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**DISTRICT IV**

February 15, 2024

To:

Hon. Michael P. Screnock  
Circuit Court Judge  
Electronic Notice

Jacob J. Wittwer  
Electronic Notice

Carrie Wastlick  
Clerk of Circuit Court  
Sauk County Courthouse  
Electronic Notice

Jason A. Fernald  
E13493 Grace Street  
Merrimac, WI 53561

You are hereby notified that the Court has entered the following opinion and order:

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2022AP2061-CR                      State of Wisconsin v. Jason A. Fernald (L.C. # 2017CF364)

Before Blanchard, Graham, and Nashold, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Jason Fernald, pro se, appeals a circuit court order that denied his request for additional sentence credit, and he also appeals the court's order denying his motion for reconsideration on the sentence credit issue. Based on our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2021-22).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2021-22 version.

In 2018, Fernald was convicted of two misdemeanors and a felony OWI in the same circuit court case. The offenses arose out of the same course of conduct.

At Fernald's June 28, 2018 sentencing, the circuit court imposed consecutive jail sentences on the two misdemeanors. On the felony OWI, the court withheld sentence and ordered three years of probation, and as a condition of probation the court ordered one year of jail time to be commenced upon completion of the two misdemeanor jail sentences.

Fernald served the first of the two misdemeanor jail sentences from June 28, 2018, to September 3, 2018. He served the second of these two jail sentences from September 4, 2018, to November 10, 2018. He then began serving his conditional jail time on the felony OWI on November 11, 2018, and he was released after having served the conditional jail time that the circuit court had ordered.

Fernald's probation on the felony OWI was later revoked, and he was returned to the circuit court for sentencing on that offense. The circuit court imposed a five-year prison sentence, consecutive to any other sentence previously imposed. The court awarded Fernald 378 days of sentence credit. This included credit for the time that Fernald had been in jail as a condition of his probation on the felony OWI. The court denied Fernald's request for an additional 136 days of credit for the time he had been in jail serving his sentences on the two misdemeanors from June 28, 2018, through November, 10, 2018.

On appeal, Fernald continues to maintain that he should receive the additional 136 days of sentence credit on his prison sentence for the felony OWI. He contends that a correct application of the sentence credit statute, WIS. STAT. § 973.155, entitles him to this credit.

Whether the statute entitles a defendant to credit based on a given set of facts is a question of law that we review de novo. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

WISCONSIN STAT. § 973.155(1)(a) provides that “[a] convicted offender shall be given credit toward 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.” The statute “is designed to afford fairness so that a person does not serve more time than that to which [the person] is sentenced.” *State v. Thomas*, 2021 WI App 59, ¶7, 399 Wis. 2d 165, 963 N.W.2d 927 (citation omitted).

According to Fernald, he is due credit for the 136 days he was serving his misdemeanor jail sentences in 2018 because that time in custody was “in connection with” the same course of conduct for which his felony OWI sentence was imposed. We disagree.

Fernald’s argument overlooks relevant case law interpreting WIS. STAT. § 973.155(1)(a) consistent with its purpose. As these cases explain, a defendant is not entitled to credit for the same time in custody on two or more consecutive sentences, even if the time in custody is factually connected with all of the consecutive sentences that are imposed. *See, e.g., State v. Lira*, 2021 WI 81, ¶30, 399 Wis. 2d 419, 966 N.W.2d 605 (“[W]hile criminal defendants are entitled to sentence credit for incarceration factually connected to an offense, they are not entitled to credit already counted toward a separate and consecutive sentence.”); *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) (“Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.”).

As a corollary, so-called “dual credit” is permissible only on concurrent sentences. *See State v. Slater*, 2021 WI App 88, ¶22, 400 Wis. 2d 93, 968 N.W.2d 740 (“[D]ual credit—i.e.,

credit for a single period of custody against two or more sentences—is permissible only when the sentences are imposed concurrently.”); *Rohl*, 160 Wis. 2d at 330 (“So-called ‘dual credit’—where an offender can receive credit for a single episode of jail time toward two (or more) sentences—will be granted only for sentences which are *concurrent*.”).

Here, although Fernald’s circumstances do not present the typical “dual credit” problem, the underlying principle is the same. His misdemeanor jail sentences and his felony OWI prison sentence were consecutive, not concurrent.<sup>2</sup> He nevertheless seeks to reduce the sentence he is now serving for his felony OWI by an additional 136 days for the time he spent in jail in 2018 serving his sentences on the two misdemeanor offenses. If he received this additional credit, his total time served on all three sentences would be no more than if the sentences had been concurrent. That result would violate WIS. STAT. § 973.155(1)(a), as that statute has been interpreted in *Lira*, 399 Wis. 2d 419, ¶30, and *Boettcher*, 144 Wis. 2d at 87.

In arguing that he is nonetheless entitled to the additional 136 days of credit, Fernald relies on a letter that the department of corrections sent to the circuit court. The letter reflects the department’s view that the court miscalculated the total credit to be 378 days and that the total credit should have instead been 514 days, which would have included the additional 136 days Fernald seeks. The court addressed the letter, and it concluded that its own calculation of credit was the correct one. We agree.

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<sup>2</sup> For this reason, Fernald’s reliance on *State v. Yanick*, 2007 WI App 30, 299 Wis. 2d 456, 728 N.W.2d 365, is misplaced. *Yanick* involved the State’s failure to show that the defendant was serving consecutive sentences. See *id.*, ¶¶8-14, 23.

The department's calculation is not supported by the record. As the State points out, the department appears to have mistakenly concluded that Fernald began serving his conditional jail time on the felony OWI on June 28, 2018, the same day that he began serving the first of his two misdemeanor jail sentences. This is incorrect because the circuit court ordered the conditional jail time to commence upon Fernald's completion of the misdemeanor jail sentences. Thus, Fernald did not begin serving his conditional jail time on the felony OWI until he had completed his misdemeanor jail sentences, and there is no dispute that he received credit for that conditional jail time.

Finally, Fernald cites WIS. STAT. § 304.072(4) for the proposition that he is entitled to the additional 136 days of credit. However, § 304.072(4) pertains to credit for time spent in custody pending revocation. We agree with the State that the provision has no application to Fernald's request for credit for jail sentences he served prior to his revocation proceedings.<sup>3</sup>

Therefore,

IT IS ORDERED that the circuit court's orders are summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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<sup>3</sup> WISCONSIN STAT. § 304.072(4) states: "The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution subject to sentence credit for the period of custody in a jail, correctional institution or any other detention facility pending revocation according to the terms of [WIS. STAT. §] 973.155."

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*