COURT OF APPEALS
DECISION
DATED AND FILED

January 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP719 **Cir. Ct. No. 2009IP3**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN EX REL. CHRISTOPHER L. SHELTON,

PETITIONER-APPELLANT,

V.

JUDY P. SMITH, WARDEN, OSHKOSH CORRECTIONAL INSTITUTION,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 REILLY, J. Christopher L. Shelton appeals from an order of the circuit court denying his petition for a writ of habeas corpus. Shelton was convicted of two crimes and given consecutive sentences. Shelton argues that

because he was unlawfully detained for 143 days after the mandatory release date of his first sentence, he should receive credit on his second sentence as a form of equitable relief. The State concedes that Shelton was unlawfully detained after the mandatory release date of his first sentence. The State argues that because Shelton has finished serving his first sentence his habeas corpus claim is moot, and that sentence credit is not applicable because Shelton's custody was not in connection with the course of conduct for which the second sentence was imposed. The circuit court denied Shelton's petition for a writ of habeas corpus. We affirm.

FACTS

¶2 Shelton was convicted in 1993 of one count of child enticement and one count of sexual assault of a child. The circuit court sentenced Shelton to an eight-year indeterminate prison term on the child enticement offense and granted 268 days of sentence credit for the time Shelton spent in presentence custody.[1] As to the sexual assault sentence, the circuit court also imposed an eight-year indeterminate prison sentence to be served consecutive to the child enticement sentence. The circuit court stayed the sexual assault sentence in favor of ten years of probation to be served after the child enticement sentence. No presentence credit was granted on the sexual assault sentence.

[1] Shelton's sentence was imposed as an indeterminate sentence, as it occurred before 1997 Wis. Act 283 (Truth-in-Sentencing). Under Truth-in-Sentencing, a convicted defendant receives a bifurcated sentence: a term of initial confinement in prison followed by a period of extended supervision in the community. Before Truth-in-Sentencing, offenders served an indeterminate sentence. Absent extenuating circumstances, the offender would reach his mandatory release date after serving two-thirds of the court-imposed sentence. For a further discussion, *see* Michael B. Brennan & Donald V. Latorraca, *Truth-in-Sentencing*, WISBAR.ORG, May 2000, *available at* http://www.wisbar.org/AM/Template.cfm?Section=Search&template=/CM/HTMLDisplay.cfm&ContentID=49911#3 (last visited Jan. 18, 2011).

¶3 While Shelton's mandatory prison release date for the child enticement offense was February 13, 1998, he was not released on that date as the State attempted to commit him under WIS. STAT. ch. 980.[2] The circuit court dismissed the State's ch. 980 petition on July 13, 1998.[3] Shelton remained in a correctional facility from July 15, 1998, until December 8, 1998—a span of 143 days—as the Department of Corrections (DOC) attempted to find suitable housing for Shelton while he served the remainder of his child enticement sentence on parole.

¶4 Shelton completed his eight-year child enticement sentence on October 8, 2000. Shelton then commenced serving his ten years of probation for the sexual assault conviction. On May 9, 2005, Shelton's probation was revoked, and he began serving the eight-year indeterminate sentence for sexual assault. Shelton's mandatory prison release date for the sexual assault charge was December 11, 2009, with a parole discharge date of August 11, 2012.

¶5 On October 8, 2009, Shelton filed a petition for a writ of habeas corpus in the circuit court. Shelton requested immediate release from custody on his sexual assault sentence arguing that he never received sentence credit for the 143 days he was held in prison in 1998 while the State tried to find him housing outside the prison walls.

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[2] WISCONSIN STAT. ch. 980 deals with the commitment of sexually violent offenders. All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] No sentence credit is available for an inmate awaiting a WIS. STAT. ch. 980 determination. *See* ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, ¶38, 274 Wis. 2d 1, 681 N.W.2d 914. Shelton does not challenge his detention while awaiting the ch. 980 determination from February 13, 1998, through July 15, 1998.

¶6 The State moved to dismiss on the grounds that credit may not be transferred to a different sentence and that Shelton therefore failed to state a claim for relief. Shelton responded by seeking an eighteen-month equitable reduction in his sexual assault sentence. The circuit court granted the State's motion to dismiss, holding that while Shelton should not have been kept in custody for 143 days after his mandatory release date on the child enticement sentence, the court did not have the authority to transfer credit from one sentence to another.

STANDARD OF REVIEW

¶7 Whether a defendant is entitled to sentence credit under WIS. STAT. § 973.155 is a question of law that we review de novo. ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480.

DISCUSSION

Shelton's Habeas Corpus Claim is Moot.

¶8 We begin by discussing the remedy Shelton failed to utilize—filing a writ of habeas corpus at the time he was unlawfully detained. Habeas corpus proceedings represent "an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." ***Preiser v. Rodriguez***, 411 U.S. 475, 484 (1973).

¶9 In ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶1, 233 Wis. 2d 685, 608 N.W.2d 425, this court found that the State had no authority to hold an inmate beyond his mandatory release date. Olson was in prison for sexual assault, and just as in Shelton's case, when Olson reached his mandatory release date the State claimed they were unable to locate a residence for him. ***Id.***, ¶2. The State therefore kept Olson in custody. ***Id.*** This court held that a prisoner who reaches

his mandatory release date must be released regardless of whether a residence has been found for him. ***Id.***, ¶5. As we have stated before, a prisoner has a constitutional liberty interest in his mandatory release date. *See* ***Santiago v. Ware***, 205 Wis. 2d 295, 317, 556 N.W.2d 356 (Ct. App. 1996).

¶10 Shelton is currently on parole for his sexual assault offense. Shelton makes no claim that his current sentence is constitutionally or statutorily infirm. Shelton never sought habeas corpus relief when he was unlawfully held for 143 days during his child enticement sentence. Only now—over ten years later and after his probation was revoked in 2005—does he seek equitable relief in the form of applying credit from the 143 days he spent in custody after his mandatory release date on the child enticement sentence to the remaining parole component of his sexual assault sentence. Because Shelton failed to challenge the extension of his mandatory release date at the time he was unlawfully detained, he is now without a remedy as his child enticement sentence was discharged.

The 143 Days that Shelton Spent in Custody were not in Connection with his Sexual Assault Sentence.

¶11 To be eligible for sentence credit in Wisconsin, a defendant's presentence custody must be "in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1)(a). As the supreme court recently made clear:

> Neither the statute nor the case law that precedes today's version of WIS. STAT. § 973.155 justifies crediting a defendant's sentence for time spent in presentence custody that is not related to the matter for which sentence is imposed.
>
> Moreover, the presentence custody's "connection with" the sentence imposed must be factual; a mere procedural connection will not suffice.

State v. Johnson, 2009 WI 57, ¶¶32-33, 318 Wis. 2d 21, 767 N.W.2d 207 (citations omitted).

¶12 While Shelton was unlawfully incarcerated for 143 days after he finished serving his prison term for child enticement, that time in custody had no connection with the upcoming service of his sexual assault sentence. Shelton has failed to establish that the time in which the DOC unlawfully detained him was "in connection with the course of conduct" for which the sexual assault sentence was imposed. *See* ***State v. Villalobos***, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995) ("The law places the burden for demonstrating both custody and its 'connection with the course of conduct for which sentence was imposed,' WIS. STAT. 973.155(1)(a), on the defendant who seeks such custody.").

¶13 Put another way, Shelton has not established that the custody was spent while he was awaiting trial, was being tried, or was awaiting imposition of the sexual assault sentence. *See* WIS. STAT. § 973.155(1)(a). There is simply no statutory basis to retroactively apply presentence credit to Shelton's 1998 custody, which was served *after* sentencing and was unrelated to his 2005 probation revocation on the sexual assault sentence. Shelton has therefore failed to establish that the post sentence custody was served "in connection with" the course of conduct for which the sexual assault sentence was imposed.

When Shelton was Held in Custody for 143 Days, the Possibility of Him Returning to Prison on His Sexual Assault Sentence was Speculative.

¶14 WISCONSIN STAT. § 973.155(1)(a) requires that an offender be held "in custody" before he can receive sentence credit. When Shelton was detained for 143 days, he was not "in custody" on the sexual assault conviction—that sentence was stayed in favor of probation. In ***State v. Martinez***, 2007 WI App

225, 305 Wis. 2d 753, 741 N.W.2d 280, the Wisconsin Supreme Court was faced with a somewhat similar issue. In that case, Martinez served consecutive sentences, the first one in state prison and the second one in federal prison. ***Id.***, ¶2. After serving his state sentence, Martinez was paroled directly to the federal government. ***Id.*** When Martinez finished his federal prison sentence, he began serving the remainder of the parole period of his state sentence. ***Id.***, ¶¶2-3. Martinez violated the terms of his parole, and was sent back to state prison. ***Id.***, ¶4. He argued that he should be given credit on his state sentence for time he spent in federal prison. ***Id.***, ¶5. The supreme court rejected Martinez's argument. The court noted that when Martinez was serving his federal sentence, the possibility of him going back to state prison was speculative because it was contingent on him violating the terms of his probation. ***Id.***, ¶¶17-18. *See also* ***State v. Rohl***, 160 Wis. 2d 325, 331-32, 466 N.W.2d 208 (Ct. App. 1991) (Because the defendant was on parole in Wisconsin at the time he was confined on charges in California, the period of confinement in California could not be credited against his Wisconsin sentence.).

¶15 Similarly, when Shelton was held in custody for 143 days after he was released from prison on the child enticement sentence, the possibility of him returning to prison on his sexual assault sentence was speculative. He was thus not "in custody" on the sexual assault sentence, and therefore cannot receive credit on that sentence.

CONCLUSION

¶16 Shelton is not entitled to a reduction in his current sentence by transferring the 143 days he unlawfully spent in custody on a previous sentence. His petition for habeas corpus is denied.

By the Court.—Order affirmed.

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