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STATE OF WISCONSIN
COURT OF APPEALS – DISTRICT III
Case No. 2020AP1936-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
v.
JOSEPH L. SLATER,
Defendant-Appellant.

Appeal of a judgment and order entered in
the Marathon County Circuit Court,
the Honorable Michael K. Moran, presiding

BRIEF AND APPENDIX OF
DEFENDANT-APPELLANT

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TABLE OF CONTENTS

	Page
Issue Presented	1
Statement on Oral Argument and Publication	2
Statement of the Case	2
Argument.....	3
Mr. Slater spent 1260 days in jail in connection to this case, and by statute he was not serving any other sentence during this time; thus he is entitled to credit in this case	3
Conclusion	7

CASES CITED

<i>State v. Beets</i> , 124 Wis. 2d 372, 369 N.W.2d 382 (1985)	4
<i>State v. Davis</i> , 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488	1, 5, 6
<i>State v. Presley</i> , 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713	5

STATUTES CITEDWisconsin Statutes

304.072	3
304.072(4)	1, 5, 6
973.10(2)(b).....	2, 3, 4, 6
973.155	6
973.155(1)(a).....	3
973.155(1)(b).....	4

ISSUE PRESENTED

A defendant does not receive pretrial sentence credit toward one sentence for time spent actually serving another sentence. *State v. Davis* held that when a person's extended supervision is revoked, he or she does not begin serving the associated sentence until "the day he or she is received at a correctional institution" because this is what Wis. Stat. § 304.072(4) commands. 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488. Thus, credit continues to accrue for other cases for time spent in jail; it stops on the day of arrival at a prison. *Id.*, ¶¶8-9. Another statute, Wis. Stat. § 973.10(2)(b), contains substantially identical language applicable to a person who is revoked from probation with an imposed and stayed sentence.

While Joseph Slater was awaiting trial in this case, his probation was revoked in a separate case with an imposed and stayed sentence. Slater was not immediately transferred to prison, however; he first spent time in jail. Did Slater's imposed-and-stayed sentence begin to run the day he entered prison, entitling him to credit in this case for the time he spent in jail before that date?

The trial court said "no"; this court should reverse.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Mr. Slater does not request oral argument as he believes the briefing will be sufficient to decide this case. Publication may be merited because no case has construed the relevant language in Wis. Stat. § 973.10(2)(b).

STATEMENT OF THE CASE

In this case, Marathon County Case No. 2002CF149, the state charged Mr. Slater with three counts of armed robbery. (12). As a result of these accusations, the probation office put a hold on Mr. Slater on February 20, 2002, in a prior case, Marathon County Case No. 2000CF583. He was taken to jail on that day. (3:11-12). In that prior case, Mr. Slater had received an imposed-and-stayed sentence of three years' initial confinement and ten years' extended supervision. (139:7). Probation in the earlier case was revoked within a few months. However, Mr. Slater did not go to prison. He remained in the Marathon County Jail until after his sentencing in this case more than three years later. (139:9).

At that sentencing, the state told the court that Mr. Slater's sentence in the former case had expired before his sentencing in this case, and thus that he should receive 164 days of credit on his new judgment of conviction. (254:6). The court ordered that amount of credit against his three concurrent sentences of

20 years' initial confinement and 10 years' extended supervision. (254:29).

In 2019, Mr. Slater filed *pro se* motions requesting credit for an additional 1096 days—three years—he spent in the Marathon County Jail. He alleged he was due credit for this time because, pursuant to Wis. Stat. § 304.072, his revocation sentence did not commence until he was received into the prison system. (178; 184). The circuit court denied the credit. (187). Postconviction counsel was appointed and filed a motion requesting the same credit, pointing to Wis. Stat. § 973.10(2)(b). (213). After a written response from the state and two substantive hearings, the court denied the credit, and Mr. Slater appealed. (222; 258; 259; 230; 231; App. 101-118).

ARGUMENT

Mr. Slater spent 1260 days in jail in connection to this case, and by statute he was not serving any other sentence during this time; thus he is entitled to credit in this case.

A person is entitled to credit “for all days spent in custody in connection with the course of conduct for which sentence was imposed.” Wis. Stat. § 973.155(1)(a). Mr. Slater was held in this case on a \$50,000 bond for the three years in question. His probation hold in the earlier case was also occasioned by the conduct charged in this one. In general, either of these facts would independently supply the

necessary “connection” between his custody and the sentence he received in this case, and since both sentences are running concurrently, he’s entitled to credit against both. Wis. Stat. § 973.155(1)(b).

However, there is a circumstance that can sever the connection between custody and the conduct leading to a sentence. In *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985), our supreme court held that when a person begins serving a separate sentence, credit is no longer due from that time forward. The circuit court initially reasoned that Mr. Slater began serving his earlier imposed-and-stayed sentence on the day his probation was revoked, so he was no longer accruing credit against this one. (256:5-6).

The court’s conclusion was incorrect, though, because pursuant to statute, Mr. Slater’s imposed-and-stayed sentence did not begin until he was received at Dodge—an event that did not occur for over three years.

The statute that creates this rule is Wis. Stat. § 973.10(2)(b). It provides that if a probationer with an imposed-and-stayed sentence is revoked, the Department of Corrections must “order the probationer to prison, *and the term of the sentence shall begin on the date the probationer enters the prison*” (emphasis added).

This language, while never having been construed in the sentence-credit context, is substantially identical to that of Wis. Stat.

§ 304.072(4). That statute provides that a person's reconfinement sentence—the sentence imposed when extended supervision is revoked—“resumes running on the day he or she is received at a correctional institution.” And this Court has already construed § 304.072(4), holding that the date that stops the accrual of credit in other cases is, as the statute says, the day of arrival at prison.

This was the holding of *State v. Davis*, 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488. The defendant there was on extended supervision when he was arrested for a new offense. *Id.*, ¶2. His supervision was revoked, and 23 days later he was sent to Dodge. *Id.* When he was later sentenced on the new charges, the circuit court awarded credit only up to the date of his revocation on the older case, concluding that this event severed the connection to the newer one. *Id.*, ¶4.

This Court reversed. It noted that Wis. Stat. § 304.072(4) provides that the sentence of a person on extended supervision resumes running not on the day supervision is revoked, but “on the day he or she is received at a correctional institution” (with credit to be applied for any time spent in jail). *Davis*, 377 Wis. 2d 678, ¶¶9-10. Thus, in accord with the statute and with its earlier decision in *State v. Presley*, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, the *Davis* Court held the defendant's credit continued to accrue until the date he was received at Dodge. 377 Wis. 2d 678, ¶10.

While *Davis* (and *Presley*) concerned extended supervision and Wis. Stat. § 304.072(4), as Mr. Slater has already noted, Wis. Stat. § 973.10(2)(b) applies the same rule to a “probationer who has already been sentenced” like him: “the term of the sentence shall begin on the date the probationer enters the prison.” (Wisconsin Stat. § 973.155 likewise requires the department to give such a person credit for time spent in jail, just as § 304.072(4) does.) Thus, because Mr. Slater did not arrive at Dodge until after his sentencing in this case, he is entitled to credit for the entire time he spent in jail before sentencing: 1260 days.

In the circuit court, the state noted that Wis. Stat. § 304.072(4) does not apply to probationers like Mr. Slater. (222). This is, as Mr. Slater has already explained, true; Wis. Stat. § 973.10(2)(b) does instead. At no point in the proceedings below did the state acknowledge § 973.10(2)(b) or explain why it does not require the grant of credit.

The circuit court, meanwhile, treated the issue abstractly, asking whether an imposed-and-stayed sentence is “more akin” to extended supervision or to a sentencing after revocation. (259:5-6; App. 115-16). But there’s no need to resort to abstraction: the answer here is concrete. It’s given by statute and by the logic of *Davis*. Mr. Slater’s revocation sentence didn’t start until he was received at Dodge, so he’s entitled to credit in this case for the time before that date.

CONCLUSION

For the foregoing reasons, Mr. Slater respectfully requests that this court reverse the order denying his postconviction motion and remand with directions that his judgment of conviction reflect the correct amount of sentence credit: 1260 days.

Dated this 1st day of February, 2021.

Respectfully submitted,

Electronically signed by Andrew R. Hinkel

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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 1,164 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief of appellant, including the appendix as a separate attachment, if any, which complies with the requirements of Wisconsin Supreme Court Order 19-02: Interim Court Rule Governing Electronic Filing in the Court of Appeals and Supreme Court.

Dated and filed this 1st day of February, 2021.

Signed:

Electronically signed by Andrew R. Hinkel

ANDREW R. HINKEL

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