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**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

REPLY BRIEF OF DEFENDANT-APPELLANT
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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.

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 the 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. Reply Argument on Legal Cause

Legal cause to stay a sentence is a judicial power with specific, limited application. See *State v. Shumate*, 107 Wis. 2d 460, 467, 319 N.W.2d 834 (1982) It is considered that this court is committed to the doctrine that 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, 489,

1 N.W.2d 899 (1942). Courts are concerned about separation of powers, and judicial infringement upon the legislative and executive functions. *Id.* at 466.

The trial court viewed legal cause expansively and incorrectly. It erroneously found a stay pending completion of jail as a condition of probation analogous to a stay pending appeal. (App. 138; 45:13). It erroneously found this 14 month stay analogous to a two day stay of execution to consolidate pending sentencing matters before one judge in *Weston v. State*, 28 Wis. 2d 136, 135 N.W.2d 820 (1965). (App. 171; 46:28). These were closely related proceedings within the state court system itself, which proceedings could have an effect on the disposition of the very case. *Shumate*, 107 Wis. 2d at 465. 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 State endorses this incorrect vision of legal cause. It fails to address the Supreme Court's imperative to reconcile statutory conflict in *State v. Szulczewski*, 216 Wis. 2d 495, ¶ 10, 574 N.W.2d 660 (1998). 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.

A circuit court's imposition of an immediate sentence under § 973.15(1) would run counter to the requirement in § 971.17 that NGI acquittees be committed to the DHSS until discharged from the commitment under chapter 971. *Szulczewski*, ¶ 14. Therefore, the Supreme Court concluded that the phrase "[f]or legal cause" in Wis. Stat. § 973.15(8)(a)1 includes an NGI commitment pursuant to chapter 971 and that a circuit court may exercise its

discretion in determining whether to stay execution of a prison sentence imposed on an NGI acquittee. *Id.*, ¶ 14.

When two statutes conflict, a court is to harmonize them, scrutinizing both statutes and construing each in a manner that serves its purpose. *Bingenheimer v. DHSS*, 129 Wis. 2d 100, 107, 383 N.W.2d 898 (1986). The Supreme Court properly harmonized the conflict by a narrow expansion of legal cause. See *Szulczewski*, ¶¶ 32-33.

The probation and sentencing provisions of Chapter 973 do not clash. Vast expansion of legal cause would be imprudent when both statutes are serving their purpose. 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 (Ct. App. 1992). 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 (Ct. App. 1997).

In the absence of an existing sentence, a circuit court's sentence must execute promptly, whether or not a defendant is on probation. See Wis. Stat. § 973.15(1). Timely execution of the sentence does not frustrate a sentencing court's objective of punishment, since the defendant serves time in custody. If the defendant is later revoked from probation, the second sentencing judge decides whether to credit that time in custody concurrently or consecutively to the first sentence. See *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

The stay in this case created a conflict of law and encroached on the legislature's established directives regarding sentencing and probation. While there was no provision for discharging an NGI acquittee convicted of a crime, the Department of Corrections has the power to revoke probation after a

criminal activity during probation. See *Szulczewski*, ¶¶ 10, 14. The stay in this case infringed upon the executive function of the Department of Corrections. The trial court's finding that a stay due to jail as a condition of probation is parallel to the NGI statute cannot withstand de novo review.

C. Reply Argument on Sentence Credit

The proper remedy for an illegal stay of sentence is to void it, not resentencing as the State argues. The sentence itself violated Wis. Stat. § 973.15(2) in *Maron*. See *Maron*, 214 Wis. 2d at 395. Therefore, resentencing was the proper remedy to correct a sentence not in accord with the law. See *State v. Holloway*, 202 Wis. 2d 694, 700, 551 N.W.2d 841 (Ct. App. 1996).

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). After discussion with the parties, 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). This sentence was proper and legal. The State does not dispute that the sentence was legal.

However, the court sought to accomplish the same result as a sentence consecutive to conditional jail through a stay of sentence. (App. 122-123; 44:18-19). The proper remedy for an illegal stay is to void the stay and grant sentence credit, regardless of how long the defendant was actually in custody. See *Drewniak*, 239 Wis. at 489.

Throughout argument, the State approaches Mr. Hawley's jail as a condition of probation exactly as if it were a sentence. Wisconsin law does not support this approach. 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 defendant is not entitled to sentence credit for periods of presentence custody during which the defendant was serving an unrelated sentence. See *State v. Trepanier*, 357 Wis. 2d 662, ¶ 18, 855 N.W.2d 465 (Ct. App. 2014)(emphasis added). In that case, the Court of Appeals granted the defendant credit for time in custody on a \$500 cash bond before sentencing despite also being in custody on a \$1000 civil commitment order. *Id.*, ¶¶ 23-24.

The State's reliance on *Trepanier* and claim that "Mr. 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" do not reflect the facts of this case. (Resp. Brief, p. 10). There is no dispute over presentence credit. This controversy concerns sentence credit due for time served in custody after sentencing based on an illegal stay of sentence.

There is no concern here with double sentence credit. Mr. Hawley was not serving a sentence in Dane County. He is not asking for sentence credit associated with his Columbia County sentences. There, the circuit court properly granted sentence credit for time served after sentencing. The Columbia County sentences terminated on January 24, 2017. At the time of sentencing in this case on February 10, 2017, Mr. Hawley was not serving any sentence.

The State implies that Mr. Hawley waived the right to pursue relief by not objecting to the stay of sentence immediately at sentencing. (Resp. Brief, pp.

4, 6). Consenting to an illegal stay is immaterial. See *Drewniak*, 239 Wis. at 489. Even asking for an extension of an illegal stay is immaterial. *Id.*

The court was without power to stay the execution and that power could not be conferred by consent. *Drewniak*, 239 Wis. at 489 (citing *Welhouse v. Industrial Comm.*, 214 Wis. 163, 252 N.W. 717 (1934)). Voiding the improper stay does not frustrate execution of the Dodge County sentence, because Mr. Hawley has not been sentenced in those Dane County probation cases.

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 sentence credit in this case is legally required, not absurd.

If Mr. Hawley ultimately faces sentencing after revocation in Dane County, that second sentence controls the ultimate sorting of sentence credit. See *Boettcher*, 144 Wis. 2d at 87. If sentences are consecutive, credit for time in custody after the February 10, 2017 sentence first applies to the first sentence imposed: this one in Dodge County. *Id.*

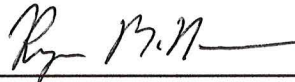
The decision regarding sentence credit is up to a Dane County judge choosing whether the Dane County sentences should be consecutive or concurrent to previous sentences. A Dodge County judge should not have power over that potential determination on potential sentences in Dane County. Enforcing one's right to sentence credit for time spent in custody when serving no other sentence is not treating the justice system like a game.

CONCLUSION

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. This Court must void the stay and grant sentence credit for time in custody beginning February 10, 2017 and ending April 20, 2018 towards the entirety of the six months of jail ordered in this case.

Signed at Madison, WI,

This 14th of March, 2019:



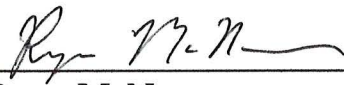
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CERTIFICATION

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 1,733 words.

Signed:



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CERTIFICATION OF COMPLIANCE
WITH RULE 809.19(12)

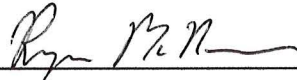
I hereby certify that:

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:

A handwritten signature in cursive script, appearing to read "Ryan McNamara", is written over a horizontal line.

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