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May 24, 2016

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

2015AP1625-CR

State of Wisconsin v. Breoen Tyree Cotton (L.C. # 2012CF1493)

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

Breoen Tyree Cotton appeals a postconviction order. The only issue is whether the trial court wrongly denied his request for seven days of sentence credit. The State concedes error. Upon our review of the briefs and record, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We summarily

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

reverse the postconviction order and remand with directions to award Cotton the seven days of sentence credit he seeks.

Cotton was serving a term of extended supervision in Milwaukee County case No. 2005CF4676 when he was arrested for the crimes underlying this appeal on March 28, 2012. Following his arrest, he was in custody pursuant to cash bail ordered in this matter and an extended supervision hold in the earlier case. His extended supervision in case No. 2005CF4676 was revoked on June 29, 2012. He arrived at Dodge Correctional Institution seven days later, on July 6, 2012. He eventually pled guilty in the instant matter. The trial court imposed sentences concurrent with the term of reconfinement he was serving in case No. 2005CF4676. The trial court also awarded Cotton credit against his sentences for the period from March 28, 2012, the date of his arrest in this case, through June 29, 2012, the date of his revocation in case No. 2005CF4676.

Cotton pursued postconviction relief, arguing, as relevant here, that he should receive seven additional days of presentence credit for the period from June 29, 2012, through July 6, 2012, when he arrived at Dodge Correctional Institution to resume serving his sentence in case No. 2005CF4676. The trial court denied the request, and Cotton appeals.

Pursuant to WIS. STAT. § 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.” Whether an offender is entitled to sentence credit under the statute is a question of law that we review *de novo*. See *State v. Carter*, 2010 WI 77, ¶¶11-12, 327 Wis. 2d 1, 785 N.W.2d 516.

“[T]wo conditions must be met in order for a defendant to receive sentence credit: (1) the defendant must have been ‘in custody’ for the period in question; and (2) the period ‘in custody’ must have been ‘in connection with the course of conduct for which the sentence was imposed.’” *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶15, 274 Wis. 2d 1, 681 N.W.2d 914 (citation omitted). Here, no question exists about the first condition because Cotton has been continuously in custody since his arrest on March 28, 2012. Rather, we must determine the event, if any, that severed Cotton’s presentence custody from its connection to his crimes in this case. The trial court concluded that the relevant event was the revocation of Cotton’s extended supervision in case No. 2005CF4676; the parties contend that the relevant event was his return to prison seven days later. Although no published case squarely answers the question, we agree with the parties that persuasive authority and relevant statutory language supports Cotton’s claim for the seven days of credit he seeks.

The rule is long-established that when a defendant begins serving a sentence in one case, the defendant is no longer entitled to credit for time spent in custody awaiting resolution of another case. See *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). In *Beets*, the supreme court determined that when an offender commits a new crime while on probation and ultimately receives concurrent sentences for the old and the new crimes, the offender should receive credit against the sentence for the new crime for all days in custody through the date of probation revocation and up through the date of sentencing for the older offenses. See *id.* at 374-76. The court explained:

any connection which might have existed between custody for the [old] offenses and the [new crime] was severed when the custody resulting from the probation hold was converted into a revocation and sentence. From that time on, [the offender] was in prison serving an imposed and unchallenged sentence; and whether [the

offender] was also awaiting trial on the [new] charge was irrelevant.

Id. at 379.

This court subsequently applied *Beets* in circumstances where an offender serving a term of extended supervision committed a new crime that led to revocation of that supervision. *See State v. Presley*, 2006 WI App 82, ¶¶2-3, 292 Wis. 2d 734, 715 N.W.2d 713. At the time *Presley* arose, an offender received a reconfinement hearing—a type of sentencing proceeding—in the trial court following revocation of extended supervision. *See id.*, ¶¶2, 10; WIS. STAT. § 302.113(9)(am) (2003-04). The trial court in *Presley* conducted the reconfinement hearing and the sentencing jointly and imposed a reconfinement term concurrent with the sentence the offender received for the new crime. *Id.*, 292 Wis. 2d 734, ¶2. We determined the offender was entitled to sentence credit against the new sentence for the period between the revocation of extended supervision and the reconfinement hearing in the older matter. *Id.*, ¶15. We explained that, under *Beets*, “the lynchpin to the uncoupling of the connection between the new and old charges was the act of sentencing, not the revocation determination.” *Presley*, 292 Wis. 2d 734, ¶9.

After *Presley*, the legislature shifted authority for reconfinement determinations from the trial court to an administrative agency. *See* 2009 Wis. Act 28, § 2726; WIS. STAT. § 302.113(9)(ag)-(am). The trial court in the instant case concluded that, in the absence of a reconfinement determination by a court, the revocation decision is “the equivalent to the act of sentencing”; therefore, revocation of extended supervision in case No. 2005CF4676 severed the connection between Cotton’s custody and the new crimes.

As the parties' briefs explain, however, we rejected the trial court's position when we decided *Presley*. There, the State argued that a defendant is serving a sentence for a past conviction as of the date his or her extended supervision is revoked, and therefore revocation severs the connection between old and new charges. See *id.*, 292 Wis. 2d 734, ¶¶10, 14. We disagreed, finding support for our position in, *inter alia*, WIS. STAT. § 304.072(4). See *Presley*, 292 Wis. 2d 734, ¶14. The statute provides, in part, that “[t]he sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution subject to sentence credit ... according to the terms of [WIS. STAT.] s. 973.155.” See § 304.072(4). In light of that language, we concluded:

[i]f the State's position were to be adopted—that [an offender] was serving a sentence once the extended supervision was revoked—it would appear to conflict with § 304.072(4), which unambiguously states that the sentence begins once the offender is transported and received at a correctional institution, not when the revocation occurs.

Presley, 292 Wis. 2d 734, ¶14.

The trial court in this case discounted WIS. STAT. § 304.072(4), describing the provision in a footnote as “a sentence computation statute, not a sentence credit statute.” Sentence computation and sentence credit are closely related concerns, however; indeed, the text of § 304.072(4) contains an explicit reference to WIS. STAT. § 973.155. “Statutes relating to the same subject matter are to be construed together and harmonized.” *State v. Robinson*, 140 Wis. 2d 673, 677, 412 N.W.2d 535 (Ct. App. 198). The parties' approach, like our decision in *Presley*, satisfies that objective.

We also observe that the parties' position is further supported by WIS JI—CRIMINAL SM34A, the special materials concerning sentence credit drafted by the Wisconsin Jury

Instruction Committee. Although these materials are not controlling, they are persuasive when interpreting WIS. STAT. § 973.155, and their use fosters uniform application of the statute throughout this state. *See State v. Gilbert*, 115 Wis. 2d 371, 378-79, 340 N.W.2d 511 (1983). The committee materials describe the mechanics of determining sentence credit under various sets of facts, including a scenario like the one at issue here. *See* § V.C.1.c., Concurrent Sentence Example 7.² The Committee states: “[t]he offender’s custody was connected to both the E[xtended] S[upervision] case and the new offense until the time he was returned to prison. The return to prison [to serve a reconfinement term] severed the connection between the offender’s custody and the new offense.” *Id.* Citing WIS. STAT. § 304.072(4), the Committee explains: “the sentence resumes running when the person is returned to prison.” *See* § V.C.1.c., Comment 36.

Our review of the foregoing persuades us that revocation of Cotton’s extended supervision in case No. 2005CF4676 was not sufficient to sever the connection between Cotton’s custody and the crimes charged in the instant matter. Revocation of supervision did not determine the severance date in *Beets* or in *Presley*, and revocation of supervision is not determinative here. Rather, the event that severed the connection between Cotton’s custody and the new crimes was Cotton’s arrival at a correctional institution to resume serving the sentence in

² WIS JI—CRIMINAL SM-34A, § V.C.1.c., Concurrent Sentence Example 7, applies the following facts:

While Smith is on extended supervision he is arrested for a new offense. He is held in custody on an ES hold and on cash bail on the new offense. Three months after his arrest his ES is revoked, and a month after revocation, he is returned to the prison system to commence reconfinement time. Two months after being returned to prison he is convicted and sentenced for the new offense and given a concurrent sentence.

the older case. Accordingly, we reverse and remand with directions to credit Cotton with seven additional days toward the sentences in this case.

IT IS ORDERED that the postconviction order is summarily reversed and this matter is remanded with directions.

Diane M. Fremgen
Clerk of Court of Appeals