

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 19, 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. 2005AP2007-CR

Cir. Ct. No. 2000CF2308

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLAYTON V. CAMPBELL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
JEFFREY A. WAGNER, Judge. *Affirmed.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Clayton V. Campbell appeals from an order denying his motion for sentence credit. Campbell claims that he should be given sentence credit for the fifty-seven days he was erroneously released from custody on a signature bond by Sheboygan County until he was contacted by his probation

agent and told that he should be in custody. Because we determine that Campbell is not entitled to sentence credit because he was not in custody for this period of time, we affirm.

BACKGROUND

¶2 Campbell's motion for sentence credit relates to his conviction arising out of a May 10, 2000 criminal complaint. Campbell pled guilty to one count of possession of marijuana and one count of failure to pay the controlled substance tax. On the first count, Campbell was sentenced to two years' probation, to include five months of limited confinement at the House of Correction, the confinement portion stayed. On the second count, Campbell received a four year sentence consisting of two years of limited confinement and two years of extended supervision, with the entire sentence stayed. Campbell was given probation for both counts, to be served consecutively.

¶3 From approximately December 5, 2003, when Campbell absconded from his ordered supervision, until his June 10, 2004 arrest, Campbell's whereabouts and activities were unknown to his probation agent. Upon Campbell's arrest, revocation proceedings were initiated. A revocation hearing was held on August 4, 2004, and by decision dated August 13, 2004, Campbell's probation was revoked. On count one, the administrative law judge (ALJ) ordered Campbell confined for a period of one month and five days, with sentence credit for the period June 10, 2004 through July 15, 2004. On count two, Campbell was returned to the circuit court, with a recommendation from the ALJ that he be sentenced to confinement for a period of one year and six months.

¶4 On August 17, 2004, Campbell was transported from the House of Correction to Sheboygan County for a hearing on an unrelated matter. At that

hearing, the Sheboygan County Circuit Court set bail at a \$1000 signature bond, which Campbell signed. He was then released from custody.

¶5 A reconfinement hearing on count two was originally scheduled for January 19, 2005. However, Campbell failed to appear at that hearing and at two subsequently scheduled hearings. At a hearing held on April 11, 2005, following Campbell's return to custody on a bench warrant, the court ordered Campbell reconfined for an additional eleven months and fifteen days. An amended revocation order and warrant granted sentence credit for time served between June 10, 2004 and August 18, 2004 (when Campbell was actually in custody before his erroneous release in Sheboygan), and from March 7, 2005 (when Campbell was returned to custody) until his "receipt at the institution."

¶6 Campbell filed a motion for sentence credit requesting credit for the time period between August 18, 2004, when he was released from custody on the signature bond, and October 18, 2004,¹ when his agent was first able to contact Campbell and informed him that he was supposed to be in custody. The trial court denied the motion, noting that Campbell had received credit for the time he had spent in the House of Correction, and further noting that "[i]f [Campbell] seeks additional credit in connection with the revocation proceedings, he is obliged to address his request to the Department pursuant to section 973.155(2), Stats., before petitioning the court."

¹ Campbell's motion requested sentence credit for the time period August 18, 2004 through October 18, 2004, or sixty days. However, in his brief, Campbell argues for credit for the time period August 18, 2004 through October 15, 2004 (the date he claims in his brief that he was contacted by his probation agent). Because Campbell requests credit for the August 18, 2004 to October 15, 2004 time period in his brief to this court, that is the time period we will consider.

¶7 Campbell filed a second request, entitled “Petition for Sentence Credit,” requesting 199 days of sentence credit for the period August 18, 2004 to March 7, 2005, which included the entire time period Campbell was improperly released. The trial court denied the petition. Campbell appealed.

DISCUSSION

¶8 Sentence credit is governed by WIS. STAT. § 973.155(1)(a) (2003-04).² Whether a defendant is entitled to sentence credit pursuant to § 973.155³ is a

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

³ WISCONSIN STAT. § 973.155 provides, in relevant part:

(1) (a) A convicted offender shall be given 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. 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.

....

(2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation, extended supervision or parole, the department, if the hearing is waived, or the division of hearings and appeals in the department of administration, in the case of a hearing, shall make such a finding, which shall be included in the revocation order.

(continued)

question of law that we review *de novo*. *State v. Tuescher*, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (Ct. App. 1999).

¶9 Campbell argues on appeal that he is entitled to credit for the time that he *should have been in custody*, but was not (*i.e.*, August 18, 2004, when he was erroneously released by Sheboygan County on a signature bond, through his being contacted by his probation agent on October 15, 2004, and notified “that he was supposed to be incarcerated”). Campbell claims he is entitled to this credit because “[h]e had been released ‘through no fault of his own.’” Campbell cites *State v. Dentici*, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180, and *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), in support of his argument that he is entitled to these fifty-seven days of sentence credit.

¶10 The State argues that *Dentici* and *Riske* are inapplicable because the defendants in those two cases, unlike Campbell, had presented themselves for incarceration, but were turned away due to jail overcrowding. The State argues that the record does not support Campbell’s contention that he was “at liberty through no fault of his own” because Campbell was aware that he was in custody on a probation revocation at the Milwaukee County House of Correction and, therefore, knew that his release on the signature bond was in error.

¶11 In *Dentici*, the defendant pled guilty to operating a motor vehicle without the owner’s consent and was sentenced to probation, with sixty days to be served in the House of Correction. *Id.*, 251 Wis. 2d 436, ¶2. On the same day as

(3) The credit provided in sub. (1) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.

he was sentenced, the trial court ordered the defendant into the custody of the Department of Corrections and the Sheriff delivered the defendant to the House of Correction. *Id.* Because of overcrowding at the jail, the defendant was turned away and told to return on a date certain, which the defendant did. *Id.* The defendant's probation was subsequently revoked and he requested sentence credit for the time he should have been incarcerated. *Id.*, ¶3. The court, citing *Riske*, held "that offenders, who report for sentencing but are turned away due to overcrowding, are in custody and will be granted sentence credit for the time they were at liberty through no fault of their own." *Dentici*, 251 Wis. 2d 436, ¶8. The court found that Dentici was entitled to credit for the time he was willing and able to serve, but could not "through no fault of his own." *Id.*, ¶9. Here, Campbell was never turned away from the House of Correction. Rather, he simply chose to allow the error of his release to continue until the State found and arrested him.

¶12 In *Riske*, the defendant pled no contest and when sentenced, reported immediately to the Portage County jail to begin his incarceration, but was turned away by a jailer who informed him that "the jail could not accommodate him and to report back on May 1, 1987." *Id.*, 152 Wis. 2d at 262. The defendant never reported back and was arrested in 1988. *Id.* The defendant argued that he should be given sentence credit for the entire time he was at large, relying on WIS. STAT. § 973.15, which states "that all sentences commence at noon on the day of sentence." *Riske*, 152 Wis. 2d at 263 n.1. The court held that the defendant was not entitled to any sentence credit after May 1, 1987, the date that he was told to report to the jail to begin his incarceration, but failed to do so. *Id.* at 264. Campbell, like the defendant in *Riske*, knew when he should have been incarcerated, but chose not to report. Therefore, like the defendant in *Riske*, Campbell is not entitled to credit for this time.

¶13 The trial court, in its July 7, 2005 decision on Campbell's petition for sentence credit, found that Campbell knew that he should have been in custody and failed to turn himself in. The trial court based this finding "on the reasons given by [Campbell's] agent as to why the defendant did not receive credit from August 18, 2004 to March 7, 2005 (defendant failed to turn himself in)." While the document on which the trial court relies is not in the record before us on appeal,⁴ the record does reflect that: (1) Campbell had been present at the revocation hearing on August 4 and therefore would have been personally aware of the ALJ's order that his probation/parole hold continued and that his case had been referred to the circuit court for resentencing; and (2) after being released from Sheboygan County on a signature bond on August 18, 2004, Campbell failed to report back to the House of Correction, and failed to timely contact his probation officer. Unlike the defendants in *Dentici* and *Riske*, Campbell was never turned away from custody at the place he was ordered to be incarcerated, *i.e.*, the House of Correction. Rather, similar to the defendant in *Riske*, Campbell was aware of when he was supposed to be in custody, but he simply chose not to report for incarceration, and like the defendant in *Riske*, Campbell is not entitled to credit for the time he was out of custody after he knew he should have reported, but failed to do so.

⁴ See *Lee v. LIRC*, 202 Wis. 2d 558, 560 n.1, 550 N.W.2d 449 (Ct. App. 1996) ("It is the appellant's burden to ensure that the record is sufficient to address the issues raised on appeal."); *State v. Holmgren*, 229 Wis. 2d 358, 362 n.2, 599 N.W.2d 876 (Ct. App. 1999) ("The appellant is responsible for ensuring that the record is complete on appeal, and when the record is incomplete, we must assume that the missing material supports the sentencing court's ruling.").

¶14 Because we conclude that Campbell is not entitled to sentence credit for the time period August 18, 2004 through October 15, 2004, we affirm the trial court's order denying same.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

