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

REPLY BRIEF

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ARGUMENT

I. 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.

As Mr. Slater's first brief explained, Wis. Stat. § 973.10(2)(b) says a revoked probationer with an imposed-and-stayed sentence begins serving that sentence on arrival in prison. This is the same rule laid out in Wis. Stat. § 304.072(4) for those revoked from extended supervision, so the result here is the same as in *State v. Davis* and *State v. Presley*: jail credit for a new case can continue to accrue, even after revocation of an older case, while the defendant is in jail. 2017 WI App 55, 377 Wis. 2d 678, 901 N.W.2d 488; 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713. Transfer to prison is the event that begins the revocation sentence and thus ends the accumulation of credit.

The state barely disputes this conclusion. It briefly suggests that Mr. Slater was not, in fact, a probationer who had "already been sentenced" per the statute. Resp. 11. This suggestion is cited to a document not in the record; in any case that document contains no support for the fanciful claim that the court "(re-)imposed" the sentence it had already given. Resp. 12. The state also complains that giving Mr. Slater jail credit for the time he spent in jail

represents a "windfall." Resp. 12. But this supposed windfall is no more than what this Court found the statutes require in *Davis* and *Presley*. It's up to the legislature to decide what event commences a sentence. The state may not like the result the legislature's rules have generated here; that doesn't justify ignoring them.

Having more or less conceded that Mr. Slater is correct about the statute, the state nevertheless raises two objections to his receiving the credit. First it says that his new sentence was actually made consecutive, rather than concurrent, to his imposed-and-stayed revocation sentence.

This claim is incorrect, for several reasons. First, the sentencing court simply did not make the new sentence consecutive. The law is that where a court does not make a "judicial declaration" that a sentence is to be consecutive, that sentence is concurrent. *Ex parte McDonald*, 178 Wis. 167, 189 N.W. 1029 (1922). Contrary to the state's suggestion, the fact that a couple of 30-plus-year-old decisions of this Court referred disparagingly to this rule, Resp. 14, does nothing to diminish its "vitality": it's still the law.

Second, the state posits that the circuit court *implicitly* made the newer sentence consecutive by noting—as the parties had told it—that the older one had run. Resp. 13. But this can't be; a new sentence is neither concurrent nor consecutive to a sentence that is complete. And in any event, the judge (like the parties) was simply wrong: that older sentence had not

run, and would not have run until Mr. Slater was received at Dodge. We can't divine anything about the sentencing court's desires with respect to a still-active sentence: it didn't know it was dealing with one, so it didn't realize there was a decision to make.

Third, the state's argument ignores that the imposed-and-stayed sentence was not, in fact, a three-year sentence. It was a 13-year sentence, with three years of initial confinement and 10 of extended supervision. So even if the sentencing court mistakenly believed three years of the sentence had elapsed, there was still a prior sentence to consider. The new sentence the court was imposing would have to be either consecutive to or concurrent with this prior sentence. (A consecutive sentence would have changed the total term of extended supervision Mr. Slater would have to serve and also increased the time available for reconfinement if that supervision were revoked. *See* Wis. Stat. §§ 302.113(4), (9)(am).) The court said nothing, so again, by law, the sentences are concurrent.

The state's only other argument is that even if—as the foregoing shows—the statute grants Mr. Slater the credit he seeks, he shouldn't get it because his counsel agreed to the state's calculation of credit at the original sentencing. Resp. 14-16.

This claim is wrong. The state says it's relying on the doctrine of "invited error"; it doesn't, however, mention the limitations of that doctrine. The doctrine actually goes by two names: one is "invited error" and

the other "strategic waiver." *State v. Gary M.B.*, 2004 WI 33, ¶11, 270 Wis. 2d 62, 676 N.W.2d 475. As the second name suggests, for a claim to be barred by this doctrine, the party's initial position must be a "deliberate choice of strategy." *Id.* That is, the doctrine applies only where a party intentionally adopts shifting positions to gain advantage: makes a "knowing election between alternative courses of action… as a matter of strategy." *Id.*, ¶12. It's plain that's not what happened here. Mr. Slater, like everyone else in the courtroom, misunderstood the law. He agreed with the state's assertion about credit based on mistake, not as a "deliberate choice of strategy." Invited error does not apply.

A litigant who fails to claim a right because he or she is unaware of it—and not as a matter of strategy—is sometimes said to have forfeited the right. The state does not invoke forfeiture, though, and for good reason. This Court has already held that a defendant's stipulation to credit does not forfeit a claim that the credit is wrong. In *State v. Kontny*, the Court held that "an agreement between the parties as to the proper amount of sentence credit—even if adopted by the circuit court during the sentencing hearing—does not prevent a defendant from later arguing in a postconviction motion that the amount of sentence credit awarded by the court was erroneous." 2020 WI App 30, ¶9, 392 Wis. 2d 311, 943 N.W.2d 923. *Kontny* is directly on point; Mr. Slater's agreement with the prosecutor's assertions about credit, even though adopted by the trial court, are no bar to his claim.

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 6th day of May, 2021.

Respectfully submitted,

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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 1,048 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 6th day of May, 2021.

Signed:

Electronically signed by Andrew R. Hinkel
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