STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP000152-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DAVID AARON PIGGUE, JR.,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

First, the State phrases the issue presented as whether "***Floyd***[1] authorize[s] 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?" (State's Response at 2). To be clear, Mr. Piggue does not argue that every defendant should be entitled to sentence credit for time spent in custody on every acquittal. Mr. Piggue's argument is much narrower. He asserts that—where (1) the acquitted charge was factually related to the offense for which Mr. Piggue was sentenced and (2) where the allegations and evidence concerning the acquitted charge became a primary focus of the sentencing—the language and remedial purpose of the sentence credit statute, and the rationale underlying ***Floyd***, reflect that Mr. Piggue is entitled to credit for the time he spent in custody on the acquitted charge.

The State also "disputes Piggue's implication that his sentence was based primarily on the sexual assault allegations." (State's Response at 10). While Mr. Piggue acknowledges that the circuit court also discussed the witness intimidation charge at sentencing, the record nevertheless reflects *extensive* discussion about and consideration given to the sexual assault charge: AJ discussed not only the circumstances related to the witness intimidation charge, but—at the State's request—also gave a complete, detailed account of the alleged sexual assault. (42:7-12;Initial App. 140-145). The State discussed the physical evidence it had related to the acquitted sexual assault charge. (42:16; Initial

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[1] ***State v. Floyd***, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155 (footnote added to quotation to provide citation).

App. 149). The State discussed Mr. Piggue's statements to police about the alleged sexual assault. (42:16-17; Initial App. 149-50).

Though defense counsel tried to steer the discussion away from the acquitted sexual assault charge, the circuit court asked defense counsel about Mr. Piggue's defense in the sexual assault trial (over which it did not preside). (42:29-30;App.163). And then, in sentencing Mr. Piggue, the court discussed the information which had been presented to it about the sexual assault acquittal. (42:37-60;Initial App.170-193). In so doing, despite the jury returning a not guilty verdict, the circuit court repeatedly noted that it wholly rejected Mr. Piggue's defense to the sexual assault charge. (42:42-43,49;Initial App. 175-176,182). The acquitted sexual assault charge was thus, indeed, a central focus of the sentencing in this case.

The State also notes that it "joins the circuit court in questioning how Piggue could successfully claim full credit for the 84 days he spent in custody on the sexual assault charge when the act of witness intimidation was not completed until the 81st day of Piggue's custody." (State's Response at 13-14, n.3). But the State overlooks both the language of Wisconsin Statute § 973.155 and the rationale underlying ***Floyd***. The statute provides that a person is entitled to credit for "confinement related to an offense for which the offender is ultimately sentenced." Wis. Stat. § 973.155(1)(a). In ***Floyd***, the Wisconsin Supreme Court acknowledged that this language was ambiguous, and—applying the rule of lenity—interpreted the statutory provision to include dismissed and read-in offenses. ***Floyd***, 2000 WI 14, ¶¶ 29-31. In so doing, the Wisconsin Supreme Court did not limit its holding to only those read-in offenses which factually occurred *after* the offense for which the

person had been convicted. Instead, the Court concluded that given the nature of and weight given to read-in offenses at sentencing, confinement spent on a read-in offense constituted confinement "*related to* an offense for which the offender is ultimately sentenced." ***Id.***, ¶¶ 25-32; Wis. Stat. § 973.155(1)(a) (emphasis added).

The State also argues that this Court "lacks the authority to extend or modify ***Floyd*** to include custody on acquittals." (State's Response at 13). But this Court indeed has the authority to interpret and apply Wisconsin Supreme Court decisions to new fact-scenarios—our appellate system demands it, as otherwise our State Supreme Court would have to hear cases to address every specific scenario. The Wisconsin Supreme Court in ***Floyd*** noted that it was limiting its holding to dismissed and read-in offenses, and in so doing noted that a read-in offense, unlike other offenses such as an acquittal, involves an admission to the offense. ***Floyd***, 2000 WI 14, ¶ 25. ***Floyd***, however, did not involve an acquittal such as this case, and, again, since ***Floyd***, the Wisconsin Supreme Court has held that a defendant's agreement to have a charge dismissed and read-in does not constitute an admission to that offense. ***State v. Straszkowski***, 2008 WI, 65, 310 Wis. 2d 259, 750 N.W.2d 835.

The State notes that "[r]ead-in offenses remain unique for other reasons," including that the court is "expressly asked to consider the offense in determining the appropriate sentence." (State's Response at 13). But that very thing also happened in this case with regard to the acquittal: the State asked the Court to consider information relating to the alleged facts of the acquitted sexual assault offense, discussed those alleged facts extensively, and then the court relied on those facts when sentencing Mr. Piggue for witness intimidation.

In this unique situation—where Mr. Piggue was in custody for the ultimately acquitted sexual assault charge when he committed the offense for which he was sentenced; where the offense for which he was sentenced involved witness intimidation against the woman who accused him of the sexual assault charge; and, most importantly, where the sexual assault charge became a central focus of the sentencing for witness intimidation—this Court should also apply the rule of lenity and hold that, under Wisconsin Statute § 973.155, Mr. Piggue is entitled to sentence credit for the 84 days he spent in custody on the acquitted sexual assault charge.

CONCLUSION

For these reasons, Mr. Piggue respectfully requests that this Court enter an order reversing the circuit court's denial of his request for 84 days sentence credit and remanding this matter for the circuit court to amend the judgment to add 84 days to Mr. Piggue's sentence credit in this case.

Dated this 13th day of July, 2015.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,003 words.

CERTIFICATE OF COMPLIANCE WITH 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 § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after 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 13th day of July, 2015.

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