

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 25, 2009**

David R. Schanker  
Clerk of Court of Appeals

**NOTICE**

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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. 2009AP382-CR**

**Cir. Ct. No. 2007CT440**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**TRACY A. GLOVER,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Columbia County: JAMES MILLER, Judge. *Affirmed.*

¶1 VERGERONT, J.<sup>1</sup> Tracy A. Glover appeals the order denying sentence credit of two days on her five-day jail sentence for operating a motor

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) and (3) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

vehicle after revocation (OAR), second offense, contrary to WIS. STAT. § 343.44(1)(b). For the reasons that follow we conclude the circuit court correctly denied the sentence credit. We therefore affirm.

¶2 Glover was convicted of theft in November 2006. She was on probation for this offense on October 5, 2007, when the incident occurred giving rise to the OAR charge in this case. An initial appearance in this case was scheduled for October 31, 2007. Glover failed to appear on October 31 and a bench warrant was issued for her arrest. She was arrested on the bench warrant on November 7, 2007. Also on November 7, 2007, the Department of Corrections issued an order to detain Glover, citing the nonappearance as violation of the rules of probation in the theft case.

¶3 The initial appearance took place on the same day as Glover's arrest, with Glover appearing, and the circuit court quashed the bench warrant. However, Glover remained in custody on November 8, 2007 and November 9, 2007, until she was released from the probation hold on November 9, 2007.

¶4 Glover entered into a plea agreement in this case whereby she would plead no contest to the OAR charge and the State would recommend five days in jail and a fine. The circuit court accepted Glover's plea and sentenced Glover according to the State's recommendation. The State stipulated that Glover was entitled to one day of sentence credit for being in custody on November 7, 2007, as a result of her arrest on the bench warrant, but the State opposed Glover's request for credit for November 8 and 9, when she was in custody pursuant only to the probation hold.

¶5 The circuit court determined that Glover was not entitled to credit for November 8 and 9, 2007, because on those days she was in custody as a result

of the probation hold for conduct—failure to appear—that was a different course of conduct than that giving rise to the OAR charge and conviction.

¶6 On appeal Glover contends the circuit court erred in denying sentence credit because, she asserts, on November 8 and 9, 2007, she was in custody “in connection with the course of conduct for which sentence was imposed” within the meaning of WIS. STAT. § 973.155(1), which provides:

(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.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

According to Glover, because the failure to appear occurred in this case, it is related to the conduct for which she was sentenced in this case.

¶7 A resolution of this issue requires that we interpret WIS. STAT. § 973.155(1) in light of existing case law. Because there are no facts in dispute, this presents a question of law, which we review de novo. *See State v. Johnson*, 2007 WI 107, ¶27, 304 Wis. 2d 318, 735 N.W.2d 505.

¶8 In order to receive sentence credit under this statute the defendant must be in custody and the custody must be “in connection with the course of conduct for which sentence was imposed.” *Id.*, ¶31. There is no dispute that Glover was in custody on November 8 and 9. The issue is whether her custody was “in connection with the course of conduct for which sentence was imposed” in this case. The custody under the probation hold was for Glover’s failure to appear at the initial appearance in this case, which was alleged to be a violation of the rules of her probation in the theft case. The sentence in this case was for her conduct in driving after revocation. Glover was not in custody in connection with her conduct in driving after revocation. The conduct for which she was in custody was conduct that occurred during this case. That conduct is procedurally connected to this case, but it is not connected to the conduct of driving after revocation.

¶9 Even if we assume without deciding there is an ambiguity in the meaning of “in connection with the course of conduct for which sentence was imposed” as applied to the facts of this case, we reject Glover’s broad construction of the phrase. We conclude a narrower construction is more consistent with existing case law.

¶10 In *State v. Beiersdorf*, 208 Wis. 2d 492, 494-95, 561 N.W.2d 749 (Ct. App. 1997), the defendant was charged with bail jumping for violating the conditions of his personal recognizance bond on a sexual assault charge. Because he was unable to post cash bail in the bail jumping case, he remained in custody. *Id.* at 495. He pleaded guilty to both sexual assault and bail jumping and received a prison sentence on the sexual assault charge and a stayed prison sentence in favor of probation on the bail jumping charge. *Id.* at 494-95. The defendant argued that he was entitled to credit on the sexual assault sentence for the time he

spent in custody in the bail jumping case because the custody resulted from his violation of the conditions of the bond on the sexual assault charge. *See id.* at 495-96. We acknowledged that in some sense the custody on the bail jumping charge was related to the sexual assault charge, but concluded it was not custody connected to “the course of conduct for which [the sexual assault] sentence was imposed” within the meaning of WIS. STAT. § 973.155(1)(a). *Id.* at 498.

¶11 The supreme court cited *Beiersdorf* approvingly in *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, ¶¶15-17, 606 N.W.2d 155, stating that “*Beiersdorf* underscores that a factual connection fulfills the statutory requirement for sentence credit, and that a procedural or other tangential connection will not suffice.”

¶12 Glover contends that *Beiersdorf* is distinguishable and, indeed, supports her position because she was in custody on November 8 and 9 for conduct related not to the theft case but to this case, whereas *Beiersdorf* was in custody for conduct that was not related to the sexual assault case but only to the bail jumping case. We do not agree with Glover’s reading of *Beiersdorf*. While the facts in *Beiersdorf* do not precisely line up with those here, they are sufficiently analogous so that the reasoning applies. In *Beiersdorf* the conduct giving rise to the bail jumping charge was not “in connection with the course of conduct” for which *Beiersdorf* was sentenced in the sexual assault case, even though the bail jumping charge arose out of a violation of a bond condition in the sexual assault case. So, here, the conduct giving rise to the probation hold is not “in connection with the course of conduct” for which Glover was sentenced in this case, even though the probation rule violation arose out of a failure to appear in this case. The point in both instances is that a procedural link is not sufficient to satisfy the requirement of “in connection with the course of conduct for which sentence was imposed.”

¶13 Another relevant case is *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999). There we rejected the defendant’s proposed construction of “course of conduct” to mean “criminal episode” in favor of the narrower meaning of “specific act.” *Id.* at 471-79. Examining the legislative history we concluded that the phrase “course of conduct” was intended to make clear that a defendant is entitled to the time served pretrial even if ultimately convicted of a different crime than that charged. *Id.* at 477.

¶14 Reading these cases together we see that “course of conduct for which sentence is imposed” means the specific conduct for which sentence is imposed—in this case, driving after revocation—and that the custody for which sentence credit is sought must have more than a tenuous or procedural connection to this conduct. We conclude that the relationship between Glover’s custody on the probation hold for nonappearance at the initial appearance has only a tenuous connection to the conduct for which she was sentenced in this case and that the two are factually distinct.

¶15 We are satisfied that this reading of the statute is in keeping with its purpose, which is to “afford fairness” and “ensure ‘that a person not serve more time than he is sentenced.’” *Johnson*, 304 Wis. 2d 318, ¶37 (citations omitted). Glover was sentenced to five days for the conduct of operating after revocation; she received credit for the day she was in custody under the bench warrant issued in this case; and there is nothing unfair about serving the remaining four days of her sentence.<sup>2</sup>

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<sup>2</sup> The legal basis for the State’s stipulation to the one-day credit for November 7 is not fully articulated by the State but that is not at issue on this appeal.

¶16 The State points out that the two days during which Glover was in custody based solely on the probation hold are properly credited to any jail time she may receive in the theft case if her probation were to be revoked. Glover replies that her probation was not revoked. Glover may be suggesting that it is unfair that she not receive credit against *some* sentence for the two days. We disagree. DOC apparently decided that the failure to appear in this case did not warrant a sanction in the theft case beyond the time already spent in custody on the probation hold. That decision is to Glover's advantage and does not make it unfair not to credit Glover in this case for the two days in custody based only on the probation hold for conduct that is not the same course of conduct for which she is being sentenced in this case. *See Beiersdorf*, 208 Wis. 2d at 497 (rejecting the defendant's argument that he should receive credit against the sexual assault sentence because he would not likely benefit from the credit against the bail jumping sentence given that prison time on that sentence was stayed in favor of probation).

¶17 Glover refers us to *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), and *State v. Hintz*, 2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646, asserting that they support her position. We conclude that neither does.

¶18 In *Beets* the defendant was on probation resulting from drug convictions when he was arrested and taken into custody on a burglary charge. 124 Wis. 2d at 374. A few days later he was also in custody for having failed to report to his probation agent and his probation was eventually revoked because of the burglary charge. *Id.* at 374-75 & n.2. Beets was sentenced to prison on the drug charges and given credit for the seventy-eight days spent in custody from the date of his arrest to the date of his sentencing. *Id.* at 375. While serving the drug sentence, he was sentenced to prison on the burglary charge, concurrent with the

drug sentence, and given credit on the burglary sentence for the same seventy-eight days. *Id.*<sup>3</sup> Beets asserted he was entitled to an additional credit on the burglary sentence for the days he had spent serving his drug sentence before being sentenced on the burglary. *Id.* The court rejected this argument. The court explained that the burglary and drug charges were not connected, although the court recognized that there was a “temporal connection” between the cause of the initial confinement in the drug case and the burglary case, in that the burglary triggered the probation hold in the drug case and, subsequently, the probation revocation and sentencing in the drug case. *Id.* at 378-79. The court then concluded that “any connection which might have existed between custody for the drug offenses and the burglary was severed when the custody resulting from the probation hold was converted into a revocation and sentence.” *Id.* at 379.

¶19 Glover contends that *Beets* stands for the proposition that a defendant is entitled to credit for time spent in custody on a probation hold that relates to a second charge unless the connection is severed by sentencing in the case with the probation hold; and, she points out, there was no sentencing in the theft case to sever the connection here. This argument overlooks the fact that the time for which Beets received credit against the sentence in the burglary case was for the time he was in custody *for the same conduct for which he was sentenced*—the burglary.

¶20 In *Hintz* the defendant was on extended supervision for one crime when, the circuit court found, he was taken into custody on an extended

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<sup>3</sup> The court in *State v. Beets*, 124 Wis. 2d 372, 378 n.5, 369 N.W.2d 382 (1985), expressly did not address the propriety of the dual credit on the concurrent charges.



supervision hold in part because he was the suspect in a new crime and in part for other reasons. 300 Wis. 2d 583, ¶¶2-3, 9-10. We accepted the circuit court's finding and concluded that, because he was in custody in part due to the conduct that resulted in the new conviction, Hintz was entitled to credit on the sentence for the new conviction. *Id.*, ¶12. *Hintz* does not aid Glover because she was not in custody on November 8 and 9, even in part, for conduct that resulted in the OAR conviction.

¶21 We conclude WIS. STAT. § 973.155(1) does not entitle Glover to sentence credit for November 8 and 9, 2007. Accordingly, we affirm the circuit court's order denying this credit.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

