

RECEIVED

01-20-2015

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2014AP2655

STATE OF WISCONSIN
ex rel. CHRISTOPHER W. BAADE,
Petitioner-Respondent,

v.

BRIAN HAYES, ADMINISTRATOR,
DIVISION of HEARINGS and
APPEALS,
Respondent-Appellant.

APPEAL FROM THE ORDER OF THE WAUKESHA
COUNTY CIRCUIT COURT DATED AUGUST 21, 2014,
THE HONORABLE JAMES R. KIEFFER, PRESIDING,
CASE NO. 14-CV-11

BRIEF AND APPENDIX OF RESPONDENT-APPELLANT

BRAD D. SCHIMEL
Attorney General

BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Respondent-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ISSUE PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE	2
I. Facts	2
II. Relevant statutes	3
III. Procedural History.....	4
STANDARD OF REVIEW	6
ARGUMENT	6
I. Under the plain language of Wis. Stat. § 973.155(1) and (4), Baade is only entitled to credit for time actually spent in custody.....	6
II. The circuit court ignored the plain language and Wisconsin law in ruling that Baade was entitled to sentence credit for his good time.	9

	Page
III. Wisconsin Stat. § 973.155(4) does not apply to time served as a condition of probation because it is not a “sentence.”	11
IV. Public policy concerns weigh against giving good time to offenders sentenced to prison.	12
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>In re Estate of Felhofer</i> , 2014 WI App 6, 352 Wis. 2d 380, 843 N.W.2d 57	6
<i>Prue v. State</i> , 63 Wis. 2d 109, 216 N.W.2d 43 (1974)	11, 12
<i>State ex rel. Kalal v. Circuit Court for Dane Cnty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110	10, 12
<i>State ex rel. Ortega v. McCaughtry</i> , 221 Wis. 2d 376, 585 N.W.2d 640 (Ct. App. 1998)	6
<i>State v. Beets</i> , 124 Wis. 2d 372, 369 N.W.2d 382 (1985)	10
<i>State v. Fearing</i> , 2000 WI App 229, 239 Wis. 2d 105	11, 12
<i>State v. Gilbert</i> , 115 Wis. 2d 371, 340 N.W.2d 511 (1983)	8
<i>State v. Magnuson</i> , 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536	5, 8
<i>State v. Plank</i> , 2005 WI App 109, 282 Wis. 2d 522, 699 N.W.2d 235	9

Statutes

Wis. Stat. § 302.43	4, 12
Wis. Stat. § 303.07(3)	4, 8
Wis. Stat. § 303.19(3)	4, 8
Wis. Stat. § 343.44(1)(b)	3
Wis. Stat. § 346.63(1)(a)	2
Wis. Stat. § 809.23(1)(a)1.	2
Wis. Stat. § 946.49(1)(a)	3
Wis. Stat. § 973.01(4)	4, 9, 10, 13
Wis. Stat. § 973.09(1)	2
Wis. Stat. § 973.09(1)(d)	4, 12
Wis. Stat. § 973.155	5, 9, 10, 12
Wis. Stat. § 973.155(1)	7
Wis. Stat. § 973.155(1)(a)	3, 5, 7, 8
Wis. Stat. § 973.155(4)	passim

INTRODUCTION

This case involves a pure question of statutory interpretation. Christopher Baade was sentenced to a prison term of two years with two years of extended supervision but the sentence was stayed. He was placed on three years of probation but, as a condition of probation, he had to serve twelve months of jail time. Baade earned three months of good time in jail and so he served only nine months of the twelve-month term. After release from jail, Baade violated the terms of his parole and was ordered to serve his two-year prison sentence. At issue in this appeal is whether Baade receives credit towards his prison sentence for the three months in which he was not in jail. The Wisconsin statutes unambiguously provide that he can receive credit toward his prison sentence only for the time he actually served in jail.

ISSUE PRESENTED

A convicted offender is entitled to sentence credit for time spent “in custody,” and only offenders serving sentences of one year or less in a county detention center can receive credit for good time. Before having his probation revoked, Baade spent nine months in custody. Is Baade entitled to nine months or twelve months of sentence credit toward his two-year sentence in state prison?

The circuit court held that Baade was entitled to twelve months of sentence credit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Respondent-Appellant Brian Hayes believes that oral argument is not necessary because the issues can be adequately addressed by the briefs. Appellant believes that this opinion should be published because there is no decision interpreting the statutory provision at issue in this appeal and a published decision would guide circuit courts in the proper application of sentence credit to the situation presented in this case, which is likely to recur in other cases. *See* Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF THE CASE

I. Facts

Christopher Baade is serving a two-year prison sentence following the revocation of his probation for two offenses committed in 2011 and 2012. On November 8, 2011, Christopher Baade was convicted of Operating While Intoxicated (4th within 5 years) under Wis. Stat. § 346.63(1)(a). (R. 4 at 3.) He was sentenced to two years of initial confinement and two years of extended supervision. (R. 4 at 3.) That sentence, however, was stayed under Wis. Stat. § 973.09(1) and he was placed on three years of probation. (R. 4 at 3.) As a condition of probation, Baade was required to serve twelve months of jail time. (R. 4 at 3.) Because Baade received good time credit when he was in jail, he only served nine of the twelve months of incarceration. (R. 4 at 47.)

On April 2, 2012, Baade was convicted of one count of Operating While Revoked (4th offense or more) under Wis. Stat. § 343.44(1)(b) and one count of Bail Jumping under Wis. Stat. § 946.49(1)(a). (R. 4 at 6.) Baade received sentences of 120 days and 60 days in jail, respectively, to be served consecutively. (R. 4 at 6.) He was also placed on probation for two years. (R. 4 at 6.)

While on probation, in July of 2013, Baade operated a motor vehicle without a license and without an ignition interlock in violation of the terms of his parole. (R. 4 at 46-47; R-A APP. 012-013.) As a result, Baade's probation agent recommended that his probation be revoked in both cases. (R. 4 at 46; R-A APP. 012.) At the revocation hearing, Baade stipulated that he had engaged in both violations. (R. 4 at 47; R-A APP. 013.) On October, 23, 2013, an Administrative Law Judge revoked Baade's parole because he "found it necessary to avoid undue depreciation of the seriousness of the proven violations and to protect the community from further criminal conduct by Mr. Baade." (R. 4 at 47; R-A APP. 013.) Baade has not disputed the revocation of his parole, only the amount of sentence credit he should receive for his time in jail.

II. Relevant statutes

Several statutes are relevant to determining the proper amount of sentence credit Baade should receive. In general, sentence credit is governed by Wis. Stat. § 973.155(1)(a), which provides that "[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.” (emphasis added). All parties agree that Baade is entitled to credit for the nine months he spent in jail because that time was “spent in custody in connection with the course of conduct for which sentence was imposed.”

Baade was able to earn good time credit while in jail because he was convicted of an offense which carries a mandatory minimum sentence and was placed in confinement as a condition of probation. Such offenders are “eligible to earn good time credit calculated under s. 302.43 regarding the period of confinement.” Wis. Stat. § 973.09(1)(d). Section 302.43 allows an “inmate of a county jail” to “earn good time in the amount of one-fourth of his or her term for good behavior.” Wis. Stat. § 302.43. In contrast, those sentenced to terms in state prison are not allowed to earn good time and must “serve the term of confinement in prison portion of the sentence without reduction for good behavior.” Wis. Stat. § 973.01(4).

The Wisconsin statutes limit sentence credit for good time to a discrete set of offenders. Section 973.155(4) provides that “[t]he credit provided in sub. (1) shall include earned good time for those inmates subject to s. 302.43, 303.07 (3) or 303.19 (3) serving sentences of one year or less and confined in a county jail, house of correction or county reforestation camp.” Wis. Stat. § 973.155(4).

III. Procedural history

In the written decision revoking parole, the ALJ ruled that Baade was only entitled to nine months credit for his time in jail. The ALJ reasoned that Wis. Stat. § 973.155 “requires that credit be given for time spent in jail” but that “[g]ood time credit does not meet the standard for actual custody under the statute.” (R. 4 at 47; R-A APP. 013.)

Baade appealed that ruling to the Division of Hearings and Appeals, which affirmed in a decision issued on November 20, 2013. Administrator Brian Hayes ruled that Baade was entitled to nine months of sentence credit because “[t]he sentence credit statute . . . indicates that credit is given for ‘days spent in custody’ toward the underlying sentence.” (R. 4 at 69; R-A APP. 010 (quoting Wis. Stat. § 973.155(1)(a)). Baade did not receive credit for his good time because “the test for determining whether an offender’s status constitutes custody for sentence credit purposes is when the offender is subject to an escape charge for leaving that status” and Baade was not entitled to credit “for time spent within the community.” (R. 4 at 69; R-A APP. 010 (citing *State v. Magnuson*, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536)). Baade was ordered to report to the Dodge Correctional Institute, a state prison. (R. 4 at 71.)

On January 2, 2014, Baade filed a petition for writ of certiorari in the circuit court. (R. 1.) After briefing, the circuit court heard oral argument on August 18, 2014.

(R. 10, 11, 14.) The circuit court ruled that Baade was entitled to credit for twelve months because “Baade earned his good time and he is thus entitled to have it credited against his sentence under Section 973.155(4) of the Wisconsin Statutes. Good time, once earned, shall in fact be credited toward one’s sentence.” (R. 14 at 13; R-A APP. 007.) The court held that “[o]ne does not lose good time once earned, therefore the court does grant Baade’s motion request for granting a writ of certiorari.” (R. 14 at 13; R-A APP. 007.)

Final judgment was entered on August 21, 2014 (R. 13), and Hayes timely filed this appeal. (R. 15.)

STANDARD OF REVIEW

On a petition for a writ of certiorari, “[j]udicial review on certiorari is limited to whether the agency’s decision was within its jurisdiction, the agency acted according to law, its decision was arbitrary or oppressive and the evidence of record substantiates the decision.” *State ex rel. Ortega v. McCaughtry*, 221 Wis. 2d 376, 385, 585 N.W.2d 640 (Ct. App. 1998). This Court “decide[s] the merits of the matter independently of the trial court’s decision.” *Id.* at 386. In this case, the circuit court found that the agency did not act according to law based on its interpretation of the Wisconsin statutes. Such questions of statutory interpretation are likewise reviewed de novo. *In re Estate of Felhofer*, 2014 WI App 6, ¶ 11, 352 Wis. 2d 380, 843 N.W.2d 57.

ARGUMENT

The Administrator reached the correct result in this case. Once Baade's probation was revoked and he was required to serve his prison sentence, he was entitled to credit only for time spent in custody—a period of nine months. The circuit court's conclusion was in error and should be reversed.

I. Under the plain language of Wis. Stat. § 973.155(1) and (4), Baade is only entitled to credit for time actually spent in custody.

Baade is not entitled to credit against his prison sentence for the three months he received in good time under the plain meaning of the relevant statutes. He does not receive credit under Wis. Stat. § 973.155(1)(a) because he was not “in custody” during that time. He also does not meet the requirements for crediting good time in Wis. Stat. § 973.155(4) because he is neither serving a sentence of one year or less nor confined in a county jail, house of corrections or county reforestation camp.

Baade's good time does not qualify for sentence credit because he was not “in custody” during those three months. The sentence credit statute provides that “[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.” Wis. Stat. § 973.155(1)(a) (emphasis added). The Wisconsin Supreme Court has explained the meaning of “in custody” in

this statute, holding that “an offender’s status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status.” *State v. Magnuson*, 2000 WI 19, ¶ 1, 233 Wis. 2d 40, 606 N.W.2d 536.

It is undisputed that Baade was “in custody” for the nine months he spent in jail and thus appropriately received sentence credit toward his prison sentence. *See State v. Gilbert*, 115 Wis. 2d 371, 377-78, 340 N.W.2d 511 (1983) (holding that an offender receives sentence credit for the time spent in county jail as a condition of probation). After he was released from jail, however, he was not subject to any escape charge and thus was not “in custody” for purposes of Wis. Stat. § 973.155(1)(a).

Baade also does not meet the narrow requirements for receiving credit against his prison sentence for previous good time. Section 973.155(4) provides that “[t]he credit provided in sub. (1) shall include earned good time for those inmates subject to s. 302.43, 303.07 (3) or 303.19 (3) serving sentences of one year or less and confined in a county jail, house of correction or county reforestation camp.” Baade is neither (1) serving a sentence of one year or less nor (2) confined in a county jail, house of corrections or reforestation camp. Instead, Baade is serving a sentence of two years, and he is confined in state prison (R. 4 at 3, 71), not a county jail, house of correction or reforestation camp.

II. Giving Baade credit for good time earned in jail conflicts with the prohibition on prisoners earning good time.

Giving Baade credit for time he did not spend in jail against his prison sentence not only goes against the plain statutory language, it also upsets the careful balance between good time credit and truth-in-sentencing exemplified in Wis. Stat. § 973.155. An offender sentenced to a term in state prison is not allowed to earn good time and must “serve the term of confinement without reduction for good behavior.” Wis. Stat. § 973.01(4). The legislature implemented this provision as part of truth-in-sentencing legislation under which prisoners were supposed to serve each day to which they were sentenced. *See State v. Plank*, 2005 WI App 109, ¶ 17, 282 Wis. 2d 522, 699 N.W.2d 235 (“there simply is no parole or good-time under truth-in-sentencing”). Baade was sentenced to two years in prison, which he must serve without any reduction for good time.

By allowing Baade to receive good time credit against his prison sentence, the circuit court effectively allowed Baade to circumvent the statutory prohibition on prisoners receiving reductions in their sentences for good time. Baade received a credit of three months for which he was not in custody, and thus his total time in confinement will only be one year and nine months. This is in direct conflict with the requirement that Baade actually serve his entire sentence without good time. *See* Wis. Stat. § 973.01(4).

This Court should not interpret the sentence credit provisions in Wis. Stat. § 973.155 in a way that conflicts with the truth-in-sentencing provisions in Wis. Stat. § 973.01(4). *See State ex rel. Kalal v. Circuit Court for Dane Cnty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110 (holding statutes should be interpreted “in relation to the language of surrounding or closely-related statutes”).

Nothing in the sentence credit statute requires this conflict. As noted above, the text of the statute avoids this problem by excluding prisoners from receiving good time credit. In addition, the purpose of the sentencing credit statute does not require creating a conflict with truth-in-sentencing. The purpose of the sentence credit statute is “to afford fairness-that a person not serve more time than that for which he is sentenced.” *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). Baade is given credit for each day spent in jail because, if he did not, he would serve more time than his sentence. In effect, he would serve two years and nine months of confinement even though his sentence was only two years. This Court should not use a statute designed to ensure that Baade does not serve more than his sentence to reduce his sentence below what he is required to serve under the truth-in-sentencing law.

III. Wisconsin Stat. § 973.155(4) does not apply to time served as a condition of probation because it is not a “sentence.”

The circuit court’s conclusion that Wis. Stat. § 973.155(4) applied to Baade because he served time in jail as a condition of probation was in direct conflict with Wisconsin law. Section 973.155(4) refers to the “sentence” that the individual is serving; *i.e.*, the sentence against which the individual would receive credit. To receive good time credit under Section 973.155(4), the individual must be seeking credit against a sentence of less than one year in a county detention facility. Section 973.155(4) does not refer to the time previously spent in confinement that that individual wants credited against his sentence.

While this is clear from the statutory language and structure, it also follows from decisions holding that incarceration as a condition of probation is not a “sentence.” As this Court has recognized, “generally probation is not considered a sentence, and the imposition of incarceration as a condition of probation is likewise not a sentence.” *State v. Fearing*, 2000 WI App 229, ¶ 6, 239 Wis. 2d 105, 619 N.W.2d 115. Wisconsin has followed this interpretation since the supreme court held in *Prue v. State*, 63 Wis. 2d 109, 113, 216 N.W.2d 43 (1974), that “[t]he view that probation is not a sentence and that the imposition of incarceration as a condition of probation is likewise not a sentence has been generally accepted.” The *Prue* court held

that when interpreting the Wisconsin statutes, the term “sentence” is a legal term and should be given its legal meaning when used in the statutes and the law unless there are strong indications the term was used in a general sense.” *Id.* at 116.

In this case, the Court must interpret the term “sentence” in Wis. Stat. § 973.155(4) using “its legal meaning,” which does not include “incarceration as a condition of probation.” *Id.* at 116; *Fearing*, 239 Wis. 2d 105, ¶ 6. As a result, Baade does not qualify for credit for good time under Wis. Stat. § 973.155(4) because he spent less than one year in jail as a condition of probation.

The circuit court’s reliance on Wis. Stat. § 302.43 was likewise misplaced. That statute merely incorporates the provisions of Wis. Stat. § 973.155 by providing that “an inmate [in county jail] shall be given credit for time served prior to sentencing under s. 973.155, including good time under s. 973.155(4).” Because this provision adds nothing to Wis. Stat. § 973.155, it does not change the interpretation of Wis. Stat. § 973.155 outlined above.

IV. Public policy concerns weigh against giving good time to offenders sentenced to prison.

Because Baade is not entitled to sentence credit for good time under the plain language of the statutes, there is no need to resort to policy considerations, such as the circuit court’s concern that Baade will “lose” his good time. *See Kalal*, 271 Wis. 2d 633, ¶ 45. In any event, Baade is not

losing anything. While on probation, Baade benefited from a statutory provision that allowed him to reduce the amount of time he spent in jail as a condition of probation through good behavior. *See* Wis. Stat. § 973.09(1)(d). This reduction in jail time is not a permanent right, but rather a calculation of the time he had to serve in jail as a condition of probation.

The issue in this case, however, is whether Baade should get credit against his prison sentence for that good time after his probation was revoked. Baade did not “lose” a right to good time credit against his prison sentence because he never had a right to reduce that sentence through good time under Wisconsin’s truth-in-sentencing regime. *See* Wis. Stat. § 973.01(4).

As a policy matter, Baade should be placed in the same position he would have been in had the sentence not been stayed. If that had been the case, there could have been no reduction in his prison sentence for good time. The court that sentenced Baade gave him the opportunity to avoid prison by staying his sentence in favor of probation. Having violated the conditions of probation, Baade should not be placed in a better position than he would have been in had his original sentence not been stayed.

CONCLUSION

For the foregoing reasons, this Court should reverse the circuit court and reinstate the decision of the Division of Hearings and Appeals.

Dated this 20th day of January, 2015.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General



BRIAN P. KEENAN
Assistant Attorney General
State Bar #1056525

Attorneys for Respondent-Appellant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0020
(608) 267-2223 (Fax)
keenanbp@doj.state.wi.us

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 3,160 words.

Dated this 20th day of January, 2015.



BRIAN P. KEENAN
Assistant Attorney General

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

I hereby certify that:

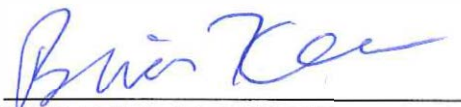
I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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 20th day of January, 2015.



BRIAN P. KEENAN
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(13)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. § (Rule) 809.19(13).

I further certify that:

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

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

Dated this 20th day of January, 2015.



BRIAN P. KEENAN
Assistant Attorney General