

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 6, 2002

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. 01-2033-CR

Cir. Ct. No. 98-CF-248

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. NEUMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Reversed and cause remanded with directions.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Jeffrey Neuman appeals an order which amended his judgment of conviction on a felony drug charge to provide additional presentence credit. The issue is whether the trial court properly computed his sentence credit. We reverse and remand for a redetermination of credit.

¶2 Neuman was jailed in Dodge County in connection with this case on October 15, 1998. He was released the next day on bail. On November 2, the trial court issued a bench warrant after Neuman failed to appear at a scheduled hearing. On November 11, Neuman was arrested and jailed in Waukesha County. He remained incarcerated there through March 4, 1999, when he was sentenced to prison on a Waukesha County drug charge.¹ On May 13, 1999, he was convicted and sentenced in this proceeding to a prison term concurrent with the Waukesha County sentence.

¶3 The trial court awarded Neuman seventy-eight days of sentence credit: one day for October 15, 1998, and seventy-seven days for his incarceration between February 25, 1999, and his May 13 conviction. Both parties agree that Neuman is not entitled to credit between March 4 and May 13, because the incarceration was attributable solely to the Waukesha County conviction. *See State v. Amos*, 153 Wis. 2d 257, 280-81, 450 N.W.2d 503 (Ct. App. 1989) (defendant may not receive credit for time spent serving a sentence on an unrelated charge). With that block of time removed, the State contends that Neuman has an undisputed claim to only eight days of credit: one day for his incarceration on October 15, 1998, and seven days for his confinement between February 25, 1999, and March 4, 1999, attributable to his failure to make the Dodge County bail ordered on February 25. At issue in this appeal is Neuman's unresolved claim to additional credit against the Dodge County sentence for his days of incarceration in Waukesha County between November 11, 1998, and February 25, 1999.

¹ Neuman's Waukesha County stay was interrupted by his transfer to the Milwaukee County Jail for a brief period in February 1999.

¶4 WISCONSIN STAT. § 973.155(1) (1999-2000)² provides that a convicted offender shall receive credit “for all days spent in custody in connection with the course of conduct for which sentence was imposed.” If the defendant is incarcerated in connection with more than one course of conduct, credit may be applied to each sentence that results, provided that those sentences are imposed to run concurrently. *See State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991).

¶5 We cannot resolve whether Waukesha County held Neuman in jail from November 11, 1998, until February 25, 1999, in connection with the Dodge County prosecution. The appendix to Neuman’s brief contains Waukesha County documents that indicate his incarceration was due, at least in part, to the bench warrant issued in the Dodge County proceeding. However, those documents are not of record, either in the trial court or in this court, and we cannot consider them. *See Jenkins v. Sabourin*, 104 Wis. 2d 309, 313-14, 311 N.W.2d 600 (1981). We therefore remand to allow Neuman the opportunity to support his assertion that the Waukesha County incarceration was at least partially in connection with the Dodge County prosecution. The trial court shall thereafter enter an amended judgment of conviction, granting Neuman eight days of credit for October 15, 1998, and between February 25, 1999, and March 4, 1999, plus whatever additional credit Neuman establishes on remand relating to the period from November 11, 1998, to February 25, 1999.

² All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶6 The State does not oppose a remand to determine Neuman's claim to additional sentence credit. However, the State moved for clarification/reconsideration of our prior opinion, since withdrawn, because we directed the trial court on remand to deduct the credit given Neuman for his March 4-May 13 incarceration. The State contends that Neuman is constitutionally entitled to keep that credit, although he is, by statute, admittedly and plainly not entitled to it. The State's sole authority for the proposition that Neuman cannot lose credit subsequent to an appeal is a footnote in a prior decision of this court. *See State v. Riley*, 175 Wis. 2d 214, 221 n.3, 498 N.W.2d 884 (Ct. App. 1993).

¶7 The *Riley* footnote says that the State did not ask on appeal that this court take away sentence credit erroneously awarded by the trial court. The *Riley* court then explained that, in order to avoid giving the appearance that Riley was being punished for exercising his right to appeal, it would not deduct the erroneous credit. The latter statement refers to Riley specifically and not appellants generally. We do not read this statement to be a general holding that an appellate court may not correct an award of sentence credit in a manner that reduces the credit. Indeed, the underlying briefing in *Riley* reveals that the State did not concede or suggest that this court lacks the authority to take away erroneously granted sentence credit. Moreover, we fail to see why an order correcting sentence credit downward gives the appearance that a defendant is being punished for exercising his right to appeal. The computation of sentence credit does not involve discretion. Such credit is computed according to rules of law, typically, as in this case, applied to undisputed facts. Accordingly, we are neither bound nor persuaded by the footnote in *Riley*. On remand, the trial court shall award credit for Neuman's incarceration only if it is shown to be in connection with this prosecution.

By the Court.—Order reversed and cause remanded with directions.

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

