RECEIVED
06-03-2020
CLERK OF COURT OF APPEA
OF WISCONSIN

STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT II

CASE NO. 2020AP000033 – CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

TANYA M. LIEDKE,

Defendant-Appellant.

Appeal from a Judgment and Order Entered
in the Fond du Lac County Circuit Court,
the Honorable Richard J. Nuss, Presiding.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Respondent-Appellant

TABLE OF CONTENTS

Page

ISSUES PRESENTED 1

STATEMENT ON ORAL ARGUMENT AND PUBLICATION 2

STATEMENT OF THE CASE AND FACTS 3

CUSTODY TABLE 5

ARGUMENT 8

I. Ms. Liedke is entitled to 582 days of credit 8

A. Introduction 8

B. Standards of review 8

C. The sentence credit statute entitles Ms. Liedke to 435 days of credit for her time in jail 9

D. Equal protection entitles Ms. Liedke to 147 days of credit for her time wearing a GPS bracelet while on probation 11

1. Overview of *Magnuson* 11

2. Overview of equal protection..... 12

3. *Magnuson* violates equal protection as applied to Ms. Liedke's time wearing a GPS bracelet. She should be credited for that time..... 14

II. A circuit court can correct credit for an imposed-and-stayed sentence even after the defendant is revoked from probation and begins serving the sentence. Both of Ms. Liedke's judgments of conviction should therefore be amended to reflect 582 days of credit 19

A. Introduction & standard of review 19

B. Every credit determination made in this case has been erroneous 19

C. The circuit court has authority to correct the erroneous credit determinations that both it and DOA have made 22

III. If Ms. Liedke was required to petition DOC before seeking credit in the circuit court, then this case should be remanded for an evidentiary hearing so she can show she's done so 29

CONCLUSION 30

APPENDIX 100

CASES CITED

Foucha v. Louisiana,
504 U.S. 71 (1992) 16

Gwenevere T. v. Jacob T.,
2011 WI 30, 333 Wis. 2d 273,
797 N.W.2d 854 8

Hayes v. State,
46 Wis. 2d 93, 175 N.W.2d 625 (1970) 25

Heller v. Doe,
509 U.S. 312 (1993) 13

Heritage Farms, Inc. v. Market Ins. Co.,
2012 WI 26, 339 Wis. 2d 125,
810 N.W.2d 465 25

Milwaukee County v. Mary F.-R.,
2013 WI 92, 351 Wis. 2d 273,
839 N.W.2d 581 ..... 16, 17

Sauk County v. Trager,
118 Wis. 2d 204, 346 N.W.2d 756 (1984) 26

State ex rel. Mentek v. Schwarz,
2001 WI 32, 242 Wis. 2d 94,
642 N.W.2d 150 ..... 26, 27

State v. Alger,
2015 WI 3, 360 Wis. 2d 193,
858 N.W.2d 346 ..... 16, 17, 19

State v. Arias,
2008 WI 84, 311 Wis. 2d 358,
752 N.W.2d 748 18

State v. Carter,
2010 WI 77, 372 Wis. 2d 1,
785 N.W.2d 516 10

State v. Collett,
207 Wis. 2d 319,
558 N.W.2d 642 (Ct. App. 1996) 12

State v. Crochiere,
2004 WI 78, 273 Wis. 2d 57,
681 N.W.2d 524 26

State v. Curiel,
227 Wis. 2d 389, 597 N.W.2d 697 (1999) 14

State v. Dairyland Power Co-op.,
52 Wis. 2d 45, 187 N.W.2d 878 (1971) 26

State v. Davis,
2017 WI App 55, 377 Wis. 2d 678,
901 N.W.2d 488 11

State v. Dowdy,
2010 WI App 158, 330 Wis. 2d 444,
792 N.W.2d 230 26

State v. Gilbert,
115 Wis. 2d 371,
340 N.W.2d 511 (1983) 12, 23, 28

State v. Harbor,
2011 WI 28, 333 Wis. 2d 53,
797 N.W.2d 828 ..... 25, 26

State v. Hintz,
2007 WI App 113, 300 Wis. 2d 583,
731 N.W.2d 646 24

State v. Johnson,
2009 WI 57, 318 Wis. 2d 21,
767 N.W.2d 207 9

State v. Johnson,
2018 WI App 2, 379 Wis. 2d 684,
906 N.W.2d 387 ..... 6, passim

State v. Kontny,
2020 WI App 30, --- Wis. 2d ---,
--- N.W.2d --- 6, 10, 20

State v. Kramer,
2001 WI 132, 248 Wis. 2d 1009,
637 N.W.2d 35 14

State v. Magnuson,
2000 WI 19, 233 Wis. 2d 40,
606 N.W.2d 536 ..... 11, passim

State v. Morgan,
2002 WI App 124, 254 Wis. 2d 602,
648 N.W.2d 23 18

State v. Obreicht,
2015 WI 66, 363 Wis. 2d 816,
867 N.W.2d 387 15

State v. Post,
197 Wis. 2d 279,
541 N.W.2d 115 (1995) 13, 18

State v. Taylor,
60 Wis. 2d 506, 210 N.W.2d 873 (1973) 25

State v. Wood,
2010 WI 17, 323 Wis. 2d 321,
780 N.W.2d 63 13

State v. Yanick,
2007 WI App 30, 299 Wis. 2d 456,
728 N.W.2d 365 28

State v. Zahurones,
2019 WI App 57, 389 Wis. 2d 69,
934 N.W.2d 905 9

Treiber v. Knoll,
135 Wis. 2d 58,
398 N.W.2d 756 (1987) 13

Winnebago County v. Christopher S.,
2016 WI 1, 366 Wis. 2d 1,
878 N.W.2d 109 16

CONSTITUTIONAL PROVISIONS CITED

Wisconsin State Constitution
Article I, § 1 13

United States Constitution
Amendment XIV, § 1..... 13

WISCONSIN STATUTES CITED

301.048(3)(a)(3) 14

302.425(2) 15

302.425(3) 15

809.22(2)(b) 2

809.23(1)(a)1 2

809.30 24

809.30(2)(h) 24

973.155 ..... 8, passim

973.155(1)(a) 11

973.155(1)(a)1 9

973.155(2) 19, 20, 21

973.155(5) ..... 19, passim

ISSUES PRESENTED

Two years ago, Tanya Liedke was revoked from probation and began serving imposed-and-stayed sentences on three counts. The next month, she was sentenced after revocation on two more counts. The circuit court imposed concurrent imprisonment.

Ms. Liedke's judgment of conviction for the counts with imposed-and-stayed sentences continues to reflect her pretrial credit of 164 days. By contrast, the JOC entered after revocation of Ms. Liedke's probation grants her 421 days. She seeks 582 days on both JOCs: the 421 days the circuit court and parties agreed upon, 14 more for uncredited time Ms. Liedke spent in jail, and 147 days for the portion of probation during which she wore a GPS bracelet.

1. **Is Ms. Liedke entitled to additional credit for time she spent in jail?**

The circuit court denied additional credit but did not specifically address Ms. Liedke's jail time.

2. **Is Ms. Liedke entitled to additional credit for her time wearing a GPS bracelet?**

The circuit court said no.

3. **Did the circuit court err by denying credit towards Ms. Liedke's imposed-and-stayed sentences (after she'd begun serving them) on the grounds that doing so is the Department of Corrections' job?**

The circuit court said it would not recalculate credit for Ms. Liedke's imposed-and-stayed sentences because doing so is DOC's responsibility.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Ms. Liedke requests both oral argument and publication.

Oral argument is merited mainly on the third issue: whether a circuit court can correct the credit applicable to an imposed-and-stayed sentence once a defendant is revoked from probation and begins serving that sentence. Here, the circuit court held that DOC alone can address such credit. But no published opinion comes to that conclusion, the statute is ambiguous, and there a number of practical reasons why leaving the issue solely to DOC is problematic. The division of authority between circuit courts and DOC is thus unclear in this domain, and the confusion is thwarting defendants' efforts to get the credit they're due. Engaging with counsel about who should do what (and why) will aid this court in crafting a workable resolution to this statutory quandary. Briefs, meanwhile, can only do so much to tease out the on-the-ground implications of the parties' positions. Argument is warranted. *See* Wis. Stat. § 809.22(2)(b).

Publication is merited for similar reasons: it will give litigants needed guidance on how to dispute the sentence credit applicable to imposed-and-stayed sentences, and it will give DOC and circuit courts needed guidance on how to—and whether they even can—resolve such disputes. The persistent confusion on these topics is an issue that a binding appellate decision can and should resolve. *See* Wis. Stat. § 809.23(1)(a)1.

STATEMENT OF THE CASE AND FACTS

Ms. Liedke was arrested for breaking into her landlord's home, stealing pills and a check, and then trying (unsuccessfully) to cash the check. (1:5-6). The state brought 16 charges based on this incident, including 12 for bail jumping. (1:1-5). It attached a repeater enhancer to every count. (*Id.*).

The parties negotiated a deal under which Ms. Liedke pleaded no contest to five counts, all as a repeater, and was put on probation for four years. (21; 62:2-4, 27). As a condition of her probation, the court ordered Ms. Liedke to participate in drug court. (62:27-28). It then withheld sentence on two counts and imposed and stayed 15 years' imprisonment on the other three. (62:27). The court also accepted the parties' stipulation to 164 days of sentence credit. (62:8, 30-31).

Nearly three years passed before Ms. Liedke was revoked. (*See* 31:1). For credit purposes, she was in and out of custody throughout that time: she spent several months wearing a GPS bracelet; she was periodically sent to jail, usually for the weekend, for failing to comply with drug court requirements or other conditions of her probation; and although she'd graduated from drug court earlier in the year, she was brought back to jail pending revocation of her probation on December 29, 2017. (31:1, 3-6). She has been incarcerated ever since.

After Ms. Liedke was revoked and transferred to prison to start serving her imposed-and-stayed sentences, she was sentenced after revocation on the two counts for which sentence had been withheld. (63). The court imposed four years' concurrent

imprisonment on each (63:18), with 421 days of sentence credit (36:4; App. 128). By contrast, the JOC for the counts with imposed-and-stayed sentences was never amended; it still reflects Ms. Liedke's pretrial credit of 164 days. (20:6; App. 134).

Following her sentencing after revocation, Ms. Liedke sought additional credit on five occasions. All five times, the circuit court said no.

First, on November 15, 2018, Ms. Liedke wrote the court to explain that, because her JOC for the counts with imposed-and-stayed sentences was never amended, she wasn't getting the credit she was entitled to on those counts. (65). The court responded with a handwritten note on Ms. Liedke's letter, saying: "Credit on JOC is correct. Further concerns need to be addressed by DOC." (65:1).

Ms. Liedke wrote the court again a few weeks later, expressing confusion about how her credit would be applied to her confinement time on the counts for which sentence was originally imposed and stayed. (66). The court did not respond.

On December 20, 2018, Ms. Liedke wrote the court a letter saying she believed she was statutorily entitled to credit for her time in drug court. (67). The court disagreed, again writing its response directly on her letter: "JOC is attached. As stated previously you received the correct credit. Per JOC that's 421 days." (67:1).

On January 9, 2019, Ms. Liedke filled out a pro se motion for sentence modification. (38). She again explained that she'd learned about a statute that grants credit to those who participate in a

substance abuse treatment program, like drug court, and she asked to be credited accordingly. (38:2-3). The court denied Ms. Liedke's motion with a note on its front page: "Motion DENIED. No new factor & all credit concerns were previously addressed." (39:1).

After the court rejected her fourth request, undersigned counsel was appointed to represent Ms. Liedke on the issue of sentence credit. (*See* 45). Counsel filed a motion for correction of sentence credit on December 18, 2019. (53; App. 102-24). This, too, was quickly rejected. The circuit court's order, filed the next day, read in full as follows:

> Upon filing and review of Defendant's Motion for Correction of Sentence Credit the Court denies the same and reaffirms its Judgments of Conviction. In support of the same the Court finds that a defendant is not entitled to sentence credit when placed on a GPS bracelet while on probation because they are not in custody. Further, the Court does not recalculate sentence credit and amend a Judgment of Conviction following a revocation of probation on an imposed and stayed sentence to reflect additional credit resulting from the revocation as that is the responsibility of DOC. Finally, the credit issue was previously addressed.

(54:1; App. 101).

CUSTODY TABLE

The following table provides the dates relevant to calculating Ms. Liedke's sentence credit, including the dates she was brought into jail in connection with this case, the dates she was released from jail, and the dates she had a GPS bracelet put on or taken off

while on probation. These dates come from booking records provided by the Fond du Lac County Jail (*see* 53:14-22; App. 115-23), as well as from information provided by Ms. Liedke's probation agent (*see* 53:23; App. 124).

A few points of clarification.

First, between October 19, 2015, and January 15, 2016, Ms. Liedke wore a GPS bracelet whenever she wasn't incarcerated. The bracelet would be placed on Ms. Liedke before she was released from jail, and she'd return to jail still wearing it. To avoid double-counting her days of custody, the table adjusts the dates she wore the GPS bracelet so they do not overlap with her jail time.

Second, for the same reason, the table adjusts the end date of Ms. Liedke's final probation hold. She was transferred to prison that day to begin serving her imposed-and-stayed sentences, so it should counts towards service of those sentences—not as credit. *See State v. Kontny*, 2020 WI App 30, ¶12, --- Wis. 2d ---, --- N.W.2d ---.

Finally, the tally of Ms. Liedke's days of custody (shown in the table's rightmost column) includes the start and end dates for each period of custody. Such inclusion is mandatory. *State v. Johnson*, 2018 WI App 2, ¶¶7-8, 379 Wis. 2d 684, 906 N.W.2d 387. Failure to count these start and end dates may account for some of the discrepancy between the circuit court's credit calculation and that set forth here.

Table. Periods of custody connected to this case.

Start Date	End Date	Type of Custody	Reason	Days
1/30/15	7/13/15	Jail	Pretrial custody	165
8/19/15	10/19/15	Jail	Probation hold	62
10/20/15	11/5/15	GPS bracelet	Drug court condition	17
11/6/15	11/9/15	Jail	Probation hold	4
11/10/15	1/15/16	GPS bracelet	Drug court condition	67
7/8/16	7/10/16	Jail	Probation hold	3
8/26/16	8/29/16	Jail	Probation hold	4
8/30/16	9/8/16	GPS bracelet	Drug court condition	10
9/9/16	9/12/16	Jail	Probation hold	4
9/13/16	11/4/16	GPS bracelet	Drug court condition	53
10/9/17	10/12/17	Jail	Probation hold	4
10/30/17	12/20/17	Jail	Probation hold	52
12/29/17	5/14/18	Jail	Probation hold (pending revocation)	137
			Total	**582**

ARGUMENT

I. Ms. Liedke is entitled to 582 days of credit.

A. Introduction.

More credit is necessary for two reasons. First, it appears the circuit court and parties simply miscalculated Ms. Liedke's jail time: at her sentencing after revocation, everyone agreed she'd spent 421 days in jail in connection with this case, when in fact the tally was 435. Second, equal protection entitles Ms. Liedke to credit for every day of probation during which she wore a GPS bracelet, but she wasn't credited for any of them. The result of these errors is that Ms. Liedke is scheduled to be released from prison nearly six months late. She asks this court to correct her credit—and thus to prevent an unwarranted delay in her return to freedom—while there's still time.

B. Standards of review.

Two bodies of law are involved here: that governing sentence credit and that guaranteeing equal protection. The former revolves around a statute, Wis. Stat. § 973.155. Interpretation and application of a statute are questions of law this court reviews independently. *Gwenevere T. v. Jacob T.*, 2011 WI 30, ¶16, 333 Wis. 2d 273, 797 N.W.2d 854. Whether a particular interpretation of § 973.155 violates equal protection as applied to Ms. Liedke is likewise a question of law this court reviews independently. *See id.*

C. The sentence credit statute entitles Ms. Liedke to 435 days of credit for her time in jail.

Ms. Liedke should be credited for all 435 days she spent in jail in connection with this case.

The starting point is § 973.155(1)(a), which provides that a defendant "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." In determining whether Ms. Liedke is entitled to the 435 days of credit at issue here, this court "must make two determinations": first, whether Ms. Liedke was "in custody" within the meaning of the statute; and second, whether her confinement was "in connection with the course of conduct for which sentence was imposed." *See State v. Johnson*, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207.

Ms. Liedke was indisputably in custody, as she was in jail. (*See* 53:14-22; App. 115-23). Incarceration is the clearest (though far from the only) form of custody for which § 973.155 ensures credit.

Nor is there any question Ms. Liedke's jail time was in connection with this case. First she was held in jail pending resolution of these charges. *See* § 973.155(1)(a)1. After the charges were resolved and she was placed on probation, Ms. Liedke was repeatedly held in jail on probation holds. Like pretrial confinement, confinement on a probation hold is "factually connected with the course of conduct for which sentence was," or will be, "imposed." *See State v. Zahurones*, 2019 WI App 57, ¶¶14-15, 389 Wis. 2d 69, 934 N.W.2d 905.

Given that the circuit court and parties agreed to additional credit at Ms. Liedke's sentencing after revocation, neither of these points appears to be contested. The gap between the 421 days granted and the 435 days warranted is, as noted above, probably the result of failing to count the start or end dates of Ms. Liedke's stints in jail. That is a common mistake, but a mistake nonetheless. *See Johnson*, 379 Wis. 2d 684, ¶¶7-8.

Although Ms. Liedke's final sentence credit motion proposed this explanation for her erroneous credit, the circuit court did not address it—or discuss her jail time at all. Instead it said "[t]he credit issue was previously addressed," implying it needn't be considered more than once. (54:1; App. 101).

That is incorrect, as the court of appeals recently recognized in an opinion recommended for publication. *See Kontny*, 2020 WI App 30, ¶¶8-9. *Kontny* held that regardless of how much credit the circuit court granted, and regardless of whether the parties agreed to that amount, the defendant could not be prevented "from later arguing in a postconviction motion that the amount of sentence credit awarded by the court was erroneous." *Id.*, ¶9. This conclusion, it explained, flows from the plain language of § 973.155, which makes sentence credit mandatory, and from precedent, which says credit must be granted when it's statutorily due because "a person [may] not serve more time than that for which he [or she] is sentenced." *Id.* (quoting *State v. Carter*, 2010 WI 77, ¶51, 372 Wis. 2d 1, 785 N.W.2d 516).

Thus, neither the parties' stipulations to credit at Ms. Liedke's sentencing and sentencing after revocation hearings, nor the circuit court's acceptance

of those stipulations, controls. What matters is what § 973.155 requires. This court should reverse the circuit court's decision denying credit for the additional days Ms. Liedke spent in jail.

D. Equal protection entitles Ms. Liedke to 147 days of credit for her time wearing a GPS bracelet while on probation.

Ms. Liedke should be credited for the 147 days of her time on probation during which she wore a GPS bracelet.

1. Overview of *Magnuson*.

As discussed above, § 973.155(1)(a) guarantees credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." Over time, courts have parsed this provision, clarifying, for example, what "a day" of custody is (*see Johnson*, 379 Wis. 2d 684, ¶8), and what nexus renders custody "in connection with the course of conduct for which sentence was imposed" (*see, e.g.*, *State v. Davis*, 2017 WI App 55, ¶10, 377 Wis. 2d 678, 901 N.W.2d 488). Here the issue is "custody" itself.

The Wisconsin Supreme Court most recently defined "custody" for sentence credit purposes in *State v. Magnuson*, 2000 WI 19, ¶31, 233 Wis. 2d 40, 606 N.W.2d 536. *Magnuson* considered whether a defendant should be credited for six months during which he was out on bond but confined to home detention with electronic monitoring and a nightly curfew, among other conditions. *Id.*, ¶1. The state argued that the defendant's bond conditions didn't amount to custody. The defendant disagreed.

In resolving their dispute, the court began by observing that prior cases had "interpreted the sentence credit statute and concluded that the plain meaning of custody . . . corresponds to the definition of custody contained in the escape statute." *Id.*, ¶13. An early case, it explained, had limited custody to the forms of restraint listed in the statute criminalizing escape. *State v. Gilbert*, 115 Wis. 2d 371, 378-79, 340 N.W.2d 511 (1983). But a later case held that the types of custody enumerated in the escape statute aren't exhaustive, so courts must decide on a case-by-case basis whether a particular set of restraints are "the functional equivalent of confinement." *State v. Collett*, 207 Wis. 2d 319, 325, 558 N.W.2d 642 (Ct. App. 1996).

Neither approach satisfied the *Magnuson* court. *Gilbert*'s narrow focus on the escape statute overlooked the legislature's efforts to categorize other "situations as restrictive and custodial." *Magnuson*, 233 Wis. 2d 40, ¶22. The fact-intensive *Collett* inquiry, meanwhile, "impose[d] an unnecessary burden upon courts and hinder[ed] consistency." *Id.* ¶26. So the court devised a new test. It declared that "for sentence credit purposes an offender's status constitutes custody whenever the offender is subject to an escape charge," either under the escape statute or under a different law altogether. *Id.*, ¶¶25-31.

2. Overview of equal protection.

The *Magnuson* court wasn't asked to consider, and did not address, the equal protection implications of its custody test. This court should do so here.

Ms. Liedke's right to equal protection is rooted in both the state and federal constitutions, which

provide substantially equivalent guarantees. *See Treiber v. Knoll*, 135 Wis. 2d 58, 68, 398 N.W.2d 756 (1987); *see also* Wis. Const. art. I, § 1; U.S. Const. amend. XIV, § 1. Both "are designed to assure that those who are similarly situated will be treated similarly." *Treiber*, 135 Wis. 2d at 68. Neither, however, requires the state to treat everyone the same: disparate treatment is allowed when there's a good enough reason for it.

The party alleging an equal protection violation must start by showing a disparity exists—that she's part of a group similarly situated to another group but subject to different treatment. *See, e.g.*, *id.* at 69. At that point, the burden shifts to the state to justify the disparity.

The level of scrutiny applied to the state's rationale varies. Ordinarily, the state need only show that the challenged disparity is rationally related to a legitimate governmental purpose. *Heller v. Doe*, 509 U.S. 312, 320 (1993). When the disparity impinges on a fundamental right, however—depriving one group, but not a similarly situated group, of that right—the state must prove the disparity "necessary to promote a compelling governmental interest." *State v. Post*, 197 Wis. 2d 279, 319, 541 N.W.2d 115 (1995).

An equal protection claim can be facial or as-applied. *State v. Wood*, 2010 WI 17, ¶13, 323 Wis. 2d 321, 780 N.W.2d 63. To prevail on a facial claim, "the challenger must show that the law cannot be enforced 'under any circumstances,'" consistent with equal protection. *Id.* If she succeeds, the law is invalidated completely. *Id.* To prevail on an as-applied claim, however, the challenger need only convince the court with regard to the facts before

it—"not hypothetical facts in other situations." *Id.* Success means "the law is void [only] as to the party asserting the claim." *Id.* It is the latter challenge Ms. Liedke brings and the latter remedy she seeks.

3. *Magnuson* violates equal protection as applied to Ms. Liedke's time wearing a GPS bracelet. She should be credited for that time.

Ms. Liedke was not subject to an escape charge while forced to wear a GPS bracelet on probation, under either the escape statute itself or any other provision. Thus, under *Magnuson*, she was not in custody and doesn't get credit for that time. But because applying *Magnuson* here would violate Ms. Liedke's right to equal protection, she should get the credit anyway.

The first and most basic problem is that *Magnuson* results in disparate treatment of similarly situated groups.

Similarly situated groups need not be identical (if they were, they'd be one group). *See, e.g., State v. Curiel*, 227 Wis. 2d 389, 413, 597 N.W.2d 697 (1999). Rather, they must resemble one another "with respect to the challenged governmental action." *State v. Kramer*, 2001 WI 132, ¶20, 248 Wis. 2d 1009, 637 N.W.2d 35.

The first group at issue here consists of probationers who wore a GPS bracelet and faced an escape charge while doing so. This group includes those who participated in intensive sanctions (*see* Wis. Stat. § 301.048(3)(a)(3) and those who served their condition time under electronic monitoring

instead of in jail (*see* Wis. Stat. § 302.425(2), (3)). The second group consists of probationers who, as with the first group, wore a GPS bracelet, but, unlike the first group, did not face an escape charge. This group includes Ms. Liedke.

Since this is a sentence credit appeal, these two groups need only resemble one another with respect to their claim for credit. They do. What matters here—what Ms. Liedke shares with bracelet-wearing probationers who faced an escape charge—is the degree to which the government deprived them of their liberty while they were ostensibly out of confinement. Deprivation of liberty is the essence of incarceration, and credit is meant to prevent lengthier incarceration than the sentencing court imposed. *See State v. Obreicht*, 2015 WI 66, ¶23, 363 Wis. 2d 816, 867 N.W.2d 387. It follows that probationers who faced the same deprivation of liberty before revocation—those who wore GPS bracelets, enabling the state to track their movement and to punish them for prohibited movement (*see Magnuson*, 233 Wis. 2d 40, ¶6)—have the same claim to credit regardless of whether they faced an escape charge. They are, for equal protection purposes, similarly situated.

Of course, *Magnuson* treats them differently. It ties the meaning of custody solely to the possibility of an escape charge—ignoring the more fundamental question of whether a defendant's circumstances resembled confinement. *See id.*, ¶31. As a result, it grants credit to just some of the similarly situated individuals at issue, letting them go free while keeping others behind bars. The disparity of treatment *Magnuson* inflicts thus impinges on the

right to "[f]reedom from physical restraint"—the very "core of the liberty protected by the Due Process Clause." *See Winnebago County v. Christopher S.*, 2016 WI 1, ¶37, 366 Wis. 2d 1, 878 N.W.2d 109. Given the fundamental right that *Magnuson*'s test for custody impacts, it must survive strict scrutiny to pass constitutional muster. *See Milwaukee County v. Mary F.-R.*, 2013 WI 92, ¶38, 351 Wis. 2d 273, 839 N.W.2d 581; *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992).

Courts often struggle to define the interest implicated by disparate treatment and hence to decide on the applicable level of scrutiny. Courts also disagree, at times, with how the parties characterize the interest at stake. For example, in *State v. Alger*, a person committed under Chapter 980 challenged the circuit court's refusal to apply *Daubert* when determining the admissibility of expert testimony offered by the state at his discharge petition trial. 2015 WI 3, ¶2, 360 Wis. 2d 193, 858 N.W.2d 346. The challenger framed the interest at stake as a fundamental right, saying, "Chapter 980 commitment implicates [the] fundamental right to freedom from bodily restraint." *Id.*, ¶40. But the Wisconsin Supreme Court was not convinced. *Id.*, ¶42. The challenge, it explained, wasn't to involuntary commitment per se; it was to the circuit court's use of one evidentiary standard instead of another, and "there is no fundamental right to a particular evidentiary standard." *Id.*, ¶¶43-44.

Alger relied heavily on *Mary F.-R.* In that case, the challenger argued that "equal protection is violated when only a six-person jury with a 5/6 determination is available . . . under Chapter 51,"

while a "12-person jury and a requirement of unanimity" are available under Chapter 980. *Mary F.-R.*, 351 Wis. 2d 273, ¶1. As in *Alger*, the challenger in *Mary F.-R.* said strict scrutiny should apply, as "her fundamental liberty interest" was at stake. *Id.*, ¶36. Again the court disagreed. *Id.*, ¶38. It held that, while "involuntary commitment is a 'significant deprivation of liberty,' [this] challenge relates only to the jury procedures available for initial commitment hearings," not to the commitments themselves. *Id.* (internal citations omitted).

Unlike the defendants in *Alger* and *Mary F.R.*, what Ms. Liedke challenges on equal protection grounds—the rule that people subject to an escape charge are in custody for credit purposes and those not so subject aren't—is not procedural. It is a rule that dictates whether credit is granted or denied and thus whether freedom is hastened or postponed. Because physical liberty is the interest at stake, this court must subject *Magnuson*'s custody test to strict scrutiny.

Finally, because the *Magnuson* rule isn't necessary to promote any compelling government interest, the disparate treatment it inflicts is unjustified. It cannot, consistent with equal protection, apply to Ms. Liedke's time wearing a GPS bracelet.

Magnuson chose a definition of custody that would simplify credit determinations and promote consistency; those were the *Magnuson* court's main goals. 233 Wis. 2d 40, ¶¶22, 25. But avoiding the difficulty and inconvenience of an "amorphous," fact-intensive analysis does not rise to the level of the "compelling governmental interest" equal protection

requires here. *See Post*, 197 Wis. 2d at 319. The many totality-of-the-circumstances tests in the criminal law demonstrate this point. *See, e.g.*, *State v. Morgan*, 2002 WI App 124, ¶12, 254 Wis. 2d 602, 648 N.W.2d 23 (fact-intensive inquiry required to assess *Miranda* custody). Protecting defendants' constitutional rights, and heeding the broader values those rights reflect, often entails time-consuming, case-by-cases analysis; anything less would prioritize ease and efficiency in judicial decisions over fairness and accuracy, giving insufficient weight to the critical interests at stake.

As Wisconsin's courts have long recognized, there are situations in which a bright-line rule is too blunt a tool. *See, e.g., State v. Arias*, 2008 WI 84, ¶34, 311 Wis. 2d 358, 752 N.W.2d 748. This is one. The firm division *Magnuson* draws between those in and out of custody sends similarly situated defendants to opposite sides, based, more or less, on a technicality.

But the *Magnuson* definition of custody isn't just unfair; it's also unnecessary. There is no inherent relationship between custody and escape. If the legislature eliminated the crime of escape, inmates across the state would remain in custody. Custody for credit purposes was linked to escape not because it has to be, but because, given precedent and concerns over administrability, it made sense. *Magnuson*, 233 Wis. 2d 40, ¶¶25-31. The escape-based definition of custody has virtues, as *Magnuson* made clear—but they don't make its approach necessary or justify the disparate treatment it produces.

In sum, denying Ms. Liedke credit for her time wearing a GPS bracelet would unjustifiably deprive her of liberty while granting it to similarly situated

others—violating equal protection. She is therefore entitled to credit not just for her overlooked jail time, but also for the 147 days of probation during which she wore a GPS bracelet.

II. A circuit court can correct credit for an imposed-and-stayed sentence even after the defendant is revoked from probation and begins serving the sentence. Both of Ms. Liedke's judgments of conviction should therefore be amended to reflect 582 days of credit.

A. Introduction & standard of review.

Beyond the question of how much more credit Ms. Liedke is entitled to is another thorny issue: who must ensure she gets it? The answer will turn on this court's interpretation of two provisions in the sentence credit statute. The first is § 973.155(2), which governs initial credit calculations (those made when a defendant is sentenced or revoked). The second is § 973.155(5), which governs the correction of errors in those calculations. This court will interpret and apply these provisions de novo. *See Alger*, 360 Wis. 2d 193, ¶21.

B. Every credit determination made in this case has been erroneous.

Section 973.155(2) provides that, after sentence is imposed, the circuit court "shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction." If the defendant is later revoked—either from probation, extended supervision, or parole—it's the Department

of Corrections (if the defendant waives a revocation hearing) or the Division of Hearings and Appeals within the Department of Administration (if a revocation hearing takes place) that makes the credit finding, "which shall be included in the revocation order." *Id.*

At Ms. Liedke's initial sentencing hearing, the circuit court made the required credit finding, granting her 164 days. (62:31). The initial JOCs (one was issued for the counts with imposed-and-stayed sentences, another for the counts with sentence withheld) both reflect this amount. (20:2, 6)

As shown in the table on page 9 of this brief, Ms. Liedke was actually entitled to 165 days of pretrial credit. The court and parties may have omitted Ms. Liedke's arrest date from their calculation. If so, that was error. *See Johnson*, 379 Wis. 2d 684, ¶¶7-8. Alternatively, the court and parties may have omitted the date of the sentencing hearing from their calculation. That too would have been error, as Ms. Liedke did not begin serving a sentence that day. *Compare with Kontny*, 2020 WI App 30, ¶12.

In sum, Ms. Liedke is entitled to one more day of pretrial credit—towards all counts—than the circuit court granted at sentencing (and than her initial JOCs reflect).

By the time Ms. Liedke was revoked, she had accrued substantially more credit. Although § 973.155(2) required DOA to calculate that credit and include it in the revocation order, all DOA did was note the credit granted at sentencing and then list the post-sentencing dates Ms. Liedke spent in jail

in connection with this case. (31:1). DOA did not, therefore, fulfill its statutory obligation to provide a tally of the "number of days for which sentence credit [was] to be granted." *See* § 973.155(2).

The dates DOA listed on the revocation order largely align with the dates Ms. Liedke's booking records say she was in jail on probation holds (and thus with the jail dates listed in the table on page 9). With one exception: the booking records show a probation hold from October 30, 2017, to December 20, 2017, while the revocation order lists the end date of that hold as November 15, 2017. The record contains no clear explanation for this 35-day discrepancy. It appears to be a mistake.

What DOA did *not* list on Ms. Liedke's revocation order were the dates she wore a GPS bracelet while on probation. Its determination of credit thus shorted Ms. Liedke 147 days' worth. That omission, plus the aforementioned 35-day discrepancy and the one missing day of pretrial credit, mean the revocation order reflects 183 fewer days of credit than Ms. Liedke is entitled to.

Because the JOC for Ms. Liedke's imposed-and-stayed sentences hasn't been amended, DOC is presumably following the revocation order in applying credit to those sentences and calculating the date Ms. Liedke will complete them.

By contrast, a new JOC was issued after Ms. Liedke's sentencing after revocation, and it sets forth a new credit finding by the circuit court: 421 days. (36:4; 63:19). As discussed earlier, that's 14 fewer days than Ms. Liedke spent in jail in connection with this case, and includes none of the

147 days she spent wearing a GPS bracelet while on probation. Nevertheless, DOC is presumably following the circuit court's credit finding on the counts to which it applies.

The various credit determinations by the circuit court and DOA thus reflect 183 fewer days than Ms. Liedke is entitled to on the counts for which her sentences were imposed and stayed, and 161 fewer days than she's entitled to on the counts for which sentence was initially withheld. Ms. Liedke's release date is, accordingly, incorrect.[1] Absent correction of her credit, she will be held in prison longer than the law allows.

C. The circuit court has authority to correct the erroneous credit determinations that both it and DOA have made.

Section 973.155(5) of the sentence credit statute describes the process for seeking credit when it wasn't granted at sentencing. It applies to everyone "who is in custody or . . . on probation," and it says they "may petition [DOC] to be given credit." § 973.155(5). If DOC can verify "the facts alleged in the petition," then credit "shall be applied retroactively." *Id.* If DOC *can't* verify those facts, or

[1] Ms. Liedke is currently scheduled to be released to extended supervision on October 7, 2024. This date can be found on the Department of Corrections' offender locator page (appsdoc.wi.gov/lop/home.do) by searching for "Tanya Liedke" and clicking on the "STATUS" tab. Her release date is listed as "Mandatory Release/Extended Supervision Date." The date she's set to complete her full term of imprisonment (including extended supervision) is listed as "Maximum Discharge Date."

for some other reason "refuses to award retroactive credit," then the defendant "may petition the sentencing court for relief." *Id.*

The full text of § 973.155(5) is as follows:

> If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation, extended supervision or parole, the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, this section shall be applied retroactively to the person. If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief. This subsection applies to any person, regardless of the date he or she was sentenced.

Despite this provision's reasonably simple text, its meaning remains obscure. What it appears to dictate, at least in some circumstances, is an administrative process that the vast majority of sentence credit case law hasn't so much as acknowledged—let alone enforced.

State v. Gilbert, 115 Wis. 2d 371, 340 N.W.2d 511 (1983), provides an early example. In *Gilbert*, the defendant was revoked from probation, began serving imposed-and-stayed sentences, and then moved for credit based on time he'd spent in jail as a condition of probation. *Id.* at 373-74. The circuit court denied the credit, and the defendant appealed. *Id.* at 375. The court of appeals certified the case to the Wisconsin Supreme Court, which decided the credit issue without even mentioning the § 973.155(5)

petition process (or clarifying whether the defendant had pursued it, or whether that mattered). *Id.* at 375, 380.

State v. Hintz, 2007 WI App 113, ¶¶4, 12, 300 Wis. 2d 583, 731 N.W.2d 646, offers a more recent example. In *Hintz*, the defendant was put on an extended supervision hold after committing multiple burglaries. *Id.*, ¶¶3-4. His supervision was eventually revoked, and, in a new case, he was convicted of one of the burglaries. *Id.*, ¶4. After sentencing in the burglary case, the defendant moved for credit for the time he'd spent in jail due to the extended supervision hold. *Id.* The circuit court denied the motion, and the defendant appealed. *Id.* The court of appeals reversed, granting the defendant his requested credit. *Id.*, ¶12. Its opinion said nothing about the defendant's failure to petition DOC before filing a credit motion under Rule 809.30(2)(h).

These are two of countless published appellate cases in which credit is handled as a standard postconviction issue—one that can be taken to the trial and appellate courts under Rule 809.30 without first pursuing relief administratively. If § 973.155(5) requires a defendant to seek credit from DOC rather than the circuit court—at least under some circumstances—then that's a requirement the courts have consistently declined to enforce.

Enforcement aside, it is far from apparent that the statute establishes any precondition to moving for credit in the circuit court, as its plain language leaves key questions unanswered. First, does the petition process apply when DOC or DOA fails to determine credit upon a defendant's revocation, or only when a circuit court fails to do so at sentencing? The

statutory text suggests the latter, which would exclude Ms. Liedke's credit request from the reach of the petition process. *See* § 973.155(5) (defendants can petition DOC for credit if the credit statute wasn't "applied *at sentencing*" (emphasis added)). Second, by saying the defendant "may" petition DOC and "may" petition the sentencing court if DOC denies relief, does § 973.155(5) leave other avenues for seeking relief open—like filing a postconviction motion? *See id.* The legislature's use of the word "may," rather than "shall," suggests the petition process is permissive, not mandatory, and thus that Ms. Liedke was allowed to move the circuit court for more credit notwithstanding the parallel availability of an administrative process. *See Heritage Farms, Inc. v. Market Ins. Co.*, 2012 WI 26, ¶32, 339 Wis. 2d 125, 810 N.W.2d 465.

But even if the statute establishes a universal administrative precondition to seeking credit in the circuit court (which its text belies), the circuit court still retained authority to correct Ms. Liedke's credit—towards all counts—on her motion. That authority has two sources, and it's corroborated by the long stretch of sentence credit cases that are silent on § 973.155(5).

First, a circuit court has inherent authority "to amend, modify and correct a judgment of sentencing even though . . . the sentence has been commenced." *Hayes v. State*, 46 Wis. 2d 93, 102, 175 N.W.2d 625 (1970), *overruled on other grounds by State v. Taylor*, 60 Wis. 2d 506, 210 N.W.2d 873 (1973). This authority is not without limits; nothing about a sentence can be altered "on reflection and second thoughts alone." *State v. Harbor*, 2011 WI 28, ¶35,

333 Wis. 2d 53, 797 N.W.2d 828. But the case law is clear that a circuit court has inherent authority to correct an illegality (like a credit error) regardless of whether a statute also grants it that authority. *See State v. Dowdy*, 2010 WI App 158, ¶28, 330 Wis. 2d 444, 792 N.W.2d 230 (citing *State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524, *overruled on other grounds by Harbor*, 333 Wis. 2d 53, ¶52). It follows that the circuit court had inherent authority to correct Ms. Liedke's credit here.

Second, even when, as here, an administrative process is available, its exhaustion isn't necessary to confer jurisdiction on the circuit court. *State v. Dairyland Power Co-op.*, 52 Wis. 2d 45, 54, 187 N.W.2d 878 (1971). A party's failure to exhaust administrative remedies "simply supplies the court with a reason for refusing to hear" that party's claim; it has discretion whether or not to use it. *Id.*; *see also State ex rel. Mentek v. Schwarz*, 2001 WI 32, ¶9, 242 Wis. 2d 94, 642 N.W.2d 150. As the Wisconsin Supreme Court has explained, "[a] court need not apply the exhaustion doctrine when a good reason exists for making an exception." *Sauk County v. Trager*, 118 Wis. 2d 204, 214, 346 N.W.2d 756 (1984).

Good reasons abound in this case.

Ms. Liedke did what countless defendants before her have done when she filed a credit motion in the circuit court and appealed its denial under Rule 809.30. For decades, courts have been resolving credit disputes this way without any mention of the petition process described by § 973.155(5). To require Ms. Liedke to pursue correction of her credit by petitioning DOC would enforce a procedure that, as a practical matter, she had no notice of. Worse, it

would hold her to a standard that other, similarly situated defendants have *not* been held to in the many published cases addressing credit.

The time sensitivity of this credit dispute is also important. To prevent a grave constitutional violation—which Ms. Liedke's incarceration past her lawful release date would cause—correction of her credit must occur while there's time for remittitur (from this court or even the Wisconsin Supreme Court); time for the circuit court to amend her judgments of conviction; and time for DOC to recompute her sentence. Meanwhile, declining to resolve this dispute unless and until DOC fails to grant the appropriate credit could force Ms. Liedke through a second round of Rule 809.30 litigation. Such litigation takes time, and lengthy delays are not uncommon (especially in light of the current public health emergency). Enforcing the petition process could make meaningful relief in this case impossible.

Finally, the question of how much credit Ms. Liedke is entitled to is *not* one for which DOC has "special competence and expertise" when compared with the circuit court. *See Mentek* 242 Wis. 2d 94, ¶8. Credit is a question of law rooted in statutory interpretation and constitutional principles. It is precisely the kind of issue courts are best able to resolve.

In sum, the circuit court had discretion to set aside any administrative exhaustion requirement § 973.155(5) imposes.

It's unclear which of these theories courts have subscribed to, if any; the case law does not delve into the § 973.155(5) petition process or explain why it

isn't enforced. What *is* clear is that binding appellate cases throughout the past few decades have resolved credit disputes that were brought, in the first instance, to a circuit court. This is true for credit determinations made by the circuit court at sentencing, then challenged by postconviction motion (*see, e.g.*, *Johnson*, 379 Wis. 2d 684, ¶¶4-5); it's true for credit determinations made by the circuit court at sentencing after revocation, then challenged by postconviction motion (*see, e.g.*, *Gilbert*, 115 Wis. 2d at 376); and it's true for credit determinations made by DOC or DOA when a defendant is revoked from probation and begins serving an imposed-and-stayed sentence (*see, e.g.*, *State v. Yanick*, 2007 WI App 30, ¶¶3-4, 299 Wis. 2d 456, 728 N.W.2d 365).

While the circuit court denied credit towards Ms. Liedke's imposed-and-stayed sentences in part because it saw the credit as DOC's problem, decades of case law, the text of § 973.155(5), the doctrine of inherent judicial authority, and the principle that circuit courts can set aside administrative exhaustion requirements *all* prove otherwise. This court should thus do what the circuit court wouldn't: recalculate Ms. Liedke's credit and ensure she receives the credit she's due.

III. If Ms. Liedke was required to petition DOC before seeking credit in the circuit court, then this case should be remanded for an evidentiary hearing so she can show she's done so.

If this court determines that petitioning DOC for correction of credit is a necessary prerequisite to moving for credit in the circuit court, then Ms. Liedke should be given the opportunity to prove she fulfilled that prerequisite. Because the circuit court denied Ms. Liedke's credit motion without a hearing, there has been no testimony taken and no credibility determinations or other findings of fact made. Thus, there is no record either demonstrating or disproving Ms. Liedke's exhaustion of administrative remedies. An evidentiary hearing will be needed to create that record if such exhaustion is deemed necessary.

CONCLUSION

Ms. Liedke asks this court to reverse the circuit court's order denying her credit motion, and to remand the case to the circuit court with instructions to amend her judgments of conviction to reflect 582 days of sentence credit.

If this court decides Ms. Liedke was required to petition DOC before seeking relief in the circuit court, then Ms. Liedke asks this court to remand the case to the circuit court for an evidentiary hearing at which she can prove she's met the petition requirement.

Dated and filed by U.S. Mail this 2nd day of June, 2020.

Respectfully submitted,

_____

MEGAN SANDERS-DRAZEN
Assistant State Public Defender
State Bar No. 1097296

Office of the State Public Defender
Post Office Box 7862
Madison, WI 53707-7862
(608) 266-8383
sandersdrazenm@opd.wi.gov

Attorney for Defendant-Appellant

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 6,731 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 and filed by U.S. Mail this 2nd day of June, 2020.

Signed:

MEGAN SANDERS-DRAZEN
Assistant State Public Defender

A P P E N D I X

I N D E X
T O
A P P E N D I X

Page

Order Denying Motion for
Correction of Sentence Credit
December 19, 2019 101

Motion for Correction of Sentence
Credit (with Exhibits A, B, and C)
December 18, 2019 102-124

Judgment of Conviction after
Revocation of Probation
(Sentence Imposed, Counts 4 & 5)
June 7, 2018 125-128

Judgment of Conviction
(Sentence Withheld,
Probation Ordered, Counts 4 & 5)
July 13, 2015 129-131

Judgment of Conviction
(Sentence Imposed & Stayed,
Probation Ordered, Counts 1, 2 & 3)
July 13, 2015 132-135

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; (3) a copy of any unpublished opinion cited under s. 809.23(3)(a) or (b); and (4) 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.

Dated and filed by U.S. Mail this 2nd day of June, 2020.

Signed:

MEGAN SANDERS-DRAZEN
Assistant State Public Defender