STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Appeal No. 2017AP001851 CR

DEMARIO D. FLEMING,

Defendant-Appellant.

An Appeal From a Judgment of Conviction and Order from Milwaukee County Case No. 2016CF004146 Partially Granting Postconviction Motion for Additional Sentence Credit and Denying Motion to Modify No Contact Order entered by the Honorable Dennis R. Cimpl, Circuit Court, Branch 19, Milwaukee County

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REPLY BRIEF OF DEFENDANT-APPELLANT

Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215
Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

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Mr. Fleming is entitled to sentence credit for the time he spent in custody on the armed robbery case before he was charged with the victim intimidation offenses because it is "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). Although the armed robbery case was dismissed, Mr. Fleming was ultimately convicted and sentenced for intimidating witnesses from the armed robbery case, he took responsibility for the armed robbery at sentencing and the circuit court specifically considered the armed robbery when imposing Mr. Fleming's prison sentences.

The no contact order with M.H. is not reasonable or appropriate under the circumstances because it is preventing Mr. Fleming from having any contact with his one year old daughter.

I. MR. FLEMING IS ENTITLED TO SENTENCE CREDIT FOR THE TIME HE SPENT IN CUSTODY ON THE ARMED ROBBERY CASE BEFORE HE WAS CHARGED WITH THE VICTIM INTIMIDATION OFFENSES.

Mr. Fleming is entitled to sentence credit for the time he spent in custody on the armed robbery case because it is "in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a).

The State argued that although Mr. Fleming was in custody, he is not entitled to sentence credit for the time spent in custody on a charge that was dismissed outright. (Plaintiff's Brief 8.) The State indicated that "Fleming relies heavily on *Floyd*, 232 Wis. 2d 767 to support his arguments, but his reading of *Floyd* is flawed." (Plaintiff's Brief 8.) However, the State did not support this argument by providing a different interpretation of *Floyd* nor did it provide any rationale or reasoning.

Instead, the State explained that this case is controlled by *State v. Piggue*, 2016 WI App 13, 366 Wis. 2d 605, 875 N.W.2d 663, *review denied*, 2016 WI 78, ¶ 1, 371 Wis. 2d 607, 885 N.W.2d 379. (Plaintiff's Brief 8.) The State referred to various similarities between Mr. Fleming and Piggue and stated "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. (*Id.*) For sentence credit purposes, that distinction does not matter." (*Id.*)

The State failed to address or even acknowledge the main difference between Mr. Fleming and Piggue, which is that Mr. Fleming admitted and accepted responsibility for the armed robbery charges when he was sentenced on the intimidation of a witness charges (40:33.), whereas Piggue

never accepted responsibility for the sexual assault charge when he was sentenced on the intimidation charge. *See Piggue*, 2016 WI App 13 at ¶ 5. For sentence credit purposes, that distinction does matter because the trial court ultimately considered the armed robbery charges and Mr. Fleming's admissions to the armed robbery charges when imposing his prison sentences. (40:37-38, 44.)

Although the court in *Piggue*, 2016 WI App 13 at ¶ 4, discussed the sexual assault trial at sentencing on the intimidation charge, Piggue did not admit or accept responsibility for the sexual assault charge and the court explained that the primary factor driving the sentence was the gravity of the offense of intimidation.

The State also suggested that it was flawed reasoning and a rather bold assertion for Mr. Fleming to attempt to distinguish *Piggue* by arguing that Piggue had his day in court and Mr. Fleming did not. (Plaintiff's Brief 10.) The State reasoned that Mr. Fleming did not have his day in court because he successfully intimidated the victims to not testify against him. (*Id.*)

Yet, the distinction between Piggue having his day in court and Mr. Fleming not is important and accurate. Piggue was acquitted of the charges of sexual assault and he never admitted guilt to those charges at his sentencing for

intimidation. *Piggue*, 2016 WI App 13 at ¶ 4. Whereas Mr. Fleming's armed robbery charges were dismissed, never tried in court and he admitted guilt at his sentencing for the intimidation charges. (40:33.)

Mr. Fleming was held in a jail for over one year, 380 days, for a crime that ultimately was dismissed and never tried in court.[1] Not only did Mr. Fleming not receive any sentence credit for the time he spent in custody on the armed robbery, he can still be charged with that offense because it was dismissed without prejudice. (39:13-14.)

While it can be argued that Mr. Fleming did not have his day in court on the armed robbery charges because he successfully intimidated the victims to not testify against him, he certainly was not "successful" in getting out of trouble or avoiding punishment. Mr. Fleming ultimately took responsibility not only for intimidating the victims, but also for the armed robbery. He is now serving seven years in prison for the actions he took responsibility for and he will be supervised in the community when he is released from prison for an additional six years. (40:43.)

The State also contended that read-ins are distinguishable from acquittals and non-read-ins because

[1] Mr. Fleming was arrested for armed robbery on January 31, 2016. (32:5.) He was held in custody on cash bail for the armed robbery. (1:1-2.) The armed robbery charges were not dismissed until February 14, 2017. (39:13-14.)

"the implication of a read-in is that the defendant agrees that, as part of the resolution of the case, the read-in offenses can increase his punishment." (Plaintiff's Brief 9.) This statement is correct, however, Mr. Fleming agreed that the dismissed charges could increase his punishment at sentencing when he took responsibility for the armed robbery and accepted the consequences for it. (40:33.) Just because Mr. Fleming did not agree "as part of the resolution of the case" that the armed robbery could increase his punishment, does not mean that the dismissed charge did not have the same effect as if it were dismissed and read-in.

The armed robbery was not dismissed and read-in as part of the resolution of the case, but Mr. Fleming admitted to the armed robbery charges at sentencing and took responsibility for them with the understanding that the judge could increase his punishment based on his admissions. The State conceded that Mr. Fleming accepted responsibility for the armed robbery at sentencing, but unfoundedly speculated that he did not do so to consent to increased punishment, but rather was hoping for leniency. (Plaintiff's Brief 10.) That is simply not accurate or correct.

Mr. Fleming never asked the court for leniency, instead after he accepted responsibility for the armed robberies he specifically stated "I accept the consequences that come behind it. Because, you know, they are my actions. I mean, whatever come my way, I guess it was meant." (40:33.) Mr. Fleming indicated that he was ready to accept the consequences for his actions of the armed robbery, which obviously may include an increased punishment based on his admissions to the court.

The State argued that "the dismissed charges in this case are far from the functional equivalent of read-in offenses." (Plaintiff's Brief 10.) The State is correct in so far as Mr. Fleming is not getting the benefit of knowing that the armed robbery charges cannot be prosecuted in the future if they were dismissed and read-in. But other than that, the dismissed charges in this case had the same effect at the time of sentencing as dismissed and read-in charges.

The State asserted that "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." (Plaintiff's Brief 10.) In fact, it is very significant that the rationale the court gave in *Floyd* for awarding sentence credit for a charge that was

dismissed and read-in also supports awarding sentence credit for a dismissed charge in this case.

The court in *Floyd* stressed the important distinction between dismissed charges and read-in charges is that read-ins are admitted by the defendant and therefore more weight is placed on them. *State v. Floyd*, 2000 WI 14, ¶ 25, 27, 232 Wis. 2d 767, 606 N.W.2d 155. Mr. Fleming admitted to the armed robbery that was dismissed and therefore more weight was placed on it. The dismissed charge had the same effect at sentencing as if it were read-in and for sentence credit purposes, that is relevant and significant.

Finally, the State argued that the Court should not even consider Mr. Fleming's argument that if the Court did not grant sentence credit for the entire time he spent in custody on the armed robbery charges, then he should receive credit from the date of the first offense of intimidation of a witness. (Plaintiff's Brief 11.) The State claimed that Mr. Fleming made this undeveloped argument "in a single paragraph with no citation to any authority that supports his position." (*Id.*)

However, Mr. Fleming developed his entire argument and supported it with case law for thirteen pages prior to concluding in the last three paragraphs of his argument that he is entitled to an additional 225 days of sentence

credit from the day he was arrested on the armed robbery charges to the day of his initial appearance on the present case or in the alternative that he is entitled to an additional 219 days of sentence credit from the date of the offense in Count one to the day of his initial appearance. (Appellant's Brief 7-20.)

Both of these arguments for additional sentence credit are supported by the preceding thirteen pages of case law and argument that was fully developed in the Appellant's brief. Both of these arguments for additional sentence credit are based on Mr. Fleming's contention that although he was being held in custody for armed robbery, the armed robbery is in connection with the intimidation of a witness convictions for which sentence was imposed. (Appellant's Brief 20.) Therefore, this Court should consider both of the arguments for additional sentence credit.

II. THE NO CONTACT CONDITION WITH M.H. IS NOT REASONABLE OR APPROPRIATE.

The no contact condition with M.H. is inadvertently preventing Mr. Fleming from having any contact with his one year old daughter. The State misconstrued this issue by indicating that Mr. Fleming "complains" that the court's order "affects the ease with which he can arrange visitation with his daughter" and described this as an

"added complexity."(Plaintiff's Brief 12.) The court's order does not affect "the ease" of arranging visitation with his daughter, the court's order completely "prevents" Mr. Fleming from seeing his daughter all together.

The purpose of the court's order was not to prevent contact with his own child, but the order is having that inadvertent effect. Mr. Fleming essentially cannot have contact with his young daughter because he is not allowed to have contact with her mother. M.H. indicated that she has no one else to take their child to see Mr. Fleming while he is in prison. (27:9.)

The State suggested that the condition "works to dissuade Fleming from further intimidating M.H. if the State reissues the dismissed robbery charge, thereby encouraging Fleming's rehabilitation." (Plaintiff's Brief 12.) Yet, it has been almost one year since the armed robbery charges were dismissed and the State has not reissued the armed robbery charges. It is not even likely that the State will reissue the charges, but even if the State did, the court could impose a condition of Mr. Fleming's bail that he have no contact with M.H.

It is not reasonable or appropriate to prevent Mr. Fleming from having contact with his daughter for at least the next seven years while he is incarcerated on the off

chance that the State "may" reissue the armed robbery charges.

Mr. Fleming not being able to have contact with his own daughter while he is incarcerated for the next seven years will not facilitate his rehabilitation. In fact, the opposite is true, if Mr. Fleming were allowed to have contact with his daughter through M.H. that would facilitate his rehabilitation.

CONCLUSION

For the foregoing reasons, Mr. Fleming respectfully requests that the Court reverse the circuit court's decision and grant his postconviction motion for additional sentence credit and to modify the no contact order with M.H.

Dated this 6th day of February, 2018.

Respectfully Submitted,

_____
Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

Mayer Law Office, LLC
120 N. Main Street, Suite 360
West Bend, WI 53095
262-338-1415

CERTIFICATION OF BRIEF

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 10 pages.

Dated this 6th day of February, 2018.

_____
Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that: I have submitted an electronic copy of this brief, excluding the appendix, 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 as of this date.

A copy of this certificate has been served with the paper copies of this brief with the court and served on all opposing parties.

Dated this 6th day of February, 2018.

_____
Becky Van Dam
Attorney for Defendant-Appellant
State Bar No. 1095215