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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP1337-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZACHARY S. FRIEDLANDER,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
SENTENCE CREDIT ENTERED IN THE
CIRCUIT COURT FOR JEFFERSON COUNTY,
THE HONORABLE DAVID J. WAMBACH, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Does Wis. Stat. § 973.155 permit the crediting of time spent in pre-trial or other custody against confinement served as a condition of probation?

The circuit court did not address this issue.

This Court should hold that the language of Wis. Stat. § 973.155 precludes sentence credit against confinement served as a condition of probation because probation is not a sentence and the statute permits credit only against a sentence.

2. Has this case become moot because Friedlander has served his conditional confinement time?

The circuit court did not address this issue.

If this Court does not resolve this case on the first issue, it should dismiss this appeal as moot.

3. Is the time Friedlander spent at liberty after his release from a prison sentence time he spent in custody?

The circuit court held that the time Friedlander spent at liberty after his release from a prison sentence was not custody under Wis. Stat. § 973.155.

If this Court reaches this question it should affirm the circuit court.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument.

If the Court decides this case on the ground that Wis. Stat. § 973.155 does not permit the crediting of time spent in pre-trial or other custody against confinement time ordered as a condition of probation, the Court should publish the decision. Numerous unpublished cases and some published cases provide examples that circuit courts are crediting days

spent in custody against conditional confinement time despite the fact that probation and confinement time as a condition of probation do not satisfy the term "sentence" as that term is used in Wis. Stat. § 973.155.

INTRODUCTION

Zachary S. Friedlander pled no contest to felony bail jumping in Jefferson County. The circuit court placed him on a three-year term of probation with sentence withheld and ordered he serve eight months confinement as a condition of his probation. At the time, Friedlander was serving a prison sentence on an unrelated felony. He served an additional 165 days after he returned to Oshkosh Correctional Institution to complete his sentence. Despite a Jefferson County Sheriff Department's detainer lodged with Oshkosh, prison officials released Friedlander at the end of his sentence without notifying the sheriff. As a result, Friedlander was at liberty for 65 days before the circuit court ordered him confined in the county jail to complete his conditional confinement time.

In the circuit court, Friedlander contended he was entitled to sentence credit on his conditional confinement time for the 65 days he spent at liberty. The circuit court denied him the credit and he renews his claim in this Court. He is not entitled to that credit for three reasons. First, the sentence credit statute, Wis. Stat. § 973.155, authorizes credit for custody against a sentence, and neither probation nor confinement as a condition of probation are sentences. Therefore, circuit courts lack authority to grant credit against confinement as a condition of probation. Second, Friedlander has now served his entire conditional confinement time. His claim for credit against confinement time is, therefore, moot. Third, Friedlander was not subject to an escape charge during the 65 days he was at liberty. Therefore, he was not in custody during those 65 days.

STATEMENT OF THE CASE

On April 15, 2016, Zachary S. Friedlander pled no contest to one count of felony bail jumping. (R. 40:1.) The circuit court withheld sentence and placed him on probation for a three-year term. (R. 40:1; 70:20.) As a condition of probation, the court ordered Friedlander to serve eight months in the county jail. (R. 70:20; 71:3.) The circuit court further ordered the conditional confinement time to begin on the day of sentencing. (R. 70:21; 71:3.)

At the time Friedlander entered his plea, he was serving a prison sentence on an unrelated drug conviction. (R. 70:9; 71:4.) According to the State, the parties expected the eight-month conditional confinement time to exceed Friedlander's prison sentence by 60 to 75 days. (R. 70:9.)

On April 16, 2016, Friedlander returned to prison. (R. 71:16.) The county lodged a detainer for Friedlander with the Department of Corrections that same date. (R. 71:16.) On September 27, 2016, Oshkosh Correctional Institution released Friedlander from his unrelated prison sentence. (R. 71:9, 16.) Despite the detainer, Oshkosh did not notify Jefferson County of his impending release.[1] (R.71:17.) The circuit court remanded Friedlander to the sheriff's custody as of December 1, 2016. (R. 48.) Friedlander was not in physical custody after September 27, 2016, until December 1, 2016, 65 days. (R. 48; 71:11, 20.)

On November 11, 2016, the Jefferson County Sheriff became aware that Friedlander was no longer in custody at Oshkosh. (R.71:15–16.) The sheriff's department sent a letter dated November 23, 2016, to the circuit court. (R. 71:2.) The circuit court held a hearing on December 1, 2016. (R.71:2.)

[1] Normally, when the county has a detainer lodged against a prisoner, the prison system notifies the sheriff of the prisoner's release and the sheriff arranges transportation to the county jail. (R. 71:18–19.)

The court determined that Friedlander had served 165 days of the eight months (240 days) of conditional confinement time, leaving 75 days of conditional confinement time remaining. (R. 71:22.)

Friedlander argued he was entitled to credit for the 65 days he spent at liberty, which, in his view, was through no fault of his own. (R. 71:22–23, 42–45.) The circuit court held that Friedlander was not entitled to sentence credit against his conditional confinement time for the 65 days he claimed. (R. 48.) It ordered him to begin serving the remainder of his confinement time. (R. 48.)

STANDARD OF REVIEW

This Court must determine whether the circuit court properly applied Wis. Stat. § 973.155 in denying Friedlander credit for the 65 days to which he claims he is entitled. Statutory interpretation and application present questions of law that this Court reviews independently from the circuit court while benefitting from that court's prior decision. *State v. Obriecht*, 2015 WI 66, ¶ 21, 363 Wis. 2d 816, 867 N.W.2d 387; *State v. Lamar*, 2011 WI 50, ¶ 22, 334 Wis. 2d 536, 799 N.W.2d 758. This Court reviews the circuit court's finding of historical fact under the clearly erroneous standard. *State v. Johnson*, 2007 WI 107, ¶ 29, 304 Wis. 2d 318, 735 N.W.2d 505.

This Court decides issues of mootness independently and without regard for the merits of the underlying claims. *State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶¶ 18–19, 252 Wis. 2d 404, 643 N.W.2d 515.

ARGUMENT

I. Friedlander is not entitled to sentence credit against confinement time as a condition of probation because probation and conditional confinement time are not sentences within the meaning of Wis. Stat. § 973.155.

Wisconsin Stat. § 973.155 governs the award of sentence credit. *State v. Obriecht*, 2015 WI 66, ¶ 36, 363 Wis. 2d 816, 867 N.W.2d 387. The first sentence of that statute reads, "A convicted offender shall be given credit toward the service of his or her *sentence* for all days spent in custody . . . for which *sentence* was imposed." Wis. Stat. § 973.155(1)(a). The statute also dictates when a circuit court must act. "*After the imposition of sentence*, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction." Wis. Stat. § 973.155(2).

"Sentence" is a legal term and should be given its legal meaning when used in the statutes and the law unless there are strong indications the term was used in a general sense. *Prue v. State*, 63 Wis. 2d 109, 116, 216 N.W.2d 43 (1974). While the term "sentence" can include probation, the meaning of the term "sentence" depends on the particular statute involved and the setting to which the statute applies. *State v. Mentzel*, 218 Wis. 2d 734, 740, 581 N.W.2d 581 (Ct. App. 1998).[2]

[2] To the extent that Friedlander's brief can be read to argue that his confinement as a condition of probation is a sentence under *State v. Dentici*, 2002 WI App 77, ¶ 10, 251 Wis. 2d 436, 643 N.W.2d 180, (Friedlander's Br. 13–14), he mistakes the *Dentici* court's broader use of the term "sentence" to include probation in concluding the point at which Dentici's confinement as a condition of probation began.

Generally probation is not considered a sentence. *State v. Fearing*, 2000 WI App 229, ¶ 6, 239 Wis. 2d 105, 619 N.W.2d 115. Probation is an alternative to sentencing. *State v. Horn*, 226 Wis. 2d 637, 647, 594 N.W.2d 772 (1999). The imposition of incarceration as a condition of probation is likewise not a sentence. *Fearing*, 239 Wis. 2d 105, ¶ 6. In *Prue*, the Wisconsin Supreme Court held that probationary confinement in jail "is not intended to be serving a sentence." *Prue*, 63 Wis. 2d at 113. In rejecting Prue's claim under what is now Wis. Stat. § 302.43 for good time credit for confinement as a condition of probation served in the county jail, the *Prue* court reasoned that "[p]robation is an alternative to a sentence; and the fact that a condition of confinement in the county jail is similar to the confinement of a sentence . . . does not make a probation a sentence." *Id.* at 114. In *State ex rel. Baade v. Hayes*, 2015 WI App 71, 365 Wis. 2d 174, 870 N.W.2d 478, this Court reached a similar result under Wis. Stat. § 973.155(4). This Court held "that Baade was not 'serving [a] sentence[ ] of one year or less' pursuant to Wis. Stat. § 973.155(4) when he was confined in county jail as a condition of his probation." *Id.* ¶ 8 (alterations in original).

The proposition that probation is not a sentence has been followed in a number of cases. *See, e.g.*, *State v. Gereaux*, 114 Wis. 2d 110, 113, 338 N.W.2d 118 (Ct. App. 1983) (Wisconsin Stat. § 973.09(1), which permits a period of probation to be consecutive to a sentence, does not permit two periods of probation to be consecutive because probation is not a sentence.); *State v. Maron*, 214 Wis. 2d 384, 390, 571 N.W.2d 454 (Ct. App. 1997) (Wisconsin Stat. § 973.15(2) does not permit a court to make a sentence consecutive to jail time as a condition of probation.); *State v. Meddaugh*, 148 Wis. 2d 204, 205–06, 435 N.W.2d 269 (Ct. App. 1988) (Condition of probation requiring jail time is not "imprisonment" within the meaning of Wis. Stat. § 346.65(2)(c).); *State v. Avila*, 192 Wis. 2d 870, 885, 532 N.W.2d 423 (1995) (Confinement as a

condition of probation is not a "sentence" under Wis. Stat. § 973.04, which gives credit for confinement previously served when a sentence is vacated and a new sentence imposed for the same crime.).

Additionally, the circuit court withheld sentence in Friedlander's case. So not only is there no sentence against which to give credit but the phrase "for which sentence was imposed" has not been met. Lastly, the time for determining the number of days of sentence credit under subsection (2) has not occurred. It will occur if Friedlander violates his probation and he is sentenced to prison on his bail jumping conviction. He will then be entitled to any time served as a condition of his probation on his imposed sentence. *State v. Yanick*, 2007 WI App 30, ¶ 24, 299 Wis. 2d 456, 728 N.W.2d 365.

The circuit court's order denying Friedlander sentence credit against his remaining confinement time was correct. This court should affirm. *See State v. Holt*, 128 Wis. 2d 110, 124, 382 N.W.2d 679 (Ct. App. 1985) ("It is well-established that if a trial court reaches the proper result for the wrong reason, it will be affirmed.")

II. Friedlander's request for sentence credit against his confinement time as a condition of probation has become moot.

A reviewing court will not ordinarily consider questions that have become moot. *Oliveira v. City of Milwaukee*, 2001 WI 27, ¶ 15, 242 Wis. 2d 1, 624 N.W.2d 117. Issues are moot if a determination of the issue when rendered, "cannot have any practical legal effect upon an existing controversy." *In re John Doe Proceeding*, 2003 WI 30, ¶ 19, 260 Wis. 2d 653, 660 N.W.2d 260. The question of mootness here turns upon a determination of whether a decision in Friedlander's favor would afford him some relief from the circuit court's order. *See State ex rel. Treat v. Puckett*, 2002 WI App 58, ¶ 19, 252 Wis. 2d 404, 643 N.W.2d 515.

Friedlander requested and the circuit court denied, credit of 65 days applied against his confinement time as a condition of his probation. (R. 48.) The circuit court's order remanded Friedlander to the sheriff's custody as of December 1, 2016. (R. 48.) The court determined that Friedlander had served 165 days of the eight months (240 days) of conditional confinement time, leaving 75 days of conditional confinement time remaining. (R. 71:22.) His remaining conditional confinement time should have been completed February 14, 2017.[3]

Since Friedlander no longer has any remaining confinement time to serve, any holding in his favor on the issue of whether he is entitled to credit for the 65 days he claims, can have no effect on his probation status. *State v. Avila*, 192 Wis. 2d 870, 879, 532 N.W.2d 423 (1995). Moreover, if he violates his rules of probation and his probation is revoked, he will return to circuit court for sentencing. At that time, Wis. Stat. 973.155(2) requires the circuit court "enter a specific finding of the number of days for which sentence credit is to be granted." Friedlander can renew his claim for the 65 days at that time and, if the circuit court adheres to its previous ruling, he can appeal and present the issue to this Court.

A reviewing court may decide otherwise moot issues if they meet at least one of four exceptions to the mootness rule. *In re Commitment of Schulpius*, 2006 WI 1, ¶ 15, 287 Wis. 2d 44, 707 N.W.2d 495. These are: the issues are of great public importance; the issues occur so frequently that a definitive decision is necessary to guide circuit courts; the issues are likely to arise again and a decision of the court would alleviate

[3] Although it is not in the record on appeal, the Jefferson County District Attorney informs counsel for the State that Friedlander completed his remaining confinement time on February 14, 2017, and was released to probation.

uncertainty; and the issues will likely be repeated, but evades appellate review because the appellate review process cannot be completed or even undertaken in time to have a practical effect on the parties. *Id.*

While these exceptions do not apply to Friedlander's arguments in favor of credit because his situation is rare and if he is revoked he will be able to raise his claim again, the broader question of whether Wis. Stat. § 973.155 permits credit against confinement time as a condition of probation at all is an important one. There are many examples in both reported and unreported cases of circuit courts granting sentence credit against confinement as a condition of probation. *See, e.g.*, *State v. Trepanier*, 2014 WI App 105, ¶ 6, 357 Wis. 2d 662, 855 N.W.2d 465 (granting ten days sentence credit against both the underlying sentence and the conditional confinement time). The authority for this action is questionable in view of the language of Wis. Stat. § 973.155(1)(a). A definitive decision is necessary to alleviate uncertainty and to guide circuit courts.

III. The circuit court correctly held that Friedlander was not in custody during the 65 days for which he requests sentence credit.

The State believes this case is controlled by the statutory language limiting sentence credit to credit against a sentence as argued in point I. In the interest of completeness, it will address the argument Friedlander presented in the circuit court and the court's rejection of that argument. Even if Friedlander is correct in his "in custody" analysis, however, the credit to which he is entitled should be applied against any sentence the court would impose in the future should he violate probation and be sentenced.

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 in connection with the course of conduct for which sentence was imposed." To receive credit, Friedlander must establish (1) that he was in custody (here for the 65 days he was at liberty), and (2) that, his custody was in connection with the course of conduct for which sentence was imposed. *State v. Hintz*, 2007 WI App 113, ¶ 6, 300 Wis. 2d 583, 731 N.W.2d 646.

Wisconsin Stat. § 973.155 does not define the term "custody." Over the years, courts adopted varying tests and definitions for "custody." *See State v. Magnuson*, 2000 WI 19, ¶¶ 13–18, 233 Wis. 2d 40, 606 N.W.2d 536 (discussing the various tests the courts of appeals had adopted over the years). The Wisconsin Supreme Court settled our "custody" debate when it decided *Magnuson*.

The circuit court placed Magnuson on signature bond and imposed a number of conditions on the bond, including that Magnuson reside with his pastor, abide by a nightly curfew, and wear an electronic monitoring bracelet. *Id.* ¶¶ 4–7. Magnuson was later returned to the jail after his pastor notified the bail monitoring authorities that he disapproved of Magnuson's behavior. *Id.* ¶ 8. After sentencing, Magnuson claimed sentence credit for the six months he resided with his pastor. *Id.* ¶ 9.

The *Magnuson* court concluded that Magnuson was not entitled to sentence credit for the time he spent residing with his pastor on bond. *Id.* ¶ 48. To reach that conclusion, the court looked at Wis. Stat. § 946.42(1)(a), Wisconsin's escape statute. The court held that "an offender's status constitutes custody" for sentence credit purposes "whenever the offender is subject to an escape charge for leaving that status." *Id.* ¶ 25.

Wisconsin Stat. § 946.42(1)(a)2. provides that "'[c]ustody' does not include constructive custody of a . . . person on extended supervision." When corrections released

Friedlander at the conclusion of his initial confinement for the unrelated felony he was serving when he entered his plea, it released him to extended supervision. Friedlander was not in anyone's physical custody. Extended supervision is not constructive custody that would subject him to an escape charge. Wis. Stat. § 946.42(1)(a)2.

Friedlander argues his "time spent 'at liberty' satisfies the in custody requirement" because he was "released from custody through no fault of his own." (Friedlander's Br. 9.) He reasons that he is entitled to sentence credit for confinement as a condition of probation. *State v. Gilbert*, 115 Wis. 2d 371, 379–80, 340 N.W.2d 511 (1983). Relying on *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989) and *State v. Dentici*, 2002 WI App 77, ¶ 10, 251 Wis. 2d 436, 643 N.W.2d 180, he argues his confinement as a condition of probation which began on April 15, 2016, when he returned to Oshkosh Correctional, continued while he was at liberty.

The circuit court distinguished *Riske* and *Dentici* based on factual differences. (R. 71:45–47.) Friedlander did not report to the Jefferson County Jail. (R. 71:45.) Both Riske and Dentici did report to jail but were turned away. The circuit court found that Friedlander was aware he had not served his entire confinement (R. 71:46), but did not do anything to resolve the matter (R. 71:46). Significant in *Riske*, Riske was told to return on a certain date but did not do so. The court held that the time after Riske should have reported was through his own fault and he was not entitled to credit for that time. *Riske*, 152 Wis. 2d at 265. Just so here. Friedlander should have at least inquired of the jail or the court about his status. Even if, as Friedlander argues, he had no duty to report, his failure to do so supports a finding that his liberty was not "through no fault of his own."

It is also important to note that the *Dentici* court likened both Riske's and Dentici's period at liberty to constructive custody like furloughs under Wis. Stat. §§ 303.068 and 946.42(1)(a)1.f. *Dentici*, 251 Wis. 2d 436, ¶¶ 12–13. Friedlander was not authorized by any official of either the Jefferson County Sheriff or the Department of Corrections to be at liberty. So his liberty was not like a furlough.

Friedlander also cites a number of federal cases in which clerical errors or other errors resulted in a prisoners release from custody. These cases are only persuasive. No Wisconsin case has addressed a situation where the prisoner was not told specifically he or she could not serve a period of confinement. Moreover, Friedlander points to nothing indicating the federal courts use the same definition for custody as the *Magnuson* court.

Since there is nothing in Wis. Stat. § 946.42(1)(a) that appears to subject Friedlander to an escape charge, he was not in custody during his period at large. He is not entitled to the 65 days even against a future sentence.

CONCLUSION

For the reasons given above, this Court should affirm the circuit court's order denying Friedlander sentence credit against his confinement time as a condition of his probation.

Dated at Madison, Wisconsin, this 21st day of November, 2017.

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) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,589 words.

Dated this 21st day of November, 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 21st day of November, 2017.

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