STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1845-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AMY JOAN ZAHURONES,

Defendant-Appellant.

ON APPEAL FROM AN ORDER AND JUDGMENT
ENTERED IN LANGLADE COUNTY CIRCUIT COURT,
THE HONORABLE JOHN B. RHODE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Defendant-Appellant Amy Joan Zahurones entitled to 276 days of credit against her sentence for child abuse?

The circuit court awarded four days of credit.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither. The issue in this appeal may be resolved by applying established law to the facts, which the parties' briefs should adequately address.

INTRODUCTION

After finding Zahurones's work shirt in a vehicle that had been reported stolen, an Antigo police officer obtained her address and went to the residence. There, he found Zahurones in a back bedroom, with several different prescription medications and drug paraphernalia. The officer arrested Zahurones and a social worker transported her daughter to a nearby hospital where the girl tested positive for methamphetamine.

The State charged Zahurones with six offenses arising from this incident. As part of a plea agreement, Zahurones pled to four of the charges, including one count of child abuse. The remaining two charges were dismissed and read in. The court adopted the parties' joint recommendation to withhold sentence on three of the counts and to place Zahurones on two years of concurrent probation. As for count 2, the child abuse count, the court deferred entry of judgment for the two years Zahurones would be on probation and Zahurones was released on signature bond.

Zahurones was not successful on probation. As a result of new charges and probation violations, she was in custody

on three separate occasions on a hold. Eventually, the State moved to revoke the deferred entry of judgment agreement (DEJ) on count 2, and the Department of Corrections revoked her probation.

At the sentencing after revocation hearing, Zahurones unsuccessfully challenged the State's DEJ revocation motion and the court imposed concurrent sentences on all four counts. The court declined to award Zahurones sentence credit against her count 2 sentence, however, for her time spent in custody on probation holds and after probation revocation. The court was persuaded by the State's argument that Zahurones was not due credit against her sentence on count 2 because she had been on signature bond with respect to that count since her plea hearing.

Zahurones moved for postconviction relief, arguing that the four counts were factually connected. Therefore, she reasoned, she was due the same credit on all four sentences even though she had never been on probation with respect to count 2. The court granted Zahurones four days of credit for her time spent in custody between her initial arrest and her release on cash bond, but otherwise denied her relief in this case.

Zahurones renews her sentence credit claim on appeal, but this Court should affirm the circuit court's ruling. The State does not dispute that Zahurones is entitled to the four days of credit that the circuit court awarded, but her signature bond on count 2 severed the connection between her custody and that charge.

STATEMENT OF THE CASE

Zahurones came to the attention of law enforcement in 2015 when an Antigo police officer found her work shirt in a

vehicle that had been reported stolen.[1] (R. 1:3–4.) After obtaining her address from her employer, the officer went to Zahurones's residence where he found her in a back bedroom. (R. 1:3–4.)

Also in that bedroom, the officer found several clonazepam tablets, a pill bottle containing three different types of prescription medication, a pipe with burnt marijuana residue, and drug paraphernalia related to methamphetamine use. (R. 1:4–5.) Because Zahurones would not follow his instructions, the officer placed her under arrest. (R. 1:5.) Zahurones struggled, requiring two officers to handcuff her and carry her out to a squad car. (R. 1:5.)

Zahurones's daughter was among the individuals in the residence at the time of the search. (R. 1:5.) A social worker transported the child to a hospital, where she tested positive for methamphetamine. (R. 1:5.)

Based on those facts, the State charged Zahurones as follows:

Count 1: possession of drug paraphernalia (needle)

Count 2: physical abuse of a child

Count 3: possession of a controlled substance

Count 4: possession of an illegally obtained prescription

Count 5: resisting an officer

Count 6: possession of drug paraphernalia (pipe)

(R. 1:1–3.) As a result of those charges, Zahurones spent four days in custody before being released on cash bond. (R. 39:11.)

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[1] Zahurones's motion for postconviction relief requested sentence credit across three different Langlade County cases. (R. 39:1.) Since only Langlade County case number 2015CF115 is relevant on appeal, the State will limit its discussion to the facts and procedural posture related to that case. (Zahurones's Br. 2 n.1.)

On September 23, 2015, pursuant to a plea agreement, Zahurones pled no contest to counts 1, 2, 3, and 5 and the State read in and dismissed counts 4 and 6. (R. 51:2, 6–7.) Also pursuant to the agreement, the parties jointly recommended that the court withhold sentence and place Zahurones on two years of concurrent probation on counts 1, 3, and 5. (R. 51:17.) The parties further recommended that the court defer entry of judgment on count 2 for the two years Zahurones would be on probation. (R. 8; 51:17.) The circuit court accepted the parties' joint recommendation. (R. 12:1; 51:21–23.)

The court thus placed Zahurones on probation for counts 1, 3, and 5. (R. 51:21–23.) As for count 2, the court approved the DEJ. (R. 51:23.) Per its terms, the DEJ could be terminated only after the State established by a preponderance of the evidence at a hearing that Zahurones had violated any of the terms or conditions. (R. 8:1.) The court warned Zahurones that if her probation was revoked, her DEJ could be vacated. (R. 51:23.) The court then converted the original $100 cash bond to a $1000 signature bond, explaining that Zahurones remained on bond with respect to count 2 because judgment on that count was deferred. (R. 51:27.)

Seven days later, Zahurones was taken into custody for drug and bail jumping offenses in Langlade County case number 2015CF197. (R. 39:2, 11.) That event triggered a probation hold for counts 1, 3, and 5 in this matter through November 23, 2015. (R. 17:15; 39:11–12.) From May 11 to May 17, 2016, Zahurones was again in custody on a probation hold for counts 1, 3, and 5. (R. 17:15; 39:12.) Zahurones's arrest on theft charges in Langlade County case number 2016CF131 triggered that second hold. (R. 39:2, 7, 12.)

Zahurones's agent learned on July 25, 2016 that Zahurones had left the state without permission, and she then failed to report for a scheduled office visit on August 3, 2016. (R. 17:11.) The Department of Corrections sought revocation

of Zahurones's probation on counts 1, 3, and 5 in this case, and on several counts in two other cases, for her violations as of August 3, 2016. (R. 17:1, 11–12.) According to her agent, Zahurones had consumed methamphetamine and THC in addition to absconding from supervision. (R. 17:11.) Police officers took Zahurones into custody on February 22, 2017, after learning where she was living in Antigo. (R. 17:11; 39:11–12.) Her probation was revoked on May 24, 2017, and Zahurones remained in custody. (R. 17:3; 39:11–13.)

On September 20, 2017, the circuit court held a sentencing after revocation hearing. (R. 54:1.) It also addressed the State's January 11, 2017 motion to revoke the DEJ on count 2 for failure to complete probation. (R. 13; 54:9.) The court explained that because Zahurones's probation had been revoked on counts 1, 3, and 5, she had breached the deferred judgment agreement on count 2. (R. 54:9–10.) After finding that Zahurones had no defense to the breach, and after the prosecutor declined to withdraw the motion to revoke, the court proceeded to sentencing on all four counts. (R. 54:9–10.) The court sentenced Zahurones to 30 days of incarceration on count 1 and count 3, and to nine months of incarceration on count 5. (R. 54:47–48.) On count 2, the court imposed two years of initial confinement and two years of extended supervision. (R. 54:48.) Zahurones's sentences are concurrent. (R. 54:48.)

The court initially considered granting Zahurones 285 days of credit against each of her four concurrent sentences in this case. (R. 54:49.) The State argued that Zahurones was not due credit against her sentence on count 2 because she had been on signature bond with respect to that count since her plea hearing. (R. 54:49.) Trial counsel did not argue otherwise. (R. 54:49–50.) After considering the State's point, the court awarded no credit on count 2 but instructed trial counsel to research the issue and inform the court if Zahurones was in fact due credit. (R. 54:50.)

Zahurones filed a postconviction motion requesting 276 days of credit against her sentence on count 2. (R. 39:1.) She calculated that total by adding her time spent in pre-plea custody to her time spent in custody on two probation holds and a probation revocation hold and revocation. (R. 39:7.) Zahurones argued that because all four counts arose from the same incident, she should receive the same amount of credit against all four sentences even though her probation holds and revocation were for counts 1, 3, and 5 only. (R. 39:8–9.)

At the postconviction hearing, the State conceded that Zahurones was due four days of credit for her pre-plea custody. (R. 55:12.) The State argued, however, that Zahurones was not entitled to any additional credit because the basis for her probation holds and revocation was never count 2 but rather counts 1, 3, and 5. (R. 55:3–4, 12.) The State also noted that Zahurones had been on signature bond with respect to count 2 and not sentenced on that count until her sentences were imposed on the other three counts after revocation. (R. 55:4–6, 12.)

The court denied Zahurones most of the credit she sought. It began its remarks by modifying its previous sentence credit calculation on counts 1, 3, and 5 to reflect a grant of 276 rather than 285 days. (R. 55:14–15.) Because Zahurones had already served those three sentences in full, however, the issue was moot. (R. 39:8.)

The issue was not moot with respect to count 2. Turning to that count, the court indicated that it found the State's arguments "to be compelling" and that it was "comforted by the fact that there [had been] a real benefit offered to [Zahurones]" in the form of the DEJ. (R. 55:19.) The court explained that Zahurones had been on bond and was never convicted on count 2 until it vacated the DEJ. (R. 55:19.) Moreover, the court noted that there was no case on all fours with Zahurones's circumstances that would compel it to grant

her the credit she sought. (R. 55:20.) Accordingly, the court granted Zahurones four days of credit only. (R. 55:21.)

Postconviction counsel then moved to stay Zahurones's sentence on count 2 pending appeal to this Court. (R. 55:22.) The State opposed the request, but the circuit court granted the motion. (R. 55:23–24.) Zahurones was again placed on signature bond with respect to that count. (R. 55:26.)

Zahurones appeals. (R. 45.)

STANDARD OF REVIEW

Whether a defendant is entitled to sentence credit pursuant to Wis. Stat. § 973.155 is a question of law that this Court reviews de novo. *State v. Marcus Johnson*, 2007 WI 107, ¶ 27, 304 Wis. 2d 318, 735 N.W.2d 505. This Court will uphold the circuit court's factual determinations unless they are clearly erroneous. *State v. Hintz*, 2007 WI App 113, ¶ 5, 300 Wis. 2d 583, 731 N.W.2d 646.

ARGUMENT

Zahurones has failed to demonstrate that she is entitled to additional sentence credit under Wis. Stat. § 973.155.

Before this Court, Zahurones renews her request for 276 days of credit against her count 2 sentence. (Zahurones's Br. 5.) Zahurones has not met her burden of establishing entitlement to the credit she seeks.

A. To receive credit, Zahurones must show that she was in custody in connection with the course of conduct for which she was sentenced.

Wisconsin sentence credit law is statutory. In 1977, the Wisconsin Supreme Court instructed that, as a matter of equal protection, "pre-trial custody time occasioned by indigency, as well as other time spent in custody for that

reason [must] be applied to reduce the sentence imposed." *Klimas v. State*, 75 Wis. 2d 244, 249–50, 249 N.W.2d 285 (1977). The Legislature codified that principle in adopting the sentence credit statute, Wis. Stat. § 973.155. The statute provides that credit "shall be given . . . toward the service of [an offender's] sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a); 1977 Wis. Act 353, § 9.

An offender seeking sentence credit must therefore prove: (1) that he or she was "in custody" within the meaning of Wis. Stat. § 973.155(1); and (2) that the custody was "in connection with the course of conduct for which sentence was imposed." *State v. Elandis Johnson*, 2009 WI 57, ¶ 27, 318 Wis. 2d 21, 767 N.W.2d 207. If an offender satisfies those two requirements, then "[c]redit is given for custody while awaiting trial, while being tried, and while awaiting sentencing after trial." *Marcus Johnson*, 304 Wis. 2d 318, ¶ 4 n.2 (citing Wis. Stat. § 973.155(1)(a)1., 2., and 3.). This includes custody "which is in whole or in part the result of a probation, extended supervision or parole hold . . . placed upon the person for the same course of conduct as that resulting in the new conviction." Wis. Stat. § 973.155(1)(b).

As for the first requirement, "an offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." *State v. Magnuson*, 2000 WI 19, ¶¶ 25, 31, 47, 233 Wis. 2d 40, 606 N.W.2d 536. As for the second requirement, "course of conduct" refers to the specific acts for which a defendant is sentenced, not to a criminal episode. *State v. Tuescher*, 226 Wis. 2d 465, 471, 595 N.W.2d 443 (Ct. App. 1999). To qualify as time spent "in connection with" the course of conduct giving rise to that sentence, the custody must be "factually connected with the course of conduct for which the sentence was imposed." *Elandis Johnson*, 318 Wis. 2d 21, ¶ 3. "[A] mere procedural connection will not suffice." *Id.* ¶ 33.

Where consecutive sentences are imposed, credit may not be awarded to more than one of the sentences imposed to run consecutively. *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). If the sentences are concurrent, however, time spent in pre-sentence custody is credited toward each sentence so long as "the statutory mandate that credit toward service of a sentence be based on custody that is 'in connection with' the course of conduct giving rise to that sentence" is satisfied. *Elandis Johnson*, 318 Wis. 2d 21, ¶ 76.

B. Zahurones's custody was not in connection with count 2 because she was free on signature bond with respect to that count.

Zahurones bears the burden of demonstrating that she is entitled to the credit she seeks. *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 785 N.W.2d 516. Here, there is no dispute that Zahurones was "in custody" because she was incarcerated at all relevant times. Rather, the issue is whether that custody was in connection with the child abuse offense. Zahurones has not established that it always was.

Zahurones maintains that she is due 276 days of credit for the following periods of incarceration:

1. July 3 to July 6, 2015: the 4 days between her initial arrest in this case and her release on bond;
2. September 30 to November 23, 2015: the 55 days spent in custody on a probation hold for counts 1, 3, and 5;
3. May 11 to May 17, 2016: the 7 days spent in custody on a probation hold for counts 1, 3, and 5; and

4. February 22 to September 20, 2017: the 210 days spent in custody after her arrest pending probation revocation on counts 1, 3, and 5, after her probation was revoked, and until her sentencing on all four counts.

(R. 39:7.)

There is no dispute that Zahurones should receive credit from her initial arrest until the July 6th cash bond. (Zahurones's Br. 10.) At her 2015 plea and sentencing, however, that cash bond was converted to a signature bond. (R. 51:27.) Zahurones was placed on probation for counts 1, 3, and 5, but the court explained that because a conviction on count 2 was deferred, she would simply remain "on bond" for that count. (R. 51:27.) At the 2017 sentencing after revocation hearing, the prosecutor argued that Zahurones had been on a signature bond on count 2 since her plea. (R. 54:49.) The prosecutor made the same argument at the 2018 postconviction motion hearing and the court acknowledged the point. (R. 55:13, 19.) Zahurones does not argue, nor does the record reflect, that her signature bond had lapsed, or was ever modified or revoked, before her sentencing on revocation hearing.

Under well-established case law discussed below, the issuing of a signature bond severs any connection between a defendant's custody and the course of conduct for which the person was sentenced. *See Elandis Johnson*, 318 Wis. 2d 21, ¶ 38, (discussing *Marcus Johnson*, 304 Wis. 2d 318, ¶ 78); *State v. Beiersdorf*, 208 Wis. 2d 492, 496, 561 N.W.2d 749 (Ct. App. 1997).

A defendant's perception that custody is related to a particular crime is not enough. *Beiersdorf*, 208 Wis. 2d at 498. In *Beiersdorf*, a defendant charged with sexual assault posted a signature bond that remained in effect until sentencing. *Id.* at 494. The defendant was subsequently charged with other

crimes and cash bail was set, but because he was unable to post bail, Beiersdorf remained in custody until sentencing on all crimes. *Id*. at 495.

This Court rejected Beiersdorf's request that he receive sentence credit in the sexual assault case for his time in custody "because he had been released on bond on that charge and, therefore, was not 'in custody in connection with' the sexual assault offense." *Beiersdorf*, 208 Wis. 2d at 496. Beiersdorf found himself in custody only because he could not post a cash bond on the bail-jumping charge. *Id*. Consequently, his custody occurred "in connection with" the bail-jumping charge, not the sexual assault charge, and he could receive sentence credit under Wis. Stat. § 973.155(1)(a) for only the bail-jumping charge. *Id*. at 498–99.

The Wisconsin Supreme Court has likewise recognized that a signature bond severs the connection between a defendant's custody and the sentence imposed in the case. In *Marcus Johnson*, a defendant serving a juvenile commitment was charged with battery as an adult after battering another resident. *Marcus Johnson*, 304 Wis. 2d 318, ¶ 12. The defendant posted a signature bond in the battery case and was returned to the juvenile facility. *Id.* ¶ 13. He asked for credit against his battery sentence for the days he spent in the juvenile facility after his arrest. *Id.* ¶ 3.

The Court concluded that the defendant was not entitled to that credit because his time spent in juvenile custody was not in connection with his battery charge. *Marcus Johnson*, 304 Wis. 2d 318, ¶ 76. In making that determination, the Court noted that the defendant's signature bond had remained in place from his arrest until his sentencing on the battery charge. *Id.* ¶¶ 22, 77. True, the Court continued that this fact was not "significant" in Marcus Johnson's case because of the preexisting juvenile commitment order. *Id.* ¶ 77. The Court observed, however, that the "signature bond seemingly made [the defendant]

eligible for pretrial release and 'severed' the connection between his custody and the crime." *Id.* ¶ 78.

In *Elandis Johnson*, the Court summarized *Marcus Johnson* as a case in which it affirmed the denial of a juvenile offender's request for sentence credit for days spent "in custody" at a juvenile detention facility while the juvenile was "free" on a signature bond in the crime for which he was sentenced. *Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 36–38 (discussing *Marcus Johnson*, 304 Wis. 2d 318, ¶¶ 63–78) (internal citations omitted). Although the signature bond issue was not determinative, the Court's language in *Johnson* suggests no disagreement with the principle established in *Beiersdorf*.

Underlying these cases is the fact that a signature bond places a defendant at liberty on the associated criminal charge. In this case, the circuit court issued a signature bond at Zahurones's plea hearing and sentencing. (R. 51:27.) Although Zahurones was convicted of and placed on probation for counts 1, 3, and 5, she remained free on signature bond on count 2. (R. 51:21–23, 27.) That bond remained in place until the court convicted and sentenced Zahurones on the child abuse count in 2017. (R. 54:49; 55:13, 19.)

Per *Beiersdorf*, unless and until the court revokes the signature bond or the bond lapses, post-bond custody does not occur "in connection with" the associated charge. *Beiersdorf*, 208 Wis. 2d at 496, 498–99; *cf. Marcus Johnson*, 304 Wis. 2d 318, ¶ 78; *Elandis Johnson*, 318 Wis. 2d 21, ¶ 38. And here, Zahurones's DEJ specified that if the State believed she violated its terms, the State could move to revoke the agreement—not that her signature bond would be modified to a cash bond or that a warrant would issue and she would be incarcerated. (R. 8.) Accordingly, for the periods of incarceration at issue, Zahurones was in custody not in relation to count 2, but either based on a probation hold or revocation order related to her count 1, 3, and 5 convictions,

or because her probation imposed for those convictions had been revoked. The signature bond thus precluded credit against Zahurones's sentence on count 2 while it was in place.

On appeal, Zahurones relies on two cases in support of her sentence credit claim. (Zahurones's Br. 8–12.) First, Zahurones analogizes her case to that of the defendant in *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155. (Zahurones's Br. 8–9.) In *Floyd*, the defendant requested credit against a reckless endangerment sentence for the days spent in custody on an armed robbery charge because that charge was dismissed and read in for sentencing purposes. *Id.* ¶ 1. *Floyd*'s applicability is thus limited to circumstances involving credit for time spent in confinement on a charge that was dismissed and read in. *Id.* ¶¶ 1, 30–32. That Floyd was on a signature bond in his reckless endangerment case for a portion of the time he spent in custody on the armed robbery charge was of no factual or analytical import to the question before the Wisconsin Supreme Court. *See id.* ¶¶ 2, 10, 14–32. *Floyd* offers little guidance.

Zahurones's second case provides better support for her position, but is also distinguishable here. (Zahurones's Br. 9.) In *Hintz*, the defendant participated in two burglaries while on extended supervision and after his agent had issued an apprehension request for failing to report among other problems. *Hintz*, 300 Wis. 2d 583, ¶¶ 2–3. Hintz's agent learned of the burglary charges on the same day Hintz was taken into custody on the apprehension request. *Id.* ¶ 3. His agent then canceled the apprehension request in favor of a supervision hold. *Id.* ¶ 3. Although Hintz signed a signature bond for the burglary charges, he remained in custody on the supervision hold. *Id.* ¶ 3. After his sentencing in the burglary case, Hintz unsuccessfully moved the court for credit against that sentence for the time spent in custody on the supervision hold. *Id.* ¶ 4.

This Court reversed, noting that credit must be awarded per Wis. Stat. § 973.155(1)(b) for time spent in custody on a supervision hold if that hold "was at least in part due to the conduct resulting in the new conviction." *Hintz*, 300 Wis. 2d 583, ¶ 8. Because the circuit court had "specifically addressed the reasons underlying Hintz's extended supervision hold" and found "that the hold was placed in part due to Hintz's involvement in the burglary," this Court concluded that Hintz was entitled to the credit he sought. *Id.* ¶¶ 10, 12.

In reaching its conclusion, this Court observed that Hintz's agent had notice of the burglary case before issuing the supervision hold and could have taken that alleged conduct into account when placing the hold. *Hintz*, 300 Wis. 2d 583, ¶¶ 10–11. Accordingly, this Court could not conclude that Hintz was in custody solely for the supervision hold even though he had been on a signature bond with respect to the burglary charges.[2] *Id.* ¶ 11.

Although Zahurones's circumstances are similar to those in *Hintz* in that both defendants were in custody on at least one charge yet still "free" on another, that case is not as helpful as Zahurones needs it to be. *Hintz* addresses the situation where a signature bond is issued on new charges for criminal conduct that also results in a period of custody on a

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[2] *Hintz* predates the *Johnson* cases and does not discuss *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997). *Hintz* was arguably wrongly decided to the extent it conflicts with this Court's earlier holding that release on signature bond for an offense severs any connection the custody had with the course of conduct for that offense. *See Beiersdorf*, 208 Wis. 2d at 496. The State recognizes that this Court cannot overrule *Hintz*. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997). The State seeks to preserve its right to challenge the correctness of this Court's decision in *Hintz* should either party petition the Wisconsin Supreme Court for review of this Court's decision in Zahurones's case.

probation hold. *Hintz*, 300 Wis. 2d 583, ¶¶ 3, 9. *Hintz* instructs that under Wis. Stat. § 973.155(1)(b), a person in custody on (a) a probation hold for criminal conduct but (b) "free" on a signature bond for new charges is entitled to credit for time in custody on the probation hold on both (a) the probation revocation sentence and (b) the new sentence where the sentences run concurrently. *Id.* ¶¶ 4, 9–12.

Unlike Hintz, Zahurones is not requesting credit against her sentences for the new criminal conduct that triggered her probation holds and would thus be a factor leading to those holds. And she received credit against her probation revocation sentences on counts 1, 3, and 5 for the time spent in custody on the related probation holds and after revocation. (R. 55:14–15.)

Rather, Zahurones is requesting credit against her sentence for an existing charge that she was not on supervision for, did not trigger her holds or revocation, and for which the court did not impose a revocation sentence. Zahurones argues that because the four counts at issue here arose from the same incident, a point the State does not contest, and because her success under the DEJ depended on her success under supervision, count 2 was necessarily and always a reason why she was in custody even though her probation holds and eventual revocation involved counts 1, 3, and 5. (Zahurones's Br. 11–14.)

But germane to this Court's decision in *Hintz* were the circuit court's specific factual findings about the connection between the defendant's hold and the new criminal conduct for which the defendant was sentenced. *Hintz*, 300 Wis. 2d 583, ¶¶ 10, 12. In short, the new conduct was a reason why the hold was imposed. *Id.* Zahurones does not point to similar specific findings about the connection between her holds and revocation and count 2.

At best, Zahurones can reference the court's blanket statement at the postconviction hearing, where she was challenging sentence credit rulings in three separate cases, that she "is in custody and was in custody for a course of conduct related to all of the charges in all of these cases." (R. 55:17.) But the court did not go on to examine in any detail why Zahurones had been placed on probation holds or why her probation was revoked. (R. 55:17–21.) Rather, the court found that Zahurones had always been on bond with respect to count 2, and was persuaded by the State's arguments against granting credit, which included that her custody was not related to count 2. (R. 55:3–4, 19.)

On this record, Zahurones's custody was due either to new charges in new cases, or to her probation violations including absconding from the state and consuming controlled substances. (R. 17:11; 39:7, 11–12.) True, the State filed to revoke the DEJ on January 11, 2017. (R. 13.) But as the State explained at the postconviction hearing, and as the DEJ agreement indicates, the State must first establish by a preponderance of the evidence that the alleged violation occurred before the agreement can be terminated. (R. 8; 55:4–6.) Moreover, as noted above, the DEJ does not provide for incarceration pending an alleged violation of its terms. (R. 8.) In short, the State must first meet its burden of proof to the court's satisfaction or the DEJ, per its terms, "continue[s] in full force and effect." (R. 8:2.)

Zahurones argues that the court "had no power to stop the revocation of the agreement," but whether the DEJ had in fact been breached was not determined until the sentence after revocation hearing. (Zahurones's Br. 15.) Here, Zahurones challenged the State's motion by casting doubt on whether her daughter tested positive for methamphetamine. (R. 54:7–8.) The court, however, found that this was not a "real defense" to the motion. (R. 54:9.) After the State declined Zahurones's request to extend the DEJ, the court found that

the agreement had been breached and proceeded to sentencing on all counts. (R. 54:9–10.) Consequently, Zahurones's DEJ was not revoked on count 2 before the sentencing after revocation hearing. (Zahurones's Br. 14–15.)

Zahurones raises two final points. First, she takes issue with the circuit court's remarks at the postconviction motion hearing concerning her DEJ. (Zahurones's Br. 15–16.) She states that the court inappropriately declined to award her sentence credit in part because she ultimately breached the terms of her DEJ. (Zahurones's Br. 15–16.) The State agrees that sentence credit is a mandatory award where it is earned. *See State v. Kitt*, 2015 WI App 9, ¶ 3, 359 Wis. 2d 592, 859 N.W.2d 164 (stating that "[t]he award of sentence credit is mandatory"). To the extent the circuit court's remarks may have indicated otherwise, the State notes that this Court reviews the sentence credit decision de novo. *Marcus Johnson*, 304 Wis. 2d 318, ¶ 27. This Court may affirm the circuit court's decision using reasoning that the circuit court did not employ. *See State v. Holt,* 128 Wis. 2d 110, 124–25, 382 N.W.2d 679 (Ct. App. 1985) (a reviewing court may affirm a circuit court's holding on a theory or reasoning not presented to the circuit court; a proper result reached for the wrong reason will still be affirmed).

Second, Zahurones argues that unless she is granted the credit she seeks, she will serve more time in custody than she was sentenced to. (Zahurones's Br. 15–16.) In other words, Zahurones will serve her two years of incarceration and two years on extended supervision plus the days spent in custody on her probation holds and after revocation; or 272 days too many in her view. (Zahurones's Br. 16.) But that follows only if this Court disagrees with the State's position. Should this Court agree in full or in part, the time Zahurones spent in pre-sentence custody that is not applicable to her count 2 sentence was not served in addition to that sentence.

In sum, Zahurones has not established that her time spent in custody on counts 1, 3, and 5 while "free" on a signature bond on count 2 could be credited against her sentence for that count. Based on the foregoing, this court should conclude that the circuit court properly granted Zahurones credit for the days between her initial arrest and release on cash bond and properly denied her credit for the remaining time.

CONCLUSION

For these reasons, the State respectfully requests that this Court affirm the circuit court's judgment and order.

Dated this 15th day of February, 2019.

Respectfully submitted,

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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 5,349 words.

Dated this 15th day of February, 2019.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

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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).

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

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