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

November 27, 2018

To:

Hon. James J. Duvall
Circuit Court Judge
407 Second St. S.
Alma, WI 54610

Scott E. Rosenow
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Margaret Feuerhelm
Clerk of Circuit Court
Pierce County Courthouse
P.O. Box 129
Ellsworth, WI 54011-0129

Dennis Schertz
Schertz Law Office
P.O. Box 133
Hudson, WI 54016

Sean E. Froelich
Pierce County District Attorney
P.O. Box 808
Ellsworth, WI 54011-0808

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

2017AP1679-CR State of Wisconsin v. Robert David Fernandez Close
(L. C. No. 2008CF60)

Before Stark, P.J., Hruz and Seidl, 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).

Robert Fernandez Close appeals an amended judgment convicting him of aggravated battery with intent to cause great bodily harm while using a dangerous weapon, and an order denying his postconviction 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. *See* WIS. STAT. RULE 809.21 (2015-16).[1]

Close was charged with attempted first-degree intentional homicide while using a dangerous weapon, and aggravated battery while using a dangerous weapon. The criminal complaint alleged that, near bar-time, Close was in a bar and made remarks about a man's wife, after which that man and Close began "butting chests." Friends held them back from fighting each other. After the bar closed, Close was waiting in a nearby park where a fight then ensued between him and the man from the bar. Close stabbed the individual eleven times in the chest and stomach with a switchblade knife. Police executed a search warrant on Close's residence after identifying him based on surveillance tape from the bar and statements of citizen witnesses, and he was arrested.

Close was simultaneously placed on a probation hold in Pierce County case Nos. 2004CF127 and 2004CF165. Close pleaded guilty in the present case to the aggravated battery charge while the attempted homicide count was dismissed, and a joint sentencing hearing was held for the present case and case No. 2004CF127.[2] Close was first sentenced after revocation of extended supervision in case No. 2004CF127 to nine months and three days. In the present case, the circuit court imposed ten years' initial confinement and five years' extended supervision "consecutive to … any other sentences imposed." The court ordered 285 days of sentence credit without specifying the sentence to which the credit would apply.

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

[2] It appears Close was sentenced in case No. 2004CF165 on the same date.

The Department of Corrections later wrote a letter to the circuit court asking for clarification on Close's sentence credit. The correspondence explained that Close received sentence credit on case Nos. 2004CF127 and 2004CF165, and "the 285 days sentence credit on the judgment [in the present case] appears to be duplicate credit," referencing ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988). The letter further explained that Close's sentence in the present case was ordered to run consecutive "to any other sentence." The circuit court amended the judgment of conviction to reflect that Close was not entitled to any sentence credit in the present case.

Close subsequently moved to reinstate the sentence credit in the present case. The circuit court denied the motion, stating that ***Boettcher*** was "the law of the land." Close then moved for reconsideration, which the court denied. Close appealed pro se, but then voluntarily dismissed his appeal. Through counsel, Close then again moved for sentence credit in the present case, and the court again denied the motion, reiterating that ***Boettcher*** was "the law of the land" and "binding precedent." Close now appeals.

Close presents the issue on appeal as whether he "is entitled to sentence credit in all of the cases for which he was in custody." Whether a defendant is entitled to sentence credit is a question of law that we determine independently of the circuit court. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480 (2002).

In ***Boettcher***, our supreme court held that a defendant is not entitled to receive duplicate credit on a consecutive sentence. ***Boettcher***, 144 Wis. 2d at 87. Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively. ***Id.*** ***Boettcher*** also states "the credits should be applied to the

sentence that is first imposed." ***Id.*** at 100. The circuit court in the present case expressly stated that the sentence was "consecutive to … any other sentences imposed." ***Boettcher*** therefore controls this case.

Close acknowledges that "***Boettcher*** and its progeny are controlling precedent and that under ***Boettcher***, he would not be entitled to presentence credit on all the charges for which he was in custody." Nevertheless, Close argues we should "reexamine" ***Boettcher*** because that case "was mistaken and objectively wrong." He argues our supreme court erred by failing to apply the plain language of the sentence-credit statute, WIS. STAT. § 973.155. The statute provides at sub. (1)(a) 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." According to Close, the statute provides credit for a sentence, and it does not limit that credit in any way or allow the circuit court not to credit a defendant in instances where the sentences are to be served consecutively. Close asserts that he thus "should be entitled to sentence credit in all three cases because ***Boettcher*** was incorrectly decided when the court found it necessary to interpret an unambiguous statute." In the alternative, Close argues that "if ***Boettcher*** was correctly decided," this court should interpret the sentence-credit statute in his favor by applying the rule of lenity, which provides generally that ambiguous penal statutes should be interpreted in favor of the defendant. *See, e.g.*, ***State v. Villamil***, 2016 WI App 61, ¶8, 371 Wis. 2d 519, 885 N.W.2d 381.

We have no authority to disregard, modify, or overrule decisions of our supreme court. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). In addition, we decline to consider Close's lenity argument because we generally do not consider undeveloped arguments. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988). Close's

argument in that regard consists of one conclusory sentence and citations to two cases with parentheticals merely explaining the rule of lenity. In any event, under ***Cook*** we may not interpret the statute in Close's favor under the rule of lenity because doing so would effectively overrule ***Boettcher***. Close is essentially arguing our supreme court erred by failing to consider and apply the rule of lenity when it interpreted the sentence-credit statute in ***Boettcher***. If we were to hold that duplicate sentence credit is allowed on consecutive sentences by virtue of the rule of lenity, our decision would conflict with ***Boettcher***'s holding that duplicate sentence credit is not allowed on consecutive sentences. This we cannot do, regardless of whether a rule of lenity argument was before the supreme court in ***Boettcher***.

Upon the foregoing,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals