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

REPLY BRIEF OF THE DEFENDANT-APPELLANT

JOSEPH T. TREPANIER

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

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III. Statement of the facts and case.

The State in its statement of the case writes that "[o]ver Trepanier's objection, the trial court imposed bail on the appeal in the amount of $1,000 cash bail. (*id.* at 16-17). It appears that Trepanier posted the $1,000 cash bail. (18)." These statements while technically accurate, may give the misimpression that Mr. Trepanier always had the ability to produce $1,000 dollars. In fact, Mr. Trepanier's economic situation was considerably different after sentencing because he was now eligible for Huber. (R.10) By December 10, 2013, he had started a new job. (R.10; R.32:18). As it was, it still took him some twenty-one days, until December 31, 2013, to post the $1,000 cash bail.

IV. Argument.

A. Section 973.155, Wis. Stats., is the only relevant authority in the award of sentence credit; that statute does not permit the award of sentence credit to a civil commitment.

Nowhere in the State's Brief does the State assert any other authority for the award of sentence credit other than § 973.155, Wis. Stats. (i.e. the sentence credit statute). This is a significant concession for two reasons. First because the trial court in denying Mr. Trepanier his full sentence credit relied heavily on the case of *State v. Way,*[1] a case which found that § 973.07, Wis. Stats. (i.e. the statute for civil commitment for unpaid fines), provided the implied authority to make commitments consecutive to sentences and vice versa. For reasons stated in Mr.

[1] *State v. Way*, 113 Wis.2d 82, 334 N.W.2d 918 (Wis. App., 1983)

Trepanier's initial brief, the defendant believes that § 973.07, Wis. Stats., cannot be read to create the implied authority to apply sentence credit to a civil commitment. (See, Mr. Trepanier's initial brief, Argument C. pp. 10-19). Mr. Trepanier reads the State's brief as a concession that § 973.155, Wis. Stats., is the sole relevant source of authority governing the award of sentence credit.

Second, by making that concession the State has fatally wounded its argument. Nothing in the language of § 973.155, Wis. Stats., permits the application of "sentence credit" to a civil commitment. (See, Mr. Trepanier's initial brief, Argument B. pp. 9-10). 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*. Sentence credit applies only to "sentences." A civil commitment is not a sentence. *State v. Way*, 113 Wis.2d at 86, 334 N.W.2d at 920. Therefore sentence credit cannot be applied to a civil commitment.

And yet, the application of sentence credit to a civil commitment is exactly what the trial court did in this case, and further that is what the trial court understood itself to be doing:

> 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. Furthermore, the State itself seems to understand the trial court's decision in the same manner, writing that "[t]hose 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." (State's brief, p.12).

In its brief the State argues that Mr. Trepanier should not be given "windfall credit" (State's brief, p. 6), "double credit" (State's brief, p. 11), and "windfall double credit" (State's brief, p. 9), but nowhere does the State ever find the word for exactly what kind of "credit" this would be. Is it "sentence" credit? "commitment" credit? or is it some kind of "sentence/commitment" credit? We don't know. What we do know, however, is that § 973.155, Wis. Stats., speaks of only one kind of credit and that is "sentence" credit. There was only one sentence in this case and that was the sentence for burglary, and it was to that sentence that Mr. Trepanier's sentence credit should have been applied.

B. State's argument that Mr. Trepanier was not in custody for the purposes of § 973.155, Wis. Stats., is a circular argument resting upon cases which do not support the propositions the State cites.

The State argues that Mr. Trepanier's custody was not "in connection with the course of conduct for which sentence was imposed." (State's brief, p. 8-9).

Now this is a somewhat surprising argument since Mr. Trepanier's confinement was clearly, at least in part, the result of his inability to post his $500 cash bail, as well as his admitted failure to meet the $1,000 purge condition on his civil commitment. Nonetheless, the State argues that Mr. Trepanier was not in custody, *in any part whatsoever;* as result of his inability to post his $500 cash bail on the burglary charge. The State rests that argument on two lines of cases (1) *State v. Beets*, 124 Wis.2d 372, 369 N.W.2d 382 (Wis., 1985), and related cases; and (2) *State v. Boettcher*, 144 Wis.2d 86, 423 N.W.2d 533 (Wis., 1988), and its related cases.

Beets held 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. In *Boettcher* it was 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. *Boettcher*, 144 Wis.2d at 87, 423 N.W.2d at 534. The problem with the State's argument is readily apparent, Mr. Trepanier was not serving an "intervening sentence," as in *Beets*, nor was he serving "consecutive sentences," as in *Boettcher*; Mr. Trepanier was serving a civil commitment, and a civil commitment is not a sentence. *State v. Way*, 113 Wis.2d at 86, 334 N.W.2d at 920.

The State attempts to argue that it does not matter whether a civil commitment is sentence, because in its view "the law is clear that he [Trepanier] is

not entitled to double credit against the two unrelated and consecutive terms of custody," citing *State v. Boettcher*. (State's brief, p. 11). But this is a misstatement of the *Boettcher* court's holding. What *Boettcher* actually held was as follows:

> We conclude that dual credit is not permitted--that the time in custody is to be credited *to the sentence first imposed*--and that, where the *sentences* are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Wis. Stats. Credit 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.

Boettcher, 144 Wis.2d at 87, 423 N.W.2d at 534 (emphasis added). Nowhere does *Boettcher* argue that sentence credit can be applied to a civil commitment. If there is only one "sentence", then by definition there cannot be a dual "sentence credit" problem. This is why the State resorts to phrases like "windfall credit", "double credit", and "windfall double credit." It wishes to obfuscate the issue by suggesting that this is a *Boettcher* style case; when clearly it is not a dual sentence credit case. Indeed, the State opines that this question of whether a commitment is or is not a sentence is all "beside the point." (State's brief, p. 11 fn. 2). But Mr. Trepanier thinks this distinction, commitment versus sentence, goes to the very heart of the matter. If a commitment is not a sentence, then sentence credit cannot be applied to the commitment. If the sentence credit cannot be applied to the commitment, *and* there is only one sentence, then there can be no dual sentence credit problem. This is simple logic.

Similarly, there is no *Beets* problem. In *Beets* the 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. This holding rested on the reasoning that during the period Mr. Beets was serving his intervening drug sentence, it was immaterial whether he could make bail on a 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. But that was not the case here, Mr. Trepanier did have a right to regain his liberty during his period of confinement on the civil commitment. If Mr. Trepanier could have produced the $1,000 purge condition, he would have been free of confinement under the civil commitment. Mr. Beets, by contrast, had no such opportunity because he was serving a *sentence*, and no amount of money could have freed him from his confinement. And that distinction makes all the difference. This is not a *Beets* situation.

The State argues the "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 to his contumacy." (State's brief, p. 3). Frankly, the Appellant believes that if Mr. Trepanier could not make his $500 cash bail, it is unavoidable inference that he could not likewise meet his $1,000 purge condition. But even if we don't make that inference, *we know* that he could not make his $500 cash bail. That fact is amply supported by the record. And ultimately, that is the problem the State's

entire argument. Mr. Trepanier's inability to make the $500 cash bail on his burglarly charge was, *at least in part*, responsible for his confinement. Had Mr. Trepanier somehow raised the $1,000 purge condition, he would still have been subject to confinement because he could not raise his $500 cash bail. His inability to raise cash bail was quite material to his confinement.

Mr. Trepanier's argument is simple and logical. Mr. Trepanier was arrested on the charge of burglary and held in custody for 171 days until the date of his sentencing. During that time he was unable to post his required $500 cash bail. There was no intervening sentence (i.e. a *Beets* situation), and there was no consecutive sentence to create a dual sentence credit problem (i.e. a *Boettcher* situation). Therefore, he should have received the 171 days sentence credit on the only sentence he was given. Contrast this argument with the circular argument which the State presents:

The State:	Mr. Trepanier was not in custody for his burglary charge because he was also in custody on a civil commitment, and the law clearly states that (1) a defendant serving consecutive sentences is only entitled to credit toward the first sentence imposed, *Boettcher*; and (2) that a defendant is not entitled to credit for time spent serving a sentence on an unrelated charge, *Beets*.
Trepanier:	But I was not serving a sentence, consecutive or intervening.
The State:	That's beside the point, you were not in custody for the burglary.
Trepanier:	Why not? I was arrested for burglary, and given $500 cash bail which I could not raise.
The State:	That doesn't matter, giving you sentence credit on the burglary would result in a "windfall double credit."

Trepanier: Your authority?

The State: *Beets* and *Boettcher.*

V. 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). His confinement was a result, at least in part, of his inability to post that cash bail. 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. This was not a dual sentence credit situation, as in *Boettcher*. Mr. Trepanier had but one sentence to which his sentence credit could be allocated, his sentence for burglary. Nor was his confinement interrupted by an intervening sentence, as in *Beets*. A civil commitment for unpaid fines is not a "sentence". There is no authority for applying sentence credit to a civil commitment, and the trial court erred in applying Mr. Trepanier's sentence credit to the 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 May 16, 2014.

Frederick A. Bechtold
State bar number 1088631
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

VI. 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 2193 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 May 16, 2014.

Frederick A. Bechtold
State bar number 108863
490 Colby Street
Taylors Falls, MN 55084
(651) 465-0463

Attorney for the Defendant-Appellant

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: _____

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