STATE OF WISCONSIN

IN SUPREME COURT

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

STATE OF WISCONSIN,

Plaintiff-Appellant-Petitioner,

v.

RICHARD H. HARRISON, JR.,

Defendant-Respondent-Cross Petitioner.

REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT IV, REVERSING AND REMANDING WITH DIRECTIONS THE CIRCUIT COURT'S ORDER GRANTING A MOTION FOR SENTENCE CREDIT, ENTERED IN THE CLARK COUNTY CIRCUIT COURT, THE HONORABLE NICHOLAS J. BRAZEAU, JR., PRESIDING

COMBINED RESPONSE AND REPLY BRIEF OF THE PLAINTIFF-APPELLANT-PETITIONER

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER R. REMINGTON
Assistant Attorney General
State Bar #1098838

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
remingtonjr@doj.state.wi.us

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Page

Statutes

INTRODUCTION

This Court accepted review to address two important legal questions related to a defendant's entitlement to credit for a vacated sentence. Harrison hopes to tank that review based on his recent conclusion that he is no longer entitled to sentence credit or advancement on his 2007 and 2008 cases' sentences.

Because review is as important now as it has ever been, and because resolution of the issues presented will impact when, where, or if Harrison receives sentence credit, this Court should issue an authored opinion addressing the significant issues presented and reversing the court of appeals' decision.

The State incorporates by reference the arguments made in its brief-in-chief and uses this reply to respond to Harrison's arguments.

ARGUMENT

I. This Court should not summarily dispose of this case.

A. The sentencing in the revived 2011 case does not preclude the Court from considering the petitioned-for issues.

Yes, one fact relating to one of Harrison's four relevant cases has changed. Days after this Court granted review, the circuit court sentenced Harrison for causing mental harm to a child in the 2011 case, Ashland County Case No. 2011CF82. Harrison wants that fact to overshadow the rest of this case, but it doesn't, and here's why.

First, everyone knew Harrison could receive a new sentence in the 2011 case. When Harrison filed his motion for sentence credit in August 2017, he knew the 2011 case

was set for a four-day trial in November. (Pet-App. 147.) When the circuit court issued its decision, it noted that Harrison faced a new trial for the 2011 case: "The defendant is currently held on a cash bond in that matter, which is scheduled for trial on November 6, 2017." (Pet-App. 114.)

When the parties briefed this case in the court of appeals, both noted that Harrison's 2011 case was set for retrial. (State's COA Br. 4; Pet-App. 196.) When the court of appeals issued its decision, it noted that Harrison had recently pled and was scheduled for sentencing in the 2011 case. (Pet-App. 105.) And when the parties petitioned for review in this Court, both noted that Harrison faced sentencing for causing mental harm to a child. (State's Pet. for Review 5; Pet-App. 220–21).

Put simply, a new sentence has loomed over this case since its inception. So Harrison's receipt of that sentence should surprise no one.[1]

Second, Harrison suggests that he did not need to wait until he was sentenced in his revived 2011 case to seek credit for the time he spent serving his vacated 2011 sentence. (Harrison's Br. 6.) He relies on *Brown* and *Wolfe* as support, but neither helps him because neither concerns a vacated sentence. *State v. Brown*, 2010 WI App 43, 324 Wis. 2d 236, 781 N.W.2d 244; *State v. Wolfe*, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655.

Brown narrowly holds that a Wisconsin court should not hold off on providing an offender with credit in a

[1] Further, in its brief-in-chief, the State emphasized that Harrison had not suggested that the specific sentence structure mattered. (State's Br. 18.) Harrison still has not suggested that the specific sentence structure mattered.

Wisconsin case based on what might happen in a separate case in another state:

> [W]hen an offender is on a parole *hold* in a different sovereignty that has not acted to revoke parole, should the circuit court grant sentence credit in Wisconsin for the time the offender spent in presentence confinement in Wisconsin? Or, may the Wisconsin court deny credit on the grounds that the foreign sovereignty may yet act to give credit in that state and, if it does, then the offender would be receiving double credit? We conclude that until the other sovereignty has actually acted on whether to grant credit, the Wisconsin sentence is the only outstanding sentence against which the court can grant credit. . . . Otherwise, if the other sovereignty never acts, the offender would not receive credit where credit is due.

Brown, 324 Wis. 2d 236, ¶ 1. Unlike *Brown*, any credit here should have been associated with a single case, Harrison's 2011 case. Because Harrison was being re-prosecuted in that case, it remained open to accept any credit Harrison was legally entitled to.

Wolfe is equally inapplicable. It simply reaffirms that credit must be applied in a mathematically linear fashion to the first sentence that is imposed. *Wolfe*, 242 Wis. 2d 426, ¶ 5. Thus, it does not support Harrison's suggestion that he did not need to wait until he was sentenced in his revived 2011 case to seek credit for the time he spent serving his vacated 2011 sentence. (Harrison's Br. 6.)

Third, Harrison's belief that the court of appeals' decision turned on the fact that he had not been sentenced in the 2011 case cannot be squared with the court's actual opinion. (Harrison's Br. 9.) Preliminarily, the court in no way indicated that its decision would change if Harrison were sentenced. And substantively, the court articulated its

understanding of what should happen if Harrison received a sentence in the revived 2011 case:

> We make two observations. First, in the event that Harrison is sentenced in a revived 2011 case, the normal rules regarding the service of confinement time before the service of extended supervision time should apply. Second, Harrison should be credited with all sentence credit in the 2011 case to which he is entitled under Wis. Stat. § 973.155.

(Pet-App. 105.) Notably missing is any sentiment from the court that it would not advance the service of Harrison's 2007 and 2008 sentences had Harrison received a sentence in the revived 2011 case.

Harrison's belief is further undercut by the court of appeals' reliance on *State v. Zastrow*, No. 2015AP2182-CRAC, 2017 WL 2782225 (Wis. Ct. App. June 27, 2017) (unpublished). (Pet-App. 267–75.) Zastrow had been re-sentenced on his vacated conviction, and the court of appeals still decided to apply an advancement concept over Wis. Stat. § 973.04. (State's Br. 38–39 (discussing *Zastrow*); Pet-App. 267–75.) It is thus Harrison, not the State, who proceeds on "hypothetical" assumptions. (Harrison's Br. 4, 9, 10.)

Fourth, Harrison says he's been "forced to concede" that he is no longer entitled to sentence credit in the 2007 and 2008 cases because "the entire basis for the credit he sought evaporated" when he was sentenced for causing mental harm to a child in the 2011 case. (Harrison's Br. 6.)

Even if we assume that's true for the time Harrison spent serving the vacated 2011 sentence,[2] what about the time he spent serving the vacated 2010 sentence? From February 20, 2014, to January 22, 2015, Harrison served his 2010 case's sentence. (State's Br. 9.) Obviously, no new sentence has been imposed in the 2010 case, so how has Harrison been forced to concede that he is no longer entitled to sentence credit or advancement in the 2007 and 2008 cases for the time he spent serving his 2010 case's sentence? Is Harrison now trying to obtain sentence credit in his 2011 case for the time he spent serving a sentence in his unrelated 2010 case?

At the end of the day, this consternation just highlights the need for law development and clarity. And that can be achieved only if this Court digs into these important issues and provides a substantive opinion.

B. Harrison's argument that this case is moot lacks merit.

As in his motion for summary reversal, Harrison says this Court should summarily reverse the court of appeals' decision because this case is moot. (Harrison's Br. 1, 4, 10.) But this case is not moot, and even if it were, review would still be warranted because the case satisfies multiple mootness exceptions.

"An issue is moot when its resolution will have no practical effect on the underlying controversy." *State v. Fitzgerald*, 2019 WI 69, ¶ 21, 387 Wis. 2d 384, 929 N.W.2d 165 (citation omitted). Said the other way around, a case is

---

[2] Given *State v. Zastrow*, No. 2015AP2182-CRAC, 2017 WL 2782225 (Wis. Ct. App. June 27, 2017) (unpublished), that's a tough assumption.

not moot "when 'a decision in [a litigant]'s favor . . . would afford him some relief that he has not already achieved." *McFarland State Bank v. Sherry*, 2012 WI App 4, ¶ 9, 338 Wis. 2d 462, 809 N.W.2d 58 (alterations in original) (citation omitted).

For example, a case becomes moot when a party is no longer subject to the order he or she challenges. *See Fitzgerald*, 387 Wis. 2d 384, ¶ 21. This often happens in cases involving involuntary commitment or involuntary medication orders, and *Fitzgerald* and *Christopher S.* serve as two examples.

In *Fitzgerald*, the circuit court ordered Fitzgerald to be involuntarily medicated to restore his competency to stand trial. *Fitzgerald*, 387 Wis. 2d 384, ¶ 1. Fitzgerald appealed, and during his appeal, he regained competency. *Id.* ¶¶ 9–11. Having regained competency, Fitzgerald was "no longer subject to the medication order" by the time this Court decided his appeal. *Id.* ¶ 21. Because Fitzgerald was no longer subject to the order he challenged, "the issues presented in reviewing that order [were] moot." *Id.*

In *Christopher S.*, the circuit court ordered Christopher S. involuntarily committed and medicated for a six-month period. *Winnebago Cnty. v. Christopher S.*, 2016 WI 1, ¶¶ 21–22, 366 Wis. 2d 1, 878 N.W.2d 109. Both the commitment and medication orders were later extended after the original orders expired. *Id.* ¶ 22. Because Christopher S.'s "original commitment order had already expired prior to the filing of his motion for postcommitment relief," this Court concluded that his case was moot. *Id.* ¶ 30.

Unlike Fitzgerald and Christopher S., Harrison remains subject to the court of appeals' order advancing the service of his 2007 and 2008 cases' sentences. Harrison will be directly impacted by any decision issued by this Court—

he will either receive credit (via the statutes or effectively through advancement) or not receive credit.

Harrison assumes that because he no longer wants sentence credit or advancement in the cases now before the Court, the case is over. But that's not how it works.[3]

This Court is not bound by Harrison's concession. *State v. Monahan*, 2018 WI 80, ¶ 30 n.11, 383 Wis. 2d 100, 913 N.W.2d 894. Because this Court—not the parties—decides the law, Harrison's concession does not control the outcome of this case. *See State v. Carter*, 2010 WI 77, ¶ 50, 327 Wis. 2d 1, 785 N.W.2d 516 ("Although the parties agree about how Wis. Stat. § 973.155(1)(a) and the existing case law apply to the undisputed facts in the present case, we are not bound by the parties' interpretation of the law or obligated to accept a party's concession of law. This court, not the parties, decides questions of law." (footnote omitted)).

Second and relatedly, sentence credit is mandatory. So, if this Court concludes that Harrison is entitled to credit, then he *must* receive that credit, regardless of whether he now wants it or not. *Carter*, 327 Wis. 2d 1, ¶ 51 ("The provisions of the sentence credit law, Wis. Stat. § 973.155(1), are mandatory. A sentencing court must give credit accorded by statute because 'a person [may] not serve more time than that for which he is sentenced.'" (alteration in original) (citation omitted)).

Put simply, Harrison is not entitled to pick and choose when and where he receives credit by advancing one

---

[3] Harrison made the same assumption in his motion for summary reversal, and the State responded with an explanation of why that assumption was faulty. (Pet-App. 250–59.) The State's arguments there apply with equal force here.

argument when it suits him and abandoning that argument when a new argument suits him more. The law directs when and where Harrison is entitled to credit, and this Court interprets the law.

Even if we assume, though, that this case is moot because of Harrison's concession, review is still warranted because this case satisfies at least two mootness exceptions.

Specifically, the issues in this appeal are of great public importance, and their resolution will avoid uncertainty. By granting review of the State's petition and Harrison's cross-petition, this Court has already indicated that the issues involved are "special" and "important." *See* Wis. Stat. § (Rule) 809.62 (1r) (noting that this Court grants review "only when special and important reasons are presented").

This Court can rest assured that its initial determination was correct. As noted in the petition for review, this case offers this Court an opportunity to develop and clarify the law on how to account for time spent in confinement on a later vacated sentence. This Court can do so by interpreting and applying a statute that has not received enough attention: Wis. Stat. § 973.04.

Right now, the lower courts do not understand that section 973.04 governs credit for vacated sentences. As a result, lower courts have failed to apply the statute and have instead created a judicial remedy (an advancement concept) that is at odds with well-established sentence credit principles and our bifurcated sentencing structure. *See, e.g.*, *State v. Harrison*, Nos. 2017AP2440-CR & 2017AP2441-CR, 2019 WL 1284825 (Wis. Ct. App. Mar. 21, 2019); *Zastrow*, 2017 WL 2782225. Through this case, this Court can provide a clear directive to lower courts that section 973.04 governs credit for a vacated sentence.

That brings us to Harrison's argument that this case is not about section 973.04. (Harrison's Br. 11.) To be clear: this case has always been about section 973.04. (State's COA Br. 7–8; State's Pet. for Review 9–13.) The State appealed and then filed a petition for review with this Court to halt the flouting of section 973.04. (State's COA Br. 7–8; State's Pet. for Review 9–13.) All along, the State has said that Harrison's entitlement or non-entitlement to credit in his 2010 and 2011 cases is governed by section 973.04. That Harrison will now seek section 973.04 credit in the circuit court in the 2011 case demonstrates how absurd it was for Harrison to initially seek that time via section 973.155 and advancement.

Absent a clear rule from this Court that section 973.04 governs credit for a vacated sentence, defendants like Harrison will continue to push for credit on unrelated, vacated sentences, and the court of appeals', pursuant to *Zastrow* and *Harrison*, will continue to grant it in violation of section 973.04 and longstanding sentence credit principles.

II. This Court should not estop Harrison from seeking reversal.

The State remains disinclined to argue that Harrison should be estopped from conceding that the court of appeals' decision should be reversed, since the State also seeks reversal.

That said, the State maintains that Harrison is manipulating the court system. (State's Br. 17–19; Pet-App. 7–8.) Harrison wants reversal so he can seek sentence credit on his new period of confinement for causing mental harm to a child in the 2011 case. (Pet-App. 244.) Because he now has a period of confinement to serve, he wants to attach sentence credit to it, not his extended supervision in the 2007 and

2008 cases. And one more thing—he also wants to foreclose this Court from hearing the important issues in this case.

It would be quite a win for Harrison if he prevents this Court from hearing the State's petition on important and recurring legal questions *and* he gets to pick where and when he receives any credit.

III. Harrison is not entitled to sentence credit on or advancement of his 2007 and 2008 cases' sentences.

Harrison's brief demonstrates that he wants to have his cake and eat it too. He asks for reversal so he can seek sentence credit on his new period of confinement for causing mental harm to a child in the 2011 case, yet he argues that the State's interpretation of sections 973.155 and 973.04 is "harsh" and "unfair," and he suggests he would challenge the State's interpretation but for his new sentence. (Harrison's Br. 15–16.)

For the reasons above, Harrison's choice to seek reversal does not preclude this Court from deciding this important case.

As to Harrison's argument that the State's interpretation is "harsh" and "unfair"—he should take that concern to the Legislature: "If the result in this case seems harsh, redress should come from the legislature, not from this court. 'If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts.'" *Meriter Hosp., Inc. v. Dane Cnty.*, 2004 WI 145, ¶ 35, 277 Wis. 2d 1, 689 N.W.2d 627 (citation omitted); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed.").

This Court has long recognized and respected that it "is not the province of the courts to set aside statutes merely because they may be deemed unwise or because it may be feared that they will work inconvenience or hardship." *Pauly v. Keebler*, 175 Wis. 428, 439, 185 N.W. 554 (1921). Because this Court's role is to "apply the statute as it is written," it should reject Harrison's call to make sections 973.155 and 973.04 fairer or less harsh. *Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 231 (2014).

Outside of his claim that the State's interpretation of sections 973.155 and 973.04 is unfair and harsh, Harrison offers no substantive critique of the State's statutory analysis. (Harrison's Br. 15–17.) Likewise, he offers no substantive critique of the State's advancement analysis. (Harrison's Br. 17–18.)

CONCLUSION

This Court should reverse the court of appeals' decision and issue an authored opinion addressing the important legal issues presented in this case.

Date this 19th day of December 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JENNIFER R. REMINGTON
Assistant Attorney General
State Bar #1098838

Attorneys for Plaintiff-Appellant-Petitioner

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8556
(608) 266-9594 (Fax)
remingtonjr@doj.state.wi.us

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 2,961 words.

Dated this 19th day of December 2019.

JENNIFER R. REMINGTON
Assistant Attorney General

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 19th day of December 2019.

JENNIFER R. REMINGTON
Assistant Attorney General