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

October 13, 2021

To:

Hon. Tammy Jo Hock
Circuit Court Judge
Electronic Notice

John VanderLeest
Clerk of Circuit Court
Brown County Courthouse
Electronic Notice

Sonya Bice
Electronic Notice

David L. Lasee
Electronic Notice

Dalton T. Plumley 631280
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2020AP1652-CR State of Wisconsin v. Dalton T. Plumley
(L. C. No. 2014CF564)

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

Dalton Plumley, pro se, appeals an order denying his motion for sentence credit. Plumley argues he is entitled to an additional 366 days of sentence credit in Brown County case No. 2014CF564. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. We reject Plumley's arguments and summarily affirm the order. *See* WIS. STAT. RULE 809.21 (2019-20).[1]

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

In the underlying Brown County case, the State charged Plumley with second-degree sexual assault of a child under the age of sixteen, contrary to WIS. STAT. § 948.02(2). The charge arose from allegations that Plumley had sexual intercourse with then fifteen-year-old Sally[2] on August 17, 2013, in the Village of Howard. Plumley was charged under the same statute in Marinette County case No. 2014CF81, based on allegations that Plumley had sexual intercourse with Sally at a Marinette residence between August 18 and August 25, 2013.

Pursuant to a plea agreement, the cases were consolidated and a two-count Information was filed under the Brown County case number. In exchange for Plumley's no-contest pleas to both counts, the Marinette County district attorney agreed not to charge Plumley with any other counts of sexual assault based on the facts alleged in the complaint. Additionally, the State agreed to recommend a withheld sentence and four years of probation with up to one year of jail as a condition of probation. The defense remained free to argue at sentencing. With respect to Count 1—the charge that originated in Brown County—the circuit court withheld sentence and imposed five years of probation, with one year of conditional jail time that included work-release privileges. On Count 2—the charge that originated in Marinette County—the court withheld sentence and imposed five years of probation. The court ordered the sentences to run concurrently.

Plumley's probation was later revoked, and the circuit court imposed concurrent ten-year sentences, each consisting of six years' initial confinement and four years' extended supervision. The court granted 299 days of sentence credit on both counts, representing the time Plumley

[2] Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use a pseudonym instead of the victim's name.

spent on probation holds for both sentences.[3] The court granted an additional 366 days toward the sentence on the Brown County offense for the conditional jail time Plumley served on that count. The Department of Corrections ("DOC") subsequently sought clarification of the sentence credit granted, suggesting that additional credit might be appropriate with respect to the Marinette County offense. Specifically, the DOC noted that "all counts … were committed close to the same day, sentenced on the same day, were ordered to run concurrent to each other, and appear to be based on custody that is in connection with the course of conduct for which both sentences were imposed."

In response to the DOC's inquiry, the circuit court confirmed that the 366 days Plumley served on Count 1 as a condition of his probation were to be credited "solely on Count 1." Plumley then filed a motion seeking credit against his sentence on Count 2 for the 366 days of conditional jail time he served on Count 1. The court denied the motion, and this appeal follows.

Whether a defendant is entitled to sentence credit pursuant to WIS. STAT. § 973.155 is a question of law that we review independently. ***State v. Rohl***, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). The statute provides 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." Sec. 973.155(1)(a).

Plumley argues he is entitled to the additional 366 days of sentence credit for Count 2 because he was in custody in connection with the same course of conduct for which that sentence

[3] The circuit court initially granted 300 days toward both counts, but it later amended that amount to 299 days to correct a prior math error.

was imposed. His argument appears to be premised on the assumption that his "course of conduct" includes all of the acts that occurred in both counties over a period of eight days.

We are not persuaded by Plumley's expansive definition of the term "course of conduct." Plumley provides no citation to legal authority for treating separate, specific criminal acts occurring on different dates and in different locations as one course of conduct simply because they involve the same victim and violations of the same statute. Moreover, "Wisconsin cases interpreting the phrase 'course of conduct' support the … position that under [WIS. STAT.] § 973.155, one sentence does not arise from the same course of conduct as another sentence unless the two sentences are based on the same specific acts." ***State v. Tuescher***, 226 Wis. 2d 465, 475, 595 N.W.2d 443 (Ct. App. 1999).

To the extent Plumley asserts that the imposition of concurrent sentences requires sentence credit to be applied to both sentences even if the underlying offenses arose from different courses of conduct, Plumley is mistaken. Our supreme court has held "that WIS. STAT. § 973.155 imposes no requirement that credit applied toward one sentence also be applied toward a second sentence if the basis for applying the same credit to both sentences is merely that the sentences are concurrent and are imposed at the same time." ***State v. Johnson***, 2009 WI 57, ¶3, 318 Wis. 2d 21, 767 N.W.2d 207. The court added that "[t]he fact that sentences are concurrent and are imposed at the same time does not alter the statutory mandate that credit toward service of a sentence be based on custody that is 'in connection with' the course of conduct giving rise to that sentence." ***Id.*** Because the conditional jail time Plumley served on Count 1 arose from a different course of conduct than that of Count 2, the circuit court properly credited the days only to Count 1.

Upon the foregoing,

IT IS ORDERED that the order is 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