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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

Case No. 2018AP1601-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CALEB J. HAWLEY,

Defendant-Appellant.

**ON APPEAL OF THE CIRCUIT COURT'S
JUDGMENTS OF CONVICTION AND ORDER
DENYING SENTENCE CREDIT, THE HONORABLE
JOSEPH G. SCIASCIA PRESIDING, IN DODGE
COUNTY CASE 2015CM000216.**

BRIEF OF THE PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Whether the circuit court appropriately stayed execution of sentence for legal cause under Wis. Stat. § 973.15(8).

This Court should answer: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case may be resolved by application of established legal principles to the facts of record. Briefs will fully develop and explain the issues pursuant to Wis. Stats. §§ 809.22 and 809.23.

STATEMENT OF THE CASE

Defendant-Appellant Caleb J. Hawley was convicted in Dodge County Case Number 2015CM000216 of two counts of Theft-False Representation <=\$2,500 as a repeater under, Wis. Stats. §§ 943.20(1)(d) and 939.62(1)(a) on December 22, 2015 (R. 19), for soliciting money from businesses under false pretenses to fundraise money for victim RS who had cancer (R. 1) The circuit court withheld sentence on each count and placed Hawley on probation for 24 months. (R. 19)

Subsequently, while on probation for the above convictions in Dodge County, Hawley committed several crimes throughout Wisconsin. In fact, Hawley committed several crimes in Columbia County on January 26, 2016, only one month after he was placed on probation in Dodge County. In Columbia County Case Number 2016CF000041, Hawley was charged with felony Possession of Narcotic Drugs as a repeater, Possession of Drug Paraphernalia as a repeater, and Theft-Movable Property <=\$2500 as a repeater, in violation of Wis. Stats. §§ 961.41(3g)(am), 961.573(1), 943.20(1)(a), 939.62(1)(b), and 939.62(1)(a). In Dane County, Hawley

committed additional crimes on April 30, 2016, May 15, 2016, and June 9, 2016.

Subsequently, Hawley was convicted and sentenced on August 9, 2016 in Columbia County Case Number 2016CF000041. Hawley was convicted of Possession of Narcotic Drugs as a repeater and sentenced to 90 days jail. Hawley was also convicted of Theft-Movable Property <=\$2500 as a repeater and sentenced to 120 days jail, consecutive to the 90 day jail sentence.

As a result of Hawley's criminal convictions in Columbia County and his criminal charges in Dane County, Hawley's probation in Dodge County Case Number 2015CM000216 was revoked by the Wisconsin Department of Corrections (DOC) on October 14, 2016. (R. 21)

In Dane County Case Number 2016CF001100, Hawley was convicted on October 28, 2016 of felony Forgery-Uttering and Theft-Movable Property <=\$2,500, under Wis. Stats. §§ 943.38(2) and 943.20(1)(a). On the Forgery conviction, the court withheld sentence and placed Hawley on probation for 5 years with 6 months of conditional jail time. On the Theft conviction, the court withheld sentence and placed Hawley on probation for 1 year, concurrent to the Forgery sentence and concurrent to Dane County Case Number 2016CF001360.

Additionally, on October 28, 2016, in Dane County Case Number 2016CF001360, Hawley was convicted of felony Armed Robbery as a repeater under Wis. Stats. §§ 943.32(2) and 939.6(1)(c). The court withheld sentence and placed Hawley on 5 years of probation with 12 months conditional jail, concurrent to Dane County Case Number 2016CF001100. Both terms of conditional jail time ordered in Dane County Case Numbers 2016CF001100 and 2016CF001360 were to run consecutive to each other, totaling 18 months of conditional jail time.

Hawley's sentencing after revocation hearing in Dodge County Case Number 2015CM000216 was not held until February 10, 2017, *after* he was sentenced in the Columbia County case and both Dane County cases. (R. 44) The circuit court sentenced Hawley after revocation on February 10, 2017, to jail sentences of 3 months each on both Theft counts in Dodge County Case Number 2015CM000216. (R. 25, R. 44) Those sentences were ordered consecutive to each other and consecutive to any other sentence. The circuit court then selected a report date of April 20, 2018, when Hawley would start his sentence. (R. 44:19)

On February 6, 2018, Hawley filed a Notice of Motion and Motion to Commence Sentence. (R. 29) Hawley stated that his sentence in Dodge County Case Number 2015CM000216 "was ordered to be served consecutive to any other sentence and was to commence on or before April 18, 2018." (*Id.*) Hawley explained that the reason the court ordered it to commence on or before April 20, 2018 was because the court thought that Hawley was serving another sentence at the time of sentencing that would end on or before April 20, 2018. (*Id.*) Hawley argued that he was in fact serving a sentence because he was serving conditional jail time in Dane County Case Numbers 2016CF00100 and 2016CF001360. (*Id.*) As a result of Hawley's analysis, he requested the sentence in Dodge County Case Number 2015CM000216 commence forthwith, thus deeming it a time served disposition. (*Id.*)

The circuit court held a Motion Hearing on March 7, 2018, where Hawley argued that "the Judgment reflects that the sentenced (sic) commenced on or before April 20th, my argument is that it should have already commenced before April 20th and would also be considered served..." (R. 45:2) Hawley further argued that the Dodge County court could not make his jail sentence consecutive to the Dane County conditional jail term he was serving because conditional jail

time is not a sentence. (R. 45) Obviously, the State disagreed and argued to the court, “You gave him a start date. We didn’t run this consecutive to conditional jail time. That’s prohibited. You gave him a start date for legal cause.” (R. 45:10) Furthermore, the State argued that “what [Hawley] did here in Dodge County warranted lengthy confinement. And certainly it should start when he got done with whatever conditional time he had in Dane. You agreed.” (*Id.*) Finally, the State asserted, “We were well aware of the situation. You were well aware [Hawley] was doing conditional time. We all knew when he was going to finish that up. There is nothing unlawful about that. He is not entitled to time served.” (R. 45:11) The circuit court held that under Wis. Stat. § 973.15(8), the sentencing court may stay execution of a sentence for legal cause and denied Hawley’s motion. (R. 45)

Subsequently, Hawley filed a Notice of Motion and Motion to Reconsider on April 16, 2018. (R. 31) A second Motion Hearing was held on April 20, 2018. (R. 46) The circuit court denied Hawley’s motion, but did move the stayed report date to May 4, 2018 at Hawley’s request. (R. 46:4-5, R. 32)

STANDARD OF REVIEW

The scope of the circuit court’s authority to stay execution of sentence of imprisonment for legal cause under Wis. Stat. § 973.15(8) presents a question of statutory interpretation. The interpretation and application of a statute presents questions of law that are reviewed *de novo*. See *State v. Alger*, 2015 WI 3, 360 Wis. 2d 193, 858 N.W.2d 346. Likewise, whether a defendant is entitled to sentence credit is a question of law the Court of Appeals reviews *de novo*. *State v. Brown*, 324 Wis. 2d 236, 781 N.W.2d 244 (Ct. App. 2010).

ARGUMENT

THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT STAYED EXECUTION OF HAWLEY'S SENTENCE AND DENIED HAWLEY'S MOTION FOR SENTENCE CREDIT.

- I. The circuit court lawfully stayed execution of Hawley's sentence for legal cause under Wis. Stat. § 973.15(8).

Wisconsin Statute § 973.15(8)(a) authorizes a court to stay a sentence for legal cause. *State v. Szulczewski*, 216 Wis. 2d 495, 574 N.W.2d 660 (1998). The Wisconsin Supreme Court concluded "that a circuit court can 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." *Id.* ¶ 26. The legislature has authorized circuit courts to exercise this kind of discretion in staying sentences of imprisonment by providing in Wis. Stat. § 973.15(8)(a) that a court may stay a sentence "[f]or legal cause." *Id.* ¶ 27. Here, the circuit court properly exercised its discretion when it stayed execution of Hawley's sentence for legal cause.

In this case, Hawley was sentenced after revocation on February 10, 2017. (R. 44) The circuit court ordered Hawley to serve a total of 6 months in jail, 3 months in jail on each count, consecutive to each other and consecutive to any other sentence. (*Id.*) The circuit court specifically noted its reasons for this sentence:

So I find that the appropriate sentence, the minimum amount of time that would do justice to the seriousness of the offense, the need to protect the public, the fact that not one red cent of restitution was paid is... [t]here months on each Count consecutive to each other and consecutive to any other sentence previously imposed.

(R. 44:16) There was discussion between the circuit court, Hawley, and the State about staying the execution of the sentence until after Hawley's conditional jail time in Dane County was served. (R. 44) Everyone was aware of the conditional jail time that Hawley was serving at the time of sentencing and Hawley's prior counsel did not object. (*Id.*) In addition, Hawley requested that he be permitted to serve his Dodge County jail term in Dane County after he was finished serving his conditional jail time in the Dane County cases. (R. 44:19) The circuit court lawfully stayed execution of Hawley's sentence of 6 months in jail until April 20, 2018.

When reviewing Hawley's Motion for Sentence Credit, the circuit court specifically held:

The [c]ourt finds that the purpose of ordering a consecutive sentence is so that the punishment that's imposed in this case is not bundled with some other time that [Hawley's] serving. And if he is serving conditional jail time, that would be legal cause to adjourn the commencement of this sentence.

(R. 45:14)

In Wisconsin, there is no precise or detailed definition of what constitutes "legal cause" for the stay of execution of sentence. *Szulczewski*, 216 Wis. 2d 495; *See also State v. Braun*, 100 Wis. 2d 77, 301 N.W.2d 180 (1981).

Legal cause refers to a stay based on *the legality of the conviction or the duty to enforce the sentence*, and has been explained as '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.'

Szulczewski, 216 Wis. 2d 495 ¶ 28 (emphasis added); *Drewniak v. State ex rel. Jacquest*, 239 Wis. 475, 1 N.W.2d 899 (1942). The State expressed this very point at the April 20,

2018 Motion Hearing on Hawley's Motion to Reconsider. The State informed the circuit court,

[L]egal cause refers to a stay based on the legality of the conviction or the duty to enforce the sentence. And that's what you did back in February '17. You wanted to enforce the sentence of two 90-day consecutive jail sentences and you are not going to be wiped out because he lucked into getting conditional time in Dane County... You want to ensure the duty to enforce the sentence you give.

(R. 46:16-17)

There was also discussion that same hearing regarding examples that courts have previously deemed legal cause. (R. 46)

Historically, a stay pending appeal is a stay for legal cause. *See Reinex v. State*, 51 Wis. 152, 8 N.W. 155 (1881). A stay to consolidate sentencing matters is also a stay for legal cause. *See Weston v. State*, 28 Wis.2d 136, 146, 135 N.W.2d 820 (1965). A stay for the purpose of personally accommodating a defendant, however, is not a stay for legal cause. *See Braun*, 100 Wis.2d at 85, 301 N.W.2d 180.

Szulczewski, 216 Wis. 2d 495 ¶ 29.

In *Szulczewski*, the Wisconsin Supreme Court held:

Granting a stay of execution of imprisonment for an NGI acquittee is consistent with the teachings of these cases. The 'legal cause' for granting a stay of imprisonment has to do with the sentence itself, not having to do with grounds unrelated to the action in which the sentence is pronounced. *See Drewniak*, 239 Wis. at 486, 1 N.W.2d 899. A stay under the circumstances of this case is analogous to a stay to consolidate sentencing matters, which has been held to be a stay for legal cause. *See Weston*, 28 Wis.2d at 146, 135 N.W.2d 820. The stay has nothing to do with personal accommodation of the defendant. *See Braun*, 100 Wis.2d at 85, 301 N.W.2d 180. In addition, the decision to grant a stay for an NGI acquittee properly belongs to the judiciary in

exercise of judicial discretion in sentencing rather than to the governor in exercise of the power to pardon. *See Drewniak*, 239 Wis. at 486, 1 N.W.2d 899.

216 Wis. 2d 495 ¶ 30.

The instant issue correlates to the same analysis that the Wisconsin Supreme Court employed in *Szulczewski*. Although the NGI commitment was not a “sentence,” the Wisconsin Supreme Court held that a circuit court could in fact stay execution of a sentence for legal cause until after an NGI commitment was served. Similarly, conditional jail as a term of probation is not a “sentence.” However, the circuit court has the discretion to stay execution of a sentence until after a conditional jail term is served based on *the legality of the conviction or the duty to enforce the sentence*. *Szulczewski*, 216 Wis. 2d 495; Wis. Stat. § 973.15(8). Moreover, when discussing the *Szulczewski* holding at the April 20, 2018 Motion Hearing, the circuit court explicitly expressed, “if commitment (sic) under 971.17 constitutes legal cause, the [c]ourt would have the option to impose a sentence of imprisonment immediately or stay execution of the sentence for NGI acquittal. I infer from that a parallel situation applies here and that I would have the authority to stay execution for somebody who is doing a condition of probation.” (R. 46:24)

“A sentencing proceeding is not a game, and when a trial court mistakenly imposes a criminal disposition that is not authorized by law, the result *should not be a windfall to the defendant*.” *State v. Maron*, 214 Wis. 2d 384, 396, 571 N.W.2d 454, 459 (Ct. App. 1997) (emphasis added); *State v. Upchurch*, 101 Wis. 2d 329, 336, 305 N.W.2d 57, 61 (1981). Meaning, the defendant should not be gifted with a concurrent time served disposition on a revocation because he chose to resolve his cases in the order he believed would allow him to skirt the system and escape additional penalty. The circuit court’s intent was clearly to punish Hawley for the

underlying conduct and his inability to comply with the terms of his supervision in Dodge County. At the April 20, 2018 Motion Hearing, the circuit court stated, “[f]rom my standpoint, it’s a get out of jail free card. I get out of jail free because I scheduled my plea on one case while I was doing my time on the other and therefore you can’t add anything. It’s a game.” (R. 46:17)

Hawley is treating the Wisconsin Court System like a joke. Not surprisingly, after Hawley was sentenced in the Dane County cases on October 28, 2016, he went back to the circuit court in Columbia County to request sentence credit for time served. In Columbia County Case Number 2016CF000041, Hawley was sentenced on August 9, 2016 to 90 days jail. (R. 45:5) Hawley ultimately convinced the circuit court to grant him sentence credit making similar arguments, asserting that the Columbia County 90 day jail sentence could not be consecutive to the subsequently ordered 18 months of conditional jail in the Dane County cases. (R. 45:5-6) The Columbia County circuit court agreed that since Hawley had already served 81 days and only 9 left to serve on his 90 day jail sentence. (*Id.*) In light of that, the Columbia County circuit court granted him time served. (*Id.*) Thus, Hawley escaped serving an additional 90 day jail sentence in that case which is what he is trying to do here. The State recognized this and informed the circuit court in the present case at the March 7, 2018 Motion Hearing, “So she (Hawley’s counsel) is trying to recreate history based on whatever success she had in the Columbia County case.” (R. 45:11)

A sentencing proceeding is not a game. To grant sentence credit for time served would frustrate the circuit court’s intent and purpose in distributing the particular sentence that it ordered. It would undermine the legality of the conviction and the circuit court’s duty to enforce the sentence. To grant sentence credit for time served would encourage defendants to manipulate the system and use the

“tricks up our sleeve” as so eloquently stated by Hawley’s counsel. (R. 46:16)

- II. Should the Court find that the circuit court’s stay of sentence execution was unauthorized, the proper remedy is resentencing.

Hawley argues that his sentence should be voided and he should be granted sentence credit. However, the same case that Hawley so heavily relies on states, “[a]s a general rule, resentencing is the proper method to correct a sentence which is not in accord with the law.” *Maron*, 214 Wis. 2d 384, 395; *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841, 844 (Ct. App. 1996). The Court of Appeals stated that resentencing was the appropriate remedy – not granting sentence credit for time served. Additionally, “[a] defendant is not entitled to sentence credit for periods of presentence custody during which the defendant was serving an unrelated sentence.” *State v. Trepanier*, 357 Wis. 2d 662, 855 N.W.2d 465 (Ct. App. 2014). Hawley was serving a jail sentence in Columbia County and conditional jail terms in Dane County. Thus, Hawley should not be granted sentence credit in this case for periods of time that he was serving jail terms for different criminal conduct in two other Wisconsin counties prior to his revocation sentence.

Finally, Wisconsin courts have long held that “the statutory purpose is important in discerning the plain meaning of a statute.” *State v. Wiskerchen*, 2019 WI 1 ¶ 21, 385 Wis. 2d 120, 921 N.W.2d 730; *Westmas v. Creekside Tree Serv.*, 2018 WI 12, ¶ 19, 379 Wis. 2d 471, 907 N.W.2d 681; see also *Kalal*, 271 Wis. 2d 633, ¶ 48. Specifically, the Wisconsin Supreme Court held as recently as January 4, 2019 that “statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, *to avoid absurd or unreasonable results.*” *Wiskerchen*, 2019 WI 1 ¶ 21 (emphasis added); see also *Kalal*,

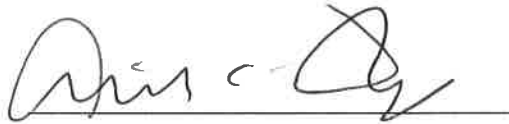
271 Wis. 2d 633 ¶ 46. Therefore, when courts are construing a statute, they “favor a construction that fulfills the purpose of the statute over one that defeats statutory purpose.” *Wiskerchen*, 2019 WI 1 ¶ 21. It would be an absolutely absurd and unreasonable result for Hawley to get sentence credit and not actually have to serve a sentence for getting revoked in this case.

CONCLUSION

For the reasons discussed above, the State respectfully asks that this Court affirm the circuit court’s denial of Hawley’s motion for sentence credit.

Dated this 25th day of February, 2019.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "G. Thompson", is written over a horizontal line.

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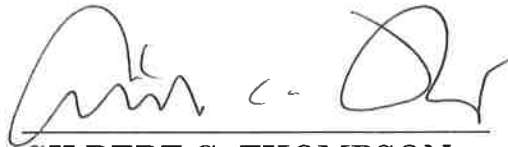
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CERTIFICATION

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 3,089 words.

Dated this 25th day of February, 2019.

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GILBERT G. THOMPSON
Assistant District Attorney

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 25th day of February, 2019.

A handwritten signature in black ink, appearing to read 'Gilbert G. Thompson', written over a horizontal line.

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