COURT OF APPEALS
DECISION
DATED AND RELEASED

March 6, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2130-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PETER ENNIS,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dane County: ROBERT DE CHAMBEAU, Judge. *Reversed and cause remanded with directions*.

Before Dykman, P.J., Vergeront and Roggensack, JJ.

DYKMAN, P.J. Peter Ennis appeals from an amended judgment of conviction and an order denying post-conviction relief. He asserts that he is entitled to sentence credit for the time he spent in the Wisconsin Division of Intensive Sanctions (DIS) program. In ***State v. Collett***, No. 96-1952-CR, slip op. at 6 (Wis. Ct. App. Dec. 3, 1996, ordered published Jan. 28, 1997), we concluded

that DIS restrictions must be so substantial as to amount to being locked in at night or its equivalent to entitle the participant to sentence credit. Because we cannot determine the extent of Ennis's restrictions from the record, we reverse and remand for a hearing at which Ennis can show the extent of his restrictions.

On May 22, 1992, Ennis was convicted of burglary and operating a motor vehicle without the owner's consent. The trial court withheld sentence and placed Ennis on probation for three years. In April 1993, Ennis was admitted to DIS as an alternative to revocation of his probation. As part of this program, he was incarcerated at two state prisons until September 30, 1993. He was later given sentence credit for the time served in these prisons, and this period is not at issue in this appeal. Ennis remained in the DIS program until May 14, 1994, at which time he was placed back on probation.

We do not know why, but on October 7, 1994, Ennis again entered the DIS program. We do not know what his living arrangements were while he was in the program, but we are told that he removed an electronic monitor and escaped on May 16, 1995. His probation was evidently revoked, for he was sentenced to six years in prison on August 23, 1995. On February 5, 1996, the trial court amended his judgment of conviction to reflect 486 days of sentence credit for the time Ennis spent in custody. However, the trial court refused to give Ennis sentence credit for the times he was in DIS from October 1, 1993 to May 14, 1994, and from October 7, 1994 to May 16, 1995, less the time during those periods that he spent in actual confinement and for which he was given credit.

Ennis's motion for sentence credit provided the facts we have recited in the previous two paragraphs of this opinion. His motion and the trial court's decision to deny sentence credit predated our decision in ***Collett***. Therefore, the parties relied upon cases such as ***State v. Holliman***, 180 Wis.2d 348, 509 N.W.2d 73 (Ct. App. 1993), and ***State v. Swadley***, 190 Wis.2d 139, 526 N.W.2d 778 (Ct. App. 1994), which focussed on whether a defendant could have escaped from custody as a test for whether he or she was entitled to sentence credit. ***Collett*** changed the inquiry from one of statutory interpretation to a

mixed question of fact and law: Was the particular intensive sanction used for a defendant so substantial "as to amount to being locked in at night or its equivalent?" *See* ***Collett***, slip op. at 6. We cannot fault either the trial court or Ennis for not anticipating the holding in ***Collett***. Accordingly, we reverse and remand to allow the trial court the opportunity, after an evidentiary hearing, to decide whether Ennis is entitled to sentence credit under the ***Collett*** test.

By the Court.—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.