

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 22, 2012

A. John Voelker
Acting 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. 2011AP774-CR

Cir. Ct. No. 2010CF2111

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KENTA D. BREWER,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: DENNIS R. CIMPL, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Kenta D. Brewer appeals from an amended judgment of conviction for three counts of misdemeanor battery, *see* WIS. STAT.

§ 940.19(1) (2005-06 and 2009-10), and from two postconviction orders.¹ He argues that “the circuit court erred in allocating presentence credit in such a way as to deny Brewer [sixty-seven days of] statutory good time credit to which he is entitled.” We conclude that the circuit court properly allocated presentence credit consistent with the dictates of *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), and *State v. Wolfe*, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655. We further conclude that whether Brewer is entitled to good time credit against his imposed and stayed sentence is not an issue that is properly before this court at this time.

BACKGROUND

¶2 The charges at issue in this case stemmed from domestic violence incidents that occurred in 2006, 2009, and 2010. In August 2006, Brewer was arrested and charged with one count of second-degree sexual assault based on an August 20, 2006 incident. He remained in custody for 180 days, until the circuit court granted the State’s motion to dismiss the charge without prejudice.

¶3 In July 2009, Brewer was arrested and charged with one count of misdemeanor battery, in connection with an April 20, 2009 incident. He remained in custody for 41 days, until the circuit court granted the State’s motion to dismiss the charge without prejudice.

¶4 On April 27, 2010, Brewer was taken into custody and charged with four crimes: first-degree sexual assault (count one), based on an April 22, 2010

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

incident; first-degree sexual assault (count two), based on the August 20, 2006 incident; substantial battery (count three), based on the April 20, 2009 incident; and misdemeanor battery (count four), based on a March 31, 2010 incident. Brewer and the State entered a plea agreement, pursuant to which count one was dismissed and counts two and three were amended to misdemeanor battery. Brewer pled guilty to counts two, three, and four and was convicted.

¶5 The circuit court sentenced Brewer to nine months in the House of Correction on count two; nine months in the House of Correction on count three, consecutive to count two; and nine months in the House of Correction on count four, consecutive to counts two and three. The circuit court then stayed the sentence on count four and placed Brewer on probation for two years.

¶6 At the time of sentencing in October 2010, Brewer had been in custody for 182 days. The circuit court gave Brewer a sentence credit of 182 days against count two. With respect to the 180 days and 41 days that Brewer was in custody in 2006 and 2009, the circuit court stated that it could not legally give Brewer credit for those days.

¶7 Brewer subsequently filed a postconviction motion asserting that, pursuant to WIS. STAT. § 973.155, he was entitled to 221 days of additional sentence credit because he was in custody for 180 days for the 2006 incident that became count two of the judgment of conviction, and for 41 days for the 2009 incident that became count three. The circuit court granted the motion and applied sentence credit “starting with a clean slate.” On count two, the circuit court gave Brewer 180 days of credit for the time he served in 2006, plus 90 days of credit for the 2010 custody, for a total of 270 days, which was a time-served disposition on count two. On count three, the circuit court gave Brewer 41 days of credit for the

time he served in 2009, plus 92 days of credit for the 2010 custody, for a total of 133 days. Thus, Brewer received the additional 221 days of credit he sought in his postconviction motion.

¶8 Brewer, however, was unhappy with the way the circuit court allocated the sentence credit. In a motion for reconsideration, he asserted for the first time that the circuit court should have taken into account the potential impact of good time when it allocated sentence credit. Brewer explained:

While the Court correctly found that the additional 221 days of sentence credit only applies to Count 2 (180 days) and 3 (41 days), the Court improperly attributed the 182 days of credit [for the 2010 custody] ... to specific counts rather than the entire consecutive sentence. As a result, Brewer is denied the benefit of jail credit to which he is entitled. By specifically attributing the 182 days of credit to Counts 2 and 3, the Court overlooked the good time or other credit that may reduce the amount of time Brewer would have to serve on each count.... [W]hen the Court applied a full 270 days of Brewer's jail credit to Count 2, it effectively deprived Brewer [of] 67 days of credit ... that otherwise would have applied to the remaining counts.

Brewer asked the circuit court to order that the 182 days of sentence credit for the 2010 custody “be distributed by the jail as appropriate between Counts 2 and 3, with any remainder attributable to the stayed sentence on Count 4.”

¶9 The circuit court denied Brewer's motion for reconsideration. It concluded that the credit had to be applied to specific counts and that it had properly applied the credit in accordance with *Wolfe*. This appeal follows.

DISCUSSION

¶10 In his appellate brief, Brewer presents numerous issues related to good time credit against his jail sentences. *See* WIS. STAT. § 302.43.² The threshold question that must be determined, however, is whether the circuit court properly allocated the 182 days of sentence credit from 2010 in accordance with the Wisconsin sentence credit statute, WIS. STAT. § 973.155, and governing case law.³ This presents a question of law that this court reviews *de novo*. *See Wolfe*, 242 Wis. 2d 426, ¶4.

¶11 In *Boettcher*, the Wisconsin Supreme Court held that when a defendant is given consecutive sentences, “custody credits should be applied in a mathematically linear fashion.” *Id.*, 144 Wis. 2d at 100. *Boettcher* explained:

The total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive

² WISCONSIN STAT. § 302.43 provides in relevant part:

Every inmate of a county jail is eligible to earn good time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored. An inmate shall be given credit for time served prior to sentencing under s. 973.155, including good time under s. 973.155(4). An inmate who violates any law or any regulation of the jail, or neglects or refuses to perform any duty lawfully required of him or her, may be deprived by the sheriff of good time under this section, except that the sheriff shall not deprive the inmate of more than 2 days good time for any one offense without the approval of the court. An inmate who files an action or special proceeding, including a petition for a common law writ of certiorari, to which s. 807.15 applies shall be deprived of the number of days of good time specified in the court order prepared under s. 807.15(3).

³ Brewer explicitly agrees that the circuit court properly allocated the 2006 and the 2009 sentence credit to counts two and three, respectively. Thus, at issue is the subsequent allocation of the 2010 sentence credit.

sentences. For ease in calculation and clarity in respect to subsequent exercise of court discretion, the credits should be applied to the sentence that is first imposed.

Id. In *Wolfe*, we concluded that a circuit court has no “choice in the matter”—it cannot choose which of two consecutive sentences will receive credit. *See id.*, 242 Wis. 2d 426, ¶8. Rather, the credit must be applied to the first sentence. *See id.*, ¶5.

¶12 In this case, the circuit court correctly applied the 182 days “in a mathematically linear fashion.” *See Boettcher*, 144 Wis. 2d at 100. The first 90 days were applied against the remaining days on count two, and 92 days were applied to count three.⁴ This approach was consistent with *Boettcher* and *Wolfe*.

¶13 Brewer disagrees. He argues that the circuit court erred when it allocated the 182 days of sentence credit for the 2010 custody to specific counts, rather than to all three counts. He contends that the allocation “effectively denied Brewer the statutory good time to which he is entitled.” Brewer asserts that

⁴ In its order denying Brewer’s motion for reconsideration, the circuit court stated that the 182 days of custody from 2010 did not relate to count three, but it had decided to apply 92 of those 182 days as sentence credit against count three “as a matter of equity.” We agree with Brewer that the 182 days he spent in custody in 2010 related to all four counts charged in the criminal complaint. *See* WIS. STAT. § 973.155(1)(a) (sentence credit available “for all days spent in custody in connection with the course of conduct for which sentence was imposed”). Thus, the 92 days of sentencing credit were properly applied against count three consistent with § 973.155(1)(a). *See Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995) (appellate court may affirm on different grounds than those relied on by the trial court).

where, as here, “presentence incarceration is equally applicable to multiple counts, *Wolfe* bars allocation by the sentencing court.”

¶14 We are not convinced by Brewer’s interpretation of *Wolfe*. In holding that a circuit court cannot “choose which of two consecutive sentences will receive credit,” *see id.*, 242 Wis. 2d 426, ¶8, *Wolfe* did not hold that credit cannot be allocated to a particular sentence. Rather, *Wolfe* reiterated that the circuit court must allocate the credit “to the sentence first imposed,” *see id.*, ¶5, and the circuit court therefore had no choice to make, *see id.*, ¶8. *Wolfe* did not hold that allocation by the sentencing court is barred when presentence incarceration is equally applicable to multiple counts. Such a holding would contradict *Boettcher*’s holding that the circuit court should apply custody credits “in a mathematically linear fashion,” beginning with “the sentence that is first imposed.” *See id.*, 144 Wis. 2d at 100. For these reasons, we reject Brewer’s argument that the circuit court erred when it allocated the 2010 sentence credit first to the days remaining on count two and then to count three.

¶15 Finally, to the extent Brewer is asking this court to determine whether he has been denied good time credit, we decline to do so. The record does not include information concerning his behavior in jail or the amount of good time that was actually applied by the county sheriff. Further, it appears undisputed that by the time the circuit court decided the motion for reconsideration, Brewer had already served his jail sentences for counts two and three. Thus, any additional jail credit would be applied against the jail time imposed and stayed for count four. Whether Brewer’s probation will be revoked and, if so, how the sheriff will apply good time credits against the imposed and stayed jail time is

unknown. We decline to consider whether and how much Brewer good time credit Brewer may receive against count four.

By the Court.—Judgment and orders affirmed.

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

