STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014 AP 178

STATE OF WISCONSIN,

Plaintiff-Respondent

v.

JOSEPH T. TREPANIER,

Defendant-Appellant

On appeal from the Circuit Court for Sawyer County,

The Honorable Gerald L. Wright, presiding

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

JOSEPH T. TREPANIER

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I. Table of Contents.

II. Table of Authorities.

Cases

Statutes

Other Authorities

III. Statement of issue presented for review.

The sole issue presented in this appeal is whether a defendant who cannot post cash bail is entitled to sentence credit for the time he spent in jail prior to sentencing, when during the same period he was also under custody for a civil commitment for unpaid fines, and was unable to meet the monetary purge condition of that commitment order? The trial court answered this question in the negative, and it is that decision which the defendant seeks to have reviewed.

IV. Statement of the facts and case.

On Sunday, November 11, 2012, Joseph T. Trepanier was arrested on the charge of burglary and held in custody at the Sawyer County Jail. (R.1:2). Mr. Trepanier would remain in the Sawyer County Jail from the date of his arrest through to the date of his sentencing on April 30, 2013. (R.30:8-9; Appx. pages 12-13). Bail was set on Monday, November 12, 2012, at Five Hundred Dollars ($500.00) cash. (R.1:1).

Mr. Trepanier, being unable to raise the cash bail, requested and received a bond modification hearing which was held on November 20, 2012. (R.24:1). Through counsel, Mr. Trepanier requested a signature bond, noting that Mr. Trepanier was unemployed, had no significant assets, and only Twenty Dollars ($20.00) in his canteen account. (R.24:2). The State argued that the bail was "if anything it's probably too low," noting the seriousness of the charges. (R.24:3-4). The trial court, the Honorable Gerald L. Wright presiding, recollected that there was "some period of time where Mr. Trepanier was absconding from a probation status and that there were lots of warrants outstanding on him." (R.24:4). Mr. Trepanier acknowledged that this was accurate, and based on the history of absconding while on probation the trial court left the bail set at Five Hundred Dollars ($500.00). (R.24:4-5). The trial court did offer, however, that it would consider lowering the cash bail amount if Mr. Trepanier could come up with somebody who would cosign a signature bond. (R.24:5).

The following day, November 21, 2012, another hearing was held in a separate branch regarding a contempt commitment for unpaid fines imposed upon Mr. Trepanier in a prior case, namely, Sawyer County Case number 10CM56. (R.31:4; Appx. page 5). At that hearing Mr. Trepanier was given purge conditions which required Mr. Trepanier to pay One Thousand Dollars ($1,000.00) toward his unpaid fines, or serve six months in jail. (R.31:4; Appx. page 5).

On February 12, 2013, a second bond modification was held, and the defendant requested that the trial court modify the cash bail to a signature bond, or at least lower the cash portion of the bail. (R.27:3). As guarantor to the signature bond Mr. Trepanier offered his mother as a cosigner. (R.27:3). Mrs. Trepanier had very limited financial means and the Court questioned her ability to pay a signature bond if Mr. Trepanier were to abscond. (R.27:4-5). The request for bond modification was therefore denied. (R.27:5). There was a brief discussion of Mr. Trepanier's civil commitment at this hearing; however, it does not appear to have influenced the trial court's decision.[1] (R.27:4).

A plea hearing was subsequently held on February 26, 2013. (R.29:1). At the plea hearing the defendant plead no contest to count 1, burglary of a building or dwelling. (R.29:9). Count 2, criminal damage to property, was dismissed by the state but read-in, and an uncharged incident on November 11, 2012 was read-

[1] The trial court may have done Mr. Trepanier a bit of a favor in denying the signature bond. If Mr. Trepanier could not raise cash bail, it is difficult to see how he would have raised the One Thousand Dollars ($1,000.00) purge condition on the commitment while he was on signature bond. That being the case he may well have forfeited his claim to sentence credit without any obtaining any release from custody.

in as well. (R.29:10). The trial court accepted Mr. Trepanier's plea of no contest and convicted him of burglary of a building or dwelling in violation of § 943.10(1m)(a), Wis. Stats., and ordered the preparation of a presentence investigation report. (R.29:9-10). Under the terms of the negotiated plea, both parties were free to argue at sentencing. (R.29:2). At the conclusion of the hearing, Mr. Trepanier's bail was revoked, the trial court noting that "it's probably not relevant since he hasn't been able to post bail." (R.29:10).

Sentencing was held on April 30, 2013. (R.30:1). Mr. Trepanier was sentenced to twelve years in the Wisconsin State Prison consisting of six years initial confinement followed by six years of extended supervision. (R.30:15). Said sentence, however, while imposed was also stayed, and Mr. Trepanier was placed on six years probation with one year of conditional time in the Sawyer County Jail. (R.30:15). This portion of the sentence is not contested by Mr. Trepanier.

Confusion arose at the sentencing hearing regarding the amount of sentence credit Mr. Trepanier was due. Mr. Trepanier requested 171 days of sentence credit, and initially the State appeared to agree with that amount. (R.30:8-9; Appx. pages 12-13). Later in the hearing, however, it was brought to the trial court's attention that Mr. Trepanier had been sitting on a civil commitment for unpaid fines. (R.30:12; Appx. page 14). Initially the defendant's counsel appears to have agreed that Mr. Trepanier would be owed only 10 days of sentence credit. (R.30:12; Appx. page 14). The trial court proceeded to grant 10 days sentence

credit. (R.30:15). But then, toward the end of the hearing, the State expressed concern whether the amount of sentence credit was correct, stating "the only thing I'm still confused on is the credit. I'm not sure that the fact that he is sitting for whatever Deputy Sajdera said it was, I'm not sure that stops him from getting credit on this one because I believe he was sitting on a cash bond." (R.30:19; Appx. page 15). Mr. Trepanier through counsel asked for whatever credit is allowed by law. (R.30:19-20; Appx. pages 15-16). The trial court then ruled that "this sentence is consecutive to any period of detention that he has been ordered previously as a contempt of court. So he has only 10 days credit in this matter." (R.30:20; Appx. page 16)

Following the sentencing hearing, Mr. Trepanier filed a motion for sentence credit. (R.13). The State replied that it could not make a proper response to that motion without a transcript of the April 30, 2013, sentencing hearing. (R.14). Thereafter, Mr. Trepanier filed an amended motion for sentence credit with portions of the transcript of the April 30, 2013, sentencing hearing attached. (R.15; Appx. pages 8-16).

The hearing on Mr. Trepanier's motion for sentence credit was held on August 6, 2013. (R.31:1; Appx. page 2). Again, Mr. Trepanier requested 171 days of sentence credit. (R. 15:1; Appx. page 8). Again, the trial court denied the request. (R.16; Appx. page 1). In denying the requested sentence credit the trial court relied heavily on the case of *State v. Way*, 113 Wis.2d 82, 334 N.W.2d 918

(Wis. App., 1983). It explained it reasoning as follows:

> "State v. Way" is very informative. [two sentences omitted]… "State v. Way" includes this statement: The obvious purpose of a sentence providing an alternative penalty of six months in jail if the original fine is not paid is to prompt or coerce the defendant to pay the fine. This being the intended purpose a Court by necessity must have the authority to impose a commitment consecutive to the jail time provision. A commitment must be separate from and in addition to any other periods of incarceration the person is required to serve in order to the able the commitment to serve it's prompting or coercive purpose. Because of that if I were to grant-- because of that I'm going to deny Mr. Trepanier's motion. *To give him credit for or to credit his time in custody against both the commitment order and the conditional jail time in this matter would completely obliterate the whole purpose of the commitment order.* The purpose of the commitment order is not to punish Mr. Trepanier. The purpose of the commitment order is to coerce payment. Motion denied.

(R.31:2-3; Appx. pages 3-4) (emphasis added).

Mr. Trepanier filed his notice of intent to pursue postdisposition relief on August 15, 2013, (R.19), and subsequently filed his notice of appeal on January 17, 2014. The sole issue presented for appeal is the proper amount of sentence credit Mr. Trepanier is due. (R.20).

V. Statement on oral argument and publication.

The issue of whether a defendant should receive sentence credit when he or she was simultaneously in custody under a civil commitment for unpaid fines is an issue which will undoubtedly confront trial courts in the future. This court will benefit from oral argument in this case. This court's decision should be published; guidance on this issue is needed and would further the efficient administration of justice in future cases with similar fact patterns.

VI. Argument.

A. The proper standard of review for this case is *de novo*.

Numerous cases have held that the application of § 973.155(1)(a), Wis. Stats., to undisputed facts is a question of law entitled to *de novo* review. *State v. Dentici*, 251 Wis.2d 436, ¶ 4, 643 N.W.2d 180 (Wis. App. 2002); *State v. Tuescher*, 226 Wis.2d 465, 595 N.W.2d 443, 445 (Wis. App., 1999); *State v. Rohl*, 160 Wis.2d 325, 329, 466 N.W.2d 208, 210 (Wis. App., 1991).

The essential facts in this case are indisputable. From the date of arrest until the date of sentencing, Mr. Trepanier was held in custody at the Sawyer County Jail for a period of 171 days. (R.30:8-9; Appx. pages 12-13). During this period Mr. Trepanier was unable to raise Five Hundred Dollars ($500.00) for his cash bail. (R.29:10). From ten days after his arrest until the date of sentencing, Mr. Trepanier was also subject to a civil commitment for failure to pay fines with purge conditions requiring Mr. Trepanier to pay One Thousand Dollars ($1,000.00) toward his unpaid fines, or serve six months in jail. (R.31:4; Appx. page 5). There are only two possible answers for the correct sentence credit, 10 days or 171 days. The question to be settled is solely a question of law, namely, what was the legal effect on sentence credit of the civil commitment for failure to pay fines?

B. Section 973.155(1)(a), Wis. Stats., does not authorize the application of sentence credit to a civil commitment, therefore Mr. Trepanier's sentence credit should have been applied to his burglary sentence.

Section 973.155(1)(a), Wis. Stats., grants sentence credit for each day in custody regardless of the basis for confinement as long as it is connected to the offense for which the sentence is imposed. *State v. Gilbert*, 115 Wis.2d 371, 377, 340 N.W.2d 511, 515 (1983).

The offense for which the defendant is sentenced need not be the sole basis for custody; so long as that custody was at least in part due to the conduct that resulted in the conviction, the defendant should receive sentence credit. *State v. Hintz*, 300 Wis. 2d 583, 731 N.W.2d 646 (Wis. App., 2007) (Hintz was entitled to sentence credit for the time he was in custody on an extended supervision hold because the hold was at least in part due to the course of conduct that resulted in his new conviction).

The resolution of this case hinges on whether sentence credit under § 973.155(1)(a), Wis. Stats., can be applied to a consecutive civil commitment. Section 973.155(1)(a), Wis. Stats., provides as follows:

> 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. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
> 1. While the offender is awaiting trial;
> 2. While the offender is being tried; and
> 3. While the offender is awaiting imposition of sentence after trial.

By its terms § 973.155(1)(a), Wis. Stats., requires that credit be given toward "the service of his or her *sentence*" for the "conduct for which *sentence* was imposed." *Id.* It further defines the confinement requiring credit as "related to an offense for which the offender is ultimately *sentenced*, or for any other *sentence* arising out of the same course of conduct." *Id*.

Mr. Trepanier's § 973.07, Wis. Stats., incarceration was a civil commitment. A commitment is not a sentence. *State v. Way*, 113 Wis.2d at 86, 334 N.W.2d at 920. Section 973.155(1)(a), Wis. Stats., does not provide for sentence credit against civil commitments. Rather, the statute directs the granting of "sentence" credit to "sentences." Consequently, because Mr. Trepanier's civil commitment was not a sentence; the sentence credit which Mr. Trepanier accrued should not have been applied to that commitment. Rather the credit should have been applied to a sentence. There is only one sentence here, the sentence resulting from the burglary conviction, and it is to that solitary sentence that the sentence credit should have been applied.

C. The trial court's reliance on *State v. Way* in denying the defendant sentence credit was misplaced.

1. *State v. Way* was not a sentence credit case.

The trial court in its decision to deny Mr. Trepanier 171 days sentence credit placed great weight on the decision rendered in *State v. Way*. (R.31:2-3; Appx. pages 3-4). *State v. Way,* however, was not a sentence credit case and the issue never arose in the decision.

The question presented in *State v. Way* was whether the trial court had jurisdiction to order that a civil commitment for failure to pay a fine be served consecutive to a criminal sentence (in that case, battery to a peace officer), and further to order that a criminal sentence for escape be served consecutive to the civil commitment. *State v. Way,* supra. The court in *State v. Way* held that such authority does exist under § 973.07, Wis. Stats. *Id.* Though the exact language of § 973.07, Wis. Stat., has changed somewhat since *State v. Way,* the substance of the statute has not. The statute currently provides:

> If the fine, plus costs, fees, and surcharges imposed under ch. 814, are not paid or community service work under s. 943.017 (3) is not completed as required by the sentence, the defendant may be committed to the county jail until the fine, costs, fees, and surcharges are paid or discharged, or the community service work under s. 943.017 (3) is completed, for a period fixed by the court not to exceed 6 months.

Central to the decision in *State v. Way* was the understanding that the purpose of the statute was "coercive" rather than punitive. *State v. Way,* 113 Wis.2d at 86, 334 N.W.2d at 920. "A commitment must be separate from and in addition to any other periods of incarceration the person is required to serve in order to enable the commitment to serve its prompting or coercive purpose." *Id*.

In practical terms for Mr. Trepanier, a sentence consecutive to his commitment should have meant that he would not begin serving his sentence for the burglary until May 20, 2013 (i.e. 180 days after the order of commitment on November 21, 2013), unless, of course, he met his purge condition of paying One Thousand Dollars ($1,000.00) towards his unpaid fines.

Mr. Trepanier has never contested that the trial court could make his sentence separate and consecutive to his commitment. (R.31:3; Appx. page 4). What the defendant does contest is the trial court's taking the additional step of applying his sentence credit, which he had accrued while sitting on a cash bail in his burglary case, to the civil commitment, rather than to the criminal sentence for burglary. For it is evident that this is how the trial court understood it decision:

> To give him [Mr. Trepanier] credit for or to credit his time in custody against both the commitment order and the conditional jail time in this matter would completely obliterate the whole purpose of the commitment order. …
> … when Mr. Trepanier is being held on the commitment order his time is either going to be attributed to the commitment order or to this conditional jail time. It is not going to be attributed to both. …

(R.31:2-3; Appx. pages 3-4). In denying Mr. Trepanier 161 days of sentence credit on his sentence for the burglary conviction, the trial court was of the belief that it had the authority to apply that sentence credit to a civil commitment. This is an action that *State v. Way* never addressed and never condoned.

2. § 973.155(1)(a), Wis. Stats., does not authorize the award of sentence credit to civil commitments.

As stated above, in *State v. Way* the court found that there was authority under § 973.07, Wis. Stats. to impose a civil commitment for unpaid fines consecutive to a criminal sentence. *State v. Way*, 113 Wis.2d at 87, 334 N.W.2d at 920. It is interesting to note, however, that the court did not find that this authority existed under § 973.15(2), Wis. Stats., (1983). At that time § 973.15(2), Wis.

Stats., (1983), provided:

> The court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent or that it shall commence at the expiration of any other sentence. If the convicted offender is then serving a sentence or is subject to parole revocation

The court agreed with Mr. Way that a commitment is not a sentence, and that "therefore sec. 973.15(2), which speaks only of only of concurrent and consecutive sentences, cannot be deemed as authority for an ordinary commitment [being made] consecutive to a sentence." *State v. Way*, 113 Wis.2d at 87, 334 N.W.2d at 920.

Similarly, § 973.155(1)(a), Wis. Stats., does not speak of commitments, but rather, only of "sentences." Consequently, § 973.155(1)(a), Wis. Stats., cannot be deemed as authority for the application of "sentence credit" to a civil commitment because the statute only speaks of "sentences". Any authority for applying sentence credit to a civil commitment would have to found somewhere other than § 973.155(1)(a), Wis. Stats.

3. Section 973.07, Wis. Stats., cannot be interpreted to authorize the application of sentence credit to a civil commitment, because the application of sentence credit is restricted by statute and common law to the terms of § 973.155(1)(a), Wis. Stats., .

Ultimately, the court in *State v. Way* found that authority for making commitments consecutive to sentences was implied under § 973.07, Wis. Stats.. Initially, it should be observed that there is nothing in § 973.07, Wis. Stats., that expressly authorizes the application of sentence credit to a civil commitment; any such authority would have to be implied.

Significantly, in reaching its decision the court in *State v. Way* found that there were "no other statutes or case law that [would] limit the authority of a sentencing court to impose a commitment consecutive to another term of incarceration." *State v. Way*, 113 Wis.2d at 87, 334 N.W.2d at 920. It was only in the absence of such restrictions that the court was willing to find such authority. *Id.* That is not the case here, however, the award of sentence credit is in fact restricted by both statute and the common law.

Originally, the rule was that there is no credit for time served in jail prior to sentencing, absent a statute providing for such sentence credit. See, 77 ALR 3rd 182, *Right to Credit for Time Spent in Custody Prior to Trial or Sentencing,* § 3 (Appx. pages 17-25); and *Cheney v. State*, 44 Wis.2d 454, 171 N.W.2d 339 (Wis., 1969)("We conclude that it is a matter of proper legislative consideration to adopt or not a rule giving credit for time spent in jail prior to sentencing') *overruled in part by Byrd v. State*, 65 Wis.2d 415, 222 N.W.2d 696 (Wis., 1974)(holding that sentence credit must be given when the combined sentence and pre-sentence custody exceeds the maximum sentence for the crime). This rule came under increasing scrutiny, first in *Byrd,* then in *Klimas v. State*, 75 Wis.2d 244, 249, 249 N.W.2d 285, 288 (Wis., 1977), where the Wisconsin Supreme Court held that "as a matter of equal protection, there be credit required for all pre-trial and pre-sentence confinement that results from the indigency of the defendant."

In its ruling the *Klimas* court, in a gesture of deference to the legislative branch, invited the Wisconsin legislature to enact legislation addressing the issue

of credit for pre-trial and pre-sentence confinement. *Id*. That invitation was taken up by the Wisconsin legislature with the adoption of § 973.155(1)(a), Wis. Stats., which expanded the scope of sentence credit to include all defendants awaiting trial or sentencing in custody, not just indigent defendants. This feature of the sentence credit statute was recommended, but not mandated, by the *Klimas* court:

> It should be noted that the federal system, by legislation and by rule requires that credit be given for 'any days spent in custody' for whatever reason. *We do not go that far, and in this opinion mandate only that where the custody is the result of indigency must credit be given as a constitutional matter*. The federal treatment of the problem of pre-sentence confinement has much to recommend it. It is simple and it is just. All pre-sentence confinement, whether because of inability to make bail, unwillingness to be released on bail, or custody for examination, are treated alike and are administratively, not judicially, credited toward satisfaction of the sentence.

Klimas, 75 Wis.2d at 251-52, 249 N.W.2d at 289. (emphasis added). *Klimas* was not a complete rejection of the common law rule articulated in *Cheney*, but rather a limited rejection of the common law rule in cases "where the custody is the result of indigency." *Id.* Absent a statute, or the existence of *Klimas*/equal protection concerns resulting from the indigency of the defendant, the common law rule against credit for pre-trial and pre-sentence confinement presumably still applies. Or to put it another way, sentence credit is purely a creature of either the equal protection clause or § 973.155(1)(a), Wis. Stats.; it has no other existence in law. These are only two sources of authority for the award of pre-sentence credit in the State of Wisconsin.

It would, of course, be ludicrous to argue that the equal protection clause provides the authority for taking away Mr. Trepanier's sentence credit, as the whole point of the equal protection clause, as interpreted by *Klimas,* is to protect indigent persons from the deprivation of liberty by the State; not to authorize the State to deprive indigent persons of their liberty. And as previously argued § 973.155(1)(a), Wis. Stats., by its terms restricts the award of sentence credit only to "sentences." Section 973.155(1)(a), Wis. Stats., can no more be said to authorize the allocation of sentence credit to civil commitments, than § 973.15(2), Wis. Stats., could be said to authorize commitments consecutive to sentences. See, argument C.2. supra., and *State v. Way*, 113 Wis.2d at 87, 334 N.W.2d at 920.

Therefore, unlike the situation in *State v. Way*, there are both statutory and common law restrictions against the application of sentence credit to a civil commitment. Mr. Trepanier was incarcerated for 171 days in jail and that time should be credited somewhere. If it cannot be credited to the commitment, then it must be credited to the sentence.

4. The practical considerations raised in *State v. Way* are not the same in a sentence credit situation as they are in the concurrent v. consecutive commitment situation; the only purpose served in denying Mr. Trepanier's sentence credit would be punitive, not coercive.

The court in *State v. Way* was concerned that finding trial courts did not have the authority to order civil commitments consecutive to sentences, would render meaningless the statutory power to order commitments for the nonpayment

of fines. *State v. Way*, 113 Wis.2d at 87, 334 N.W.2d at 920. The court wrote:

> The obvious purpose of a sentence providing an alternative penalty of six months in jail if the original fine is not paid is to prompt or coerce the defendant to pay the fine. This being the intended purpose, a court by necessity must have the authority to impose a commitment consecutive to the jail time provision. A commitment must be separate from and in addition to any other periods of incarceration the person is required to serve in order to enable the commitment to serve its prompting or coercive purpose. If commitments were not separate and consecutive to sentences, then the fine would cease to be a real penalty, since any sanction for nonpayment of the fine would be encompassed within the provision for jail time or imprisonment.

Id. It was this portion of *State v. Way* which the trial court relied upon in denying Mr. Trepanier his sentence credit. (R.31:2-3; Appx. pages 3-4). This reliance was mistaken.

The situation is not the same between *Way* and Mr. Trepanier. Clearly if Mr. Way's commitment had not been consecutive and separate from his sentences he would have had no incentive to pay his fines. (After all, why pay your fines if you are certain to sit in jail anyway?). But that was not the case here; from November 21, 2012, the date on which he was committed, and for each and every day through sentencing on April 30, 2013, Mr. Trepanier had an incentive to pay his One Thousand Dollars ($1,000.00) purge condition. It would get him out of jail. The fact that Mr. Trepanier was no more able to raise One Thousand Dollars ($1,000.00) to purge the commitment than he could raise Five Hundred Dollars ($500.00) for his cash bail does not negate the coercive effect of his commitment.[2]

[2] In fact, the coercive effect of the commitment would continue after sentencing, as Mr. Trepanier's sentence would not begin until the conclusion of his commitment on May 20, 2013.

The error the trial court made is that it looked at the situation through the wrong end of the telescope. It saw Mr. Trepanier at the end of the trial process, on the date of sentencing, and determined that if it gave Mr. Trepanier his full 171 days credit, then Mr. Trepanier would not have served even one extra day in jail for his failure to pay his fines.[3] But this presupposes that Mr. Trepanier was always guilty, and was always going to serve at least six months in jail for the burglary charge. That was not a given until the day of sentencing. Mr. Trepanier was presumed innocent until February 26, 2013, the date on which he entered his plea and was found guilty. (R.29:1). Before that point in time anything could have happened which might which might have prevented his serving even a single day in jail for the burglary charge. Witnesses could have recanted their testimony, evidence could have been suppressed; a trial could have resulted in an acquittal. Moreover, even after conviction it was not a certainty that he would serve a year in jail until the day of sentencing. The point is that on any given day during the entire time Mr. Trepanier was in custody on the commitment he had a motive for paying his One Thousand Dollars ($1,000.00) purge condition. It would get him out of jail. To be sure, by staying in jail he might be gaining sentence credit, but it was never a certainty that he would need that sentence credit. Any rational person with the financial means to pay their purge and bail would do so; and avoid the possibility of unnecessarily serving time in jail. During the entire period Mr.

[3] Actually, he would serve 20 extra days, but clearly not the full 180 days.

Trepanier was under commitment the coercive effect of that commitment was intact.

Denying Mr. Trepanier his sentence credit would not further the coercive purposes of § 973.07, Wis. Stats.. The purpose of a civil commitment under § Section 973.07, Wis. Stats., is to coerce the subject of the commitment into paying his fines, not to punish him for failing to pay his fines. *State ex rel. Pedersen v. Blessinger*, 56 Wis.2d 286, 201 N.W.2d 778 (Wis. 1972). But at the time of sentencing how could denying Mr. Trepanier his sentence credit coerce him into paying his purge condition? Whatever coercive effect that statute may have had on Mr. Trepanier had already taken its effect by the date of sentencing. Section 973.07, Wis. Stats., makes no mention of loss of sentence credit as a sanction for not paying your fines. A silent sanction can have no coercive effect on a subject. Despite the trial court's assertion of the opposite, the only possible purpose served in denying Mr. Trepanier his sentence credit was a punitive purpose. It is hard to view it any other way, Mr. Trepanier was not being coerced into paying his fines; he was being punished for not paying his fines.

D. Awarding sentence credit to Mr. Trepanier would not be dual credit for consecutive sentences as prohibited by *State v. Boettcher*.

This not a dual credit situation as encounter in *State v. Boettcher*, 144 Wis.2d 86, 423 N.W.2d 533 (Wis., 1988). *Boettcher* held that where multiple sentences are imposed consecutively, credit is to be applied to the first sentence

imposed, on a day-for-day basis, and is not to be duplicatively applied to more than one of the sentences imposed to run consecutively. *Id.*

But there are not multiple consecutive sentences in Mr. Trepanier's case. There is only one sentence here, that resulting from the burglary conviction. As argued previously, sentence credit cannot be applied to a civil commitment. See argument C.3 above. Mr. Trepanier served 171 days in the Sawyer County Jail, and that time should be credited somewhere. Section 973.155(1)(a), Wis. Stats., directs that it should be applied to a "sentence." *Boettcher* says it should be applied to "the first sentence." *Boettcher*, 144 Wis.2d at 87, 423 N.W.2d at 534. Neither of these authority state that this credit can, let alone should, be applied to a civil commitment. Therefore, the time served by Mr. Trepanier should be applied to the first and only sentence he received; the sentence for his burglary conviction.

E. A civil commitment under § Section 973.07, Wis. Stats., is not an intervening sentence as per the *State v. Beets* scenario.

This is not a *Beets* scenario. *State v. Beets*, 124 Wis.2d 372, 369 N.W.2d 382 (Wis., 1985), no more addressed the application of sentence credit to civil commitments than either § 973.155(1)(a), Wis. Stats., or *Boettcher* addressed the issue. In *Beets* the Wisconsin Supreme Court dealt with the situation where a defendant, who was sitting on cash bail awaiting trial on a burglary charge, began serving a sentence on a drug conviction which was unconnected to the burglary charge for which he was awaiting trial. In such situations the *Beets* court held that sentence credit should not to be given for the period during which the defendant

was serving an intervening sentence. *Beets*, 124 Wis.2d. at 374, 369 NW.2d at 383. However, Mr. Trepanier custody was not interrupted by an intervening sentence. Mr. Trepanier was under a commitment, and a commitment is not a sentence, nor should it be treated like a sentence. This can be seen by examining the reasoning behind the *Beets* decision.

The *Beets* court's holding rested on the reasoning that during the period Mr. Beets was serving his drug sentence, it was immaterial whether he could make bail on the burglary charge, since he had no right to be at liberty during his period of confinement on the drug sentence. *Beets*, 124 Wis.2d. at 379, 369 NW.2d at 385. The court wrote:

> It should be remembered that in our decisional law the origin of the confinement credit was a matter of equal protection, i.e., a person who could not make bail because of indigency was being denied a liberty right that a wealthy person could exercise. Klimas v. State, 75 Wis.2d 244, 249 N.W.2d 285 (1977).

Id. That is, if Mr. Beets had been a rich man he would have been in no better situation than a poor man after his drug sentence. At that point posting bail would not have achieved Mr. Beets' liberty.

But what of Mr. Trepanier, what if he had been a rich man? Presumably, if Mr. Trepanier had been a rich man he would have posted his cash bail and paid his fines and been at liberty from the day of his first appearance until the day of his sentencing. The imposition of a civil commitment did not render immaterial Mr. Trepanier's financial inability to post bail; if anything it made his plight even more acute. Indigency was at the root of Mr. Trepanier's confinement, and he was no

more able to pay the One Thousand Dollar ($1,000.00) purge condition on the commitment, than he was able to post a Five Hundred Dollar ($500.00) cash bail on his burglary charge. If he had, he would not have been in jail. Clearly, this is not a *Beets* situation.

VII. Conclusion.

From the day of his arrest until the day of his sentencing, for a period of 171 days, Mr. Trepanier was confined in the Sawyer County Jail unable to post his cash bail of Five Hundred Dollars ($500.00). Under the provisions of § 973.155(1)(a), Wis. Stats., Mr. Trepanier was entitled to sentence credit for that time toward the service of his sentence. Mr. Trepanier had but one sentence to which his credit could be allocated, his sentence for burglary. A civil commitment for unpaid fines is not a “sentence" and the trial court erred in applying that credit to the civil commitment. There is no authority for applying sentence credit to a civil commitment. The Defendant therefore respectfully requests that this court remand this case to the circuit court with instructions that Mr. Trepanier be credited with 171 days served on the sentence for his burglary conviction.

Respectfully submitted March 31, 2014.

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VIII. Certifications.

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 5530 words.

I further certify that I personally served the State of Wisconsin, Plaintiff-Respondent, with three copies of this brief the same day it was filed with this court.

Finally, I further certify that pursuant to Rule 809.19(12)(f) I have submitted an electronic copy of this brief, excluding the appendix. The text of the electronic copy of the brief is identical in content and format to the text of the paper copy of the brief. 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 March 31, 2014.

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CERTIFICATION OF MAILING

I certify that this brief and appendix was deposited in the United States mail for delivery to the Clerk of the Court of Appeals by express mail on _____. I further certify that the brief was correctly addressed and postage was pre-paid.

Date: _____

Signature: _____