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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT IV

Case Nos. 2017AP2440-CR & 2017AP2441-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

RICHARD H. HARRISON, JR.,

Defendant-Respondent.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN
ORDER GRANTING A WIS. STAT. § 973.155 MOTION
FOR SENTENCE CREDIT ENTERED IN THE CIRCUIT
COURT FOR CLARK COUNTY, THE HONORABLE
NICHOLAS J. BRAZEAU, JR., PRESIDING

**BRIEF AND APPENDIX OF THE
PLAINTIFF-APPELLANT**

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ISSUE PRESENTED

Is Richard H. Harrison entitled to have roughly 12 years of sentence credit for the time he served on convictions that were later overturned on appeal applied against his earlier unrelated convictions?

The circuit court answered, “Yes.”

This Court should reverse the circuit court by answering, “No.”

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case involves the application of established principles of law to the facts presented.

INTRODUCTION

This is a sentence credit case involving Harrison’s four separate convictions from 2007, 2008, 2010, and 2011. A court sentenced Harrison in 2007 and 2008 cases to concurrent sentences of six years’ imprisonment. Later, a court sentenced Harrison in 2010 and 2011 cases to lengthy consecutive sentences. After completing his term of initial confinement in the 2007 and 2008 cases, Harrison served his term of initial confinement for the 2010 case, and he began serving his term of initial confinement in the 2011 case.

Harrison later successfully appealed both his 2010 and 2011 cases. The State dismissed his 2010 case and rescheduled his 2011 case for retrial. Harrison then convinced the circuit court that the time he spent serving his initial confinement on his vacated 2010 and 2011 cases—roughly 12 years—should be applied to reduce his extended supervision in his 2007 and 2008 cases. Awarding this time

would render Harrison's 2007 and 2008 sentences fully served.

This Court should reverse the circuit court's order awarding Harrison additional sentence credit for three reasons. First, in failing to reference Wis. Stat. § 973.155, the circuit court did not determine whether Harrison met the statutory prerequisites for obtaining sentence credit. Harrison did not, as his custody in his 2010 and 2011 cases was not factually connected to the conduct that led to his 2007 and 2008 sentences. Second, the circuit court failed to appreciate that another statute, Wis. Stat. § 973.04, governs sentence credit for vacated sentences and does not provide any credit for Harrison here. Third, the circuit court misapplied case law when reaching its decision, the effect of which would allow for credit for time spent on an invalid conviction against any unrelated crime. Because no law supports the circuit court's award of sentence credit here, this Court should reverse the circuit court's order granting Harrison's motion for sentence credit.

STATEMENT OF THE CASE

A. The 2007 and 2008 cases.

On March 3, 2009, Harrison pled no contest to theft-business setting in Clark County Circuit Court Case No. 2007CF115 and fraud/rendering income tax return in Clark County Circuit Court Case No. 2008CF129.¹ (R. 94:19–20, A-App. 5:19–20.) In both cases, the circuit court withheld sentence and placed Harrison on probation. (R. 60, A-App. 1; 2017AP2441-CR, 6, A-App. 2.) Harrison's probation was

¹ Unless otherwise indicated, all record citations are to the record in Case No. 2017AP2440-CR.

later revoked. (R. 70, A-App. 3; 2017AP2441-CR, 13, A-App. 4.)

On December 21, 2011, the circuit court sentenced Harrison to six years of imprisonment, consisting of three years of initial confinement and three years of extended supervision in both the 2007 and 2008 cases. (R. 70, A-App. 3; 2017AP2441-CR, 13, A-App. 4.) The court ordered the sentences to run concurrently, and it awarded 462 days of sentence credit against the 2007 case and 119 days of sentence credit against the 2008 case. (R. 70, A-App. 3; 2017AP2441-CR, 13, A-App. 4.)

B. The 2010 case.

Meanwhile, in July 2010, the State filed charges against Harrison in Clark County Circuit Court Case No. 2010CF88. (R. 80:4, A-App. 7:4.) Roughly a year later, the jury found Harrison guilty of burglary of a building or dwelling, resisting or obstructing an officer, and theft of movable property, all as a repeater. (R. 80:7, A-App. 7:7.) The court sentenced Harrison on January 4, 2012. (R. 80:8, A-App 7:8.) For the burglary charge, the court sentenced Harrison to 16 years of imprisonment, consisting of 11 years of initial confinement followed by five years of extended supervision. (R. 80:8, A-App. 7:8.) The court granted 221 days of sentence credit on that charge. (R. 80:8, A-App. 7:8.) For both the obstruction charge and the theft charge, the court sentenced Harrison to two years of imprisonment, consisting of one year of initial confinement followed by one year of extended supervision. (R. 80:8–9, A-App. 7:8–9.) The court ordered all sentences to run consecutively to each other and to any other sentence. (R. 80:8–9, A-App. 7:8–9.)

C. The 2011 case.

In September 2011, Harrison picked up an additional charge: one count of repeated sexual assault of the same child in Ashland County Circuit Court Case No. 2011CF82. (R. 80:7–8, A-App. 7:7–8.) A jury found Harrison guilty, and on March 13, 2013, the circuit court sentenced Harrison to 40 years of imprisonment, consisting of 30 years of initial confinement followed by 10 years of extended supervision. (R. 80:9, A-App. 7:9.) The court ordered the sentence to run consecutively to any other sentence. (R. 80:9, A-App. 7:9.)

D. Harrison’s successful appeals of his 2010 and 2011 cases.

In January 2015, the Supreme Court of Wisconsin affirmed a decision and order of the Wisconsin Court of Appeals remanding for a new trial Harrison’s 2010 case.² (R. 80:9, A-App 7:9.) The State decided not to retry the case, so it was dismissed on the prosecutor’s motion on June 23, 2015. (R. 80:9, A-App. 7:9.)

In January 2017, the Western District Court of Wisconsin vacated Harrison’s 2011 case.³ (R. 80:9, A-App. 7:9.) The case is set for retrial. (R. 80:9, A-App 7:9.)

E. Harrison’s sentence credit request.

Due to the consecutive nature of his 2010 and 2011 sentences, Harrison never began serving his extended supervision in his 2007 and 2008 cases. Instead, when the initial confinement portions of the 2007 and 2008 cases

² *State v. Harrison*, 2015 WI 5, 360 Wis. 2d 246, 858 N.W.2d 372.

³ *Harrison v. Tegels*, 216 F. Supp. 3d 956 (W.D. Wis. 2016).

ended, Harrison then began to serve his initial confinement portion for the 2010 case, and following that, the 2011 case.

In August 2017, Harrison filed a motion for sentence credit, requesting to have the time he spent in confinement on his 2010 and 2011 cases applied to the extended supervision time he had remaining in his 2007 and 2008 cases. (R. 80, A-App. 7.) In his motion, Harrison calculated this time to be 2304 days of credit on his 2007 case and 1961 days of credit on his 2008 case. (R. 80:5, A-App. 7:5.)

The circuit court ruled in favor of Harrison. (R. 85, A-App. 11.) The court “believe[d] it [was] silly to view the incarceration time as simply wasted, dead time.” (R. 85:3, A-App. 11:3.) Relying on a case from the United States Court of Appeals for the Fourth Circuit, the court decided to “date back” the service of Harrison’s extended supervision on the 2007 and 2008 cases so that Harrison could “at least receive credit which [would] extinguish those sentences.” (R. 85:2–3, A-App. 11:2–3.) The court did not reference Wisconsin’s sentence credit statute (Wis. Stat. § 973.155) in its decision and order.

The State now appeals.

STANDARD OF REVIEW

Whether a defendant is entitled to sentence credit under Wis. Stat. § 973.155 is a question of law that this Court reviews de novo. *State v. Johnson*, 2007 WI 107, ¶ 27, 304 Wis. 2d 318, 735 N.W.2d 505.

ARGUMENT

The circuit court cannot apply credit for the time Harrison spent in confinement on his later, overturned convictions to his earlier, unrelated convictions.

Wisconsin Stat. § 973.155 governs sentence credit. Under it, “[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). In other words, to receive credit, a defendant must establish (1) that he was in custody, and (2) that his custody was connected to the conduct that led to the sentence. *State v. Presley*, 2006 WI App 82, ¶ 6, 292 Wis. 2d 734, 715 N.W.2d 713.

Here, there is no dispute that Harrison was “in custody.” At all relevant times, Harrison was imprisoned. In this case, the issue is whether Harrison’s custody in the 2010 and 2011 cases was connected to the conduct that led to his 2007 and 2008 sentences. It was not.

To qualify as time spent “in connection with” the course of conduct giving rise to that sentence, the custody must be “factually connected with the course of conduct for which the sentence was imposed.” *State v. Elandis Johnson*, 2009 WI 57, ¶ 3, 318 Wis. 2d 21, 767 N.W.2d 207. “[A] mere procedural connection will not suffice.” *Id.* ¶ 33. When the necessary factual connection is present, presentence credit can be applied to the term to which a defendant is sentenced.

Here, there is no evidence that Harrison’s 2007 and 2008 crimes are factually connected to his 2010 and 2011 crimes. The circuit court did not find that the crimes were factually connected. Harrison has never demonstrated—much less asserted—that the crimes were factually connected. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995.) (“The law places the burden of

demonstrating both custody and its ‘connection with the course of conduct for which sentence was imposed,’ on the defendant who seeks such custody.” (internal citation omitted)). Harrison’s crimes occurred at different times and arose out of different factual scenarios. Because Harrison has failed to meet the connection requirement, he has failed to establish that he is entitled to credit under Wis. Stat. § 973.155.

The circuit court erred in three main respects when it reached the opposite conclusion. First, the circuit court failed to even reference the statute governing sentence credit, Wis. Stat. § 973.155. In doing so, the court failed to discuss the statutory prerequisites to obtaining sentence credit. Consequently, the court’s decision does not address whether Harrison’s custody in the 2010 and 2011 cases was factually connected to the conduct that led to his 2007 and 2008 sentences. Had the court considered this prerequisite to obtaining credit, it would have found that Harrison did not establish a factual connection.

Second, the circuit court failed to reference the statute that governs credit for vacated sentences. Wisconsin Stat. § 973.04 provides, “When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served.”

Here, nothing can be done with the confinement time Harrison served in his 2010 case because the State is not retrying Harrison. Thus, no “new sentence” will be imposed upon Harrison for the same crime. If, however, Harrison is reconvicted in his 2011 case, the time he spent in custody in connection with his vacated 2011 sentence can be credited against the new sentence.

Third, the circuit court misapplied the law in reaching its decision. The court relied heavily on *Tucker v. Peyton*, 357

F.2d 115 (4th Cir. 1966) to award Harrison credit. To start, *Tucker* is not binding on Wisconsin state courts. *See State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993). Nor does it provide persuasive authority to Harrison's case. As this Court has correctly recognized, *Tucker* is limited to situations "when a defendant is sentenced on consecutive sentences for related offenses and the earlier sentence is invalid." *See State v. Allison*, 99 Wis. 2d 391, 393 (Ct. App. 1980). Under those circumstances, "the later sentence [is] advanced to the date it would have begun but for the intervening invalid sentence." *Id.*

Here, the rationale behind *Tucker* is not present because Harrison's sentences were not for related offenses. Moreover, it was Harrison's later (2010 and 2011) and not his earlier (2007 and 2008) sentences that were ruled invalid. Consequently, the circuit court's reliance on *Tucker* was misplaced. Allowing the circuit court's decision to stand would entitle a defendant to receive credit for time spent on an invalid conviction against any unrelated crime. Such a rule cannot stand, as it conflicts with Wis. Stat. § 973.155 and Wis. Stat. § 973.04.

In short, Harrison cannot obtain sentence credit for the time he spent in confinement for the 2010 or 2011 cases against his unrelated 2007 and 2008 cases. As noted above, if Harrison is convicted after his retrial in the 2011 case, he will receive credit for the confinement time that he served in that case. But just as a court cannot allow a defendant to carry over as a "line of credit" time from one acquitted case to another unrelated conviction, the circuit court here had no basis to have granted Harrison credit from his 2010 and 2011 cases to his extended supervision in his unrelated 2007 and 2008 cases. *See Allison*, 99 Wis. 2d at 393–94.

CONCLUSION

This Court should reverse the circuit court's order granting Harrison's motion for sentence credit.

Dated this 13th day of March, 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 2,091 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).

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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 13th day of March, 2018.

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Appendix

State of Wisconsin v. Richard H. Harrison, Jr.

Case Nos. 2017AP2440-CR & 2017AP2441-CR

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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JENNIFER R. MCNAMEE
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I hereby certify that:

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