STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2017AP001337-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ZACHARY S. FRIEDLANDER,

Defendant-Appellant.

On Appeal From an Order Denying Sentence Credit
Entered in the Jefferson County Circuit Court, the
Honorable David J. Wambach, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The issue the trial court decided and the issue Mr. Friedlander raises on appeal is whether Friedlander is entitled to credit for time he spent "at liberty" through no fault of his own pursuant to ***State v. Riske***, 152 Wis. 2d 371, 340 N.W.2d 260 (Ct. App. 1989), and ***State v. Dentici***, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180. (48). Rather than respond directly to that question, the state initially responds to a straw-man argument and frames the issue to be whether Friedlander is entitled to sentence credit under Wis. Stat. § 973.155 against a jail term ordered as a condition of probation. (State's brief at 5-7). Next, the state continues to focus on its straw-man by arguing that the issue is moot because Friedlander has now completed his full eight-month conditional jail term. (State's brief at 7-9). Finally, the state responds to Friedlander's argument concerning credit for time spent "at liberty" under ***State v. Riske*** and ***State v. Dentici*** by arguing that there are "factual differences" between Friedlander's case and controlling precedent. (State's brief at 9-12).

This Court should reject the state's straw-man arguments because they misrepresent the issues on appeal. Further, this Court should reject the state's argument regarding credit for time spent "at liberty" because the state fails to distinguish controlling precedent.

A. ***Riske*** and ***Dentici*** control the outcome of this case.

The state attempts to downplay the significance of the controlling precedent by relying on ***State v. Magnuson***, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536. Notably, however, ***Riske*** was decided 11 years prior to ***Magnuson*** and ***Dentici***

was decided two years after ***Magnuson***. ***Magnuson*** did not overrule ***Riske*** and this Court considered ***Magnuson*** when it decided ***Dentici***.

The ***Dentici*** court noted that ***Magnuson*** created a "bright-line test to determine when an offender is in "custody" pursuant to Wis. Stat. § 973.155: "[A]n offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status."" 251 Wis. 2d 436, ¶17. (quoting ***Magnuson***, 233 Wis. 2d 40, ¶25). The court then considered Dentici's argument, which relied on ***Riske***, and the state's argument, which relied on ***Magnuson***. ***Id***., ¶¶8-13. After rejecting the state's attempt to factually distinguish Dentici's case from ***Riske***, it noted that "the *Riske* definition of custody coexists with the *Magnuson* definition." ***Dentici***, 251 Wis. 2d 436, ¶13. Specifically, the court held that, for sentence credit purposes, the definition of "custody" is not limited to the definition established in Wis. Stat. § 946.42(1)(a) and that Wis. Stat. § 973.15(7) established that "custody" includes time offenders spend at liberty through no fault of their own. ***Id***. Moreover, the court noted that it is bound to follow ***Riske's*** mandates and must attempt to synthesize ***Riske*** and ***Magnuson*** until or unless the supreme court overturns ***Riske***. ***Id***., ¶13, fn4.

Factually, Friedlander's case is not materially distinguishable from ***Dentici*** or ***Riske***. As previously argued (Friedlander's initial brief at 10-17), Riske actually failed to comply with the jailer's order to return to the jail in 30 days. When he was arrested more than a year later, that blatant violation of the jailer's order was not enough to deny Riske credit for the time he was "out of jail through no fault of his own." ***Riske***, 152 Wis. 2d at 264. Friedlander complied with

all court orders and all orders issued by his probation agent, the sheriff, and the county jail. (Friedlander's initial brief at 3-8).

Further, the facts in ***Dentici*** are even closer to Friedlander's. Dentici was placed on probation and ordered to serve 60 days in jail as a condition of probation. ***Dentici***, 251 Wis. 2d 436, ¶1. Dentici was turned away from the jail and returned as ordered 25 days later. ***Id***., ¶2. Like Dentici, Friedlander abided by all court and jail orders and returned to court and jail as ordered. Friedlander is, as was Dentici, entitled to sentence credit on his judgment of conviction to account for the time he was "at liberty" through no fault of his own.

The state's factual distinction between Friedlander's case and ***Riske*** and ***Dentici*** is that Friedlander was not physically turned away from the jail, but rather was mistakenly released by the DOC to probation and returned to jail after he voluntarily appeared in court on December 1, 2016. (State's brief at 11-12). This is a distinction without a material difference. Just like Riske and Dentici, Friedlander should not be faulted or penalized, by losing out on sentence credit to which he is entitled, for someone else's mistake.

B. Friedlander did not request in the circuit court and does not argue on appeal that he is entitled to sentence credit, pursuant to Wis. Stat. § 973.155, for time spent "at liberty" towards his conditional jail term.

Friedlander agrees that he is not *entitled* to sentence credit, pursuant to Wis. Stat. § 973.155, against his conditional jail term. However, that was not the issue decided by the circuit court and it is not the issue on appeal. In the circuit court, the issue was whether Friedlander's conditional

jail term continued to run from his erroneous release from prison on September 27, 2016, until December 1, 2016. On appeal, like Dentici, Friedlander now seeks sentence credit on his judgment of conviction for time spent "in custody" as a condition of probation.

C. The issue presented is not moot.

Because the circuit court denied Friedlander's motion to stay his remaining conditional jail term pending this appeal (49), it is true that Friedlander can now only receive the sentence credit to which he is legally entitled should his probation be revoked. That circumstance alone, however, does not make this issue moot.

An issue is moot when its resolution will have no practical effect on the underlying controversy or where circumstances have rendered the question purely academic. ***State ex rel. Olson v. Litscher***, 2000 WI App 61, ¶3, 233 Wis. 2d 685, 608 N.W.2d 425. A flaw in the state's mootness argument is that it could be applied to any case where the court failed to properly grant sentence credit to a defendant placed on probation. However, Wis. Stat. § 973.155 applies to convicted offenders and explicitly discusses application of sentence credit to offenders "on probation." Wis. Stat. § 973.155(1) and (5). It is clear that sentence credit *should* be granted even when the disposition is probation. *See* Wis JI-Criminal SM34A at 5 ("The finding regarding sentence credit should be made in every case, including those where the disposition is probation"). While the statute does not explicitly require a finding where a defendant's sentence is withheld, "making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked." *Id*.

A decision from this court will have a practical effect in this case. Should Friedlander be revoked from the probation ordered in this case, all parties and the future circuit court will benefit from having this issue revolved in this appeal.

On a final note, the state's reasoning that this court should issue a "definitive decision" regarding circuit court authority to grant sentence credit against conditional jail time is unpersuasive. While Friedlander certainly welcomes a decision from this Court on the merits of his appeal, published and controlling precedent, cited by the state, refutes the "uncertainty" asserted by it. *See* ***State v. Avila***, 192 Wis. 2d 870, 879-885, 523 N.W.2d 423 (1995) *overruled on other grounds by* ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 756. ***Avila*** holds that while circuit courts *may*, as a matter of discretion, grant sentence credit against a conditional jail term, Wis. Stat. § 973.155 does not require that result. ***Id***. at 884. Thus, it is unsurprising that circuit courts do, from time to time, exercise their discretion to grant presentence credit against a defendant's conditional jail term. Similarly, while defendant's are not entitled to statutory good time while serving a conditional jail term (because conditional time is not a "sentence" within the meaning of Wis. Stat. § 302.43), circuit courts have discretion to declare defendants eligible to earn good time on a conditional jail term. ***Prue v. State***, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974). The state's alleged uncertainty does not exist.

CONCLUSION

For the reasons argued above and as argued in his initial brief, Zachary S. Friedlander respectfully asks this Court to reverse the circuit court's December 12, 2016, order and remand this case to the circuit court with directions to amend Friedlander's judgment of conviction to clarify that, if his probation is revoked, he is entitled to 65 days sentence credit to account for his time at liberty from September 27, 2016, through December 1, 2016, in addition to the full eight-months he spent in prison and jail serving the conditional jail term ordered by the circuit court.

Dated this 8th day of December, 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 1,482 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 8th day of December, 2017.

Signed:

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