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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2016AP0924-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTONIO A. JOHNSON,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER DENYING POSTCONVICTION RELIEF
ENTERED IN THE CIRCUIT COURT FOR WALWORTH
COUNTY, THE HONORABLE DAVID M. REDDY,
PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Wisconsin Stat. § 973.155(1(a) provides for sentence credit “for all days spent in custody.” Is a defendant entitled to a full day’s credit against his or her sentence for *any portion* of a day spent in custody?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

This case meets the criteria for publication since there are no published decisions on the treatment of partial days under Wis. Stat. § 973.155. However, this fact pattern is rare so the issue does not arise frequently.

INTRODUCTION

The sole issue Antonio A. Johnson raises in this appeal is whether he is entitled to three additional days of sentence credit under Wis. Stat. § 973.155 because he was in custody for a part, but not all, of those three calendar days.

The ordinary meaning of a day is 24 hours. Sentences commence at noon on the day of sentence. Therefore, the ordinary meaning of a “day spent in custody” is a 24-hour period, measured from noon to noon. Johnson spent only one 24-hour period in custody on the calendar days August 19, 2013 and August 20, 2013, for which he claims two days credit. He was in custody an hour at most on September 16, 2013. The period September 26, 2013, through October 25, 2013, comprises 29 24-hour periods. There is nothing in section 973.155 which would require a contrary result. The circuit court thus awarded the correct amount of sentence credit when it awarded 30 days of credit.

STATEMENT OF THE CASE

On September 3, 2013, the State charged Antonio A. Johnson with delivery of cocaine greater than one but less than or equal to five grams, second or subsequent offense and delivery of designer drugs less than or equal to three grams, second or subsequent offense. (R. 3.)¹ The State filed an information alleging the same two counts. (R. 5.)

The State and Johnson reached a plea agreement in which Johnson would plead guilty to both counts of the information. The State would dismiss four additional charges which would be read-in at sentencing. The State would recommend two ten-year sentences (five years of initial confinement and five years of extended supervision) to run consecutively. (R. 10:3; 46:2–3.) At sentencing, the State and Johnson agreed to dismiss and read-in two additional charges. (R. 47:3.) The circuit court sentenced Johnson to two consecutive sentences of five years initial confinement and five years of extended supervision. (R. 17; 37; 47:126, 128.) The circuit court awarded Johnson 30 days of sentence credit consisting of August 19–20, 2013, and September 26 to October 25, 2013. (R. 47:128–29.)

Johnson filed a postconviction motion (R. 31.) As relevant here, Johnson claimed 33 days of sentence credit. He claimed two days for the period August 19, 2013 through August 20, 2013, one day for September 16, 2013 and 30 days for the period September 26, 2013 to October 25, 2013. (R. 31:5.) He based his calculation of days in custody for the August period on the fact he was arrested at 7:30 a.m. on

¹ As Johnson's brief notes, (Johnson's Br. 2), the record in this case has two documents numbered 3 and two documents numbered 4. The first two number 3 and 4 documents are in connection with a search warrant executed prior to the filing of the criminal complaint. Like Johnson, the State refers to the second document 3, the criminal complaint. The subsequent numbered documents are those following the criminal complaint.

August 19, 2013, (R. 31:12), and he was released at 3:25 p.m. on August 20, 2013 (R. 48:6). The State did not contest that Johnson was in custody on those dates and times but took the position that August 19, 2013 through August 20, 2013 constituted one day for sentence credit purposes and that September 26, 2013 to October 25, 2013 constituted 29 days for sentence credit.² (R. 32:1.) According to the State, Johnson was not entitled to any credit for September 16, 2013, when he spent approximately one hour in custody to be booked and released. (R. 31:13; 32:1.)

The circuit court denied additional sentence credit.³ (R. 33.) It reasoned that the phrase “all days spent in custody” in connection with the course of conduct means a day not a partial day. (R. 48:8.) The court declined to award credit for three additional days. (R. 45:8.)

STANDARD OF REVIEW

The interpretation and application of a statute are questions of law that appellate courts review independently. *Richards v. Badger Mut. Ins. Co.*, 2008 WI 52, ¶ 14, 309 Wis. 2d 541, 749 N.W.2d 581.

² The State did not rely on waiver in opposing Johnson’s postconviction sentence credit claim. Therefore, the State will not raise waiver here. *See State v. Klimas*, 75 Wis. 2d 244, 246, 249 N.W.2d 285 (1977); Wis. Stat. § 973.155(5) (permitting prisoners to petition the circuit court for relief at any time in the award of sentence credit).

³ The circuit court granted Johnson’s postconviction motion to vacate the second/subsequent enhancer to both counts and vacated one DNA surcharge. (R. 33.)

ARGUMENT

The circuit court awarded the correct amount of sentence credit.

Wisconsin Stat. § 973.155 governs the award of sentence credit. As relevant here, paragraph (1)(a) of the statute provides: “A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody As used in this subsection, ‘actual days spent in custody’ includes” Wis. Stat. § 973.155(1)(a).

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.” *State v. Gilbert*, 115 Wis. 2d 371, 376, 340 N.W.2d 511 (1983). A defendant seeking sentence credit has the burden of demonstrating both “custody” and its connection with the course of conduct for which the sentence was imposed. *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 785 N.W.2d 516. “The provisions of . . . Wis. Stat. § 973.155(1), are mandatory.” *Carter*, 327 Wis. 2d 1, ¶ 51.

The parties below agreed on the dates and times that Johnson spent in custody in connection with the conduct for which sentence was imposed.⁴ They disagreed on the amount

⁴ The State agrees with Johnson that *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155, holds that charges dismissed and read-in at sentencing are “in connection with the course of conduct for which sentence was imposed.” Although some of the justices on the supreme court have questioned the continued viability of *Floyd*, see *State v. Johnson*, 2009 WI 57, ¶¶ 90–92, 318 Wis. 2d 21, 767 N.W.2d 207 (Ziegler, J. concurring), this Court is bound to follow it. See *Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (holding the court of appeals may not overrule, modify or withdraw language from a prior supreme court decision or a previously published decision of the court of appeals.)

of sentence credit due for those dates. Johnson contends he is entitled to a day of sentence credit for any partial day he spent in custody. To resolve this dispute, this Court must construe the term “days” in Wis. Stat. § 973.155(1)(a).

“[S]tatutory interpretation begins with the language of the statute. If the meaning of the statute is plain,” the inquiry ordinarily stops. *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110 (citation omitted). Context and structure of the statute are also important to the meaning of the statute. *State v. Obriecht*, 2015 WI 66, ¶ 22, 363 Wis. 2d 816, 867 N.W.2d 387 (citing *Kalal*, 271 Wis. 2d 633, ¶ 46.) Courts interpret statutory language “in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results.” *Kalal*, 271 Wis. 2d 633, ¶ 46. Where this process yields a plain meaning, the statute is not ambiguous. *Id.* If the language is ambiguous, however, courts look beyond the language and examine the scope, history, context, and purpose of the statute. *Id.* ¶ 48.

“Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Kalal*, 271 Wis. 2d 633, ¶ 45. The common, ordinary and accepted meaning can be ascertained from the dictionary definition. *Id.* ¶ 53.

The American Heritage Dictionary of the English Language contains two primary definitions of “day.” First, “the period of light between dawn and nightfall” and second, “the 24-hour period during which the earth completes one rotation on its axis.” *American Heritage Dictionary of the English Language* 463 (5th ed. 2011).

Wisconsin Stat. § 973.15(1) provides that “all sentences commence at noon on the day of sentence.” This surrounding

and related statute eliminates the first dictionary definition of “day” in interpreting Wis. Stat. § 973.155(1). Noon is in the middle of the “period of light between dawn and nightfall.” Therefore, the first definition does not illuminate the meaning of “day” in section 973.155.

Awarding sentence credit finds its roots in equal protection. An indigent who cannot make bail should not serve more time in jail than a person of means who can post bail. *Klimas v. State*, 75 Wis. 2d 244, 249, 249 N.W.2d 285 (1977). 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. *Obrieht*, 363 Wis. 2d 816, ¶ 23 (citing *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985)).

A 24-hour period is the common, ordinary, and accepted meaning of the term “day.” This second definition is consistent with the plain meaning of “day” in section 973.155 and the legislative purpose of the statute. It is also consistent with the plain meaning of “day” in section 973.15.

Using this definition, Johnson is entitled to one day of credit for the period August 19 through August 20. Likewise, the period from September 26 through October 25 he is entitled 29 days of credit. The first period contains one 24-hour period and the second contains 29 such periods. Since Johnson was not in custody for 24-hours on September 16, he is not entitled to any sentence credit for that date.

Using the time of arrest on August 19 and the time of release on August 20, as Johnson does, is unnecessary. Whether one starts at noon on August 19 through noon of August 20 or 7:30 a.m. of August 19 through 7:30 a.m. of August 20, Johnson was in custody for only one 24-hour period on those dates. And if Johnson is correct, the amount of time in custody for those two days does not matter. Using the 7:30 a.m. arrest time is also administratively impractical because the normal documents that the courts, attorneys, the

Department of Corrections, and the Division of Hearings and Appeals rely on do not consistently contain the date custody begins or ends.

The circuit court awarded a total of 30 days of credit. That is the correct amount of sentence credit for Johnson's custody.

Johnson relies on *State v. Carter*, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516, the mandatory release statute, the federal Bureau of Prisons interpretation of federal law, and Minnesota's Sentencing Guidelines in support of his argument that he is entitled to credit for any partial day he spent in custody in connection with his drug offenses.

Johnson's reliance on *Carter* is misplaced. He observes that the *Carter* court used dates to compute Carter's sentence credit from December 13–15, 2003. (Johnson's Br. 8 (citing *Carter*, 327 Wis. 2d 1, ¶ 25).) He notes that the court counted this period as three days in custody. But the *Carter* court was not consistent in its methodology. The opinion also counts the period between December 15 and December 21 as six days. *Id.* ¶ 17. That period is seven days if one counts any portion of the day as a full day. (December 15, December 16, December 17, December 18, December 19, December 20, December 21.) *See also State v. Obriecht*, 2015 WI 66, ¶ 8, 363 Wis. 2d 816, 867 N.W.2d 387 (counting the period between June 30 and November 19, 1999, as 142 days when that period is 143 days when counting any portion of a day as a full day). In fact, the reported decisions of either this Court or the supreme court have never addressed the issue of how partial days are counted under Wis. Stat. § 973.155 and, for the most part, have merely acceded to the parties' or the circuit court's computation of the number of days, whether based on dates or a 24-hour period.

The mandatory release statute, Wis. Stat. § 302.11(1) does state that "[a]ny calculations under this subsection . . .

resulting in fractions of a day shall be rounded in the inmate's favor to a whole day." This statute provides scant support for treating sentence credit calculations the same, however. The mandatory release statute provides that the "mandatory release date is established at two-thirds of the sentence." Wis. Stat. § 302.11(1). This calculation will frequently result in fractions of days. For instance, if an indeterminate sentence is four years or 1,460 days, two-thirds of that sentence equals 973 and one-third days. The legislature had to address how to treat the fraction when applying this statute. But that hardly informs whether partial days in custody should be treated as whole days for sentence credit.

Johnson also relies on the federal system's method which treats partial days as one full day for sentence credit. As Johnson noted, the legislature adopted Wis. Stat. § 973.155 in order to "bring the law of Wisconsin into conformity with the broad federal statute." (Johnson's Br. 9, (citing *State v. Floyd*, 2000 WI 14, ¶ 22, 232 Wis. 2d 767, 606 N.W.2d 155).) Johnson points to the Federal Bureau of Prisons *Sentencing Computation Manual*, which treats any part of a day as a full day. (Johnson's Br 9.)

When Wis. Stat. § 973.155 was enacted, the federal statute, 18 U.S.C. § 3568, used the term "day." See *Klimas v. State*, 75 Wis. 2d 244, 251, 249 N.W.2d 285 (1977). The federal statute in effect in 1977 has been repealed. See Pub. L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 2001. The reenacted statute provides that an inmate, "shall be given credit toward the service of a term of imprisonment for any *time* he has spent in official detention prior to the *date* the sentence commences." The statute no longer uses the term "day."

Moreover, even within the federal system, the Sentencing Computation Manual provides only persuasive authority on interpretation of the federal statute. See *Zavala v. Ives*, 785 F.3d 367, 375 n.10 (9th Cir. 2015). Likewise,

Minnesota’s Sentencing Guidelines and *State v. Jackson*, 557 N.W.2d 552 (Minn. 1996) concluding that any portion of a day in jail should be counted as one full day of credit, is only persuasive in interpreting the meaning of “day” in Wis. Stat. § 973.155. (Johnson’s Br. 9–10.)

Johnson relies upon the rule of lenity. (Johnson’s Br 6, 10–11.) Under the rule of lenity, courts interpret ambiguous penal statutes in favor of the defendant. *State v. Cole*, 2003 WI 59, ¶ 67, 262 Wis. 2d 167, 663 N.W.2d 700. The rule of lenity applies only if the penal statute is ambiguous. *State v. Luedtke*, 2015 WI 42, ¶ 73, 362 Wis. 2d 1, 863 N.W.2d 592. If the statute is ambiguous, the court first looks to legislative history before applying the rule. *Id.* Resort to legislative history and the rule of lenity is inappropriate in this case because the language of the statute and surrounding statutes yields a plain meaning. *State v. Holcomb*, 2016 WI App 70, ¶ 15 n.4, 371 Wis. 2d 647, 886 N.W.2d 100.

CONCLUSION

For the reasons stated above, this Court should affirm Johnson's judgment of conviction and that part of the circuit court's order denying additional sentence credit.

Dated at Madison, Wisconsin, this 12th day of June, 2013.

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), (c) for a brief produced with a proportional serif font. The length of this brief is 2,740 words.

Dated this 12th day of June, 2017.

WARREN D. WEINSTEIN
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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 12th day of June, 2017.

WARREN D. WEINSTEIN
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