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COURT OF APPEALS

STATE OF WISCONSIN
C O U R T O F A P P E A L S
DISTRICT II

Case No. 2020AP976-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

AVERY B. THOMAS, JR.,
Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF
CONVICTION AND AN ORDER DENYING A MOTION
FOR ADDITIONAL SENTENCE CREDIT ENTERED IN
RACINE COUNTY CIRCUIT COURT, THE HONORABLE
WYNNE P. LAUFENBERG, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Is Defendant-Appellant Avery B. Thomas, Jr., entitled to sentence credit for 48 days spent in custody on a federal parole hold while on a signature bond in the present case?

The circuit court answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The State agrees with Thomas that this appeal may be resolved by application of established legal principles to the facts.

INTRODUCTION

Avery Thomas seeks 48 days additional sentence credit for time he spent in custody pursuant to a federal probation hold only. During this time, Thomas was not in custody on the offenses in the present case—a signature bond had been issued, severing the factual connection between Thomas’s custody and the present offenses.

In *State v. Hintz*, 2007 WI App 113, ¶¶ 9–11, 300 Wis. 2d 583, 731 N.W.2d 646, this Court interpreted Wis. Stat. § 973.155(1)(b) to confer credit for custody on a state supervision hold even when the offender is “free” on a signature bond on the offense for which sentence is imposed. Because Wis. Stat. § 973.155(1)(b) plainly authorizes credit for custody on only *state* probation, supervision, and parole holds, Thomas is not entitled to credit for his custody on a federal probation hold. Accordingly, this Court should affirm the circuit court’s order denying relief and the judgment of conviction.

STATEMENT OF THE CASE

In February 2018, Avery Thomas was charged with four counts of delivery of three grams or less of heroin near a school, and single counts of delivery of one gram or less of cocaine near a school, maintaining a place of drug trafficking, possession of heroin, possession of cocaine, and possession of THC, all as a repeat offender. (R. 1:1–4.) As alleged in the criminal complaint, Thomas sold drugs to a confidential informant near a school on multiple occasions, and drugs were found in his vehicle as it was parked outside a government office building. (R. 1:5–6.) At the time, Thomas, who was on federal supervision, was inside the building meeting with his (federal) probation agent. (R. 1:5–6.)

Thomas was taken into custody on February 21, 2018. (R. 42:14.) At Thomas's February 23, 2018 initial appearance, the court set a cash bond of \$10,000. (R. 28:4.) Thomas did not post bond and remained in custody. (R. 24:2.)

On February 27, 2018, a warrant was issued for his arrest in his federal case. (R. 24:8, 16; 42:14–15.) The circuit court treated as fact that the federal hold resulted in part from Thomas's crimes in the present case, and the State does not challenge this determination here. (R. 24:8; 42:13, 15.)

Nearly one year later, on February 15, 2019, Thomas entered guilty pleas to two counts of delivery of heroin, and to single counts of delivery of cocaine, possession of heroin as a second and subsequent offense, and possession of cocaine as a second and subsequent offense. (R. 40:17–18.)

On April 1, 2019, while Thomas was awaiting sentencing, the court converted Thomas's cash bond to a signature bond upon a request of the parties. (R. 15:1–2.) But Thomas remained in custody on the federal supervision hold¹

¹ Thomas apparently remained in the Kenosha County Jail on the federal hold. (R. 41:2.)

when federal authorities refused to participate in a plan that would have allowed his release. (R. 41:2–3.) On May 20, 2019, Thomas’s federal supervision was revoked, and the federal court imposed a sentence of 28 months of imprisonment. (R. 24:8–9, 17–18.)

Thomas was sentenced in the present case in June 2019. (R. 42.) The court imposed a total sentence of seven years of initial confinement and seven years of extended supervision, to be served concurrently with the federal revocation sentence.² (R. 42:26–27.)

The sentencing court ordered a total of 403 days of credit for Thomas’s custody from his February 21, 2018 arrest to April 1, 2019, the date the court issued the requested signature bond. (R. 21:3, A-App. 103; 42:27.) The court declined to order credit for the period of April 2, 2019, to the May 20, 2019 federal sentencing because, at the time, Thomas was in custody on the federal hold only. (R. 42:27.)

Thomas moved for postconviction relief under Wis. Stat. § (Rule) 809.30 requesting 50 additional days of credit. (R. 24.) The motion sought: (a) 2 more days of credit for February 21, 2018, to April 1, 2019, because this period is 405 days, not 403 days; and (b) 48 days for the April 2 to May 20, 2019 custody on the federal hold. (R. 24:4–5.)

The court issued a written decision and order granting the motion in part, and denying it in part. (R. 25, A-App. 104.) The court granted the 2 additional days of credit for the period

² At sentencing, the Federal Bureau of Prisons (FBP) had yet to calculate Thomas’s credit against his federal sentence for his pre-revocation custody (R. 42:27–28), and Thomas does not say how much credit the FBP ultimately ordered. Nonetheless, an award of credit against the federal sentence would not appear to preclude a state court order of credit for the same time because the sentences were ordered to run concurrently. *See State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988).

from Thomas's arrest to the issuance of the signature bond, but denied the request of credit for the April and May 2019 period when Thomas was in custody on the federal hold only.

The court observed that Wis. Stat. § 973.155(1)(b) provides sentence credit for custody on certain probation, parole and supervision holds authorized by Wisconsin statute. (R. 25:1, A-App. 104.) The court concluded that because "this statute does not contemplate sentence credit for a federal supervised release hold," Thomas was not entitled to credit for the period he was in custody on the federal hold only. (R. 25:2, A-App. 105.)

ARGUMENT

Thomas is not entitled to credit for custody on a federal supervision hold because, at the time, Thomas was free on a signature bond in the present case, and the sentence credit statute provides credit for custody on Wisconsin holds only.

A. Standard of review

The application of the sentence credit statute to a particular set of facts presents a question of law this Court reviews independently. *State v. Kontny*, 2020 WI App 30, ¶ 6, 392 Wis. 2d 311, 943 N.W.2d 923.

B. Relevant statutory provisions and legal principles

Under Wis. Stat. § 973.155(1)(a), "[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."

The next paragraph of subsection 973.155(1) specifically addresses the availability of sentence credit for probation, supervision, and parole holds. It provides that

“[t]he categories in par. (a) . . . include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2)” for the same course of conduct that resulted in the new conviction. Section 973.155(1)(b).³

Generally, the issuance of a signature bond severs the factual connection between a defendant’s custody and the offense for which the person is sentenced. *See State v. Elandis Johnson*, 2009 WI 57, ¶¶ 36–38, 318 Wis. 2d 21, 767 N.W.2d 207 (*discussing State v. Marcus Johnson*, 2007 WI 107, ¶¶ 13, 76, 81, 304 Wis. 2d 318, 735 N.W.2d 505); *State v. Beiersdorf*,

³ In full, Wis. Stat. § 973.155(1) provides as follows:

(a) 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. As used in this subsection, “actual days spent in custody” includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:

1. While the offender is awaiting trial;
2. While the offender is being tried; and
3. While the offender is awaiting imposition of sentence after trial.

(b) The categories in par. (a) and sub. (1m) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

208 Wis. 2d 492, 496, 498–99, 561 N.W.2d 749 (Ct. App. 1997). With the posting of a signature bond, the person is “free” on the offense, and credit is generally unavailable against the sentence for time he or she remains in custody on another offense. *Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 5–6, 36–38, 49 (no factual connection between custody and offense for which sentence was imposed where signature bond was posted on offense and the continued custody was for another offense); *Beiersdorf*, 208 Wis. 2d at 497–99 (holding that, where Beiersdorf posted a signature bond on the offense for which sentence was imposed, the time he remained in custody on other charges was not “in connection with the course of conduct for which sentence was imposed”).

An exception to this general principle exists for custody resulting from probation, supervision, or parole holds under Wisconsin law. In *State v. Hintz*, 2007 WI App 113, ¶¶ 9–11, 300 Wis. 2d 583, 731 N.W.2d 646, this Court concluded that credit was available for custody on a state supervision hold due in part to conduct resulting in the new conviction, pursuant to Wis. Stat. § 973.155(1)(b). The court concluded that the language of section 973.155(1)(b) entitled Hintz to credit even though Hintz was actually “free” on a signature bond on the offense for which he was sentenced, and his custody was a result of the supervision hold only. *Hintz*, 300 Wis. 2d 583, ¶ 11.

C. Thomas is not entitled to the requested credit because Wis. Stat. § 973.155(1)(b) does not authorize credit for custody on a federal probation hold.

Thomas argues that he is entitled to credit for his April and May 2019 probation hold custody because the hold was due in part to his conduct in the present case, citing *Hintz* and Wis. Stat. § 973.155(1)(b). But, as developed below, credit is unavailable for this time because Thomas was on a federal

probation hold, and *Hintz* and section 973.155(1) authorize credit only for state holds specified in the statute.

1. Principles of statutory interpretation

“Wisconsin’s statutes reflect the legislature’s policy determination with respect to sentence credit determinations.” *State v. Friedlander*, 2019 WI 22, ¶ 19, 385 Wis. 2d 633, 923 N.W.2d 849. To determine whether the legislature authorized credit for federal probation holds, the inquiry starts with the text of the sentence credit statute, Wis. Stat. § 973.155. *Id.*

“[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. If the meaning of the statute is plain, ordinarily the inquiry stops. *Id.* When reading a statute, language should be given its “common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning.” *Id.* ¶ 45.

Context and the structure of the statute are also important to the statute’s meaning. *Kalal*, 271 Wis. 2d 633, ¶ 46. “Therefore, statutory language is interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results. *Id.*

2. Analysis

To repeat, Wis. Stat. § 973.155(1)(a) provides generally that an offender is entitled to credit for pretrial custody that is “in connection with the course of conduct for which sentence was imposed.” Section 973.155(1)(a). But cases applying section 973.155(1)(a) have determined that when, as here, a

signature bond is issued, credit is unavailable because the bond severs the factual connection between the custody and offense. *Elandis Johnson*, 318 Wis. 2d 21, ¶¶ 5–6, 36–38, 49; *Beiersdorf*, 208 Wis. 2d at 498–99. However, this Court concluded in *Hintz* that, even when a defendant is “free” on a signature bond in the case for which sentence is imposed, credit is available when, under Wis. Stat. § 973.155(1)(b), the custody is the result of a probation, supervision, or parole hold that is factually connected to the sentenced conduct. *Hintz*, 300 Wis. 2d 583, ¶ 11.

Because Thomas, like *Beiersdorf* and *Elandis Johnson*, was “free” on a signature bond on the offense in this case, the dispositive issue is whether credit is nonetheless available for custody on Thomas’s federal probation hold under *Hintz* and section 973.155(1)(b). It is not under the statute’s plain language.

Wisconsin Stat. § 973.155(1)(b) does not authorize credit for custody that is the result of *all* probation, supervision, and parole holds issued by any jurisdiction. Instead, it specifically provides that “[t]he categories in par. (a) . . . include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold *under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2)*” for the same course of conduct that resulted in the new conviction. Section 973.155(1)(b) (emphasis added). Because section 973.155(1)(b) authorizes credit for holds issued pursuant to Wisconsin law only, credit is unavailable for Thomas’s custody on his federal probation hold.

Thomas argues that the list in Wis. Stat. § 973.155(1)(b) “is expressly . . . non-exhaustive” because it is prefaced by the word “including.” (Thomas’s Br 6–7.) But while “including,” as

used here, appears to be non-exhaustive,⁴ its placement in the sentence indicates that what is meant to be non-exhaustive are the general categories of custody—here, custody on holds as but one example of the custody types for which credit is available—not the list of particular holds for which credit is available. *See* section 973.155(1)(b).

Indeed, the absence of a word or phrase like “including” or “such as” or “for example” immediately before or after the statutory list indicates that the list of holds for which custody credit is available is exhaustive. Because the list plainly limits credit to custody on holds under Wisconsin law, credit is not available on Thomas’s custody resulting from a federal probation hold only.

Hintz is distinguishable because the hold in that case was among those listed in Wis. Stat. § 973.155(1)(b). *Hintz* was entitled to credit on his custody for a supervision hold because the statute plainly authorizes credit for custody on such holds under Wis. Stat. § 302.113(8m). *See* Wis. Stat. § 973.155(1)(b). *Hintz* did not address whether credit is available for custody on a hold not among those listed in the statute.

Finally, Thomas appears to argue that, even if credit is unavailable under Wis. Stat. § 973.155(1)(b), credit is available under Wis. Stat. § 973.155(1)(a), because his custody on the federal hold was “in connection with the course of conduct” he was sentenced for. (Thomas’s Br. 5–8.) But section 973.155(1)(b) specifically addresses the availability of credit for custody on probation holds, and thus the more general provision in section 973.155(1)(a) should give way to section 973.155(1)(b). *See State v. Brandt*, 2009 WI App 115,

⁴ “[T]he word ‘includes’ may be construed in two ways: either as an illustration of a few acceptable examples; or, as a statement of limitation setting forth an exclusive list.” *Plevin v. Dep’t of Transp.*, 2003 WI App 211, ¶ 16, 267 Wis. 2d 281, 671 N.W.2d 355.

¶ 5, 321 Wis. 2d 84, 772 N.W.2d 674 (“In cases where two or more statutes relate to the same subject matter, ‘the more specific statute controls over the general statute.’” (citation omitted)). *Hintz* similarly regarded section 973.155(1)(b) as controlling when addressing whether custody on a state supervision hold where Hintz was “free” on a signature bond on the offense in the case.⁵

For these reasons, sentence credit is not available for the 48 days in April and May 2019 in which Thomas was in custody on a federal probation hold only.

⁵ Thomas also appears to argue that the following statement in *State v. Obriecht*, 2015 WI 66, ¶ 23, 363 Wis. 2d 816, 867 N.W.2d 387, provides grounds for credit beyond those in Wis. Stat. § 973.155: Sentence credit “is designed to afford fairness so that a person does not serve more time than that to which he or she is sentenced.” (Thomas’s Br. 6–8.) This is a statement of the statute’s policy, not a separate ground on which credit may be claimed. “[P]ublic policy decisions are the province of the legislature” and judicial statements of policy “are not grounds for relief from statutory requirements.” *Marine Bank Appleton v. Hietpas, Inc.*, 149 Wis. 2d 587, 592, 439 N.W.2d 604 (Ct. App. 1989) (discussing *Julien v. Model Bldg., Loan & Invest. Co.*, 116 Wis. 79, 92 N.W. 561 (1902)).

CONCLUSION

This Court should affirm the circuit court's order denying relief and the judgment of conviction.

Dated this 9th day of December 2020, in Madison, Wisconsin.

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 2,807 words.

Dated this 9th day of December 2020.

Electronically signed by:

s/ Jacob J. Wittwer
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that:

A copy of this certificate has been served with this brief filed with the court and served on all parties either by electronic filing or by paper copy.

Dated this 9th day of December 2020.

Electronically signed by:

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