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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case Nos. 2019AP000691-CR & 2019AP000692-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CESAR ANTONIO LIRA,

Defendant-Appellant.

On Appeal from an Order Denying a Motion for Custody Credit and an Order Denying a Motion for Reconsideration in Milwaukee County Circuit Court, the Honorable Frederick C. Rosa Presiding

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REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. Mr. Lira is entitled to credit against his Wisconsin sentences for time spent in Oklahoma pursuant to Wis. Stat. § 973.15(5).[1]

In his brief-in-chief, Mr. Lira relied on Wis. Stat. § 973.15(5) and *State v. Brown*, 2006 WI App 41, 289 Wis. 2d 823, 711 N.W.2d 708 to argue that he was entitled to credit in two alternative scenarios—either from the date of his confinement in Oklahoma in April 2004 until the date he was returned to Wisconsin in June of 2017 or from the date he was returned to Oklahoma in March of 2006 until June of 2017.[2] In essence, Mr. Lira has argued that his sentences should have constructively commenced once the State of Wisconsin revoked his supervision and he found himself in custody in a foreign jurisdiction.

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[1] Mr. Lira notes that the State has substantially reorganized the issues in its response. (State's Br. at 8). In order to ensure that all arguments are fully replied to, Mr. Lira's reply will mimic that organizational scheme in this reply.

[2] This latter block of credit was entailed with other periods of confinement representing his custody in Wisconsin and Texas.

The State rejects Mr. Lira's reliance on these authorities, proffering a wide array of contrary arguments. Mr. Lira will address each in turn.

First, the State argues that Wis. Stat. § 973.15(5) applies only if a sentence is "running," (State's Br. at 20), and, because they contend that Mr. Lira's sentence was not "running" until June of 2017, Mr. Lira is not entitled to credit. (State's Br. at 23). However, the State's reading of the law is not at all persuasive.

As a starting point, the plain language of the statute contains no such requirement. The State implicitly acknowledges this, informing the Court that "[t]he requirement that the offender actually be serving the Wisconsin sentence that credit is sought on when he or she is made available to another jurisdiction is all but explicit in the statute." (State's Br. at 21). This is a statement of wishful optimism and not a demonstration of sound statutory construction. Moreover, as binding case law establishes, the statute has only two requirements: that the defendant be both a "convicted offender" and "made available" to a foreign jurisdiction. *State v. Brown* 2006 WI App 41, ¶ 11, 289 Wis. 2d 823, 711 N.W.2d 708

Of course, the State acknowledges *Brown* but does so only to support their tortured and confusing misreading of that case. They claim, for example, that the statute is designed to ensure "that a Wisconsin sentence *continues* to run when a

Wisconsin offender is lawfully made available to another jurisdiction." (State's Br. at 21) (emphasis added). Yet that reading is belied by *Brown*, because the State also admits that Brown's sentence was not yet "running"—he was "awaiting transfer to Dodge Correctional Institution to begin serving his sentence" when he was abruptly transferred to federal authorities and then began constructively serving his state sentence. (State's Br. at 21). As the State is forced to admit, this Court awarded credit regardless, because Mr. Brown had been revoked and, but-for his transfer to federal custody, the sentence would have started to run upon his transfer to Dodge. *Brown*, 2006 WI App 41, ¶ 11. This Court did not rely on an argument that Brown *continued* to serve his sentence; rather, the Court held that his sentence constructively commenced when he was transferred to another jurisdiction. The Court erected no such requirement that the sentence already be "running."

The State's argument is therefore based on a fundamental misreading of the statute and the published—and binding—authority cited by Mr. Lira. Their emphasis on the sentence having begun to "run" is not reflected in the case law; rather, the case law establishes that a sentence can be construed to constructively commence—even if not already "running" for the purposes of Wis. Stat. § 973.10(2)(b)—under certain specified conditions. As

Mr. Lira pointed out in his brief-in-chief, his situation satisfies those requirements.[3]

Next, the State argues that Mr. Lira's sentences did not begin "running" until June of 2017. (State's Br. at 23). As stated above, this strained insistence on the requirement that a sentence be "running" is misplaced and is not logically deducible from legal authority. They appear to argue that, pursuant to Wis. Stat. § 973.10(2)(b), Mr. Lira's sentence did not begin "running" until he entered a Wisconsin institution. (State's Br. at 24). The assertion is an odd one to make, especially considering that the State has already informed this Court that this exact same argument was considered, and rejected, in the binding *Brown* decision. (State's Br. at 22).

The State then claims that "Lira provides no authority for his assertion that his sentences began running on April 16, 2004." (State's Br. at 24). Mr. Lira disagrees. Mr. Lira's entire argument is based

[3] The State claims that Mr. Lira "appears to accept the premise that his Wisconsin sentences had to be running when he was 'made available' to Oklahoma to claim credit for his Oklahoma custody under Wis. Stat. § 973.15(5)." Mr. Lira accepts no such thing. Instead, he has consistently asserted that, when the prerequisites of *Brown* are satisfied, the sentence will have been deemed to have commenced at that point. The State's repeated references to a sentence "running" reflect a willful papering over of the constructive conception this Court articulated in *Brown*.

on *Brown*, which establishes that a sentence constructively commences under certain conditions. Mr. Lira made this argument very plainly in his brief.

Moving on, the State gets to the real meat of its response—that *Brown* is distinguishable and therefore not applicable to this situation. (State's Br. at 27). The State correctly points out there are factual differences between the two cases because Mr. Lira escaped from custody. (State's Br. at 25). Yet, the State concedes that the DOC did formally revoke Mr. Lira's probation. (State's Br. at 25). As Mr. Lira has argued, the constellation of circumstances in this case—the formal revocation of his probation, the issuance of the detainer, and his incarceration—all merit a finding that his sentences constructively commenced upon being placed in custody in Oklahoma. This bleeds into an argument that the State has listed under another subject heading—whether he was "lawfully" made available to the foreign jurisdiction in question. (State's Br. at 27). The State argues that the circumstances of his placement in Oklahoma do not satisfy this requirement. (State's Br. at 28). Mr. Lira disagrees, however, and redirects this Court to his arguments in the brief-in-chief on that point.

Curiously, the State does not put up much of a fight as to the second term of contested credit—credit due once Wisconsin sent Mr. Lira back to Oklahoma in 2006. (State's Br. at 27). They appear to concede that Mr. Lira may have been lawfully made

available, (State's Br. at 28), yet still fall back on a claim that the sentences must have been "running." (State's Br. at 28). The argument is bizarrely circular; if he was lawfully made available, then the constructive commencement rule in *Brown* applies—there is no freestanding "running" requirement. In sum, the State appears to argue that the sentence could not have been constructively running because it was not running. (State's Br. at 28). This is not a persuasive argument.

As Mr. Lira has shown, their focus on whether the sentence was actually "running" is misplaced; the proper question is whether he satisfies the conditions for constructive commencement under *Brown*. Because Mr. Lira has argued that he does, this Court should faithfully apply that case to these facts in order to establish that his sentences commenced on April 16, 2004, or in the alternative, that the sentences started running when he was transferred back to Oklahoma in March of 2006.

Next, the State argues that *Brown* was wrongly decided and that this Court should privilege another case instead. (State's Br. at 28). However, this Court cannot overrule itself. *Cook v. Cook*, 208 Wis.2d 166, 190, 560 N.W.2d 246 (1997). *Brown* is a published case and therefore binding on this Court. The Court may not disregard it, or otherwise hold that it is "wrongly decided;" arguments to that effect are in contravention of binding authority from the Wisconsin Supreme Court.

The State also argues that *Brown* conflicts with *State v. Rohl*, 160 Wis.2d 325, 466 N.W.2d 208 (1991). (State's Br. at 29). To support that argument, they rely on a non-binding concurring opinion from *State v. Martinez*, 2007 WI App 225, 305 Wis. 2d 753, 741 N.W.2d 280. (State's Br. at 29). While *Martinez* itself is superficially distinguishable from the facts of this case, the State has not argued that the majority opinion in that case applies and therefore Mr. Lira will not waste words trying to make that argument here.

Instead, the State claims that the concurrence in *Martinez* sets up a conflict between *Rohl* and *Brown*. (State's Br. at 29). In sum, the State argues that *Brown* impermissibly awards double credit for non-concurrent sentences in contravention of *Rohl*. (State's Br. at 29). *Rohl* is distinguishable. In that case, the offender was not yet formally revoked when they were sentenced in California. *Rohl*, 160 Wis. 2d at 328. It was not until after he returned to Wisconsin that he was formally revoked. *Id*. At that time, he requested that pretrial incarceration credit he received in California also apply to the revocation because he was also sitting on the parole warrant while the California charges pended. *Id*. at 329. This Court straightforwardly denied the claim, as it would award double credit to a non-concurrent sentence. *Id* at 332. Yet, this Court was clear that Rohl was not "constructively" serving his revocation sentence, presumably because he had not yet been revoked in Wisconsin. *Id*. However, in *Brown*, the defendant had been revoked and was therefore constructively

serving the revocation sentence. There is no conflict between these cases and the State's overall attempt to render the sentences constructively consecutive is also without legal support.

Finally, the State rejects Mr. Lira's argument that he is not entitled to credit based on the language of the revocation order and warrant. (State's Br. at 30). The State does not discuss this Court's contemplation of this argument in the footnote cited from *Brown*, and instead falls back on arguments that such a result would be "absurd and unjust." (State's Br. at 31). The State's frustration with a legal outcome, however, is not a sufficient basis to deny relief.

Accordingly, this Court should hold that the requirements of *Brown* were triggered with respect to both controverted dates—April 16, 2004 and March 17, 2006.

II. Remaining credit.

A. The petition requirement.

The State takes a firm position that Wis. Stat. § 973.155(5) establishes a mandatory procedural hurdle for defendants seeking credit after sentencing—they must petition the DOC. (State's Br. at 33). In support, the State cites three dated Wisconsin Supreme Court decisions. (State's Br. at 34). Mr. Lira acknowledged this authority in his brief-in-chief. However, as Mr. Lira pointed out, these opinions are grossly inconsistent with sentence credit

practice as it is reflected in numerous published decisions. If the inflexible petition requirement described in these cases is governing, then it has been laxly applied by reviewing courts in the intervening forty years.

The State asserts that this administrative procedure is binding in light of *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977). (State's Br. at 34). Yet, the State does not address the authority cited by Mr. Lira, also from the Supreme Court, establishing no such mandatory bar. At the same time, even their authority asserts that the "rule" of administrative exhaustion is not absolute and that there are "numerous exceptions." *Nodell Inv. Corp*., 78 Wis. 2d at 424-425.

Moreover, the State's resort to cases dealing with highly specific administrative proceedings is a difficult fit for this case; here, the statute does not erect a robust administrative procedure and leaves only the vague possibility of a "petition" to the DOC. As the State concedes, there is absolutely no statutory guidance as to what this administrative mechanism is supposed to look like. (State's Br. at 36). The circumstance faced by a litigant like Mr. Lira is therefore not at all like that of a property owner seeking to leapfrog the municipal zoning appeal process, as in the case cited by the State.

The State also addresses Mr. Lira's statutory construction argument, finding that his argument about the statute's use of "may" is unreasonable.

(State's Br. at 35). However, Mr. Lira believes that reading makes more sense in light of several factors: (1) the lack of defined administrative mechanism for obtaining sentence credit (thus differentiating this case from the administrative appeal process discussed by the State), (2) the circuit court's inherent authority to correct errors in the judgment of conviction; and (3) the lack of any remedy, in the statutes, for convicted offenders outside of DOC supervision (such as inmates who are serving county jail sentences).

The State claims that this reading will be good policy. (State's Br. at 34-35). The State ignores that proper application of the sentence credit statute is a question of law and thus something that is best left to judicial decision makers, as opposed to bureaucratic workers within a given institution. At the same time, the State ignores the massive change its flat rule would have on current sentence credit practice, as this rule would impact all defendants—including defendants within their Rule 809.30 direct appeal. This impact cannot be understated. If the State's rule is accepted, defendants will no longer be able to file for sentence credit in their Rule 809.30 postconviction motions without first proceeding through a vaguely defined administrative process. And, while a defendant has a right to counsel if his motion is denied in circuit court through the Rule 809.30 appellate process, a strict petition requirement would strip much of the meaning from that appeal. After all, a defendant has no right to counsel in the administrative pursuit of challenged sentence credit.

Accordingly, for all of the reasons set forth in the initial brief, this Court should not endorse the flat rule advocated by for the State.

B. A merits review entitles Mr. Lira to relief.

The State does not contend that Mr. Lira's attempts to bring his credit issues to the DOC's attention were deficient, thereby conceding that issue in his favor.

Instead, they argue that a merits review shows him to be not entitled to credit.[4]

- Credit from Date of Arrest in Oklahoma until Date of Sentencing in Oklahoma

The State claims no credit is warranted because there is no factual connection. (State's Br. at 37). However, Mr. Lira was being detained in Wisconsin pursuant to these revocation cases. When he escaped, and was then re-detained in another State, that custody connection was not severed. Assuming that no new charges resulted from the Oklahoma escapade, and Mr. Lira was then re-transported to Wisconsin, there would be no serious argument against credit here. Thus, this is not a case where the State of Wisconsin merely filed a detainer,

[4] The State also acknowledges that a remand may be appropriate. While Mr. Lira acknowledges that this is also a legitimate remedy, he has asked this Court to address the claim on the merits for the reasons set forth in the initial brief.

instead, Mr. Lira's confinement in Oklahoma represents a continuation of his Wisconsin incarceration, especially considering the existence of an authorized revocation order and warrant. Finally, the State also argues that this would constitute impermissible double-credit, assuming that Mr. Lira received this credit in Oklahoma. However, the record does not support that argument.

- Credit After Being Returned to Wisconsin

While sitting in Wisconsin custody, Mr. Lira had a pending ROW. He was therefore in the same position as any revoked offender and should have continued accruing credit until he began actually serving that sentence. Thus, Mr. Lira should receive credit for the time he spent in custody in Wisconsin, as well as the time he spent in Texas after briefly absconding and being re-arrested.

The State disagrees, again citing the lack of a factual connection. (State's Br. at 38). Yet, if Mr. Lira was still "sitting" with a pending ROW, his custody was in connection with those revocation sentences. Second, they argue that any connection was severed by his sentencing in Oklahoma and that he was actually "serving" his Oklahoma sentence while present in Wisconsin. (State's Br. at 38). Accordingly, they claim this would be impermissible double credit. (State's Br. at 38). However, Mr. Lira was primarily "sitting" on two revoked cases. Mr. Lira acknowledges the authorities cited by the State, but simply believes his situation to be distinguishable due to its unique

facts. Moreover, while the State has cited a generic provision that may apply to his Oklahoma sentence, the State has not provided proof that Mr. Lira actually received credit for the time he spent in custody after being transported from Oklahoma.

Accordingly, Mr. Lira asks this Court to award credit as outlined in the initial brief.

CONCLUSION

Mr. Lira therefore requests that this Court reverse the ruling of the circuit court and award credit as outlined herein.

Dated this 26th day of December, 2019.

Respectfully submitted,

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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 2,883 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 26th day of December, 2019.

Signed:

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Christopher P. August
Assistant State Public Defender