STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

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

REPLY BRIEF OF RESPONDENT-APPELLANT

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This case involves two different terms of incarceration: one as a condition of probation and one as a result of the revocation of probation. Baade mistakenly assumes that credit applicable to one term of incarceration automatically applies to the other. This is simply incorrect. There are two different types of credits applicable to the two terms of incarceration, governed by two different statutes. Good time can serve to reduce the amount of time served in jail as a condition of probation, but it does not count as credit toward a sentence in prison. In this case, credit toward a prison sentence is limited to what Baade refers to as "custodial credit." The statutes are drafted this way so as to be consistent with Wisconsin's truth-in-sentencing regime, which requires that a prisoner actually serve each day of his prison sentence without reduction for good time.

The essence of Baade's argument seems to be that failing to grant sentence credit for the good time he received in county jail as a condition of probation somehow "forfeits" that good time. As a legal matter, this argument ignores the distinction between his term in jail as a condition of probation and the sentence in prison he has to serve as a result of later violating his probation. As a matter of fairness, Baade has only himself to blame for any "forfeiture" of his good time, because the alleged "forfeiture" of that time was caused by his subsequent violation of probation. Baade was supposed to serve twelve months as a condition of probation, but only served nine months due to good time.

Baade would not have lost this three months "good time" had he obeyed the terms of his probation. Now that Baade must serve his prison sentence due to his own misconduct, the State has no obligation to give him credit against his prison sentence for time he did not actually spend in custody.

ARGUMENT

The Respondent agrees that Baade was eligible under Wis. Stat. § 973.09(1)(d) to earn good time in county jail that reduced his time spent in jail as a condition of probation. This case, however, involves a determination of how much credit Baade should receive toward his prison sentence under Wis. Stat. § 973.155. Under the plain language of that statute, he is not entitled to any credit for good time that reduced his term in county jail as a condition of probation. There is no reason to make the ruling in this case prospective because the Court would merely be interpreting the statute as written if it reversed the circuit court and would not be overturning any existing precedent.

I. Baade is not entitled to sentence credit under Wis. Stat. § 973.155 for his good time.

Baade's good time does not meet the standards for credit under Wis. Stat. § 973.155. Good time does not count towards what Baade refers to as "custodial credit" under Wis. Stat. § 973.155(1) because he was not "in custody" for the three months of good time. He also does not receive credit for good time under Wis. Stat. § 973.155(4) because that subsection only allows for good time credit toward a

sentence in county jail, house of corrections or county reforestation camp. Baade does not receive such credit because he is seeking credit toward a two-year prison sentence. Section 973.155(4) does not allow for good time credit toward a sentence in prison so as to be consistent with the truth-in-sentencing regime under which prisoners must actually serve each day of a prison sentence without reductions for good time.

A. Baade is not entitled to "custodial credit" under Wis. Stat. § 973.155(1) for time in which he was not in jail.

By distinguishing between "custodial credit" and "good time credit," Baade appears to concede that his good time does not qualify for credit under Wis. Stat. § 973.155(1). (Baade Br. at 7.) Baade is incorrect, though, that the Respondent is attempting to limit all sentence credit to custodial credit under Wis. Stat. § 973.155(1). While there are other subsections in Wis. Stat. § 973.155 that allow for sentence credit for time not spent in custody, Baade simply does not meet the statutory criteria for those types of credit.

B. "Good time credit" under Wis. Stat. § 973.155(4) does not apply towards prison sentences.

Baade's argument that he is entitled to sentence credit for good time under Wis. Stat. § 973.155(4) fails under the plain language of the statute. Even assuming that incarceration as a condition of probation can count as a "sentence," the subsection still would not apply to Baade.

Section 973.155(4) provides that sentence credit "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 corrections or county reforestation camp." (emphasis added). In this case, Baade had already served his time in jail as a condition of probation at the time the sentence credit determination was made. This is the nature of sentences stayed in favor of probation—the sentence credit determination will only occur after an individual has completed his condition time and there has been a subsequent violation of probation. If the legislature wanted to grant sentence credit for good time earned during time in jail as a condition of probation, it would have used the past tense and granted credit for those who have "served" time in county jail. Instead, the legislature used the present tense "serving sentences" to indicate that the relevant sentence is the sentence to which the credit will be applied (here, a two-year prison sentence), and not the condition time that has already been served.

Baade's argument further falls apart when one realizes that Wisconsin law rejects the underlying assumption that incarceration as a condition of probation is a "sentence." *See Prue v. State*, 63 Wis. 2d 109, 216 N.W.2d 43 (1974); *State v. Fearing*, 2000 WI App 229, 239 Wis. 2d 105, 619 N.W.2d 115. When dealing with a statute involving credit toward a "sentence," the Wisconsin

courts hold that the word "sentence" does not include incarceration as a condition of probation. *Prue*, 63 Wis. 2d at 166. The *Prue* court reasoned 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." *Id.* at 114.

Baade's attempts to distinguish the *Prue* and *Fearing* cases are unpersuasive. The *Prue* decision recognized "that the word 'sentence' or 'sentencing' may be and often is used in a more general sense," but held that the term should be given its "legal meaning when used in the statutes and the law unless there are strong indications the term was used in the general sense." *Prue*, 63 Wis. 2d at 116. The stray reference to "sentence" in *State v. McClinton*, 195 Wis. 2d 344, 536 N.W.2d 413 (Ct. App. 1995) is one of those instances and the decision's use of the word "sentence" in its more general sense cannot overrule the holding in *Prue*.

Further, the decision in *State v. Mentzel*, 218 Wis. 2d 734, 581 N.W.2d 581 (Ct. App. 1998) was merely one of the cases in which the word "sentence" was to be interpreted in the more general sense. The *Mentzel* case interpreted the phrase "prisoner in custody under sentence of a court" in Wis. Stat. § 974.06, a postconviction procedure statute. *Id.* at 741-44. The Court of Appeals interpreted the phrase so to include probationers because "the reality of a probationary status is that it results directly from the trial

court's consideration of dispositional alternatives at a sentencing hearing." *Id.* at 743-44. That a court did not use the technical definition of "sentence" in a case involving postconviction procedure does not support departing from *Prue* in this case, which does involve sentencing law.

Lastly, this Court should not rely on the dicta in *State v. Yanick*, 2007 WI App 30, 299 Wis. 2d 456, 728 N.W.2d 365. While the court offered a calculation of sentence credit that would have included good time, it "stress[ed] that these two assumptions are not holdings and that, on remand, the parties remain free to make arguments on these topics." *Id.* at ¶ 24. The *Yanick* court's non-holding is neither binding nor persuasive on the correct interpretation of Wis. Stat. § 973.155(4). The rule that a court may not presumptively deny good time does not mean that good time earned during condition time is credited toward a sentence. That question is governed by Wis. Stat. § 973.155, but the *Yanick* decision cannot be persuasive on that issue because it did not even attempt to apply Wis. Stat. § 973.155 to the facts of the case before it.

C. Credit under Wis. Stat. § 973.155(4) is unavailable for prisoners so as to be consistent with truth-in-sentencing policy.

The statutory language in Wis. Stat. § 973.155(4) is clear that Baade does not receive credit for the good time he earned in county jail during his condition time. Wisconsin's truth-in-sentencing regime explains why good

time is credited towards sentences to be served in county jail but not towards sentences in prison. Those serving sentences in county jail, a house of corrections, or a county reforestation camp can reduce their sentences through good time.

See Wis. Stat. §§ 302.43, 303.07(3), 303.19(3). Those serving sentences in prison cannot. *See* Wis. Stat. § 973.01(4). By specifically referencing Wis. Stat. §§ 302.43, 303.07(3), and 303.19(3), Wis. Stat. § 973.155(4) is tailored to provide credit for past good time when the sentence to be served could be reduced by future good time.

A ruling in favor of Baade would contravene Wis. Stat. § 973.01(4) by allowing prisoners to reduce sentences where good time is not available. Baade's policy arguments cannot trump the statutory language in Wis. Stat. § 973.155 or the overriding policy behind the structure of the sentence credit regime.

II. The Court's ruling should apply in this case and not be made prospective only.

There is no reason in this case to depart from the normal practice that a court's decision applies in the case before it. This is not one of the "certain rare situations" in which "the better course is to apply a rule prospectively." *Wenke v. Gehl Co.*, 2004 WI 103, ¶ 69, 274 Wis. 2d 220, 682 N.W.2d 405. Baade relies on case law involving decisions on whether "a decision to overrule or repudiate an earlier decision" should be retroactive or prospective. *State v.*

Picotte, 2003 WI 42, ¶ 42, 261 Wis. 2d 249, 661 N.W.2d 381. In this case, the Court is not overruling or repudiating an earlier decision or rule of law. Further, retroactive application does not retard the operation of the rule in any way. *See Wenke*, 274 Wis. 2d 220, ¶ 71. Prospective application would do so by allowing Baade to serve a shorter sentence than that intended by the legislature. *See id.* In addition, there are no substantial inequitable results in forcing Baade to serve the amount of time that he is supposed to serve under the proper application of the sentence credit statute. *Id.*

While courts can also make a ruling prospective in a matter of first impression, the normal rule of retroactivity applies unless the resolution "was not clearly foreshadowed." *Wenke*, 274 Wis. 2d 220, ¶ 71. The resolution of this case is not surprising because it is based on the interpretation of the plain statutory language. If this case were appropriate for prospective application, then courts would need to apply the prospective application rule to every interpretation of a statute that had not yet been interpreted by an appellate court. This would turn what is supposed to be a rare exception into the general rule.

Lastly, this case is not similar to *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), in which the defendant could not serve his time due to errors by jail officials. In this case, the state officials have consistently argued for Baade to serve the correct amount of time on his

sentence. The Respondent contends Baade has not served that amount of time because the circuit court misapplied the sentencing credit statute. The Respondent followed the normal procedure for correcting such errors by appealing that ruling to this Court. There is nothing in the course of this litigation indicating a need to depart from the normal course of litigation in which errors in statutory interpretation are corrected on appeal and applied in the case at hand.

CONCLUSION

The Court should reverse the circuit court and reinstate the decision of the Division of Hearings and Appeals.

Dated this 10th day of April, 2015.

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 2,150 words.

Dated this 10th day of April, 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 10th day of April, 2015.

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