STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP152-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID AARON PIGGUE, JR.,

Defendant-Appellant.

APPEAL FROM AN AMENDED JUDGEMENT OF CONVICTION AND AN ORDER GRANTING IN PART AND DENYING IN PART A MOTION FOR POSTCONVICTION RELIEF ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID L. KONKOL, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Under *State v. Floyd*, 2000 WI 14, ¶¶ 25-32, 232 Wis. 2d 767, 606 N.W.2d 155, a defendant is entitled to sentence credit for time spent in custody on a dismissed

charge that is read-in at sentencing. *Floyd* limited its holding to read-in offenses, expressly distinguishing acquittals and outright dismissals from read-ins. *Floyd*, 232 Wis. 2d 767, ¶¶ 30-31. Piggue seeks credit for days spent in custody on a charge for which he was acquitted. Does *Floyd* authorize an award of credit for time spent in custody on an acquittal, and, if not, may this court extend *Floyd* to authorize sentence credit for custody on acquittals?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs of the parties should adequately address the legal issue presented, which may be resolved by application of *Floyd* to the facts of the case.

STATEMENT OF THE CASE

Piggue's statement of the case and facts is adequate to frame the issue on appeal. The State therefore exercises its option not to present a full statement of the case, *see* Wis. Stat. § (Rule) 809.19(3)(a)2., and instead provides a brief narrative of the facts in the Argument section.

ARGUMENT

PIGGUE IS NOT ENTITLED TO SENTENCE CREDIT FOR TIME SPENT IN CUSTODY ON A CHARGE FOR WHICH HE WAS ACQUITTED.

A. Introduction.

On appeal, Piggue argues that the circuit court erred in denying his postconviction request for 84 days of sentence credit for time spent in custody on a sexual assault charge for which he was acquitted at trial. Piggue maintains that, because the circuit court relied on the sexual assault allegations in sentencing him, the acquittal was "an offense for which [he] was ultimately sentenced," and thus credit is available under Wis. Stat. § 973.155(1)(a) (Piggue's Br. at 12-13). Piggue acknowledges that, in *Floyd*, the Wisconsin Supreme Court addressed the availability of credit for time spent in custody on other offenses, including acquittals, and expressly limited credit to offenses read-in for sentencing purposes. But Piggue appears to argue that the court effectively removed this limitation in *State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835 (Piggue's Br. at 14).

As developed below, Piggue reads far too much into *Straszkowski*, and *Floyd* controls. Because this court lacks the authority to extend *Floyd* to authorize credit for acquittals, this court must follow *Floyd* and affirm the circuit court's order denying sentence credit.

B. Applicable Law and Standard of Review.

1. Sentence Credit Generally.

The defendant carries the burden of proving that he or she is entitled to the sentence credit requested. *See State v. Villalobos,* 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995). For sentence credit to be awarded, 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." *See State v. Beiersdorf*, 208 Wis. 2d 492, 496, 561 N.W.2d 749 (Ct. App. 1997). The sentence credit statute, Wis. Stat. § 973.155, provides in relevant part:

> **(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.

The application of Wis. Stat. § 973.155 to undisputed facts presents a question of law this court reviews *de novo*. *Beiersdorf,* 208 Wis. 2d at 496.

2. *Floyd*

In *Floyd*, the defendant was convicted upon a guilty plea of reckless endangerment and felony bail jumping, and sought sentence credit for time spent in custody on an armed robbery charge that, pursuant to the plea agreement, was dismissed but read-in for sentencing purposes. *Floyd*, 232 Wis. 2d 767, ¶ 1. Floyd argued that his custody on the armed robbery charge (1) was "in connection with" the reckless endangerment charge by virtue of being dismissed but read in at sentencing in exchange for a plea to reckless endangerment; and (2) was "related to an offense for which [he] was sentenced" because the court took into account the read-in armed robbery offense in imposing sentence. *Id.*, ¶¶ 14, 18.

The Wisconsin Supreme Court rejected Floyd's first argument on grounds that a procedural connection—i.e., the plea agreement tying the reckless endangerment charge to the read-in armed robbery charge—may not satisfy the statute's "in connection with" requirement, citing *Beiersdorf*, 208 Wis. 2d at 498. *Floyd*, 232 Wis. 2d 767, ¶¶ 15-17.

The court ultimately agreed with Floyd's second argument, however. The court determined that the phrase "related to an offense for which [he] was sentenced" was ambiguous in this context, and examined the legislative history and purpose of Wis. Stat. § 973.155. *Id.*, ¶¶ 18-23. The court then considered the nature of read-in offenses, noting that a sentencing court "considers read-ins as a part

of a defendant's conduct in determining the appropriate sentence." *Id.*, ¶ 25. While the offender cannot receive a concurrent or consecutive sentence on a read-in charge, or be subject to a future prosecution on the charge, "there is exposure to the risk of a lengthier sentence as a result of consideration by the court of read-in charges." *Id.*, ¶ 26.

Citing *State v. Cleaves,* 181 Wis. 2d 73, 78-79, 510 N.W.2d 143 (Ct. App. 1993), the court also noted that "[r]ead-ins constitute admissions by the defendant to those charges," *Floyd*, 232 Wis. 2d 767 ¶ 25, language later withdrawn by *Straszkowski*, 310 Wis. 2d 259, ¶¶ 89, 95.

Finally, the court applied the rule of lenity to the ambiguous statute, and concluded that custody on a dismissed charged that is read in at sentencing relates to "an offense for which the offender is ultimately sentenced." *Id.*, ¶¶ 31-32.

Responding to a State's argument that the award of credit for pretrial custody on read-in offenses would result in credit "for a myriad of dismissed and other charges that also may be considered or mentioned at sentencing," the court drew a clear line and limited its holding to read-in offenses. The court explained its decision was "guided by" *State v. Szarkowitz*, 157 Wis. 2d 740, 755-56, 460 N.W.2d 819 (Ct. App. 1990), in which this court read the restitution statute to provide restitution for victims of offenses read in at sentencing, but not victims of other offenses considered at sentencing. *Floyd*, 232 Wis. 2d 767, ¶¶ 28-29.

"In limiting the statute's scope," the *Floyd* court explained, "we recognize the important distinction between read-ins and other charges, including pending charges acquittals or dismissals." *Id.*, ¶ 31.

C. Facts.

1. Sentencing.

Piggue was charged with first-degree sexual assault in the 2012 rape of A.J., and appears to have spent 84 days in custody before and during the trial on that charge (2:2; 22; A-App. 130). After the first day of trial, Piggue called his girlfriend from jail and told her to call A.J. and urge her to either not testify or change her story (2:2). The girlfriend did so (2:2). A jury acquitted Piggue of the sexual assault charge, but prosecutors later charged Piggue with conspiring to intimidate a witness (2; 42:7; A-App. 140).

Piggue pled guilty to the witness intimidation charge (32; A-App. 101). At sentencing, A.J. gave a statement recounting the sexual assault, and the call she received from Piggue's girlfriend urging her not to testify (42:8-16; A-App. 141-49). The prosecutor asked the sentencing court to consider the facts of the alleged assault for which Piggue was acquitted, properly noting that Wisconsin courts may consider facts related to acquittals, as well as uncharged and unproven offenses, in imposing sentence, citing *State v. Prineas*, 2009 WI App 28, ¶ 28, 316 Wis. 2d 414, 766 N.W.2d 206 (42:6-7; A-App. 139-40). The prosecutor outlined the facts of the alleged assault, and the existence of DNA-tested

semen evidence taken from A.J.'s body and clothes after the alleged assault establishing that Piggue had had sexual contact with A.J. (42:7, 16, 41-42; A-App. 140, 149, 174-75). When the court asked what Piggue's defense had been, the prosecutor said that A.J. had been a prostitute—apparently, that A.J. had consented to sex with Piggue in exchange for money (42:28-29; A-App. 161-62).

In passing sentence, the court began by addressing the sexual assault allegations, and concluded that it did not believe that A.J. had been working as a prostitute (42:42-43; A-App. 175-76). But, following this discussion, the court declared the gravity of *the witness intimidation charge* was the "primary … factor" in the court's sentence (42:44; A-App. 177), and, as a whole, the court's explanation of sentence reflects this assertion (*see* 42:44-57; A-App. 177-90).

The court sentenced Piggue to six years' initial confinement and five years' extended supervision—substantially less than the State's recommendation of the maximum sentence of nine years' initial confinement and five years' extended supervision on the charge of witness intimidation as a repeat offender (32:2; 42:6; A-App. 101, 139). The court awarded 203 days sentence credit for predisposition custody on the witness intimidation charge (15; 42:58; A-App. 191).

2. Postconviction motion and decision.

In a postconviction motion, Piggue requested, among other relief, an award of an additional 84 days sentence

credit for time spent custody on the sexual assault charge for which he was acquitted (30:11-14; A-App. 119-22). Piggue argued that the rationale underlying *Floyd* warranted granting credit in his case, and, alternatively, that the circuit court should exercise its inherent power to reduce Piggue's sentence by 84 days where the sentencing court gave "extensive consideration" to the sexual assault allegations in imposing sentence (30:12-14; A-App. 120-22).

While granting other unrelated relief requested in the motion,[1] the circuit court denied Piggue's request for credit on his confinement on the sexual assault charge (31:2-3; A-App. 106-107). The court concluded, in part, that it would be inappropriate to award the requested amount of 84 days when no factual connection existed between the prior and current charges until the 81st day of Piggue's custody:

> [T]he court fails to perceive why the defendant would be entitled to credit from December 14, 2012, when the offense in [the witness intimidation case] was not committed until March 4, 2013, three days before he was acquitted of the sexual assault. In short, postconviction counsel's request for 84 days of sentence credit exceeds the logic of her argument, since the "factual connections" between the charges did not exist until March 4, 2013.

(31:36: A-App. 107).

In a footnote, the court observed that *Floyd* had held that sentence credit was available for time spent in custody

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[1] The court granted Piggue's requests (1) to remove the repeater enhancement and commute the confinement portion of his sentence to five years, the maximum allowed without the enhancer; (2) to vacate the DNA surcharge imposed at sentencing; and (3) to award an additional one day of sentence credit (31; A-App. 105).

on read-in offenses, and "[t]hat is not what happened here." (31:3 n.3; A-App. 107). The court also rejected Piggue's alternative request for the court to exercise its inherent powers to reduce Piggue's sentence by 84 days. (31:3; A-App. 107).

D. The Requested Credit is Not Available under *Floyd*, and this Court May Not Extend *Floyd* to Grant Such Relief.

Piggue seeks reversal of the circuit court's order denying sentence credit. He argues that, as with the custody on the read-in offense in *Floyd*, Piggue's custody on the sexual assault charge was "related to an offense for which [he] was sentenced" (Piggue's Br. at 12-13). Piggue maintains that the sexual assault charge was related to the witness intimidation charge because he was in custody on the former charge when he committed the acts resulting in the latter charge, and both charges had the same victim (Piggue's Br. at 13). Piggue also argues that the sexual assault charge was related "because it became a central—arguably the primary—focus at the sentencing for witness intimidation" (Piggue's Br. at 13).

As an initial matter, the State disputes Piggue's implication that his sentence was based primarily on the sexual assault allegations. While the prosecutor focused on those allegations, and A.J. recounted the assault and its impact on her life at the hearing, the sentencing transcript shows that the alleged assault was not the "primary focus" of the court's sentence (*see* 42:37-57; A-App. 177-90). The

gravity of the witness intimidation charge was (42:44; A-App. 177). And it is well-established that "[a] sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted." *State v. Leitner*, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341.

Regardless, what matters for purposes of this court's decision is that *Floyd* controls. *Floyd* expressly limited the availability of sentence credit to time spent in custody on read-in offenses, specifically distinguishing custody on acquittals, pending charges and outright dismissals from read-ins. *Floyd*, 232 Wis. 2d 767, ¶ 31 ("In limiting the statute's scope, we recognize the important distinction between read-ins and other charges, including pending charges, acquittals or dismissals."). Whether the rationale underlying *Floyd* may support an award of sentence credit in Piggue's case,[2] sentence credit is not available because *Floyd*

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[2] Moreover, the State questions that rationale—i.e., the correctness of the supreme court's interpretation of Wis. Stat. § 973.155(1)(a) in *Floyd*. In the State's view, the conduct charged in an offense read in at sentencing is not "the course of conduct for which sentence was imposed," and a read-in offense is not "an offense for which the offender is ultimately sentenced." Wis. Stat. § 973.155(1)(a). Respectfully, both statutory provisions plainly refer to the offense(s) for which the defendant is convicted and "ultimately sentenced."

Of course, the rule that the supreme court adopted in *Floyd* is clear and workable: credit is available for custody on all read-ins, but not for custody on other offenses like acquittals. But, respectfully, the rule does not square with the language of the statute. Even if the statute could reasonably be interpreted to authorize credit for custody on read-in offenses, it is even more plain that the statute cannot support an interpretation that includes *all* read-in offenses. Only

itself limited the availability of credit for other offenses to read-in offenses. *See id.*, ¶¶ 29-31. The *Floyd* court drew a clear line limiting credit to read-ins in response to an argument that providing credit in Floyd's case would lead to a flood of motions for sentence credit on other offenses. *Id.*, ¶¶ 29-31.

Acknowledging the express limitations adopted by the *Floyd* court, Piggue argues that the supreme court effectively swept away those limitations in *Straszkowski* (Piggue's Br. at 14). Piggue is mistaken.

In *Straszkowski*, the defendant moved to withdraw his guilty plea after sentencing on grounds he was unaware that a charge that was dismissed but read in would be deemed admitted for purposes of sentencing. *Straszkowski*, 310 Wis. 2d 259, ¶ 2. The circuit court denied the motion, and the court of appeals summarily affirmed. *Id.*, ¶¶ 20-27. On review, the supreme court concluded that a defendant who enters a guilty plea should not be deemed to have admitted guilt to offenses dismissed but read-in at sentencing. *Id.*, ¶ 58. The court then withdrew language in prior cases stating that a read-in constitutes an admission of guilt to the charge, which would include the sentence to that effect in *Floyd*. *See id.*, ¶¶ 73, 89, 92-95.

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custody on those read-in offenses on which the court, in fact, *based the sentence* would be entitled to credit. The State makes this argument only to preserve a challenge to *Floyd* in the event of supreme court review.

But *Straszkowski* said nothing about overruling *Floyd*'s interpretation of Wis. Stat. § 973.155(1)(a) authorizing sentence credit for custody on read-in offenses, but not acquittals and other offenses. *Straszkowski* merely removed one ground on which the *Floyd* court distinguished read-ins from other offenses. Read-in offenses remain unique for other reasons. *See Floyd*, 232 Wis. 2d 767, ¶¶ 26-29. With a read-in offense, the court is expressly asked to consider the offense in determining the appropriate sentence, and the defendant is made aware that the read-in will be put before the sentencing court. *See id.*, ¶ 26. A sentencing court is, of course, free to consider other offenses and conduct as well, *Prineas*, 316 Wis. 2d 414, ¶ 28, but only read-in offenses are submitted to the court on the record for consideration.

Floyd's limitation of sentence credit to time spent in custody on read-ins but not other offenses therefore remains good law, and this court lacks the authority to extend or modify *Floyd* to include custody on acquittals. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W. 2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case."). Accordingly, Piggue is not entitled to sentence credit for time spent in custody on the sexual assault charge for which he was acquitted.[3]

[3] *Floyd* aside, the State joins the circuit court in questioning how Piggue could successfully claim full credit for the 84 days he spent

CONCLUSION

For the foregoing reasons, this court should affirm the circuit court's order denying Piggue's postconviction request for sentence credit.

Dated this 24th day of June, 2015, in Madison, Wisconsin.

Respectfully submitted,

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in custody on the sexual assault charge when the act of witness intimidation was not completed until the 81st day of Piggue's custody (31:3; A-App. 107).

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 2,966 words.

_____
Jacob J. Wittwer
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 24th day of June, 2015.

_____
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