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DISTRICT I

February 21, 2018

To:

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

2017AP194-CR

State of Wisconsin v. Sean M. Barbosa (L.C. # 2015CF2533)

Before Brennan, P.J., Kessler and Dugan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Sean M. Barbosa appeals a judgment convicting him of three counts of possession of cocaine with intent to deliver, as a second or subsequent offense. He also appeals the circuit court's order denying his motion for sentence credit. Barbosa argues that he is entitled to 343 additional days of sentence credit. We affirm.

Barbosa first argues that he should be given sentence credit from June 9, 2015, the date of his arrest in this case, until May 16, 2016, the date he was received at Dodge Correctional Institution to serve his sentence in a separate case, Ozaukee County Circuit Court case No. 2013CF93. Barbosa concedes that under *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988), he is not entitled to sentence credit because he was placed on a probation hold in Ozaukee County Circuit Court case No. 2013CF93, as a result of his arrest in this case. *See id.* (dual sentence credit is not permitted when credit has already been applied upon revocation of probation to reduce a previously imposed sentence). However, Barbosa argues that *Boettcher* is wrongly decided and should be overruled by this court. This argument is unavailing. “The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.” *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). We are bound by the supreme court’s decision in *Boettcher*.

Barbosa next argues that this court should provide him with relief under the rule of lenity, a common law rule developed in federal courts. *See State v. Kittilstad*, 231 Wis. 2d 245, 267, 603 N.W.2d 732 (1999). Under the rule of lenity, when “a criminal statute is ambiguous, it should be interpreted in a defendant’s favor.” *Id.* Barbosa has not shown that he is entitled to relief based on the rule of lenity because he does not argue that the sentence credit statute, WIS. STAT. § 973.155 (2015-16),¹ is ambiguous. To the contrary, he argues that it is *not* ambiguous. Therefore, Barbosa has not shown that he is entitled to relief based on the rule of lenity.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

Finally, Barbosa argues that he is entitled to sentence credit under WIS. STAT. § 304.072(4). That statute pertains to revoked parolees and persons on extended supervision. Barbosa was on *probation* in Ozaukee County Circuit Court case No. 2013CF93. He was not a revoked parolee or a person on extended supervision. Therefore, the statute does not apply to Barbosa.

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Acting Clerk of Court of Appeals