

**RECEIVED**

**12-21-2018**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

STATE OF WISCONSIN  
COURT OF APPEALS

DISTRICT IV

---

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

Case No. 2018AP1601-CR

Caleb J. Hawley,

Defendant-Appellant.

---

ON APPEAL OF THE CIRCUIT COURT'S  
JUDGMENTS OF CONVICTION AND ORDERS  
DENYING SENTENCE CREDIT, THE  
HONORABLE JOSEPH G. SCIASCIA PRESIDING,  
IN DODGE COUNTY CASE 2015-CM-216

---

BRIEF AND APPENDIX OF DEFENDANT-  
APPELLANT CALEB J. HAWLEY

---

RYAN MCNAMARA  
State Bar No. 1053053

P.O. Box 1857  
Madison, WI 53701-1857  
608-467-0331 phone

Attorney for Defendant-  
Appellant

TABLE OF CONTENTS

Table of Authorities.....2

Statement of the Issue.....4

Statement on Oral Argument.....4

Statement on Publication.....4

Statement of the Case.....4

Argument.....9

**SENTENCE CREDIT IS DUE BECAUSE  
THE STAY OF SENTENCE VIOLATED  
WISCONSIN LAW AND MUST BE  
VOIDED**

    a. Summary.....9

    b. Standard of Review.....9

    c. Applicable Law.....9

    d. Sentence Credit Must Be Granted.....11

Conclusion.....22

Certificate of Conformity with Rule 809.19(8).....23

Certificate of Compliance with Rule 809.19(12).....24

Appendix.....100

Appendix Certification.....187

Certificate of Compliance with Rule 809.19(13)....188

## TABLE OF AUTHORITIES

### Cases Cited

<i>Bingenheimer v. DHSS</i> , 129 Wis. 2d 100 383 N.W.2d 898 (1986).....	10, 18
<i>State v. Braun</i> , 100 Wis. 2d 77, 301 N.W.2d 180 (1981).....	11-12, 15, 19
<i>State v. Clausen</i> , 105 Wis. 2d 231, 313 N.W.2d 819, (1982).....	10, 20
<i>Drewniak v. State ex rel. Jacquest</i> , 239 Wis. 475, 1 N.W.2d 899 (1942).....	9, 11-14, 21
<i>Drinkwater v. State</i> , 69 Wis. 2d 60, 230 N.W.2d 126 (1975).....	16, 20
<i>State v. Hays</i> , 173 Wis. 2d 439, 496 N.W.2d 645 (Wis. App. 1992).....	10
<i>Law Enforcement Standards Bd. v. Village of Lyndon Station</i> , 101 Wis. 2d 472, 305 N.W.2d 89 (1981).....	10
<i>State v. Maron</i> , 214 Wis. 2d 384, 571 N.W.2d 454 (Wis. App. 1997).....	7-8, 10, 18-19, 21
<i>Prue v. State</i> , 63 Wis. 2d 109, 216 N.W.2d 43, 45 (1974).....	18, 21
<i>State v. Randall</i> , 192 Wis. 2d 800, 532 N.W.2d 94 (1995).....	17
<i>Reinex v. State</i> , 51 Wis. 152, 8 N.W. 155 (1881).....	11-12
<i>State v. Shumate</i> , 107 Wis. 2d 460, 319 N.W.2d 834 (1982).....	10-11, 14-16, 19-21

<i>State v. Szulczewski</i> , 216 Wis. 2d 495, 574 N.W.2d 660 (1998).....	8-9, 16-18, 21
<i>Ex parte United States</i> , 242 U.S. 27, 37 S.Ct. 72 (1916).....	13-14
<i>In re Webb</i> , 89 Wis. 354, 62 N.W. 177, (1895).....	13-14, 21
<i>Weston v. State</i> , 28 Wis. 2d 136, 135 N.W.2d 820 (1965).....	11-12, 15-16, 20
<i>State v. Woods</i> , 173 Wis. 2d 129, 496 N.W.2d 144 (Wis. App. 1992).....	9

Statutes Cited

Wis. Stat. § 940.20(1).....	17
Wis. Stat. § 943.20(1)(d).....	5
Wis. Stat. § 971.17.....	16-17
Wis. Stat. § 973.09.....	9, 18, 20-21
Wis. Stat. § 973.15(1).....	9, 17-18, 20-21
Wis. Stat. § 973.15(2).....	7, 10, 18, 20
Wis. Stat. § 973.15(8)(a).....	4, 7, 9-11, 15, 20

Other Authorities Cited

76 Op. Att'y Gen. 165.....	10, 15
1981 Assembly Bill 736.....	11

## STATEMENT OF THE ISSUE

1. Was denial of sentence credit during a 14 month stay of sentence until completion of Mr. Hawley's jail as a condition of probation supported by a later finding that the stay was for legal cause?

The trial court ruled: Yes.

## STATEMENT ON ORAL ARGUMENT

The appellant does not request oral argument. Briefs will fully develop and explain the issues pursuant to Wis. Stat. § 809.22(2)(b). If the court deems oral argument helpful in addressing the claims, the appellant has no objection.

## STATEMENT ON PUBLICATION

Publication is appropriate in this case pursuant to Wis. Stat. § 809.23(1)(a)(1). The Court should clarify that legal clause cannot support a stay of sentence that is impermissible under other provisions of the sentencing and probation statutes. On August 27, 2018, this Court ordered Mr. Hawley's motion for a 3-judge panel in abeyance pending completion of briefing.

## STATEMENT OF THE CASE

The trial court ordered a jail report date 14 months after sentencing, coinciding with defendant Caleb J. Hawley's completion of jail as a condition of probation in other cases. (App. 122-123; 44:18-19). The trial court later ruled that the stay was supported by legal cause under Wis. Stat. § 973.15(8)(a). (App. 135; 45:10).

Mr. Hawley pleaded no contest in Dodge County Case 2015-CM-216, the Honorable Judge Joseph G. Sciascia presiding, to two counts of theft/false representation contrary to Wis. Stat. § 943.20(1)(d) as a repeater. (App. 101-102; 19:1-2). He deceived two businesses into donating \$25 each on behalf of a sick person but kept the money for himself. (App. 108; 44:4). The court withheld sentence and placed Mr. Hawley on probation for a period of 24 months on December 22, 2015. (App. 101-102; 19:1-2).

At the time of this conviction, Mr. Hawley was on probation in Columbia County Case 2011-CF-97. (App. 109; 44:5). The Department of Corrections later revoked his supervision on this Dodge County Case and the Columbia County Case based on new charges in Dane and Columbia Counties. (App. 127-128; 45:2-3).

Mr. Hawley pleaded no contest to two counts in Columbia County Case 2016-CF-41. (App. 127-128; 45:2-3). He served a 90 day sentence from August 10, 2016 to October 15, 2016, and a 120 day sentence from October 16, 2016 to January 14, 2017, earning good time credit. (Id).

He pleaded guilty to criminal charges in Dane County Cases 2016-CF-1100 and 2016-CF-1360 on October 28, 2016. (App. 128-129; 45:3-4). The Dane County sentencing court placed him on probation, with 12 months of jail forthwith as a condition of supervision in 2016-CF-1360 and 6 months additional months of jail as a condition of supervision in 2016-CF-1100. (App. 122-123; 44:18-19).

While serving his conditional time in Dane County, Mr. Hawley faced sentencing after revocation on November 3, 2016 in Columbia County Case 2011-CF-97, receiving a consecutive sentence of 120 days. (App. 130; 45:5). Mr. Hawley later successfully moved for time served sentencing credit in 2011-CF-97 from

January 15, 2017 to January 24, 2017, consecutive to completion of his sentence in 2016-CF-41 (App. 130-131; 45-5-6).

Following probation revocation in this Dodge County Case, Mr. Hawley faced sentencing before the Honorable Judge Sciascia on February 10, 2017. (App. 103; 25:1). The trial court found that three months of jail consecutive on each of the two counts was the appropriate sentence. (App. 118-120; 44:14-16). The State originally called for the sentence to begin forthwith. (App. 121; 44:17). The court wanted the sentence to be consecutive to the jail in Dane County. (Id.).

Defense counsel pointed out that the Dane County jail as a condition of probation was not a sentence, and the court agreed that its sentence could not be consecutive to the jail time. (App. 121-122; 44:17-18). Instead of ordering the sentence to commence forthwith, the court ordered that the sentence would start on April 20, 2018, Mr. Hawley's scheduled release date from conditional jail time in Dane County. (App. 122-123; 44:18-19).

On February 6, 2018, Mr. Hawley, by new counsel, moved the court to commence the sentence and earn sentence credit from February 10, 2017 onward, amounting to time served. (App. 176-177; 29:1-2). The court held a motion hearing on March 7, 2018. (App. 106-143; 45). The defense argued that at the time of sentencing after revocation, Mr. Hawley was in custody only for jail as a condition of probation in Dane County. (App. 130-132; 45:5-7). The trial court agreed that a sentence cannot be ordered consecutive to jail as a condition of probation. (App. 133; 45:8).

The State argued that the trial court was aware at the time of sentencing that it could not order its jail sentence to be consecutive to the Dane

county jail as a condition of probation. (App. 135; 45:10). The State argued that the court gave a report date of April 20, 2018 for legal cause. (Id.).

The trial court recognized that under Wis. Stat. § 973.15(8)(a), it could stay execution of a sentence for legal cause. (App. 136; 45:11). It then stated:

The question is whether there is legal cause. If the sentence is consecutive to any other sentence previously imposed and he is doing conditional jail and we want it to start after his conditional jail, that seems to be legal cause to me, but I'm not claiming to be an expert on what is or isn't legal cause under these circumstances.

(App. 137; 45:12). Based on a judicial note, the trial court reasoned that if a stay pending appeal can be legal cause, completion of conditional time should also be legal cause for a stay. (App. 138; 45:13). The trial court denied the motion and maintained a report date of April 20, 2018. (App. 140; 45:15).

Mr. Hawley filed a motion for reconsideration. (App. 178-80; 31:1-3). A sentence under Wis. Stat. 973.15(2) cannot be consecutive to jail as a condition of probation under *State v. Maron*, 214 Wis. 2d 384, 571 N.W.2d 454, 458 (Wis. App. 1997) (Id.). Defense argued that finding legal cause for such a stay would create an illogical conflict of laws between Wis. Stat. 973.15(2) and 973.15(8)(a). (Id.). Moreover, the Court did not find legal cause for a stay at the sentencing hearing. (Id.). The finding 13 months ex post facto could not justify the stay. (Id.).

The trial court held a hearing on the reconsideration motion on April 20, 2018. (App. 144-175; 46). The State argued that the *Maron* case was not really on point, and that legal cause should allow



the punitive aspects of a sentence that cannot be consecutive to jail as a condition of probation. (App. 153-55; 46:10-12). The defense countered that the *Maron* court said the legislature must change the law if it intends to permit sentences to be consecutive to jail as a condition of probation. (App. 156; 46:13).

The trial court ultimately sided with the State's argument that ensuring enforcement of the sentence is legal cause under *State v. Szulczewski*, 216 Wis. 2d 495, 574 N.W.2d 660 (1998). (App. 161; 46:18). It likened its stay of Mr. Hawley's to a stay to consolidate sentencing matters. (App. 171; 46:28). It found it had the discretion to determine whether or not the sentence should be served immediately upon sentencing or stayed to give effect to the sentence. (Id). Serving a condition of probation that would have frustrated sentencing constituted legal cause to stay the sentence until April 20, 2018. (App. 171-172; 46:28-29).

The trial court encouraged appeal to clarify the concept of legal cause. (App. 161, 166; 46:18, 23). The trial court allowed Mr. Hawley to change his jail report date to May 4, 2018. (App. 173; 46:30). He filed a timely notice of intent to pursue postconviction relief on May 3, 2018 (35). Mr. Hawley reported to jail on May 4, 2018 as ordered and remained in custody until June 19, 2018, when the trial court granted a stipulated motion to stay the sentence pending appeal. (39:1-5).

## ARGUMENT

### SENTENCE CREDIT IS DUE BECAUSE THE STAY OF SENTENCE VIOLATED WISCONSIN LAW AND MUST BE VOIDED

#### A. Summary

Mr. Hawley must earn sentence credit from the date of sentencing because a 14 month stay designed to pause execution of a sentence while a defendant served jail as a condition of probation violated the sentencing statute and cannot be supported by Wisconsin's limited concept of legal cause.

#### B. Standard of Review

This case involves interpretation of the sentencing statute, specifically Wis. Stat. §§ 973.09, 973.15(1), and 973.15(8)(a). The interpretation of a statute presents a question of law, which we review de novo. *State v. Woods*, 173 Wis. 2d 129, 136, 496 N.W.2d 144, 147 (Wis. App. 1992).

#### C. Discussion of Applicable Law

Courts have no inherent power to stay execution of a sentence in a criminal case in the absence of statutory authority except for the limited purpose of affording relief against the sentence itself. *Drewniak v. State ex rel. Jacquest*, 239 Wis. 475, 484, 1 N.W.2d 899 (1942). Wis. Stat. § 973.15(8)(a), sets forth exceptions to the rule that all sentences commence at noon on the day of sentence and provides that a sentencing court may stay the execution of a sentence of imprisonment in three circumstances: (1) for legal cause, (2) to place the person on probation to the DOC under § 973.09(1)(a) or (3) for not more than 60 days. See *State v. Szulczewski*, 216 Wis. 2d 495, ¶12, 574 N.W.2d 660

(1998).

"[L]egal cause" means that a stay or release on bail is appropriate only when the defendant has the right to pursue within the Wisconsin court system some relief against the sentence or conviction. *State v. Shumate*, 107 Wis. 2d 460, 465, 319 N.W.2d 834 (1982). [I]t seems clear that "legal cause," for purposes of section 973.15(8)(a), should be given the narrow interpretation given that term by the supreme court in *Shumate*. 76 Op. Att'y Gen. 165, 167 (1987); (App. 183, 185).

In construing a statute, the entire section and related sections are to be considered in its construction or interpretation. *State v. Clausen*, 105 Wis. 2d 231, 244, 313 N.W.2d 819, (1982). Furthermore, a statute should be construed to give effect to its leading idea, and the entire statute should be brought into harmony with the statute's purpose. *Id.* Sections of statutes relating to the same subject matter must be construed together. *Id.*

Under the ordinary rules of statutory interpretation statutes should be reasonably construed to avoid conflict. See *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 489-90, 305 N.W.2d 89 (1981). When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose. See *Bingenheimer v. DHSS*, 129 Wis. 2d 100, 107, 383 N.W.2d 898 (1986).

Probation is not a sentence and, therefore, jail time served as a condition of probation is not a sentence. See *State v. Hays*, 173 Wis. 2d 439, 444, 496 N.W.2d 645 (Wis. App. 1992). Wis. Stat. § 973.15(2) does not permit a court to order a sentence to be served consecutive to jail time imposed as a condition of probation. *State v. Maron*, 214 Wis. 2d 384, 395, 571 N.W.2d 454, 458 (Wis. App. 1997).

#### D. Sentence Credit Must Be Granted

The stay of sentence in this case must be voided as it is beyond the trial court's statutory authority. See *Drewniak*, 239 Wis. at 489. Legal cause is a judicial power with specific, limited application. See *Shumate*, 107 Wis. 2d at 467. The trial court did not have legal cause to stay the sentence for 14 months, so Mr. Hawley should earn sentence credit from the day of sentencing, February 10, 2017, amounting to time served on for his two consecutive three month sentences.

Prior to 1981, what constituted legal cause for the stay of execution of sentence had not been defined in detail. See *State v. Braun*, 100 Wis. 2d 77, 85, 301 N.W.2d 180 (1981). Wis. Stat. § 973.15(8)(a) codified legal cause in 1981. (App. 181).

Historically, it has been recognized that a stay pending appeal is appropriate, see *Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881), and stays of execution have been allowed in other situations, see, e. g., *Weston v. State*, 28 Wis. 2d 136, 135 N.W.2d 820 (1965). *Braun*, 100 Wis. 2d at 85. However, a stay of execution for the purpose of personally accommodating a criminal defendant has never been sanctioned. *Id.* Such a stay is not for legal cause. *Id.*

The Wisconsin Legislature responded to the *Braun* ruling, passing 1981 Assembly Bill 736 to create Wis. Stat. § 973.15(8). (App. 181). This law authorized judges to stay sentences for up to 60 days to accommodate defendants. The Legislative note echoes the *Braun* opinion:

Note: Subsection (8) has been added to specify the circumstances under which execution of a sentence of imprisonment may be stayed. Paragraph (a) references the rule of *Reinex v. State*, 51 Wis. 152

(1881) and *Weston v. State*, 28 Wis. 2d 136 (1965), whereby execution can be stayed for "legal cause", such as during the pendency of an appeal. Paragraph (b) cross-references the probation statute. Paragraph (c) is new. It allows the court to delay the commencement of a sentence for up to 60 days. The Wisconsin Supreme Court recently held that courts have no authority to stay execution of a sentence of imprisonment in the absence of such a statutory provision or legal cause. *State v. Braun*, 100 Wis. 2d 77 (1981).

(App. 181). Therefore, the legal cause statute authorizes stays of a sentence pending appeal and short stays to consolidate sentencing of one defendant on multiple charges.

A defendant appealed and filed for a stay of execution of his sentence in the Wisconsin Supreme Court. *Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881). The Supreme Court found that both it and the trial court had the power to grant a stay pending appeal. *Id.* However, it dismissed the motion because the trial court is better suited to exercise its power to issue a stay of sentence pending appeal, being more familiar with the case. *Id.*

A trial court did not have authority for its multiple stays of the execution of the sentence for the purpose of having a defendant available to testify at some future session of the grand jury. *Drewniak*, 239 Wis. at 482; 89. The defendant was convicted in Waukesha County of a criminal conspiracy related to slot machines on July 19, 1938. *Id.*, p. 477. He appealed, and his conviction was affirmed, with remittitur back to the trial court on February 1, 1939. *Id.* Instead of serving his six month sentence, the circuit court issued multiple stays of sentence for the

defendant to appear as a witness in grand jury proceedings until March 15, 1940. *Id.*, pp. 477-478. The defendant and other co-defendants filed orders to show cause and then writs of error. *Id.* The defendants surrendered on January 24, 1941 and immediately filed writs of habeas corpus in Milwaukee County, obtaining release on January 31, 1941. *Id.*, pp 478-479.

The Supreme Court ultimately found that the Waukesha County trial court had exceeded its authority for a stay once the appeal expired. *Drewniak*, 239 Wis. at 489. The later stays of sentence were a nullity. *Id.* The defendant's sentence continued to run and expired six months from February 1, 1939, the date of remittitur after unsuccessful appeal, despite serving approximately a week in custody. *Id.*

The *Drewniak* Court reviewed Federal and State precedent, focusing on separation of powers discussed in *Ex parte United States*, 242 U.S. 27, 37 S.Ct. 72 (1916); and *In re Webb*, 89 Wis. 354, 62 N.W. 177 (1895). *Drewniak*, 239 Wis. at 486. All of the cases recognize the fact, that for what in the *Webb* case is called legal cause, the court may grant temporary stays. *Id.* Such stays, however, can only be granted for good cause, having to do with the sentence itself, and not on grounds which have no relation to the action in which the sentence is pronounced and are more properly for the consideration of the governor, in whom the power to pardon is vested, rather than the judiciary. *Id.*

A circuit court had no authority to grant a suspension of defendant Webb's six month jail sentence until further order of the court. *Webb*, 62 N.W. at 177. [T]he period of imprisonment, in contemplation of law, commenced March 16, 1894, when the defendant was in custody and failed to pay the fine imposed against him, and he could not be

lawfully imprisoned after it had expired. *Id.*, p. 179. The court order of October 12, 1894 committing Webb to jail for up to six months, was not merely erroneous; in making it, the court exceeded its jurisdiction. *Id.* The petitioner's demurrer to the respondent's return must be sustained, and he is entitled to be discharged from custody. *Id.*

In *Ex Parte United States*, the U.S. Supreme Court in effect held a stay void because it was unconstitutional—that is, that the court by way of granting a stay was in fact exercising a power that belonged to the executive, not to the judiciary. *Drewniak*, 239 Wis. at 488. It clearly indicated that the power of the trial court to stay execution was limited to a temporary purpose having relation in some legal way to the sentence. *Id.* When the trial court goes beyond that limit and stays execution of sentence for reasons having no relation to the sentence, it exceeds its power and its act is void. *Id.* It invades the legislative field as well as that of the executive. *Id.*

There the U.S. Supreme Court pointed out that ultimately a court's power was limited by the doctrine of separation of powers. See *Shumate*, 107 Wis. 2d at 466. Under that doctrine, power is assigned to the legislature to enact laws, to define crimes, and to fix the degree and method of punishment; to the judiciary is assigned the power to try offenses under the law and to impose punishment within the limits set by the legislature; and to the executive is assigned the power to relieve from the punishment fixed by law. *Id.*

The inherent power of a circuit court to stay execution of a sentence for legal cause does not include the power to stay sentence while a collateral attack is being made on the conviction by habeas corpus proceedings in the federal court system. *Shumate*, 107 Wis. 2d at 464. Once a defendant has

exhausted all remedies in this court system, the trial court has no choice but to remand the defendant immediately to the executive authority of the state for incarceration. *Id.*, p. 466. The Wisconsin Statutes do not authorize such a stay, and the federal system has both the power and is better positioned to rule on a stay. *Id.*, p. 469.

A stay after conviction where not sanctioned by the narrow exceptions of the statute or common law directly contravenes the public policy stated by the legislature. See *Braun*, 100 Wis. 2d at 86-87. Since the Judicial Council Note makes specific reference to *Braun*, it seems clear that "legal cause," for purposes of section 973.15(8)(a), should be given the narrow interpretation given that term by the supreme court in *Shumate*. 76 Op. Att'y Gen. 165, 167 (1987); (App. 185).

The Wisconsin Supreme Court held that a two day stay of execution of a sentence to consolidate sentencing matters was within a trial court's jurisdiction. *Weston*, 28 Wis. 2d at 147. The court arraigned Weston on murder and two charges of armed burglary. *Id.*, p. 141. The burglary charges were continued pending the murder trial. *Id.* A jury returned of verdict of guilty for second-degree murder on Saturday, February 8th. *Id.*

Weston indicated he was considering a change of plea on the armed burglary charges from not guilty to guilty. *Weston*, 28 Wis. 2d at 141. The court and parties agreed that the burglary charges would be addressed on Monday, February 10th. *Id.* Then the court imposed a sentence of 25 years on the murder conviction, to start as of noon February 8th, but stayed execution of the sentence until February 10th. *Id.* The court was silent on whether the sentence would be consecutive or concurrent. *Id.*

On February 10th, Weston filed an affidavit of



prejudice against the trial judge for the burglary charges. *Weston*, 28 Wis. 2d at 141. The court acknowledged the affidavit and directed that the 25 year murder sentence was modified to run consecutive to any prior sentences. *Id.* *Weston* appealed the modification. *Id.* The Supreme Court held that the trial court retained the jurisdictional authority to determine whether the sentence would run consecutively or concurrently until execution of the sentence. *Id.*, p. 147. Deferring execution or imposition of the sentence for two days in order to consolidate other matters before the same court affecting the same defendant was authorized under the sentencing statutes. *Id.*

The application of *Weston* is limited. See *Shumate*, 107 Wis. 2d at 465. These were closely related proceedings within the state court system itself, which proceedings could have an effect on the disposition of the very case. *Id.* The Wisconsin Supreme Court has emphasized that the holding in *Weston* must be limited to its precise facts. See *Drinkwater v. State*, 69 Wis. 2d 60, 66, fn. 1, 230 N.W.2d 126 (1975).

The Wisconsin Supreme Court has employed legal cause to reconcile statutory conflict. See *State v. Szulczewski*, 216 Wis. 2d 495, 574 N.W.2d 660 (1998). There, the sentencing statute clashed with Wis. Stat. § 971.17, which governs the custody, care, treatment and discharge of a defendant found not guilty of a crime by reason of mental disease or defect (NGI), committed to the Department of Health and Social Services (DHSS). *Id.*, ¶¶ 8-9. Szulczewski was convicted of battery of another patient at Mendota Mental Health Institute. *Id.*, ¶¶ 4-5. At the time of the incident, he was committed to the DHSS following an NGI disposition of a murder charge. *Id.*

The circuit court sentenced Szulczewski to five years in prison on the battery charge and ordered

him immediately transferred to the Department of Corrections for assessment and placement in the Wisconsin prison system. *Szulczewski*, ¶ 6. Szulczewski moved for sentence modification, which the circuit court denied. The Court of Appeals affirmed, concluding that immediate commencement of the defendant's prison sentence was required by Wis. Stat. § 973.15. *Id.*, ¶ 7.

The Supreme Court noted that these facts put two chapters of the Wisconsin Statutes at odds. *Szulczewski*, ¶ 10. Wis. Stat. § 971.17 makes no provision for an NGI acquittee in the event the NGI acquittee, like the defendant in this case, is convicted of a crime while under a Chapter 971 commitment. *Id.* Wis. Stat. § 971.17(1) does not on its face authorize the discharge of an NGI acquittee for imprisonment upon sentence for a crime while § 973.15 requires immediate imprisonment of a convicted defendant, with no exception made expressly for NGI acquttees. *Id.*, ¶ 14. A circuit court's imposition of an immediate sentence under § 973.15(1) would run counter to the requirement in § 971.17 that NGI acquttees be committed to the DHSS until discharged from the commitment under chapter 971. *Id.*

The purpose of the NGI statute is... two-fold: to treat the NGI acquittee's mental illness and to protect the acquittee and society from the acquittee's potential dangerousness. *Szulczewski*, ¶ 22, citing *State v. Randall*, 192 Wis. 2d 800, 833, 532 N.W.2d 94 (1995). The criminal statutes and the resulting judgment of conviction and sentence are, on the other hand, designed to accomplish the objectives of deterrence, rehabilitation, retribution and segregation. *Id.* Based on the legislature's intent in criminalizing battery by a prisoner under Wis. Stat. § 940.20(1), the Supreme Court concluded the legislature intended NGI acquttees to experience the analogous consequences set forth in the criminal

code. *Id.*, ¶ 25. It is also reasonable to conclude that the legislature intended to effectuate the goals of the NGI statutes, including treatment of an NGI acquittee's mental illness and behavioral disorders, even when an acquittee commits a subsequent criminal offense. *Id.*

The Supreme Court concluded that a circuit court can harmonize and give effect to both statutes and to the objectives of the legislature if the statutes authorize the circuit court to make a reasoned determination about imposing or staying a prison sentence on the basis of the facts of each case. *Szulczewski*, ¶ 26. Legal cause to stay the sentence gave the trial court the power to weigh the competing objectives of the two statutes. *Id.* Therefore, legal cause helped harmonize a problem of conflicting statutes. *Id.*; See *Bingenheimer*, 129 Wis. 2d at 107.

Unfortunately, the trial court in this case failed to note that the *Szulczewski* Court employed legal cause to reconcile statutory conflict (App. 161-172; 46:18-29). Instead, this case presents a factual situation with no statutory conflict.

Probation under Wis. Stat. § 973.09 is an alternative to a sentence. *Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43, 45 (1974). The view that probation is not a sentence and that the imposition of incarceration as a condition of probation is likewise not a sentence has been generally accepted. *Id.*

A court may not impose a sentence consecutive to a term of probation. *State v. Maron*, 214 Wis. 2d 384, 395, 571 N.W.2d 454 (Wis. App. 1997). ...[N]othing in the language of § 973.15(1) or (2) or its legislative history indicates that "sentence" is intended to include the imposition of probation. *Id.* For the same reasons... § 973.15(2) does not permit a court to order a sentence to be served consecutive to jail time imposed as a condition of probation. *Id.*

At briefing for *Maron*, the State argued that prohibiting sentences consecutive to conditional time would thwart the punitive purposes of the court's sentencing order. *Maron*, 214 Wis. 2d at 394. While the court sympathized with the State's frustrations, it could not rewrite the statutes:

We do not dispute that there may be good reasons for permitting a sentence to be made consecutive either to a term of probation or to jail time served as a condition of probation, such as the reasons the trial court articulated here. However, those are policy considerations that must be addressed to the legislature, not this court.

*Id.*, p. 395. The *Maron* court did not cite legal cause as a way to preserve or enforce the punitive aspects of a sentence that cannot be consecutive to jail as a condition of probation.

The separation of powers reasoning in *Maron* applies to this case. [The] judiciary is assigned the power to try offenses under the law and to impose punishment within the limits set by the legislature. See *Shumate*, 107 Wis. 2d at 466. Allowing a trial court to seek punishment or enforcement of punishment via legal cause, beyond the limits of the statutes, would infringe upon the legislative role and violate separation of powers. *Id.* The legislature has had over four decades to legalize sentences consecutive to probation or jail as a condition of probation, but it has declined that opportunity. In contrast, the legislature acted promptly to sanction stays up to 60 days for the convenience of defendants after the *Braun* ruling. (App. 181).

The trial court in this case formulated a sentence of three months of jail on both counts, to be

served consecutively. (App. 120; 44:16). This sentence was proper and legal. After discussion with counsel, the trial court correctly ruled that it could not order its sentence consecutive to Mr. Hawley's jail as a condition of probation in Dane County. (App. 121-122; 44:17-18).

However, the court sought to accomplish the same result through an improper stay of sentence. (App. 122-123; 44:18-19). It did not explain that it based the stay on legal cause until 13 months later at the March 2018 motion hearing. (App. 136; 45:11). The trial court admitted it wasn't an expert on legal cause (App. 137; 45:12).

The trial court did not realize that legal cause means that a stay or release on bail is appropriate only when the defendant has the right to pursue within the Wisconsin court system some relief against the sentence or conviction. *Shumate*, 107 Wis. 2d at 465. It erroneously found the notion of a stay pending completion of jail as a condition of probation analogous to a stay pending appeal. (App. 138; 45:13). It erroneously found a 14 month stay in this case analogous to a two day stay of execution to consolidate sentencing matters before one judge in *Weston* despite case law directing that *Weston* must be limited to its precise facts. See *Drinkwater v. State*, 69 Wis. 2d 60, 66, fn. 1, 230 N.W.2d 126 (1975); (App. 171; 46:28).

Permitting a trial court to broadly employ legal cause to justify the stay of Mr. Hawley's sentence would itself create statutory conflict between Wis. Stat. §§ 973.15(1), 973.15(2), 973.15(8), and 973.09. Statute sections within the same subject matter should be construed together. See *Clausen*, 105 Wis. 2d at 244.

A trial court cannot use legal cause under Wis. Stat. § 973.15(8) to accomplish what is explicitly

forbidden in Wis. Stat. §§ 973.15(1) and 973.09 under *Prue* and *Maron*. Employment of legal cause beyond the scope of *Shumate* is only appropriate to harmonize statutory conflict, not create it. See *Szulczewski*, ¶ 26. Expanding legal cause to the facts of this case would allow sentencing judges to infringe on probation and functionally make jail as a condition of probation a sentence, contrary to several sections of the sentencing statute and decades of precedent.

Voiding the trial court's improper stay and granting sentence credit from the date of sentencing is the proper remedy for the trial court's error. As in *Webb* and *Drewniak*, voiding a stay may appear to be a windfall to the defendant. However, Mr. Hawley has served substantially more jail time than either of those defendants, both in general and for this case in particular, even though all three defendants were ordered to serve six months in jail.

He began serving his jail sentences in Columbia County Case 2016-CF-41 on August 10, 2016, finishing on January 14, 2017. (App. 127-128; 45:2-3). During that time, he began 18 months of jail as a condition of probation in his Dane County Cases on October 28, 2016, forthwith. (App. 128-129; 45:3-4). He completed the remaining 9 days in Columbia County Case 2011-CF-97 from January 15, 2017 to January 24, 2017 after application of presentence and good time credits. (App. 131-132; 45:6-7).

On the date of sentencing in this case on February 10, 2017, Mr. Hawley was not serving any previous sentence. If this Court were to deny relief and Mr. Hawley successfully completes his Dane County probation, his time in custody from February 10, 2017 to April 20, 2018 would ultimately not be credited to any case.

Granting Mr. Hawley six months of sentence credit for this case is the proper remedy after voiding

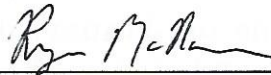
the stay. Moreover, Mr. Hawley has served 46 additional days in custody solely for this case from his ultimate jail report date of May 4, 2018 until his stay pending this appeal ordered on June 19, 2018. (32; 39:1-5).

### CONCLUSION

This Court must void the stay and grant time served sentence credit starting from February 10, 2017. A stay of sentence pending completion of jail as a condition of probation cannot stand under Wisconsin law. Legal cause is a specific judicial power allowing stays pending appeal and harmonization of statutory conflict that does not apply to the facts of this case.

Signed at Madison, WI,

This 21st of December, 2018:



---

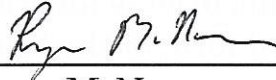
Ryan McNamara  
State Bar No. 1053053  
Attorney for Caleb J. Hawley

P.O. Box 1857  
Madison, WI 53701-1857  
608-467-0331 phone

## CERTIFICATION

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 proportional serif font. The length of this brief is 5,266 words.

Signed:



---

Ryan McNamara  
State Bar No. 1053053  
Attorney for Caleb J. Hawley

P.O. Box 1857  
Madison, WI 53701-1857  
608-467-0331 phone



CERTIFICATION OF COMPLIANCE  
WITH RULE 809.19(12)

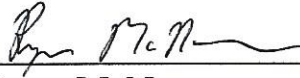
I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 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.

Signed:



---

Ryan McNamara  
State Bar No. 1053053  
Attorney for Caleb J. Hawley

P.O. Box 1857  
Madison, WI 53701-1857  
608-467-0331 phone