

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 8, 2003

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 Nos. 02-2463-CR
02-2464-CR**

**Cir. Ct. Nos. 94-CF-1480
94-CF-1779**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH MCGOWAN,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County:
ANGELA B. BARTELL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Joseph McGowan, a prison inmate, appeals orders denying his claim for additional sentence credit. He asserts a right to 311 more days credit than previously awarded. We conclude, as did the trial court, that

McGowan has failed to show that he is entitled to receive this additional credit. We therefore affirm.

¶2 McGowan was sent to prison in 1995. Between December 1998 and December 2001, he was paroled twice and his parole was revoked twice. He is presently serving out his terms. This appeal concerns the trial court's rulings that denied McGowan credit for the time he was on parole but subject to electronic monitoring.

¶3 A prisoner is eligible for credit against a sentence for time spent in custody in connection with the course of conduct for which sentence was imposed. WIS. STAT. § 973.155(1)(a) (2001-02).¹ "In custody" means subject to a criminal escape charge for absconding. *State v. Magnuson*, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536. However, one who absconds from parole is not subject to an escape prosecution, and therefore cannot claim credit for time served as a parolee. *See id.* This remains true even if the parolee is subject to electronic monitoring. *See State ex rel. Simpson v. Schwarz*, 2002 WI App 7, ¶¶2, 32, 250 Wis. 2d 214, 640 N.W.2d 527 (it is the defendant's status and not the fact of monitoring that establishes the right to credit). Consequently, the trial court properly denied McGowan credit in the absence of evidence that the department of corrections placed McGowan on electronic monitoring for any reason other than his parole status.

¶4 Alternatively, McGowan claims credit for a period of time after January 29, 1999, on grounds that he was released from jail on that date due to

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

overcrowding. For this contention he cites *State v. Dentici*, 2002 WI App 77, ¶1, 251 Wis. 2d 436, 643 N.W.2d 180, where this court allowed credit for that portion of a jail sentence the defendant served at home because the county jail was full. *See id.*, ¶¶8-12. However, there are no facts of record here to support McGowan's allegation that overcrowding caused his release from jail on January 29, 1999. Additionally, in *Dentici* we held that the circumstances of the defendant's temporary release from a jail sentence left him open to escape charges had he absconded. *Id.*, ¶12. Here, McGowan was in jail on January 29, 1999, on a parole hold, not a sentence. Nothing of record indicates that his release on that date was temporary or subject to any conditions beyond those imposed by his parole status. His release did not interrupt a sentence, and we are not persuaded that McGowan could have been charged with escape had he subsequently absconded. *Dentici* is therefore distinguishable.

¶5 We note that the State indicates the record suggests that McGowan was on parole hold from January 26, 1999, to January 29, 1999. If this is true, McGowan *may* be entitled to sentence credit for this time period. Our own review of the record is inconclusive on this topic. Accordingly, McGowan may still pursue sentence credit for this time period, but we express no opinion on the topic.

By the Court.—Orders affirmed.

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

