COURT OF APPEALS
DECISION
DATED AND RELEASED

July 29, 1997

NOTICE

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.

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

No. 97-0041-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN R. STAMBAUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: BONNIE L. GORDON, Judge. *Affirmed.*

CURLEY, J. John Stambaugh appeals from a judgment convicting him of one count of intentional violation of a civil injunction, contrary to § 785.01(1)(b), STATS. He claims that the trial court erroneously exercised its discretion in sentencing him to a longer sentence than that given to one of his

co-defendants and, further, that the trial court should have credited him with time served in federal custody. This court affirms the judgment of the trial court.[1]

I.

On December 10, 1992, the Hon. Jeffrey A. Wagner issued a permanent civil injunction against Stambaugh, Skott, and Braun. The terms of the injunction required all named defendants to refrain from certain conduct, including impeding or obstructing access to, ingress or egress from the Women's Health Care Center and to refrain from demonstrating within twenty-five feet of the side or front of any entrance or exit of the clinic, including the parking lots, parking lot entrances, and driveway entrances. Stambaugh was personally served with a copy of the permanent injunction order.

On the morning of September 29, 1994, John Stambaugh, his two co-defendants Michael Skott and Robert Braun, and others blockaded the front and rear doors of the Wisconsin Women's Health Care Center. They wedged two automobiles in front of the Clinic entrances and welded themselves inside the cars using a number of interlocking steel devices. It took police and thirty-seven firefighters six to eight hours to remove Stambaugh and the other protesters from the automobiles blocking the Clinic's front and rear doors. After his extraction, Stambaugh was arrested by Milwaukee police. He spent the first four days in state custody until his custody was transferred to federal authorities pending trial on a violation of 18 U.S.C. § 248 (1994), the "F.A.C.E." (Freedom of Access to Clinic Entrances) Statute before the United States District Court for the Eastern District of Wisconsin.

[1] This appeal is decided by one judge pursuant to § 752.31(2), STATS.

A state criminal charge of intentional violation of a civil injunction was issued on October 28, 1994, against Stambaugh, Skott, and Braun for the September 29, 1994, violation of the injunction, contrary to § 785.01(1)(b), STATS. Prior to this incident, Stambaugh had been found in remedial contempt for violating the injunction on two separate occasions. Stambaugh was in federal custody, pending trial on the 18 U.S.C. § 248 violation, at the time of his initial appearance in the trial court. On December 7, 1994, Stambaugh entered a not guilty plea while his co-defendant, Michael Skott, entered a plea of no contest to the charge. Later that day, Skott was sentenced to six months in the House of Correction with Huber privileges. On February 8, 1996, a jury found Stambaugh guilty. He was sentenced to one year in the House of Correction without Huber privileges on April 12, 1996.

Stambaugh asked the court for sentence credit for the time he spent in federal custody. Specifically, he requested 129 days credit from October 29, 1994, to March 17, 1995. The trial court denied his request.

II. ANALYSIS.

A. Waiver of right to challenge trial court's exercise of discretion in sentencing.

The first issue this court addresses is whether Stambaugh waived his right to challenge his sentence because, as the State asserts, he did not bring a sentencing modification motion in the trial court. Stambaugh claims his counsel's comments during the sentencing hearing on April 12, 1996, preserved the issue. At sentencing, counsel for Stambaugh stated:

> I think that this should be a 60-day sentence; however; I'm mindful that Pastor Skott received six months in this case upon a plea and it would be somewhat strange if—if my client got less than someone who ple[aded] on this very

> same case. Nevertheless, I still feel that it's —that if you take away all the hype, this is a 60-day offense, and that's the sentence I'm requesting.

Contrary to his assertion, his attorney's statements were not an objection to the possibility of a longer sentence for Stambaugh than Skott received, but, rather, were a request for a lesser sentence. Defense counsel's remarks at sentencing do not satisfy the requirement of bringing a post-sentencing motion pursuant to § 973.19, STATS., before the issue may be raised on appeal.

Motions challenging a sentence must be made within ninety days of sentencing. ***Sears v. State***, 94 Wis.2d 128, 140, 287 N.W.2d 785, 790-91 (1980); ***State v. Chambers***, 173 Wis.2d 237, 261, 496 N.W.2d 191, 200 (Ct. App. 1992); *see also* ***Brown v. State*** 73 Wis.2d 703, 709, 245 N.W.2d 670, 673 (1976). Although Stambaugh now argues that the case law (which requires a modification of sentencing motion be made first to the trial court) is inapplicable here, this court notes that on May 13, 1997, Stambaugh filed a motion to remand the matter to the trial court, asking, *inter alia*, that this court permit him to file a postconviction motion challenging his sentence. This request was denied in an unpublished order. *See* ***State v. Stambaugh***, No. 97-0041-CR, (Wis. Ct. App. June 9, 1997). In the May 13 motion, Stambaugh's counsel indicated that he did not raise this issue because he "overlooked [it] until after filing the Notice of Appeal."

The first time Stambaugh raised this issue was in his appellate brief of April 3, 1997. The motion to remand was filed May 13, 1997. Neither document was submitted pursuant to § 973.19, STATS., and/or § 809.30, STATS., within the ninety-day period after sentencing. "[F]ailure to make such [a] motion bars a defendant from raising an issue as to sentencing within statutory limits except under compelling circumstances." ***Sears***, 94 Wis.2d at 140, 287 N.W.2d at

791 (citations omitted). Stambaugh has shown neither compelling circumstances mandating such relief nor has he endeavored to prove more than that the trial court erroneously exercised its discretion in sentencing pursuant to ***State v. Thompson***, 172 Wis.2d 257, 263, 493 N.W.2d 729, 732 (Ct. App. 1992). This court, therefore, concludes that Stambaugh has waived his right to question the sentence of the trial court because of his failure to bring a motion challenging his sentence within the statutory time limit.

Finally, we note that the trial court, after reviewing the State's sentencing memorandum, weighed a number of factors in sentencing Staubaugh. Among other things, the court considered Stambaugh's two previous violations of the injunction, his seventy-four municipal code violations, and his lack of remorse for his actions. Although the trial court did not directly compare Stambaugh's position with that of his co-defendant Skott, it reviewed the sentencing memorandum and discussed the matter with counsel. It is evident from the record that Skott had thirty-one less municipal ordinance violations than Stambaugh and had never previously been held in violation of the injunction, while Stambaugh had been held in remedial contempt twice for violation of this injunction. Stambaugh has failed to present us with any compelling circumstances which would require us to review his sentence.

B. Sentence Credit for State Conviction for Time in Custody Pending Trial on Federal Charges.

Stambaugh also raises the issue of whether he should receive sentencing credit for time he spent in federal custody awaiting trial in federal court pursuant to 18 U.S.C. § 248, for his state conviction of § 785.01(1)(b), STATS.

Both parties generally agree that the amount of credit, if allowed, would be for the time period between October 29, 1994, and March 17, 1995. As noted earlier, Stambaugh was charged with a violation of the federal F.A.C.E. statute in ***United States v. Wilson***, 880 F. Supp. 621 (E.D. Wis.), *reversed*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, 117 S. Ct. 47 (1996). Currently, these federal charges against Stambaugh are still pending.

In order to determine whether Stambaugh is entitled in state court to sentence credit for time spent incarcerated pending trial on federal charges, we must look to § 973.155, STATS., Wisconsin's sentence credit statute, which provides, in relevant part:

> **(1)**(a) A convicted offender shall be given credit towards the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.

The application of § 973.155(1)(a), STATS., to undisputed facts presents a question of law this court reviews *de novo*. *See* ***State v. Beiersdorf***, 208 Wis.2d 492, 496, 561 N.W.2d 749, 751 (Ct. App. 1997).

Stambaugh argues that, according to the rationale of ***State v. Boettcher***, 144 Wis.2d 86, 423 N.W.2d 533 (1988), he is entitled to sentence credit. In ***Boettcher***, the supreme court examined whether dual sentence credit

should be applied to two consecutive sentences, pursuant to § 973.155–one stemming from a crime for which the defendant had been placed on probation, and the other stemming from a subsequent crime resulting in a revocation of the prior probation. *See* ***id.*** at 87, 423 N.W.2d at 534; *see also* ***Beiersdorf***, 208 Wis.2d at 497, 561 N.W.2d at 752.

The supreme court in ***Boettcher*** looked to the Wisconsin Legislative Council Report No. 6 to the 1977 Legislature: Legislation Relating to Credit for Time in Jail, 2, for guidance. This report shows that the Wisconsin sentencing credit statute has its roots in the federal sentence credit statute, 18 U.S.C. § 3568, and § 7.09 of Model Penal Code. The court in ***Boettcher*** perceived "no meaningful difference" between the language of 18 U.S.C. § 3568 and § 753.155, STATS., declaring that the Wisconsin Legislature clearly intended to create a statute with the same meaning as the federal statute. *See* ***Boettcher***, 144 Wis.2d at 93, 423 N.W.2d at 536.

Because the ***Boettcher*** court found 18 U.S.C. § 3568 and § 973.155, STATS., almost identical, an analysis of the federal application of § 3568 in cases similar to Stambaugh's is persuasive on the application of the state statute. Section 3568 provides, in relevant part:

> The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.

Stambaugh asserts that this court should look to both 18 U.S.C. § 3568 and 18 U.S.C. § 3585, because ***Boettcher*** discussed both of them. ***Id.*** at 97, 423 N.W.2d at 538. We decline to do so. The supreme court in ***Boettcher*** notes that the federal statute has changed—that is, § 3568 was repealed in 1984, and § 3585 was enacted the same year, effective for crimes committed after November 1, 1987—and only briefly mentions § 3585 in a footnote. The court uses § 3568 extensively in its opinion. The Wisconsin Legislature modeled its sentence credit statute, in substantial part, after § 3568. The federal sentence credit statute changed, and the Wisconsin Legislature chose not to revise their own statute accordingly. Thus, this court will use the lens of § 3568, not § 3585, in its analysis.

In ***Kendrick v. Carlson***, 995 F.2d 1440 (8th Cir. 1993), a court of appeals noted:

> Section 3568 does not explain when custody is "in connection with the offense or acts for which the sentence was imposed." It is clear, however, that time spent serving a prison sentence imposed by a sovereign other than the federal government (whether that sovereign be a state or a foreign nation) can not be time spent in custody in connection with the offense for which a federal sentence is imposed.

Id. at 1445; *see generally* ***Jackson v. Brennan***, 924 F.2d 725 (7th Cir. 1991).

In the instant case, Stambaugh's state and federal charges, even if they share a common factual nexus, cannot be considered "in connection with the offense or acts for which the sentence was imposed." One of the charges is federal while the other is a state charge. Under § 3568 the only possible credit Stambaugh could get would be for incarceration pursuant to actions in violation of an Act of

Congress; here, 18 U.S.C. § 248. Here, those charges are still pending for Stambaugh.

The ***Boettcher*** court also commented that the phrase "arising out of the same course of conduct" was "intended to assure that credit would be given in the case of a different crime than that charged." ***Id***. at 96, 423 N.W.2d at 538. In Wisconsin, however, a person is entitled to credit for detention in jail in another jurisdiction only where that detention results exclusively from a Wisconsin warrant or detainer. *See* Wis J I Criminal—SM 34A at 5. In this case, Stambaugh was being held in federal custody as an "exclusive result" of a federal criminal charge, not in federal custody as a result of a state criminal charge. The comment to Wis J I Criminal—SM34A instructs that: "Credit should not be granted [for example] when a Wisconsin parolee, already in custody on Illinois charges, has a Wisconsin hold or detainer filed against him." ***Id.*** at 16 n.8. Stambaugh's situation is identical to this example posited by the jury instructions. Stambaugh was in federal prison, held for a violation of 18 U.S.C. § 248. All of Stambaugh's appearances during the contempt proceeding while in federal custody were pursuant to writs of habeas corpus *ad prosequendum*.

Stambaugh asserts that he "was incarcerated federally for the exact same crime for which he was convicted herein [in Wisconsin]." A criminal contempt charge for a violation of an injunction and a federal criminal charge for blocking abortion clinic doors are not the exact same crimes, even though the criminal conduct which led to the different charges is. Regardless, pursuant to an analysis of § 973.155, STATS., 18 U.S.C. § 3568, and relevant Wisconsin and federal case law, this court concludes that John Stambaugh is not entitled to sentence credit for the time he spent in federal custody.

III. CONCLUSION.

For the foregoing reasons, we affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.