STATE OF WISCONSIN

COURT OF APPEALS – 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

REPLY BRIEF 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

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ARGUMENT

Ms. Zahurones is entitled to credit towards her sentence on Count 2 because the conduct underlying Count 2 and the conduct that resulted in her confinement was the same.

A. A signature bond is not dispositive of whether or not a person is entitled to sentence credit.

The state argues that because Ms. Zahurones was technically on a signature bond on Count 2 during the periods she was in jail, this severed the connection between the custody and the course of conduct for which Ms. Zahurones was sentenced. The case law, however, does not support this argument.

1. The case law is consistent and focuses on factual, not procedural, connections.

The state attempts to reconcile sentence credit case law to support its position that a signature bond related to a charge necessarily precludes sentence credit. Unable to do so, it attempts to distinguish case law in which a defendant was on bond related to a charge and yet was entitled to sentence credit. It also argues that one case in particular, *State v. Hintz*,

2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646, was wrongly decided. Respondent's Brief at 14 n.2.[1]

Contrary to the state's argument, the case law is consistent. The state's mistake is to view the case law through a procedural lens. It incorrectly focuses on procedural mechanisms like signature bonds. Similarly, the state focuses on the connection between a specific charge, a procedural designation, rather than the conduct underlying the charge.

However, sentence credit turns on factual connections not procedural connections. *State v. Floyd*, 2000 WI 14, ¶17, 232 Wis. 2d 767, 606 N.W.2d 155. When viewed from this perspective, the case law is consistent in that when there is a factual connection between the conduct underlying the custody and the conduct underlying the sentence, a defendant is entitled to credit regardless of whether there is some procedural impediment, such as a signature bond.

The state relies heavily on *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997), for its assertion that a signature bond precludes sentence credit. However, *Beiersdorf* focused on the factual connection between the conduct underlying the charge and the conduct underlying the custody,

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[1] The argument that *Hintz* was wrongly decided is particularly disingenuous given that the state conceded in *Hintz* "that sentence credit must be awarded . . . for time in custody . . . if the [custody] was at least in part due to the conduct resulting in the new conviction." 300 Wis. 2d 583, ¶8.

not the mere fact that the defendant was on bond. *See Floyd*, 232 Wis. 2d 767, ¶17 ("*Beiersdorf* underscores that a factual connection fulfills the statutory requirement for sentence credit, and that a procedural or tangential connection will not suffice."). Significantly, the case involved separate charges arising from separate courses of conduct. Beiersdorf was on bond on a sexual assault charge when he was subsequently charged with bail jumping. *Beiersdorf*, 208 Wis. 2d at 495. He remained in custody on the bail jumping charge while still on bond on the sexual assault charge. *Id.* The court concluded that he was not entitled to sentence credit towards his sentence on the sexual assault charge because the conduct underlying the sexual assault charge was not a reason he was in custody. *Id.* at 498-99. Because of the bond, he was in custody because of one course of conduct—the bail jumping charge—but not the other—the conduct underlying the sexual assault charge.

The state also relies on *State v. Marcus Johnson*, 2007 WI 107, 304 Wis. 2d 318, 735 N.W.2d 505, which also involved separate courses of conduct. Johnson was in custody under a juvenile commitment order when he was charged with assault. *Id.*¶9. He was on bond on the assault charge but remained in custody under the juvenile commitment order. *Id.* He was therefore in custody for one course of conduct—the conduct underlying the juvenile case—but not the other—the conduct underlying the assault charge.

State v. Elandis Johnson, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207, also relied on by the state, also dealt with separate courses of conduct. Johnson was on bond related to one course of conduct but remained in custody on another. *Id.* ¶24. Given that he was on bond on one charge, the conduct underlying that charge was not a reason he was in custody.

In all of these cases, the defendants were on bond for one course of conduct while at the same time in custody related to a separate course of conduct. While the bond was the procedural mechanism by which they became "free" related to one course of conduct, it was the court's analysis of whether there was a connection between the facts underlying the charge for which they were sentenced and the facts underlying the custody that was dispositive.

This becomes even more clear in cases like *Floyd* and *Hintz*, where the defendants were in custody while technically on bond on the charge for which they were sentenced but still received sentence credit. In *Floyd*, the defendant was on bond on various charges but remained in custody on an armed robbery charge. 232 Wis. 2d 767, ¶¶2-4. The armed robbery charge was ultimately dismissed and read in *Id*. ¶4. Despite the fact that Floyd was on bond related to the charges for which he was ultimately sentenced, he was still entitled to sentence credit because the conduct underlying the read-in armed robbery charge was considered at sentencing. *Id*. ¶¶25-26. In other words, because the conduct

underlying the armed robbery charge for which he was in custody was considered at sentencing, that conduct was a reason for both his sentence and his custody. Floyd, therefore, was entitled to credit.

Hintz, too, is consistent in that it focused on a factual rather than procedural connection. *Hintz* was on extended supervision when he was arrested for burglary. 300 Wis. 2d 583, ¶¶2-3. He received a signature bond in the burglary case, but his probation agent put him on an extended supervision hold and he therefore remained in custody. *Id.* Because the probation agent considered the conduct underlying the burglary charges in deciding to place the extended supervision hold, the court concluded that the conduct underlying the burglary charge was a reason for the custody, and Hintz was entitled to credit. *Id.* ¶11. The court specifically rejected an argument identical to the one the state makes now, that a signature bond automatically precluded credit, looking instead at whether there was a factual connection between the conduct for which Hintz was sentenced—the burglary—and the conduct for which he was in custody. *Id*.

Thus, a signature bond is a procedural mechanism which is not determinative of whether a defendant is entitled to sentence credit. Rather, this court must look to the underlying factual connections. Where, as in *Floyd* and *Hintz*, a signature bond exists on a charge but the conduct underlying that charge is still a reason for the period of custody, a defendant is entitled to sentence credit.

The state does not discuss the sentencing credit statute much in its brief, but this interpretation of the case law is consistent with the plain language of Wis. Stat. § 973.155. A defendant is entitled to credit for "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." § 973.155(1)(a). The statute is clear: Where multiple charges arise out of a single course of conduct and that conduct results in confinement, a defendant is entitled to credit towards her sentence on all of those charges.

2. There is a factual connection between the conduct which resulted in Ms. Zahurones' custody and the conduct for which Ms. Zahurones was sentenced on Count 2.

Applying these principles here, Ms. Zahurones is entitled to additional credit. Despite the fact that Ms. Zahurones was on bond on Count 2 during the various periods she spent in jail, the conduct underlying Count 2 and the conduct underlying the custody are the same. The state concedes that all of the counts arose from a single course of conduct. Respondent's Brief at 15. Ms. Zahurones possessed drugs in her home, giving rise to multiple charges. This single course of conduct was the reason she was on probation and in jail on probation holds and pending revocation and sentencing. This single course of conduct is also the conduct for which she received a two-year sentence on Count 2. Because

this single course of conduct was both a reason for the periods of custody and the conduct for which she was sentenced on Count 2, she is entitled to credit. *See State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985) ("[U]nless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges."); *State v. Tuescher*, 226 Wis. 2d 465, 475, 595 N.W.2d 443 (Ct. App. 1999) ("[O]ne sentence does not arise from the same course of conduct as another sentence unless the two sentences are based on the same specific acts.").

The state also argues that Ms. Zahurones has shown no "specific findings" about the connection between the periods of custody and the conduct for which she was sentenced. Respondent's Brief at 15. But, as pointed out in Ms. Zahurones' initial brief, the circuit court specifically acknowledged that all counts arose from a single course of conduct, Appellant's Brief at 12, and the state has conceded as much, Respondent's Brief at 15. Ms. Zahurones has shown that the conduct for which she was sentenced and the conduct giving rise to her periods of custody were one in the same; it doesn't get much more specific than that.

To the extent that the state argues that Ms. Zahurones' claim for sentence credit fails because it was not new, separate conduct, *see* Respondent's Brief at 15, it is wrong. The fact that the conduct underlying Ms. Zahurones' custody and her sentence

on Count 2 is identical makes it stronger than the claims in *Floyd* or *Hintz*, which dealt with separate conduct which was merely considered alongside other conduct for purposes of sentencing or custody.

B. Ms. Zahurones is at least entitled to credit for the period of time she spent in jail pending revocation and sentencing.

Ms. Zahurones makes an alternative argument that she is at least entitled to credit for the last period of custody, February 22, 2017 through September 20, 2017 (210 days). Not only do the previously-discussed legal principles apply to this period, but there is also a stronger connection between Count 2 and this period of custody in that she was in jail pending revocation and sentencing on Count 2 as well as Counts 1, 3, and 5. The state argues that Ms. Zahurones is not entitled to credit for this period because the deferred entry of judgment agreement was not technically revoked by the judge until the sentencing hearing.

This argument also relies on a procedural application of sentence credit. While Ms. Zahurones was technically still on bond regarding Count 2 during this period, it is clear that Ms. Zahurones was in jail awaiting sentencing on all counts, not just Counts 1, 3, and 5. During this period, the state had already moved to revoke the deferred entry of judgment agreement because Ms. Zahurones had "failed to complete probation." (13:1). This was permitted under the terms of the agreement, which

required Ms. Zahurones to successfully complete probation. (8:1).

The state challenges Ms. Zahurones' assertion that the judge had no power to prevent revocation of the agreement, but this is true. The court does not determine whether to revoke probation; the Department of Corrections initiates the process, and the Department of Hearings and Appeals makes the final decision. *See* Wis. Stat. § 301.03(3); Wis. Admin. Code § HA Ch. 2. Revocation of probation triggered revocation of the deferred entry of judgment agreement. At no point did the judge have authority to overrule or review either the Department's or the state's revocation decisions; because the Department revoked probation for a valid reason, the court had to accept the state's revocation of the deferred entry of judgment agreement. The court acknowledged this. (54:9).

It was also clear that Ms. Zahurones was awaiting sentencing not just on Counts 1, 3, and 5, but also on Count 2 during this period. According to the deferred entry of judgment agreement, after revocation "the matter shall proceed to sentencing forthwith." (8:1-2). The hearing transcript also reflects that the parties understood that the September 20, 2017, hearing would address sentencing on Count 2 as well as Counts 1, 3, and 5. (54:4, 11).

The fact that the deferred entry of judgment agreement required judicial approval to finalize

revocation does not defeat Ms. Zahurones' claim for sentence credit. When a probation agent initiates revocation proceedings, he may place the defendant in jail on a probation hold pending a formal administrative process to review the decision. Wis. Admin. Code DOC § 328.27(2). Only after that process is completed is the revocation technically complete. However, that person is still entitled to credit for time spent in custody on the probation hold prior to the completion of the administrative procedures. The same is true with regard to the deferred entry of judgment agreement. The state moved to revoke the agreement on January 11, 2017. The fact that the judge had not yet rubber-stamped the revocation does not change the fact that Ms. Zahurones was in custody pending revocation of the deferred entry of judgment agreement and awaiting sentencing on Count 2.

C. Sentence credit is required to ensure Ms. Zahurones does not spend more time in custody than she was sentenced to.

Finally, the state argues that Ms. Zahurones will not serve more time in custody than she was sentenced to because the 272 days she spent in jail were not related to Count 2. This argument fails for the same reason as discussed above—it requires a narrow, procedural view of sentence credit when Wisconsin courts have repeatedly required a factual analysis. Factually, Ms. Zahurones did one thing—she possessed drugs in her home. For that one thing, Ms. Zahurones was sentenced to two years'

confinement and two years' extended supervision. However, she will spend two years and 272 days in confinement for that one thing unless she is granted credit.

CONCLUSION

For the reasons stated above, Ms. Zahurones requests that this court reverse the circuit court and award her 272 additional days of credit towards her sentence on Count 2. Alternatively, she requests that this court award her an additional 210 days of credit for the period she spent in custody awaiting sentencing.

Dated this 28th day of February, 2019.

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

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 2,475 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.

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 28th day of February, 2019.

Signed:

CARY BLOODWORTH
Assistant State Public Defender