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

2015AP1552-CR State of Wisconsin v. Jason William Brown (L.C. # 2011CF495)

Before Lundsten, Higginbotham and Sherman, JJ.

The State appeals an order granting Jason Brown's motion for postconviction relief and an order denying reconsideration. On Brown's motion, the circuit court awarded Brown 360 days of additional sentence credit on Count 2 of Brown's conviction, accepting Brown's argument that Count 2 was part of the same course of conduct as Count 1, the count on which the 360 days had been served. 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

(2013-14).[1] We reverse the order awarding additional sentence credit, and remand for entry of an amended judgment of conviction.

BACKGROUND

Brown was charged in 2011 with four counts of delivery of heroin as a result of his participation in four controlled buys, each involving a confidential police informant. Count 1 was for a buy that occurred on February 18, 2011, in a pharmacy parking lot. Count 2 was for a buy that occurred on February 16, 2011, in an alley.

In 2012, Brown entered a guilty plea to these counts, and the other two counts were dismissed and read in.[2] On Count 1, the circuit court withheld sentence and sentenced Brown to seven years of probation with one year of jail time as a condition. On Count 2, the circuit court withheld sentence and sentenced Brown to seven years of probation, concurrent to the probation on Count 1. Brown served one year of jail time on Count 1. He served no jail time on Count 2.

Brown violated the terms of his probation, and his probation on both counts was revoked. As a result, he was taken into custody on April 24, 2014, and remained in custody for 140 days, until a hearing for sentencing after revocation on September 11, 2014. The circuit court sentenced Brown to a bifurcated ten-year sentence on each count, to run concurrent. On Count 1 and Count 2, the circuit court awarded 140 days of sentence credit for the time in custody

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

[2] A separate felony bail jumping case, Case No. 2011CF2688, was resolved at the same time. It resulted in a sentence to run consecutive to the sentence at issue, and is not relevant to the question presented by this case.

following the probation revocation. On Count 1, the circuit court awarded the 360 days of confinement time that had been served in jail on that count.

Brown filed a postconviction motion seeking to have credited to Count 2 the 360 days of custody that he served and had credited on Count 1. The circuit court granted Brown's motion, concluding that, because the two crimes were both part of a course of conduct for which sentence was imposed, the sentence credit statute required crediting the days on the second count as well.

DISCUSSION

The question we address is whether, under Wisconsin's sentence credit statute, the 360 days[3] of jail time served on Count 1 and applied as sentence credit to Count 1 must be applied to Count 2 as well. The application of a statute to a particular set of facts is a question of law that is reviewed de novo. ***State v. Piddington***, 2001 WI 24, ¶13, 241 Wis. 2d 754, 623 N.W.2d 528. WISCONSIN STAT. § 973.155(1)(a) states that "[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."

Cases interpreting this statute have focused on what constitutes a "connection" between the "days spent in custody" and "the course of conduct for which sentence was imposed." For example, ***State v. Carter***, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516, examined whether a connection existed between a period of custody in another state and the course of conduct for which the defendant was being sentenced in Wisconsin, and it turned on the question of whether

[3] The number of days spent in custody is not in dispute.

the out-of-state custody resulted in any part from the Wisconsin warrant issued in the case. *See* ***id.***, ¶21. In ***Carter***, our supreme court explained that, in ***State v. Johnson***, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207, "the question was whether the statute requires a court to apply the same sentence credit to *each* concurrent sentence given to an offender at the same sentencing hearing, regardless of whether the offender's days spent in presentence custody were in connection with the course of conduct for which [each] sentence was imposed." ***Carter***, 327 Wis. 2d 1, ¶54 (internal quotation marks omitted). According to ***Carter***, ***Johnson*** held that the statute did not require sentence credit for Johnson under those circumstances because "[t]he cases arose from separate courses of conduct, and each period of custody for which the defendant sought sentence credit was 'tied directly to only one case.'" ***Carter***, 327 Wis. 2d 1, ¶54 (quoted source omitted). Further, the ***Carter*** court explained, the ***Johnson*** court "rejected the defendant's reliance on a procedural connection between multiple concurrent sentences by emphasizing that it is the factual connection between custody and the conduct for which sentence is imposed that is controlling." ***Carter***, 327 Wis. 2d 1, ¶56.

As ***Johnson*** stated, cases applying WIS. STAT. § 973.155,

> attempt to distinguish time spent in presentence custody that is factually "in connection with the course of conduct for which sentence was imposed" from time spent in presentence custody that is *not* factually "in connection with the course of conduct for which sentence was imposed." The statute does not provide sentence credit for time in custody that is not related, or is only procedurally related, to the matter for which sentence is imposed.

Johnson, 318 Wis. 2d 21, ¶45.

Two earlier cases, ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914, and ***State v. Tuescher***, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999),

addressed related questions. In ***Thorson***, the question was whether a person "reincarcerated for a parole violation, is entitled to claim sentence credit for time spent in detention during the pendency of a Chapter 980 [civil] proceeding." ***Thorson***, 274 Wis. 2d 1, ¶11. Our supreme court concluded that he was not entitled to the credit in part because the custody was not in connection with the offense for which he was sentenced. *See* ***id.***, ¶¶30-38. This was so because "Thorson was not detained for the specific offense that caused his original conviction." ***Id.***, ¶34.

In ***Tuescher***, the defendant faced multiple charges related to a shootout with police that occurred when he was confronted while committing a burglary. ***Tuescher***, 226 Wis. 2d at 467. After trial, Tuescher had an attempted homicide conviction vacated due to a jury instruction error and was subsequently convicted of first-degree reckless injury. ***Id.*** Tuescher then sought sentence credit for the reckless injury sentence "for the period between the reversal of his first conviction and the imposition of the second sentence" during which he had "remained incarcerated on sentences for other offenses committed during the criminal episode which included the shooting." ***Id.*** The court of appeals concluded that, where there were "multiple concurrent sentences imposed at different times, but arising from a single, relatively brief criminal episode," ***id.*** at 472, a defendant "earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts," ***id.*** at 479. In reaching this conclusion, the ***Tuescher*** court relied in part on the supreme court's express approval in ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), of the resolution of ***State v. Gavigan***, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984), which rejected the argument that a robbery charge and fleeing charge constituted a single course of conduct such that time in custody on one charge could be applied to the other. *See* ***Tuescher***, 226 Wis. 2d at 473-74. In ***Beets***, our supreme court stated: "We conclude that the same rationale as that expressed in

Gavigan, which we expressly approve, is applicable and controlling here. We accept the ***Gavigan*** holding by the court of appeals as precedent for this court." ***Beets***, 124 Wis. 2d at 381.

Brown disparages ***Tuescher*** as stale, and emphasizes the cases stating that the test is one of factual connection. He thus points to language in ***Carter*** and ***Johnson*** to support the proposition that sentence credit is due on sentences for separate counts where a factual connection, as distinguished from a procedural connection, exists between the conduct underlying the first count and the conduct underlying the second count. He argues that this is true because what the cases require is factual connection, and "the *two acts* forming the basis for [Brown's] convictions and sentences *were factually connected*" (emphasis added). His argument is that this factual connection between the two acts turns them into the "course of conduct" for which he was sentenced.

The argument fails because a factual connection between two criminal acts does not render them a single course of conduct. In ***Carter*** and ***Johnson***, the relevant factual connection is between the custody and the course of conduct for which sentence was imposed, not between the crimes for which the defendant is sentenced. Further, it is clear from ***Thorson***, ***Tuescher***, and ***Gavigan*** that sentence credit is not based on whether there is a factual connection between two acts that lead to convictions and sentences. No case holds that, for purposes of the sentence credit statute, factual connections between separate criminal charges merge multiple charges into a single course of conduct.[4] Nor do any of these cases support the proposition that, when

[4] *See* ***State v. Tuescher***, 226 Wis. 2d 465, 476, 595 N.W.2d 443 (Ct. App. 1999) (noting that ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), "provided a useful discussion of the history and purpose of the phrase 'course of conduct' in [WIS. STAT.] §973.155").

multiple counts are charged under one case number, as is permitted under WIS. STAT. § 971.12, the counts are automatically rendered a single course of conduct for purposes of applying the sentence credit statute. Nothing in ***Johnson***, ***Carter***, ***Thorson***, ***Tuescher***, or ***Gavigan*** leads to a grouping of individual crimes that share similarities to create a course of conduct for this purpose. In this case, Counts 1 and 2 arose from separate courses of conduct occurring on different dates and in different locations, and charged as separate crimes. We conclude that the period of custody for which Brown sought sentence credit is applicable only to Count 1, the count on which Brown served the conditional jail time.

Upon the foregoing reasons,

IT IS ORDERED that the order awarding additional sentence credit is summarily reversed pursuant to WIS. STAT. RULE 809.21, and the cause is remanded for entry of an amended judgment of conviction.

Diane M. Fremgen
Clerk of Court of Appeals