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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2019AP1257-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

WYATT WILLIAM KONTNY,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN
MARINETTE COUNTY CASE 2018CF74, THE
HONORABLE JUDGE JAMES A. MORRISON
PRESIDING, AND FROM AN ORDER DENYING THE
DEFENDANT'S POST-CONVICTION MOTION FOR
ADDITIONAL SENTENCE CREDIT

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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Wisconsin Statutes

Wis. Stat. § 973.1553-5

STATEMENT OF THE ISSUE

Is Wyatt William Kontny entitled to receive one additional day of sentence credit for a total of 162 days spent in custody prior to being sentenced on October 1, 2018?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the facts and legal analysis can be sufficiently developed in writing.

STATEMENT ON PUBLICATION

Publication is not requested because the issue presented on appeal involves the application of settled law to the specific facts of this case. The issue is unlikely to reoccur.

STATEMENT OF THE CASE

Wyatt William Kontny (“Kontny”) was arrested on April 23, 2018 at 11:46 p.m. R. 4; App. 1; R. 46:3; App. 10.

Kontny’s arrest was based upon a warrant issued on a three-count criminal complaint, alleging that Kontny had delivered three pills (controlled substances) to a confidential informant in 2015. R. 2; R. 4; App. 1.

When Kontny appeared for his bail hearing, his bond was set at \$10,000 cash. R. 5. Kontny was unable to post that bond and remained confined throughout the remainder of

the pretrial proceedings in this matter. R. 58:2; R. 59:2; R. 60:3; R. 61:2; R. 13; R. 62:2; R. 25; R. 64:2.

At sentencing, the parties made a joint recommendation to the trial court that Kontny receive 161 days of sentence credit. R. 64:13. That recommendation was adopted by the trial court and 161 days was granted. R. 64:22. A judgment of conviction was entered accordingly. R. 35; App. 3.

Kontny filed a post-conviction motion, seeking one additional day of sentence credit. R. 44; App. 5-6. Kontny's motion alleged that he was arrested on April 23, 2018 and held until October 1, 2018 when he was sentenced, for a total of 162 calendar days.

The trial court issued a memorandum to the clerk advising that the defendant could not seek the additional credit because he stipulated to credit at the time of sentencing. R. 45; App. 7.

Kontny filed a motion to reconsider, supplementing the record with the police report to validate his arrest record on April 23, 2018. R. 46; App. 8-11. However, the motion was denied by a formal order. R. 49; App. 12.

The trial court's order denying Kontny's motion refused to grant Kontny 162 days of credit to include April 23, 2018, not because he had not proven his arrest date, but rather because the trial court found that Kontny forfeited the right to request it by stipulating to 161 days of credit at the time of sentencing. R. 49; App. 12.

Kontny appeals, seeking an order granting him 162 days credit for every calendar day for which he was confined.

ARGUMENT

Kontny was arrested April 23, 2018 and held until October 1, 2018 for a total of 162 calendar days; therefore the judgment in this case should be amended to grant him all of the credit to which he is entitled, pursuant to Wis. Stat. § 973.155. Wis. Stat. § 973.155 (2018); *see also* State v. Johnson, 2018 WI App 2, ¶ 8, 379 Wis. 2d 684, 906 N.W.2d 704; and State v. Johnson, 2009 WI 57, ¶ 27, 318 Wis. 2d 21, 767 N.W.2d 207.

A trial court's authority to sentencing a defendant is established by statute. *See* State v. Maron, 214 Wis. 2d 384, 388, 571 N.W.2d 454 (Wis. App., 1997). Sentence credit is a function of the trial court at sentencing. The trial court is bound by the sentence credit statute. Whether a trial court has improperly denied a defendant sentence credit to which he was entitled is a matter of law for the reviewing court. Johnson, 2009 WI 57 at ¶ 27.

The legislature has clearly prescribed that “[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” and while he is awaiting trial. Wis. Stat. § 973.155(1)(a)1.

Kontny was arrested on April 23, 2018, at 11:46 p.m., as evidenced by the arresting officer's report. App. 10. Kontny remained confined until his sentencing hearing on October 1, 2018. Therefore, Kontny is entitled to confinement for the entire time he sat in custody awaiting trial in this matter, or from April 23, 2018 until October 1, 2018, or 162 days.

In Johnson, the Court of Appeals unequivocally held that a defendant is entitled to one day of credit for every

calendar day for which he is confined for any part of that day. 2018 WI App 2 at ¶ 8. Kontny is entitled for one calendar day including April 23, 2018, October 1, 2018 and every day in between, for a total of 162 days of sentence credit.

In reaching that conclusion, the Court of Appeals cited to the Supreme Court decision, Johnson. Johnson, 2018 WI 2 at ¶ 7; *citing Johnson*, 2009 WI 57 at ¶ 5. The Supreme Court found that *Johnson* was confined from August 10, 2004 to August 13, 2004 and calculated his sentence credit to be four days, which can only be done if every calendar day is counted. Johnson, 2009 WI 57 at ¶ 5. Therefore, the Court of Appeals held that lower courts were bound to follow the Supreme Court's interpretation of Wis. Stat. § 973.155(1)(a)1 and grant one day of credit for every calendar day in which a defendant was confined for any portion of that day. Johnson, 2018 WI App 2 at ¶ 7; *citing Johnson*, 2009 WI 57 at ¶ 5; *see Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (Wis., 1997); *see also State v. Carter*, 2010 WI 77, ¶ 57 n. 39, 327 Wis. 2d 1, 785 N.W.2d 516; State v. Obriecht, 2015 WI 66, ¶ 21, 363 Wis. 2d 816, 867 N.W.2d 387.

Section 973.155(1), Wis. Stat., is mandatory and “[a] sentencing court *must* give credit accorded by the statute,” find that “ ‘a person [may] not serve more than that for which he is sentenced.’” Carter, 2010 WI 77 at ¶ 51; *quoting State v. Ward*, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Wis. App., 1989); *citing State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (Wis., 1985). The Supreme Court's holding in Carter, Ward, and Beets properly reflects the clear, mandatory language used by the legislature in Wis. Stat. § 973.155(1), which requires that a defendant *shall* receive credit for the time he spends in custody awaiting trial. *Id.*

Even where a defendant has not sought credit before sentencing, the legislature provides that he may later seek enforcement of the statute. *See* Wis. Stat. § 973.155(5). Kontny was not barred from receiving sentence credit for the days he spent in custody because the State and his attorney asked for one day less, whether by mathematical error or lack of knowledge of the law set forth in this brief. The statutes and prior holdings of both the Court of Appeals and the Supreme Court require that he receive a day of credit for every day he spent in custody to ensure fairness in judgments, so that he serves no more time than what he was sentenced to serve.

CONCLUSION

The trial court abused its discretion in refusing to grant Kontny 162 days of sentence credit to reflect one day of credit for every day he spent in custody in connection with the charges in this case. Therefore, Kontny respectfully requests that this Court issue an order reversing the trial court's ruling, requiring the trial court to issue an amended judgment granting Kontny 162 days of sentence credit for time spent in custody awaiting trial.

Dated this 6th day of September, 2019.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,276 words.

Dated this 6th day of September, 2019.

Signed:

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**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 6th day of September, 2019.

Signed:

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APPENDIX

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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; and (3) 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 first names and last initials 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.

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