STATE OF WISCONSIN COURT OF APPEALS DISTRICT II

STATE OF WISCONSIN
ex rel. CHRISTOPHER W. BAADE,

Petitioner-Respondent,

v.

BRIAN HAYES, ADMINISTRATOR,
DIVISION OF HEARINGS and APPEALS,

Respondent-Appellant.

RESPONSE BRIEF OF PETITIONER-RESPONDENT

Appeal No. 2014AP2655

Trial Case No. 14-CV-11 (Waukesha Co.)

APPEALED FROM THE ORDER OF THE WAUKESHA COUNTY CIRCUIT COURT DATED AUGUST 21, 2014, THE HONORABLE JAMES R. KIEFFER, PRESIDING

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STATEMENT ON NECESSITY OF ORAL ARGUMENT & PUBLICATION OF OPINION

Petitioner-Respondent does not request oral argument. The issues presented can be fully argued in the parties' briefs. The Petitioner-Respondent agrees with the State that publication is warranted, for the reasons stated in the State's brief.

STATEMENT OF THE CASE

On November 8, 2011, in Waukesha County Case No. 11CF1113, Mr. Baade was convicted of Operating While Intoxicated, 4th Offense, pursuant to Wis. Stat. § 346.63(1)(a). He was sentenced on January 18, 2012 to a term of 4 years in prison, consisting of 2 years of initial confinement followed by 2 years of extended supervision. His sentence was stayed, and Mr. Baade was placed on probation for a period of 3 years, with one year in the county jail as condition time. He served his condition time. He was released after 9 months because he earned good time credit under applicable statutes. (R. 4:3-5).

On April 2, 2012 Mr. Baade was convicted, in Dodge County, in Case No. 11CT423, of one count of Operating While Revoked, in violation of Wis. Stat. § 343.44(1)(b), and one count of Bail Jumping, contrary to Wis. Stat. §

946.49(1)(a). Both offenses were misdemeanors. He was sentenced that same day to two years probation on each count, concurrent. On the O.A.R. he received an imposed and stayed sentence of 120 days in the county jail with Huber release, consecutive to any other sentence previously imposed. On the Bail Jumping he received an imposed and stayed sentence of 60 days in the county jail, with Huber, consecutive to count one. (R. 4:6-7).

Mr. Baade's probation on both files was revoked on October 23, 2013. At his revocation hearing Mr. Baade had argued for credit towards his sentence for the full one year of condition time he was ordered to serve on his Waukesha OWI. The hearing examiner only granted credit for the time actually spent in custody, effectively revoking his earned good time (R. 1:9-11; P-R APP. 106-108).

Mr. Baade appealed the ruling of the hearing examiner. On appeal, the administrator also ruled that Mr. Baade was not entitled to credit (R. 1:12-13, P-R APP. 109-110).

Mr. Baade pursued a writ of certiorari in circuit court. The circuit court agreed that Mr. Baade was entitled to the full 12 months credit (R. 13). The State appealed.

The question is whether, upon revocation of his probation, the defendant was entitled to credit for the full 12 months of his condition time, or whether the credit was forfeited when his probation was revoked.

ARGUMENT

I. THE DEFENDANT IS ENTITLED TO CREDIT FOR THE ENTIRE TERM OF HIS 12-MONTH CONDITION TIME.

There is no doubt that Mr. Baade was entitled to earn good time credit on his condition time. Wis. Stat. § 973.09(1)(d), provides:

> (d) If a person is convicted of an offense that provides a mandatory or presumptive minimum period of one year or less of imprisonment, a court may place the person on probation under par.(a) if the court requires, as a condition of probation, that the person be confined under sub. (4) for at least that mandatory or presumptive minimum period. The person is eligible to earn good time credit calculated under s.302.43 regarding the period of confinement.

Since Mr. Baade's OWI conviction requires a minimum period of imprisonment of one year or less, Wis. Stat. § 973.09, afforded him the opportunity to earn good time credit under Wis. Stat. § 302.43, on the one year of condition time he was sentenced to serve. Wis. Stat. § 302.43, provides in pertinent part:

> Every inmate of a county jail is eligible to earn good time in the amount of one-fourth of his or her term for good behavior if sentenced to at least 4 days, but fractions of a day shall be ignored. An inmate shall be given credit for time served prior to sentencing under s.973.155, including good time under s. 973.155(4). (emphasis added)

As can be seen from the above, Wis. Stat. § 302.43, states that the credit earned shall be credited towards a sentence under Wis. Stat. § 973.155(4). Wis. Stat. § 973.155(4) provides:

> (4) The 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. (emphasis added)

Wis. Stat. § 973.155 is the general sentence credit statute. As can be seen from the above, Wis. Stat. § 973.155(4) states that sentence credit shall include earned good time. In this case, Mr. Baade earned the good time credit afforded him under the statutes. He is entitled by law to have it applied to his sentence.

The circuit court agreed. It said:

> Since Baade was convicted of an offense that provided for a minimum period of imprisonment of one year or less, Section 973.09 of the Wisconsin Statutes afforded Baade good time credit under Section 302.43 of the Wisconsin Statutes on the one year of condition time he was sentenced to

serve. Section 302.43 from the Wisconsin Statutes does provide that an inmate shall be given credit for time served prior to sentencing under Section 973.155, including good time under 973.155(4) of the Wisconsin Statutes. Section 302.43 of the Wisconsin Statutes clearly states that the credit earned shall be credited toward the sentence under Section 973.155(4) of the Wisconsin Statutes.

That section of the statutes, that being Section 973.155(4), provides that the credit provided in (1) shall include earned good time for those inmates subject to Section 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 earned the good time credit afforded him under the statutes. He is thus entitled by law to have it apply to his sentence.

In his decision the administrator cited Section 973.155(1)(a) of the Wisconsin Statutes which is the general sentence credit statute for the proposition that credit is given only for days spent in custody. However, this rationale ignores the above cited statutes that are applicable to this particular case. Section 973.155(4) of the Wisconsin Statutes explicitly affords credit for earned good time. In the year 1990 the Wisconsin legislature created Section 973.09(1)(d) of the Wisconsin Statutes. That particular section of our statutes specifically authorizes credit in certain cases, like this particular case, even though the time being served is being served as a condition of probation.

The statutes have carved out an exception for persons like Baade. Section 973.09(1)(d) of the Wisconsin Statutes specifically authorizes good time credit to Baade under Section 302.43 of the Wisconsin Statutes, which statute by its wording applies to sentences. 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.
>
> The State's argument that Baade lost this credit time once he began his imposed and stayed prison term is incorrect. One does not lose good time once earned, therefore the court does grant Baade's request for granting of a writ of certiori and the court's decision today then in effect overturns the decision of November 20, 2013. Baade is entitled to that additional credit time that he seeks.

(R. 14:5-8)

The circuit court was correct. Mr. Baade was sentenced to serve 12 months of condition time. He successfully completed that portion of his sentence. He should be given credit for the 12 months of condition time he successfully completed.

The State makes a number of arguments to deny Mr. Baade the credit he has earned. The State argues that Mr. Baade was not in custody; that he was not serving a sentence; and that affording him the credit he has earned would be contrary to the statutory requirements, and policies, of truth-in-sentencing. None of those arguments defeat Mr. Baade's right to the credit he has earned.

II. CASES DEFINING CUSTODY ARE NOT ON POINT

The State's first argument to deny Mr. Baade credit is that Mr. Baade was not in custody during the three month

period at issue. To that end the State cites ***State v. Magnuson,*** 200 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, and ***State v. Gilbert,*** 115 Wis. 2d 371, 340 N.W.2d 511 (1983). Those cases do not address Mr. Baade's situation.

In ***Gilbert,*** the defendant was ordered to serve condition time as a condition of probation. When revoked, he was not given credit for that time. The court ruled that he was entitled to credit because he was in custody.

In ***Magnuson*** the defendant was not allowed sentence credit because he was released on electronic monitoring. The court ruled that he was not in custody.

Magnuson and ***Gilbert*** do not apply here. The State is mixing apples and oranges. Custodial credit is not the same as good time credit. Although all defendants are entitled to credit for the time they spend in actual custody, that does not mean defendants cannot earn additional credit while in custody. To limit credit to custodial credit, i.e. credit for time spent in custody, and subject to an escape charge, as the State argues, would abrogate all good time credit, and other credit clearly allowed by statute; for example the substance abuse programming and the challenge incarceration program credits. See Wis. Stats. §§ 302.045 and 302.05. Those statutes allow credit for

reasons other than being in custody. Those statutes allow inmates credit for what they do while in custody, just as the earned good time statute allowed Mr. Baade to earn credit while he was incarcerated. Cases discussing whether a defendant was in or out of custody so as to earn credit, do not apply. To the extent they apply, they support granting Mr. Baade credit. There is no doubt that Mr. Baade was "in custody" when he earned his good time credit.

III. MR. BAADE'S CONDITION TIME IS TREATED AS A SENTENCE UNDER THE APPLICABLE STATUTES.

The State also argues that Mr. Baade is not entitled to sentence credit because probation is not a sentence, and therefore Wis. Stat. § 973.155(4) does not apply. The State cites ***Prue v. State,*** 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974) and ***State v. Fearing*** 2000 WI App 229, 239 Wis. 2d 105, for that proposition. Those cases do not defeat Mr. Baade's right to credit. Those cases held that probationers could not earn good time credit on condition time, because probation was not considered a sentence. Those cases have been rendered inapplicable to a defendant like Mr. Baade by virtue of Wis. Stat. §973.09(1)(d).

In ***Fearing,*** the defendant argued that he was entitled to earn credit under Wis. Stats. § 302.43 and § 973.155, on

his condition time. The court in ***Fearing,*** relied on ***Prue,*** an earlier decision interpreting predecessor statutes, to deny ***Fearing*** credit. ***Prue*** had determined that, since probation was not a sentence, defendants serving condition time were not entitled to earn good time, because they were not serving a sentence. The ***Fearing*** court concluded that there had been no change in the language of the applicable statutes since the time of the ***Prue*** decision, and therefore determined that the legislature approved of the court's construction of the statutes in ***Prue.*** Therefore, the defendant in ***Fearing*** was not allowed to earn good time on his condition time.

Fearing, however, did not address the question of whether, after revocation, good time could be deducted from credit earned while serving condition time. That is not surprising, since the holdings of ***Prue*** and ***Fearing*** did not allow a defendant to earn such credit in the first place. That has changed for defendants in Mr. Baade's position. ***Prue*** was decided in 1974. In 1990 the legislature created Wis. Stat. § 973.09(1)(d). Wis. Stat. § 973.09(1)(d), as we have shown above, specifically authorizes credit in cases, like this one, even though the time being served is served as a condition of probation.

The statutes make clear that the formulaic reasoning that probation is not a sentence, and therefore Mr. Baade's earned good time can be discarded, is faulty. The statutes have carved out an exception for persons like Mr. Baade. Wis. Stat. § 973.09(1)(d) specifically authorizes good time credit to Mr. Baade under Wis. Stat. § 302.43, which statute, by its wording, applies to sentences. Therefore, Mr. Baade's condition time is treated as a sentence under the statute. § 302.43 specifically references § 973.155(4), which statute is the general sentence credit statute. § 302.43 and § 973.155(4) are directly linked by reference to defendants like Mr. Baade through Wis. Stat. § 973.09(1)(d).

Since good time has been made available to defendants like Mr. Baade by § 973.09(1)(d), the word "sentence", as construed by ***Prue*** and ***Fearing***, has no magical connotation. Mr. Baade earned his good time, and he is entitled to have it credited against his sentence under Wis. Stat. § 973.155(4).

The statutory exception afforded persons in Mr. Baade's position by Wis. Stat. § 973.09(1)(d), has been addressed by the court of appeals. In ***State v. McClinton***, 195 Wis. 2d 344, 536 N.W.2d 413 (Ct. App. 1995), the issue before the court was whether a defendant sentenced under

Wis. Stat. § 973.09(1)(d), could be denied good time credit on the condition time imposed. The trial court had determined that a probationer was merely eligible for good time credit under the statute, but it was not mandatory. At sentencing the trial court denied the defendant the opportunity to earn good time credit. In holding that the defendant was entitled to earn good time, the court of appeals stated:

> "In 1990, the legislature created a number of offenses, principally drug crimes, which carry minimum mandatory sentences. In the same session, the legislature created §973.09(1)(d) Stats., which provides probation jail-termers a rough *quid pro quo*: a defendant who the court confines to jail to serve a minimum mandatory sentence as a condition of probation may earn good time for good behavior." (emphasis added)

McClinton at 346, 347.

It is instructive that in the above quote the **McClinton** court termed the probationer's condition time as a "minimum mandatory sentence". By doing so, the court recognized that the condition time served in these cases is equated with a sentence under the statutes.

As can be seen from the above, Mr. Baade is a member of a discrete class of defendants who can, as stated by the ***McClinton*** court, earn good time while serving a minimum mandatory sentence as a condition of probation. Construing

the minimum mandatory term of incarceration as a sentence, as the court in ***McClinton*** characterized it, is consistent with the wording of Wis. Stat. § 302.43, which, by its terms, affords good time only to inmates who have been "sentenced". In Mr. Baade's situation, the term sentence includes, by operation of law, his condition time.

Other case law supports our position that the State's myopic view of the word sentence does not apply here. The term sentence must be construed in context.

In ***State v. Mentzel***, 218 Wis. 2d 734, 739, 581 N.W.2d 581, (Ct. App. 1998), the court of appeals faced the question of whether a defendant who had been placed on probation, and whose sentence had been withheld, was a "prisoner in custody under sentence of a court" such that he could file a motion under Wis. Stat. § 974.06. In construing the statute the court noted that:

> ... the case law is not uniform as to whether a probation disposition in a criminal case represents a sentence. In *Prue v. State,* 63 Wis. 2d 109, 114, 216 N.W.2d 43, 45 (1974), the supreme court held that probation is not a sentence for purposes of the "good time" statute, §53.43, STATS., 1973-74. However, in *State v. Booth,* 142 Wis. 2d 232, 235, 418 N.W.2d 20, 21 (Ct. App. 1987), the court of appeals held that "the imposition of probation constitutes sentencing for purposes of determining which standard to apply to the consideration of a guilty plea withdrawal motion." More recently, in *State v. Thompson,* 208 Wis. 2d 253, 257-58,

> 559 N.W.2d 917, 918 (Ct. App. 1997), the court of appeals held that an imposed and stayed sentence accompanied by probation was a sentence to which a new sentence could be made consecutive.
>
> It is obvious from these cases that the meaning of the term "sentence" depends on the particular statute involved and the setting to which the statute applies.

Mentzel at 740.

We believe it is clear that in the context of earned good time involving this discrete class of defendants, a probationer's term of incarceration is the functional equivalent of a sentence.

In ***State v. Yanick,*** 2007 WI App 30, 299 Wis. 2d 456, 728 N.W.2d 365, (Ct. App. 2007) ¶24, the court of appeals addressed the precise question posed by this case. In ***Yanick*** the defendant, like Mr. Baade, was serving an imposed and stayed prison sentence after revocation of his probation on an OWI. The defendant sought sentence credit for the condition time he had been ordered to serve as a condition of his OWI probation. He had been ordered to serve 6 months condition time. The court of appeals agreed that he was entitled to credit for his condition time, even though it accrued while he was in prison serving concurrent time on an unrelated sentence. The court, in calculating the credit due, assumed that the condition time of 6 months

was equivalent to 180 days, and subtracted 23 days for which the defendant had already been given credit. It ordered an additional 157 days credit. The result was that the defendant received credit for the entire 180 days of condition time. In calculating ***Yanick's*** credit, the court included all good time earned. The court, when explaining its calculation, stated:

> [w]e note that, in making our calculation, we assumed that a 'six-month' term of conditional jail time is 180 days. In addition, we assumed that good time Yanick might have earned is not deducted. See Wis. Stat. Sec. 973.09(1)(d) and ***State v. McClinton*** ... (a court imposing conditional jail time under Sec. 973.09(1)(d) may not preemptively deny good time).
>
> (Emphasis added)

The court's calculation was not made a holding of the case, however, we believe the court's reasoning, specifically its reliance on ***McClinton***, and Wis. Stat. § 973.09(1)(d), is sound. Good time, once earned, cannot be preemptively denied by the State.

IV. NOT FORFEITING MR. BAADE'S GOOD TIME DOES NOT CONFLICT WITH THE PROHIBITION ON PRISONER'S EARNING GOOD TIME. THE TERM OF CONFINEMENT PORTION OF HIS SENTENCE THAT HE SERVES IN PRISON WILL NOT BE REDUCED FOR GOOD TIME.

The State, citing Wis. Stat. § 973.01(4), argues that a defendant is not allowed to earn good time in a truth-in-

sentencing case. To the extent that the State is arguing that a defendant sentenced under the truth-in-sentencing regime cannot, under any circumstances, earn good time; that is simply incorrect. Mr. Baade was sentenced under the truth in sentencing law. He earned good time.

We recognize that Wis. Stat. § 973.01(4), does not allow Mr. Baade to earn good time for the portion of his sentence served in prison. That has not happened in this case. Mr. Baade is not claiming entitlement to earn good time while in prison. He earned his good time while serving a portion of his sentence in the county jail. His doing so is consistent with the statutory scheme.

Rules of statutory construction require that statutes relating to the same subject matter be construed together and harmonized. See ***State v. Burkman*** 96 Wis. 2d 630, 292 N.W. 2d 641 (1980). The statutes are harmonized by our interpretation of the statutes. Our interpretation of the statutes harmonizes the rights afforded a defendant serving time in a county jail with the requirements placed on defendants serving time in prison. Our interpretation of the statutes is consistent with case law addressing how the place of confinement determines the rules governing the serving of a particular sentence.

Case law teaches that the place of confinement can determine what rights accrue to a defendant. For example, in ***State v. Harris,*** 2011 WI App 130, 337 Wis. 2d 222, 805 N.W.2d 386 (Ct. App. 2011), the defendant argued that he was entitled to earn good time while he was serving his sentence in prison, because a portion of his sentence was attributable to a misdemeanor. A jury found Harris guilty of one count of misdemeanor battery and one count of felony intimidation of a victim. Harris was sentenced to 10 months on the battery followed by 7 years imprisonment on the felony. The judgment indicated that the misdemeanor sentence would be served in the Milwaukee House of Correction. However, his felony sentence was made consecutive to the county jail sentence, resulting in the entire term of his incarceration being served in prison, by law. The Court of Appeals ruled that, since he was serving a continuous sentence in prison, the prison rules applied, and he would not be entitled to earn good time on the continuous sentence he was serving. The court of appeals stated:

> In light of § 973.03(2), Harris was not, nor would he ever become, an inmate of a county jail or house of correction. He did, on the other hand, become an inmate of the state prison system. Therefore, Harris could not be awarded any good time credit under county jail rules.

> We therefore hold that because the trial court was required to construe Harris's sentences as a single sentence, which put the sentence under the purview of Wis. Stat. § 973.01 - and because Harris was, under the terms of the statutes, an inmate of the prison system rather than the county jail – that Wis. Stat. § 302.43, the county jail "good time" statute, does not apply to his sentence.

See ***Harris*** at ¶¶ 9, 10.

Unlike the defendant in ***Harris***, Mr. Baade served a portion of his sentence in the county jail, and he came under the county jail rules. Wis. Stat. § 302.43 applied to him, and applied to his sentence.

The legal requirement that the place of confinement determines the credit available to a defendant does not provide a windfall to Mr. Baade. By virtue of **Harris**, Mr. Baade lost the opportunity to earn good time on the Dodge County case that he was also revoked on. In that case he was sentenced to 180 days of jail (R. 4:6-7, P-R APP 104-105). That time was made consecutive to his time on the Waukesha OWI. Just as with the defendant in **Harris**, Mr. Baade, because of the consecutive nature of the sentences, lost his Huber privileges and the ability to earn good time credit on the Dodge County misdemeanors.

The State further argues that giving Mr. Baade credit for the good time that he earned "upsets the careful

balance between good time credit and truth in sentencing exemplified in Wis. Stat. § 973.155." State's Brief – P. 9. We disagree. There is no careful balancing that has been upset. Mr. Baade earned his good time credit under the law. He earned it while serving a portion of his sentence as condition time in a county jail. By virtue of being revoked and going to prison, he lost the opportunity to earn good time on the misdemeanor. Our interpretation of the statutes maintains the "delicate balance" involved when portions of sentences are served in the county jail, and portions in prison. He has properly received credit for the portion of his sentence served in the county jail; he will not receive good time credit for the portion of his sentence served in prison.

In support of its argument the State cites ***State v. Plank,*** 2005 WI App 109, ¶ 17, 282 Wis. 2d 522, 699 N.W.2d 235 as stating that "there simply is no parole or good-time under truth-in-sentencing". Citing ***Plank*** is not helpful. In ***Plank*** a defendant was seeking to withdraw his plea because he had not been informed that, under truth-in-sentencing, he would not be eligible for parole or good time credit. The defendant in ***Plank*** attempted to analogize the entry of his plea to the entry of the plea addressed in

State v. Byrge, 2000 WI 101, ¶ 60, 237 Wis. 2d 197, 614 N.W..2d 477. In ***Byrge*** parole eligibility was held to be a direct consequence of a plea. In that case the circuit court sentenced the defendant to life imprisonment, and was therefore required by statute to make a parole-eligibility determination. The court chose a date that exceeded Byrge's life span, assuring that Byrge would never be paroled. Byrge sought to withdraw his plea because the court failed to inform him that the maximum sentence he faced was not merely life imprisonment with the possibility of parole, but effectively life without the possibility of parole. ***Byrge*** at ¶ 14. In ***Byrge*** it was determined that the court's authority to establish parole eligibility was a direct consequence of his plea, therefore he should have been informed. In ***Plank***, the court of appeals stated that "at most, Plank's complaint is that he misunderstood the law concerning a collateral consequence of his plea." ***Plank*** at ¶ 17.

In the above cases, the courts did not make any attempt to undertake an examination of the statutes applicable here. In fact, **Plank** was not placed on probation. In his case his plea agreement called for the recommendation of probation, however it was rejected by the

court and he was sentenced to a prison term. ***Plank*** sheds no light on the issues presented by this case.

The State also argues that the purpose of the sentencing credit statute does not require creating a conflict with truth-in-sentencing. It argues that 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" citing ***State v. Beets,*** 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). The State argues that 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. State's Brief – P. 10. We believe the State's identification of the purpose of the applicable statutes is too narrow. The sentencing credit statutes do more than ensure day for day credit for time in custody.

We believe the State's argument does not address other "purposes" of the statutes at issue in this case. To the extent the State relies on ***Beets*** to identify the "purpose" of the applicable statutes, it errs. ***Beets*** did not involve good time credit. In that case the defendant was initially on probation for a drug charge. He subsequently was

arrested on a burglary charge. Following his burglary arrest, his probation on the drug charge was revoked, and he was sentenced to three years in prison. Following a period of time in prison on the drug charge, he was found guilty and sentenced on the burglary charge. Between the two charges he was given credit for every day spent in custody, however, he requested additional credit against his burglary sentence for time spent in custody between the sentencing on the drug charge and the sentencing on the burglary charge. The supreme court stated the two sentences were unrelated, and determined that he was not in custody on the burglary charge after he was sentenced to prison on the drug charge. *See* ***Beets*** at 380.

Beets addressed a question of custodial credit. It did not address an issue involving good time credit. The purpose of custodial credit, i.e. not to serve more time than sentenced, is not the same as the purpose underlying good time credit. "Good time is a means, built into the system by the legislature, for providing an incentive for good conduct to jailed defendants." ***State v. Kluck,*** 210 Wis. 2d 1, 10, 563 N.W.2d 468 (1997) ¶20. Consistent with the purpose of the applicable statutes, Mr. Baade earned

his credit. It would not be in keeping with the purpose of the statutes to rescind that credit now.

V. PUBLIC POLICY CONCERNS DO NOT WEIGH AGAINST RECOGNIZING MR. BAADE'S CREDIT.

The State's policy argument is that Baade did not lose good time credit because he never had a right to reduce his sentence by earning good time. As we have shown, however, he did earn good time, and he did earn the right to reduce his sentence under the statutes.

The State also argues that, as a policy matter, Mr. Baade should be placed in the same position he would have been in had the sentence not been stayed. In that regard the State makes an assumption that is not warranted. The State assumes that Mr. Baade's sentence would have been identical if he had been sentenced straight to prison, as opposed to being placed on probation. That is something we simply do not know. It is possible that had Mr. Baade not been sentenced to probation, the court may have imposed a shorter prison sentence, or even a sentence to the county jail. We believe it is safe to say that courts often impose and stay more stringent sentences when they place defendants on probation than they might impose without probation. The argument that, if Mr. Baade had not been

placed on probation, he would have served a full two years in prison, is simply guesswork.

VI. IF THIS COURT DETERMINES DEFENDANTS IN MR. BAADE'S POSITION ARE NOT ENTITLED TO GOOD TIME CREDIT, WE RESPECTFULLY REQUEST THAT THE COURT'S DECISION BE APPLED PROSPECTIVELY ONLY AND NOT APPLY TO MR. BAADE.

Pursuant to the applicable judgments of conviction, Mr. Baade's time to be served in custody after his revocation consisted of 2 years on the Waukesha felony, and 180 days on the Dodge County misdemeanors, for a total of 30 months of incarceration. At the time of his revocation Mr. Baade had accumulated significant amounts of credit. He had 91 days presentence credit, and, after the circuit court's order, he would have been credited for 12 months of condition time on his Waukesha felony. The record indicates he was in custody from July 12th until October 23rd, which was the date of his revocation hearing (R. 4:48, APP. R-108). That was approximately 103 days, or a little over 3 months. Custody would have continued following his revocation hearing. That hearing was over 20 months ago. Clearly, his release date has passed. If the court denies him good time credit, he will have up to 90 days left to serve on his sentences. Under the

circumstances, we respectfully request that, if the court agrees with the State, the court's decision apply prospectively, and not apply to Mr. Baade. If it is made applicable to Mr. Baade, he would be reincarcerated for up to 90 days, after having been released by virtue of the circuit court's decision. We believe case law allows prospective application of this court's decision. Prospective application would be appropriate in this case.

In ***State v. Picotte***, 2003 WI 42, 261 Wis. 2d 249, 271, 661 N.W.2d 381, the supreme court discussed the circumstances under which a new rule of law would be applied prospectively. Regarding prospective application the court stated:

> ...The court has stated a number of times that it, like all courts, generally adheres to the 'Blackstonian doctrine,' which provides that 'a decision to overrule or repudiate an earlier decision is retrospective in operation.' The Blackstonian doctrine is based on the jurisprudential theory that courts declare but do not make law. In consequence, when a decision is overruled, it does not merely become bad law,-it never was the law, and the later pronouncement is regarded as the law from the beginning.
>
> The court, however, has also criticized the Blackstonian doctrine because it 'leads to a strict and unyielding adherence to the rule of *stare decisis* and interferes with the progress of the law.' Furthermore, inequities can arise when a court departs from precedent and announces a new rule. Accordingly, the court has recognized exceptions to the Blackstonian doctrine and has

> employed the technique known as prospective overruling, or 'sunbursting,' to soften or limit the impact of a newly announced rule.
>
> In *Harmann v. Hadley,* 128 Wis. 2d 371, 377, 382 N.W.2d 673 (1986), we explained that there are not easy-to-follow rules or consistent guidelines directing courts on whether or how to sunburst a decision. Courts must make the decision based upon the "equities peculiar to a given rule or case."

Picotte at ¶¶ 42 43, 44.

In ***Picotte*** the defendant claimed that his conviction for first-degree reckless homicide was barred by the common-law year-and-a-day rule, which rule established an irrebuttable presumption that a death occurring more than one year and one day after an accused's injury-inflicting act, was not caused by the accused. In ***Picotte*** the defendant had been convicted of aggravated battery and substantial battery. He pled guilty and was sentenced to 15 years in prison. More than two years later the victim of his battery died from complications arising from the injuries sustained in the fight with Picotte. Picotte was then charged with first-degree reckless homicide. After a jury trial he was convicted and sentenced to 30 years in prison.

On appeal, Picotte raised the issue of the year-and-a-day rule. The supreme court abrogated the rule, so that it

would not be a defense to an action such as the action against Picotte, but determined that the abrogation would operate prospectively only. Therefore, Picotte's conviction and 30 year sentence were vacated.

In its decision the court noted that there are no easy-to-follow rules or consistent guidelines directing courts on whether or how to sunburst a decision. Courts must make the decision based upon the equities peculiar to a given rule or case. ***Picotte*** at ¶44.

Picotte dealt with the abrogation of a common law rule. It has been noted however that sunbursting is an approved method of dealing with both changes within the common law, as well as changes in the way that courts interpret statutes. *See* ***State v. Thiel***, 2001 WI App 52, 241 Wis. 2d 439, 449, 625 N.W.2d 321.

In making the policy decision whether to apply this court's decision prospectively, we believe it is significant that, as argued by the State in its request for publication, this is a case of first impression.

We also believe retroactive application of the decision would be problematic to the extent that other defendants in Mr. Baade's position, who might not have had their good time forfeited, would theoretically be subject

to reincarceration to serve the remaining portion of their sentences. We believe that would be an inequitable result.

A practical problem that would arise in Mr. Baade's case is that he would have at most 90 days of additional time to serve. Given that his misdemeanors were made consecutive to his felony, the 90 days would clearly be attributable to the misdemeanor case out of Dodge County. Would he be instructed to report to Dodge Correctional, in the prison system, to serve what is the remaining portion of his misdemeanor sentences; or would he be ordered to report to the Dodge County jail, where he would serve the balance of his time on Huber, as ordered at the time of his sentence?

In determining what is appropriate in this case, we believe ***State v. Riske,*** 152 Wis. 2d 260, 264, 448 N.W.2d 260 (Ct. App. 1989), is instructive. Riske had been sentenced to jail. He reported to the jail to serve his sentence. He was told to report back at a later date. Riske was given credit for the time he was out of custody after sentencing to the day he was told to report. The court explained its reasoning as follows:

> This is because Riske was out of the jail through no fault of his. Sentences are continuous, unless interrupted by escape, violation of parole, or some fault of the prisoner, and 'where

> a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, ... his sentence continues to run while he is at liberty.'

Riske at 264

The court went on to observe:

> Section 973.15(7), Stats., by which the time that a convicted offender is at large after escape is not counted as service of the sentence, codifies the broader principle that a person's sentence for a crime will be credited for the time he was at liberty through no fault of the person.

Riske at 265.

In this case Mr. Baade was at liberty through no fault of his own. We therefore respectfully request that if this court determines that probationers, like Mr. Baade, forfeit their good time upon revocation, the court's opinion be prospectively applied, and not apply to Mr. Baade.

CONCLUSION

For the reasons stated herein we ask the court to affirm the circuit court's order.

Dated: _____, 2015.

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) Stats., for a brief in non-proportional type with a courier font and is 29 pages long including this page.

Dated: _____, 2015.

GRAU LAW OFFICE

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

I further certify that this electronic brief is identical to the printed form of the brief filed as of this date.

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

Dated: _____, 2015.

GRAU LAW OFFICE

_____
John J. Grau

APPELLANT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decision showing the circuit court's reasoning regarding those issues.

I certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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