

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 20, 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. 02-0195
STATE OF WISCONSIN**

Cir. Ct. No. 93-CF-247

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY G. TACKETT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Fond du Lac County:
PETER L. GRIMM, Judge. *Affirmed.*

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

¶1 PER CURIAM. Timothy G. Tackett has appealed from an order denying his motion for 102 days of sentence credit for the time he spent on electronic monitoring from November 22, 1999, through January 14, 2000, and from January 28, 2000, through March 16, 2000. We affirm the trial court's order.

¶2 Tackett was convicted of theft by fraud on January 31, 1995. The trial court withheld sentence and placed him on probation for seven years. On November 16, 1999, Tackett's probation agent was advised of allegations that Tackett had committed a sexual assault. Tackett's agent authorized his detention in the county jail pending investigation of the new charges. Tackett was in jail from November 16, 1999, to November 22, 1999. On November 22, 1999, the agent authorized Tackett's release from jail, but placed him on electronic monitoring while the investigation into the new allegations continued.

¶3 On January 14, 2000, the electronic monitoring program lost contact with Tackett, who subsequently was hospitalized. Upon release from a treatment center on January 28, 2000, the probation agent again placed Tackett on electronic monitoring, which continued until March 2000, when the prosecutor informed Tackett's agent that the sexual assault allegation would not be pursued further. Ultimately, Tackett's probation was revoked for another offense.

¶4 Tackett filed three motions in the trial court seeking sentence credit for the time period he spent on electronic monitoring. The State contends that Tackett waived his right to object to the trial court's denial of sentence credit when he failed to appeal the first order denying relief. We find it unnecessary to address the waiver argument because, on the merits, it is clear that Tackett is entitled to no relief.

¶5 A convicted offender is entitled to credit for all days spent in custody in connection with the course of conduct for which sentence was imposed. WIS. STAT. § 973.155(1)(a) (1999-2000).¹ For purposes of sentence credit, an

¹ All references to the Wisconsin Statutes are to the 1999-2000 version.

offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status. *State v. Magnuson*, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536. "In determining whether an individual would have been subject to an escape charge, we look both to the general escape statute, WIS. STAT. § 946.42, as well as 'other statutory provisions in which the legislature has classified certain situations as restrictive and custodial by attaching escape charges for an unauthorized departure from those situations.'" *State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶32, 250 Wis. 2d 214, 640 N.W.2d 527, *review denied*, 2002 WI 48, 252 Wis. 2d 150, 644 N.W.2d 686 (Wis. Mar. 19, 2002) (No. 01-0008) (quoting *Magnuson*, 2000 WI 19 at ¶26).

¶6 Tackett was not subject to an escape charge under WIS. STAT. § 946.42 during the time period for which he seeks credit. As conceded by Tackett, he was placed on electronic monitoring by his probation agent, who authorized the sheriff to release him from jail during the investigation of the sexual assault allegations. To be subject to an escape charge under § 946.42, a probationer must be in actual custody or be subject to a confinement order under WIS. STAT. § 973.09(4). *State v. Zimmerman*, 2001 WI App 238, ¶5, 248 Wis. 2d 370, 635 N.W.2d 864. Section 946.42(1)(a) provides that actual custody includes secured correctional facilities, secured child caring institutions, secure detention facilities, Type 2 child caring institutions, a juvenile portion of a county jail, or the custody of a peace officer or an institution guard.² None of these custodial

² A person may also be subject to an escape charge under WIS. STAT. § 946.42 while in constructive custody as defined in § 946.42(1)(a). However, constructive custody constitutes temporary leave from one of the defined institutions for purposes such as work or child care. *See id.*; *see also State v. Magnuson*, 2000 WI 19, ¶41, 233 Wis. 2d 40, 606 N.W.2d 536. It is not applicable to Tackett's situation.

situations applied to Tackett during the time period for which credit was sought, nor was he subject to a confinement order under § 973.09(4). *Cf. Simpson*, 2002 WI App 7 at ¶33 (custody does not exist within the meaning of § 946.42 when a probationer is on electronic monitoring as a court-ordered condition of probation). Moreover, escape from the custody of a probation agent is not escape from actual custody and may not give rise to a charge under § 946.42. *Zimmerman*, 2001 WI App 238 at ¶14.

¶7 Tackett contends that because he was on electronic monitoring, he was in the intensive sanctions program and was thus a prisoner in a type 2 prison as provided in WIS. STAT. §§ 301.01(6) and 301.048(4)(b). Because § 301.048(5) provides that a participant in the intensive sanctions program is subject to an escape charge for leaving that status, Tackett contends that he was in custody for purposes of sentence credit.

¶8 The defect in Tackett's argument is that he was not on electronic monitoring as part of the intensive sanctions program under WIS. STAT. § 301.048. Section 301.048 provides in part:

(2) ELIGIBILITY. (am) Except as provided in par. (bm), a person enters the intensive sanctions program only if he or she has been convicted of a felony and only under one of the following circumstances:

1. A court sentences him or her to the program under s. 973.032.

2. He or she is a prisoner serving a felony sentence not punishable by life imprisonment and the department directs him or her to participate in the program. This subdivision does not apply to a prisoner serving a bifurcated sentence imposed under s. 973.01.

3. The parole commission grants him or her parole under s. 304.06 and requires his or her participation in the program as a condition of parole under s. 304.06(1x).

3m. A court or the department requires his or her participation in the program as a condition of extended supervision under s. 302.113(7) or 302.114(5)(d) or (8) or 973.01(5).

4. The department and the person agree to his or her participation in the program as an alternative to revocation of probation, extended supervision or parole.

¶9 The mere fact that an offender is electronically monitored by officials in the intensive sanctions program does not make the offender a participant in the program. *See Magnuson*, 2000 WI 19 at ¶34. Tackett was not ordered to participate in the intensive sanctions program by a court. He was not a prisoner serving a felony sentence who was directed to participate in the program by the Department of Corrections. He was not required to participate in the program as a condition of parole or extended supervision, nor was he participating in it as an alternative to revocation. He thus was not a participant in the intensive sanctions program and was not subject to an escape charge under WIS. STAT. § 301.048(5).

¶10 Because no other statute has been identified which subjected Tackett to an escape charge while he was on electronic monitoring, no basis exists to conclude that he is entitled to additional sentence credit. The trial court therefore properly denied relief.

By the Court.—Order affirmed.

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

