

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 31, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 2006AP978-CR

Cir. Ct. No. 2005CF166

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. WELLER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Barron County:
EDWARD R. BRUNNER, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jason Weller appeals an order denying his motion for reconsideration of sentence.¹ Weller received no credit for time spent in custody prior to sentencing. We conclude Weller is due credit for time he spent in custody after his arrest but before his parole revocation and is not due credit for any time spent in custody after the parole revocation. Therefore, we affirm in part, reverse in part, and remand.

BACKGROUND

¶2 On December 9, 2004, Weller was arrested and placed in custody for possession of amphetamine with intent to deliver. On January 21, 2005, Weller's parole for an earlier conviction of recklessly causing great harm to a child was revoked as a result of the December 9, 2004 drug charge. On November 3, 2005, Weller pled guilty to possession of amphetamine with intent to deliver. The court sentenced Weller to a total imprisonment of six years, with four years' initial confinement and two years' extended supervision. The sentence was made concurrent with Weller's sentence for recklessly causing great harm to a child. At the conclusion of sentencing Weller's attorney stated, "there is no credit which is owed for any of the presentencing incarceration, as it all applies to the other case." The court relied on this statement and did not give Weller any credit for presentence incarceration.

¹ Weller also alleges the State violated the plea agreement. This allegation is made parenthetically, is not included in the statement of issues and is not developed in the argument section. We do not consider arguments unsupported by legal authority and insufficiently developed. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶3 On February 2, 2006, Weller filed a motion for sentence credit for 330 days, the length of time he spent in custody from the date of his arrest on December 9, 2004, until his conviction on November 3, 2005. The court denied Weller's motion.

¶4 On March 10, 2006, Weller filed a motion for reconsideration. On March 20, the court denied the motion holding that all time served prior to November 3, 2005, was credited to the sentence for recklessly causing great harm to a child.

DISCUSSION

¶5 Weller argues he is entitled to sentence credit of 330 days, the length of time he spent in custody from the date of his arrest on December 9, 2004, until his conviction on November 3, 2005.² Sentence credit is a question of law we address without deference to the trial court. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). WISCONSIN STAT. § 973.155(1)(a) requires the court to give the offender “credit toward 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.”³

² The State argues Weller waived his right to sentence credit. However, the State concedes “[t]here is no explicit statement in the record of the plea and sentencing that a part of the plea agreement was that Weller was not to receive credit for any pre-sentence incarceration.” While defense counsel did state, “there is no credit which is owed for any of the presentencing incarceration, as it all applies to the other case,” we do not deem defense counsel’s misstatement as a waiver of Weller’s rights. Even if the issue had been waived, waiver is discretionary and this court may address an issue on the merits. See *Wirth v. Ehly*, 93 Wis. 2d 433, 444, 287 N.W.2d 140 (1980).

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 While Weller may have spent 330 days in prison prior to his sentencing, not all of that time was “in connection with the course of conduct for which sentence was imposed.” *See id.* Weller was arrested for possession of amphetamine with intent to deliver on December 9, 2004. On January 21, 2005, Weller’s parole for the earlier conviction of recklessly causing great harm to a child was revoked as a result of the December 9, 2004 drug charge. From January 21, 2005 on, Weller’s time in custody was not in connection with his new charges, but with the charges for which he had been on parole.

¶7 In *State v. Beets*, 124 Wis. 2d 372, 377-78, 369 N.W.2d 382 (1985), the supreme court determined that time spent in custody as a result of revocation, even if the revocation arises because of the current offense, is not connected to the current offense. Thus, a defendant is not entitled to sentence credit for time served in custody as a result of parole revocation even if the revocation occurred as a result of the current charges. *See id.*; *see also State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 386, 260 N.W.2d 727 (1978) (“Revocation is thus a continuing consequence of the original conviction from which parole was granted.”). Therefore, Weller is not entitled to credit for time spent in custody after January 21, 2005, the date of his parole revocation. However, the State concedes that if Weller did not waive his argument for credit, then Weller is entitled to credit for the time he spent in custody from the date of his arrest, December 9, 2004, until his parole revocation, forty-three days. The time spent in custody from the date of his arrest until the date of his parole revocation was “in connection with the course of conduct for which sentence was imposed.” WISCONSIN STAT. § 973.155(1)(a). Because Weller is only entitled to forty-three days’ sentence credit, we affirm that part of the order denying him credit from the time of revocation, but reverse that part of the order denying him credit for the time from

his arrest until his revocation. The matter is remanded to the circuit court with directions to amend the order and grant Weller forty-three days' credit.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

