

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**January 17, 2007**

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. 2005AP1488-CR**

**Cir. Ct. No. 1997CF970080**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**ANDRE DERRICK WINGO,**

**DEFENDANT-APPELLANT.**

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

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Andre Derrick Wingo appeals from an order denying his motion for sentence credit. The issue is whether Wingo was entitled to sentence credit for time he spent in community residential confinement in a halfway house, and in the intensive sanctions program subject to electronic

monitoring. We conclude that Wingo has not proven that he is entitled to sentence credit for those placements because they were conditions of his parole, pursuant to which his failure to comply with the conditions of those placements did not subject him to an escape charge. Therefore, we affirm.

¶2 In 1997, Wingo entered *Alford* pleas to substantial battery and third-degree sexual assault.<sup>1</sup> The trial court imposed a four-year sentence for the battery to run concurrent to a previously imposed sentence, and a five-year sentence for the sexual assault, which the trial court stayed in favor of a five-year consecutive term of probation.

¶3 Although the record is sparse, evidently Wingo was serving his four-year sentence, and was then released to parole. He alleges that his parole agent placed him at a halfway house from August 31, 1999 through October 9, 1999, and monitored him with an electronic bracelet from March 13, 2000 through July 19, 2000, and from July 26, 2001 through August 31, 2001. In his appellate reply brief, he concedes that he had been released to parole during the periods he was subject to electronic monitoring.

¶4 The trial court rejected Wingo's original motion for these sentence credits for his failure to seek that relief initially from the Department of Corrections. *See* WIS. STAT. § 973.155(5) (2003-04).<sup>2</sup> Wingo then moved the

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<sup>1</sup> An *Alford* plea waives a trial and constitutes consent to the imposition of sentence, despite the defendant's claim of innocence. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); *accord State v. Garcia*, 192 Wis. 2d 845, 856, 532 N.W.2d 111 (1995) (acceptance of an *Alford* plea is discretionary in Wisconsin).

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

Department for sentence credit, which it denied, explaining that “[p]lacement on the electronic monitoring program or in a halfway house does not constitut[e] a custody. Both placements were a condition of your supervision.” Wingo then renewed his trial court motion for sentence credit. This time the trial court denied Wingo’s motion on its merits “because he was on electronic monitoring as a condition of his parole and, hence, not in custody,” citing *State v. Magnuson*, 2000 WI 19, ¶¶46-48, 233 Wis. 2d 40, 606 N.W.2d 536. Wingo appeals.

¶5 A defendant seeking sentence credit has the “burden to come forward with any evidence of ‘custody.’” *State v. Cobb*, 135 Wis. 2d 181, 185 n.5, 400 N.W.2d 9 (Ct. App. 1986). Sentence credit is governed by WIS. STAT. § 973.155(1)(a), which provides in pertinent part: “[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.*” *Id.* (emphasis added). “[F]or sentence credit purposes an offender’s status constitutes custody whenever the offender is subject to an escape charge for leaving that status.” *Magnuson*, 233 Wis. 2d 40, ¶25. WISCONSIN STAT. § 946.42(1)(a) (2001-02) defines custody for purposes of an escape as

not includ[ing] the custody of a probationer, parolee or person on extended supervision by the department of corrections or a probation, extended supervision or parole officer or the custody of a person who has been released to aftercare supervision under ch. 938 unless the person is in actual custody or is subject to a confinement order under s. 973.09(4).

In *State ex rel. Ludtke v. DOC*, 215 Wis. 2d 1, 4-12, 572 N.W.2d 864 (Ct. App. 1997), we described the special status of a parolee in rejecting a similar request for sentence credit.

A prisoner has no constitutional right to parole. *See Ashford v. Division of Hearings & Appeals*, 177 Wis. 2d 34, 44, 501 N.W.2d 824, 828 (Ct. App. 1993). Rather, parole is a statutorily created privilege that grants conditional freedom to a parolee. *See id.* “The legislature has authorized the state to revoke a parolee’s conditional freedom if a parolee fails to comply with conditions of parole. This potential forfeiture of parole provides the leverage with which the state gains compliance with parole conditions.” *Id.* at 44-45, 501 N.W.2d at 828.

*Id.* at 4-5. We review an application for sentence credit pursuant to § 973.155, as a question of law. *See State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶6 In its respondent’s brief, the State refutes Wingo’s claim for sentence credit on a multitude of bases. The Department’s probation and parole agent responding to Wingo’s request for sentence credit represented that the halfway house and electronic monitoring “placements were a condition of [his] supervision.” Nevertheless, the State’s inability to determine whether Wingo was on parole or probation at the time he was subject to electronic monitoring prompted the State to refute his sentence credit request for either status. This comprehensive refutation of alternative claims prompted Wingo to acknowledge in his reply brief that he was in fact on parole at those times.<sup>3</sup>

¶7 Wingo was placed in the halfway house and subject to electronic monitoring as a condition of parole. Violating a condition of parole subjected Wingo to potential revocation, not to an escape charge. *See* WIS. STAT. § 302.11(7)(am) (2001-02); *see also* WIS. STAT. § 946.42(1)(a) (2001-02) (custody

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<sup>3</sup> While Wingo’s concession essentially defeats this claim, his inability to prove otherwise also defeats this claim. *See State v. Cobb*, 135 Wis. 2d 181, 185 n.5, 400 N.W.2d 9 (Ct. App. 1986).

for escape purposes does not include detention of a parolee while satisfying a condition of parole). We consequently conclude that Wingo is not entitled to sentence credit for complying with his conditions of parole, which included his halfway house placement and monitoring, because they are not considered time spent “in custody,” as that phrase is interpreted in WIS. STAT. § 973.155(1)(a), and failure to comply with those conditions would not have subjected him to an escape charge.

*By the Court.*—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2003-04).

