STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2013AP1345-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW M. OBRIECHT,

Defendant-Appellant-Petitioner.

On Review of a Decision of the Court of Appeals, District IV, Affirming an Order of the Dane County Circuit Court, the Honorable William E. Hanrahan Presiding.

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

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ARGUMENT

I. Mr. Obriecht is Entitled to 107 Days of Sentence Credit Applied to his Term of Reincarceration.

The correct result in this case follows from a straight-forward application of the sentence credit statute, Wis. Stat. § 973.155. Mr. Obriecht served 107 days in jail before he was sentenced. Had the parties advised the court of this at sentencing, the court would have had no authority to withhold the credit from Mr. Obriecht's prison sentence and postpone it for a later period of supervision. To do so would nullify the sentence credit statute, which requires the credit to be "computed as if the convicted offender had served such time in the institution to which he or she has been sentenced." § 973.155(3).

The only difference here is timing. The credit was overlooked at sentencing and noted for the first time after Mr. Obriecht's parole was revoked. But § 973.155(5) provides for retroactive sentence credit:

> If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person…This subsection applies to any person, regardless of the date he or she was sentenced.

This shows that the legislature did not intend a "use it or lose it" time limit on credit.

There is no dispute that § 973.155 applies to revocation proceedings. The Legislature incorporated the

sentence credit statute into Wis. Stat. § 302.11(7)(am): "The revocation order shall provide the parolee with credit in accordance with ss. 304.072[1] and 973.155."

Absent a mistake, the revocation order and warrant (ROW) will generally list all credit due and DHA will provide that credit accordingly. For example, in the instant case, the ROW listed additional credit Mr. Obriecht was entitled to but not the 107 days. The DOC's letter to the circuit court stated that it had used the amount of credit listed on the ROW to calculate Mr. Obriecht's release date, but withheld the remaining 107 days to shorten parole. (Ap. App. 111).

The state's position is that credit should be treated differently depending on whether or not it was listed on the ROW. Only credit listed on the ROW should be applied to reincarceration time. Otherwise, the application of credit "contradict[s] DHA's revocation order." (State's brief at 5). But the ROW is not infallible, and the application of statutory credit principles cannot rest on whether a particular agent or administrative law judge includes or omits deserved credit from the ROW.

By suggesting that DHA should be aware of all sentence credit ahead of time, the state implies that DHA should be able to lengthen its reincarceration determination in light of the credit. This practice is prohibited by ***Struzik v. State***. In ***Struzik***, the trial court found that the defendant was entitled to 14 days of pretrial incarceration credit and then

[1] Section 304.072(5) specifically provides for sentence credit on supervision holds by reference to § 973.155. "The 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."

sentenced him to 5 years and 14 days. The length of the sentence revealed that the court added to the sentence to cancel out the sentence credit. "This technique subverts the constitutional right of a convicted prisoner to have time previously served…applied toward the reduction of an appropriate sentence." ***Struzik v. State***, 90 Wis. 2d 357, 357-68, 279 N.W.2d 922 (1979).

The DHA and DOC do not have more power than the circuit court. A circuit court judge cannot withhold sentence credit from a prison sentence at the time of original sentencing for some speculative release date, nor can DOC. A circuit court judge cannot lengthen a sentence to cancel out sentence credit, nor can DHA. A circuit court cannot deny a post-sentencing request for rightfully owed sentence credit simply because it was not listed on the judgment of conviction. Neither can the DOC reject a post-sentencing request for rightfully owed sentence credit simply because it was not listed on the revocation order and warrant. There is no special set of rules for DHA and DOC. Wisconsin Statute § 973.155 controls.

II. The Lower Courts and DOC's Interpretation of Wis. Stat. § 302.11(7)(b) is Unreasonable.

The state mistakenly states that Mr. Obriecht "appears to argue that Wis. Stat. § 302.11(7)(b) does not apply to him." Of course it applies to him, but it has nothing to do with sentence credit. Section 302.11(7)(b) is a restriction on automatic early release.

The state argues that Mr. Obriecht's interpretation of § 302.11(7)(b) cannot be correct; otherwise the second sentence of the subsection would render the first sentence superfluous. (State's brief at 11).

Subsection (7)(b) provides that:

> "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 unless paroled earlier under par. (c).
>
> The parolee is not subject to mandatory release under sub. (1) or presumptive mandatory release under sub. (1g)."

This statute does not contain superfluous language. The second sentence is a specific example of the rule provided by the first sentence. There will be no early release except for discretionary release under subsection (c). This includes mandatory release and presumptive mandatory release.

It can be inferred that the legislature chose to specifically enumerate mandatory release and presumptive mandatory release to clarify that it was implementing a major change in the law. When § 302.11(7)(b) was first created, [2] it *did* provide for automatic early release for revoked parolees. (see brief-in-chief at 13-14).

In sum, § 302.11(7)(b) pertains to early release, not sentence credit. And applying credit that was rightfully earned but previously overlooked does not result in early release. It corrects the calculation of a release date based on time already served.

The state invites the Court to defer to the DOC's interpretation of § 302.11(7)(b) merely because a single record supervisor at a single correctional institution claims

[2] Then numbered Wis. Stat. § 53.11(7)(b).

that the policy is "long standing." (state's brief at 12). This conclusory assertion is not borne out by any evidence in the record. More importantly, the DOC's interpretation is not owed deference because it contravenes the statute and is unreasonable. *See* ***State ex rel. Parker v. Sullivan***, 184 Wis. 2d 668, 700, 517 N.W.2d 449 (1994) (the court does not defer to an interpretation that "directly contravenes the words of the statute, is clearly contrary to legislative intent, or is otherwise unreasonable or without rational basis.").

The state unsuccessfully attempts to avoid the Equal Protection Clause by insisting that Mr. Obriecht has received the benefit of his credit because the "overall" sentence (confinement plus parole) has been shortened. (*See* state's brief at 8, 15). It ignores reality to claim that being locked behind bars, away from family, with drastically reduced privacy and access to even basic amenities such as deodorant, is equivalent to being at home, with freedom to move about and live life in comfort and privacy. (*see* Amicus at 6). The former is far more punitive.

As to Mr. Obriecht's hypothetical in his brief-in-chief, the state argues that the 100-day disparity between the two individuals is a "slight difference." (State's brief at 13). In fact, the state changes Mr. Obriecht's hypothetical to one year instead of 100 days to "simplify" the numbers. It is unreasonable to suggest that more than 3 months in prison—or a year in the state's hypothetical—is "slight."

The state cites to this Court's prior case holding in ***State ex rel. Solie v. Schmidt***, 73 Wis. 2d 76, 242 N.W.2d 244 (1976) that a deprivation of 82 days credit was unreasonable and violated equal protection. (state's brief at 8). The state attempts to distinguish ***Schmidt*** because the defendant there did not have remaining supervision time on

his sentence. (State's brief at 8). This distinction does not alter this Court's determination that 82 days is a constitutionally significant amount of time. And obviously Mr. Obriecht's 107 days exceeds the amount in ***Schmidt***.

The state argues that it is unfair to compare any two individuals (including, apparently, hypothetical ones), and cites to cases involving disparity in sentencing between co-defendants. *See, e.g.* ***Ocanas v. State***, 70 Wis. 2d 179, 233 N.W.2d 457 (1975). This line of cases is irrelevant. The cases involve challenges to the trial court's sentencing discretion, not sentence credit.

The point of the hypothetical is that the difference between 100 days in freedom and 100 days behind bars cannot turn on something as arbitrary as which point in time a judge or bureaucrat recognizes that a defendant is entitled to credit.

The state's argument on mootness is insufficient. (State's brief at 4). It makes no assertion that Mr. Obriecht's sentence has discharged. Regardless, as the State acknowledges, this is an important legal issue that is likely to recur, as demonstrated by this Court's decision to grant review. *See* ***State v. Walker***, 2008 WI 34, ¶14, 308 Wis. 2d 666, 747 N.W.2d 673. A decision on the merits is warranted

CONCLUSION

For the reasons stated above and in the brief-in-chief, Mr. Obriecht respectfully asks this court to reverse the court of appeals and remand the case for further proceedings.

Dated this 30th day of January, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,578 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 30th day of January, 2015.

Signed:

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