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DISTRICT I

March 25, 2013

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

2012AP1951-CR State of Wisconsin v. Gregory R. Schmitt (L.C. #2007CF6224)

Before Fine, Kessler and Brennan, JJ.

Gregory R. Schmitt, *pro se*, appeals from a circuit court order denying his motion for sentence credit. Based upon our review of the briefs, we conclude at conference that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).¹ We summarily affirm the order.

On December 22, 2007, Schmitt was taken into custody for operating while intoxicated as a fifth offense, in what would become the underlying case in this matter, Milwaukee County

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Circuit Court case No. 2007CF6224. On the same day, a hold was placed on him by the Department of Corrections with regard to Washington County Circuit Court case No. 2002CF374 and Fond du Lac County Circuit Court case No. 2003CF262. In those cases, Schmitt was serving terms of extended supervision.

On March 7, 2008, Schmitt was ordered reconfined for two years in the Fond du Lac County case, consecutive to his Washington County sentence. Schmitt was also awarded seventy-five days' sentence credit for the time between the December 22, 2007 hold and the March 7, 2008 sentencing. On April 2, 2008, Schmitt was ordered reconfined for two years in the Washington County case. In the Milwaukee County case, Schmitt was convicted, and he was sentenced on May 30, 2008. The Milwaukee County circuit court awarded no sentence credit “[be]cause he’s serving time on the other cases.”

On July 16, 2012, Schmitt filed a *pro se* motion in the Milwaukee County case, seeking sentence credit for the time between December 22, 2007, and May 30, 2008. The circuit court denied the motion, explaining that under *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), Schmitt is not entitled to credit in this case because he received credit in his other cases and the Milwaukee sentence is consecutive.

On appeal, Schmitt does not appear to dispute that he received sentence credit in at least one other case. Rather, he contends that *Boettcher* does not apply and that he is also entitled to credit in the current case because he was serving time for all three cases simultaneously.

Boettcher, however, is precisely on point. Boettcher was convicted of burglary. *Id.* at 87. On July 13, 1984, a three-year sentence was imposed and stayed and Boettcher was placed on probation. *Id.* On April 11, 1986, probation agents entered Boettcher’s home and found a

gun; he was arrested on April 12 on a probation hold. *Id.* at 88. At some point, because of the gun, Boettcher was also arrested for being a felon in possession of a firearm. *Id.* He posted bond on that charge on April 22, but remained in custody on the probation hold. *Id.* On July 21, Boettcher's probation was revoked and his three-year imposed-and-stayed sentence commenced. *Id.* On July 23, Boettcher pled no contest to the firearm charge and was sentenced to a one-year term, consecutive to the burglary sentence. *Id.* at 89.

Boettcher received 100 days' sentence credit, from the April 12, 1986 hold to the July 21, 1986 revocation sentencing, against the three-year burglary sentence. *Id.* at 88-89. The same 100 days' credit was denied on the firearm sentence, despite Boettcher's claim that he had been in custody in both cases simultaneously. *Id.* at 89. The State argued, and the supreme court agreed, that "no dual credit is allowable where consecutive sentences are imposed." *Id.* at 90.

Similarly here, Schmitt was simultaneously in custody for three cases.² His extended supervision was revoked in Fond du Lac County and he was ordered reconfined. Schmitt was expressly awarded credit in Fond du Lac County for the seventy-five days between his December 27, 2007 arrest/hold and the March 7, 2008 sentencing date when his sentence-after-revocation commenced. We further expect that any time spent in custody between the March 7, 2008 sentencing-after-revocation in Fond du Lac County and the May 30, 2008 sentencing in Milwaukee County is being or has been credited as time served on one of the sentences-after-revocation: "custody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed in the

² It is irrelevant that Schmitt was still in custody on the fifth-offense operating while intoxicated because he was unable to post bond.

consecutive sentences.” *Id.* at 100. That appears to be what is happening in Schmitt’s cases, so the circuit court properly denied what amounts to a request for dual credit in the Milwaukee County case.

To the extent that Schmitt believes *Boettcher* is wrongly decided, “[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.” See *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 426 (1997). We are bound by *Boettcher*’s holding.

IT IS ORDERED that the order denying sentence credit is summarily affirmed.

Diane M. Fremgen
Clerk of Court of Appeals