

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 4, 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. 2008AP1005-CR

Cir. Ct. No. 2006CF1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY THOMAS BRUMMER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed and cause remanded with directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Troy Thomas Brummer appeals an amended judgment of conviction for operating a motor vehicle while intoxicated, sixth offense, as a repeater, contrary to WIS. STAT. §§ 346.62(1)(a) and 939.62(1)(b).¹ He also appeals an order denying without a hearing his postconviction motion for sentence credit. Brummer contends he was entitled to a hearing on his postconviction motion, and we agree. Therefore, we reverse the amended judgment and order and remand for the court to hold a hearing on Brummer's motion.

BACKGROUND

¶2 On January 3, 2006, Brummer was arrested for OWI, sixth offense. At the time, he was on probation for his OWI, fifth offense, which was also a Pierce County case. Brummer avoided revocation for his fifth offense case by completing the terms of an Alternative to Revocation Agreement, which required him to undergo AODA treatment in a secure detention facility. He was released from custody on July 7, 2006.

¶3 On September 22, 2006, Brummer failed to appear for a court hearing in this case, and a bench warrant was issued. On October 20, a warrant was also issued for Brummer's arrest in the fifth offense case after he failed to appear for an appointment with his probation agent.

¶4 On April 19, 2007, Brummer was arrested in Minnesota after driving without a license. He was subsequently extradited to Wisconsin, where he was

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

held in Dunn County for Pierce County. On September 10, 2007, Brummer was sentenced after revocation in the fifth offense case. He was sentenced to three years' initial confinement and three years' extended supervision. His sentence credit included the time from his April 19 arrest to his September 10 sentencing.

¶5 On December 14, 2007, Brummer entered a guilty plea in this case. He was sentenced to two years' initial confinement, followed by three years' extended supervision, concurrent to his sentence in the fifth offense case. The court held open the issue of sentence credit.

¶6 On January 8, 2008, following briefs from the parties, the court issued a memorandum opinion and order determining Brummer was entitled to 280 days of sentence credit. However, the court did not grant sentence credit for the time between Brummer's arrest on April 19, 2007, and his September 10, 2007 sentencing in the fifth offense case. The court's determination of sentence credit was reflected in an amended judgment of conviction.

¶7 On March 18, 2008, Brummer filed a postconviction motion seeking sentence credit for the time between his arrest and his sentencing in the fifth offense case. His motion alleged, among other things, that a bench warrant was issued in this case on September 22, 2006, and remained in effect until September 10, 2007. His motion further alleged that "Mr. Brummer was arrested in Minnesota on April 19, 2007, and was transferred back to Wisconsin and held in Dunn County for Pierce County until sentencing in [the fifth offense case] on September 10, 2007." Additionally, his motion alleged the State conceded he was at least partly in custody in connection with this case when stating in a letter to the court that Mr. Brummer "was not solely in custody relative to the 2006 file."

¶8 The court denied Brummer’s motion without a hearing in a memorandum opinion on April 3, 2008. The court concluded Brummer should not be

entitled to pre-trial credit in a situation ... where the defendant may have been in custody because of a Minnesota criminal charge or may have been in custody for a probation hold unrelated to the current case or may have been in custody because of a bench warrant issued in this case, when he cannot establish if his being in custody was related at least in part to the bench warrant issued in this case.

DISCUSSION

¶9 A defendant is entitled to a hearing on a postconviction motion if the motion alleges sufficient facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a defendant’s motion alleges sufficient facts to require a hearing is a question of law that we review independently. *Id.* If a defendant’s motion does not allege sufficient facts to require a hearing, the circuit court may, in its discretion, grant a hearing after reviewing the record and pleadings. *Id.*

¶10 Under WIS. STAT. § 973.155(1), a defendant is entitled to sentence credit “for all days spent in custody in connection with the course of conduct for which sentence was imposed...” Therefore, the question here is whether Brummer’s motion alleged sufficient facts demonstrating he was in custody in connection with this case between the time of his arrest and his sentencing in the fifth offense case.

¶11 We conclude Brummer did allege sufficient facts to entitle him to a hearing. While the facts surrounding Brummer’s custody in Minnesota from the time of arrest until his extradition to Wisconsin are unclear, Brummer’s motion

alleged that, once in Wisconsin, he was held in Dunn County “for Pierce County.” This is a Pierce County case. While there was another Pierce County case, the fifth offense case, for which Brummer was awaiting sentencing, the existence of a bench warrant in this case suggests he was also being held in connection with this case.

¶12 Further, the State’s concession recited in Brummer’s motion—that Brummer was held partly in connection with this case—supported his claim for sentence credit. The circuit court acknowledged Brummer might be entitled to additional credit when stating he “may have been in custody because of a bench warrant in this case” Given the allegations in Brummer’s motion, we conclude the court acted prematurely when it denied Brummer’s motion without a hearing. Therefore, we reverse and remand for the court to conduct a hearing to determine whether Brummer was in custody on the bench warrant between April 19 and September 10, 2007 and, therefore, entitled to sentence credit.

By the Court.—Judgment and order reversed and cause remanded with directions.

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

