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DISTRICT IV

March 17, 2022

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

2021AP647-CR

State of Wisconsin v. Adam C. Kohler (L.C. # 2013CF99)

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

Adam Kohler, pro se, appeals a circuit court order in this criminal case that denied his motion for sentence credit and a subsequent order denying reconsideration. 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 (2019-20).¹ We summarily affirm.

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

Kohler pled guilty to operating while intoxicated, fifth offense, and operating while intoxicated, causing injury. The circuit court entered a judgment of conviction sentencing Kohler to three years of initial confinement and three years of extended supervision. On January 31, 2017, Kohler was released to extended supervision. He was taken back into custody on August 2, 2019, for violating the terms of his supervision, and his supervision was revoked. Kohler moved for sentence credit for the time that he served on extended supervision. The circuit court denied the motion for sentence credit and Kohler's subsequent motion for reconsideration.

Kohler contends that he is entitled to sentence credit for the time he served on extended supervision. Kohler contends that, under *Locklear v. State*, 87 Wis. 2d 392, 274 N.W.2d 2d 898 (Ct. App. 1978), and *State ex rel. Avery v. Percy*, 99 Wis. 2d 459, 299 N.W.2d 886 (Ct. App. 1980), a defendant is entitled to "street time" credit for time on supervision in the community that was not "tolled" under WIS. STAT. § 304.072. Kohler contends that the circuit court improperly relied on *State v. Obrecht*, 2015 WI 66, 363 Wis. 2d 816, 867 N.W.2d 387, and *State ex rel. Ludtke v. DOC*, 215 Wis. 2d 1, 572 N.W.2d 864 (Ct. App. 1997), as establishing that he is not entitled to credit. Kohler argues that *Obrecht* is inapposite because it addressed sentence credit under WIS. STAT. § 973.155, not credit for time on supervision that was not "tolled" under § 304.072. Kohler argues that, in *Ludtke*, this court did not expressly overrule *Locklear* or *Avery*, and in any event, lacked authority to do so. See *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997) (only supreme court may overrule prior opinion of court of appeals). Here, Kohler asserts, the state Department of Corrections did not "toll" the time Kohler was on supervision, and thus, he argues, he is entitled to sentence credit for that time.

The State responds that Kohler is not entitled to sentence credit for the time he served on extended supervision. It argues that Kohler was not “in custody” within the meaning of the sentence credit statute, WIS. STAT. § 973.155(1)(a), while he was serving extended supervision time. *See* § 973.155(1)(a) (defendant is entitled to sentence credit for time the defendant was “in custody” if that custody was “in connection with the course of conduct for which sentence was imposed”); *State v. Friedlander*, 2019 WI 22, 385 Wis. 2d 633, 923 N.W.2d 849 (a defendant is not entitled to sentence credit for time spent while on extended supervision because a defendant is not then “in custody”). The State contends that Kohler’s reliance on *Locklear* and *Avery* is misplaced because those cases involved “good time” credits awarded under indeterminate sentences. *See Avery*, 99 Wis. 2d at 464-65; *Locklear*, 87 Wis. 2d at 401-02. Here, the State points out, Kohler received a bifurcated sentence under WIS. STAT. § 973.01, and therefore he was not issued “good time” credits as discussed in *Locklear* and *Avery*. *See* § 973.01(4). The State asserts that, because Kohler received a bifurcated sentence under § 973.01, the amount of time available for reconfinement was the amount of time remaining on his sentence, less time he had already served in confinement under the sentence. *See* WIS. STAT. § 302.113(9)(am).

In reply, Kohler concedes that, while he served on extended supervision, he was not “in custody” for sentence credit purposes under WIS. STAT. § 973.155(1)(a). He asserts, however, that he is not seeking sentence credit under § 973.155(1)(a). Rather, Kohler asserts, he is seeking “street time” credit under WIS. STAT. § 304.072. Kohler disputes the State’s argument that *Locklear* and *Avery* do not support Kohler’s claim for “street time” credit. Kohler argues that both *Avery* and *Locklear* addressed a defendant’s claim for “street time” credit, that is, credit for time served while on supervision in the community. Kohler contends that *Locklear* and *Avery*

remain good law, and establish that he is entitled to sentence credit for his time on extended supervision.

We conclude that Kohler is not entitled to sentence credit for the time he served on extended supervision. In *Ludtke*, 215 Wis. 2d at 8-10, we explained that WIS. STAT. “§ 304.072 ... addresses the tolling of time served between an alleged violation and revocation. It does not serve to limit the department’s discretion ... to determine what, if any, period of time remaining as a result of revocation should be spent in prison.”

Here, Kohler was not sentenced to an indeterminate sentence and then released to probation, as in *Locklear*, or parole, as in *Avery*. Rather, Kohler received a bifurcated sentence under WIS. STAT. § 973.01 and was then released to extended supervision. When Kohler’s extended supervision was revoked, the DOC was required, as stated in WIS. STAT. § 302.113(9)(am), to “order [Kohler] to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence.” The “time remaining on the bifurcated sentence” is “the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision ... and less all time served in confinement for previous revocations of extended supervision under the sentence.” *See id.* Thus, following revocation of Kohler’s extended supervision, Kohler could have been returned to prison for any portion of the total bifurcated sentence that he had not already served in confinement. The time that Kohler spent on extended supervision did not count in determining how much reconfinement time was available. *See* § 302.113(9)(am).

Therefore,

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