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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP462-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent.

APPEAL FROM AN ORDER GRANTING SENTENCE
CREDIT ON A JUDGMENT OF CONVICTION ENTERED
IN LANGLADE COUNTY CIRCUIT COURT, THE
HONORABLE JOHN B. RHODE, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

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ISSUE PRESENTED

Under Wis. Stat. § 973.155(1)(a), a convicted offender is entitled to credit for all days spent in custody that are in connection with the course of conduct for which the offender was sentenced. In *State v. Tuescher*, 226 Wis. 2d 465, 479, 595 N.W.2d 443 (Ct. App. 1999), this Court interpreted the phrase “course of conduct” to mean the “specific acts” for which sentence was imposed, not an entire “criminal episode.”

One night, Defendant-Respondent Michael K. Fermanich committed several offenses at multiple locations across two counties, occurring at different times and involving different victims. Did these specific acts amount to one, ongoing “course of conduct” under Wis. Stat. § 973.155(1)(a), entitling Fermanich to sentence credit for custody in one county, on specific acts committed and charged in that county, against the sentence on a different, specific act committed in another county?

The circuit court answered yes, granting credit for this custody time against the sentence.

This Court should answer no and reverse the circuit court’s order granting credit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issue presented may be resolved on the briefs by applying established law to the facts.

STATEMENT OF THE CASE

The following facts taken from the Langlade County criminal complaint appear to be undisputed. (R. 26:1, A-App. 103; 45:15.)

On the night of September 30, 2017, Michael Fermanich stole three trucks in succession, taking three joyrides in Langlade and Oneida Counties. (R. 1:2–3.) At around 9:30,

Fermanich stole a truck in the Town of Antigo and drove it to the Thirsty Bear tavern in the Town of Peck. (R. 1:2.) There, he abandoned the first truck and stole another, driving it to Fischer's Bar in the Town of Parish. (R. 1:2.)

Fermanich ditched the second truck outside the bar and stole a third truck, driving it into Oneida County. (R. 1:2–3.) The truck, which had apparently been reported as stolen, was spotted on the road by an Oneida County sheriff's deputy, who gave pursuit. (R. 1:3; *see also* 44:22, A-App. 133.) Fermanich led the deputy on a chase through the county before losing control of the truck while attempting a sharp turn, sliding into a ditch and submerging the truck's front end in a creek. (R. 1:3.)

The deputy approached Fermanich, who seemed disoriented and said that he "was running." (R. 1:3.) When the deputy asked who he was running from, Fermanich responded, "Maybe God." (R. 1:3.) Fermanich said he did not know who owned the truck, but it was the third one he had taken that night. (R. 1:3.)

On October 1, 2017, Fermanich was charged in Oneida County case number 2017CF245 with the following counts: taking and driving a motor vehicle without the owner's consent, contrary to Wis. Stat. § 943.23(2); obstructing an officer, contrary to Wis. Stat. § 946.41(1); failure to obey a traffic officer, contrary to Wis. Stat. §§ 346.04(2t) and 346.17(2t); and two counts of attempting to flee or elude an officer, contrary to Wis. Stat. § 346.04(3). (R. 12:1–2; 26:1, A-App. 103.) Fermanich was held in custody of the Oneida County jail on cash bail awaiting disposition of his charges. (R. 45:22, 27.)

On December 29, 2017, Fermanich was charged in Langlade County case number 2017CF313 with one count of taking and driving a motor vehicle without consent as a repeat offender, contrary to Wis. Stat. §§ 943.23(2)(b) and

939.62(1)(b); and two counts of taking and driving a motor vehicle without consent (joyriding) as a repeat offender, contrary to Wis. Stat. §§ 943.23(3m) and 939.62(1)(b).¹ (R. 1:1–2.) At his February 6, 2018 initial appearance, Fermanich was placed on a \$10,000 signature bond. (R. 44:11, A-App. 122; 45:18–19.) *See also* Wisconsin Circuit Court Access website, *State of Wisconsin v. Michael K. Fermanich*, Langlade County case number 2017CF313, wcca.wicourts.gov (accessed July 12, 2021).

The two cases were eventually consolidated for the purpose of resolution by plea. Fermanich waived his right to a trial in Oneida County, and the State filed an amended information in the Langlade County case adding the five Oneida County charges as counts four through eight. (R. 10–12.)

Pursuant to a plea agreement, Fermanich entered no-contest pleas to three charges in the amended information at a December 6, 2018 hearing: Count 1, taking and driving a motor vehicle without consent as a repeat offender (the first truck, Langlade County); Count 4, taking and driving a motor vehicle without consent (the third truck, Oneida County); and Count 5, attempting to flee or elude an officer (Oneida County). (R. 45:2–3.) The remaining counts were dismissed and read-in. (R. 45:2–3.) The defense agreed at the hearing that the allegations in the complaint set forth an adequate factual basis for the pleas. (R. 45:15.) The court accepted

¹ Wisconsin Stat. § 943.23(2)(b) provides that “intentionally tak[ing] and driv[ing]” a vehicle without the owner’s consent is a Class H felony. The “joyriding” statute, Wis. Stat. § 943.23(3m), mitigates a violation under section 943.23(2) (or (3), not relevant here) to a Class A misdemeanor “if the defendant abandoned the vehicle without damage within 24 hours after the vehicle was taken from the possession of the owner.”

Fermanich's pleas and proceeded directly to sentencing. (R. 45:15.)

The State, pursuant to the plea agreement, asked the court to withhold sentence and place Fermanich on probation for five years with six months of conditional jail time on Count 1. (R. 45:3–4, 18–19.) The court adopted most of this recommendation, ordering that sentence be withheld and that Fermanich be placed on probation for five years. (R. 45:25, 27.) But recognizing that Fermanich had already spent substantial time in pretrial custody on the Oneida County charges, the court imposed only 30 days of jail time as a condition of probation on Count 1. (R. 45:18–19, 27.) For his Oneida County jail custody, the court determined that Fermanich would be entitled to 433 days of sentence credit on Counts 4 and 5 if his probation was revoked and sentence imposed. (R. 45:27.)

Fermanich committed several probation violations in 2019 and 2020 for which he spent time in custody on probation holds and two agreements to serve 20 days and 45 days of extra conditional time as an alternative to revocation. (R. 21; 22; 24:5–6.) On September 14, 2020, the Division of Hearings and Appeals issued an order and warrant revoking Fermanich's probation and returning him to the circuit court for sentencing. (R. 24:1.)

The circuit court held a hearing on November 3, 2020, to impose sentence. (R. 43:1.) On the parties' joint recommendation, the court imposed a sentence of 18 months of initial confinement and 24 months of extended supervision on each of the three counts, to be served concurrently to each other. (R. 43:5, 12–13.)

The court only partially addressed the matter of sentence credit at the hearing. Fermanich filed a motion the day before the hearing requesting that the 433 days of credit ordered at the original sentencing on Counts 4 and 5 be

applied to Count 1 as well. (R. 26:1–5, A-App. 103–07.) The court said that it intended to award at the hearing whatever amount of credit the parties could agree upon, and address disputed credit issues on another day. (R. 43:4–5.) The State declared its opposition to Fermanich’s request for 433 days of credit on Count 1. (R. 43:14.) But the parties agreed that Fermanich was entitled to 198 days of credit for probation holds and the extra conditional jail time. (R. 43:14–15.) The court awarded this time but (mistakenly) applied it to Count 1 only. (R. 28:1; 43:15–16.) It set a hearing date to address Fermanich’s sentence credit motion and any other credit issues. (R. 43:16.)

Before the hearing, the court received a letter from the Department of Corrections (DOC) advising that it believed Fermanich was entitled to additional credit for custody time on probation holds and conditional jail time. (R. 33:1, A-App. 108.) Based on its calculations, DOC said it determined that Fermanich was entitled to 236 days of credit, not 198 days, on Count 1. (R. 33:1, A-App. 108.) This amount appears to consist of 205 days of custody on probation holds and conditional jail time imposed as an alternative to revocation, plus 31 days² for the conditional time imposed at the original sentencing on Count 1. (R. 33:1–2, A-App. 108–09.)

DOC also determined that Fermanich was entitled to 638 days of credit on Count 4—the 433 days of credit ordered at the original sentencing, plus the 205 days of custody on probation holds and extra conditional jail time. (R. 33:1, A-App. 108.) DOC overlooked Count 5 in the letter, and DOC

² DOC determined that Fermanich was entitled to 31 days of credit for the 30 days of conditional jail time imposed on Count 1 because he was in custody for this time from December 6, 2018, to January 5, 2019 (R. 33:2, A-App. 109), which is 31 days inclusive. *See State v. Antonio Johnson*, 2018 WI App 2, ¶ 8, 379 Wis. 2d 684, 906 N.W.2d 704 (custody for any portion of a calendar day should be counted as one full day of sentence credit).

staff's handwritten calculation of credit on Count 5 on the revocation order and warrant (mistakenly) omitted the 433 days of credit awarded against Counts 4 and 5 at the original sentencing. (R. 33:2, A-App. 109.) DOC was not presented with, and did not address, Fermanich's request for 433 days of credit on Count 1. (R. 33:1, A-App. 108.)

At the February 2, 2021 hearing, the parties agreed with the DOC's calculation of 638 days of credit on Count 4, consisting of 433 days awarded at the original sentencing and 205 days for probation holds and conditional time as an alternative to revocation. (R. 44:19, A-App. 130.) The parties also agreed that 638 days of credit was due on Count 5, despite DOC's failure to address Count 5 in its letter. (R. 44:18–19, A-App. 129–30.) The parties also appeared to agree that Fermanich was entitled to at least 236 days of credit on Count 1—31 days for the conditional jail time imposed at the original sentencing plus 205 days for probation holds and extra conditional time.³ (R. 44:19, A-App. 130.)

The parties agreed that the only disputed issue was whether Fermanich was also entitled to credit for the 433 days of Oneida County pretrial custody against his sentence on Count 1. (R. 44:19–20, A-App. 129–30.) Among other arguments, District Attorney Elizabeth Gebert asserted that credit was unavailable because the Oneida County custody was not connected with the “course of conduct” for which Fermanich was sentenced in Count 1. (R. 44:8–10, A-App. 119–21.) She noted that Wisconsin case law has defined “course of conduct” narrowly to mean the “specific act” for which sentence was imposed. (R. 44:9–10, A-App. 120–21.) And because Fermanich stealing and driving the first car (Count 1) was plainly a separate, specific act from stealing and driving the third car (Count 4), or from fleeing officers

³ As noted *infra* p. 19, the circuit court does not appear to have ordered credit for the 31 days of conditional time on Count 1.

(Count 5), the Oneida County custody on Counts 4 and 5 (and other Oneida County charges) cannot be credited to the sentence on Count 1. (R. 44:9–10, A-App. 120–21.) The district attorney therefore asked the court to modify the judgment of conviction to order 236 days (205 + 31) of credit on the Count 1 sentence, and 686 days (433 + 205) of credit on the Count 4 and 5 sentences. (R. 44:17, A-App. 128.)

Defense counsel’s primary argument at the hearing and in the motion was that Fermanich was entitled to credit because his Oneida County custody was based on the same “course of conduct” for which sentence was imposed in Count 1. (R. 26:3, A-App. 105; 44:21–22, A-App. 132–33.) Thus, counsel argued, Fermanich was entitled to credit against Count 1 for his custody on the Oneida County charges. (R. 26:3, A-App. 105; 44:21–22, A-App. 132–35.)

The court granted the motion in a bench ruling. At the outset, the court remarked that “the state of the case law in this situation is a mess” (R. 44:25, A-App. 135.) But it declared, “This was all the same course of conduct.” (R. 44:26, A-App. 137.) “It happened on the same day within a short period of time.” (R. 44:26, A-App. 137.) The court made no specific factual findings. (R. 44:26, A-App. 137.) The court also hedged its ruling, indicating it believed that the issue was close (“both sides are right”). (R. 44:26, A-App. 137.) But the court said that it was siding with Fermanich because, if it ruled in the State’s favor and was eventually reversed on appeal, Fermanich would have already served most, if not all, of the disputed time. (R. 44:26, A-App. 137.)

The court ordered the judgment of conviction amended to grant Fermanich 638 days of credit on all three counts. (R. 36:1, A-App. 101; 44:29, A-App. 140.)

The State appeals.

ARGUMENT

The circuit court erred in granting Fermanich 433 days of credit because the custody time was not in connection with the course of conduct for which Fermanich was sentenced in Count 1.

A. Standard of Review

Application of the sentence credit statute, Wis. Stat. § 973.155, to a particular set of facts presents a question of law that this Court reviews de novo. *State v. Kontny*, 2020 WI App 30, ¶ 6, 392 Wis. 2d 311, 943 N.W.2d 923.

B. Legal Principles

- 1. Under Wis. Stat. § 973.155(1)(a), credit is available for custody that is in connection with the course of conduct for which sentence was imposed.**

Wisconsin Stat. § 973.155(1)(a) provides that a convicted offender is entitled to sentence credit for all days in custody spent “in connection with the course of conduct for which sentence was imposed.”⁴ “Sentence credit is designed to

⁴ Wisconsin Stat. § 973.155(1) provides as follows:

(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. 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

afford fairness so that a person does not serve more time than that to which he or she is sentenced.” *State v. Obriecht*, 2015 WI 66, ¶ 23, 363 Wis. 2d 816, 867 N.W.2d 387.

To be entitled to credit, the offender bears the “burden of demonstrating both ‘custody’ and its connection with the course of conduct for which the Wisconsin sentence was imposed.” *State v. Carter*, 2010 WI 77, ¶ 11, 327 Wis. 2d 1, 785 N.W.2d 516. The “connection” between the custody and the criminal conduct described in Wis. Stat. § 973.155(1)(b) must be factual in nature. *State v. Floyd*, 2000 WI 14, ¶ 17, 232 Wis. 2d 767, 606 N.W.2d 155, *abrogated on other grounds by State v. Straszkowski*, 2008 WI 65, ¶¶ 2–3, 310 Wis. 2d 259, 750 N.W.2d 835; “[A] procedural or other tangential connection will not suffice.” *Id.*

This appeal addresses the meaning of “course of conduct” within the phrase “in connection with the course of conduct for which sentence was imposed,” and its application to the present facts. Wis. Stat. § 973.155(1)(a).

2. “Course of conduct” means the specific acts for which sentence was imposed, not a broader criminal episode of which the specific acts may have been a part.

As this Court recently reiterated, “[t]he term ‘course of conduct’ . . . refers to the specific offense or acts embodied in the charge for which the defendant is being sentenced.” *State*

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.

v. Zahurones, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905 (citing *Tuescher*, 226 Wis. 2d at 471–72). This interpretation is well rooted in Wisconsin case law.

In *State v. Gavigan*, 122 Wis. 2d 389, 390, 362 N.W.2d 162 (Ct. App. 1984), the defendant committed a robbery and, 24 hours later, led police on a high-speed chase. Gavigan was charged with robbery and fleeing in separate complaints. *Id.* Gavigan was sentenced first in the fleeing case, then sought 107 days of credit against the robbery sentence for time served on the fleeing sentence. *Id.* at 391. The circuit court denied the request. *Id.* On appeal, Gavigan argued that he was entitled to credit against the robbery for custody time on the fleeing sentence because the two crimes were part of the same course of conduct. *Id.* at 393. The court of appeals disagreed, concluding that the fleeing charge arose from an incident that was separate from the robbery. *Id.* at 394–95.

In *Tuescher*, 226 Wis. 2d at 467, the defendant burglarized a restaurant while armed with a shotgun. When police confronted him, he exchanged gun fire, wounding an officer. *Id.* *Tuescher* was convicted of attempted burglary, attempted second-degree homicide, and felon in possession of a firearm. *Id.* The court sentenced *Tuescher* to 22½ years on the attempted homicide, and to shorter concurrent terms on the other offenses. *Id.* at 467–68. The circuit court later vacated the conviction on the attempted homicide charge, and *Tuescher* eventually pleaded guilty to first-degree reckless injury for which he was sentenced to 15 years of imprisonment, to be served concurrently with the other two offenses. *Id.* at 468.

The court granted *Tuescher* credit against the new sentence for the time served from sentencing on the three felonies to the grant of the new trial. *Tuescher*, 226 Wis. 2d at 468. But it denied credit for the time period after the grant of the new trial because he was serving that time on only the

two undisturbed convictions for felon in possession and attempted burglary. *Id.*

On appeal, Tuescher argued that he was entitled to credit for the time he served after the circuit court vacated the attempted homicide conviction up to his plea. *Tuescher*, 226 Wis. 2d at 470. Tuescher contended that his shooting of the police officer arose “out of the same course of conduct” as the burglary and possession convictions. *Id.* at 470. This Court interpreted Tuescher’s contention as advocating that “‘course of conduct’ broadly . . . mean[s] ‘criminal episode.’” *Id.* at 471.

The *Tuescher* Court concluded that the phrase “course of conduct” in Wis. Stat. § 973.155(1)(a) was ambiguous. 226 Wis. 2d at 471. It could be interpreted broadly to encompass “criminal episode” or could be narrowly limited to the “specific acts” for which the sentence is imposed. *Id.*

Relying in part on *Gavigan*, the court adopted the narrower definition of the phrase, holding that “a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts.” *Id.* at 479. Thus, the court determined that Tuescher was “not entitled to credit toward his reckless injury sentence for time he spent serving his sentences for burglary and possession of a firearm after his attempted homicide conviction was vacated, because those sentences did not arise out of the same ‘course of conduct.’” *Id.*

Tuescher also relied on *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), the foundational case establishing the rules for applying credit to consecutive and concurrent sentences. But *Boettcher* also included a detailed examination of the history and meaning of “course of conduct” in Wis. Stat. § 973.155, which *Tuescher* excerpted at length. See *Tuescher*, 226 Wis. 2d at 476–78 (citing *Boettcher*, 144 Wis. 2d at 97–98).

The *Boettcher* Court explained that the Model Penal Code (MPC), upon which the Wisconsin drafters based the sentence credit statute, authorized credit for custody connected to “*the crime* for which such sentence is imposed.” *Boettcher*, 144 Wis. 2d at 97 (emphasis added). A comment to the MPC advised, however, that the words “the crime” might well be misinterpreted to indicate that credit is tied to the crime charged, and that it might be denied on a conviction for a different charge. *Id.* To remedy this problem, the Wisconsin drafters substituted “the course of conduct” for “the crime” in the statute. *Id.*

Thus, as *Boettcher* made clear, the phrase “course of conduct” in Wis. Stat. § 973.155 was intended to ensure that the defendant received credit if convicted of a crime different than the one charged. *Boettcher*, 144 Wis. 2d at 97–98. It was not intended to expand the availability of credit beyond custody linked to the specific acts for which sentence was imposed to all custody associated with any part of the criminal episode. *See id.*; *Tuescher*, 226 Wis. 2d at 471–72.

As noted, in its bench ruling granting credit here, the court appeared to suggest that there was confusion about what constitutes a “course of conduct,” stating “there’s varying case law” and “the state of the case law in this situation is a mess” (R. 44:25, A-App. 136.) As shown, this is not the case; the meaning of “course of conduct” for purposes of Wis. Stat. § 973.155 is settled law. Again, it “refers to the specific offense or acts embodied in the charge for which the defendant is being sentenced.” *Zahurones*, 389 Wis. 2d 69, ¶ 14 (citing *Tuescher*, 226 Wis. 2d at 471–72).

C. Application of law to the facts

1. **Because Fermanich's Oneida County custody was not in connection with the specific acts for which he was sentenced on Count 1, Fermanich is not entitled to credit for this time on Count 1.**

Fermanich appropriately received credit against his sentences on Counts 4 and 5 for the 433 days he spent in jail custody in Oneida County. On these counts, his custody was connected to the specific acts for which he was sentenced: Fermanich took and drove the third truck (Count 4) into Oneida County, attempted to flee (Count 5) once detected by a sheriff's deputy there, and was charged and held on these offenses by Oneida County authorities.

But the circuit court erred in also awarding Fermanich credit for this custody time against his sentence on Count 1, based on its misunderstanding of the phrase "course of conduct" in Wis. Stat. § 973.155.

The court appeared to apply a colloquial understanding of the phrase "course of conduct" to this case. "This was all the same course of conduct," the court declared. (R. 44:26, A-App. 137.) "It happened on the same day within a short period of time." (R. 44:26, A-App. 137.) The court did not apply the specific meaning Wisconsin courts have ascribed to the phrase within the context of Wis. Stat. § 973.155. Had it applied the legal meaning of "course of conduct" as used in section 973.155, it would have reached a different conclusion.

As discussed, "course of conduct" within this context means the specific acts constituting the offense for which the defendant was sentenced. *Zahurones*, 389 Wis. 2d 69, ¶ 14; *Tuescher*, 226 Wis. 2d at 471–72. Under this definition, it is impossible to view the series of criminal acts committed on the night of September 30, 2017, as being all the same "course

of conduct” under Wis. Stat. § 973.155. That night, Fermanich went on a crime spree, committing multiple specific criminal acts, each constituting its own “course of conduct,” at different locations across Langlade and Oneida Counties. It began at 9:30 in the Town of Antigo with Fermanich taking and driving the first truck, the offense in Count 1 for which Fermanich was convicted and sentenced. (R. 1:2.) It continued with Fermanich taking and driving the second truck in the Town of Peck (Count 2, dismissed and read-in). It further continued with Fermanich taking the third truck in the Town of Parrish in Langlade County and driving it into Oneida County, charged as Count 3 (dismissed and read-in) for the Langlade portion of the conduct and as Count 4 for the Oneida County conduct on which Fermanich was convicted and sentenced. (R. 1:2–3.) And, once detected by an Oneida County sheriff’s deputy, it continued with Fermanich leading the deputy on a chase through Oneida County, for which Fermanich was charged, convicted, and sentenced in Count 5. (R. 1:2.)

While these acts all occurred within approximately a two-hour period (R. 1:2; 44:22, A-App. 133), this fact does not show that they amounted to the same “course of conduct” within the meaning of Wis. Stat. § 973.155(1)(a). Recall that in *Tuescher* there was no separation in time between the offender burglarizing the restaurant and shooting an officer who confronted him at the scene. *Tuescher*, 226 Wis. 2d at 467. And yet these criminal acts were deemed separate “courses of conduct” for purposes of the sentence credit statute. *Id.* at 479.

Likewise, the fact that two of the acts for which Fermanich was convicted were similar in nature, constituting two violations of the same statute (taking and driving a motor vehicle), does not mean that they were the same “course of conduct” under section 973.155. These were separate specific acts—they were committed in different locations at different specific times targeting different trucks owned by different

individuals—and thus constituted two different “course[s] of conduct for which sentence was imposed.” Wis. Stat. § 973.155(1)(a).

Thus, Fermanich’s pretrial custody in Oneida County was not connected to the course of conduct—the specific acts committed at the beginning of the spree in Langlade County—for which Fermanich was sentenced on Count 1. Moreover, that custody did not function as custody for both Oneida County and Langlade County charges because a signature bond was filed in the Langlade County case at the initial appearance and remained in effect until disposition. (R. 44:11, A-App. 122; 45:18–19.) Stated differently, the Oneida County custody did not carry the added burden of custody on the Langlade County charges because (1) the Oneida County custody was not in connection with the course of conduct for which Fermanich was sentenced on Count 1; and (2) there was no unpaid cash bond on the Langlade County charges mandating custody.

These facts distinguish the present case from *Zahurones*. There, the defendant had filed a signature bond on one count (“Count 2”) but remained in custody before trial on Counts 1, 3, and 5. *Zahurones*, 389 Wis. 2d 69, ¶ 15. *Zahurones* sought credit against her sentence on Count 2 for her custody on the other three counts, and the court denied her request. *Id.* ¶ 10. On appeal, *Zahurones* renewed this claim, and the State opposed it on the ground that she was not in custody on Count 2 at the time because she had filed a signature bond. *Id.* ¶¶ 15–18.

This Court reversed, concluding that a signature bond filed on one count was not, by itself, sufficient to sever the connection between the defendant’s pretrial custody and Count 2. Critically, the State did not dispute that the custody on the other counts was connected to the same “course of conduct” for which sentence was imposed on Count 2. Given the State’s choice not to litigate the “course of conduct” issue,

the Court determined that the custody time, which was on drug charges and a count of resisting an officer, was connected to the same course of conduct for which sentence was imposed in Count 2, physical abuse of a child. This conclusion was, at least, supported by the facts that all the offenses occurred at home, and that police discovered the crimes essentially all at once upon entering the home.

Here, the present facts leave no doubt that Count 1, taking and driving the first truck, was not the same “course of conduct” because it was distinct in place and time from the Oneida County offenses for which Fermanich was held in custody.

Accordingly, the 433 days of custody for which Fermanich seeks credit is not “in connection with the course of conduct” for which he was sentenced on Count 1. The circuit court erred in concluding otherwise, and its order granting credit for this time should be reversed.

2. Two more arguments Fermanich made in support of his credit request lack merit.

In his motion for credit, Fermanich offered two additional reasons why he should receive credit against his sentence on Count 1 for the Oneida County custody. First, he argued that denying him credit for this custody on Count 1 would, in effect, deprive him of credit on Counts 4 and 5 because the sentences were imposed concurrently, citing to *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989). (R. 26:3–4, A-App. 105–06.) Second, he argued that the holding of *Floyd*, 232 Wis. 2d 767, which provides for credit on custody associated with read-in offenses, argues in favor of credit for the Onedia Custody on the Count 1 sentence. (R. 26:4–5, A-App. 106–07.) Neither argument is persuasive.

Fermanich’s argument that credit should be applied to Count 1 to avoid depriving him of credit on Counts 4 and 5 is

nothing more than a request to ignore Wis. Stat. § 973.155 when determining credit on this count. In *State v. Elandis Johnson*, 2009 WI 57, ¶¶ 50–70, 318 Wis. 2d 21, 767 N.W.2d 207, the supreme court explicitly rejected the argument that any credit due one sentence must also be applied to any other sentence imposed concurrently to that sentence. The court also criticized *Ward* and labeled as “unfortunate” a passage in the jury instruction special materials on which the *Ward* decision relied. *Johnson*, 318 Wis. 2d 21, ¶ 50 (discussing Wis. JI–Criminal SM-34 at 11 (1982)). This passage no longer appears in the special materials. See Wis. JI–Criminal SM-34A (2020).

Rather, as provided in another part of the special materials that *Johnson* quoted with approval: “There will . . . be situations where the periods of time for which credit is due on unrelated concurrent sentences will not line up with each other. Some credit will be due on one sentence and a different amount of credit will be due on another.” *Johnson*, 318 Wis. 2d 21, ¶ 63 (quoting Wis. JI–Criminal SM-34A at 12 (2020)).

The argument that *Floyd* provides support for credit in this case is also unavailing. In *Floyd*, the supreme court adopted a bright-line rule requiring credit under Wis. Stat. § 973.155(1) for time spent in custody on offenses that are dismissed but read-in at sentencing. *Floyd*, 232 Wis. 2d 767, ¶ 32. Fermanich’s point here is difficult to follow. (R. 26:4–5, A-App. 106–07.) It appears to be that, because the dismissed Oneida County counts were read-in, credit should be applied against the sentence in Count 1 for the Oneida County custody. But this is an argument for dual credit—the Oneida County custody was already credited against the sentences in Counts 4 and 5—once again without regard to whether credit is due under the terms of section 973.155. The *Floyd* rule does not apply here.

Based on the foregoing, this Court should reverse the order granting Fermanich 433 days of credit against his sentence on Count 1.

Finally, it appears that Fermanich is entitled to an additional 31 days not previously awarded against the sentence on Count 1 for conditional jail time imposed at the original sentencing, pursuant to *State v. Gilbert*, 115 Wis. 2d 371, 380, 340 N.W.2d 511 (1983) (authorizing credit for jail time served as a condition of probation). (R. 33:1–2, A-App. 108–09.) DOC correctly noted that Fermanich is entitled to credit for this time, but it does not appear to have been ordered by the circuit court.

CONCLUSION

The order awarding 433 days of credit should be reversed, and the matter remanded with instructions to amend the judgment of conviction to reflect the removal of 433 days of credit on Count 1, and the addition of 31 days of credit on Count 1.

Dated this 16th day of July 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 5,256 words.

Dated this 16th day of July 2021.

Electronically signed by:

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JACOB J. WITTWER
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 16th day of July 2021.

Electronically signed by:

s/ Jacob J. Wittwer
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Appendix
State of Wisconsin v. Michael K. Fermanich
Case No. 2021AP462-CR

<u>Description of Document</u>	<u>Pages</u>
<i>State of Wisconsin v. Michael K. Fermanich</i> , No. 2017CF313, Langlade County Circuit Court, Judgment of Conviction, dated Feb. 2, 2021	101–102
<i>State of Wisconsin v. Michael K. Fermanich</i> , No. 2017CF313, Langlade County Circuit Court, Defendant’s Notice of Motion and Motion to Modify the Judgment of Conviction, dated Nov. 2, 2020	103–107
<i>State of Wisconsin v. Michael K. Fermanich</i> , No. 2017CF313, Department of Corrections, Letter Regarding Sentence Credit, dated Jan. 15, 2020	108–111
<i>State of Wisconsin v. Michael K. Fermanich</i> , No. 2017CF313, Langlade County Circuit Court, Transcript – Sentence Credit Hearing, dated Feb. 2, 2021	112–141

APPENDIX CERTIFICATION

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 Wis. Stat. § (Rule) 809.19(2) and that contains, at a minimum: (1) the findings or opinion of the circuit court, and (2) 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; (3) a copy of any unpublished opinion cited under section rule 809.23 (3)(a) or (b).

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.

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Dated this 16th day of July 2021.

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