STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2018AP001845-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMY JOAN ZAHURONES,

Defendant-Appellant.

Appeal from an Order and Judgment
Entered in the Langlade County Circuit Court,
the Honorable John B. Rhode, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

CARY BLOODWORTH
Assistant State Public Defender
State Bar No. 1089062

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
bloodworthc@opd.wi.gov

Attorney for Defendant-Appellant

TABLE OF CONTENTS

CASES CITED

STATUTES CITED

<u>Wisconsin Statutes</u>

ISSUE PRESENTED

1. Ms. Zahurones pled no contest to four counts arising from a single course of conduct. The court withheld sentence with two years' probation on Counts 1, 3, and 5 and deferred entry of judgment on Count 2 for the two-year term of probation. After numerous probation holds, the probation and deferred entry of judgment agreement were revoked, and Ms. Zahurones was sentenced concurrently on all four counts. Is Ms. Zahurones entitled to credit towards her sentence for Count 2 for the time she spent in jail on probation holds, when all counts arose from the same course of conduct?

   Circuit Court Answer: No

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Zahurones does not request oral argument and expects the briefs to fully address the issue. She does not request publication as this case involves the application of established case law.

STATEMENT OF THE CASE

According to the criminal complaint for Langlade County Case No. 15-CF-115, on July 3, 2015, police entered the house in which Ms. Zahurones was living and found Ms. Zahurones with controlled substances and paraphernalia in the presence of a child, who subsequently tested positive for a controlled substance. (1:3-4). The complaint also alleged that Mr. Zahurones was uncooperative during her arrest.

The state charged several counts arising from this single incident, including 2 counts of possession of drug paraphernalia (repeater), 1 count of physical abuse of child (repeater), 1 count of possession of a controlled substance (repeater), 1 count of possession of illegally obtained prescription (repeater), and 1 count of resisting an officer (repeater). (1:1-3).

Ms. Zahurones spent four days in jail before being released on bond. (39:11; App. 115). On September 23, 2015, Ms. Zahurones pled no contest to the following four counts: Count 1, possession of drug paraphernalia; Count 2, child abuse; Count 3, possession of a controlled substance; and Count 5, resisting an officer.[1] (51:6-7). The parties jointly

[1] Ms. Zahurones also entered pleas related to other criminal cases at the September 23, 2015 hearing and at subsequent plea hearings in 2015 and 2016. Ms. Zahurones does not challenge the circuit court's sentence credit decision in those cases; therefore, this brief will focus on the facts and

recommended a withheld sentence and two years' probation on Counts 1, 3, and 5, and asked that judgment on Count 2 be deferred for the term of probation pursuant to a deferred entry of judgment agreement. (51:3-4). The circuit court accepted the joint recommendation. (51:21-23).

After several probation holds, which will be discussed in further detail below, Ms. Zahurones' probation and deferred entry of judgment agreement were revoked. (13, 17). Ms. Zahurones then spent additional time in jail awaiting sentencing on all counts. (39:11). On September 20, 2017, the circuit court imposed the following concurrent sentences:

- Count 1: 30 days in jail.
- Count 2: 2 years of initial confinement, 2 years of extended supervision.
- Count 3: 30 days in jail.
- Count 5: 9 months in jail.

(54:47-48).[2]

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procedural posture related to Langlade County Case No. 15-CF-115.

[2] The court also imposed sentences in three additional cases, which also ran concurrent with the sentences in this case.

Regarding sentence credit, the circuit court granted 285 days on Counts 1, 3, and 5 but zero days on Count 2. (54:49-50). Ms. Zahurones filed a motion for postconviction relief seeking amended sentence credit of 276 days towards all four counts, as well as other sentence credit adjustments related to Ms. Zahurones' other cases. (39).

On August 22, 2018, the circuit court amended the sentence credit for Counts 1, 3, and 5 to 276 days. (55:14-15; App. 131-32). However, it only gave Ms. Zahurones four days of credit towards her sentence on Count 2 from her initial arrest to the date on which she posted bond, declining credit for the additional 272 days because: (1) the probation holds that resulted in those 272 days of jail time were only technically on Counts 1, 3, and 5; and (2) because she had already received the benefit of a deferred entry of judgment agreement. (15:17-21). The court was hesitant to, in its view, "creat[e] new law" and "punt[ed] the issue to the court of appeals." (55:19-20; App. 136-37). Ms. Zahurones now appeals the circuit court's decision regarding sentence credit for Count 2.

ARGUMENT

I. Ms. Zahurones is entitled to 276 days of credit on Count 2 for time she spent in presentence custody that was "in connection with" the course of conduct for which the sentence was imposed.

In Wisconsin, sentence credit is governed by Wis. Stat. § 973.155(1):

> (a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
>
> 2. While the offender is being tried; and
>
> 3. While the offender is awaiting imposition of sentence after trial.
>
> (b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113 (8m), 302.114 (8m), 304.06 (3), or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

Criminal defendants are entitled to sentence credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). This includes "confinement related to an offense for which the [defendant] is ultimately sentenced" as well as confinement "for any other sentence arising out of the same course of conduct." Wis. Stat. § 973.155(1)(a). If a person is in custody in connection with more than one charge, and the charges ultimately result in concurrent sentences, the defendant is entitled to credit on each charge. *State v. Ward*, 153 Wis. 2d 743, 746, 452 N.W.2d 158 (Ct. App. 1989). However, if the charges ultimately result in consecutive sentences, the defendant is only entitled to credit against one of the charges. *State v. Boettcher*, 144 Wis. 2d 86, 95, 423 N.W.2d 533 (1988).

Circuit courts must award sentence credit due under the statute. *State v. Kitt*, 2015 WI App 9, ¶3, 359 Wis. 2d 592, 859 N.W.2d 164. Because this is an issue of statutory interpretation, this court should review the circuit court's decision de novo, upholding any factual findings of the circuit court unless they are clearly erroneous. *State v. Hintz*, 2007 WI App 113, ¶5, 300 Wis. 2d 583, 731 N.W.2d 646.

A. The law requires a factual connection between the presentence custody and the sentence.

To determine sentence credit, the court must consider: (1) whether the defendant was "in custody" and (2) whether the custody was "in connection with" the course of conduct for which the sentence was imposed. *State v. Marcus Johnson*, 2007 WI 107, ¶31, 304 Wis. 2d 318, 735 N.W.2d 505. There is no dispute about whether Ms. Zahurones was "in custody" while in jail. Rather, the question is whether the custody was "in connection with" Count 2. This connection must be factual rather than procedural or technical in nature. *State v. Floyd*, 2000 WI 14, ¶¶15, 17, 232 Wis. 2d 767, 606 N.W.2d 155. *See also State v. Elandis Johnson*, 2009 WI 57, ¶3, 318 Wis. 2d 21, 767 N.W.2d 207. However, the relevant factual connection need only be a reason, not the only or main reason, for the confinement. *Hintz*, 2007 WI App 113, ¶8.

In determining whether there is "a factual connection between the presentence custody and the sentence," courts follow the statutory directive and focus on whether the "custody [is] factually connected with *the course of conduct* for which sentence is imposed." *E. Johnson*, 2009 WI 57, ¶¶66 (emphasis added). The course of conduct refers to "the specific 'offense or acts' embodied in the charge for which the defendant is being sentenced." *State v. Tuescher*, 226 Wis. 2d 465, 471, 595 N.W.2d 443 (Ct. App. 1999). *See also State v. Gilbert*, 115 Wis. 2d 371, 380,

340 N.W.2d 511 (1983) ("The clear intent of sec. 973.155, Stats., is to grant credit for each day in custody regardless of the basis for the confinement as long as it is connected to the offense for which sentence is imposed."). Thus, even when there is no procedural connection between the sentence and the time spent in custody, a defendant is still entitled to sentence credit if the "specific act[]" for which she is being sentenced is also a reason she was in custody. *Tuescher*, 226 Wis. 2d at 475. *See also State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985) (holding that a defendant is not entitled to sentence credit on two sentences "unless the acts for which the first and second sentences are imposed are truly related or identical").

For example, in *State v. Floyd*, the defendant spent presentence time in jail on charges that were ultimately dismissed and read in. 2000 WI 14, ¶¶1-4. During that period of confinement he was technically out on bond related to the charge for which he was eventually convicted. *Id.* ¶¶25-27, 32. Despite the lack of a procedural connection, i.e. that Floyd was technically out on bond on the relevant charge, the court concluded that Floyd was entitled to sentence credit because read-in charges are considered by the sentencing court and expose the defendant to the risk of a lengthier sentence. *Id.* In other words, the fact that the course of conduct underlying the read-in charges was considered during sentencing was sufficient to create a factual connection. *Id.* ¶¶2-3, 32.

Likewise, in *State v. Hintz*, the defendant was on extended supervision and picked up new charges. 2007 WI App 113, ¶¶2-3. Despite technically being out on bond on the new charges, Hintz remained in jail on a supervision hold. *Id.* The court determined that Hintz was entitled to credit towards the sentence on his new charges for the time he spent in jail on the supervision hold because the conduct underlying the new charges was a factor in the decision to place the defendant on the supervision hold. *Id.* ¶¶10-11. Thus, his presentence custody was factually connected to the course of conduct that gave rise to the new charges, despite the fact that he was technically out on bond on the new charges.

Conversely, a procedural connection alone is not sufficient to justify sentence credit without some factual connection between the specific conduct underlying the sentence and the time in custody. For example, a defendant is not entitled to credit towards two separate sentences when the conduct underlying those sentences occurred eight months apart, even though both sentences were imposed at the same time and ran concurrently. *E. Johnson*, 2009 WI 57, ¶¶2, 11-12, 24, 76.

As discussed below, Ms. Zahurones' case is similar to *Floyd* and *Hintz*: Ms. Zahurones spent presentence time in custody on Counts 1, 3, and 5 while technically being out on bond on Count 2. However, all counts arose from the same course of conduct.

B. The time Ms. Zahurones spent in presentence custody on probation holds related to Counts 1, 3, and 5 is factually connected with her sentence on Count 2.

There are four separate periods of confinement for which Ms. Zahurones is entitled to sentence credit on Count 2. First, Ms. Zahurones was initially detained on Case No. 15-CF-115 for a period of 4 days before being released on bond. At the postconviction hearing, the state conceded and the circuit court correctly concluded that Ms. Zahurones is entitled to a credit of four days for this period towards each of her sentences in Case No. 15-CF-115. The remaining periods in dispute are:

- September 30, 2015 through November 23, 2015 (55 days) during which Ms. Zahurones was on a probation hold for Counts 1, 3, and 5;
- May 11, 2016 through May 17, 2016 (7 days), during which Ms. Zahurones was on a probation hold for Counts 1, 3, and 5; and
- February 22, 2017 through September 20, 2017 (210 days), during which Ms. Zahurones was on a probation hold pending revocation of probation for Counts 1, 3, and 5 and pending

revocation of the deferred entry of judgment agreement for Count 2.[3]

1. Ms. Zahurones is entitled to credit for all of the time she spent in jail on probation holds for Counts 1, 3, and 5 towards her sentence on Count 2 because all counts arose from a single course of conduct.

The circuit court granted Ms. Zahurones 276 days of credit on Counts 1, 3, and 5 to account for the time she spent in custody related to probation holds on those counts. Because Counts 1, 3, and 5 and Count 2 arose from the same single course of conduct, and because all four counts resulted in concurrent sentences, *Ward*, 153 Wis. 2d at 746, Ms. Zahurones should have received 276 days towards her sentence on Count 2 as well.

But the court only granted four days towards Count 2, specifically for the initial period of confinement after arrest before posting bond. In denying her 272 days of sentence credit, the circuit court relied on the technicality that Ms. Zahurones was not on probation for Count 2 during the three periods of confinement in dispute and thus was technically out on bond regarding that count. (55:12-13, 55:19; App. 129-30, 136). This is the type of procedural analysis that the Wisconsin Supreme

[3] The State did not dispute these dates or calculations. But see Defendant's Motion for Postconviction Relief and attachments for more detailed information. (39; App. 111-12, 115-17).

Court has warned against. In *Floyd* and *Hintz*, both defendants were technically out on bond on the charges of which they were ultimately convicted during their periods of presentence custody. *See Hintz*, 2007 WI App 113, ¶¶3; *Floyd*, 2000 WI 14, ¶¶2-3. In each case the court rejected a procedural analysis and concluded that the defendants were entitled to sentence credit because the presentence custody related to the same course of conduct for which they were ultimately sentenced. The same is true in this case.

Under the plain statutory language, the time Ms. Zahurones spent in jail on probation holds was "in connection with" Count 2 because it was "confinement . . . for any other sentence arising out of the same course of conduct." Wis. Stat. § 973.155(1)(a). Counts 1, 3, and 5, and Count 2 arose from a single course of conduct. Ms. Zahurones' charges for which she was on probation (Counts 1, 3, and 5) arose because the police found drugs in her home on July 3, 2015. The child abuse charge (Count 2) also arose because the police found drugs in her home on July 3, 2015, where her child was living. That single act—possessing drugs in her home on July 3, 2015—violated multiple statutes and gave rise to multiple charges, but it was still a single course of conduct. The circuit court acknowledged this factual connection, stating, "[t]here is no doubt that she is in custody and was in custody for a course of conduct related to all of the charges." (55:17, App. 134). That single course of conduct is why she was in jail on probation holds prior to sentencing, and that single course of conduct is what she was

sentenced for on Count 2. This factual connection requires sentence credit towards Ms. Zahurones' sentence on Count 2.

The factual connection is further strengthened by the way Ms. Zahurones' probation and deferred entry of judgment agreement were structured. Despite the technicality that Ms. Zahurones was only on probation for Counts 1, 3, and 5, the terms of her probation and the deferred entry of judgment agreement were intertwined. As part of the deferred entry of judgment agreement, Ms. Zahurones was required to "successfully complete probation on Counts 1, 3 and 5," meaning her behavior on probation directly affected her deferred entry of judgment agreement. (8:1). The deferred entry of judgment agreement did not specify who was to monitor compliance with its terms, instead relying on the supervision provided by probation. (8).

Further, despite the fact that Ms. Zahurones was only technically on probation for the drug-related offenses and resisting an officer, a condition of her probation was "[c]ooperation with the Langlade County Department of Social Services with regard to [her] children," a condition directed at Count 2, the child abuse charge. (51:22). Thus, the fate of Ms. Zahurones' deferred entry of judgment agreement depended on her behavior during probation, and her success during probation depended at least in part on her efforts to address issues related to the child abuse charge. Not only was Count 2 factually connected to the specific course of

conduct underlying probation, it was also factually intertwined with her performance on probation.

2. Ms. Zahurones is at least entitled to credit towards her sentence on Count 2 for the time she spent in jail awaiting sentencing on Count 2.

Even if this court concludes that the time Ms. Zahurones sat in jail on probation holds related to Counts 1, 3, and 5 were not in connection with Count 2, she is still entitled to sentence credit for the third disputed time period, the 210 days she spent in custody awaiting sentencing. This period is different from the other two periods in dispute in that not only was she in custody pending probation revocation on Counts 1, 3, and 5, Ms. Zahurones' deferred entry of judgment agreement had also been revoked and she was awaiting sentencing on Count 2. Thus, there was an additional connection during this period of confinement. On January 11, 2017, the district attorney filed a motion to revoke the deferred entry of judgment agreement on Count 2 on the basis that she had not completed probation. (13). On February 22, 2017, Ms. Zahurones was taken into custody pending revocation and sentencing on all charges. (39:7). She then sat in jail for 210 days, until she was sentenced concurrently on all counts on September 20, 2017.

Given these facts, it follows that Ms. Zahurones' custody for those 210 days was "in connection" with Count 2 as she was in custody "[w]hile . . . awaiting imposition of sentence."

Wis. Stat. § 973.155(1)(a). Her probation revocation on Counts 1, 3, and 5 triggered the revocation of the deferred entry of judgment agreement, and the district attorney had affirmatively moved to revoke the deferred entry of judgment agreement. The court had no power to stop the revocation of the agreement because there was no dispute as to whether Ms. Zahurones had breached the agreement by failing to complete probation. (54:9-10). Thus, she was awaiting sentencing on Count 2 during this period of confinement, and she is entitled to credit for it.

C. If Ms. Zahurones is not granted the credit, she will serve more time in custody than she was sentenced to.

The purpose of sentence credit under Wis. Stat. § 973.155 is to ensure that a defendant does not serve more time than his or her sentence calls for. *E. Johnson*, 2009 WI 57, ¶31. A sentence in a criminal case is meant to account for a particular course of conduct. If a defendant has already spent time in custody for that same course of conduct, that time must be credited towards the sentence. *See Beets*, 124 Wis. 2d at 379, 383 ("For there to be a time credit there ought to be some nexus between the events.").

Here, the circuit court concluded that it would not be fair to award sentence credit for Count 2 because Ms. Zahurones had already been given the opportunity to benefit from a deferred entry of judgment agreement, describing the request as

Ms. Zahurones trying "to have her cake and eat it too." (55:20, App. 137). But sentence credit is not a benefit to be given and taken away by a judge as he sees fit; it is something Ms. Zahurones is entitled to receive regardless of any other agreements she was able to negotiate. *See Kitt*, 2015 WI App 9, ¶3 (describing the award of sentence credit as "mandatory").

While the circuit court viewed the deferred entry of judgment agreement as a benefit to Ms. Zahurones justifying a denial of sentence credit, in fact the combination of the deferred entry of judgment and the denial of sentence credit will result in Ms. Zahurones serving more time than she was sentenced to. Had judgment on Count 2 not been deferred and had the court imposed the same sentence of two years of initial confinement concurrent with the other counts, Ms. Zahurones would have gone straight to prison and only spent two years in confinement. However, with the circuit court's denial of sentence credit, the "benefit" of the deferred entry of judgment agreement will actually result in Ms. Zahurones spending an additional 272 days in custody. "A sentence credit decision that effectively nullifies the sentence credit earned is improper." *State v. Brown*, 2010 WI App 43, ¶8, 324 Wis. 2d 236, 781 N.W.2d 244.

* * *

Ms. Zahurones must receive sentence credit under Wis. Stat. § 973.155 towards her sentence on Count 2 for the time she spent in jail on probation holds for Counts 1, 3, and 5. All of the counts arise from the same course of conduct, and therefore time she spent in custody on Counts 1, 3, and 5 is factually connected to Count 2. When Ms. Zahurones was sentenced on all counts, she received concurrent sentences, with the Count 2 sentence of 2 years' initial confinement being the longest and therefore controlling. Despite the fact that Ms. Zahurones was sentenced to 2 years of confinement for a single course of conduct, she will spend an additional 272 days in custody in connection with that course of conduct unless she is granted credit. And that is precisely the result that Wis. Stat. § 973.155 is meant to prevent.

CONCLUSION

For these reasons, Ms. Zahurones respectfully requests that the Court reverse the circuit court's decision regarding sentence credit and instruct the circuit court to amend the judgment of conviction to reflect that Ms. Zahurones is entitled to 276 days of credit[4] towards her sentence on Count 2. Alternatively, if the court does not accept that Ms. Zahurones is entitled to the entire 276 days, Ms. Zahurones requests that the Court conclude that she is entitled to 214 days of credit[5] towards her sentence on Count 2.

Dated this 10th day of December, 2018.

Respectfully submitted

CARY BLOODWORTH
Assistant State Public Defender
State Bar No. 1089062

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 267-2123
bloodworthc@opd.wi.gov

Attorney for Defendant-Appellant

[4] Four days undisputed plus 272 days disputed.
[5] Four days undisputed plus 210 days disputed.

CERTIFICATION AS TO FORM/LENGTH

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 3,661 words.

CERTIFICATE 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 § 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.

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 10th day of December, 2018.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

CERTIFICATION AS TO APPENDIX

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.

Dated this 10th day of December, 2018.

Signed:

CARY BLOODWORTH
Assistant State Public Defender

APPENDIX

INDE X
TO
APPENDIX

Page