

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 13, 2008

David R. Schanker
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. 2007AP60-CR

STATE OF WISCONSIN

**Cir. Ct. No. 1997CF677
1988CF563**

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROBERT J. SOWLE,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part.*

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 PER CURIAM. Robert J. Sowle appeals pro se from an order denying his motion for complete discharge of an eight-year prison sentence. The convoluted procedural background contributed to a trial court decision for which

we requested clarification. We ordered a limited remand to the trial court and supplemental briefing by the parties. Benefited by the new submissions, we now affirm in part and reverse in part.

¶2 This appeal mainly involves two underlying cocaine possession cases, Nos. 88CF563 and 97CF677, and touches on a disorderly conduct case, 96CM2002. In 88CF563, the case on which Sowle seeks to have his sentence discharged, Sowle was convicted of three felonies. He was sentenced on May 2, 1990 to seven-year sentences on each of counts 1 and 3, to be served concurrently. On count 2, he was sentenced to eight years, imposed and stayed, consecutive to 88CF563(1) and (3), with ten years' probation to begin after discharge of the prison sentences on 88CF563(1) and (3). Sowle began his 88CF563(2) probation when the 88CF563(1) and (3) sentences were discharged on September 15, 1998. On that date, however, he already was in prison on 96CM2002 for an offense committed while out on one of his several 88CF563(1) and (3) paroles.

¶3 In 97CF677,¹ Sowle was convicted of one felony for which he received a seven-year sentence on October 7, 1998. For some reason, his probation on 88CF563 was not revoked at that time. Repeatedly paroled and revoked on 97CF677, Sowle was on parole with one year, one month and sixteen days left to serve when, on March 20, 2006, both that parole and his 88CF563(2) probation were revoked. As his probation had not previously been revoked on that count 88CF563(2), Sowle still had the full stayed eight years left to serve, but was given 182 days' credit against it. Applying the credit to the date of the offense

¹ Sowle also committed the underlying crime in 97CF677 while out on parole in 88CF563(1) and (3).

triggering the probation revocation, Sowle's effective sentence start date was May 25, 2005. On 97CF677, Sowle was ordered reincarcerated for the full year, month and sixteen days. That sentence eventually was discharged on January 13, 2007.

¶4 Sowle then moved for complete discharge of his sentence in 88CF563(2). Apparently believing the overlapping incarcerations on his various offenses warranted sentence credit against 88CF563, he sought to amend the judgment of conviction in 97CF677 to "reflect the fact that [97CF677] was judged concurrent to 88CF563(2) ... which case 97CF677 was served concurrent to 88CF0563(2) and was discharged July 11, 2006."

¶5 By order dated November 6, 2006, the trial court denied the motion and Sowle appealed. Although the Department of Corrections (DOC) appeared to treat Sowle's sentences as concurrent, the trial court deemed them consecutive and stated that Sowle's "complete sentence will not be discharged until October 2007." The order left us uncertain as to whether Sowle's two revoked sentences were to be served consecutively or concurrently and whether the court's reference to Sowle's "complete sentence" referred to one or both cases. We retained jurisdiction but remanded to the trial court for clarification. The trial court promptly filed its response, which the parties addressed in supplemental briefs we ordered. Aided by these additional filings, we now turn to Sowle's appellate claim that he is due credit against his 88CF563(2) sentence sufficient to discharge it entirely.²

² Sowle now alleges that his postconviction counsel who filed a no-merit appeal, which this court upheld, rendered constitutionally ineffective assistance for failing to raise these issues. As Sowle gives no reason for not raising that claim in the previous no-merit appeal, we conclude that he is barred from doing so now. See *State v. Tillman*, 2005 WI App 71, ¶4, 281 Wis. 2d 157, 696 N.W.2d 574.

¶6 On remand, the trial court withdrew its statement that Sowle’s “complete sentence will not be discharged until October 2007” as not relevant to 88CF563 in light of its substantive rulings. The court clarified that it had derived the October 2007 date from adding one year, one month and sixteen days—the time the ALJ imposed on 97CF677—to September 15, 2006, which the court said Sowle represented to be the date his 88CF563(2) sentence would be discharged. Sowle’s representation is inaccurate if he does not prevail here in his quest for additional sentence credit. The DOC calculates his mandatory release date on 88CF563(2) to be September 25, 2010, and his maximum discharge date on May 25, 2013. In addition, Sowle’s claim of a July 11, 2006 discharge date of his 97CF677 sentence proved unfounded. He submitted a document purporting to be a DOC Discharge Certificate, but its significant anomalies caused authorities to strongly suspect it was forged. Later DOC documents confirm that Sowle’s 97CF677 sentence was not discharged in July 2006.³

¶7 The trial court’s response next addressed our uncertainty about whether the sentences in the two cases were consecutive or concurrent. The court’s November 6, 2006 order had stated that “Mr. Sowle was originally sentenced to *consecutive* sentences for felony convictions in 1989 and 1999,” that “[t]he sentence for [97CF677] was *consecutive* to the sentence of [88CF563],” and that although revocation in both cases was determined on the same day, the two revocation sentences were to run consecutively because “the original sentences were *consecutive*.” (Emphasis added.) On remand, the trial court confessed to

³ A January 4, 2007 memorandum from the Oshkosh Correctional Institute records office advised Sowle that the July 11, 2006 discharge date was “no longer correct.” Another DOC document shows that the actual discharge date on that sentence was January 13, 2007.

being perplexed as to “how the DOC can permit sentences to be served concurrently if the courts rule that they are consecutive.”

¶8 We are not convinced that the courts, in fact, have ruled that the sentences were consecutive. While the sentences in both 88CF563 and 97CF677 have consecutive components relative to the separate charges or to another case, we conclude the trial court’s statement was incorrect.

¶9 The judgment of conviction in 88CF563 shows that Sowle was sentenced on counts 1 and 3 to seven years, concurrent, and on count 2 to eight years, imposed and stayed, consecutive to counts 1 and 3, with ten years’ probation to begin after discharge of the prison sentences. The judgment makes no mention that count 2 would run consecutive to or concurrent with any future sentence.⁴ Absent a judicial declaration of a consecutive sentence, a sentence is deemed concurrent. *See State v. Coles*, 208 Wis. 2d 328, 332, 559 N.W.2d 599 (Ct. App. 1997).

¶10 The judgment of conviction in 97CF677 shows that Sowle was sentenced to seven years consecutive not to 88CF563, but to his two-year prison sentence in a different case, 96CM2002.⁵ We see no judicial declaration that 97CF677 was ordered or intended to be consecutive to 88CF563. By March 20,

⁴ In its initial decision, the trial court stated that where a defendant began serving his sentence on an earlier case years before a second sentence, the court of appeals has held that “the ‘chronological reality’ is that the sentences are served consecutively. Subsequently, any sentence determined after a probation revocation would also be served consecutively.” As this holding is taken from an unpublished opinion, *see State v. Reek*, No. 2000AP1131-CR, unpublished slip op. ¶14 (WI App. Dec. 21, 2000), we make no comment on whether or not the case squares with Sowle’s. Even if it does, it cannot drive our decision here. *See WIS. STAT. RULE 809.23(3)*.

⁵ The 96CM2002 judgment of conviction is not in the record.

2006, when the 88CF563(2) probation was revoked, the sentences on counts 1 and 3 already had been discharged. The count 2 sentence could not possibly be served consecutive to the sentences on counts 1 and 3.

¶11 The record contains other indications that the sentences are concurrent. A November 27, 2006 DOC memorandum written “to make sure Mr. Sowle’s revocation history is clear” indicates that Sowle’s reincarceration in 97CF677 was concurrent to his eight-year prison sentence on a consecutive probation in 88CF0563. On December 21, 2006, Sowle wrote to the Waukesha County Clerk of Courts asking the clerk to send to the Oshkosh Correctional Institution’s record office a copy of the November 6, 2006 order indicating, as we have said, that his complete sentence would discharge in October 2007. The DOC clarified Sowle’s 88CF563 sentence structure in a December 28, 2006, letter. It stated that, considering his 182 days’ sentence credit, Sowle’s 88CF563 sentence began on May 25, 2005. This sentence straddles his eventual incarceration on March 20, 2006 when his 97CF677 parole was revoked.

¶12 We find no indication that the sentencing courts ruled that the sentences relevant here were consecutive to each other. It is their intent that controls the determination of the terms of a sentence, which we ascertain by looking to the record as a whole. *Brown*, 150 Wis. 2d at 642. When we consider the trial court’s decision and response, the parties’ briefs, the judgments of conviction and the DOC documents, we conclude that 88CF563(2) was to be served concurrent with the remaining sentence on the revoked parole in 97CF677. Accordingly, we affirm the order to the extent that it denied Sowle’s motion to discharge his 88CF563 sentence, and reverse the order to the extent that it requires his sentences to be served consecutively.

¶13 We turn, then, to Sowle’s claim for sentence credit. At the October 6, 2006 postconviction hearing, he asked the court to amend or clarify the 97CF677 judgment of conviction, which sentence he asserted already was discharged, to provide that it was concurrent to 88CF563(2), and then to grant credit against 88CF563(2) for the aggregate nine years he served for 96CM2002 (two years) and 97CF677 (seven years). The court denied his request. As we have noted, Sowle’s claimed July 2006 discharge of his 97CF677 sentence later was alleged to be fabricated and the date “no longer correct.”

¶14 The issue Sowle raises requires application of the sentence credit statute, WIS. STAT. § 973.155 (2005-06), to essentially undisputed facts.⁶ The trial court stated that, under *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999), “if sentences are concurrent, then ‘dual credit’ is applied to each sentence, but if consecutive, then time in ... custody is credited toward only one sentence.” We think this oversimplifies *Tuescher* and the statute.

⁶ 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.

All references to the Wisconsin Statutes are to the 2005-06 version.

Section 973.155 entitles a defendant to credit toward a sentence for any custody “in connection with the course of conduct for which sentence was imposed.” *Id.*; see *Tuescher*, 226 Wis. 2d at 469-70. When multiple sentences are imposed at different times, applying the statutory mandate can be complex, but a defendant is not entitled to credit for time spent serving a sentence on a different, unrelated charge. *Tuescher*, 226 Wis. 2d at 469-70. “[T]here is no justification in the common law, and none expressed in the statute, affording a right to credit against confinement in criminal matters where the period of confinement has nothing to do with the matter for which sentence credit is sought.” *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985).

¶15 True, the 88CF563 and 97CF677 charges all involved delivery of cocaine. They were separated by years, however, and inarguably were distinct events. Sowle was in prison serving his two-year 96CM2002 disorderly conduct sentence when his 88CF563(2) probation began on September 15, 1998. Although temporally connected, the offenses otherwise were unrelated. Another temporal connection arose in October 1998 when he received the seven-year sentence consecutive to 96CM2002. A defendant earns credit toward a future sentence while serving another sentence only when both are imposed for the same specific acts. *Tuescher*, 226 Wis. 2d at 479. That cannot be said here.

¶16 Not until Sowle’s 88CF563(2) probation finally was revoked on March 20, 2006, was his prison sentence on that charge set into motion. When his 97CF677 sentence was discharged ten months later on January 13, 2007, he still had a significant portion left to serve on 88CF563(2)’s eight-year sentence. We disagree with Sowle that the effect here was to improperly make the 88CF563(2) prison sentence run consecutive to 97CF677. Rather, the 88CF563(2) probation ran concurrent. When his probation was revoked nearly at the completion of his

97CF677 sentence, the eight-year prison sentence began to run consecutive to that probation just as was ordered sixteen years earlier. Sowle has gotten all the credit he deserves.

By the Court.—Order affirmed in part and reversed in part.

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

