



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 II/IV

January 15, 2016

To:

Hon. Michael O. Bohren
Circuit Court Judge
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Kathleen A. Madden
Clerk of Circuit Court
Waukesha County Courthouse
515 W. Moreland Blvd.
Waukesha, WI 53188

Andrea Taylor Cornwall
Asst. State Public Defender
735 N. Water St., Ste. 912
Milwaukee, WI 53202

Gabe Johnson-Karp
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Susan Lee Opper
District Attorney
515 W. Moreland Blvd. Rm. G-72
Waukesha, WI 53188-2486

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

2014AP2868-CR	State of Wisconsin v. David Helm-Lyon (L.C. # 2011CF1070)
2014AP2869-CR	State of Wisconsin v. David Helm-Lyon (L.C. # 2012CF291)
2014AP2870-CR	State of Wisconsin v. David Helm-Lyon (L.C. # 2012CF293)

Before Lundsten, Higginbotham and Blanchard, JJ.

David Helm-Lyon appeals an order denying his motion for sentence credit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Helm-Lyon's arguments, and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2013-14).¹

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

In Waukesha County Circuit Court case No. 2004CF1025, Helm-Lyon was convicted of theft as party to a crime. The court imposed and stayed concurrent five-year sentences in the 2004 case and another case, and placed Helm-Lyon on seven years of probation. On September 19, 2011, Helm-Lyon was arrested for burglary in Waukesha County Circuit Court case No. 2011CF1070. On the same day as his arrest, Helm-Lyon was placed on a probation hold. Helm-Lyon's probation was ultimately revoked and, on November 22, 2011, he was sentenced to five years of confinement in the 2004 case.

The State subsequently filed additional complaints against Helm-Lyon in Waukesha County Circuit Court case Nos. 2012CF291 and 2012CF293, including charges of burglary, misdemeanor theft, armed burglary and felon in possession of a firearm. Although bail was set in the new cases, Helm-Lyon remained confined under his revocation sentence during the pendency of the newer charges. Helm-Lyon was convicted upon his no-contest pleas in the newer cases and, on December 14, 2012, the court imposed concurrent and consecutive sentences resulting in twelve years of initial confinement and eight years of extended supervision.²

² For the burglary in case No. 2011CF1070, the court imposed six years of initial confinement and four years of extended supervision. With respect to the burglary in case No. 2012CF291, the court imposed a consecutive ten-year term consisting of six years of initial confinement and four years of extended supervision. With respect to the theft in case No. 2012CF291 and the armed burglary in case No. 2012CF293, the court imposed concurrent sentences of two years (one and one-half year of initial confinement and six months of extended supervision) and fifteen years (ten years of initial confinement and five years of extended supervision), respectively. Finally, the court imposed and stayed a ten-year sentence for the felon in possession of a firearm charge, and placed Helm-Lyon on five years of consecutive probation.

Helm-Lyon filed a postconviction motion seeking 452 days of sentence credit in case No. 2011CF1070, representing the time between the date of his arrest and the date he was sentenced in that case. With respect to case Nos. 2012CF291 and 2012CF293, Helm-Lyon sought 267 days of credit, for the time between the date of his first court appearance in those matters and the date he was sentenced. The court ultimately awarded 64 days of credit against the concurrent sentences for the time Helm-Lyon spent in confinement before his November 22, 2011 sentencing after revocation, but denied credit for the period after his sentence after revocation was imposed. This appeal follows.

Whether a defendant is entitled to sentence credit pursuant to WIS. STAT. § 973.155 is a question of law we review independently. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). In order to receive sentence credit, a defendant must establish: “(1) that he or she was in ‘custody’; and (2) that the custody was in connection with the course of conduct for which the sentence was imposed.” *State v. Dentici*, 2002 WI App 77, ¶5, 251 Wis. 2d 436, 643 N.W.2d 180 (citation omitted).

Here, there is no dispute that Helm-Lyon was “in custody” for all relevant time periods. The “in connection with” element is deemed satisfied when the defendant is in custody for a new offense as well as a probation hold, when the hold is predicated at least in part on the new offense. See WIS. STAT. § 973.155(1)(b); see also *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). Thus, during the period in which a defendant is confined under a new charge and a probation hold, the defendant will be entitled to credit against both his eventual sentence on the new charge as well as the revocation sentence (as long as the sentences are made concurrent). See *State v. Hintz*, 2007 WI App 113, ¶12, 300 Wis. 2d 583, 731 N.W.2d 646.

Unless the acts for which the first and second sentences imposed are truly related or identical, however, “the sentencing on one charge severs the connection between the custody and the pending charges.” *Beets*, 124 Wis. 2d at 383. Accordingly, while time spent confined on a probation hold and an unrelated new charge may be creditable against both sentences, once the defendant is sentenced in one of the cases, that sentence severs the connection between continuing confinement and any later-imposed sentences. *See id.*; *see also State v. Tuescher*, 226 Wis. 2d 465, 479, 595 N.W.2d 443 (Ct. App. 1999) (holding that credit is not required against future sentences for time spent serving one sentence unless the “sentences are imposed for the same specific acts”).

Consistent with the severance principle outlined in *Beets*, the circuit court granted Helm-Lyon sixty-four days of credit against his concurrent sentences arising from the new charges for the period from the date of his arrest and probation hold until the date of his sentencing after revocation. Helm-Lyon nevertheless contends he is entitled to the full amount of credit he sought in his postconviction motion, claiming *Beets* does not create the type of bright-line rule the circuit court applied here. Helm-Lyon argues that three cases decided after *Beets* establish that he is entitled to “full credit.” We are not persuaded.

The first case, *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), is inapposite. *Boettcher* sets forth the day-for-day principle for consecutive sentences—that days spent in custody should be credited on a day-for-day basis to the first-imposed sentence with no dual credit allowed. *Id.* at 87. Although *Boettcher* acknowledges that dual credit may be allowed when concurrent sentences are imposed, Helm-Lyon fails to establish that dual credit is required under *Boettcher* for the concurrent sentences here.

The next case, *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989), is likewise distinguishable. There, the court determined that credit for pre-sentence incarceration should apply to all of the concurrent three-year terms imposed. *Id.* at 744. The *Ward* court acknowledged that “[a]pplying pre-sentence credit against only one of the concurrent ... terms defeats the concurrent nature of the sentence because the first term is reduced ... while the remaining ... terms stand at ... full years.” *Id.* at 745. The *Ward* court further noted its result was consistent with the conclusion of the Wisconsin Criminal Jury Instructions Committee, which stated: “When concurrent sentences are imposed at the same time or for offenses *arising from the same course of conduct*, sentence credit is to be determined as a total number of days and is to be credited against each sentence imposed.” *Id.* at 746 (emphasis added; quoted source omitted). Here, the sentence after revocation and the subsequent concurrent sentences for the new offenses did not arise from the same course of conduct. A revocation sentence is based on the underlying conduct for which the defendant was initially sentenced, not on the conduct for which probation was revoked. *See Beets*, 124 Wis. 2d at 378.

Finally, *State v. Yanick*, 2007 WI App 30, ¶1, 299 Wis. 2d 456, 728 N.W.2d 365, is inapplicable to the present matter because it involved credit for jail time served as a condition of probation. There, Yanick was serving conditional jail time on his conviction for operating while intoxicated, fifth offense, when he was transferred to prison to begin serving a separate sentence imposed for an unrelated felony escape conviction. *Id.*, ¶2. When Yanick’s probation was later revoked on the OWI-fifth offense, he sought credit for the conditional jail time that overlapped with his prison sentence on the escape conviction. The *Yanick* court held that a defendant is entitled to credit for conditional jail time that overlaps with an unrelated prison sentence. *Id.*, ¶24. Although Helm-Lyon suggests *Yanick* no longer makes credit dependent on the sentences

arising from the same course of conduct, we agree with the State that *Yanick* is limited to its facts. We are not persuaded that *Yanick* undercuts the severance principle or otherwise entitles Helm-Lyon to the sentence credit sought.

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals