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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

2015AP2137-CR

State of Wisconsin,

Plaintiff-Respondent,

v.

Lazeric R. Maxey,

Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE CIRCUIT COURT ENTERED IN KENOSHA COUNTY, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT LAZERIC R. MAXEY

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STATEMENT OF THE ISSUES

Did the circuit court err in failing to grant Lazeric Maxey a sentence credit?

Answered by the trial court: Mr. Maxey was not entitled to a sentence credit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not required. Publication is not necessary as current case law provides sufficient guidance on the issue of sentence credit in criminal cases.

STATEMENT OF THE CASE

This appeal goes to whether Mr. Maxey is entitled to a 138-day sentence credit. In State v. Maxey, Kenosha Co. Case No. 2011CF453, Maxey plead guilty to two counts: §940.20(2), Wis. Stats. (Battery to Law Enforcement Officers); and §961.41(1m)(b), Stats. (Possession w/Intent/Deliver Non-Narcotics). He received concurrent sentences of sentences of 18 months confinement and 30 months of Extended Supervision.

While on Extended Supervision in Kenosha Co. Case No. 2011CF453, on June 13, 2014, Maxey was charged with violating §946.41(1), Stats. (Obstructing an Officer by driving with a suspended license and giving a police officer by giving a false name.), and §939.62(1)(a) as a repeater, in this case, 14CM824 (1:1-2). On September 3, 2014, Maxey

plead guilty to the two charges. On February 13, 2015, the circuit court imposed a sentence of 18 months in prison, a period of 6 months of extended supervision consecutive to any previous sentence. (30:8) At this sentencing hearing Maxey's counsel requested a sentence credit of 132 days. (3:6) The court implicitly denied the motion by not addressing the request. A judgment of conviction was entered on 2/16/15. (15:1; A. App. 1)

On 2/19/15 Mr. Maxey filed a pro-se motion for a sentence credit. (20:1-3; A. App. 2-3) The undersigned was then appointed by the State Public Defender to represent him. An additional brief in support of the motion for a sentence credit was filed by the undersigned. (24:1-4;A.App. 4-7) At the 6/15/15motion hearing the circuit court cited State v. Boettcher, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), and denied the motion on the ground the sentence in this case (14CM824) was not consecutive to the sentence in Case No. 2011CF453. (32:4-6; A.App. 8-10) Subsequently, on 7/7/15 the Wisconsin Supreme Court issued a decision in State v. Obriecht, 2015 WI 66. Maxey believed this case provided a basis for a sentence credit and moved for reconsideration. (25:5; A.App. 11-15) The State responded with a letter brief objecting to any sentence credit. (27:1-2; A.App. 16-17)

By written Order of 10/13/2015 the circuit court denied the motion to reconsider on the grounds that (1) Maxey was on Extended Supervision and not probation "when he committed the crime for which he was sentenced in this case," and (2) that "this court did not impose 'a new sentence based on his violation of probation'; it imposed a sentence for the commission of a new crime, which the defendant committed while on Extended Supervision." (28:1-2; A.App. 18-19)

STANDARD OF REVIEW

De Novo. The application of undisputed facts to a statute is a question of law this court reviews independently while benefitting from the decision of the circuit court. State v. Obriecht, 2015 WI 66, ¶ 27, 363 Wis. 2d 816, 828, 867 N.W.2d 387.

ARGUMENT

I. "Sentence credit is designed to afford fairness so that a person does not serve more time than that to which he or she is sentenced." Obriecht, 2015 WI 66, ¶ 23.

It is undisputed that Mr. Maxey was incarcerated from June 16, 2014 to September 3, 2014 (79 days) for violating his extended supervision in case 2011CF453 by committing a new crime, obstructing an officer (§946.41(1)) as a repeater (§939.62(1)(a)). Likewise, he was incarcerated from October 14, 2014 to December 12, 2014 (59 days) while

awaiting sentencing in this case. That amounts to 138 days. In both cases, he was incarcerated because of his arrest in Kenosha Co. Case No. 14CM824.

§ 973.155, Stats. governs sentence credits. In State v. Obriecht, 2015 WI 66, ¶¶ 1-3, the court ruled that:

> In deciding whether to award sentence credit under Wis. Stat. § 973.155, a court must make two determinations: (1) whether the defendant was 'in custody' for the period under consideration, and (2) whether the custody was 'in connection with the course of conduct for which sentence was imposed.'

State v. Obriecht, 2015 WI 66, ¶25.

As the court further held:

> In order for the sentence to be 'in connection with the course of conduct for which sentence was imposed,' there must be a factual connection between the custody and the sentence. State v. Elandis Johnson, 2009 WI 57, ¶65, 318 Wis. 2d 21, 767 N.W.2d 207.
>
> When custody is at least "in part due to the conduct resulting in [a] new conviction," a court must award sentence credit under Wis. Stat. § 973.155(1)(b). State v. Hintz, 2007 WI App 113, ¶11, 300 Wis. 2d 583, 731 N.W.2d 646. Here, the sentence for the felony conviction was issued subsequent to the sentences for the misdemeanor convictions as a consecutive sentence.

Id. at ¶¶ 26-27.

It is undisputed that Maxey was incarcerated for 138 days between his arrest and while awaiting sentencing in this case. But for his arrest in Case. No. 14CM824, he would have been free on extended supervision. Accordingly, he was being held "in connection with the course of conduct for which sentence was imposed." Therefore, he is entitled to a sentence credit of 138 days pursuant to the holding in State v. Obriecht, 2015 WI 66, ¶ 27.

In denying Maxey's motion, the circuit court cited Obriecht at ¶¶ 36 & 37, for the rule that "this court will allow credit against the sentence in this case only if the time cannot be credited against the sentence in case 11CF453." (28:1-2; A.App. 18-19). That was Maxey's point in moving to reconsider. Maxey had served his prison sentence in the 2011 case (11CF453) and was on extended supervision when he was arrested and held for 138 days pending the outcome of this case. Because he was on extended supervision, applying 138 days credit to his extended supervision would be an illusory remedy. All it would do is shorten his period of extended supervision. It would be trading days of incarceration for days of extended supervision where he was not incarcerated. Granting Maxey a sentence credit does not offend the State v. Boettcher rule against receiving credit for more than one sentence. Under Boettcher, the Court specifically held that

when consecutive sentences are given, sentence credit can only be applied to the first sentence. Boettcher, 144 Wis. 2d at 87. Here, there was no period of incarceration remaining in the first case to apply the credit to. According to the Judgment of Conviction in 14CM824 "PROBATION HAS BEEN REVOKED CONSECUTIVE TO 11CF453." (1:1; A.App. 1)

As the State v. Obriecht, 2015 WI 66, ¶¶ 36 & 37, Court held, and the circuit court cited in denying relief:

"In addition, when sentences are consecutive, sentence credit is not issued to more than one sentence so long as the first sentence to be served is sufficient to receive the sentence credit at issue.

As we explain, the custody first imposed should be applied to the sentence first imposed, with consecutive sentences."

The problem here is the first sentence to be served is not sufficient to receive the sentence credit at issue. It lacks any unfulfilled period of incarceration. Therefore, the sentence credit should be applied to the sentence in Case No. 14CM824.

CONCLUSION

For the reasons stated above and the record Maxey requests this court Order the circuit court to grant him 138 days of sentence credit in Case No. 14CM824.

Dated at Milwaukee, WI this 27th day of January, 2016.

Respectfully submitted,

ZALES LAW OFFICE

/s/ Nicholas C. Zales

_____

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CERTIFICATIONS

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 1260 words.

/s/ Nicholas C. Zales

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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 27th day of January, 2016.

/s/ Nicholas C. Zales

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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 s. 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 s. 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 decisions showing the circuit court's reasoning regarding those issues.

I further 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 one or more initials or other appropriate pseudonym or designation instead of full names of persons, 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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