STATE OF WISCONSIN

C O U R T O F A P P E A L S

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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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The State agrees with Defendant-Respondent Michael K. Fermanich that this is a straightforward case. (Fermanich's Br. 12.)

Under Wis. Stat. § 973.155(1)(a), sentence credit is available "for all days spent in custody in connection with the course of conduct for which sentence was imposed." Wisconsin courts have defined "course of conduct" narrowly to mean "the specific act[s]" constituting the offense for which sentence was imposed. *State v. Tuescher*, 226 Wis. 2d 465, 471–72, 595 N.W.2d 443 (Ct. App. 1999).

Fermanich seeks credit against his Count 1 sentence for 433 days spent in Oneida County custody due to his failure to post bail on Counts 4 and 5. All counts were for offenses committed when, one night, Fermanich took three trucks on successive joyrides through Langlade and Oneida counties.

Applying Wisconsin courts' definition of "course of conduct," Fermanich's Oneida County custody was not connected to the course of conduct—*i.e.*, to "the specific act[s]"—for which sentence was imposed on Count 1. *See Tuescher*, 226 Wis. 2d at 471–72. The specific acts or offense for which sentence was imposed on Count 1 was taking and driving the first truck in Langlade County, a count in a case for which Fermanich posted a signature bond. The Oneida County custody was connected to the specific offenses Fermanich committed in that county, including taking and driving into Oneida the third truck (Count 4) and attempting to elude an officer (Count 5). Because the Oneida County custody was not in connection with the specific acts for which sentence was imposed in Count 1, Fermanich is not entitled to 433 days of credit against Count 1 for that custody.

Accordingly, this Court should reverse the circuit court's order and remand for the circuit court to amend the judgment of conviction to remove 433 days of credit on Count 1.

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.

The State renews the arguments made in its opening brief. Unless expressly conceded, the State opposes all Fermanich's arguments made in his response brief, addressing the main ones below.

Fermanich begins his Argument with the correct legal standard. (Fermanich's Br. 11.) He appears to acknowledge that he is entitled to credit "toward the service of his . . . sentence" on Count 1 "for all days spent in custody in connection with the course of conduct for which sentence was imposed" on that count. (Fermanich's Br. 11.) But he then fails to engage this standard in his argument for credit.

Instead, Fermanich declares the case to be "fairly straightforward" and asserts that the State "complicates the analysis" by focusing on whether the custody was connected to the "course of conduct" for which Fermanich was sentenced on Count 1.[1] (Fermanich's Br. 12.) "The real question," Fermanich asserts, "is whether the custody was factually connected to Count 1." (Fermanich's Br. 12.) This last statement is true, so far as it goes; this is a factual-connection case that turns on the application of the factual-connection

[1] More precisely, Fermanich asserts that the State's position is that "Mr. Fermanich must prove that all three counts of the judgment of conviction were a single course of conduct." (Fermanich's Br. 12.) But as stated in the brief in chief, the State's position is that Fermanich is not entitled to credit against his Count 1 sentence for his 433 days in Oneida County custody because that custody was not connected to the "course of conduct"—the specific offenses or criminal acts—for which sentence was imposed in Count 1. (Brief-in-Chief 12–20.)

portion of Wis. Stat. § 973.155(1)(a)—*i.e.*, whether the custody was "in connection with the course of conduct for which sentence was imposed."

But Fermanich doesn't apply this operative language to the facts. Rather, he appears to argue that the Oneida County custody is factually related to Count 1 because his *arrest* was for all his conduct on the night of September 30, 2017. (Fermanich's Br. 13.)

The standard in Wis. Stat. § 973.155(1)(a) says nothing about what the offender was arrested for. Here, Fermanich wasn't charged in Langlade County with Count 1 until December 29, 2017. (R. 1.) And Langlade County didn't make a demand on Fermanich's liberty until it issued a warrant January 29, 2018.[2] Shortly thereafter, on February 6, 2018, Fermanich made his initial appearance on the Langlade County case, satisfying the warrant, and he posted a signature bond. *See* Wisconsin Circuit Court Access website (WCCA), *State v. Michael K. Fermanich*, Langlade County case no. 2017CF313, Court record wcca.wicourts.gov (accessed October 21, 2021). That Fermanich committed the

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[2] Fermanich argues in a footnote that, even if Count 1 is not factually related to his Oneida County custody, he is still entitled to credit against Count 1 for this time because the Langlade County count was part of the reason for his custody in Oneida County, citing *State v. Carter*, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516. (Fermanich's Br. 13 n.3.) *Carter* does not apply. In *Carter*, the fact that the charging county issued a warrant, and that Illinois records expressly established that Carter was held in Illinois in part because of the outstanding Wisconsin warrant, entitled Carter to credit against his Wisconsin sentence for his Illinois custody. *Id.* ¶¶ 62–63. Here, as noted above, Langlade County did not issue a warrant until January 29, 2018, then Fermanich satisfied the warrant by making his initial appearance one week later. *See* Wisconsin Circuit Court Access website (WCCA), *State v. Michael K. Fermanich*, Langlade County case no. 2017CF313, Court record wcca.wicourts.gov (accessed October 21, 2021).

Langlade County offense in Count 1 on the same night as the Oneida County offenses does not establish that his Oneida County custody was "in connection with the course of conduct" for which Fermanich was sentenced in Count 1.[3]

No, the factual-connection requirement is satisfied when the custody is linked to the "course of conduct for which sentence was imposed." Wis. Stat. § 973.155(1)(a). As shown in the opening brief, Wisconsin courts have long construed "course of conduct" narrowly to mean the "specific acts" for which sentence was imposed, *Tuescher*, 226 Wis. 2d at 471, or the "specific offense or acts embodied in the charge for which the defendant is being sentenced." *State v. Zahurones*, 2019 WI App 57, ¶ 14, 389 Wis. 2d 69, 934 N.W.2d 905.[4] And, as *State v. Boettcher* explained, the Model Penal Code provision on which section 973.155 was based refers to "*the crime* for which such sentence is imposed." 144 Wis. 2d 86, 97–98, 423 N.W.2d 533 (1988) (emphasis added). The drafters of section 973.155 replaced "the crime" with "course of conduct" merely to ensure that, if prosecutors later charged the offender with a different "crime" for the same acts, credit would still be available. *Id.* They did not intend to make credit available for custody arising from a broader set of acts than the specific ones supporting "the crime" or charge. *See id.*

Given this longstanding interpretation of "course of conduct" to mean "specific acts" or "specific offense," it is difficult to argue that the Oneida County custody on the

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[3] An arrest would also appear to establish merely a procedural connection to the confinement, not the requisite factual connection. *See State v. Floyd*, 2000 WI 14, ¶ 17, 232 Wis. 2d 767, 606 N.W.2d 155 ("[A] factual connection fulfills the statutory requirement for sentence credit . . . a procedural or other tangential connection will not suffice.").

[4] *See qlso State v. Gavigan*, 122 Wis. 2d 389, 390, 362 N.W.2d 162 (Ct. App. 1984), on which *Tuescher* relied in adopting this narrow interpretation of "course conduct." (Brief-in-Chief 14.)

Oneida County charges was connected to the course of conduct—the specific acts of taking and driving the first truck in Langlade County—for which Fermanich was sentenced on Count 1. Because Fermanich's Oneida County custody was not connected to the course of conduct for which the Count 1 sentence was imposed, he is not entitled to credit for the 433 days of custody in Oneida County against his Count 1 sentence.

Eventually, Fermanich does engage Wisconsin courts' established interpretation of "course of conduct" in Wis. Stat. § 973.155(1)(a). (Fermanich's Br. 17–21.) Fermanich offers three arguments in response to this interpretation and its application to his case, all of which fail.

First, Fermanich appears to suggest that this interpretation does not apply to determinations of credit based on pretrial custody. (Fermanich's Br. 18–20.) Fermanich is correct that *Tuescher* and *Gavigan* involved determinations of credit for custody served on another sentence. (*See* Brief-in-Chief 14–15.) And he repeatedly notes that his case, unlike *Tuescher* and *Gavigan*, involves pretrial custody. (Fermanich's Br. 19–20.) True enough, but Wis. Stat. § 973.155(1) and the "course of conduct" language in the statute apply to credit determinations in general, *see* section 973.155(1), and *Tuescher*'s interpretation of "course of conduct" has been applied to all custody, including pre-trial and pre-sentencing custody. *See Zahurones*, 389 Wis. 2d 69 (pre-sentencing custody); *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶¶ 1, 31, 274 Wis. 2d 1, 681 N.W.2d 914 (pre-trial). It would be strange and confusing for "course of conduct" to have one meaning for pre-trial custody and another meaning for other types of custody.

Second, and relatedly, Fermanich suggests that the outcome in *Tuescher* was controlled by *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985), and thus, apparently, its interpretation of "course of conduct" is dicta or

otherwise lesser authority. (Fermanich's Br. 18–19.) For starters, Fermanich misreads *Tuescher*. The rule of *Beets*—service of a sentence severs the connection between custody and an unrelated pending charge, 124 Wis. 2d at 379, 383—was not controlling in *Tuescher* because the issue there was whether the custody on the sentence *was, in fact, related* to the course of conduct for which the new sentence was imposed. *See Tuescher*, 226 Wis. 2d at 470–80. Regardless, the holding of *Tuescher* is that the "course of conduct" in Wis. Stat. § 973.155(1)(a) means the "specific acts" for which the defendant was sentenced, not the "criminal episode" of which those acts were a part. *Id.* at 471–72, 478–80; *see Zahurones*, 389 Wis. 2d 69, ¶ 14 (citing *Tuescher*, 226 Wis. 2d at 471–72).

Third, Fermanich argues that, if Wisconsin courts' narrow interpretation of "course of conduct" applies, he is still entitled to credit because the acts charged in Count 1 were nonetheless part of the course of conduct resulting in his Oneida County custody. (Fermanich's Br. 20–21.) Fermanich states that the entire criminal episode "took at most two hours," and that the circuit court found that this was a "short period of time." (R. 44:26, A-App. 137; Fermanich's Br. 21.) But while this finding is not clearly erroneous, it says nothing about whether the custody was connected to the "specific acts" for which Fermanich was sentenced on Count1—the operative test. And in *Tuescher*, the two offenses, attempted burglary while armed and first-degree reckless injury, occurred *almost simultaneously*—Tuescher shot an officer who confronted him as he was leaving the scene of the burglary—but were nonetheless determined to be not part of the same course of conduct. *See Tuescher*, 226 Wis. 2d at 478–79.

Fermanich also relies on the facts of *Zahurones*. As argued in the opening brief, the State did not dispute the "course of conduct" issue in *Zahurones* and believes that its silence on this issue may explain, in part, the outcome in that case. *See Zahurones*, 389 Wis. 2d 69, ¶¶ 15–18.

Zahurones was convicted upon no-contest pleas of possession of drug paraphernalia (Count 1), physical abuse of a child (Count 2), possession of a controlled substance (Count 3) and resisting an officer (Count 5). *Zahurones*, 389 Wis. 2d 69, ¶¶ 4–5. Pursuant to a complex plea agreement, the court withheld sentence on Counts 1, 3, and 5, and placed Zahurones on probation. *Id.* ¶ 5. The court then deferred entry of judgment (DEJ) on Count 2 and converted the original cash bond to a signature bond on that count. *Id.*

Zahurones committed violations for which she was placed on probation holds. *Id.* ¶¶ 6–7. Ultimately, her probation and DEJ were revoked, and the court imposed concurrent sentences on all four counts, granting credit for custody on the probation holds against the sentences on Counts 1, 3, and 5. *Id.* ¶¶ 7–8. Postconviction, Zahurones sought credit for the probation holds against Count 2 as well—the count on which he was on a signature bond. *Id.* ¶¶ 8–9. The circuit court denied the motion. *Id.* ¶¶ 10–11.

This Court reversed. It properly noted that "course of conduct" in Wis. Stat. § 973.155(1)(a) means the "specific offense or acts embodied in the charge for which the defendant is being sentenced." *Zahurones,* 389 Wis. 2d 69, ¶ 14. But it concluded that Zahurones's custody on the probation holds on Counts 1, 3 and 5—for the offenses of possession of drug paraphernalia, possession of a controlled substance, and resisting an officer—were connected to the "course of conduct" for which Zahurones was sentenced on Count 2. *Id.* The State believes that this conclusion was likely incorrect—Zahurones's custody on probation holds on the other counts was not linked to the *specific act or offense* of physical abuse of a child for which she was sentenced in Count 2.

However, this outcome was not surprising because the State did not dispute that the custody stemmed from the "course of conduct" for which sentence was imposed. It argued only that Zahurones was not entitled to credit because she

was on a signature bond on Count 2—a good point, but not necessarily a dispositive one. *See State v. Hintz*, 2007 WI App 113, ¶¶ 8, 10–11, 300 Wis. 2d 583, 731 N.W.2d 646.

To the extent this Court believes it necessary to distinguish *Zahurones* when applying Wisconsin courts' interpretation of "course of conduct" to the present facts, it may do so on the ground that the "course of conduct" issue was not disputed in *Zahurones*.

Three additional arguments Fermanich makes also lack merit.

First, Fermanich briefly argues that he is entitled to credit on the Count 1 sentence because denial of credit "negate[s] the credit" on the other concurrently imposed counts, citing *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App. 1989). (Fermanich's Br. 14.) But, as argued, automatically applying the credit on one sentence to any other concurrently imposed sentence has no basis in Wis. Stat. § 973.155—and would effectively "negate" a portion of the sentence imposed on those counts. (Brief-in-Chief 20–21.) Further, the Wisconsin Supreme Court criticized *Ward* in *State v. Johnson*, 2009 WI 57, ¶ 50, 318 Wis. 2d 21, 767 N.W.2d 207, and the passage in the special materials on which *Ward* relied has been deleted. (Brief-in-Chief 21.)

Second, Fermanich argues that he "cannot be denied credit on Count 1 based on the fact that he was on a signature bond on" Count 1. (Fermanich's Br. 14.) The State does not argue that Fermanich is not entitled to credit just because he was on a signature bond—although Fermanich correctly observes that "[s]ometimes the fact of a signature bond means a person does not earn credit . . . ." (Fermanich's Br. 16 n.5.) Rather, the State's main argument is that Fermanich's custody was not connected to the course of conduct for which sentence was imposed. That said, as argued above, p.6 n.2, the existence of the signature bond dooms Fermanich's

argument under *State v. Carter*, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516, that, even if his custody was not connected to Count 1, the custody was still "in part" the result of the Langlade County case. It was not; Fermanich was on a signature bond in that case.

Finally, Fermanich also argues that he is entitled to credit under *State v. Floyd*, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155. (Fermanich's Br. 15–17.) There, the Wisconsin Supreme Court held that, because a court may consider the read-in offense at sentencing, custody that was on a read-in offense only is creditable because it is related to "an offense for which the offender is ultimately sentenced," pursuant to Wis. Stat. § 973.155(1)(a). *Floyd*, 232 Wis. 2d 767, ¶ 32.

This is not a *Floyd* case. On its facts and rationale, *Floyd* applies when the custody was associated with read-in offenses only. *See Floyd*, 232 Wis. 2d 767, ¶ 32. Here, unlike in *Floyd*, the custody was also associated with adjudicated claims (Counts 4 and 5), and Fermanich, unlike Floyd, already received credit for this custody against the sentences on those claims. Using *Floyd* to trump a dispute over whether the custody was also connected to another count would extend *Floyd* beyond its logic and purpose.

* * * *

In sum, Fermanich is not entitled to credit for his Oneida County custody against Count 1, and Fermanich's arguments to the contrary are unavailing. The order granting credit should be reversed, and this matter remanded with instructions to remove 433 days of credit on Count 1 from the judgment of conviction, and to add 31 days of credit for a different custody period to the judgment. (Brief-in-Chief 22.)

Dated this 29th day of October in Madison, Wisconsin.

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 2,914 words.

Dated this 29th day of October 2021.

Electronically signed by:

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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 29th day of October 2021.

Electronically signed by:

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