STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP178-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSEPH T. TREPANIER,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN THE CIRCUIT COURT FOR SAWYER COUNTY, HONORABLE GERALD L. WRIGHT, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court err when it: (a) imposed a sentence for burglary consecutive to time served on a civil contempt commitment for failure to pay a fine; and (b) refused to give credit against the burglary sentence for 171 days already served on the civil contempt commitment?

The trial court: (a) held that it had the authority to impose the burglary sentence consecutive to the civil

contempt commitment; and (b) refused to give Trepanier "double credit" for 171 days against both the civil contempt commitment and the consecutive unrelated burglary sentence.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument or publication. This case involves the application of established principles of law to the facts presented.

STATEMENT OF THE CASE

Trepanier appeals (20) from a judgment of conviction entered upon his no contest plea to burglary (10), and from an order denying direct postconviction relief, entered in the Circuit Court for Sawyer County, the Honorable Gerald L. Wright, presiding (16; A-Ap. at 1). Trepanier's only challenge is to the trial court's denial of his request for an additional credit of 171 days of pretrial custody against his burglary sentence.

The trial court made the following findings of fact regarding the contempt proceedings at the postconviction hearing held August 6, 2013 (31). On March 9, 2012, a civil contempt commitment order issued and was served on Trepanier April 16, 2012, for failure to pay a $1,000 court fine. A hearing was held April 18, 2012, at which Trepanier was found in contempt for non-payment of the fine. Sentence was withheld. Trepanier could "purge" the contempt either by paying the fine or serving six months in jail. Trepanier failed to pay any of the fine. Another commitment order, therefore, was issued on October 25, 2012, and was served on Trepanier November 19, 2012. At a hearing held November 21, 2012, Circuit Judge Anderson ordered Trepanier to serve six months in jail unless he paid the $1,000 fine (31:4). Trepanier did not "pa[y] a dime" and was ordered to jail for six months. Trepanier presumably never proved to Judge Anderson

that he lacked the ability to pay the $1,000 fine (32:13-14); hence, the commitment order. Trepanier did not challenge the commitment order on appeal.[1]

Trepanier was arrested for burglary November 11, 2012 (1:2), and was jailed ten days before the November 21 contempt commitment hearing. Cash bond for the burglary was set at $500 November 13, 2012 (2). At a bail hearing held November 20, 2012, the court refused Trepanier's request to modify bail from $500 cash to only a signature bond due to his history of absconding (24:2-5).

At a bail modification hearing held February 12, 2013, Trepanier again asked to be released on a signature bond. The prosecutor opposed the request, remarking that $500 "is obscenely low" bail for burglary (27:3). Defense counsel acknowledged that Trepanier would likely not be released even on a signature bond because he was also in custody on a six-month civil commitment for contempt of court for non-payment of a fine commencing in November of 2012 (*id.* at 4). The trial court again denied bail

[1] Because Trepanier never challenged the commitment order, he may not argue in this case that his failure to purge the contempt order in that closed case was due to his inability to pay the fine rather than due to his contumacy. Trepanier bore the burden of proving to Judge Anderson that he lacked the ability to pay the fine in the time allotted. *Will v. State*, 84 Wis. 2d 397, 402-07, 267 N.W.2d 357 (1978). *See id.*, at 402 ("[W]hen an indigent defend[ant] upon whom a fine has been imposed lacks the diligence to meet a reasonable payment schedule, his refusal to pay the fine results from contumacy and not indigency, and incarceration is permissible to punish the refusal to pay."); *id.* at 406-07 ("Once a fine and a payment schedule are reasonably suited to the offender's means, the offender carries the heavy burden of showing that such an individualized payment schedule is in fact beyond his means."). Trepanier obviously failed to meet that burden and then failed to challenge Judge Anderson's commitment order on appeal. This court should, therefore, reject the repeated insinuations throughout Trepanier's brief that he lacked the ability to pay his fine. After all, had Trepanier proven his inability to pay, he could not have been jailed for contempt. *Id. See also State v. Way*, 113 Wis. 2d 82, 89-90, 334 N.W.2d 918 (Ct. App. 1983).

modification due to Trepanier's criminal record and history of absconding (*id.* at 5).

Trepanier pled guilty to burglary February 26, 2013. Another charge was dismissed but read-in, and an uncharged offense was also read-in as part of the plea agreement (29:9-10). The court ordered bail revoked that day (*id.*).

Trepanier was sentenced April 30, 2013, to six years of initial confinement, followed by six years of extended supervision for the burglary. That sentence was stayed and the court placed Trepanier on probation for six years, with the condition that he serve one year in the county jail with Huber privileges. The court ordered that he be given credit for ten days of pretrial custody against both the stayed prison sentence and the one year of jail time imposed as a condition of probation (30:15, 18).

Defense counsel initially requested at sentencing that Trepanier be given 171 days of credit for pretrial custody but corrected himself later on, requesting only ten days upon realizing that his client was simultaneously serving (except for ten days) a six-month civil contempt commitment (*id.* at 8, 12). After the court imposed sentence, the prosecutor expressed "confus[ion]" about the amount of sentence credit for the burglary because Trepanier "was sitting on a cash bond." The prosecutor did not elaborate. In response, defense counsel requested credit for all of the time that the law allows his client (*id.* at 19-20).

The trial court removed all confusion by clarifying its intent that the burglary sentence be imposed consecutive to the time served on the civil contempt commitment, thereby entitling Trepanier to credit for only the ten days of pretrial custody served exclusively for the burglary (November 11-21, 2012), and not for the 171 days served thereafter for the civil contempt commitment beginning November 21, 2012 (*id.* at 20).

The sentence credit issue was raised again by postconviction counsel at a hearing on Trepanier's motion for release on bail pending appeal held December 10, 2013 (32). The trial court explained that Trepanier had been ordered by Circuit Judge Anderson to pay a $1,000 fine or serve six months in jail for contempt of court. He never paid any of the $1,000 fine and, accordingly, served six months in jail instead. The court explained that it imposed the burglary sentence consecutive to the time served on the civil contempt commitment, to give the contempt commitment "some strength, some power, some control" (32:11-12). The court remarked that Trepanier had not "paid a dime" in the case for which he was found in contempt (*id.* at 13).

Although he insisted that Trepanier was entitled to credit against his burglary sentence for 171 days served on the civil contempt commitment, postconviction counsel conceded that the trial court had the authority to impose the burglary sentence consecutive to the civil commitment time (*id.*). The trial court noted that Trepanier never appealed Judge Anderson's commitment order issued in the contempt proceeding on November 21, 2012. In response, Trepanier's attorney said: "we are not contesting that"; they were only challenging the trial court's determination that Trepanier was not entitled to credit for the additional 171 days against his burglary sentence (*id.* at 14). Over Trepanier's objection, the trial court imposed bail on the appeal in the amount of $1,000 (*id.* at 16-17). It appears that Trepanier posted the $1,000 cash bail (18).

ARGUMENT

THE TRIAL COURT HAD THE AUTHORITY TO IMPOSE THE BURGLARY SENTENCE CONSECUTIVE TO THE CIVIL CONTEMPT COMMITMENT AND, IN DOING SO, PROPERLY REFUSED TO GIVE TREPANIER "DOUBLE CREDIT" FOR 171 DAYS OF TIME SERVED IN CUSTODY AGAINST BOTH THE CIVIL COMMITMENT AND THE UNRELATED CONSECUTIVE BURGLARY SENTENCE.

Trepanier insists that he is entitled to double credit for 171 days served in custody against both a civil commitment and an unrelated burglary sentence imposed consecutive to that commitment. His argument flies in the face of clearly established Wisconsin statutory and case law.

Trepanier's civil contempt commitment to jail ended on May 20, 2013, six months after it was imposed on November 21, 2012. The burglary sentence was imposed and stayed on April 30, 2013, and ordered to run consecutive to the time served on the civil commitment. This means that service of the one-year jail term imposed as a condition of probation on the burglary sentence began on May 20, 2013, after the civil commitment ended. Trepanier was entitled to credit against his burglary sentence for only the ten days between his arrest for burglary on November 11, 2012, and the civil commitment hearing on November 21, 2012, that resulted in the order sending him to jail for contempt. He most certainly was not entitled to "windfall" credit against his burglary sentence for an additional 171 days already served in jail for the unrelated civil contempt commitment.

A. The applicable law and standard for review.

The determination of sentence credit is a question of law involving the application of the provisions of Wis. Stat. § 973.155(1) to the facts. It is reviewed by this court *de novo*. *State v. Carter*, 2007 WI App 255, ¶ 8, 306 Wis. 2d 450, 743 N.W.2d 700; *State v. Tuescher*, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (Ct. App. 1999).

The determination of sentence credit is governed by Wis. Stat. § 973.155(1), which provides:

> **973.155 Sentence credit. (1)** (a) 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.
>
> (b) The categories in par. (a) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

Courts are bound by the statutes in calculating sentence credit, and can only grant such credit as the legislature has seen fit to award. *State v. Beets*, 124 Wis. 2d 372, 382, 369 N.W.2d 382 (1985).

For sentence credit to be awarded under § 973.155, two requirements must be satisfied: (1) the defendant must

have been "in custody" for the period in question; and (2) the period "in custody" must have been "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a); *State v. Johnson*, 2009 WI 57, ¶ 27, 318 Wis. 2d 21, 767 N.W.2d 207; *State v. Johnson*, 2007 WI 107, ¶ 31, 304 Wis. 2d 318, 735 N.W.2d 505; *State v. Gilbert*, 115 Wis. 2d 371, 376-77, 340 N.W.2d 511 (1983); *State v. Beiersdorf*, 208 Wis. 2d 492, 496, 561 N.W.2d 749 (Ct. App. 1997).

Trepanier bore the burden of proving that he was "in custody," and that his custody was in "'connection with the course of conduct for which sentence was imposed,'" here, the burglary. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995) (quoting Wis. Stat. § 973.155(1)(a)).

With respect to the "in connection with the course of conduct for which sentence was imposed" requirement, a defendant is not entitled to credit for time spent serving a sentence on an unrelated charge. *State v. Amos*, 153 Wis. 2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989); *State v. Beets*, 124 Wis. 2d at 373-74. Further, if a defendant is in custody for two pending charges, once the defendant is sentenced on one charge and begins serving that sentence, the custody is no longer "in connection with" the other pending charge because any connection is severed when the sentence is imposed on the first charge. *State v. Beets*, 124 Wis. 2d at 379-81. *See State v. Gavigan*, 122 Wis. 2d 389, 394, 362 N.W.2d 162 (Ct. App. 1984) (when defendant begins serving sentence on one of the charges, he is no longer eligible to be released on the other pending charge, and his custody is no longer "in connection with" that other pending charge). *See also State v. Tuescher*, 226 Wis. 2d at 470, 472-74.

Moreover, if a defendant is serving consecutive sentences, he is only entitled to credit in a "linear fashion" toward the first sentence imposed, but not toward both sentences. *State v. Boettcher*, 144 Wis. 2d 86, 87, 100, 423 N.W.2d 533 (1988); *State v. Wolfe*, 2001 WI App 66,

¶ 5, 242 Wis. 2d 426, 625 N.W.2d 655. Finally, a defendant is not entitled to sentence credit if he has already received credit for that period of custody. *State v. Boettcher*, 144 Wis. 2d at 87, 100-01; *State v. Jackson*, 2000 WI App 41, ¶¶ 19-20, 233 Wis. 2d 231, 607 N.W.2d 338 ("dual credit" is not permitted where a defendant has already received credit against a sentence which has been, or will be, separately served).

B. Trepanier failed to prove he was entitled to double credit for consecutive terms of custody.

Trepanier's attorney was correct to concede that the trial court had the authority to impose the burglary sentence consecutive to the time served on the six-month civil contempt commitment (32:13). Otherwise, the contempt commitment would be of no practical force and effect. *State v. Strohbeen*, 147 Wis. 2d 566, 572-73, 433 N.W.2d 288 (Ct. App. 1988); *State v. Way*, 113 Wis. 2d 82, 87, 334 N.W.2d 918 (Ct. App. 1983). That concession, unfortunately for Trepanier, effectively defeats his appeal. That is because, having already served the 171 days on the contempt commitment, he was not also entitled to credit for those same 171 days against his consecutive burglary sentence. *State v. Boettcher*, 144 Wis. 2d at 87; *State v. Jackson*, 233 Wis. 2d 231, ¶¶ 19-20. *See State v. Lamar*, 2011 WI 50, ¶¶ 28-29, 334 Wis. 2d 536, 799 N.W.2d 758.

Trepanier wisely does not argue that his post-commitment custody for contempt of court was in any way related to ("in connection with") his pretrial custody for the burglary.

Therefore, having already served 171 days in custody for the civil commitment, Trepanier was not entitled to a "windfall" double credit for those same 171 days against an unrelated consecutive sentence imposed for burglary. *See State v. Johnson*, 318 Wis. 2d 21, ¶ 32

("Neither the statute nor the case law that precedes today's version of Wis. Stat. § 973.155 justifies crediting a defendant's sentence for time spent in presentence custody that is not related to the matter for which sentence is imposed.").

Trepanier insists, however, that he was not serving a "sentence" for the civil commitment and, so, § 973.155 does not apply. The statute's inapplicability, in Trepanier's view, allows for a windfall award of "double credit" against both his custody already served for the contempt commitment and his consecutive custody imposed for the unrelated burglary. That flies in the face of controlling law. The issue is not, after all, whether Trepanier was serving a "sentence" for the civil commitment. It is only whether he was "in custody" for that commitment. He most certainly was. Having already served that time in custody, he was not entitled to credit for service of that time a second time against the unrelated burglary sentence to which § 973.155 plainly applied.

> In *State v. Riley*, 175 Wis. 2d 214, 220, 498 N.W.2d 884, 886 (Ct. App. 1993), we rejected the argument that confinement as a condition of probation was not a "sentence" within the meaning of § 973.155, STATS., pointing out that "[s]ection 973.155(1), Stats., uses the terms 'custody' and 'confinement,' not the word 'sentence,' to define the status that entitles a defendant to pre-sentence credit . . . ." We are satisfied that the same analysis applies when the confinement results from an NGI commitment.

State v. Harr, 211 Wis. 2d 584, 596, 568 N.W.2d 307 (Ct. App. 1997).

A civil commitment is not a "sentence." *See State v. Way*, 113 Wis. 2d at 86. That does not matter because Trepanier was plainly "in custody" for purposes of § 973.155 when ordered to jail for contempt. Trepanier is deemed to have been "in custody" for purposes of § 973.155 because he could be charged under Wis. Stat. § 946.42 for escaping from that custody. *State v. Magnuson*, 2000 WI 19, ¶¶ 13-15, 233 Wis. 2d 40,

606 N.W.2d 536. "In summary, we conclude that an offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." *Id.* ¶ 47.

Moreover, because Trepanier was "sentenced" for the burglary, § 973.155 plainly applied in determining whether he was entitled to credit against *that sentence* for the time he had already spent "in custody" on the unrelated contempt commitment. The law is clear that he was not entitled to double credit against the two unrelated and consecutive terms of custody. *State v. Boettcher,* 144 Wis. 2d at 87.[2]

Therefore, Trepanier was "in custody" for the six-month contempt commitment for non-payment of a fine because, had he escaped, he could have been prosecuted under Wis. Stat. § 946.42(2)(a). *State v. Smith,* 214 Wis. 2d 541, 543-47, 571 N.W.2d 472 (Ct. App. 1997). Because Trepanier would have been "in custody" for the 171 days serving the civil commitment even if the November 11, 2012 burglary had never occurred, "he is not being treated unfairly by not receiving sentence credit for that time" against the time imposed consecutively thereto for the unrelated burglary. *State v. Johnson,* 304 Wis. 2d 318, ¶ 70.

Trepanier argues at page 16 of his brief that, "Mr. Trepanier was incarcerated for 171 days in jail and that time should be credited somewhere. If it cannot be

[2] Trepanier hopelessly confuses the issue by arguing that § 973.155 does not apply because he was not serving a "sentence" for the contempt commitment. Trepanier's brief at 10, 13. That may be so, but it is beside the point. Trepanier is seeking credit, after all, *against his burglary sentence* for the 171 days already served in jail for contempt. The issue whether he gets credit for only ten days, or an additional 171 days, against that burglary sentence plainly implicates § 973.155. Trepanier's argument would only make sense if he was seeking reduction of the time served for contempt. He is not. He is seeking reduction of his burglary sentence based on the time already served for contempt.

credited to the commitment, then it must be credited to the sentence." Those 171 days were obviously "credited" to the commitment because they were actually served in jail by the time the burglary sentence commenced on May 20, 2013. Consequently, the same jail time could not be "credited" a second time against the burglary sentence.

Trepanier has, therefore, failed to prove he is entitled to double credit for 171 days against both his custody already served for the civil contempt commitment and the sentence imposed consecutively thereto for burglary.

CONCLUSION

Therefore, the State of Wisconsin respectfully requests that the judgment of conviction and order denying postconviction relief be AFFIRMED.

Dated at Madison, Wisconsin, this 2nd day of May, 2014.

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 3,317 words.

Dated this 2nd day of May, 2014.

_____
DANIEL J. O'BRIEN
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 2nd day of May, 2014.

_____
DANIEL J. O'BRIEN
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