



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688

Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT III/II

April 9, 2014

To:

Hon. William M. Gabler Sr.
Circuit Court Judge
Eau Claire County Courthouse
721 Oxford Ave.
Eau Claire, WI 54703-5496

Kristina Aschenbrenner
Clerk of Circuit Court
Eau Claire County Courthouse
721 Oxford Ave.
Eau Claire, WI 54703-5496

William L. Gansner
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Gary M. King
District Attorney
721 Oxford Ave.
Eau Claire, WI 54703

Timothy A. Gould, #311599
Oakhill Corr. Inst.
P.O. Box 938
Oregon, WI 53575-0938

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

2013AP1828-CR

State of Wisconsin v. Timothy A. Gould (L.C. #2010CF634)

Before Brown, C.J., Reilly and Gundrum, JJ.

Timothy Gould appeals *pro se* from a July 2013 circuit court order denying his request for sentence credit in Eau Claire County circuit court case No. 2010CF634. Based upon our review of the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2011-12).¹ We reverse and remand for a circuit court determination of sentence credit after considering the facts and the applicable law.

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

In July 2010, while on extended supervision for prior crimes,² Gould was arrested for seventh offense operating while intoxicated and other charges. In February 2011, Gould's extended supervision was revoked and he was reconfined.³ In June 2011, Gould was sentenced for operating while intoxicated 7th concurrent to the sentence Gould was then serving. Since his June 2011 sentencing, Gould has been seeking sentence credit in his OWI 7th case. The circuit court has denied sentence credit on several occasions, notably at the June 2011 sentencing, in October 2012 (in response to a sentence credit motion from Gould), and in July 2013 (in response to a motion the circuit court construed as a request to reconsider the October 2012 denial of sentence credit).

We acknowledge that the June 2011 sentencing and the October 2012 denial of Gould's sentence credit request are not before this court. Nevertheless, these proceedings provide relevant background and context to our decision to reverse the circuit court's July 2013 order and remand for a sentence credit determination.

At Gould's June 2011 sentencing in his OWI 7th case, the circuit court apparently made two errors of law on the question of sentence credit. First, the court may have erred when it found that no credit was available for Gould's presentence custody because Gould was on an extended supervision hold. The record suggests that Gould was on an extended supervision hold

² Gould was on extended supervision in Eau Claire County circuit court case nos. 2004CF835 and 2005CF414.

³ The record suggests that Gould's reconfinement period began in March 2011, but we cannot make a finding about the exact date. *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994) (the court of appeals does not find facts).

because he committed OWI 7th.⁴ If Gould's extended supervision hold was due to the conduct in his OWI 7th case, Gould might be entitled to some amount of credit on both his OWI 7th sentence and his extended supervision reconfinement. *State v. Hintz*, 2007 WI App 113, ¶¶7 n.3, 9-10, 300 Wis. 2d 583, 731 N.W.2d 646. The circuit court did not consider *Hintz* at sentencing.

The second likely error at sentencing occurred when the circuit court denied sentence credit to avoid depreciating the seriousness of Gould's offense. Concerns about depreciating the seriousness of the offense relate to the decision whether to impose probation, *State v. Gallion*, 2004 WI 42, ¶44, 270 Wis. 2d 535, 678 N.W.2d 197, not to sentence credit. The sentence credit statute requires the court to determine sentence credit at sentencing. WIS. STAT. § 973.155(2). Under § 973.155(1)(a), “[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 court made an error of law when it declined to apply the sentence credit statute.

We turn to the October 2012 denial of sentence credit. The circuit court found that Gould's OWI 7th charge caused his extended supervision hold but denied Gould credit because Gould had received credit on his extended supervision reconfinement. The circuit court did not consider whether *Hintz* applied, and this may have been error as well.

⁴ In October 2012, as discussed below, the circuit court found that Gould's operating while intoxicated 7th charge caused him to be in custody on a hold.

We turn to the order on appeal: the circuit court's July 2013 denial of Gould's July 2013⁵ sentence credit motion after construing the motion as a request to reconsider the circuit court's October 2012 denial of sentence credit.

At the time Gould sought sentence credit in July 2013, the time for seeking reconsideration of the October 2012 sentence credit decision had long since expired. Therefore, the court erred when it construed Gould's July 2013 sentence credit request as a reconsideration motion. Gould's July 2013 motion was a new sentence credit motion, and the court had a duty under *State v. Agnello*, 226 Wis. 2d 164, 593 N.W.2d 427 (1999), to consider Gould's sentence credit request on the merits. *Id.* at 175 (courts have a duty to appreciate commonplace legal issues before them). The court erred because it did not address the merits of Gould's July 2013 sentence credit request.

We reverse because: (1) the circuit court denied sentence credit at Gould's June 2011 sentencing for reasons that likely amounted to errors of law; (2) the sentence credit statute has not been applied to Gould; (3) Gould appropriately requested credit in July 2013, but the circuit court erroneously construed Gould's sentence credit motion as a reconsideration request; and (4) the circuit court has never applied *Hintz*, and it is not clear to this court from this record that *Hintz* does not apply.

⁵ Gould's sentence credit motion was dated June 12, 2013, and it was filed in the circuit court on July 8, 2013. The order on appeal refers to a June 17, 2013 sentence credit motion, but the circuit court docket entries do not show any corresponding document. We assume that the circuit court denied the motion filed on July 8, 2013.

In addition to the foregoing grounds for reversal, we observe that Gould is being shuttled between the circuit court and the Department of Corrections as each suggests that the other should determine sentence credit.⁶ The court did not address sentence credit at sentencing, and in the intervening years, the Department of Corrections has also declined to address sentence credit. If the Department of Corrections “is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief.” WIS. STAT. § 973.155(5). The circuit court must address Gould’s July 2013 sentence credit request.

We reverse the July 2013 order and remand for a determination of sentence credit after consideration of the record, Gould’s July 2013 motion, the relevant facts and the applicable law, including *Hintz*.⁷

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21 and the cause is remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals

⁶ See, for example, the minutes of the October 25, 2012 hearing. In addition, we note the letters from the Department of Corrections dated June 21 and December 12, 2013, which Gould submitted to this court. In those letters, the Department of Corrections suggests that Gould should petition the court for sentence credit.

⁷ We cannot find the facts to which we could apply the sentence credit rules. *Cf. State v. Abbott*, 207 Wis. 2d 624, 628, 558 N.W.2d 927 (Ct. App. 1996) (we can apply sentence credit statute to undisputed facts); *Kovalic*, 186 Wis. 2d at 172.