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DISTRICT IV

January 13, 2022

To:

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Electronic Notice

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Clerk of Circuit Court
Sauk County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2020AP1192-CR

State of Wisconsin v. Shaun A. Welch (L.C. # 2012CF44)

Before Blanchard, P.J., Kloppenburg, and Graham, 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).

Shaun Welch, by counsel, appeals a judgment and an order of the Sauk County circuit court. The single issue raised on appeal is whether Welch is entitled to receive credit against his sentence after revocation in a Sauk County criminal case under WIS. STAT. § 973.155 (2019-20).¹ 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. Under unusual

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

circumstances, the circuit court properly recognized that it was obligated to eliminate what would otherwise have amounted to dual credit for consecutive sentences. We summarily affirm.

Background

In January 2013, Welch was convicted of incest following a guilty plea in Sauk County Circuit Court Case No. 2012CF44 (“the Sauk County case”). The circuit court withheld sentence and placed Welch on five years of probation, with 90 days of jail time as a condition of probation. Welch served the conditional jail time in the Sauk County Jail from March 8, 2013, to June 6, 2013.

At the time that Welch was charged in the Sauk County case, he had been serving a probationary term under a deferred prosecution agreement in Rock County Circuit Court Case No. 2009CF634 (“the Rock County case”). As a result of the filing of the charge in the Sauk County case, Welch’s probation in the Rock County case was revoked and he was convicted of second-degree sexual assault of a child. The Rock County Circuit Court withheld sentence and placed Welch on probation for 10 years.

Shortly after Welch was released from the Sauk County Jail in June 2013, he was taken back into custody for violation of the terms of probation in the Rock County case. Welch accepted an alternative to revocation (ATR), which included serving nine months in the Rock County Jail. Welch served that time from June 24, 2013, to March 24, 2014. After his release from the Rock County Jail, Welch was taken into custody again on September 29, 2014, for violation of the terms of his probation in the Rock County case. Welch’s probation was revoked in both the Sauk County and Rock County cases.

On February 25, 2015, Welch was sentenced after revocation in the Sauk County case to two years of initial confinement and two years of extended supervision, and was awarded 252 days of sentence credit. The circuit court in the Sauk County case withheld its decision as to whether Welch was entitled to 274 additional days of sentence credit for the time he had served in the Rock County Jail pursuant to the ATR, stating that the issue may become “moot” if Welch received credit for that time along with a consecutive sentence in the Rock County case.

On March 6, 2015, Welch was sentenced in the Rock County case to seven years of initial confinement and eight years of extended supervision. The circuit court ruled that the sentence would run consecutive to Welch’s sentence in the Sauk County case. The attorneys for both parties stated on the record at the sentencing hearing in the Rock County case that they agreed that Welch was entitled to 640 days of sentence credit, which included the 274 days served as a result of the ATR. The Rock County Circuit Court awarded 640 days of sentence credit, consistent with the parties’ agreement.

In July 2019, Welch filed a motion in the Sauk County case, arguing that he was entitled to an additional 289 days of sentence credit.² Welch argued that, although he was given one day of pretrial credit, he should have been given 11 days of pretrial credit because he was in custody from February 10, 2012, to February 20, 2012. Welch also argued that the 274 days of ATR credit he received in the Rock County case should have been applied to the Sauk County case

² As the State points out in its brief, although Welsh argued in the postconviction motion that he is entitled to 289 days of additional sentence credit, that number appears to be a typographical or calculation error. When the periods of custody for which Welch sought additional credit are added together, the resulting sum is 284 days, consisting of 274 days spent in custody pursuant to the ATR, plus 10 additional days of pretrial credit referenced in the postconviction motion.

because the sentence in the Sauk County case was imposed first in time, citing *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988).

The circuit court in the Sauk County case denied Welch's motion for additional sentence credit. The court stated that, based on its review of the record, the 640 days of credit that Welch received in the Rock County case "included all 536 days of credit that would have been available and were available to be applied in this case." Those 536 days consisted of the following periods of time that Welch was in custody: 11 days from February 10 to February 20, 2012; 91 days from March 8 to June 6, 2013; 11 days from June 13 to June 24, 2013; 274 days from June 24, 2013, to March 24, 2014; and 149 days from September 29, 2014, to February 25, 2015.

The circuit court in the Sauk County case cited *Boettcher* for its statement that courts may not award dual credit when consecutive sentences are imposed. *See id.* at 87. The circuit court then concluded that, because Welch already had received credit in the Rock County case for the 11 days he spent in pretrial custody from February 10 to February 20, 2012, and for the 274 days he spent in custody pursuant to the ATR, Welch was not entitled to sentence credit in the Sauk County case for the same time periods. The court further noted that the 252 days of credit that Welch previously had been awarded in the Sauk County case amounted to dual credit, since Welch was awarded credit for the same 252 days at his sentencing after revocation in the Rock County case. For these reasons, the circuit court concluded that Welch was "actually entitled to zero days' sentence credit in this case because all available credit was applied to the Rock County Circuit Court sentence." The judgment of conviction in the Sauk County case was thus amended to reflect zero days of sentence credit awarded. Welch appeals the decision regarding sentence credit by the circuit court in the Sauk County case.

Discussion

On appeal, Welch argues that the sentence credit that was available to him in the Sauk County case was improperly applied to the Rock County case. Welch asserts that, because the sentence in the Sauk County case was imposed first in time, the 536 days of sentence credit that were available to him (the 284 days of credit at issue in his postconviction motion plus the 252 days of dual credit that the circuit court removed from this case) should have been awarded in this case. For this argument he relies on a statement in *Boettcher* that “custody credits should be applied in a mathematically linear fashion” “on a day-for-day basis” “to the sentence first imposed.” *See id.* at 100. Welch argues that *Boettcher* requires that this court remand the case to the Sauk County Circuit Court with instructions that it award 536 days of sentence credit against his sentence in this case. For the reasons discussed below, we reject Welch’s argument.

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). Dual credit is not permitted when “a defendant has already received credit against a sentence which has been, or will be, separately served.” *State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338.

If we were to remand this case to the circuit court with instructions to award 536 days of sentence credit, as Welch requests, the result would be that Welch would receive dual credit. Welch attempts to get around this result by asserting that credit is not considered dual credit if

the credit is being sought against the sentence that was first imposed. Welch relies upon *Jackson*, 233 Wis. 2d 231, ¶17, in an attempt to support this position, but his reliance is misplaced. In *Jackson*, this court stated that “*Boettcher* bars a claim for dual credit where the defendant has already received the same credit against a prior sentence that the defendant has already served.” *Jackson*, 233 Wis. 2d 231, ¶20. That is not the situation in this case.

Here, Welch was sentenced in the Sauk County case before he was sentenced in the Rock County case. When Welch was sentenced in the Rock County case, the parties did not explain to the Rock County sentencing court that Welch had already received 252 days of sentence credit in the Sauk County case for periods of time that were included in the stipulated 640 days of sentence credit that the parties requested. Had the parties so informed the Rock County sentencing court, it is likely that the court would have excluded those 252 days from its sentence credit award, since the sentence being imposed was consecutive. It is well established that the same period of time in custody cannot be duplicatively credited to more than one sentence imposed to run consecutively. *Boettcher*, 144 Wis. 2d at 87.

The State concedes that (were it not for the communication errors that led to the potential for dual credit) any credit applicable to the consecutive Sauk County and Rock County cases should have been applied only to the Sauk County case, given that Welch was sentenced first in the Sauk County case. However, as the circuit court noted at the hearing on Welch’s postconviction motion, the Sauk County Circuit Court lacked the authority to modify a Rock County judgment or order. To correct the awarding of dual credit in consecutive sentences, the Sauk County Circuit Court properly amended its judgment of conviction to remove the 252 days of sentence credit it had previously awarded. The result is that Welch received day-for-day credit for all 536 days against the total days of incarceration imposed in his consecutive

sentences. We agree with the State’s argument that the fact that Welch received all of his sentence credit in the Rock County case, as opposed to this case, makes no difference in the end result and does not call for the relief that Welch requests.

Welch appears to interpret *Boettcher* as mandating that sentence credit always must be applied in a mechanical fashion to the sentence that was imposed first in time, regardless of the circumstances. We discern no such mandate in *Boettcher*. Rather, the court stated, “For ease in calculation and clarity in respect to subsequent exercise of court discretion, the credits *should* be applied to the sentence that is first imposed.” *Boettcher*, 144 Wis. 2d at 100 (emphasis added). The use of the word “should” rather than “shall” suggests that the court was not establishing a bright line rule of law but was, instead, stating a rule of judicial administration to aid courts in the often complicated calculation and application of sentence credit.

It remains that the “core idea of *Boettcher* is that ‘dual credit is not permitted’ where a defendant has already received credit against a sentence which has been, or will be, separately served.” *Jackson*, 233 Wis. 2d 231, ¶19 (citing *Boettcher*, 144 Wis. 2d at 87). Here, in denying Welch’s request for additional credit in this case and amending the award of sentence credit to zero days, the circuit court properly corrected what otherwise would have been an award of dual credit in consecutive sentences, which is clearly prohibited under Wisconsin law.

IT IS ORDERED that the judgment and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals