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February 5, 2014

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

2012AP2485-CR State of Wisconsin v. Jonathan Robert Blount
(L.C. # 1993CF933185)

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

Jonathan Blount, pro se, appeals an order of the circuit court denying his motion for sentence credit. Blount argues on appeal that he is entitled to sentence credit for 380 days that he spent under GPS tracking while on parole. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We summarily affirm.

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Blount focuses his argument on ***State v. Magnuson***, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536. In ***Magnuson***, the defendant was required to wear an electronic monitoring bracelet as a condition of release on bond. ***Id.***, ¶¶5-6. The Wisconsin Supreme Court held that the defendant's status did not constitute "custody" for sentence credit purposes because he could not have been charged with escape for leaving his status. ***Id.***, ¶47.

Blount was placed under GPS tracking by the Department of Corrections during two parole periods, a discretionary parole release in 2006 and mandatory release in 2010. Blount argues on appeal that, while he was under GPS tracking, he was similarly situated to persons who are placed on electronic monitoring in community residential confinement or the intensive sanctions program under WIS. STAT. §§ 301.046 and 301.048. He argues that, because persons in those programs receive sentence credit for their time spent under electronic monitoring, whereas he did not receive sentence credit for time spent under GPS tracking, his right to equal protection has been violated.

A person's right to equal protection under the law "is not implicated, much less violated, unless the groups which are treated differently are similarly situated in the first instance." ***State v. Benson***, 2012 WI App 101, ¶12, 344 Wis. 2d 126, 822 N.W.2d 484, *review denied*, 2013 WI 6, 345 Wis. 2d 402, 827 N.W.2d 96. Blount acknowledges that, while on parole, he was not in "custody" as the supreme court interpreted that term in ***Magnuson***, 233 Wis. 2d 40, ¶25. Conversely, persons in community residential confinement or the intensive sanctions program under Wis. Stat. §§ 301.046 and 301.048 are, unlike a parolee, serving the incarceration or confinement portions of their sentences. *See* WIS. STAT. §§ 301.046(1) (the community residential confinement program operates as "a correctional institution" under which "the department shall confine prisoners in their places of residence or other places designated by the

department"); 301.046(2) (inmates in community residential confinement program are "under the care and control of the institution, subject to its rules and discipline and subject to all laws pertaining to inmates of other correctional institutions"); 301.048(4)(a) (participant in intensive sanctions program "is a prisoner"). We reject Blount's argument because we are not persuaded that he is similarly situated to the individuals in the programs he identifies.

We resolve this case, then, on the basis of statutory interpretation. In ***State ex rel. Ludtke v. DOC***, 215 Wis. 2d 1, 5, 572 N.W.2d 864 (Ct. App. 1997), we held that a parolee's entitlement to sentence credit for time served on parole was governed by WIS. STAT. § 302.11(7) (1997-98), which, at the time ***Ludtke*** was decided, provided as follows:

> (a) The division of hearings and appeals in the department of administration, upon proper notice and hearing, or the department of corrections, if the parolee waives a hearing, may return a parolee released under sub. (1) or (1g)(b) or s. 304.02 or 304.06(1) to prison for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole. The revocation order shall provide the parolee with credit in accordance with ss. 304.072 and 973.155.

Ludtke, 215 Wis. 2d at 11.

We concluded in ***Ludtke*** that the unambiguous language of WIS. STAT. § 302.11(7) distinguished between "custody" and time served on parole. Interpreting ***State v. Gilbert***, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983), we reasoned that "[t]he factor of incarceration, or deprivation of liberty, lies at the heart of the ***Gilbert*** ruling" and concluded that "[t]hat factor is not present with a parolee who has been granted the conditional privilege of freedom and liberty."

Since ***Ludtke*** was decided, WIS. STAT. § 302.11(7) has been amended, but the key language stating that the "remainder of the sentence is the entire sentence, less time served in

custody prior to parole[,]" has remained unchanged during the time periods at issue in this case. *See* WIS. STAT. § 302.11(7)(am) (2005-06), WIS. STAT. § 302.11(7)(am) (2007-08), WIS. STAT. § 302.11(7)(am) (2009-10). Accordingly, our holding in ***Ludtke*** controls and, applying that holding to this case, we conclude that Blount is not entitled to sentence credit for time served on parole while subject to GPS tracking.

IT IS ORDERED that the order is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals