limit . . . consecutive sentences to only those offenders who commit assaults while confined after a conviction . . . is inconsistent with the clearly expressed intent of the legislature to deter any assaults against . . . workers within custodial settings by mandating additional punishment."); *see also State v. Davis*, 74 P.3d 1064, 1069 (N.M. 2003) (interpreting the words "sentence being served" in a similar New Mexico statute to require the new sentence to be imposed consecutively to all of a defendant's consecutive sentences, reasoning that to do otherwise would be "contrary to the intent of the Legislature" and lead to "absurd or unreasonable results").

¶ 25 Furthermore, there is a substantial practical problem with Plotner's urged interpretation — namely, determining which of a defendant's multiple consecutive sentences is "being served" at the time of sentencing. In other words, which of the defendant's consecutive sentences must the court run the section 18-3-203(1)(f) sentence consecutively to? In this case, it's immaterial which sentence the new consecutive sentence would attach to because the new four-year sentence is shorter than both Plotner's forty-eight-year sentence and his sixteen-year sentence. But consider a hypothetical situation in which a defendant is serving a sixteen-year sentence and a two-year sentence consecutively when the defendant is sentenced for second degree assault in violation of section 18-3-203(1)(f). If the trial court were to decide that, at the time of sentencing for the assault, the defendant was serving the two-year sentence, then the trial court would have discretion to run the new four-year sentence concurrently with the sixteen-year sentence and the defendant would serve no additional time. If, however, the defendant was serving the sixteen-year sentence, then the new four-year sentence would run consecutively with the sixteen-year sentence, and the trial court would have the discretion

to run the new sentence concurrently with the two-year sentence. In that situation, the defendant would serve two additional years.

¶ 26 This conundrum illustrates the critical role that section 17-22.5-101 plays in understanding the meaning of section 18-3-203(1)(f). Section 17-22.5-101 explicitly tells us that an inmate serves multiple DOC sentences "as one continuous sentence."

¶ 27 Simply put, even if we were to determine that the phrase "being served" in section 18-3-203(1)(f) is ambiguous, we would still conclude that it means *all* of a defendant's sentences — including a defendant's consecutive sentences that have been imposed as of the date of sentencing.

3. The Rule of Lenity

¶ 28 Finally, we reject Plotner's invitation to invoke the rule of lenity to adopt his interpretation of section 18-3-203(1)(f). The rule of lenity is properly invoked only when, after using the ordinary tools of statutory construction, we are left with "no more than a guess as to what [the General Assembly] intended." *People v. Thoro Prods. Co.*, 70 P.3d 1188, 1198 (Colo. 2003) (citation omitted). As explained above, we aren't at sea here. Instead, all of the tools at

our disposal point to the same interpretation. Accordingly, there is no role for the rule of lenity in this case. *See id.* ("The rule of lenity is a rule of last resort, to be invoked only after traditional means of interpreting the statute have been exhausted.") (citation omitted).

III. Disposition

¶ 29 We affirm the trial court's order denying Plotner's Crim. P. 35(b) motion for sentence reconsideration.

JUDGE LIPINSKY and JUDGE GOMEZ concur.