

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2012

Diane M. Fremgen
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. 2011AP1010-CR
2011AP1011-CR**

**Cir. Ct. Nos. 2009CM340
2009CM648**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DARYL J. TESKA,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Walworth County: ROBERT J. KENNEDY and DAVID M. REDDY, Judges.¹
Affirmed.

¹ The Honorable Robert J. Kennedy entered the judgment of conviction. The Honorable David M. Reddy entered the order denying the postconviction motion.

¶1 GUNDRUM, J.² Daryl J. Teska appeals his judgments of conviction and an order denying postconviction relief. Teska argues that the circuit court erred by not granting him certain sentence credit on all three of his concurrent sentences for days he spent in custody presentence. Because the presentence days at issue were factually connected only with the course of conduct related to the first of Teska’s three sentences, they were not “days spent in custody in connection with the course[s] of conduct” for which the other two sentences were imposed. WIS. STAT. § 973.155(1)(a). The circuit court properly credited those days to only the first of Teska’s three sentences. We affirm.

¶2 On December 9, 2009, in a hearing before Judge Robert J. Kennedy, Teska pled guilty to two counts of knowingly violating a domestic abuse injunction as a habitual criminal in case No. 2009CM340 and to the sole count of bail jumping as a habitual criminal in case No. 2009CM648. Count one of No. 2009CM340 alleged Teska violated a domestic abuse injunction by sending a text message to the victim on June 29, 2009. Count two alleged he violated the injunction by leaving the victim a voice mail message³ on that same date. The sole count in No. 2009CM648 alleged Teska violated conditions of his bond set in No. 2009CM340 by calling and sending text messages to the victim between September 1, 2009, and September 13, 2009.

² This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

³ While the complaint states count one was for the “text message” Teska sent to the victim and count two was for the “voice message” he left for her, the complaint makes clear Teska sent multiple text messages to the victim and left multiple voice mail messages for her.

¶3 Following the plea on these charges and at the same hearing, Judge Kennedy withheld sentence on all three counts and placed Teska on two years of concurrent probation on each of the counts. As a condition of probation, Teska was ordered to serve six months in the county jail with work release on count one of No. 2009CM340.

¶4 Teska began serving his six months of condition time on count one of No. 2009CM340 on March 1, 2010. On May 23, 2010, a probation hold was placed on Teska on all three counts. Teska remained in custody on his probation hold until his probation was subsequently revoked on all three counts. With Teska's probation revoked, Judge Kennedy sentenced him to eighteen months of initial confinement followed by six months of extended supervision on each of the counts, making the sentences concurrent to each other. Judge Kennedy granted Teska sentence credit on each count for the days he spent in custody since the probation hold began on each count, May 23, 2010, until the date of sentencing. With regard to the condition time Teska served on count one of No. 2009CM340 from March 1, 2010, to May 23, 2010, Judge Kennedy only gave Teska credit for those 83 days toward his sentence on count one of No. 2009CM340. Judge Kennedy did not give Teska credit for the 83 days on the concurrent sentences on count two of No. 2009CM340 and the sole count of No. 2009CM648.

¶5 Teska filed a postconviction motion for reconsideration of the sentence credit issue, arguing that, because the sentences on each of the three counts were made concurrent to each other, the 83 days of condition time should also be applied to Teska's sentences on the other two counts. Judge David M. Reddy heard arguments on the issue and denied Teska's motion.

¶6 On appeal, Teska raises the same argument he did in his postconviction motion. The State counters that under WIS. STAT. § 973.155(1)(a) Teska bears the burden of demonstrating that the 83 days were “in connection with the course of conduct for which sentence was imposed” on the other two counts, and that Teska has not met this burden.

¶7 WISCONSIN STAT. § 973.155(1)(a), which governs sentence credit, states in relevant part: “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.*” (Emphasis added.) Whether a defendant is entitled to sentence credit pursuant to § 973.155 is a question of law reviewed de novo. *State v. Lange*, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480.

¶8 For custody credit to be granted, the days spent in custody must be factually, not just procedurally, connected to the course of conduct for which sentence was imposed. *See State v. Johnson*, 2009 WI 57, ¶33, 318 Wis. 2d 21, 767 N.W.2d 207. In this case, the six months of jail time Judge Kennedy ordered Teska to serve as a condition of probation was factually related only to the underlying course of conduct in count one of No. 2009CM340, sending a text message to the victim on June 29, 2009, in violation of the domestic abuse injunction in place at the time. Thus, the 83 days Teska served on that count alone, from the date he began serving the condition time, March 1, 2010, through the date the probation hold was put in place on all three counts, May 23, 2010, were only “in connection with” Teska sending that text message.

¶9 The “course of conduct” for which Teska’s sentence was imposed on count two of No. 2009CM340 was his conduct of calling the victim and leaving a

voice mail message for her on June 29, 2009, in violation of the domestic abuse injunction. Because Judge Kennedy had specifically ordered that Teska's six months of condition time relate only to count one of No. 2009CM340, the text message offense, the 83 days of custody time at issue were not spent "in connection with" the "course of conduct" for which sentence was imposed on count two of No. 2009CM340. Though calling and leaving a voice mail message may be similar to sending a text message, and, in this instance, these separate acts were committed on the same date, these acts were not the same course of conduct. *See State v. Tuescher*, 226 Wis. 2d 465, 475, 595 N.W.2d 443 (Ct. App. 1999) ("Wisconsin cases interpreting the phrase 'course of conduct' support the State's position that under [WIS. STAT.] § 973.155, one sentence does not arise from the same course of conduct as another sentence unless the two sentences are based on *the same specific acts.*" (Emphasis added.)). Since the 83 days at issue were only served in connection with the June 29, 2009 text message course of conduct, Judge Kennedy and Judge Reddy were correct in not crediting Teska with the 83 days on count two of No. 2009CM340, related to the calling and leaving a voice mail message course of conduct.

¶10 The "course of conduct" for which Teska's sentence was imposed on the bail jumping count in No. 2009CM648 was for his conduct of calling and sending text messages to the victim between September 1, 2009, and September 13, 2009, in violation of his bond in No. 2009CM340. Again, because Judge Kennedy had specifically ordered that Teska's six months of condition time relate only to count one of No. 2009CM340—the June 29, 2009 text message "course of conduct," the 83 days of custody time at issue were not spent "in connection with" the "course of conduct" for which sentence was imposed on the bail jumping count in No. 2009CM648. Thus Judge Kennedy and

Judge Reddy were also correct in not crediting the 83 days at issue toward Teska's sentence on case No. 2009CM648.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

