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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2020AP976-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AVERY B. THOMAS, JR.,

Defendant-Appellant.

On Appeal of a Judgment of Conviction and Order
Denying Postconviction Relief Entered in the
Racine County Circuit Court, the Honorable Wynne
P. Laufenberg, Presiding.

REPLY BRIEF OF
DEFENDANT-APPELLANT

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ARGUMENT

I. The April 1, 2019 signature bond did not sever the factual connection between Mr. Thomas' custody and the offense.

The State argues that Mr. Thomas is not entitled to the additional 48 days of sentence credit because the circuit court's granting of a signature bond in this case on April 1, 2019 "severs the factual connection between the custody and offense." (State's Response at 7-8). However, the only authority the State cites in support of their argument is inapposite and thus irrelevant to the question this Court must address in this case.

Both cases cited by the State, *State v. Elandis Johnson*, 2009 WI 57, ¶¶ 5-6, 318 Wis. 2d 21, 767 N.W.2d 207 and *State v. Beiersdorf*, 208 Wis. 2d 492, 494-495, 561 N.W.2d 749 (Ct. App 1997), involved situations where the defendant had a signature bond on one case and was denied sentence credit in that case for pretrial custody served in connection with a separate and factually distinct case. In those cases, there was no factual connection between the pretrial custody time the defendants were seeking credit for and the case to which they sought to apply that credit. Thus, they have no bearing on this case.

Here, there is a factual connection between Mr. Thomas' pretrial custody time between April 2, 2019 and May 20, 2019 because the federal supervised release hold that kept him in custody was in part the result of his criminal conduct which resulted in the

state charges in this case. In such a case, the law is clear that a defendant is entitled to the sentence credit.

In fact, in *Johnson*, after the Court discussed two other cases where the defendants were not entitled to sentence credit because of a lack of factual connection between the custody and the offenses charged in the case, the Court stated:

In contrast to these two cases, sentence credit must be applied when the defendant's presentence custody is factually in connection with the course of conduct for which sentence was imposed.

Id., 318 Wis. 2d 21, ¶ 39 (internal quotes omitted). Thus, the State's reliance on these cases is misplaced and the principles articulated therein actually support the conclusion that Mr. Thomas is entitled to an additional 48 days of sentence credit for the period between April 2, 2019 and May 20, 2019.

II. Mr. Thomas is entitled to an additional 48 days of sentence credit under Wis. Stat. § 973.155(1)(a).

The State argues that (1) Wis. Stat. § 973.155(1)(b) provides an exhaustive list that limits pretrial sentence credit in supervision hold cases to only those cases where the hold is instituted under state authority; (2) that Wis. Stat. § 973.155(1)(b) should be applied in this case, and; (3) that Wis. Stat. § 973.155(1)(a) should not be applied. (State's Response at 8-10). The State is wrong as to all three arguments.

First, a plain language reading of Wis. Stat. § 973.155(1) as a whole belies the State's argument that (1)(b) provides an exhaustive list limiting credit to state supervision holds. Wis. Stat. § 973.155(1)(a) first lays out general principles regarding when a defendant is entitled to sentence credit. Wis. Stat. § 973.155(1)(b) then clarifies that one specific and often reoccurring set of circumstances is included in calculating sentence credit: situations where the defendant is being held in custody on a state supervision hold for the same conduct that resulted in the new sentence being imposed. This in no way limits credit being granted to only cases where the hold was placed under state authority. The language of Wis. Stat. § 973.155(1)(b) makes that obvious:

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 [various state statutes] placed upon the person for the same course of conduct as that resulting in the new conviction.

(emphasis added). Thus, (1)(b) simply seeks to make it clear that custody under Wis. Stat. § 973.155(1)(a) includes custody for state supervision holds among many other types of custody. Therefore, it is a non-exhaustive list that does not limit sentence credit for time spent in custody on a supervision hold to only those cases where the hold was placed under state authority.

Additionally, because (1)(b) only speaks to situations where a defendant is in custody on a state hold and is silent as to situations when the defendant

is in custody on a federal supervision hold, it is not the appropriate statute to apply in Mr. Thomas' case. Instead, this Court should apply the general principles under Wis. Stat. § 973.155(1)(a) and the test articulated in *State v. Obriecht*, 2015 WI 66, ¶ 25, 363 Wis. 2d 816, 867 N.W.2d 387. Under that test, Mr. Thomas is entitled to the credit if (1) he was in custody from April 2, 2019 to May 20, 2019, and (2) that custody was "in connection with the course of conduct for which sentence was imposed." *Id.*

As to the first question, Mr. Thomas was indeed in federal custody between April 2, 2019 and May 20, 2019 on a hold that was in place at least in part because of his criminal conduct in this case. (24:8, 16-17). As to the second question, Mr. Thomas can show that his custody was in connection with the course of conduct for which sentence was imposed if the period of custody is *factually connected* with the course of conduct for which sentence was imposed. *State v. Zahurones*, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905. Indeed, his custody from April 2, 2019 to May 20, 2019 was factually connected with the course of conduct in this case because his federal supervision hold was instituted at least in part because of his criminal conduct that served as the factual basis for his state charges in this case.

"The clear intent of sec. 973.155, Stats., is to grant credit for each day in custody *regardless of the basis for the confinement* as long as it is connected to the offense for which sentence is imposed." *State v. Gilbert*, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983)(emphasis added). Thus, Mr. Thomas is entitled to 48 additional days of sentence credit for

the time he spent in custody between April 2, 2019 and May 20, 2019 on a federal supervision hold that was based in part on his criminal conduct for which sentence was imposed in this case.

CONCLUSION

Mr. Thomas respectfully requests that this Court reverse the circuit court's decision denying him sentence credit for the time that he spent in custody from April 2, 2019 to May 20, 2019 and order 48 days of additional sentence credit in this case, for a total of 453 days.

Dated this 23rd day of December, 2020.

Respectfully submitted,

Electronically signed by Jay Pucek

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,136 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, including 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 23rd day of December, 2020.

Signed:

Electronically signed by Jay Pucek

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