

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

NOTICE

June 25, 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.

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

No. 97-0358-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARSHAL G. ESKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge, and DAVID L. DANCY, Reserve Judge. *Affirmed.*

SNYDER, P.J. Marshal G. Eske appeals from a judgment convicting him of disorderly conduct and from an order denying his postconviction motion. Eske had petitioned the court for presentence credit against an alternative ten-day jail sentence for failure to pay court costs and victim/witness fees. Because we conclude that § 973.07, STATS., applies and that

the trial court's denial of the requested sentence credit is supported by our prior holding in *State v. Way*, 113 Wis.2d 82, 334 N.W.2d 918 (Ct. App. 1983), we affirm.

The facts are undisputed. Eske was originally charged with obstructing an officer in violation of § 946.41(1), STATS., a Class A misdemeanor subjecting him to a fine not to exceed \$10,000 and/or incarceration not to exceed nine months. *See* § 939.51(3), STATS. On June 7, 1996, an agreement to amend the charge resulted in Eske's no contest plea and conviction of one count of disorderly conduct contrary to § 947.01, STATS., a Class B misdemeanor. Eske was sentenced to a maximum ninety-day jail term and was granted ninety-one days of presentence credit under § 973.155, STATS. In addition to jail time, the judgment of conviction required that Eske "pay the court costs and victim/witness fees totaling \$70 by September 1, 1997 or serve an alternate ten (10) days in the County jail, consecutive to any other sentence he may be serving."

On October 14, 1996, Eske filed a motion for postconviction relief which requested that the judgment "be amended to provide 91 days of sentence credit toward both the 90-day and 10-day sentences." This amendment, according to Eske, would result in the satisfaction of both jail sentences as a matter of law. Eske claims that since he was entitled to good time credit on his base sentence of ninety days, he was only required to serve sixty days of that sentence.¹ *See* § 302.11(1), STATS. He then reasons that the excess thirty-one days of time served should be applied to the ten-day consecutive term that would be imposed for

¹ In this case, Eske would earn good time credit at the rate provided for prison inmates because his sentence was made concurrent to a prison sentence he was already serving.

nonpayment of costs and fees.² The State responds that the issue presented by Eske has been addressed in *Way*. We conclude that the appellate issue presented by Eske has been resolved by the *Way* court's application of § 973.07, STATS., as the controlling statute.

In *Way*, the convicted defendant was sentenced to six months in jail and required to pay a fine and costs by a future date or to serve an additional six months in jail for nonpayment. See *Way*, 113 Wis.2d at 84-85, 334 N.W.2d at 919. *Way* contended, inter alia, that the alternative jail sentence was an unauthorized consecutive sentence of incarceration.

The *Way* court pointed to the supreme court's statement in *State ex rel. Petersen v. Blessinger*, 56 Wis.2d 286, 289-90, 201 N.W.2d 778, 780-81 (1972), where it indicated that "a commitment for failure to pay a fine is not an alternative sentence of incarceration in lieu of the original fine nor is it another punishment for the crime for which the fine was imposed. Rather, it is a means to enforce payment of the fine and potentially a sanction for the inexcusable failure to pay." *Way*, 113 Wis.2d at 85-86, 334 N.W.2d at 919. The *Way* court concluded that the trial court's authority to impose alternative sentences in lieu of payment of fines and costs is § 973.07, STATS. That statutory section provides in relevant part:

If the fine, costs ... [and] crime victim and witness assistance surcharge ... are not paid ... as required by the sentence, the defendant may be committed to the county jail until [all applicable fines, costs and assessments] are paid or discharged ... for a period fixed by the court not to exceed 6 months.

² Eske cited to § 302.43, STATS., in his trial court brief for postconviction relief but has abandoned reference to that statute on appeal.

After noting that the above statutory section imposes “a commitment” and that “a commitment is not a sentence,” *Way*, 113 Wis.2d at 86, 334 N.W.2d at 920, the court went on to conclude that a sentencing court has the power under this section “to order that a commitment for failure to pay a fine be served consecutive to another term of incarceration,” *id.* at 87, 334 N.W.2d at 920.

Under the facts of the instant case, the “other term of incarceration” is Eske’s ninety-day sentence, which is fully resolved by the application of the sentence credit awarded pursuant to § 973.155, STATS. The trial court’s imposition of a ten-day commitment as an alternative under § 973.07, STATS., was independent of and consecutive to the incarceration imposed for the crime committed. The narrow question thus presented is whether Eske can apply his good time credit towards the satisfaction of the alternative ten-day commitment. We conclude that he cannot.

As outlined in *Way*, a commitment is not a sentence. *See Way*, 113 Wis.2d at 86, 334 N.W.2d at 920. While Eske was sentenced on a disorderly conduct conviction, the commitment was imposed only as an alternative should he fail to pay required costs and fees. The commitment serves as an incentive “separate from and in addition to any other periods of incarceration the person is required to serve.” *Id.* at 87, 334 N.W.2d at 920. Furthermore, a commitment will only be imposed if a defendant fails to pay required costs, fees and assessments by some future date. A requirement that a commitment be subject to sentence credit would, in certain cases, render the “statutory power to order commitment for nonpayment of a fine ... meaningless.” *Id.* It is a well-settled rule of statutory construction that statutes are not to be construed in such a manner as to render them meaningless. *See id.* Because of our conclusion in *Way* that a commitment may lawfully be imposed consecutive to a sentence and the fact that the

commitment will only be imposed for a defendant's failure to pay assessed costs, we here conclude that there is no statutory requirement that sentence credit be applied to the commitment.³

Eske disputes this, arguing that because the \$70 in costs and fees imposed related to his conviction for disorderly conduct, the alternative commitment is subject to sentence credit as "confinement related to an offense for which the offender is ultimately sentenced" Section 973.155(1), STATS. Our analysis of *Way*, however, negates the application of § 973.155, "Sentence Credit," to Eske's claim of credit against the alternative commitment in favor of applying the provisions of § 973.07, STATS., which recognize the commitment as separate and distinct. Eske's argument fails.

Eske's claim of entitlement to good time reductions pursuant to the provisions of § 302.11(1) and (3), STATS., must also fail. This statutory section relates to calculating the mandatory release date of an *inmate* while incarcerated in the Wisconsin prison system. Eske's term of commitment under the alternative sentence would be served in the county jail. *See* § 973.07, STATS. As directed by *Way*, § 973.07 is the relevant statutory section.

In sum, we read *Way* to hold that a § 973.07, STATS., alternative jail commitment order is not subject to the sentence credit provisions of § 973.155, STATS., nor is it governed by the mandatory release considerations applicable to prison inmates under § 302.11, STATS.⁴ Section 973.07 provides for an

³ This conclusion is further supported by the language of § 973.07, STATS., which incorporates its own six-month sentence limitation, indicating that the legislature intended that a commitment be separate from other forms of incarceration.

⁴ We do not, however, intend to suggest that a sentencing court may not grant relief from § 973.07, STATS., assessments consistent with an appropriate exercise of discretion.

alternative commitment period which is intended “to prompt or coerce the defendant to pay [the imposed costs, fines and assessments],” *Way*, 113 Wis.2d at 87, 334 N.W.2d at 920, rather than jail time imposed because of the convicted crime. As we stated in *Way*, “[T]he commitment statute [§ 973.07] must be interpreted as permitting the imposition of a commitment consecutive to the jail time provision in order to make the statute meaningful.” *Way*, 113 Wis.2d at 87-88, 334 N.W.2d at 920.

We conclude that the trial court correctly denied Eske’s motion for good time sentence credit against the ten-day alternative commitment imposed.

By the Court.—Judgment and order affirmed.

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

