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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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

The State and Kontny both agree that Kontny cannot be denied sentence credit because he agreed otherwise at his sentencing hearing. *St. Br.* at p. 4; *see State v. Ortiz*, 2001 WI App 215, ¶ 25, 247 Wis. 2d 836, 634 N.W.2d 860. Therefore, the State does not dispute that the trial court abused its discretion in denying Kontny's motion on those grounds.

Rather, the State argues that because Kontny began serving his sentence at noon on October 1, 2018, he is not entitled to a day of credit for that calendar day. That argument is flawed and the State cites to no legal authority for that position.

The State and Kontny both agree that Kontny was arrested April 23, 2018. Therefore, both agree that Kontny is entitled to one day of sentence credit for April 23, 2018 because he was held in custody for a portion of that calendar day, in connection with this case. *St. Br.* at p. 3-5; *see Antonio A. Johnson*, 2018 WI App 2, ¶ 8, 379 Wis. 2d 684, 906 N.W.2d 704; *see also State v. Johnson*, 2018 WI App 2, ¶ 8, 379 Wis. 2d 684, 906 N.W.2d 704.

The State and Kontny also agree that Kontny began serving his sentence at noon on October 1, 2018. *See* Wis. Stat. § 973.15(1) (2017-18).

The State and Kontny both agree that the time he was in custody from April 23, 2018 to October 1, 2018 was time he was in custody in connection with this case.

Finally, the State and Kontny also both agree that section § 973.155(1)(a) requires this Court to grant Kontny a day of credit for every day Kontny was 'awaiting sentencing.'

Kontny was awaiting sentencing until he was sentenced, noon on October 1, 2018. *See* Wis. Stat. § 973.155(1)(a); *see also* Wis. Stat. § 973.15(1). The statutes require the court to grant Kontny one day of credit for every calendar day for which he was confined, including the portion of October 1, 2018 before he was sentenced. Therefore, Kontny should be granted one day of credit for October 1, 2018.

The State disputes Kontny's position by arguing that "the Department of Corrections will give Kontny credit for his sentencing date when it computes his time spent in prison." *St. Br.* at p. 5. However, the State cites to no legal authority to support that position. The State cites to no legal authority for their argument.

The Court of Appeals has held that the Court cannot abandon its neutrality to develop arguments for either party, where an argument is not sufficiently developed. *See Wisconsin Conference Bd. Of Trs. Of United Methodist Church, Inc. v. Culver*, 2001 WI 55, ¶ 38, 243 Wis. 2d 394, 627 N.W.2d 469; *see also Industrial Risk Insurers v. American Eng'g Testing, Inc.*, 2009 WI App 62, ¶ 25, 318 Wis. 2d 148, 769 N.W.2d 82. The Court should not do so here.

Kontny is entitled to 162 days of credit which includes one day of credit for every calendar day from April 23, 2018 to October 1, 2018.

The trial court awarded Kontny 161 days of credit consistent with Kontny's interpretation of the law. However, the, trial court was presented with erroneous information and belief that Kontny was arrested on April 24, 2018. On appeal, Kontny produced evidence that Kontny was arrested on April 23, 2018, not April 24, 2018.

The trial court made a finding that Kontny was in fact arrested on April 23, 2018. That finding is not clearly erroneous.

Therefore, Kontny should be granted one additional day of credit and his judgment should be amended to reflect that Kontny was held in custody, in connection with this case for 162 days not 161 days.

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 which requires the trial court to issue an amended judgment granting Kontny 162 days of sentence credit for time spent in custody awaiting sentencing.

Dated this 6th day of November, 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 693 words.

Dated this 6th day of November, 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 November, 2019.

Signed:

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