STATE OF WISCONSIN

COURT OF APPEALS-DISTRICT III

Case No. 2018AP001623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASEY T. WITTMANN,

Defendant-Appellant.

Appeal of a Judgment of Conviction and Order
Denying Postconviction Relief, filed in the
Outagamie County Circuit Court,
the Honorable Mark J. McGinnis, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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ISSUE PRESENTED

Whether in setting the length of Mr. Wittmann's sentence, the circuit court erroneously deprived Mr. Wittmann of sentence credit, in violation of Wis. Stat. § 973.155 and Mr. Wittmann's right to equal protection.

The circuit court denied Mr. Wittmann's postconviction motion.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not requested, given Mr. Wittmann's expectation that the briefs will adequately set forth the arguments. Publication may be warranted to clarify an independent appellate standard of review, as discussed further in the argument section below.

STATEMENT OF THE CASE

I. Introduction.

Wisconsin Statute § 973.155 and case law hold that when imposing criminal sentences and determining sentence credit, courts should follow a particular order. Courts should first determine the appropriate sentence, and only after doing so, consider the defendant's entitlement to sentence credit.

In this case, the circuit court departed from the correct procedural order. The court first determined that Mr. Wittmann was entitled to 245 days of sentence credit, which is between 8 and 9 months, and then proceeded to set the length of confinement at 3 years and 9 months. The length of confinement shows that the court accounted for sentence credit when setting the sentence.

At the postconviction hearing, the court rejected that its subjective intent had been to deprive Mr. Wittmann of sentence credit, and maintained that it was the court's practice to always decide sentence credit first and then to set the sentence.

On appeal, this Court should evaluate the case under an independent standard of review. Doing so, the Court should find that Mr. Wittmann was erroneously deprived of sentence credit.

II. Factual and Procedural History.

Mr. Wittmann waived his right to a trial and instead pleaded to one count of child enticement, a violation of Wis. Stat. § 948.07. The charge alleged that Mr. Wittmann engaged in an online conversation with an undercover police officer posing as a teenager. (2). While the case was pending, Mr. Wittmann was held on a $50,000 bond. (33:4). He could not post bond, and therefore spent 245 days in custody pretrial.

On October 30, 2017, the Outagamie County Circuit Court, the Honorable Mark J. McGinnis presiding, conducted a sentencing hearing. At the start of the sentencing hearing, the court asked about pretrial sentence credit. Defense counsel opined that Mr. Wittmann had 245 days of credit, and the State indicated it would verify that number while the defense was arguing. (32:3).

Both of the parties requested confinement in rounded numbers—the State requested 5 years of initial confinement and the defense asked for 3 years of initial confinement. (32:4, 32:12).

After hearing arguments from the parties, the court made sentencing remarks. Then, the court asked the State, "did you agree on that 245 days?" (32:25; App. 108). The State said "yes." The court then declared the length of sentence: 3 years and 9 months of initial confinement and 6 years and 3 months of extended supervision. (32:25; App. 108). None of the court's sentencing comments explained how the court reached this numerical term of confinement.

Mr. Wittmann filed a postconviction motion, arguing that the court's sentence impermissibly deprived him of the sentence credit he was entitled to under Wis. Stat. § 973.155, and requesting sentence modification. (26). The State filed a response, objecting to the motion. (27).

The court held a postconviction hearing on August 8, 2018. The court stated that the procedure taken in Mr. Wittmann's case is "how I do every case." (41:9; App.122). The court always asks the State for the credit amount "before the sentencing, before we start with the arguments . . . ." (41:10; App.123). The court stated, "I am not going to change my system of doing things." (41:12; App.125). The court then stated that, "the sentence credit that was stipulated to by the parties is not the reason that I imposed a three-year-nine-month sentence of initial confinement." (41:12; App.125). The court was not "exactly sure" why it had chosen 3 years and 9 months, but "it had nothing to do with" sentence credit. (41:19; App.132). This appeal follows.

ARGUMENT

I. When sentencing Mr. Wittmann, the circuit court departed from the proper sentencing procedure and deprived Mr. Wittmann of his lawfully-earned sentence credit under Wis. Stat. § 973.155.

A. Sentencing courts should first set the sentence before determining the amount of sentence credit. Failure to follow this procedure in circumstances showing that the defendant was deprived of sentence credit amounts to an erroneous exercise of discretion

Defendants are entitled to credit toward the service of their sentence for all days spent in custody

in connection with the course of conduct for which sentence is imposed. Wis. Stat. § 973.155(1). Commonly, as in the instant case, such credit is for pretrial custody during which a defendant has been unable to post bond.

A defendant's right to sentence credit is not only statutory, but constitutional as well. Under the equal protection clause, sentence credit is required to prevent impoverished persons from spending more time in confinement than they would have had they been more wealthy, and thus able to post bond. *Klimas v. State*, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1976) ("The failure to credit pre-trial time or pre-sentence time in custody as the result of indigency means that persons similarly situated except for financial means are subject to different periods of confinement for the same crime.").

Klimas outlined a procedure for determining sentence credit. *Id.* at 252. The court should decide an appropriate sentence, and then make a sentence credit finding. *Id.* The legislature responded to *Klimas* by codifying a right to sentence credit in Wis. Stat. § 973.155. *State v. Armstrong*, 2014 WI App 59, ¶25, 354 Wis. 2d 111, 847 N.W.2d 860.

Section 973.155(2) sets forth the order in which a sentencing court should proceed when sentencing a defendant and determining sentence credit:

> After the imposition of sentence, the court shall make and enter a specific finding of the number

> of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction.

It is only "[a]fter the imposition of sentence" that the court shall make and enter a finding regarding the defendant's entitlement to sentence credit. Statutory interpretation is a question of law, reviewed on appeal de novo. *State v. Johnson*, 2009 WI 57, ¶63, 318 Wis. 2d 21, 767 N.W.2d 207. Where the words of a statute are clear, the statute must be applied according to their accepted meaning. *State ex rel. Kalal v. Circuit Court for Dane Ct'y*, 2004 WI 58, ¶¶45-46, 271 Wis. 2d 633, 681 N.W.2d 110 (setting forth the framework for statutory interpretation).

The Wisconsin Supreme Court affirmed the importance of sentencing first and determining sentence credit second in *State v. Struzik*, 90 Wis. 2d 357, 367, 279 N.W.2d 922 (1979). In *Struzik*, the defendant was sentenced to 5 years and 14 days in prison. The sentencing court first determined the amount of sentence credit, and then imposed the sentence. The resulting sentence suggested the credit amount was added to the sentence: "The peculiar length of the sentence transparently reveals that the trial court added to the appropriate sentence the time already served, so that the sentence after the application of the credit would still constitute the sentence originally determined." *Id.* at 367.

The *Struzik* court was not merely concerned with the outcome, but the erroneous nature of the sentencing procedure itself: "We conclude that the *procedure* used was an abuse of discretion." *Id.* at 361 (emphasis added). The court held that the proper procedure was as follows: "the trial court should first determine an appropriate sentence, then determine the time spent in preconviction custody, and finally credit that time toward the sentence imposed." *Id.* at 367 (citing "the procedure outlined in *Klimas*").[1] Deciding sentence credit first was improper: "This technique subverts the constitutional right of a convicted prisoner to have time previously served (in circumstances where the time should be credited) applied toward the reduction of an appropriate sentence. This procedure is a clear abuse of discretion." *Id.* at 367-68. As a remedy, the court remanded for sentence modification to 5 years with 14 days of sentence credit. *Id.*

Subsequent to *Struzik*, cases have recognized narrow exceptions to the required procedure. In *State v. Coles*, 208 Wis. 2d 328, 336, 559 N.W.2d 599 (Ct. App. 1997), the court upheld the circuit court's imposition of a "time served" sentence of 185 days. The court noted that the circuit court granted full sentence credit and simply equated that credit with the sentence selected. Where the court

[1] Although the sentence credit statute was published on May 16, 1978, and *Struzik* was decided on June 29, 1979, *Struzik* does not mention the statute, likely because the defendant in that case was sentenced on May 9, 1977, before the statute was published.

orders time served, there is no risk that the court has enlarged the sentence by the amount of sentence credit.

In *State v. Fenz*, 2002 WI App 244, 258 Wis. 2d 281, 653 N.W.2d 280, the court recognized a second narrow exception. At the sentencing hearing, the court determined that the defendant was entitled to 342 days of sentence credit. The court also determined that the defendant should receive institutional sex offender treatment, which required at least six years of incarceration. The court considered sentence credit in setting the length of sentence. *Id.*, ¶3. On appeal, the court held that the circuit court did not err by considering sentence credit due to the unique circumstances of the case.

Fenz must be narrowly read. Consideration of credit in setting the length of sentence was deemed necessary to accomplish a "very specific incarceration goal." *Id.*, ¶10. In concluding that a "court may, in specific circumstances, consider presentence credit as a factor in determining an appropriate sentence, we remain mindful of a defendant's constitutional right to receive credit for time already served." *Id.*, ¶12.

The most recent case discussing this issue is *State v. Armstrong*, 354 Wis. 2d 111. There, the circuit court considered the amount of credit the defendant was owed when setting the appropriate sentence. It was later revealed that the correct sentence credit amount was lower than believed. *Armstrong* held that correction of the credit error was

a new factor for sentence modification. The State argued that the corrected credit amount was not a new factor based in part on *Struzik*. *Id.*, ¶19 (the State arguing that consideration of credit was erroneous, and therefore, "the proper remedy would be to remand for resentencing."). The *Armstrong* court was not persuaded. The court opined that the *Struzik* procedure was meant "to avoid a clearly defined problem: a court acting with the improper purpose of depriving a defendant of sentence credit by enlarging the sentence." *Id.*, ¶27. The court concluded, "that compliance with the formulation set forth in *Klimas* and reiterated in *Struzik* is not a strict requirement when that problem is avoided." *Id.*, ¶27.[2]

Under *Coles*, *Fenz*, and *Armstrong*, failure to follow the *Struzik* procedure of sentencing first, sentence credit second, does not always result in reversible error. However, when, as in *Struzik*, the court does not express a sentencing-related purpose for considering sentence credit, and the court's sentence shows that the defendant was in fact deprived of sentence credit, reversible error occurs.

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[2] *Armstrong* noted that a footnote in *State v. Gallion*, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, listed "the length of pretrial detention" as a factor courts may consider in imposing sentence. In context, the court was citing to a list of several factors set forth in a 1977 case, *Harris v. State*, 75 Wis. 2d 513, 519–20, 250 N.W.2d 7 (1977). *Harris* was decided prior to the enactment of the sentence credit statute.

Courts should first set the appropriate sentence, and only after doing so, determine the amount of sentence credit. Failure to follow this procedure in circumstances showing that the defendant was deprived of sentence credit amounts to an erroneous exercise of discretion.

B. An independent appellate standard of review applies.

On appeal from a claim that a sentencing court erroneously departed from the correct sentencing procedure under Wis. Stat. § 973.155(2), resulting in the deprivation of sentence credit, a reviewing court should apply an independent standard of review.

Section 973.155(2) establishes an order for courts to follow in sentencing and setting sentence credit. The court first determines the appropriate sentence and then determines sentence credit. This procedure is also required to protect defendants' right to equal protection. *Struzik*, 90 Wis. 2d 357.

Circuit courts are afforded wide discretion in sentencing, but sentencing discretion is not limitless. A reviewing court will affirm a discretionary decision by a circuit court so long as the court did not erroneously exercise its discretion. *State v. Davis*, 2001 WI 136, ¶28, 248 Wis. 2d 986, 637 N.W. 2d 62. "An erroneous exercise of discretion results when the exercise of discretion is based on an error of law." *Id.* "Whether the circuit court made an error of law is a question of law we review de novo." *State v. Allen*, 2015 WI App 96, ¶9, 366 Wis. 2d 299, 873 N.W.2d 92.

As in cases involving a claim that the sentencing court relied on inaccurate information, the reviewing court should independently review the record to determine whether error occurred. *State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491 ("A reviewing court must independently review the record of the sentencing hearing to determine the existence of any actual reliance on inaccurate information.").

Under an independent standard of review, a circuit court's after-the-fact assertion of non-reliance on sentence credit is not dispositive. *See id.*, ¶48 ("A circuit court's after-the-fact assertion of non-reliance on allegedly inaccurate information is not dispositive of the issue of actual reliance.").[3] In *Travis*, the circuit court declared at a postconviction hearing that the inaccurate information at issue was not pertinent to its sentencing decision. *Id.*, ¶38. The Wisconsin Supreme Court was not persuaded by the circuit court's assertion of non-reliance. Instead, based on an independent review of the record, the court found that the court did in fact rely on the inaccurate information. *Id.*, ¶49.

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[3] Citing *State v. Groth*, 2002 WI App 299, ¶28, 258 Wis. 2d 889, 655 N.W.2d 163 (other language withdrawn in *State v. Tiepelman*, 2006 WI 66, ¶¶2, 31, 291 Wis. 2d 179, 717 N.W.2d 1). In *Groth*, the court of appeals found reliance on inaccurate information despite the circuit court's disclaimer: "Notwithstanding the postconviction court's disclaimer of reliance on the inaccurate information about beating pregnant women, we conclude, for three reasons we will explain, that the record establishes a very strong likelihood that the sentencing court did indeed rely on the information." *Id.*, ¶27.

Reviewing the record for deprivation of sentence credit involves examining the sentencing transcript to evaluate the court's sentencing procedure (whether the court followed the procedure set forth in Wis. Stat. § 973.155), the structure and length of the sentence imposed, and the court's stated reasons for the sentence. The court's comments at a postconviction hearing are not dispositive.

C. Mr. Wittmann was deprived of his right to sentence credit. Sentence modification is warranted.

In Mr. Wittmann's case, the court subverted the Wis. Stat. § 973.155(2) sentencing procedure by first determining the amount of sentence credit and then setting the length of sentence. In denying Mr. Wittmann's postconviction motion, the court insisted that determining credit first was its practice in every case. (41:9-12; App.122-25).

The circumstances of the case show that Mr. Wittmann was denied his right to sentence credit. Mr. Wittmann was lawfully entitled to 245 days of sentence credit, which is between 8 and 9 months—albeit closer to 8 months. The court imposed 3 years and 9 months of confinement. The length of sentence imposed raises the same inference that existed in *Struzik*—that the court decided on a length of confinement (3 years) and then added 9 months to account for time already served.

At sentencing, the court did not explain how it reached the 3 years, 9 months figure, nor did it explain during postconviction proceedings how it reached the numerical figure. Furthermore, the court did not court express any specific, sentencing-related goal that would justify consideration of sentence credit.

Deprivation of sentence credit in this case does not only present a statutory problem under Wis. Stat. § 973.155, but also presents an equal protection, constitutional concern. Mr. Wittmann is indigent, receiving public defender counsel both at the trial and postconviction levels. The court commissioner imposed a $50,000 cash bond. (33:4). Mr. Wittmann was unable to post bond and therefore spent 245 days in jail awaiting resolution of his case. "The failure to credit pre-trial time or pre-sentence time in custody as the result of indigency means that persons similarly situated except for financial means are subject to different periods of confinement for the same crime." *Klimas*, 75 Wis. 2d at 252.

At the postconviction hearing, the court asserted that it had not acted with the intent to deprive Mr. Wittmann of sentence credit, but this retrospective assertion is not dispositive. *See Travis*, 347 Wis. 2d 142, 77 ("We are not, however, bound by the circuit court's retrospective review of its sentencing decision that was made almost a year before."). It is particularly notable that the court did not explain, either at the sentencing hearing or the

postconviction hearing, how it reached 3 years and 9 months figure.

In sum, the court departed from the correct procedure of sentencing first and determining sentence credit second. Mr. Wittmann was entitled to 245 days of sentence credit, which is between 8 and 9 months. The court imposed 3 years and 9 months of confinement. The length of sentence imposed shows that the court added to the length of the sentence to account for time already served. As such, Mr. Wittmann's right to sentence credit was violated. Under *Struzik*, the remedy is sentence modification. 90 Wis. 2d at 368.

CONCLUSION

For the reasons stated above, Mr. Wittmann respectfully asks the court to reverse the circuit court and remand with instructions to modify Mr. Wittmann's sentence to 3 years of initial confinement with 245 days of sentence credit.[4]

Dated this 9th day of November, 2018.

Respectfully submitted,

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[4] In the circuit court, Mr. Wittmann asked to modify his sentence by 245 days, but his counsel was mistaken. The correct remedy under *Struzik* is to modify the sentence to 3 years with 245 days of sentence credit. 90 Wis. 2d at 368.

CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,996 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons,

specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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 9th day of November, 2018.

Signed:

COLLEEN MARION
Assistant State Public Defender

APPENDIX

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