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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CLERK OF COURT OF APPEALS
OF WISCONSIN

Case No. 2019AP1257-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

WYATT WILLIAM KONTNY,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING A
POSTCONVICTION MOTION FOR SENTENCE CREDIT,
ENTERED IN MARINETTE COUNTY CIRCUIT COURT,
THE HONORABLE JAMES A. MORRISON, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUE PRESENTED

Did Wyatt William Kontny prove that he is entitled to one additional day of presentence credit against his sentence for delivery of a controlled substance?

The circuit court answered: No.

This Court should answer: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication.

INTRODUCTION

Following his guilty plea to one count of delivery of a controlled substance, the circuit court sentenced Kontny to an eight-year term of imprisonment. At Kontny's October 1, 2018, sentencing hearing, the parties agreed that he should receive 161 days of pretrial sentence credit because he was in custody from April 24, 2018, to October 1, 2018, his sentencing date. Based on this agreement, the circuit court granted Kontny 161 days of presentence credit.

Through a postconviction motion under Wis. Stat. § 973.155(1)(a), Kontny requested one additional day of credit because he was actually arrested on April 23, 2018, and not April 24, 2018. The circuit court denied the motion based on the parties' sentence credit stipulation at sentencing. This Court should uphold its denial on a different ground. By operation of Wis. Stat. § 973.15(1), a sentence commences on the day the circuit court imposes it and, therefore, the sentencing date is not included in calculating pretrial sentence credit. Therefore, Kontny was entitled to 161 days of pretrial credit—from the date of his April 23, 2018, arrest date to, but not including, his October 1, 2018, sentencing date.

STATEMENT OF THE CASE

Kontny pleaded no contest to one count of delivery of a controlled substance as a party to a crime, contrary to Wis. Stat. § 951.41(1)(a). (R. 35:1.) The circuit court sentenced Kontny to an eight-year term of imprisonment, consisting of a four-year term of confinement and a four-year term of extended supervision. (R. 35:1.)

The following exchange occurred when the circuit court asked about sentence credit:

[Prosecutor]: Yes, Judge. 161 days.

The Court: Do you agree with that, [trial counsel]?

[Trial Counsel]: He's been in custody since April 24th. That was the number . . . I came up with yesterday.

The Court: Okay. Credit for 161 days of time served is granted.

(R. 35:2; 64:13.)

Kontny filed a postconviction motion for additional sentence credit. (R. 44:1.) Kontny asserted that he was arrested at 11:46 p.m. on April 23, 2018 and was held in continuous custody until he was sentenced on October 1, 2018 and, therefore, was entitled to 162 days of sentence credit. (R. 44:1.) The circuit court denied the motion. (R. 45:1.) The circuit court's entry includes the following notation: "DENIED: amount agreed on the record it is binding." (R. 45:1.)

Kontny moved for reconsideration. (R. 46:1.) His motion included a police report that documented his arrest on April 23, 2018. (R. 46:3–4.) The circuit court agreed that Kontny "was arrested on April 23, 2018." (R. 49:1.) But it denied Kontny's motion because it found "that the amount of sentence credit agreed to at the time of sentencing is binding." (R. 49:1.)

Kontny appeals.

ARGUMENT

Kontny received proper sentence credit and is not entitled to an additional day of presentence credit.

A. Legal standards guiding sentence credit determinations

Whether a defendant is entitled to sentence credit under Wis. Stat. § 973.155(1) presents a legal question that this Court reviews independently. *State v. Carter*, 2010 WI 77, ¶ 12, 327 Wis. 2d 1, 785 N.W.2d 516. This Court will uphold a 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.

Wisconsin Stat. § 973.155(1)(a) grants a defendant credit “for all days spent in custody in connection with the course of conduct for which sentence was imposed.” An offender who seeks sentence credit must 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.

Under section 973.155(1)(a), an offender is entitled to presentence credit for time spent in custody “while awaiting trial,” “while being tried,” and “while awaiting imposition of sentence.” Wis. Stat. § 973.155(1)(a)1., 2., and 3.; *State v. Marcus Johnson*, 2007 WI 107, ¶ 4 n.2, 304 Wis. 2d 318, 735 N.W.2d 505 (citation omitted). Further, a defendant is due a day of credit for any portion of a day spent in custody. *State v. Antonio A. Johnson*, 2018 WI App 2, ¶ 8, 379 Wis. 2d 684, 906 N.W.2d 704.

However, a defendant is not entitled to pretrial sentence credit for the date of the sentencing itself because a sentence is deemed to commence on the date that it is

imposed. Wis. Stat. § 973.15 (“Except as otherwise provided in this section, all sentences commence at noon on the day of the sentence[.]”).

B. The judgment of conviction accurately reflects Kontny’s pretrial sentence credit because he is not entitled to pretrial sentence credit for his sentencing date.

1. The State does not seek affirmance on the ground that the parties’ stipulation to presentence credit precluded Kontny from requesting additional credit under section 973.155.

A respondent may raise an argument for affirmance even though it was not raised in the circuit court. *State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860. And this Court may affirm a decision on grounds different from those that the circuit court relied. *State v. Earl*, 2009 WI App 99, ¶ 18 n.8, 320 Wis. 2d 639, 770 N.W.2d 755.

The State does not ask this Court to affirm the denial of Kontny’s motion based on the parties stipulated at the sentencing hearing that he served 161 days of confinement. (R. 45; 49; 64:13.) Section 973.155(1)(a)’s plain language mandates that an offender “shall be given credit toward the service of his or her sentence for *all days spent in custody . . .*” *Id.* (emphasis added.) Nothing within this section’s language authorizes parties to agree to presentence credit that differs from this section’s formula for calculating it. To hold otherwise would allow parties to circumvent section 973.155(1)(a)’s requirements and prevent a circuit court from later amending a judgment if it discovers that a stipulation for sentence credit resulted in an offender receiving more or less credit than statutorily allowed. A convicted offender should receive credit for “all days spent in custody”—no more

and no less—regardless of the parties’ stipulation. Wis. Stat. § 973.155(1)(a).

2. Kontny is nevertheless only entitled to 161 days of sentence credit.

Based on the information Kontny provided in his motion for reconsideration, the circuit court found that Kontny was arrested on April 23, 2018. (R. 46:1, 3–4; 49:1.) Even though he spent less than 15 minutes in custody the date of his arrest, he is entitled to a full day of credit for that day. *Antonio A. Johnson*, 379 Wis. 2d 684, ¶ 8. Kontny remained in continuous custody until his October 1, 2018, sentencing date. (R. 46:1; 64:1.)

Based on his April 23, 2018, arrest date and his October 1, 2018, sentencing date, Kontny spent 161 days in custody, not including his sentencing date, and 162 days in custody, including his sentencing date.¹

By operation of section 973.15(1), Kontny’s sentence began on his sentencing date, and by operation of section 973.155(1)(a), he only gets presentence credit for days “*awaiting* imposition of sentence.” Therefore, his sentencing date is not included in the calculation of his *presentence* credit. Instead, the Department of Corrections will give Kontny credit for his sentencing date when it computes his time spent in prison. Therefore, Kontny was entitled to 161 days of presentence credit granted at sentencing rather than 162 days of presentence credit that he requested through his postconviction motion.

¹ An online calendar-computation site, <http://www.timeanddate.com/date/duration.html>, provides a calculation consistent with the statutory-computation standard.

The judgment of conviction reflects that Kontny received credit for 161 days of sentence credit. (R. 35:2.) Therefore, the circuit court properly denied his postconviction motion for one additional day of presentence credit.

CONCLUSION

This Court should affirm the circuit court's order denying Kontny's postconviction motion for sentence credit.

Dated this 9th day of October 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 1,322 words.

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Assistant Attorney General

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

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of 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 9th day of October 2019.

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