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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The State's arguments are logically inconsistent and fall short. This is because Mr. Johnson's interpretation of the sentence credit statute is correct: it is consistent with the language of the statute, the reasons behind the statute, and with the fair and easy application of the statute.

The State ends by asserting that though the rule of lenity requires courts to interpret ambiguous penal statutes in favor of the defendant, the rule of lenity nevertheless should not apply here because there is no ambiguity in the statute. (Response Brief at 9). Yet, the rest of the State's brief focuses on the fact that the word "day" could be interpreted in multiple different ways. (*See generally* Response Brief).

The rule of lenity mandates that this Court interpret the sentence credit statute in a way which affords—not denies—sentence credit to defendants. *See* ***State v. Frey***, 178 Wis. 2d 729, 745, 505 N.W.2d 786 (1993)(citations omitted).

The rule of lenity is not the only factor requiring this Court to interpret the word "days" in a way that errs on the side of providing sentence credit. The very purpose of the sentence credit statute also demands such an interpretation. As the State notes, our sentence credit statute is designed to ensure that an indigent defendant "who cannot make bail" does not "serve more time" "than a person of means who can post bail." (Response Brief at 6); *see also* ***State v. Beets***, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985); ***Klimas v. State***, 75 Wis. 2d 244, 249 N.W.2d 285 (1977).

How is this purpose advanced if an indigent defendant who spent time in pre-trial custody on a particular calendar day does not receive sentence credit for that time?

Interestingly, though the State agrees with Walworth County's calculation in this particular case, it advances a different position than Walworth County's—an interpretation of the statute which is even *less* consistent with the reasons behind the statute: Walworth County's "policy" holds that a defendant will receive sentence credit if he has served "more than 12 hours" on a particular calendar day. (48:2;Johnson Initial Brief App.112). The State now argues that "day" under the statute should mean a "24-hour period." (Response Brief at 5-6).

The State bases this suggestion on one of the multiple definitions of the word "day" found in the American Heritage Dictionary. (Response Brief at 5). It notes that the American Heritage Dictionary's first definition of day ("the period of light between dawn and nightfall") cannot apply here because it is inconsistent with a nearby statute providing that all sentences in Wisconsin "commence at noon on the day of the sentence." (Response Brief at 5-6); *see also* Wis. Stat. § 973.15(1).[1]

So, the State asks this Court to interpret the statute based on the American Heritage Dictionary's second definition: "the 24-hour period during which the earth completes one rotation on its axis." (Response Brief at 5).

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[1] Wisconsin Statute § 973.15(1) provides, in relevant part, that "[e]xcept as otherwise provided in this section, all sentences commence at noon on the day of sentence, but time which elapses after sentence while the convicted offender is at large on bail shall not be computed as any part of the term of imprisonment."

The State, however, makes no attempt to explain how its suggested definition comports with the long-recognized equal protection purpose of the sentence credit statute. (*See generally* Response Brief); *see also* ***Beets***, 124 Wis. 2d at 379.

The State's proposal would accomplish just the opposite: it would deny sentence credit for indigent defendants who have spent time in custody. "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 ***State ex rel. Kalal v. Circuit Court for Dane County***, 271 Wis.2d. 633, 681 N.W. 2d 110, 2004 WI 58, ¶ 49).

Consider what the State's new proposal would mean for a defendant who spent 23 hours in custody on a particular calendar day (from arrest to posting bond). Even under the Walworth County 12 hour "policy," he *would* get sentence credit for that day. Under the State's new argument, he would not.

Further, under the State's proposed interpretation, if a defendant is arrested one day at 1:30am, spends multiple days in custody, and then is released on bond at 11:50pm, the defendant would not get credit for the day of his arrest or the day of his release on bond because those dates were not "24-hour periods".

The State argues that "the amount of time in custody" on particular days should "not matter," and acknowledges, as Mr. Johnson has argued, that it would be "administratively impractical" to rely on the precise hour a defendant has been arrested to determine credit. (Response Brief at 6-7; *see also* Johnson Initial Brief at 10).

But the State's own proposed interpretation would *demand* calculations of hours and minutes. How else could a court determine whether a defendant has been in custody for a particular 24-hour period without determining the time of arrest/custody and the time of the release?

Such hours and minutes determinations are unnecessary under the proper interpretation of Wisconsin Statute § 973.155: any part of a calendar day spent in custody equals one day for sentence credit purposes under Wisconsin Statute § 973.155.

The State's discussion of the Wisconsin Supreme Court's decision in ***Carter*** is also incorrect. The State asserts that the Wisconsin Supreme Court was "not consistent in its methodology" and "counts the period between December 15 and December 21 as six days" when, if it were counting calendar days, it would be "seven days." (Response Brief at 7). The State looks only to language in ***Carter*** in isolation and overlooks the Court's actual credit calculations.

In ***Carter***, the Court found that the defendant did get credit for December 15th on his Wisconsin sentence; he did not get credit for the "six days" from December 16th through 21st because he was serving time for an Illinois revocation. ***State v. Carter***, 2010 WI 77, ¶ 24, 327 Wis. 2d 1, 785 N.W.2d 516. Thus, as the Supreme Court explained: "These days (12/13-12/15) count to Wisconsin sentence credit"; on the other hand, "[t]he six days (12/16-12/21) do not count to Wisconsin sentence credit because Carter was serving sentence time on the Illinois probation violation." ***Id.***, ¶¶ 24-25.

To be fair, the Court did in its introduction and conclusion—when explaining what credit applies to which case (Wisconsin or Illinois)—note that the defendant should get custody "from the date of his arrest on December 13,

2003, until he was sentenced on an Illinois conviction on October 19, 2004, excluding six days between December 15 and December 21" because he was "serving a sentence in Illinois" during that time. ***Id.***, ¶¶ 17-82.

But a full review of the Court's credit table and calculations show that the defendant did receive credit in Wisconsin for December 15th, and—importantly here—that the Court counted as six days the period between December 16th and December 21st. *See generally* ***id.*** ((1) Dec. 16 (2) Dec. 17 (3) Dec. 18 (4) Dec. 19 (5) Dec. 20 (6) Dec. 21).

This, along with the rest of the Court's credit calculations in ***Carter***, reflects the Court's use of calendar days to determine sentence credit. *See* ***id.***, ¶ 25 (credit calculation table reflecting credit determinations based on calendar dates).

Again, whether credit did or did not apply to the defendant's Wisconsin sentence was at issue in ***Carter*** and is not here. But the Supreme Court's application of its analysis in ***Carter*** demonstrates that the Wisconsin Supreme Court views "days" under Wisconsin Statute § 973.155 as each calendar day where the defendant spent time in custody.

The State further argues that the fact that both the federal system and Minnesota give criminal defendants one day of sentence credit for any part of a calendar day spent in custody is only "persuasive." (Response at 8-9). But again, the State makes no attempt to explain what authority—other than one of multiple dictionary definitions—supports its interpretation. Nor does it explain how its suggested

definition in any way comports with the purpose of the statute, or why this Court should overlook the absurd results which would follow its proposed interpretation.[2]

Both the Walworth County "policy" and the State's new proposed interpretation are inconsistent with the purpose of the statute and the rule of lenity, and further would result in cumbersome, complicated sentence credit determinations. Both would result in defendants who *did* sit in custody unable to post bond *not* receiving sentence credit for that time.

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.

As such, Mr. Johnson is entitled to thirty-three days of sentence credit.

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[2] The State notes that the language of the federal statute has changed since Wisconsin enacted § 973.155 from using the term "days" (in 18 U.S.C. § 3568) to using the term "time" (in the current statute, 18 U.S.C. § 3585). However, Congress "did not intend a different result from the old statute." *See* ***U.S. v. Woods***, 888 F.2d 653, 654-655 (10th Cir. 1989). Indeed, the Senate's Judiciary Committee 1983 Report addressing the proposed new statute (18 U.S.C. § 3585) described the "present Federal law" (18 U.S.C. § 3568) (the law Wisconsin looked to when drafting Wis. Stat. § 973.155) as requiring that "the offender will receive credit for any time spent in custody in connection with the offense or acts for which the sentence was imposed". S.Rep. No. 225, 98th Congr., 2nd Sess. at 128-129; *see also* ***State v. Floyd***, 2000 WI 14, ¶¶ 21-22 (discussing how the Wisconsin Supreme Court in ***Klimas*** urged the Legislature to adopted a broader rule based on existing federal law, resulting in the creation of Wis. Stat. § 973.155).

CONCLUSION

For these reasons and those set forth in his Initial Brief, 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 29th day of June, 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 1,762 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 29th day of June, 2017.

Signed:

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