

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL CASE NO. 17AP677CR
 17AP678CR

STATE OF WISCONSIN

Plaintiff-Respondent,

Lance P. Howard

Defendant-Appellant.

ON APPEAL OF THE JUDGMENT OF CONVICTION
IN THE CIRCUIT COURT OF SHEBOYGAN COUNTY,
HON. REBECCA PERSICK, PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

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STATE OF WISCONSIN

Plaintiff-Respondent,

Lance P. Howard

Defendant-Appellant.

ON APPEAL OF THE JUDGMENT OF CONVICTION
IN THE CIRCUIT COURT OF SHEBOYGAN COUNTY,
HON. TERENCE BOURKE, PRESIDING

BRIEF AND APPENDIX OF THE DEFENDANT-APPELLANT

STATEMENT ON ISSUE PRESENTED

I. DID THE COURT VIOLATE MR. HOWARD'S DUE PROCESS RIGHTS BY TAKING AWAY SENTENCE CREDIT THAT WAS CLEARLY A CONSIDERATION AT THE TIME OF SENTENCING?

POSITION ON ORAL ARGUMENT AND PUBLICATION

The issue presented by this appeal is controlled by well settled law, therefore there is no recommendation for oral argument or publication.

STATEMENT OF THE CASE AND FACTS

On May 9, 2012, Plaintiff, Sheboygan County District Attorney's Office (hereinafter DA), filed a complaint against Lance Howard, (hereafter, Defendant), alleging that between the dates of May 2 and May 4, 2012, he intentionally deprived TP of her property (R. 1:2). The complaint stated that TP was in possession of a box that had been mailed from Miami Florida via US mail (R1:2). According to the complaint, the Defendant removed tablet from this box with another individual and later told police that the tablet was still in the possession of the other individual. (R.1:3). Defendant was charged with Theft as well as Bail Jumping as it was alleged that he was out on bail in Manitowoc County Case number 12CM164 (R 1:1,3) Defendant was also charged as a Repeater based on his record of three misdemeanor convictions within the last five years (R. 1:3).

On June 7, 2012, Defendant entered a guilty plea to the charge of theft, the charge of bail jumping was dismissed (R. 118:5,8). At that time, Defendant was given a withheld sentence with a period of probation of 18 months to run concurrent to other charges and a period of 30 days credit should the probation be revoked (R. 118:15). Defendant was then subject to a sentence after revocation on November 6, 2012 after he was charged with a new offense causing his probation to be revoked (R. 119:2). At that hearing, the defendant was

sentenced to one year prison and one year extended supervision consecutive to any other case and given 139 days credit for time served (R. 119:18,24).

On February 21, 2014, Defendant filed a Motion for Resentencing based on the fact that he was not given a revocation packet prior to his sentencing after revocation hearing on November 6, 2012 (R. 46, 47). This Motion was heard and granted on May 5, 2014 (R. 121). At that time, Defendant was again sentenced to one year incarceration and one year extended supervision (R. 56). The court ordered that there be 572 days presentence credit on case ending 411 and 687 on case ending 412. (R. 121: 13). This amount of credit was not only stipulated to by the parties in court but was actually calculated by the sitting Judge Terrence Bourke. (R. 121: 13)

The Department of Corrections then submitted correspondence to the court requesting that the court clarify what they believed to be inappropriate granting of sentence credit (R. 58) The court then filed a modified Judgment of Conviction on May 16, 2014 vacating previous sentence credit and granting 365 days credit on one case and 317 on the other. (R. 60). The court then filed a final modified Judgment of Conviction that removed the previously ordered DNA testing requirement. (R. 72). On November 7, 2016, Defendant file a motion for a new sentencing hearing. (R.

107). At a hearing on December 13, 2016, now presiding Judge Rebecca Persick denied the motion for a new sentencing. (R. 122:8) Defendant now appeals.

ARGUMENT

THE TRIAL COURT ERRED IN MODIFYING DEFENDANT'S SENTENCE TO REFLECT CONSEQUITIVE CREDIT WHEN THE RECORD SUPPPORTS CONCURRENT CREDIT AND A CONCURRENT SENTENCE.

At the time of the resentencing of Mr. Howard on May 5, 2014, the sentencing judge clearly took into consideration the calculations of time credit that he took it upon himself to perform. (R. 121:12-13). The court then specifically addressed the fact that the calculation was straight forward and that he double checked his math to make sure he was correct. (R. 121:12-13). He specifically outlined the credit in relation to what point in time he was giving credit for. (R. 121:12-13). The court gave presentence credit in an amount that would be appropriate for a concurrent not consecutive sentence (121:13-14). The court then modified the sentence post-hearing to grant the appropriate amount of sentence credit for a consecutive sentence without the benefit of reviewing the transcript or having a hearing to allow argument. Sentence credit is governed by 973.155 Wis. Stats. Specifically, in 973.155(2)Wis. Stats., the court is to order the appropriate credit after imposing a sentence on the defendant.

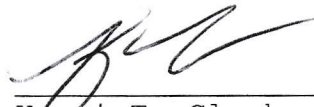
According to the Court in Walker, when the intended sentence is legal, but the judge fails to follow the procedure set forth in 973.155 Wis Stats., the appropriate remedy is to modify the sentence to conform it to the requirements outlined in that statute. State v. Walker, 117 Wis. 2d 579, 345 N.W.2d 413 (1984). In the present case, the court did give a valid sentence but inconsistently ordered that the sentences should run consecutive to each other. As in Walker, the court in the present case clearly gave thought to the type of sentence he wanted the Defendant to serve and in addition to that was well aware of the length of time that he believed the defendant deserved as presentence credit. Given the law set forth in Walker, the appropriate remedy was to modify the sentence as done by the court. However, it should not be assumed that the court's intention is for the Defendant to serve more time and error on the side of increased time. In the present case, the proper remedy would be to modify the sentence to include sentences to run concurrent to each other. There is should be no mistaking the court's intention when the court specifically performs the calculation and orders that amount of credit all the while commenting on the straightforward nature of the calculation.

CONCLUSION

For the above-listed reasoning, the Defendant, Lance Howard requests that the Court modify the sentence to reflect credit at the time of sentencing of 572 days credit on case ending 411 and 678 days on case ending 412 with sentences running concurrently.

Dated this 1st August, 2017.

Respectfully submitted,



Kerri T. Cleghorn, Attorney
for defendant-appellant
State Bar No. 1045719

CERTIFICATE

I hereby certify that this brief conforms to the rules contained in 809.19(8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 6 pages.

Dated at Milwaukee, Wisconsin, this 1st day of August 2017.

Respectfully submitted,



Kerri Cleghorn
State Bar No. 1045719

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including the appendix, if any, which complies with the requirements of s. 09.19(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 1st day of August, 2017.



Kerri T. Cleghorn, State Bar No. 1045719
Appellate Attorney for Lance Howard

CERTIFICATE TO APPENDIX


I hereby certify that filed with 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 first names and last initials instead of full names of person, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to reserve confidentiality and with appropriate references to the record.

Dated this 1st day of August, 2017.



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