COURT OF APPEALS
DECISION
DATED AND FILED

June 23, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2397-CR **Cir. Ct. No. 2004CF74**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KEITH W. BROWN,

DEFENDANT-APPELLANT.

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

Before Vergeront, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Keith Brown appeals a judgment of conviction and an order denying postconviction relief. The relief sought was to apply nine months of sentence credit to not only Count 1 of the information, but also to Counts 3 and 6, in his sentencing after revocation. Brown argues that the nine

months of conditional jail time that he received in his original sentence should be applied to Counts 3 and 6 under WIS. STAT. § 973.155 (2009-10),[1] because he was serving a single term of probation as a disposition for Counts 1, 3, and 6. We conclude that the credit that the circuit court applied to the sentences imposed after revocation on Counts 3 and 6 was not inconsistent with the requirements of § 973.155, and therefore Brown is not entitled to the credit. Accordingly, we affirm.

BACKGROUND

¶2 In 2004, Brown pled guilty to two counts of burglary (Counts 1 and 3) and one count of theft (Count 6), each offense involving separate victims and occurring at different times. Brown was sentenced to six years of probation for Count 1 and 3, and five years of probation for Count 6, all to run concurrently. The circuit court imposed, as to Count 1 only, a condition of nine months of jail time. The court made clear its intent to limit the conditional incarceration to Count 1 only, in order to have available to impose the time represented by the remaining two counts in the event that Brown violated a term of his probation.

¶3 After completing the nine months of conditional jail time in 2005, Brown remained on probation until January 2010, when he was revoked.

¶4 At the postrevocation sentencing hearing, the court sentenced Brown to the following: (1) three years of initial confinement and five years of extended supervision on Count 1; (2) thirty months of initial confinement and five years of

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

extended supervision on Count 3; and (3) thirty months of initial confinement and three years of extended supervision on Count 6. The court applied 605 days of sentence credit to Count 1, which consisted of the nine months of incarceration in 2005 and 335 days of presentence custody. As to Counts 3 and 6, the court applied the 335 days of presentence custody only. The sentences on all three counts were to run concurrently.

¶5 Brown filed a postconviction motion, arguing that the nine months of credit should have been applied not only to Count 1, but also to Counts 3 and 6. The circuit court denied the motion, on the grounds that it had intentionally imposed the conditional jail time on Count 1 alone, and intentionally avoided the potential for this time to be credited against the other two counts. This appeal followed.

DISCUSSION

¶6 Brown contends that 605 days of presentence custody must be credited against each of the three counts in the sentencing after revocation. Specifically, Brown argues that he was serving a single term of probation for the three counts, because he was sentenced at the same time on each count, and therefore the element of "in connection with" in WIS. STAT. § 973.155(1)(a) is satisfied.

¶7 Determining whether Brown is entitled to the nine month's worth of sentence credit for Counts 3 and 6 requires application of WIS. STAT. § 973.155(1)(a) to undisputed facts. ***State v. Tuescher***, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (1999). This involves a question of law subject to de novo review. ***Id.***

¶8 Wisconsin's sentence credit statute, WIS. STAT. § 973.155, grants credit to the defendant's sentence for the days spent in presentence custody. The statute provides, in relevant part:

> (1)(a) A convicted offender shall be given credit towards 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.

WIS. STAT. § 973.155(1)(a) (emphasis added).

¶9 The sentence credit statute requires two determinations: (1) whether the defendant was "in custody"; and (2) whether the custody is being served "in connection with" the conduct for which the sentence was imposed. ***State v. E. Johnson***, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207. The parties do not dispute that Brown was in custody during the nine-month period. Instead, the issue is whether that custody was in connection with a single course of conduct for which all three of the sentences were imposed.

¶10 Brown argues that the sentences after revocation on the three counts were, in the sense intended in WIS. STAT. § 973.155(1)(a), "in connection with" each other, because he was serving a single term of probation for the counts. Brown relies on ***State v. T. Johnson***, 2005 WI App 202, 287 Wis. 2d 313, 704 N.W.2d 318, for the proposition that he was serving a single term of probation for the counts. Brown then asserts that because he was serving a single probationary term encompassing all three counts, his conditional jail time was "necessarily" in connection with all three counts. We disagree, because ***T. Johnson*** is not applicable here, and Brown's argument is contrary to ***E. Johnson***.

¶11 ***T. Johnson*** is not applicable, because ***T. Johnson*** addressed a single term of probation in connection with WIS. STAT. § 973.09(4)(a), which involves a

limitation on the length of a conditional confinement sentence, not sentence credit. We concluded in that case that a defendant serving probation under both a child support case and a drug case was not serving a single probationary term because he was not convicted at the same time. ***Id***., ¶¶1, 9. Because § 973.09 does not require sentences to be "in connection with" each other, ***T. Johnson*** has no relevance here.

¶12 Moreover, even if we were to assume that Brown's probation term were a single term of probation, Brown's argument fails under ***E. Johnson***, 318 Wis. 2d 21. Brown makes the same erroneous argument as was made by the defendant in ***E. Johnson***. The defendant in ***E. Johnson*** argued that because his sentences were concurrent and imposed at the same time, the "in connection with" element of WIS. STAT. § 973.155 was satisfied. ***Id***., ¶50. The ***E. Johnson*** court rejected the argument and concluded that, "[t]he fact that sentences are concurrent and are imposed at the same time does not alter the statutory mandate that credit toward service of a sentence be based on custody that is 'in connection with' the course of conduct giving rise to that sentence." ***Id.***, ¶76.

¶13 Therefore, even if the probation disposition on Counts 1, 3, and 6 were seen as involving a single term of probation, the requirement that the dispositions be "in connection with the course of conduct" at issue must still be satisfied. In order for the presentence custody to be credited toward different counts, "the presentence custody's 'connection with' the sentence imposed must be factual; a mere procedural connection will not suffice." ***Id***., ¶33.

¶14 In this case, there is no factual connection between the course of conduct at issue in Count 1, to which the nine-month custody applied, and the

courses of conduct for which sentence was imposed on Counts 3 and 6. The three acts were carried out at three different points in time with three different victims.

¶15 Brown's final argument fails for the same reason as his arguments above. He contends that if the nine-month credit is not applied to Counts 3 and 6, he will serve a longer period of time than that for which he was sentenced, because his longest sentence imposed after revocation was thirty-six months of initial confinement on Count 1, but he will have served thirty-nine months in confinement in total. It is true that a purpose of WIS. STAT. § 973.155 is to prevent a defendant from serving more time than the defendant was sentenced to serve. *See* ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W. 2d 382 (1985). However, again Brown's argument is premised on the contention that the conduct underlying the three counts of conviction is interrelated. "The clear intent of sec. 973.155, Stats., is to grant credit for each day in custody regardless of the basis for the confinement as long as it is *connected to the offense for which sentence is imposed*." ***State v. Gilbert***, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983) (emphasis added).[2] The nine-month conditional jail time was applied only to Count 1, which is not based on conduct connected with the conduct at issue in the remaining counts, as discussed above. Therefore, the court did not err in requiring Brown to serve thirty months of initial confinement on Counts 3 and 6, minus the credit due. The credit applicable to Counts 3 and 6 does not include the nine months of conditional incarceration and therefore Brown is not entitled to the credit.

[2] The language of WIS. STAT. § 973.155(1)(a) remains the same as in 1983, when ***State v. Gilbert***, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983), was decided.

CONCLUSION

¶16 For these reasons, the circuit court's decision is affirmed.

By the Court.—Judgment and order affirmed.

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