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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2016AP000924-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO A. JOHNSON,

Defendant-Appellant.

On Appeal from a Judgment of Conviction and
Order Denying Post-Conviction Relief,
Both Entered in the Walworth County Circuit Court,
the Honorable David M. Reddy Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

I. Is a "Day" Spent in Custody for Sentence Credit Purposes Under Wisconsin Statute § 973.155 Quantified by Any Part of a Calendar Day Spent in Custody or By a Requisite Twelve Hours Spent in Custody? As Such, is Mr. Johnson Entitled to Thirty-Three or Thirty Days of Sentence Credit?

The circuit court awarded Mr. Johnson thirty days of sentence credit. It denied his post-conviction motion to amend the judgment to reflect that he is entitled to thirty-three days of sentence credit based on a local "policy" that a defendant only receive a day of sentence credit if he spent twelve hours or more in custody on that day.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Johnson would welcome oral argument should this Court find it helpful. Publication is warranted to address the statutory interpretation and application of "days" spent in custody under Wisconsin Statute § 973.155.

STATEMENT OF THE FACTS AND CASE

A. Case Overview

On September 3, 2013, the State filed the complaint charging Mr. Johnson with two drug-dealing offenses both of which allegedly occurred on August 5, 2013. (3).[1],[2] Mr. Johnson pled guilty to the two charges, in exchange for the State agreeing to dismiss and read in the charges in Walworth County Case Number 13-CF-398 (additional counts related to the delivery of cocaine and designer drugs). (46:2).[3]

The circuit court sentenced Mr. Johnson to ten years of initial confinement followed by ten years of extended supervision: five years of initial confinement and five years of extended supervision on each count, with the counts running consecutively to each other. (47:126-127).

With regard to sentence credit, Mr. Johnson's attorney noted that he calculated thirty-three days; the court noted that its clerk had calculated thirty. (47:128;App.109). The court stated: "I have August 19th, August 20th, one day. September 26th to October 25th, 29 days." (47:129;App.110). Counsel stated: "[c]orrect" and explained: "I had it as 30 and 3—the first one was three and the second one was 30, but we'll

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[1] The State charged him with one count of delivery of cocaine, in an amount between one and five grams, in violation of Wisconsin Statute § 946.41(1)(cm)1r, and one count of delivery of MDMA, in violation of Wisconsin Statute § 946.41(1)(hm)1. (3).

[2] The circuit court clerk's record index contains two record items numbered as "3" and two record items numbered as "4". Mr. Johnson does not cite to either document "4". When he cites to record item "3", he refers to the criminal complaint.

[3] At sentencing, the parties also agreed that the charges in Walworth County Case Number 13-CF-455 would be dismissed and read-in as part of the global resolution of these cases. (47:3).

accept that." (47:129;App.110). The judgment of conviction reflects the court's order of thirty days of sentence credit. (17; App.101-103).

B. Facts Relevant to Sentence Credit

Records reflect that Mr. Johnson was arrested for drug dealing allegations that resulted in the charges in Walworth County Case Number 13-CF-398 (the charges dismissed and read-in at sentencing here) on August 19, 2013, at 7:30am. (31:12-13;App.132-133)(PCM Exh.A)(notice of arrest form noting that his arrest related to allegations of drug dealing occurring on July 23, 2013, July 29, 2013, and August 1, 2013); *see also* (13:3)(discussing that Mr. Johnson was charged in 13-CF-398 with four counts related to drug dealing on July 23, 2013, July 29, 2013, and August 1, 2013, that were dismissed and read-in as part of this case).

Mr. Johnson was released on bond on August 20, 2013, at 3:25pm. (1); *see also* (32:3;App.137) (credit worksheet attached to the State's response to Mr. Johnson's post-conviction motion).[4]

Walworth County jail records reflect that Mr. Johnson was then taken into custody for booking on the charges in this case on September 16, 2013, and released from custody that same day. (31:14;App.134)(PCM Exh.B); *see also* (32:3; App.137). The records reflect that he was in custody from 16:11 to 16:57, forty-six minutes. (31:14;App.134).

[4] At the post-conviction hearing, the State noted that Mr. Johnson was released at 3:25 pm on August 20th. (48:6;App.116). While neither the jail records Mr. Johnson provided to the court nor the credit worksheet the State provided to the court reflected an hour/minute time for his release, Mr. Johnson has no reason to dispute the 3:25 pm release time.

Records further reflect that Mr. Johnson was again taken into custody on September 26, 2013, at 18:11, following a bond violation in this matter for new drug dealing allegations. (31:14;39:2-3;App.134). Records reflect that he remained in custody until October 25, 2013, at 18:04, when he posted bond. (31:14;App.134); *see also* (32:3;App.137). The jail records reflect that Mr. Johnson then remained out of custody until sentencing on July 18, 2014. (31:14;App.134).

C. Post-Conviction Litigation

Mr. Johnson filed a post-conviction motion to amend the judgment of conviction to reflect a total of thirty-three days of sentence credit, not thirty. (31;App.121-134).[5] The State filed a letter response with an attached sentence credit worksheet. (32;App.135-137).

The court held a hearing. (48;App.111-120). The court noted that its policy was that a defendant had to serve "more than 12 hours in order to get credit for a day." (48:2; App.112). Mr. Johnson's attorney argued that the sentence credit statute did not provide any such time restriction, and that under the rule of lenity, any ambiguity in the wording of the statute falls to the defendant such that Mr. Johnson should receive credit for each calendar day during which he spent time in custody for this case and the dismissed and read-in case (13-CF-398). (48:6-7;App.116-117).

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[5] Mr. Johnson also asked the court to vacate the "Second/Subsequent Enhancer" modifiers from both offenses and vacate the two $250 DNA surcharges imposed. (31;App.121-134). The court granted the motion to vacate the modifiers and vacated one of the two DNA surcharges. (33;App.107). Undersigned counsel asked this Court to stay briefing pending the Wisconsin Supreme Court's decision in ***State v. Scruggs***, 2015 WI App 88, --Wis. 2d--, --N.W.2d-- (concerning the DNA surcharge challenge). In light of the Court's decision in ***Scruggs***, Mr. Johnson does not challenge the imposition of the single-remaining DNA surcharge on appeal.

The court denied the sentence credit motion. (48:7 9;33;App.107,117-119). The court stated that it "hate[s] to say that's the way we have always done it, but that is the case." (48:7;App.117). It found no reason to "stray" from its policy. (48:8;App.118).

Mr. Johnson now appeals.

ARGUMENT

I. Any Part of a Calendar Day Spent in Custody Equals One Day for Sentence Credit Purposes Under Wisconsin Statute § 973.155. Mr. Johnson is Entitled to Thirty-Three Days of Sentence Credit.

A. Any part of a calendar day spent in custody equals one day for sentence credit purposes under Wisconsin Statute § 973.155.

Wisconsin Statute § 973.155 provides that 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." Wis. Stat. § 973.155(1)(a).

The statute further explains:

> "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.

Wis. Stat. § 973.155(1)(a).

This appeal turns on what is considered a "day spent in custody" under Wisconsin Statute §973.155. The plain language of the statute does not provide any additional definition of the word "days."

Statutory interpretation is a question of law subject to de novo review. ***State v. Peters***, 2003 WI 88, ¶ 13, 263 Wis. 2d 475, 665 N.W.2d 171.

Statutory interpretation begins with the plain language of the statute. ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. Courts "generally give words and phrases their common, ordinary, and accepted meaning," but the "plain meaning is seldom determined in a vacuum." ***Osterhues v. Bd. Adjustment for Washburn County***, 2005 WI 92, ¶ 24, 282 Wis. 2d 228, 698 N.W.2d 701.

Accordingly, courts interpret statutory language in the "context in which it is used"—to "avoid absurd or unreasonable results." ***Kalal***, 2004 WI 58, ¶ 46. "If the plain language proves ambiguous, [courts] look beyond the language to examine the scope, history, context, and purpose of the statute." ***State v. Floyd***, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155.

"An interpretation that contravenes the manifest purpose of the statute is unreasonable." ***State v. Dinkins***, 2012 WI 24, ¶29, 339 Wis. 2d 78, 810 N.W.2d 787 (citing ***Kalal***, 2004 WI 58, ¶ 49).

Further, when a statute is ambiguous, courts apply the rule of lenity, which mandates that courts construe penal statutes strictly to safeguard a defendant's rights unless doing so would contravene legislative purpose. ***State v. Frey***, 178 Wis. 2d 729, 745, 505 N.W.2d 786 (1993)(citations omitted); *see also* ***Floyd***, 2000 WI 14, ¶ 31. Thus, absent

"express legislative indication to the contrary," this Court should interpret any ambiguity in Wisconsin's sentence credit statute in favor of criminal defendants. *See* ***State v. Bohacheff***, 114 Wis. 2d 402, 417, 338 N.W.2d 466 (1983).

Wisconsin's sentence credit statute was "designed to afford fairness" and ensure "that a person not serve more time than he is sentenced." ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985). The statute has its origins in equal protection, as "a person who could not make bail because of indigency was being denied a liberty right that a wealthy person could exercise." ***Id.***

In ***Klimas v. State***, 75 Wis. 2d 244, 249 N.W.2d 285 (1977), the Wisconsin Supreme Court issued a "call to action", "urg[ing] the legislature to provide sentence credit for custody based on an indigent defendant's inability to post bail". ***Floyd***, 2000 WI 14, ¶ 21 (discussing ***Klimas***). Though "the holding in ***Klimas*** was limited to requiring sentence credit in the case of the defendants treated disparately due to their financial status, the court also encouraged the adoption of a broader rule based on the existing federal law." Our Legislature responded by creating Wisconsin Statute § 973.155, "which expanded sentence credit beyond the scope of ***Klimas***." ***Id.***, ¶¶ 21-22.

Wisconsin has thus long held that our credit statute demands that a defendant get credit "on a day-for-day basis." *See, e.g.,* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

Recently, the Wisconsin Supreme Court issued a decision which reflects that a "day" under § 973.155 means every calendar day, not a requisite number of aggregated hours. In ***State v. Carter***, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516, the Court addressed the question of credit for a defendant who spent time in custody out-of-state on a

Wisconsin warrant where concurrent sentences were imposed. What is relevant here, though, is the Court's addition of days to determine the total amount of credit.

For example, the record reflected that the defendant was in custody from December 13-15, 2003. ***Id.***, ¶ 25. The Court counted this as three days (December 13, December 14, December 15). ***Id.*** The Court addressed multiple periods of time, and for each calculated the total amount of credit based on the number of calendar days. ***Id.***

Carter thus reflects that the Wisconsin Supreme Court views "days" as each calendar day where the defendant spent time in custody. While the Court in ***Carter*** did not discuss the start and end hours of each period of custody, it seems highly unlikely that the defendant was in custody for exactly twenty-four hours on December 13th (when taken into custody) and exactly twenty-four hours on December 15th (when released from custody). As such, ***Carter*** suggests that the Wisconsin Supreme Court interprets one "day" for credit as part or all of a calendar day where the defendant spent time in custody.

Wisconsin's statute addressing how the Department of Corrections calculates a mandatory release date for those inmates eligible for parole also supports this interpretation of "days" spent in custody. Wisconsin Statute § 302.11 provides that a mandatory release date is established at two-thirds of the sentence, and that "[a]ny calculations…resulting in fractions of a day shall be rounded in the inmate's favor to a whole day." Wis. Stat. § 302.11(1). In light of the remedial purpose of the sentence credit statute, the same must be true for calculations of credit.

Other important jurisdictions—most notably the federal system—have held that any time spent in custody on a calendar day equals one "day" for calculating credit. Importantly, our sentence credit statute was modeled after

the federal statute: "Underlying the adoption of Wis. Stat. § 973.155 was the intent to bring the law of Wisconsin into conformity with the broad federal statute, which provided for sentence credit for any pre-sentence confinement period, whether arising from a financial inability to post bail, unwillingness to grant release on bail, or for the purpose of examination." ***Floyd***, 2000 WI 14, ¶ 22.

Under the Federal system, the Bureau of Prisons determines sentence credit. The Bureau of Prisons, applying the current federal statute, employs what is referred to as the "one day rule", which means that "[a]ny part of a day spent in official detention equals one day for credit purposes." Federal Bureau of Prisons, *Sentencing Computation Manual*, at 45, available online at https://www.bop.gov/policy/progstat/5880_028.pdf (last accessed March 23, 2017).[6]

Minnesota also applies the same rule: Minnesota's sentencing statutes provide that when pronouncing sentence, a court must "[s]tate the number of *days* spent in custody in connection with the offense or behavioral incident being sentenced. That credit must be deducted from the sentence and term of imprisonment". Minn. R. Crim. P. 27.03, subd. 4(B) (emphasis added).

Minnesota's Sentencing Guidelines hold that any part of a single day spent in custody counts as one day for credit: "In computing jail time credit, each day or portion of a day in jail should be counted as one full day of credit. For example, a defendant who spends part of a day in confinement on the day of arrest and part of a day in confinement on the day of

[6] At the time Wisconsin adopted § 973.155, the federal sentence credit statute it followed was 18 U.S.C. § 3568. That section has since been replaced by 18 U.S.C. § 3585.

release should receive a full day of credit for each day." Minn. Sentencing Guidelines 3.C.05; *see also* ***State v. Jackson***, 557 N.W.2d 552 (Minn. 1996).

These applications of sentence credit make sense. Indeed, to interpret the sentence credit statute to reflect that a defendant is not entitled to sentence credit for a calendar day unless he has served a certain number of hours on that calendar day, would be to ignore both the purpose of the sentence credit statute—to afford fairness and equal protection—and the rule of lenity.

The circuit court here noted that its policy was that a defendant does not receive sentence credit unless he has served twelve hours in custody on a particular day. (48:2;App.112). That is "the way [they] have always done it". (48:7;App.117). Yet, there is no support in the language of the statute, purpose of the statute, or case law for this policy. Indeed, by this standard, a defendant who is arrested at 11:59 a.m. and kept in custody for days thereafter *would* get sentence credit for the day of his arrest, but a defendant who was arrested at 12:01 p.m. would not. How does this comport with the fairness and equal protection at the heart of the sentence credit statute?

Such an interpretation and application of Wisconsin Statute § 973.155 would also lead to the absurd and cumbersome result of jail and court staff across Wisconsin having to add up time by hours, minutes, or perhaps even seconds.

Even more importantly, as equal protection serves as the foundation of our sentence credit statute, it is concerning that inmates in pre-trial custody in Walworth County may—because of this apparent policy—receive less sentence credit

than inmates in other Wisconsin counties under the same statute. Under the rule of lenity, any ambiguity in the meaning of the word "days" must be construed in favor of allocating sentence credit.

The purpose of the sentence credit statute, the Wisconsin Supreme Court's decision in ***Carter***, related statutes in Wisconsin and other jurisdictions, and the rule of lenity all reflect that any part of a calendar day spent in custody equals one day for sentence credit purposes under Wisconsin Statute § 973.155.

B. Mr. Johnson is entitled to thirty-three days of sentence credit.

Pre-trial confinement on a charge that is dismissed and read-in as part of a plea agreement falls under the parameters of an offense for which the person is ultimately "sentenced". ***State v. Floyd***, 2000 WI 14, ¶ 32, 232 Wis. 2d 767, 606 N.W.2d 155.

The record reflects that Mr. Johnson was in custody for purposes of the sentence credit statute on pre-trial custody for this case and the dismissed and read-in case (13-CF-398) for the following periods of time:

- August 19, 2013 at 7:30 am, to August 20, 2013, at 3:25 pm,;
- September 16, 2013, from 4:11 pm to 4:57 pm;
- September 26, 2013, at 6:11 pm, to October 25, 2013, at 6:04 pm.

(31:12-14;32:3;App.132-134). [7]

He is entitled to one day of credit for each calendar day spent in custody. So, that equals:

- August 19, to August 20, 2013: **two days**;
- September 16, 2013: **one day**;
- September 26 to October 25, 2013: **thirty days**.

Mr. Johnson is therefore entitled to a total of thirty-three days of sentence credit. As the circuit court ordered the two sentences to run consecutively to each other, Mr. Johnson only is entitled to the thirty-three days of credit on the first of the two counts. *See* ***Boettcher***, 144 Wis. 2d at 100.

[7] At the post-conviction hearing, the State noted that Mr. Johnson was "booked" at 12:44 pm on August 20th. (48:6;App.116). The notice of arrest, however, reflects that he was arrested at 7:30 am. (31:12-13;App.132-133). Therefore, that is when his custody began, not when he was booked in the jail a few hours later. Thus, even under the Walworth County twelve hours "policy", he was entitled to two days for this period of time—one day for August 19th (more than twelve hours) and one day for August 20th (more than twelve hours).

CONCLUSION

For these reasons, Mr. Johnson respectfully requests that this Court enter reversing the circuit court's decision denying his post-conviction motion for sentence credit and remanding with an order that the judgment be amended to reflect that Mr. Johnson is entitled to a total of thirty-three days of sentence credit.

Dated this 24th day of March, 2017.

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 2,982 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 24th day of March, 2017.

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CERTIFICATION AS TO APPENDIX

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 § 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 § 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 first names and last initials 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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