STATE OF WISCONSIN

IN SUPREME COURT

No. 2013AP1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW M. OBRIECHT,

Defendant-Appellant-Petitioner.

APPEAL FROM A DECISION OF THE COURT OF APPEALS AFFIRMING AN ORDER DENYING A MOTION FOR RECONSIDERATION ENTERED IN THE DANE COUNTY CIRCUIT COURT, THE HONORABLE WILLIAM E. HANRAHAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT OF THE ISSUE

Under Wis. Stat. § 302.11(7)(am),[1] when a parolee has violated his parole, the Division of Hearings and Appeals (DHA) may revoke the parole and return the offender to

[1] All references to the Wisconsin State Statures are to the 2013-14 edition, unless otherwise indicated.

prison for the remainder of his sentence. Under Wis. Stat. § 302.11(7)(b), the offender must be incarcerated for the entire reconfinement period as determined by DHA. Here, pursuant to a Department of Corrections (DOC) policy, when the circuit court awarded Obriecht credit for time he had previously spent in custody long before his most recent parole revocation, DOC applied the credit to Obriecht's overall sentence so as not to change the amount of time to which DHA ordered Obriecht reconfined. The circuit court and the court of appeals agreed with DOC's interpretation of the statutes and the application of the credit. Are the lower courts and DOC correct?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As in most cases accepted for review by the Wisconsin Supreme Court, both oral argument and publication are warranted.

STATEMENT OF THE CASE: FACTS AND PROCEDURAL HISTORY

In January 2012, Obriecht returned to prison following a September 2011 supervision violation (271; Pet-Ap. 111).[2] Obriecht then moved the circuit court for 107 days of sentence credit for time he had spent in custody in 1998, 1999, and 2001 before his 2001 probation revocation (267). The State did not object to the amount of sentence credit (269). The court granted Obriecht's motion, issuing an amended judgment of conviction in February 2013, reflecting the sentence credit (270; Pet-Ap. 112).

[2] Due to the unusual posture of this case, the record is sparse.

Pursuant to Wis. Admin. Code § DOC 302.22 (2014), DOC then wrote the circuit court, seeking clarification of the amended judgment of conviction (271; Pet-Ap. 111). DOC wrote that it follows "a long-standing administrative practice based on sections 304.072 and 973.155, WI Stats., regarding application of presentence credit on sentences of persons whose parole has been revoked" (271; Pet-Ap. 111). DOC stated that it "interpret[s] that presentence credit granted while an offender is serving reincarceration does not reduce the reincarceration term, but rather reduces the parole time remaining on the sentence until its maximum discharge date" (271; Pet-Ap. 111). DOC informed the court that it "applied the additional 107 days of credit to the overall sentence length in calculating Mr. Obriecht's sentence expiration date and [] utilized the credit listed on the Revocation Order and Warrant in calculating his release date" (271; Pet-Ap. 111).

In March 2013, Obriecht asked the circuit court to reject DOC's practice and apply the 107 days credit to his confinement period (272). After several more requests from Obriecht to apply the credit to his confinement time, the circuit court denied Obriecht's request (273; 274; 275). Obriecht moved for reconsideration (276). The circuit court denied the motion, finding that DOC had "correctly calculated the maximum discharge date of the defendant based upon pre-incarceration credit earned by the defendant in accordance with § 302.11(7)(am)" (277; Pet-Ap. 110).

Obriecht appealed and the court of appeals affirmed (Pet-Ap. 101-09). *State v. Obriecht*, 2014 WI App 42, 353 Wis. 2d 542, 846 N.W.2d 479. The court found that "the plain language of Wis. Stat. § 302.11(7)(b)" supported DOC's application of the sentence credit to the parole period, as

opposed to the DHA-ordered revocation period (Pet-Ap. 106). *Id.* ¶12. The court concluded that an application of the sentence credit to the reincarceration period, as advocated by Obriecht, would violate the statute (Pet-Ap. 106). *Id.* ¶13. Obriecht moved the court for reconsideration, but the motion was denied.

Obriecht petitioned this Court for review. This Court granted review on November 14, 2014.

STANDARD OF REVIEW

The issues before the Court involve questions of law, which this court reviews independently. *See State v. Michael S.*, 2005 WI 82, ¶31, 282 Wis. 2d 1, 698 N.W.2d 673.

ARGUMENT

As a preliminary matter, the State notes that its records show that Obriecht was released from prison in September 2014. Because Obriecht is no longer in custody, his argument that his confinement time should be lessened is moot. *See State v. Walker*, 2008 WI 34, ¶14, 308 Wis. 2d 666, 747 N.W.2d 673. This court may still choose to address the issue because the way in which custody credit is applied to an offender's sentence is an issue that is likely to be seen again by DOC and the circuit courts. *See id.* For purposes of this brief, the State treats the case as if its outcome could affect Obriecht.

THE LOWER COURTS AND DOC CORRECTLY CONCLUDED THAT OBRIECHT'S SENTENCE CREDIT SHORTENS HIS OVERALL SENTENCE, BUT DOES NOT REDUCE THE TIME DHA ORDERED HIM TO BE RECONFINED AFTER REVOCATION.

There is no dispute between the parties that Obriecht is entitled to have his sentence shortened by 107 days.[3] The dispute here is whether, in light of the credit to which Obriecht is entitled, DOC should have reduced Obriecht's reconfinement time, which would have contradicted DHA's revocation order, or whether the credit should be applied to reduce Obriecht's overall sentence.

A. The relevant statutes.

DHA "may return a parolee . . . to prison for a period up to the remainder of the sentence for a violation of the conditions of parole. The remainder of the sentence is the entire sentence, less time served in custody prior to parole." Wis. Stat. § 302.11(7)(am).

"A parolee returned to prison for violation of the conditions of parole shall be incarcerated for the entire period of time determined by the reviewing authority[.]" Wis. Stat. § 302.11(7)(b).

B. Relevant law on statutory interpretation.

"The purpose of statutory interpretation is to discern the intent of the legislature." *In re Foreclosure of Tax Liens*, 2013 WI App 29, ¶16, 346 Wis. 2d 264, 828 N.W.2d 262. In interpreting a statute, this court looks to the plain meaning of the words in the statute. *See State v. Grady*, 2007 WI 81,

[3] Obriecht's Br. at 8-9.

¶15, 302 Wis. 2d 80, 734 N.W.2d 364. "We interpret statutory language in the context in which it is used, in relation to the language of surrounding or closely-related statutes, and to avoid unreasonable results." *In re Foreclosure of Tax Liens*, 346 Wis. 2d 264, ¶16.

C. The court of appeals, the circuit court and DOC correctly applied Obriecht's pre-revocation sentence credit to reduce Obriecht's overall sentence.

The lower courts and DOC have all correctly interpreted Wis. Stat. § 302.11(7)(am) and (b) and their intersection with a defendant's right to credit for spent in custody. Here, what happened is simple. Obriecht had X amount of days remaining on his sentence when he was revoked. DHA ordered him reconfined for X minus at least 107 days.[4] When Obriecht alerted the court to the sentence credit issue, the court amended the judgment accordingly. With court approval, DOC then applied its "long-standing administrative practice" to leave the DHA revocation order as it stood, but to reduce Obriecht's overall sentence by 107 days (271; Pet-Ap. 111).

Consider this hypothetical. At the time of his revocation, Obriecht had three years remaining on his sentence. DHA determined that Obriecht's violations demanded an order of revocation that would reconfine him for the remainder of his term. Obriecht then returned to

[4] Although the record is sparse, we know that Obriecht must have been reconfined for this amount of time because DOC's letter to the court indicated that it would award Obriecht 107 days of pre-revocation custody to reduce his period of parole (Pet-Ap. 111). If at least that amount of time were not available, DOC would not have been able to reduce his sentence in this manner (Pet-Ap. 102). *See State v. Obriecht*, 2014 WI App 42, ¶2 n.1, 353 Wis. 2d 542, 846 N.W.2d 479.

prison to serve three more years in custody. Under this scenario, if Obriecht then sought 107 days of custody credit for time he spent in custody years ago, the circuit court and DOC would approve of a reduction of Obriecht's reconfinement time. This is because, correctly calculated, the entire three-year period was never available to be forfeited upon revocation. Obriecht's remaining time would have been shorter than that previously believed.

On the other hand, here, while the record does not reveal how much time DHA ordered Obriecht to be reconfined, we know it was less than the amount of time left on Obriecht's sentence because he had remaining time on his sentence, which has been reduced (271; Pet-Ap. 102, 111). *See Obriecht*, 353 Wis. 2d 542, ¶2 n.1. Thus, DHA's determination of the amount of time warranted by Obriecht's parole violations should stand.

Here, *State ex rel. Solie v. Schmidt,* 73 Wis. 2d 76, 242 N.W.2d 244 (1976), is instructive. In *Solie*, this Court addressed how much credit, if any, a defendant is entitled to for time he spent in custody before a probation revocation determination. 73 Wis. 2d at 77. After the Department of Health and Social Services Division of Corrections[5] revoked Solie's probation, he was sentenced to a mandatory term of two years' incarceration. *Id.* at 82. Solie argued that he was entitled to a reduction of this term for the eighty-two days he spent in jail pending the revocation proceeding. *Id.* This Court found that it would violate due process not to award

[5] The Department of Health and Social Services Division of Corrections was the predecessor of DOC. *See* doc.wi.gov/about/doc-overview/history (last accessed Jan. 6, 2015).

him the credit off of his term of reconfinement. *Id.* It appears that two things were germane to this Court's holding: (1) eighty-two days is a substantial amount of time[6] and (2) that the revocation triggered a mandatory period of incarceration. As for the latter point, if Solie were not awarded the custody credit, the result would have effectively extended his two-year maximum sentence. *See id.* at 82-83.

On the contrary, here there is no concern about unlawfully extending Obriecht's sentence. Obriecht's overall sentence has been *shortened* to reflect the credit he is due from his pre-probation revocation custody. If DHA had revoked Obriecht for a period of time more than what was actually remaining on his sentence, then Obriecht would be entitled to a shorter revocation period.

The lower courts and DOC's interpretation of the statutes at issue is reasonable. Under Wis. Stat. § 304.072(5), "[t]he sentence of a revoked probationer shall be credited with the period of custody in a jail, correctional institution or any other detention facility pending revocation and commencement of sentence according to the terms of s. 973.155." This means that Obriecht is entitled to 107 days of custody. But, pursuant to Wis. Stat. § 302.11(7)(b), after DHA has made the decision to revoke a parolee, the parolee "shall be incarcerated for the entire period of time determined by" DHA unless the parole commission grants

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[6] The Court contrasted the eighty-two day period to the two-and-a-half week period at issue in *Mitchell v. State*, 69 Wis. 2d 695, 701-02, 230 N.W.2d 884 (1975), and the four-day period at issue in *Kubart v. State*, 70 Wis. 2d 94, 105-06, 233 N.W.2d 404 (1975), concluding that to deny eighty-two days of credit implicated the Constitution. *State ex rel. Solie v. Schmdit*, 73 Wis. 2d 76, 82-83, 242 N.W.2d 244 (1976).

him parole at an earlier date. Given the plain meaning of these statutes, DOC's long-standing interpretation of the statutes is correct.

D. Obriecht's reliance on three cases does not advance his argument that his post-revocation sentence must be reduced.

Obriecht argues that the 107 days of custody credit must be applied to the reconfinement portion of his sentence because "[s]entence credit only applies to confinement custody."[7] Obriecht argues that the court of appeals' holding to the contrary "ignores" *State ex rel. Ludtke v. Dep't of Corr.*, 215 Wis. 2d 1, 572 N.W.2d 864 (Ct. App. 1997).[8] Obriecht is incorrect.

In *Ludtke*, the court of appeals addressed the defendant's claim that he was entitled to sentence credit for time that he had spent on parole. 215 Wis. 2d at 4. The court rejected Ludtke's claim, concluding the plain language of the statute precluded it. *Id.* at 6. Nothing in the court of appeals' decision in this case is contrary to *Ludtke*'s conclusion that a parolee is not entitled to custody for time spent on parole.

In addition to *Ludtke*, Obriecht cites two other cases in support of his argument that the court of appeals, the circuit court and DOC erred in their interpretation of the statutory scheme at issue.[9] Obriecht contends that *State v. Magnuson*, 2000 WI 19, ¶12, 233 Wis. 2d 40, 606 N.W.2d 536, stands for the proposition that "[s]entence credit only applies to

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[7] Obriecht's Br. at 9.

[8] Obriecht's Br. at 9.

[9] Obriecht's Br. at 9.

confinement custody."[10] The paragraph in the case to which Obriecht points merely recites the sentence credit statute. If Obriecht means to say that sentence credit is available to a defendant only when he has spent time in custody, then the State does not disagree. Of course credit is given only for time spent in actual custody.

The second case Obriecht cites is *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988). *Boettcher* stands for the unremarkable (at this point) proposition that when a defendant is subject to consecutive sentences, he is to receive sentence credit only once. *See* 144 Wis. 2d at 87. In other words, "[c]redit 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.*

Ludtke, *Magnuson* and *Boettcher* do nothing to advance Obriecht's position that the lower courts and DOC are wrong in their interpretation of the statutes.

E. Obriecht's argument that Wis. Stat. § 302.11(7) does not apply to him is not persuasive.

Obriecht appears to argue that Wis. Stat. § 302.11(7)(b) does not apply to him.[11] He argues that this subsection "merely clarifies that revoked parolees are not entitled to 'good time' or mandatory release."[12] He argues that "applying sentence credit [to the reincarceration time]

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[10] Obriecht's Br. at 9.

[11] Obriecht's Br. at 10-15.

[12] Obriecht's Br. at 12.

does not interfere with the Division of Hearings and Appeals' reincarceration order."[13] Obriecht is incorrect.

First, the words of the statute are clear: an offender must be reconfined for the entire period of time as determined by DHA. *See* Wis. Stat. § 302.11(7)(b). Obriecht's effort to parse this sentence so that it does not apply to him is unconvincing. While Obriecht is correct that the second sentence in this subsection instructs that a parolee whose parole is revoked is not entitled to mandatory release, this does not change the meaning of the first sentence. Under Obriecht's reading of the statute – that it is merely "a restriction on mandatory release" – the first sentence of the subsection is superfluous. This Court should reject a reading of the statute that renders a portion of a subsection superfluous. *See State v. Meindl*, 2005 WI App 176, ¶8, 285 Wis. 2d 807, 701 N.W.2d 654 (stating that statutes should be read to avoid finding superfluous phrases). If the legislature had intended to merely restrict mandatory release, the subsection would have read, "A parolee returned to prison for violation of the conditions of parole is not entitled to mandatory release." Instead, the legislature also directed that the parolee must be incarcerated for all of the time that DHA determined was necessary.

Second, as Obriecht recognizes, "courts frequently refrain from substituting their interpretation of a statute for that of the agency charged with the administration of a law." *State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 699, 517 N.W.2d 449 (1994). Here, DOC has indicated that its long-standing policy is to adhere to the revocation order and

[13] Obriecht's Br. at 12-13.

apply any sentence credit to the parole portion that remains on the defendant's sentence.[14] Given that this policy is consistent with the plain language of the statute, the State submits there is no reason for this Court to alter it.

Third, while the statute at issue is titled "mandatory release," subsection seven clearly pertains to parolees such as Obriecht. It directs that DHA has authority over parole revocation. Wis. Stat. § 302.11(7)(ag). It directs that an offender may be reconfined for the remainder of his sentence. Wis. Stat. § 302.11(7)(am). And it directs that an offender must be reconfined for the entire time determined necessary by DHA. Wis. Stat. § 302.11(7)(b).

Fourth, to the contrary of Obriecht's statement that application of the credit will not affect the revocation order, application of the credit in the way he advocates would directly affect the order. DHA ordered Obriecht to be reconfined for X number of days. Applying the sentence credit to the reconfinement time would change the revocation order to reconfine Obriecht for X number of days minus 107 days.

F. DOC's application of sentence credit to reduce an inmate's overall exposure does not violate the Equal Protection Clause.

Obriecht argues that the court of appeals' approval of DOC's application of Wis. Stat. § 302.11(7) violates the Constitution's Equal Protection Clause.[15] Obriecht is mistaken.

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[14] Pet-Ap. 111.

[15] Obriecht's Br. at 15-18.

1. Relevant law.

The Equal Protection Clause is implicated when the government treats similarly situated people differently. *See State v. Feldman*, 2007 WI App 35, ¶8, 300 Wis. 2d 474, 730 N.W.2d 440. Where, as here, there is no implication of a fundamental right or a disadvantaged suspect class, the court reviews the constitutional challenge under "the more deferential, rational basis review." *State v. Smith*, 2010 WI 16, ¶12, 323 Wis. 2d 377, 780 N.W.2d 90. The government may treat people differently so long as there is a reasonable basis for the different treatment. *See State v. Quintana*, 2008 WI 33, ¶79, 308 Wis. 2d 615, 748 N.W.2d 447.

2. Applying the plain language of Wis. Stat. § 302.11 does not violate the Equal Protection Clause.

Obriecht posits that the lower courts and DOC's interpretation of Wis. Stat. § 302.11(7)(b) violates the Equal Protection Clause because a defendant who is properly awarded sentence credit shortly after he is sentenced may end up serving less time in custody than a defendant who does not realize he is entitled to sentence credit until after a later revocation.[16] While perhaps superficially persuasive, Obriecht's hypothetical ignores at least two important factors: (1) it is nearly impossible to compare two defendants' sentences, time spent in prison, parole violations and revocation proceedings; and (2) the significance of DHA's revocation order and DOC's rightful reliance upon it. In addition, slight differences such as the one highlighted by Obriecht do not raise Constitutional implications.

[16] Obriecht's Br. at 15-18.

As a preliminary matter, it may be useful to examine a chart of what the State believes is the hypothetical Obriecht proposes. With a slight variation in order to simplify the numbers, Obriecht's "illogical and unreasonable result"[17] looks like this:

	Time spent in custody before sentencing	Sentence imposed	Time in prison before parole	Time on parole before revocation	Sentence imposed in revocation order	Time remaining if released after full 2 year period
A	1 year	10 years	4 years	2 years	2 years (5 years available)	3 years
B	1 year	10 years	5 years	2 years	2 years (5 years believed to be available, but only 4 years actually available)	2 years

Under Obriecht's scenario, Defendant A has ultimately – although we do not know what happens to either defendant while on their remaining period of parole – spent more time in prison than Defendant B. While this may be true, it is not an equal protection violation.

First, it is unreasonable to compare any two defendants in the manner Obriecht proposes. Even if these two people committed the exact same crime, and even if they were given the same sentence, it is not reasonable to suggest that their behavior in prison would have been so identical

[17] Obriecht's Br. at 17.

that they would have been granted parole at the same time. And even if they had been granted parole at the same time, it is surely unreasonable to suggest that the behavior that led them to revocation would have been precisely the same warranting identical revocation orders. Thus, the hypothesis is based on a flawed premise.

Second, even if these two people were exactly the same in this bizarre manner, the revocation order remains significant. Obriecht forgets that there has been an intervening event that has changed the landscape. At the time Defendants A and B were revoked, under Obriecht's hypothetical, they had different amounts of time remaining on their sentences, but DHA ordered them both to serve two more years in prison. At this point, under Obriecht's theory, Defendant B's revocation order must be changed because he was entitled to sentence credit for time he spent in custody several years earlier. This theory ignores the import of the revocation order. Defendant B is certainly entitled to have his exposure reduced, but DHA determined that his parole violation(s) warranted an additional two years in custody. This decision does not change even if Defendant B is entitled to custody credit. As long as that two years was available to be forfeited, Defendant B is entitled to have only his overall exposure lessened.

In addition, variances in sentences and time spent in custody happen all the time. It is not an equal protection violation when one co-conspirator receives more time than another. *See Ocanas v. State*, 70 Wis. 2d 179, 186-87, 233 N.W.2d 457 (1975). It is not an equal protection violation when two parolees violate their parole in similar manners and receive different revocation dispositions. *See id.* Nor is it an equal protection violation that Obriecht may

serve more time in custody than he would have if he had realized he was entitled to sentence credit earlier.

Disparity in sentences can rise to the level of a constitutional issue when the sentences are arbitrary. *See id.* There is nothing arbitrary about adhering to DHA's revocation order by reconfining Obriecht for the amount of time determined by the agency and reducing Obriecht's future time on parole. Further, as Obriecht acknowledges, there is no equal protection problem when there is an appropriate governmental interest that is served by any disparate treatment.[18] *See Smith*, 323 Wis. 2d 377, ¶12. Here, the governmental interest in reconfinement as mandated by DHA and codified in Wis. Stat. § 302.11 is certainly appropriate. DHA determined Obriecht needed to be reconfined for X amount of time. Because X amount of time (plus at least another 107 days) remained on Obriecht's sentence, this determination should be affirmed.

***

In sum, when DHA determines how much reconfinement time for which a parole violator should be returned to prison, DHA looks at how much time the offender has left on his sentence. Here, DHA thought Obriecht had X amount of time remaining on his sentence when, because of the sentence credit, he really had X minus 107 days amount of time. DHA ordered Obriecht to be reconfined for some amount of time *less than* X minus 107 days. The fact that DHA thought Obriecht had more time available to forfeit than he actually had available does not change DHA's determination that his violations required a

[18] Obriecht's Br. at 15-16.

specific amount of time of reconfinement. If DHA had sentenced Obriecht to more time than he actually had remaining on his sentence, then the sentence would have to be modified as unauthorized. Here, though, the revocation order should stand because DHA is charged with determining the amount of time an offender should be returned to prison. As long as that amount of time was available to forfeit, the revocation order controls the reconfinement period.

CONCLUSION

For the foregoing reasons, the State respectfully requests this Court affirm the decision and order of the court of appeals.

Dated this 15th day of January, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,791 words.

Dated this 15th day of January, 2015.

_____
Katherine D. Lloyd
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of January, 2015.

_____
Katherine D. Lloyd
Assistant Attorney General