STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2021AP000462-CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent.

On Appeal from a Judgment of Conviction
Entered in the Langlade County Circuit Court,
the Honorable John B. Rhode, Presiding

RESPONSE BRIEF OF DEFENDANT-RESPONDENT

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ISSUE PRESENTED

On the night of September 30, 2017, Mr. Fermanich was arrested for operating vehicles without their owners' consent and evading arrest. He remained in custody pretrial. He pled to three charges arising from the conduct. Ultimately, the court imposed concurrent sentences and granted 433 days of pretrial sentence credit on each count. Sentence credit is owed for all days spent "in custody in connection with the course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). The issue is:

> Whether the circuit court properly determined that Mr. Fermanich's pretrial custody was "in connection" with Count 1.

The circuit court granted the credit. The State argues that credit was only owed on Counts 4 and 5, not Count 1. This Court should affirm.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Mr. Fermanich agrees with the State that neither publication nor oral argument is warranted.

STATEMENT OF THE CASE AND FACTS

According to the criminal complaint, on the night of September 30, 2017, Mr. Fermanich was arrested after he took three vehicles without owners'

consent, abandoning one vehicle before taking the next. R.1:1-2. Law enforcement became aware of what was occurring after the first vehicle's owner called to report the crime. R.1:2. Law enforcement soon learned about the second and third vehicles, caught up to Mr. Fermanich, and arrested him. R.1:1-2. This all occurred over a "short period of time." R.44:26; A-App. 137. The incident straddled two counties: Langlade County and Oneida County. The three vehicles were taken in Langlade County. Then, Mr. Fermanich drove the third vehicle over the county line into Oneida County, where he unsuccessfully attempted to avoid arrest. R.1:1-2.

Initially, separate cases were filed in Oneida County and Langlade County.[1] Mr. Fermanich was found indigent, and the State Public Defender appointed counsel for him. R.2. Oneida County

[1] Oneida County Case No. 2017CF245: Count 1, operating a motor vehicle without owner's consent, Wis. Stat. § 943.23(2); Count 2, attempting to flee or elude an officer, Wis. Stat. § 346.04(3); Count 3, obstructing an officer, Wis. Stat. § 946.41(1); Count 4, resisting a traffic officer, Wis. Stat. § 346.04(2t); Count 5, attempting to flee or elude a traffic officer, Wis. Stat. § 346.04(3). *See* R. 10:2-3 (listed as Counts 4 through 8 on the amended information, following consolidation).

Langlade County Case No. 2017CF313: Count 1, felony taking and driving a motor vehicle without consent as a repeat offender, Wis. Stat. § 943.23(2)(b); Count 2, misdemeanor taking and driving a motor vehicle without consent (joyriding) as a repeat offender, Wis. Stat. §§ 943.23(3m) and 939.62(1)(b); and Count 3, misdemeanor taking and driving a motor vehicle without consent (joyriding) as a repeat offender, Wis. Stat. §§ 943.23(3m) and 939.62(1)(b). R.1:1-2.

imposed a cash bond. R.44:12; A-App. 123. Langlade County added a signature bond thereafter. R.44:11; A-App. 122. Unable to post cash bond, Mr. Fermanich was confined in the Oneida County Jail until sentencing, a total of 433 days. R.45:22, 27.

Mr. Fermanich accepted a plea agreement and the cases were consolidated for purposes of the plea. R. 12, R.13. The Oneida County case was dismissed. The five charges from that case were added to the Langlade County information as Counts 4 through 8. R.10:1-3. Mr. Fermanich entered pleas to Count 1, operating a motor vehicle without owner's consent as a repeater, (taking the first vehicle in Langlade County); Count 4, operating a motor vehicle without owner's consent (driving the third vehicle in Oneida County); and Count 5, attempting to flee or elude an officer (in Oneida County). R.45:2-3. All of the other counts from both cases were dismissed and read in. R.45:2-3. On all three counts (Counts 1, 4, and 5) the court withheld sentence and instead imposed five years of probation. R.45:25; R.20. The court imposed 30 days of jail as a condition of probation on Count 1. R.45:27. The judgment of conviction listed 433 days of pretrial credit on Count 4, but not Counts 1 or 5. R.20:1.

Subsequently, Mr. Fermanich's probation was revoked and the case was set for a sentencing hearing, to take place on November 3, 2020. On November 2, 2020, Mr. Fermanich filed a motion for sentence credit. R.26. He argued that the pretrial credit was actually owed on all three counts, Counts 1, 4, and 5, because

the custody was factually connected to all three counts. The arrest was based on one course of conduct. In turn, all of the charges arose from that one arrest. Ultimately, all of the charges were consolidated into one case. R.26:3. Mr. Fermanich further argued that the fact that a signature bond was imposed in Langlade County did not factor into the result, with citation to *State v. Hintz*, 2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646. R.26:3. Finally, as the court imposed concurrent sentences on all three counts, credit was owed on each count. *State v. Ward*, 153 Wis. 2d 743, 746, 452 N.W.2d 158 (Ct. App. 1989). R.26:3.

On November 3, 2020, Mr. Fermanich returned to the court for sentencing. At the sentencing hearing, the court imposed the same sentence on each count, to be served concurrently: eighteen months of initial confinement and twenty-four months of extended supervision. R.43:12-13. The court made preliminary comments about sentence credit. However, the issue was held open for a future date. R.43:16.

Sentence credit was determined at a hearing held on February 2, 2021. R.44. There was an agreement between the parties about the number of days' credit Mr. Fermanich was owed for probation holds. R.44:19-20; A-App. 130-31. However, as anticipated, the parties disputed the 433 days of pretrial credit. The State argued that the post-arrest custody was only connected to Counts 4 and 5, not with Count 1. R.44:8-10; A-App. 119-20. The State asserted, "Count 1 involves a vehicle that was stolen in

Langlade County. . . Then, the Oneida County case involves a different vehicle. . .". R.44:9-10; A-App. 120-121.

The court determined that, "[t]his was all the same course of conduct. It happened on the same day within a short period of time. The only reason we're dealing with this issue is because it happened to spill over a county line." R.44:26; A-App. 137. The court acknowledged that both arguments had merit; however, it would "err on the side of protecting Mr. Fermanich's personal liberty." R.44:28; A-App. 139. The court ordered the 433 days of pretrial credit on all three counts, including Count 1. R.44:29; A-App. 140, R. 36:1.[2] The State appeals.

[2]As the State notes the DOC wrote a series of letters to the court asking the court to amend the JOC to reflect the correct amount of credit on each count. Mr. Fermanich agrees with the State that the judgment of conviction should be amended to add 31 days of credit to Count 1 for the conditional jail time that was overlooked. Appellant's Brief at 22.

ARGUMENT

The circuit court did not err by granting Mr. Fermanich 433 days of sentence credit on Count 1 for time he spent in pretrial custody "in connection with the course of conduct for which sentence was imposed."

A. Standard of Review.

Application of the sentence credit statute to a given set of facts is a question of law, reviewed de novo. *State v. Kontny*, 2020 WI App 30, ¶6, 392 Wis. 2d 311, 943 N.W.2d 923. However, any factual findings made by the circuit court are upheld unless clearly erroneous. *Id.*

B. A court shall grant credit toward service of a sentence for days spent in pretrial custody "in connection with the course of conduct for which sentence was imposed."

Sentence credit "has its roots in the constitutional principle of equal protection;" it ensures that a wealthier person who can afford to post bond and a person of lesser means who cannot afford to do so still serve the same amount of time for their crimes. *Klimas v. State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977). In relevant part, Wis. Stat. § 973.155(1) provides that "[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." This includes pretrial custody. *Id.* The grant of lawfully

earned sentence credit is mandatory. *State v. Kitt*, 2015 WI App 9, ¶3, 359 Wis. 2d 592, 859 N.W.2d 164.

There is no dispute in Mr. Fermanich's case that the 433 days of pretrial confinement were "custody." Instead, the question is whether the custody was "in connection with the course of conduct for which sentence was imposed" on all three counts of the judgment of conviction, as the circuit court found, or only Counts 4 and 5, as the State argues.

C. The circuit court correctly determined that Mr. Fermanich was entitled to 433 days of pretrial sentence credit on Count 1.

1. The 433 days of pretrial custody were "in connection with the course of conduct for which sentence was imposed" on Count 1.

The circuit court did not err in finding that the pretrial custody was factually connected to the course of conduct for which sentence was imposed on Count 1. This is actually a fairly straightforward case. The State complicates the analysis by arguing that Mr. Fermanich must prove that all three counts of the judgment of conviction were a single course of conduct. The real question is whether the custody was factually connected to Count 1. The answer is yes.

To be entitled to pretrial credit, Mr. Fermanich must demonstrate that his pretrial custody was factually connected to the course of conduct underlying

Count 1. *See State v. Elandis Johnson*, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207 (the court must determine "whether all or part of the 'custody' for which credit is sought was 'in connection with the course of conduct for which sentence was imposed'").

The 433 days of pretrial custody were factually connected to Count 1. Mr. Fermanich was arrested on September 30, 2017, after taking three vehicles, one after the other, before trying to evade police and being arrested. This conduct violated more than one statute. As relevant here, the taking of the first vehicle was charged as Count 1. However, Mr. Fermanich's arrest was for the entirety of his conduct on that day. Law enforcement became aware of what was happening after the first vehicle was taken and after that, were in continuous pursuit of Mr. Fermanich. R.1:2-3. For this, Mr. Fermanich was charged and remained in jail, unable to post bond, for more than a year. This custody was plainly "in connection with the course of conduct for which sentence was imposed" on Count 1.[3]

[3] Clearly, the charges were related in this case. However, sentence credit is owed even where charges are unrelated so long as the charge at issue is part of the reason for the custody. In *State v. Carter*, 2010 WI 77, ¶38, 327 Wis. 2d 1, 785 N.W.2d 516, the defendant was charged in Wisconsin with a crime. A warrant was issued. Later, he was arrested in Illinois for an "unrelated armed robbery." He was also held on Wisconsin's warrant. He was entitled to credit in Wisconsin even though the two crimes were unrelated because, "a factual connection exist[ed] between the defendant's presentence custody in Illinois and the Wisconsin sentence imposed." *Id.*, ¶78.

Mr. Fermanich is entitled to the credit on Count 1 even though he also received the credit on Counts 4 and 5. This is because the circuit court imposed the sentences on all three counts concurrently. If a person is in custody in connection with more than one charge, and the charges result in concurrent sentences, the defendant is entitled to credit on each sentence. *Ward*, 153 Wis. 2d at 746. Credit against only one sentence would negate the credit because the longer sentences would control the release date. *C.f. State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988) (when sentences are consecutive, credit shall only be granted on one of the sentences). The circuit court clearly intended the same disposition on all three counts. Initially it imposed the same length of probation on each. Then, after probation was revoked, it imposed the same length of confinement on each, to run concurrently.

Finally, Mr. Fermanich cannot be denied credit on Count 1 based on the fact he was on a signature bond on that count. Response Brief at 19. Several cases grant credit for periods of custody where there was a signature bond on the charge of conviction as long as there was a factual connection between the custody and the course of conduct underlying the charge. *See State v. Zahurones*, 2019 WI App 57, ¶18, 389 Wis. 2d 69, 934 N.W.2d 905. As this Court explained in *Zahurones*:

> The State argues that Zahurones' custody during the probation holds was not "in connection with" the course of conduct for which she was sentenced

> on Count 2 because Zahurones was technically "free" on a signature bond on that count during the time periods when she was in custody on the probation holds. The State contends that the issuing of a signature bond necessarily "severs any connection between a defendant's custody and the course of conduct for which the person was sentenced." The State's argument in this regard is unpersuasive, however, because both this court and the Wisconsin Supreme Court have upheld sentence credit for periods of custody during which the defendants were technically "free" on bond on the charges for which they were ultimately sentenced.

Id.

For example, in *State v. Hintz*, 2007 WI App 113, ¶¶8, 10-11, 300 Wis. 2d 583, 731 N.W.2d 646, the defendant was on a signature bond on the charges for which he was sentenced. However, he was meanwhile held in custody on a supervision hold. The hold, in turn, was based in part on the new charges. Given that the new charges were part of the basis for the custody, credit was due. *Id*., ¶8.

Even more on point is *State v. Floyd*, 2000 WI 14, ¶2, 232 Wis. 2d 767, 606 N.W.2d 155.[4] In *Floyd*, the defendant was on a signature bond on the charges for which he was sentenced. However, he was meanwhile held in custody on a separate charge on a cash bond. The charge with the cash bond was

[4] Abrogated on other grounds by *State v. Straszkowski*, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835.

dismissed and read in to a plea to the charge with the signature bond. *Id.* ¶4. Given that the read in charge was considered at sentencing, the defendant was entitled to credit for the custody. *Floyd*, 232 Wis. 2d 767, ¶26.[5]

As in *Floyd*, Mr. Fermanich's case included read in charges. As the State notes, *Floyd* is 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." Appellant's Brief at 21 (citing *Floyd*, 232 Wis. 2d 767, ¶32). As part of the plea agreement, multiple counts that were originally charged in the Oneida County case were dismissed and read in. More specifically, Counts 6 through 8 of the amended information were dismissed and read in.[6] Mr. Fermanich was on cash bond on those charges.

[5] Sometimes the fact of a signature bond means a person does not earn credit, but it is not always true and it is not true here. *C.f., State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997) (no credit where defendant was already out on a signature bond when he was arrested on new charges, and held on a cash bond in that case only). *See also, Zahurones*, 389 Wis. 2d 69, ¶24 (distinguishing *Beiersdorf*.).

[6] Counts 6, 7, and 8 were originally charged in the Oneida County case as Counts 3, 4, and 5. When the cases were consolidated, these counts became Counts 6, 7, and 8 in the Langlade County case. Count 6 of the amended information was obstructing an officer, Wis. Stat. § 946.41(1); Count 7 of the amended information was resisting a traffic officer, Wis. Stat. § 346.04(2t) and Count 8 of the amended information was attempting to flee or elude a traffic officer, Wis. Stat. § 346.04(3). R. 10:2-3.

Therefore, pursuant to *Floyd*, the custody from those charges must be applied to Count 1.

The State attempts to distinguish *Floyd* based on the fact that Mr. Fermanich pled to other Oneida County charges. Appellant's Brief at 21. The State argues that Mr. Fermanich cannot have "dual" credit for the Oneida custody because this custody was "already credited against the sentences in Counts 4 and 5." *Id.* However, "dual" credit (in the sense that the credit applies to more than one sentence) is lawful in the event of concurrent sentences. *See Boettcher*, 144 Wis. 2d 86, ¶100 n.4 (explaining the allowance of "dual credit in appropriate cases," "*E.g.,* when a new sentence is imposed to run concurrently with a revoked probation."). Dual credit is not the problem. The problem is *duplicate* credit, which occurs when the same period of custody is applied to more than one sentence imposed to run consecutively. *Id.* at 100. There is no concern about duplicate credit here because the sentences are concurrent, not consecutive.

The circuit court did not err by concluding that Mr. Fermanich's 433 days of pretrial custody were "in connection with the course of conduct for which sentence was imposed" on Count 1. *See* Wis. Stat. § 973.155(1)(a).

2. The State's reliance on *Gavigan* and *Tuescher* is misplaced.

To avoid this straightforward result, the State incorrectly argues that Mr. Fermanich must prove that Counts 1, 4, and 5 made up a single course of

conduct. Appellant's brief at 17-20. As demonstrated, his burden is instead to prove a factual connection between the pretrial custody and Count 1, which he has. Regardless, Mr. Fermanich prevails under the State's argument as well because, as will be shown, this was a single course of conduct.

The State primarily relies on two cases that are clearly distinguishable. In both cases the defendant was requesting credit for time spent in custody between the commencement of one sentence and the commencement of another. Here, the dispute is regarding Mr. Fermanich's pretrial credit. In *State v. Gavigan*, 122 Wis. 2d 389, 390, 362 N.W.2d 162 (Ct. App. 1984), the defendant committed a robbery, and the next day, led police on a chase that resulted in a fleeing charge. He pled to the fleeing and began serving a sentence. Several months later, he was sentenced on the robbery. He sought credit toward the robbery for time that was spent in service of the fleeing sentence. The court denied the credit because he was serving a different sentence at the time. *Id.* at 389. One year after *Gavigan*, the supreme court decided *State v. Beets*, 124 Wis. 2d 372, 381, 369 N.W.2d 382 (1985). *Beets* is the seminal case that established the rule that the commencement of one sentence severs the connection between the custody and any other charge. *Id.* at 383. The *Beets* court cited *Gavigan* for this "basic position." *Id.* at 380.

The other case relied on by the State, *State v. Tuescher*, post-dated and addressed *Beets* directly. *State v. Tuescher*, 226 Wis. 2d 465, 472, 595 N.W.2d

443 (Ct. App. 1999). In *Tuescher*, the defendant won a new trial on an attempted homicide that arose from an incident that also led to convictions for burglary and possession of a firearm. He began serving sentences on all three charges. On appeal, the attempted homicide charge was reversed. While the charge was being relitigated, he remained in prison on the other two sentences. After being reconvicted (on an amended charge), he sought credit for the time between the reversal of the conviction and the resentencing on the amended charge. *Id.* at 467-68.

The *Tuescher* court denied the credit based on *Beets*. The court acknowledged that *Beets* offered a potential contingency: the connection was deemed severed "unless the acts for which the first and second sentences are imposed are truly related or identical. . .". *Id.* at 476. However, the court also noted that *Beets* hedged on that caveat when it stated that "[the consequences of even that contingency is not clear. . ." *Id.* at 476 n.4; *Beets*, 124 Wis. 2d at 383. To determine whether the *Beets* contingency might apply, the *Tuescher* court considered the question of whether the acts were truly related or identical and concluded they were not.[7] The *Tuescher* court helpfully clarified what was *not* at issue in that case—pretrial credit: "Tuescher received 224 days credit on each of the three concurrent sentences for time he spent in custody prior to sentencing. That credit is not in dispute." *Id.* at 468.

[7] Mr. Fermanich is not aware of any case where the "contingency" noted in passing in *Beets* has determined the outcome of a case.

Mr. Fermanich's case involves pretrial credit, which was explicitly "not in dispute" in *Tuescher*. The sentences on Counts 1, 4, and 5 commenced at the same time. As such, the *Beets* rule is not implicated, and neither *Gavigan* nor *Tuescher* applies. Mr. Fermanich is not required to prove that Counts 1, 4, and 5 made up a single course of conduct.

Yet even if Mr. Fermanich were required to prove that Counts 1, 4, and 5 made up a single course of conduct, he does that as well. Comparison of his facts to *State v. Zahurones* is instructive. *State v. Zahurones*, 389 Wis. 2d 69. In *Zahurones*, that police entered the defendant's home and found drugs and drug paraphernalia. After finding the contraband, police attempted to arrest the defendant. However, she resisted. Her child was removed from the home and tested positive for methamphetamine. Ultimately, she pled guilty to four counts arising from the conduct. This Court found that all of the charges arose from a single course of conduct. *Id.*, ¶15.[8] That single course of conduct was the reason for her incarceration. *Id.*

Likewise, here, the criminal conduct in Mr. Fermanich's case gave rise to separate charges. However, all of the charges stemmed from a series of interconnected crimes that occurred near in time. Mr. Fermanich took three cars in succession,

[8] The pretrial credit in *Zahurones* was granted without controversy. Instead, the disputed credit in *Zahurones* was from probation holds that were technically only imposed on some, but not all, of the counts. This is where the course of conduct analysis became relevant. *Id.,* ¶¶18-28.

(abandoning one before taking the next), evaded police, and was arrested. Count 1 was based on taking the first vehicle; Count 4 was based on driving the third vehicle in Oneida County; and Count 5 was based on avoiding arrest. *See* R.1:2-3.[9] The entire incident took at most two hours. *See* R.1:2. It may have been less time; the complaint is not precise. The circuit court found that it was a "short amount of time." R.44:26; A-App. 137. This factual finding is not clearly erroneous. On these facts, this Court should find that Counts 1, 4, and 5 made up a single course of conduct.

Sentence credit is rooted in principles of equal protection and fundamental fairness. After his arrest on September 30, 2017, Mr. Fermanich was held in jail on a cash bond and remained there for 433 days. Had Mr. Fermanich been wealthy and able to pay the bond, he would indisputably serve the same length of time on all three counts arising from that unfortunate day in September. Depriving Mr. Fermanich of the credit on Count 1, would mean that he would serve more than a year longer on Count 1 than Counts 4 and 5, despite the fact that the crimes and arrest took place at the same time and the court imposed identical sentences on each count, to run concurrently. This would be a penalty on poverty, and would be fundamentally unfair. Fortunately, adherence to the

[9] The State asserts that "Fermanich took and drove the third truck (Count 4) into Oneida County," (Appellant's Brief at 17) but as the complaint shows Mr. Fermanich actually "took" the third vehicle in Langlade County and drove it over the county line into Oneida County. R.1:2-3.

well-established rules governing sentence credit avoids this unjust result.

The circuit court's order granting 433 days of pretrial sentence credit on Count 1 should be affirmed.

CONCLUSION

For the reasons stated above, Mr. Fermanich respectfully asks this Court to affirm the court's grant of 433 days of pretrial credit on Count 1 and to remand with directions to add an additional 31 days of credit to Count 1.

Dated this 15th day of September, 2021.

Respectfully submitted,

Electronically signed by Colleen Marion

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CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in S. 809.19(8)(b), (bm), and (c) for a brief. The length of this brief is 3,972 words.

Dated this 15th day of September, 2021.

Signed:
Electronically signed by
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