STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2017AP1337-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

ZACHARY S. FRIEDLANDER,

Defendant-Appellant.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AN ORDER DENYING SENTENCE CREDIT ENTERED IN JEFFERSON COUNTY CIRCUIT COURT, THE HONORABLE DAVID J. WAMBACH, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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INTRODUCTION

Defendant-Appellant Zachary S. Friedlander seeks credit for 75 days he was at liberty from the county jail. He argues that the *Riske/Dentici* common law rule, which provides that sentence credit is available for time at liberty through no fault of the defendant, is consistent with the sentence credit statute and case law interpreting the statute. Friedlander does so primarily by trying to show that Dentici was entitled to credit under Wis. Stat. § 973.155(1) and *Magnuson*.[1] (Friedlander's Br. 16–22, 26.)

The State disputes that Dentici would have been entitled to credit under Wis. Stat. § 973.155(1) and *Magnuson*. But more to the point, the *Riske/Dentici* rule should be overturned because the enactment of Wis. Stat. § 973.155 precluded the court of appeals from developing court-made law independent of the statutory scheme. And Friedlander's own case plainly shows that the *Riske/Dentici* rule cannot be reconciled with that scheme, resulting in the award of credit when credit would not be available under the statute.

Friedlander also argues that if the *Riske/Dentici* rule cannot be reconciled with the statutory scheme, this Court should adopt the common law rule based on principles of equity. But, as argued, courts may not adopt such a rule where the Legislature has enacted a comprehensive sentence credit statute. And, even if this Court could adopt common law rules to determine sentence credit, Friedlander fails to show that the *Riske/Dentici* rule is necessary to do justice here. Accordingly, this Court should reject the rule of *Riske* and *Dentici*, reverse the court of appeals decision, and

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[1] *State v. Magnuson*, 2000 WI 19, ¶¶ 25, 31, 47, 233 Wis. 2d 40, 606 N.W.2d 536.

remand for the circuit court to reinstate the order denying credit.

ARGUMENT

The State renews the arguments presented in its brief-in-chief and replies below to arguments made in Friedlander's response brief.

I. The *Riske/Dentici* common law rule should be disavowed because the Legislature enacted an exclusive, comprehensive statutory scheme to address sentence credit, and the rule is inconsistent with Wis. Stat. § 973.155 and *Magnuson*.

Wisconsin sentence credit law is statutory and consists of Wis. Stat. § 973.155 and case law interpreting the statute.

In *Klimas v. State*, 75 Wis. 2d 244, 250, 249 N.W.2d 285 (1977), this Court held that equal protection guarantees sentence credit for pre-trial confinement due to indigency. Then, recognizing that it was "enter[ing] a field in which the legislature ought to act to implement in some detail the constitutional provisions," this Court invited the Legislature to enact a statute for determining sentence credit modelled after the federal statute, 18 U.S.C. § 3568. *Klimas*, 75 Wis. 2d at 250–51.

Accepting the invitation, the Legislature enacted a comprehensive sentence credit statute based on the federal code. *See* 1977 Wis. Act 353, § 9, eff. May 16, 1978. That statute provided (and provides) that credit "shall be given . . . toward the service of [an offender's] sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a).

Nevertheless, in *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), the court of appeals adopted a rule to apply to a certain class of sentence credit requests—

without mentioning Wis. Stat. § 973.155. Riske was sentenced to jail but was turned away and told to return at a later date. *Riske*, 152 Wis. 2d at 262. The court of appeals determined that Riske was entitled to credit for the time he was authorized to be at liberty,[2] holding based on federal common law that the sentence of a prisoner "discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole . . . continues to run while he is at liberty." *Riske*, 152 Wis. 2d at 264 (quoting *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930)).[3]

Later, in *Dentici*, the court of appeals followed *Riske* in a turned-away-from-jail case involving conditional jail time, and it concluded that credit was also available under *Magnuson*'s definition of "in custody" in Wis. Stat. § 973.155.

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[2] Friedlander asserts that "at liberty" as used in *State v. Riske*, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), and *State v. Dentici*, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180, is a term of art and not a plain language description of Riske's and Dentici's status when not in confinement. (Friedlander's Br. 1 n.2, 11 n.5, 28 n.14.) This idiom, he explains, has a technical meaning: It refers to persons who were convicted and confined, prematurely released, but still subject to a confinement order. (Friedlander's Br. 1 n.2.) Of course, those were Riske's and Dentici's circumstances. But, to be clear, *Riske* or *Dentici* say nothing about "at liberty" being a term of art. And the idiom's plain meaning——"free," https://www.merriam-webster.com/dictionary/at%20liberty?src=search-dict-hed (last accessed November 4, 2018)—also describes their circumstances.

[3] *Riske* also read Wis. Stat. § 973.15(7)—a statute merely providing that an escapee is not entitled to credit for time at large—to "codif[y] the broader principle that a person's sentence for a crime will be credited for the time he was at liberty through no fault of the person." *Riske*, 152 Wis. 2d at 265. Friedlander does not argue that section 973.15(7) authorizes the award of credit.

Dentici, 251 Wis. 2d 436, ¶¶ 1, 11–13; *see State v. Magnuson*, 2000 WI 19, ¶¶ 25, 31, 47, 233 Wis. 2d 40, 606 N.W.2d 536. ("[A]n offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status.").

That the court of appeals adopted a common law rule in this area after the Legislature enacted a comprehensive sentence credit statute is sufficient reason to overturn *Riske* and *Dentici*. "[I]t is a fundamental principle of statutory construction" that when the legislature adopts "a comprehensive statutory remedy" it is deemed "to be exclusive." *Bourque v. Wausau Hosp. Ctr.*, 145 Wis. 2d 589, 594, 427 N.W.2d 433 (Ct. App. 1988); s*ee also Hermann v. Town of Delavan*, 215 Wis. 2d 370, 383, 572 N.W.2d 855, 859 (1998). Accordingly, this Court should disavow the *Riske/Dentici* rule on this basis.

Relatedly, that *Riske* and *Dentici*—and Friedlander's case—are inconsistent with the Legislature's enactment, Wis. Stat. § 973.155, and cases interpreting it, is another reason to set aside the *Riske/Dentici* rule.

Friedlander argues that *Riske* and *Dentici* do not conflict with Wis. Stat. § 973.155 and *Magnuson*; therefore, they should not be overturned. (Friedlander's Br. 27.) He defends the *Dentici* majority's conclusion that the common law rule is consistent with *Magnuson* because Dentici (and, he maintains, he himself) could have been charged with escape for leaving their statuses. *Dentici*, 251 Wis. 2d 436, ¶ 12. (Friedlander's Br. 20–27.) Friedlander notes that a 1996 amendment extended the escape statute to probationers "subject to a confinement order" of conditional jail time, Wis. Stat. § 946.42(1)(a)1.h. (Friedlander's Br. 23–26.) And, like the majority in *Dentici*, 251 Wis. 2d 436, ¶ 12, Friedlander argues that Dentici (and he) could have been charged with escape had they left their status because they were "temporarily outside the institution

whether for the purposes of work, school, medical care . . . a temporary leave or furlough . . . or otherwise" under section 946.42(1)(a)1.f. (Friedlander's Br. 26–27.)

The State reasserts here the arguments made in its brief-in-chief. Dentici and Friedlander had yet to enter the jail and therefore were not on "temporary leave or furlough . . . or otherwise" from the jail. Wis. Stat. § 946.42(1)(a)1.f. Though ordered to a period of confinement as a condition of probation,[4] they had yet to enter the jail, and thus they were "free," and "'escape from freedom' is not yet a crime." *Dentici*, 251 Wis. 2d 436, ¶ 15 (Fine, J. dissenting). Contrary to Friedlander's argument, the 1996 amendment to the escape statute does not answer whether a person who has yet to set foot in the jail is nonetheless "in custody." It merely provides that "[c]ustody of a person subject to a confinement order under s. 973.09(4)" constitutes "custody" for purposes of the escape statute. As argued, the State questions whether a charge of escape against a person like Dentici who has yet to be admitted to the jail would survive a notice challenge. *See State v. Kay Distrib. Co.*, 110 Wis. 2d 29, 33–34, 327 N.W.2d

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[4] Relying on a phrase in the Legislative Reference Bureau (LRB) analysis of a 1996 amendment to the escape statute, Friedlander maintains that a probationer under an order of conditional confinement is "at all times" subject to the escape statute. (Friedlander Br. 25–26.) Respectfully, this Court did not consider or comment on the meaning of "at all times" in quoting a section of the LRB analysis in *State v. Rosenburg*, 208 Wis. 2d 191, 199, 560 N.W.2d 266 (1997). And *Rosenburg* provides no support for the idea that this Court, or the LRB, contemplated whether a person like Dentici or Friedlander who has yet to enter the jail is on "temporary leave . . . or otherwise" such that they may be charged with escape. *See id.* at 198–99. The court quoted the LRB analysis only to show that those serving conditional confinement did not come under the escape statute until 1996, and not under a prior amendment of 1983. *Id.*

188 (Ct. App. 1982) ("A criminal statute is unconstitutionally vague if it fails to afford proper notice of the conduct it seeks to proscribe, or if it encourages arbitrary or erratic arrests and convictions.").

More importantly, even assuming that an escape charge could lie for Dentici, it plainly would not for Friedlander and others mistakenly released from custody.

To prove escape, the State must show that the person "le[ft] in any manner without lawful permission or authority," Wis. JI–Criminal 1774 (2009). (Friedlander's Br. 24.) Here, until Friedlander was directed to appear at the December 2 court hearing, there was nothing for him to "leave in any manner." He was, as argued, on probation, a status for which a person may not be charged with escape for "leaving." *See* Wis. Stat. § 946.42(1)(a)2. Unlike Dentici, he was not told that he had to remain within the state. *Dentici*, 251 Wis. 2d 436, ¶ 12. He was simply released, mistakenly, without conditions other than those of probation and supervision. Without a condition of release to violate, he could not be charged with unauthorized "leaving in any manner." And to say that he was "subject to an order of confinement" does not explain what a person already released from that confinement could have done to violate the confinement order.

Thus, for persons like Friedlander at liberty following a mistaken release—and, the State still maintains, those like Dentici and Riske turned away from the jail—a charge of escape for leaving their status in any manner will not lie. Accordingly, the *Riske/Dentici* rule granting credit for time at liberty through no fault of the defendant is inconsistent with Wis. Stat. § 973.155(1) and *Magnuson*.

And, as set forth above and in the State's brief-in-chief at page 22, Friedlander is not entitled to credit under Wis. Stat. § 973.155(1) and *Magnuson*.

II. The *Riske/Dentici* rule should not be upheld under equitable principles because the Legislature's enactment of Wis. Stat. § 973.155 precludes the adoption of common law remedies, and the equities do not weigh in Friedlander's favor.

Of course, if the statutory scheme resulted in credit in every circumstance in which the *Riske/Dentici* common law rule did, there would be no reason for the rule. The only justification for the rule would be to grant credit where application of the statutory standard unjustly denies credit. So Friedlander argues that this Court should adopt the rule for equitable reasons if it concludes that the rule cannot be reconciled with Wis. Stat. § 973.155 and *Magnuson*. (Friedlander's Br. 27–35.) The State opposes adoption of the rule on equitable grounds for two basic reasons.

First, the Legislature, at this Court's invitation, enacted a comprehensive statutory scheme to address sentence credit. *Bourque*, 145 Wis. 2d at 594; *Hermann*, 215 Wis. 2d at 383. As argued, this scheme is exclusive and, though courts have a duty to ascertain the meaning of Wis. Stat. § 973.155 in case law, they may not supplement the scheme by adopting court-made doctrines. *See id.* Even if, for some reason, this rule of statutory construction did not apply in this instance, courts should be reluctant to enact judicial remedies when, as here, the Legislature has addressed a topic in a fulsome manner. *Cf. Black v. City of Milwaukee*, 2016 WI 47, ¶ 30, 369 Wis. 2d 272, 299, 882 N.W.2d 333 (the Legislature is the primary policy maker, and courts defer to the Legislature's choices).

Second, the State disputes Friedlander's premise that the equities strongly favor the award of credit in his case. Friedlander dismisses the suggestion that he seeks a windfall in requesting credit for the 75 days he spent at liberty. (Friedlander's Br. 37.) He correctly notes that state officials were responsible for his mistaken release. And he argues generally that sentence credit is designed to afford fairness to defendants, and discusses at length one case that does not resemble the present case (Friedlander's Br. 31–32); *see State v. Roach*, 74 P.3d 134 (Wash. 2003) (fairness and equity did not permit state to re-incarcerate defendant for remaining 18 months of a sentence after *three years* had passed since his mistaken release). But he ultimately does not explain how receiving sentence credit for time spent at liberty does not constitute a windfall in his case.

Recently, this Court held that the Department of Corrections may not apply unused credit to reduce a defendant's parole discharge date when the defendant is in confinement and the credit can instead be applied to reduce the defendant's confinement time. *See State v. Obriecht*, 2015 WI 66, ¶¶ 3, 23, 44, 363 Wis. 2d 816, 867 N.W.2d 387. The Court reached this conclusion by interpreting the statute, adding that this was also a fair result. *Id.* Here, Friedlander does not seek the same sort of day-for-a-day credit for time spent *in confinement*. He requests credit against potential incarceration time for days spent *at liberty*, albeit liberty granted by the State in error. The equities do not demand an award of credit in this situation.

III. Friedlander was responsible in part for his continued absence from custody following his release; thus, he would not be entitled to credit even under the *Riske/Dentici* rule.

The State renews its argument that Friedlander would not be entitled credit even under the *Riske*/*Dentici* rule because he was responsible, in part, for his continued liberty

from custody. While the State was at fault for his mistaken release, Friedlander was partially responsible for his continued absence from custody.

At the December 2 hearing, the circuit court found that Friedlander was aware that he still had time to serve following his mistaken release. (R. 71:46, Pet-App. 188.) This finding is supported by the sentencing hearing transcript, which, if unclear on *where* Friedlander would serve his extra time, was clear that his concurrent, conditional jail time would exceed the time remaining on his prison sentence. (R. 70:20–21.) For these reasons, and those discussed in the brief-in-chief, this Court should conclude that Friedlander is not entitled to credit even if it declines to overrule *Riske* and *Dentici*.

CONCLUSION

For the reasons discussed here and in the State's brief-in-chief, this Court should disavow the *Riske*/*Dentici* rule, reverse the court of appeals decision, and remand for the circuit court to reinstate the order denying sentence credit.

Dated this 9th day of November, 2018.

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 2,621 words.

Dated this 9th day of November, 2018.

_____
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 9th day of November, 2018.

_____
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