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OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2017AP1851-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DEMARIO D. FLEMING,

Defendant-Appellant.

ON APPEAL FROM AN ORDER GRANTING SENTENCE CREDIT IN PART AND DENYING MODIFICATION OF A CONDITION OF NO CONTACT, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DENNIS R. CIMPL, PRESIDING

BRIEF OF THE PLAINTIFF-RESPONDENT

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TABLE OF CONTENTS

Page

STATEMENT OF THE ISSUES 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 1

INTRODUCTION 1

SUPPLEMENTAL STATEMENT OF THE CASE 2

STANDARD OF REVIEW 7

ARGUMENT 7

I. Fleming is not entitled to sentence credit for time spent in custody before he was charged with the victim intimidation offense. 7

II. The court-imposed condition of no contact with M.H. is reasonable and appropriate under the circumstances. 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

State v. Beiersdorf,
208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997) 7

State v. Carter,
2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516 7

State v. Floyd,
2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155,
abrogated on other grounds by State v. Straszkowski,
2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835 ..... 1, 8, 9, 10

State v. Frey,
2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436 9

Page

State v. Johnson,
2007 WI 107, 304 Wis. 2d 318, 735 N.W.2d 505............... 11

State v. Leitner,
2002 WI 77, 253 Wis. 2d 449, 646 N.W.2d 341................. 10

State v. Miller,
2005 WI App 114, 283 Wis. 2d 465, 701 N.W.2d 47......... 12

State v. Oakley,
2001 WI 103, 245 Wis. 2d 447, 629 N.W.2d 200............... 12

State v. Pettit,
171 Wis. 2d 627, 492 N.W.2d 633 (Ct. App. 1992)............ 11

State v. Piggue,
2016 WI App 13, 366 Wis. 2d 605,
875 N.W.2d 663 .... 8, 9, 10, 11

State v. Rowan,
2012 WI 60, 341 Wis. 2d 281, 814 N.W.2d 854................. 12

State v. Stewart,
2006 WI App 67, 291 Wis. 2d 480, 713 N.W.2d 165..... 7, 11

State v. Straszkowski,
2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835............... 1, 8

State v. Villalobos,
196 Wis. 2d 141, 537 N.W.2d 139 (Ct. App. 1995).............. 8

State v. Ward,
153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989).............. 7

Statutes

Wis. Stat. § 973.155(1).. 6, 7

Wis. Stat. § 973.155(1)(a) 7, 11

STATEMENT OF THE ISSUES

1. Is a defendant entitled to sentence credit for time spent in custody for a different crime that occurred before the State charged the crime that he was ultimately sentenced for?

The circuit court concluded no, relying on *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835.

This Court should conclude the same.

2. Is a condition of no contact with the mother of the defendant's child reasonable and appropriate under the circumstances of this case?

The circuit court concluded it was.

This Court should conclude the same.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying established law to the facts.

INTRODUCTION

Demario Fleming is asking for sentence credit for the total time in custody, including the time spent in custody before he committed and was charged with the offenses for which he was ultimately sentenced. Fleming's argument should be rejected as it is contrary to the controlling principle that a defendant is only awarded credit for time spent in connection with the crime for which he is ultimately sentenced.

Fleming is also asking for a modification of a condition of extended supervision. He was ordered to have no contact

with M.H. Under the circumstances of this case, the order was reasonable and appropriate.

SUPPLEMENTAL STATEMENT OF THE CASE

Demario Fleming was charged with two counts of intimidating a witness. (R. 1:1.) While he was in custody for committing an armed robbery, Fleming placed calls to his mother and his girlfriend, M.H.[1] (R. 1:2.) There were a multitude of phone calls placed, but the most egregious were the following.

On February 2, 2016, Fleming placed a call to M.H. and told her "if one person up in that house makes a statement tell Triple A to break [their] mother fuckin face." (R. 1:3.) Fleming also told M.H. "I know the phone is tapped but I don't give a fuck." (R. 1:3.)

On February 4, 2016, Fleming placed another call to M.H. (R. 1:3.) He instructed her to text one of the victims of the robbery from Fleming's phone and "tell them not to come to court, you want me to say all this shit over the phone, you suppose to know, tell them fucking ass not to come to court . . . once you bust that move there shouldn't be any of this shit." (R. 1:3.)

On February 8, 2016, Fleming again called M.H. and stated: "I need you to call the game and tell them I'm gonna get my finesse on and tell the game they wanted to be reimbursed I'll reimburse right tell them niggers if them boys don't show up for court I'll reimburse them but I'm not gonna reimburse them before court off the script because they may show up for court so tell them if they don't show up

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[1] The sentencing court considered M.H. to be a victim, and thus, the State will refer to her by her initials. The criminal complaint lists M.H.'s last name as beginning with a P., but all other records indicate that her last name begins with H.

for court and they and drop the charges they can get reimbursed, and there be no beef." (R. 1:4.)

On February 8, 2016, Fleming also called his mother. (R. 1:5.) He asked his mother to call one of the victims of the robbery and tell him that "if they don't come to court then they get reimbursed, but if they come to court then [it's] a loss, and tell them I'm gonna take them to Court for what we had going on." (R. 1:5.)

The criminal complaint for the victim intimidation charges was filed on September 12, 2016. (R. 1:5.) An initial appearance was held the same day. (R. 33.) The preliminary hearing was held on September 20, 2016. (R. 34.)

At the final pretrial on February 1, 2017, the State informed the court that it had offered Fleming a plea agreement that included dismissing and reading in the robbery charges or dismissing the robbery charges outright. (R. 38:2.) The court explained to Fleming:

> If the armed robberies are dismissed outright, that means I can't consider them when I sentence you on the intimidation of witnesses. The benefit to you -- Well, the detriment to you is you could be charged with them again if the State ever gets their witnesses together on the armed robbery. If you considered a dismissal and read-in, then I can consider it. The benefit will be you can never be charged with those armed robberies and I can order restitution on it.

(R. 38:3.)

On February 13, 2017, the State moved for a material witness warrant. (R. 9:2.) M.H. had cooperated with the police at one point and retained counsel. (R. 9:2.) After her cooperation began, Fleming repeatedly tried to contact M.H. from jail. (R. 9:3.) After that, officers were unable to contact M.H. and unable to personally serve M.H. with a subpoena

for trial. (R. 9:4.) The circumstances indicated that she was no longer cooperative. (R. 9:4.)

Fleming ultimately pled guilty to two counts of victim intimidation. (R. 10; 40:4.) At the plea hearing the State explained that Fleming did not want the robbery charges read-in, and the resolution of that case was not a part of the negotiation. (R. 40:2–3.) Rather, if the court accepted the plea to the intimidation charges, the State would move to dismiss the robbery charges without prejudice. (R. 40:2–3.) Fleming acknowledged that he understood that the agreement did not include resolution of the robbery charges. (R. 40:3.)

At the sentencing hearing, the State reminded the court that the robbery charges were not read-in, but argued that the robbery was relevant to the assessment of the seriousness of the victim intimidation offenses and to Fleming's character. (R. 41:6.) The State also commented on Fleming's repeated attempts to contact M.H. after M.H. cooperated with the police. (R. 41:13–14.) The State explained:

> [M.H.], who actually hired a lawyer, came in, cooperated, did all of the right things, and seemed to be really concerned. Then when it came to come to trial she disappears. A material witness warrant is put out for her. Even her lawyer can't get her here. She stops responding to everybody. Detective Emanuelson, who did all of the work on these calls, notifies me that he checked the calls again and Mr. Fleming is trying to call her repeatedly over and over. He couldn't find any connected calls or accepted calls. Clearly, he is still trying to reach out to her. She, all of a sudden, changed so much that she ended up losing her job . . . . She hasn't shown up for work . . . . That is very sad. You have a young, single mother, who had a good job, and now doesn't have a job in part because of this defendant.

(R. 41:13–14.)

Defense counsel also reminded the court that the robbery charges were not a part of the resolution of the intimidation case. (R. 41:32.) The defense asked for sentence credit of 380 days, from the date of Fleming's arrest on the robbery charges. (R. 41:30.) The State disagreed with that calculation and argued that credit was only appropriate from the date of the initial appearance on the intimidation charge. (R. 41:30.)

Fleming "apologize[d] for the inconvenience . . . and [for the] role that [he] played during this case and the other cases." (R. 41:33.) He took "full responsibility" for the intimidation case. (R. 41:33.) When he did so, the court asked him: "You are not taking any responsibility for the armed robberies?" (R. 41:33.) Fleming responded that he would "take responsibility for them too" and accept the consequences. (R. 41:33.) His explanation for his actions in the intimidation case was that he was trying to do whatever he could to beat the robbery charges so he could be with his newborn daughter. (R. 41:34.)

The court acknowledged that it could not sentence Fleming for the robbery charges and did not mention any details of the robbery in its exercise of sentencing discretion. (R. 41:37–38.) The court did explain that it could, however, "consider [Fleming's] role in those armed robberies and the games [he] [was] playing with regard to those armed robberies." (R. 41:38.) The court noted that it was "tragic" that Fleming's intimidation succeeded and that even M.H. was unwilling to continue her cooperation. (R. 41:38.)

The court sentenced Fleming to a global sentence of seven years of initial confinement and six years of extended supervision. (R. 41:43.) It awarded sentence credit from the date of Fleming's arrest on the robbery charge, which amounted to 380 days. (R. 41:43.) The court noted that it was unsure if that was legally correct. (R. 41:43.)

As a rule of extended supervision, the court ordered no contact with M.H. (R. 41:42.) The court reasoned that the no contact provision was appropriate "because she is a victim in this case as far as I am concerned. Because she is the one that had to run away because she was so afraid of you. She is the one that lost her job. She is the one I had to issue the warrant for." (R. 41:42–43.)

The Department of Corrections (DOC) contacted the court in May 2017 by letter. (R. 23:1.) The letter noted that "Since the offense occurred on 02/06/2016 and the sentencing date was 02/15/2017, 375 days later, it appears the Court granted more jail credit than allowed per Wis. Stat. § 973.155(1)." (R. 23:1.) In response, the court amended the judgment of conviction to award 154 days of sentence credit. (R. 24; 25.) The new calculation awarded credit from the date of the intimidation charges. (R. 24:1.)

Fleming filed a postconviction motion requesting that the court award him 381 days of sentence credit and modify his condition of extended supervision to allow for contact with M.H. (R. 28.) The motion included an affidavit from M.H. indicating that she wanted to have contact with Fleming to facilitate visitations with her and Fleming's daughter. (R. 28:8–9.)

The circuit court partially granted the request for additional sentence credit and denied the request for modification of the no contact order. (R. 29.) The court granted two additional days of credit, for a total of 156 days. (R. 29:1.) The court concluded that Fleming was due two additional days of credit because the court had previously misidentified the date that the criminal complaint was filed in the victim intimidation case. (R. 29:1.)

The court denied the requested modification of the no contact order, relying on its rationale at sentencing and Fleming's use of M.H. "to subvert the criminal justice

system." (R. 29:3.) The court explained that it understood M.H.'s "desire to facilitate contact between the defendant and his daughter . . . [but] the interests of justice must supersede her personal interests in this matter." (R. 29:3.)

Fleming appeals.

STANDARD OF REVIEW

The determination of sentence credit is a question of law involving the application of the provisions of Wis. Stat. § 973.155(1). *State v. Ward*, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989). This Court independently reviews whether the circuit court properly awarded credit under Wis. Stat. § 973.155(1), but does so benefiting from the circuit court's analysis. *State v. Carter*, 2010 WI 77, ¶ 12, 327 Wis. 2d 1, 785 N.W.2d 516 (citations omitted).

This Court reviews the imposition of a condition of supervision under the erroneous exercise of discretion standard. *State v. Stewart*, 2006 WI App 67, ¶ 11, 291 Wis. 2d 480, 713 N.W.2d 165.

ARGUMENT

I. Fleming is not entitled to sentence credit for time spent in custody before he was charged with the victim intimidation offense.

Wisconsin Stat. § 973.155(1)(a) reads in pertinent part: "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." Wis. Stat. § 973.155(1)(a).

Section 973.155(1)(a) is mandatory, not discretionary. *Ward*, 153 Wis. 2d at 745. Sentence credit must be awarded if: (1) the defendant was in custody; and (2) that period in custody was in connection with the course of conduct for which sentence was imposed. *State v. Beiersdorf*, 208 Wis. 2d

492, 496, 561 N.W.2d 749 (Ct. App. 1997). When alleging that sentence credit was improperly calculated, the defendant bears the burden of proving that he is entitled to additional sentence credit. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

In this case, there is no dispute that Fleming was in custody. The only question is whether he should be awarded credit for time spent in custody on a charge that was dismissed outright. The answer to that question is no. Fleming relies heavily on *Floyd*, 232 Wis. 2d 767, to support his arguments, but his reading of *Floyd* is flawed.

This case is controlled by *State v. Piggue*, 2016 WI App 13, 366 Wis. 2d 605, 875 N.W.2d 663, which addressed the arguments that Fleming raises. Like Fleming, Piggue was convicted of witness intimidation. *Id.* ¶ 1. Like Fleming, Piggue was awaiting trial on another charge when he intimidated a victim. *Id.* Like Fleming, Piggue argued that because the sentencing court considered the other charge when sentencing him on the intimidation charge, he should receive sentence credit for the time spent in custody for that charge, as well. *Id.* The only difference between Piggue and Fleming is that Piggue was acquitted because of proof issues and Fleming was never tried because of proof issues. For sentence credit purposes, that distinction does not matter.

Like Fleming, Piggue acknowledged that *Floyd* limited credit for other offenses to read-in offenses, but argued that this Court should expand *Floyd*. *Piggue*, 366 Wis. 2d 605, ¶ 12. Like Fleming, Piggue argued that *Straszkowski*, 310 Wis. 2d 259, ¶¶ 58, 91–95, ended the distinction between read-in offenses and dismissal or acquittals because that case established that read-ins do not require an admission of guilt. *Piggue*, 366 Wis. 2d 605, ¶ 12. Like Fleming, Piggue also argued that there was a factual connection between the two charges because he intimidated the witnesses of the

crime for which he was in custody. *Piggue*, 366 Wis. 2d 605, ¶ 12.

This Court was not persuaded by Piggue's arguments, and it should not be persuaded by Fleming's. As this Court concluded, "[e]ven though *Straszkowski* may have clarified that read-ins are not to be construed as admissions, the fact is that read-ins are still distinguishable from acquittals and non-read-in dismissals." *Id.* ¶ 13. This Court was correct. Read-in offenses are unique because the implication of a read-in is that the *defendant agrees* that, as a part of the resolution of the case, the read-in offenses can *increase his punishment*. *Floyd,* 232 Wis. 2d 767, ¶ 26; *State v. Frey*, 2012 WI 99, ¶¶ 68–73, 343 Wis. 2d 358, 817 N.W.2d 436.

Fleming argues that because he admitted to the robbery at the sentencing hearing, the dismissed charge is indistinguishable from a read-in charge. (Fleming's Br. 13.) This is not true. The implication of a read-in charge is that the defendant agrees that the charge can increase his punishment. That same implication does not exist with charges that have been dismissed without prejudice. The dismissed robbery charge in this case was not a part of the resolution agreement between the State and Fleming. (R. 40:13.) Everyone agreed that the dismissed robbery charges could not effect Fleming's sentence. (R. 41:6, 32, 37–38.)

Fleming nonetheless asserts that he was punished for the robbery offenses. (Fleming Br. 19.) That is also not true. The sentencing court acknowledged that it could not increase Fleming's punishment based upon his admission to the robbery charge. (R. 41:37–38.) Rather, the court considered the role Fleming played in the robbery offense as a relevant sentencing factor. (R. 41:38.) This was proper. "[I]t is well-known that '[a] sentencing court may consider uncharged and unproven offenses and facts related to offenses for which the defendant has been acquitted.'"

Piggue, 366 Wis. 2d 605, ¶ 13 (citing *State v. Leitner*, 2002 WI 77, ¶ 45, 253 Wis. 2d 449, 646 N.W.2d 341). Considering uncharged or unproven offenses at sentencing does not convert those offenses to read-in offenses. *Piggue*, 366 Wis. 2d 605, ¶ 13.

While Fleming did accept responsibility for the robbery at sentencing, he did so not to consent to increased punishment. Rather, he was hoping the court would be lenient. (R. 41:34.) He was trying to persuade the court that his motivation for the intimidation offenses was to beat the robbery charge so he could be a part of his daughter's life. (R. 41:34.) The dismissed charges in this case are far from the functional equivalent of read-in offenses.

Furthermore, as this Court concluded in *Piggue*, the factual connection and the circumstances of victim intimidation are not sufficient to warrant sentence credit. *Piggue*, 366 Wis. 2d 605, ¶ 13. If they were, courts would be rewarding offenders for successful intimidation attempts. Fleming tries to distinguish *Piggue* by arguing that Piggue had his day in court and Fleming did not. (Fleming's Br. 15.) That is flawed reasoning and a rather bold assertion seeing that Fleming was not tried because he successfully intimidated the victims to not testify against him.

Like Piggue, Fleming is asking this Court to extend the reasoning of *Floyd* to non-read-in offenses. The *Floyd* court outright rejected that argument. *Floyd,* 232 Wis. 2d 767, ¶ 31. The *Floyd* court specifically limited its holding to read-in charges, concluding that there is an "important distinction between read-ins and other charges, including pending charges, acquittals or dismissals." *Id*. That remains true. Whether the *Floyd* court's rationale regarding an admission of guilt tangentially supports an award of sentence credit in Fleming's case is of no significance. Sentence credit is not available because *Floyd* itself limited

the availability of credit for other offenses to read-in offenses.

The supreme court has not overruled *Floyd*'s interpretation of Wis. Stat. § 973.155(1)(a) as not authorizing sentence credit for charges dismissed outright. *Piggue* clearly articulated that *Floyd*'s limitation on sentence credit to read-in offense remains good law. *Piggue,* 366 Wis. 2d 605, ¶ 13. Fleming is not entitled to credit for the time he spent in custody on the robbery charges.

Fleming alternatively argues that he is entitled to credit from the date of his first intimidation offense as opposed to the date he was formally confined for that offense. Fleming makes this argument in a single paragraph with no citation to any authority that supports his position. (Fleming's Br. 20.) This Court should decline to consider this argument,[2] but if it does, it should reject it. If the defendant would have been in custody regardless of the alleged new conduct, the defendant is not treated unfairly by not receiving credit for that time. *See State v. Johnson*, 2007 WI 107, ¶ 70, 304 Wis. 2d 318, 735 N.W.2d 505. Fleming is not entitled to additional sentence credit.

II. The court-imposed condition of no contact with M.H. is reasonable and appropriate under the circumstances.

"Sentencing courts have wide discretion and may impose any conditions of probation or supervision that appear to be reasonable and appropriate." *Stewart*, 291 Wis. 2d 480, ¶ 11. "A condition is reasonably related to the person's rehabilitation 'if it assists the convicted individual

[2] *See State v. Pettit*, 171 Wis. 2d 627, 646–47, 492 N.W.2d 633 (Ct. App. 1992) (The court generally does not consider undeveloped arguments.).

in conforming his or her conduct to the law.'" *State v. Rowan*, 2012 WI 60, ¶ 10, 341 Wis. 2d 281, 814 N.W.2d 854 (quoting *State v. Oakley*, 2001 WI 103, ¶ 21, 245 Wis. 2d 447, 629 N.W.2d 200). "It is also appropriate for circuit courts to consider an end result of encouraging lawful conduct, and thus increased protection of the public, when determining what individualized . . . conditions are appropriate for a particular person." *Id.*

Here, Fleming complains that the court's order that he have no contact with M.H. affects the ease with which he can arrange visitation with his daughter. (Fleming's Br. 22.) The State fails to understand how the added complexity in visitation transforms the no contact order with M.H. into one that is unreasonable and inappropriate under the circumstances.

There is no doubt that Fleming used M.H. in an attempt to subvert the criminal justice system. There is also sufficient circumstantial evidence to suggest that M.H. suffered adverse consequences due to her involvement with Fleming and may have been the victim of intimidation herself. This condition works to dissuade Fleming from further intimidating M.H. if the State reissues the dismissed robbery charge, thereby encouraging Fleming's rehabilitation.

Wisconsin courts have considerable latitude in setting conditions of extended supervision. *State v. Miller*, 2005 WI App 114, ¶ 11, 283 Wis. 2d 465, 701 N.W.2d 47. Under the circumstances of this case, the condition of no contact with M.H. is reasonable and appropriate and not an erroneous exercise of discretion.

CONCLUSION

For the forgoing reasons, this Court should affirm the circuit court order denying relief.

Dated this 31st day of January, 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 3429 words.

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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 31st day of January, 2018.

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