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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

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

REPLY BRIEF OF THE PLAINTIFF-APPELLANT

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ARGUMENT

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

As a preliminary matter, Harrison criticizes the State for quantifying Harrison's sentence credit time as roughly 12 years. (Harrison's Br. 7 n.7.) The State stands by that rough calculation. Harrison's motion for sentence credit requested "2304 total days of credit," totaling "6 1/3 years" for Clark County Case No. 2007CF115 and "1961 total days of credit," totaling "5 1/3 years" for Clark County Case No. 2008CF129. Thus, the State arrived at its total of roughly 12 years by adding Harrison's requested periods of credit.

Harrison argues that he is entitled to sentence credit under *Allison*,¹ *Tucker*,² and *Zastrow*.³ But none of those cases help Harrison.

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." *State v. Allison*, 99 Wis. 2d 391, 393 (Ct. App. 1980). Under those circumstances, "the later sentence must be advanced to the date it would have begun but for

¹ *State v. Allison*, 99 Wis. 2d 391, 393, 299 N.W.2d 286 (Ct. App. 1980).

² *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966).

³ *State v. Zastrow*, No. 2015AP2182, unpublished slip op., (R. App. 101–08).

the intervening invalid sentence.” *Id.* *Allison* made clear that the *Tucker* rule does not apply to “time spent on an invalid conviction against a later unrelated crime.” *Id.* This Court applied that same rule in *Zastrow*. There, this Court advanced a later consecutive sentence to the date that sentence would have begun—the date of sentencing—had there been no earlier sentence. *State v. Zastrow*, No. 2015AP2182, unpublished slip op., ¶ 7–8 (Def.-Resp. App. At 105.)

Harrison effectively admits that *Allison*, *Tucker*, and *Zastrow* cannot help him when he acknowledges an important factual distinction between his case and those three cases: Harrison’s later (2010 and 2011) and not his earlier (2007 and 2008) sentences were vacated. (Harrison’s Br. 16.) As a result, there is no later consecutive sentence to be advanced.

Additionally, although Harrison indirectly asserts that his sentences are factually connected, he does not explain how. As noted in the State’s brief-in-chief, there is no evidence that they are factually connected, the circuit court did not find that they were connected, and Harrison still has not demonstrated that they are connected, despite it being his burden. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995.) (“The law places the burden for 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)). This connection is required under Wis. Stat. § 973.155 and *Allison*. 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 or *Allison*.

In cases where courts are advancing a later consecutive sentence, they are only forwarding to the date of sentencing on the later sentence. In such cases, it is possible to treat the vacated sentence as not having happened and to assign a new sentencing date to the advanced sentence. The same is not true in Harrison's case.

In Harrison's case, the consecutive 2010 and 2011 sentences effectively paused completion of Harrison's 2007 and 2008 sentences. This is because Wis. Stat. § 973.15(2m)(b) states that when a "court provides that a determinate sentence is to run consecutive to another determinate sentence, the person sentenced shall serve the period of confinement in prison under the sentences consecutively and the terms of extended supervision under the sentences consecutively and in the order in which the sentences have been pronounced." Under this rule, the later consecutive sentence does not begin at noon on the day of sentence; it begins when the first sentence expires.

Here, Wis. Stat. § 973.15(2m)(b) paused Harrison's completion of his extended supervision in his 2007 and 2008 cases to allow him to serve the initial confinement portions of his 2010 and 2011 cases. Now that that pause has been lifted by virtue of the 2010 and 2011 cases being vacated, Harrison should resume serving his 2007 and 2008 sentences by serving his term of extended supervision.

Harrison has not demonstrated entitlement to sentence credit under Wis. Stat. § 973.155 or any of the cases discussed above. This Court should not allow Harrison to obtain sentence credit for the time he spent in confinement for his 2010 and 2011 cases against his unrelated 2007 and 2008 cases. A contrary ruling would allow defendants to receive credit for time spent on an

invalid conviction against any unrelated crime in violation of
Wis. Stat. § 973.155 and Wis. Stat. § 973.04.

Dated May 8, 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 806 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 8th day of May, 2018.

JENNIFER R. REMINGTON
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