FILED
05-10-2022
CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP462-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MICHAEL K. FERMANICH,

Defendant-Appellant-Petitioner.

PETITION FOR REVIEW

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ISSUES PRESENTED

On the night of September 30, 2017, Mr. Fermanich was arrested for operating three vehicles without their owners' consent and attempting to elude police. He drove one of the vehicles from Langlade County into Oneida County, and both counties filed charges. Oneida County imposed $10,000 cash bail, and Langlade County imposed a $10,000 signature bond. Mr. Fermanich was never able to post bail and remained in custody for 433 days. The cases were consolidated into the Langlade County case and resolved in a global plea agreement, including three charges: count one (from Langlade County) and counts four and five (from Oneida County). The circuit court imposed identical concurrent sentences on each count and granted 433 days of pretrial sentence credit on each sentence. The State appealed the credit on count one and the court of appeals reversed.

The issues presented are:

1. Whether, in order to prove that his custody was "in connection with the course of conduct for which sentence was imposed" on count one, under Wis. Stat. § 973.155(1)(a), Mr. Fermanich was required to prove that count one was based on the same "specific act" as counts four and five.

The circuit court granted 433 days of credit, concluding that "this 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; App.44).

The court of appeals reversed. In reliance on *State v. Gavigan*[1] and *State v. Tuescher*,[2] it held that Mr. Fermanich was required to prove that count one arose from the same "specific act" as counts four and five, and had failed to do so. *State v. Fermanich*, No. 2021AP462-CR, unpublished slip op. (April 12, 2022). (App.11-12, ¶20).

2. Whether *State v. Tuescher* should be re-examined to determine whether its definition of "course of conduct" as meaning "specific act" was erroneous, or alternatively, whether the definition should be limited to the specific circumstances present in *Tuescher*.

The lower courts were not asked to answer this question.

3. Whether Mr. Fermanich is entitled to the 433 days of pretrial credit on count one.

The circuit court granted 433 days of credit. (R. 44:26; App.44).

The court of appeals reversed the credit, finding that Mr. Fermanich failed to prove that count one was

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[1] *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984).

[2] *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999).

based on the same "specific act" as counts four and five. (App.11-12, ¶20).

CRITERIA FOR REVIEW

The court of appeals imposed a legal burden that is unsupported by the sentence credit statute or case law. It held that Mr. Fermanich is not entitled to pretrial credit on count one because he did not prove that count one was based on the same "specific act" as counts four and five. (App.11-12, ¶20). In fact, Mr. Fermanich's burden was to prove that the custody was "in connection with the course of conduct for which sentence was imposed" on count one—which he did. *See* Wis. Stat. 973.155(1)(a). The statute required a factual connection between the custody and count one, not a factual connection between the charges.[3]

In concluding that Mr. Fermanich was required to prove that the counts stemmed from the same specific act, the court of appeals relied on *State v. Gavigan* and *State v. Tuescher*. However, those cases involved the situation where a defendant seeks credit for time spent in custody serving a separate sentence. A different rule makes sense in that context because the presumptive rule is that the commencement of one sentence severs the connection between the custody and any other matter. *State v. Carter*, 2010 WI 77, ¶37, 327 Wis. 2d 1, 785 N.W.2d 516 (citing *State v. Beets*, 124 Wis. 2d 372, 381, 369 N.W.2d 382 (1985)).

[3] As discussed below, the court of appeals did not rely on the mere fact that a signature bond was imposed on count one.

This Court should grant review and clarify that the holdings in *Gavigan* and *Tuescher* apply to the situation in which a defendant seeks credit for time spent in custody serving a preexisting sentence. They do not limit credit in a situation like Mr. Fermanich's, where the person is seeking credit for pretrial custody that is factually connected to multiple concurrent sentences that are imposed at the same time. As the circuit court stated, "there's varying case law." (R.44:25; App.43). The bench and bar would benefit from clarification on this subject.

In addition, this Court should grant review to consider whether *Tuescher* correctly interpreted the statutory phrase "course of conduct." 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 as "criminal episode" or more narrowly as "specific acts" for which a sentence is imposed. *Id.* The court concluded it was the latter. *Id.* at 475. The Court should reexamine the definition set forth in *Tuescher*. The court of appeals did not apply the established canons of statutory construction and its conclusion is not based in the statutory text. Alternatively, the Court should consider limiting the "specific act" definition to the particular circumstances present in *Tuescher*.

Sentence credit is grounded in principles of equal protection. An erroneous application of the sentence credit statute has significant consequences. Here, it will result in Mr. Fermanich being taken back

into custody for another 433 days.[4] Sentence credit is at issue in every case where the defendant spent time in custody. This case presents important questions of law of the type that are likely to recur unless clarified by this Court. *See* Wis. Stat. § 809.62(1r)(c).

STATEMENT OF THE CASE AND FACTS

On the night of September 30, 2017, Mr. Fermanich was arrested for operating three vehicles without owners' consent and attempting to elude police. (R.1:1-2). He took three unoccupied trucks, abandoning one before taking the next. Each of the trucks was taken in Langlade County. Police began searching for Mr. Fermanich after the owner of the first truck made a complaint. He was apprehended in Oneida County. The Langlade County Circuit Court determined that this incident occurred "on the same day within a short period of time." (R.44:26; App.44).

Initially, separate cases were filed in Oneida County Case No. 2017CF245 and Langlade County Case No. 2017CF313. (R.10:2-3; R.1:1-3). Oneida County filed charges first, and imposed $10,000 cash bail. (R.44:12; App.49). Langlade County followed, and the court imposed a $10,000 signature bond. (R.44:11; App.51).[5] Unable to post his bail, Mr. Fermanich was

[4] Mr. Fermanich does not believe that it is disputed that, had the Langlade County Circuit Court added even one dollar of cash bail he would be entitled to the credit.

[5] The signature bond form is not in the appellate record (although it is in the circuit court record) and is therefore

confined in the Oneida County Jail until the cases resolved, for a total of 433 days. (R.45:22, 27).

The matter resolved in a global plea agreement, whereby the cases were consolidated into the Langlade County case. On December 6, 2018, Mr. Fermanich pleaded to: count one, operating a motor vehicle without the owner's consent for taking the first truck in Langlade County; count four, operating a motor vehicle without owner's consent for driving the third truck into Oneida County; and count five, fleeing and eluding while in Oneida County. (R. 12, R.13). Other counts from both cases were dismissed and read in. (R.45:2-3). The court withheld sentence and imposed probation. (R.45:25; R.20). The judgment of conviction listed 433 days of credit on count four only. (R.20:1). Subsequently, Mr. Fermanich's probation was revoked. On November 3, 2020, the court sentenced him to eighteen months of initial confinement and twenty-four months of extended supervision on each count, concurrent. (R.43:12-13).

On February 2, 2021, the court held a sentence credit hearing, at which time the parties disputed the 433 days of pretrial credit. (R.44; App.19-48).[6] The prosecutor argued that Mr. Fermanich was only entitled to the credit on counts four and five. (R.44:8-10-17; App.28-35). She asserted, "Count 1 involves a

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included in the appendix. (App.50). Mr. Fermanich also includes the bond form from the Oneida case. (App.49). If this Court grants review, Mr. Fermanich will ask to supplement the record.

[6] There have been subsequent corrections to credit based on probation holds, which are not relevant to the current appeal.

vehicle that was stolen in Langlade County. . . Then, the Oneida County case involves a different vehicle. . .". (R.44; App.28). Mr. Fermanich argued that the credit was owed on count one because the custody was factually connected to all three counts, and the court imposed concurrent sentences that commenced at the same time. (R.26:3, 44:5-7, 20-25; App.23-25, 38-43). The circuit court ordered the credit on all three counts. (R.44:29; App.47, R. 36:1). The State appealed.

The court of appeals reversed the 433 days of pretrial credit on count one. With citation to *Gavigan* and *Tuescher*, it concluded that Mr. Fermanich failed prove that count one was based on the same specific act as counts four and five.

> In this case, we agree with the State that Fermanich was in custody on Counts 4 and 5 for a different course of conduct than that for which sentence was imposed on Count 1.
>
> . . .
>
> The specific act or offense for which sentence was imposed on Count 1 was taking and driving the first truck in Langlade County, a charge for which Fermanich posted a signature bond. The Oneida County custody was connected to the specific offenses Fermanich committed in that county. . .
>
> Because the Oneida County custody was not in connection with the specific acts for which sentence was imposed on Count 1, Fermanich is not entitled to 433 days of credit against Count 1 for that custody.

(App.10-11, ¶20). The court of appeals clarified that it did not base its holding on the mere fact that there was a signature bond on count one.[7]

> Here, as the State explains, it is not arguing that 'Fermanich is not entitled to credit just because he was on a signature bond.' Fermanich is being denied sentence credit on Count 1 because his custody was not connected to the course of conduct for which sentence was imposed.

(App.14-15, ¶27).

ARGUMENT

I. This Court should grant review to clarify that *State v. Gavigan* and *State v. Tuescher* do not require Mr. Fermanich to prove that his sentence on count one stems from the "same specific act" as counts four and five. These cases only limit credit in situations where a defendant seeks credit for time spent in custody on a preexisting sentence.

The court of appeals held that Mr. Fermanich was only entitled to credit on count one if he could prove that counts one and count four and five were part of the same "course of conduct," and that to do so, the counts had to arise from the same "specific act." The court of appeals relied on *Gavigan* and *Tuescher*; however, those cases concerned whether the defendant

[7] Mr. Fermanich explains in detail, *infra* Argument III why the signature bond does not affect his entitlement to credit.

was entitled to credit on one sentence for time served on a separate, preexisting sentence.

The term "course of conduct" appears twice in the sentence credit statute.

> 973.155 Sentence credit.
>
> (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
>
> 3. While the offender is awaiting imposition of sentence after trial.
>
> . . .

Wis. Stat. § 973.155(1)(a)1.-3.

The first use of "course of conduct," is in reference to the factual connection between custody and the sentence at issue. The defendant 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). The second use of "course of

conduct," is in reference to the factual connection between a specific kind of custody—a separate sentence—and that sentence at issue. The defendant may receive credit for "confinement. . . for any other sentence arising out of the same course of conduct." Wis. Stat. § 973.155(1)(a). *Gavigan* and *Tuescher* involve the second use of the phrase, in the contest of a preexisting sentence.

In *State v. Gavigan*, 122 Wis. 2d at 390, 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 was given credit on both sentences for the time between his arrest and sentencing on the fleeing. However, his request for additional credit on the robbery for the time between the commencement of the fleeing sentence and the commencement of the robbery sentence was denied. The court held that after the commencement of the fleeing sentence, the custody was solely in connection with that conviction. *Id.*, at 393-94. The court then considered whether the robbery and fleeing charges constituted a course of conduct for which he was sentenced and concluded they were not. They were "separate and unrelated." *Id.* at 394-95.

One year after *Gavigan*, this Court decided *State v. Beets*, 124 Wis. 2d 372. In *Beets*, the defendant was convicted of drug offenses and placed on probation. He was later arrested for burglary and held in custody on that charge. A few days later, a probation hold was imposed. Probation was later revoked and he began

serving a revocation sentence. He was later sentenced on the burglary. He sought credit for the time between the commencement of the revocation sentence and the commencement of the burglary sentence. This Court denied the credit holding that the commencement of one sentence "severs" the connection between the custody and any other charge. *Id.* at 383.[8]

In *Beets*, there was no argument that the sentences were based on the same course of conduct. However, the court stated a possible exception to the general severance rule.

> We do not attempt to postulate all the variations of such manipulations, but it is clear that, *unless the acts for which the first and second sentences are imposed are truly related or identical*, the sentencing on one charge severs the connection between the custody and the pending charges. And the consequences of even that contingency is not clear-certainly not decided herein-for the acts underlying the drug charges and the burglary were not related.

Id. at 383 (emphasis added).

In *State v. Tuescher*, 226 Wis. 2d at 472, the court of appeals again considered whether sentence credit was owed for time spent serving a preexisting sentence. In *Tuescher*, the defendant robbed a restaurant and as he was leaving the scene, shot at police. He was sentenced on charges of attempted

[8] The court cited *Gavigan* for this "basic position." *Id.* at 380.

armed burglary, possession of a firearm, and second-degree intentional homicide. On appeal, he won a new trial on the attempted homicide. While it was being retried, he continued serving the other two sentences. He was reconvicted on an amended charge. He requested credit toward the new sentence for the time spent in custody between the reversal of the attempted homicide conviction and resentencing on the amended charge. He argued credit was owed "by virtue of the statute's inclusion of time spent serving 'any other sentence arising out of the same course of conduct' within the definition of "actual days spent in custody." *Id.* at 470. *See* Wis. Stat. § 973.155(1)(a).

Initially, the *Tuescher* court relied on *Beets* to conclude that the pretrial custody was not in connection with the sentences that had kept running. However, the court acknowledged that *Beets* had posed a possible exception for when "the acts for which the first and second sentences are imposed are truly related or identical. . .". *Id.* at 476 (quoting *Beets*, 124 Wis. 2d at 383). To determine whether the exception might apply, the court considered whether the charges arose from the same course of conduct. The court concluded that the phrase "course of conduct" in Wis. Stat. § 973.155(1)(a) was ambiguous. *Id.* at 471. It could mean "criminal episode" or it could mean "specific acts" for which the sentence is imposed. *Id.* The court concluded 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 (emphasis added).[9] The burglary and shooting were not the same specific act.

As shown, *Gavigan* and *Tuescher* apply where a defendant seeks credit toward one sentence for time spent in custody serving a separate sentence. It is in *that* context that courts must consider whether two sentences are based on the same "specific act." The court of appeals dismissed Mr. Fermanich's argument that it should distinguish between pretrial credit and credit for time served on a separate sentence. (App.13, ¶23). It found "neither any reason nor any language in the statute indicating that the [statute] would apply differently based on whether the custody was pretrial or otherwise." (App.13, ¶24).[10]

Contrary to the court of appeals assertion, there is good reason to apply the statute differently in different contexts. The presumptive rule is that the commencement of one sentence severs the connection

[9]The court's conclusion about the meaning of "course of conduct" is discussed in more detail *infra* Argument II.

[10] The court of appeals asserted that this Court applied *Tuescher* in "pretrial setting" in *State ex rel. Thorson v. Schwarz*, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914. (App.13, ¶24). That case did not actually involve a pretrial setting. The court considered whether a person who was reincarcerated for a parole violation was entitled to sentence credit for time he previously spent in detention during a Chapter 980 proceeding. The court held that the detention was not "custody" for purposes of the sentence credit statute. *Id.*, ¶29. It also rejected the assertion that the detention was a "sentence," but even if it were, it was not based on "the specific offense that caused his original conviction." *Id.*, ¶34. It was a separate civil matter. *Id.*

between the custody and any other matter. *See Beets*, 124 Wis. 2d 372, 381. Thus, pursuant to *Beets*, there will never be a direct "connection" between the custody and any other sentence unless the underlying acts are the same. Only then will the narrow exception to the severance rule apply.

II. This Court should grant review to consider whether *State v. Tuescher* should be re-examined to determine whether its definition of "course of conduct" as meaning "specific act" was erroneous.

The phrase "course of conduct" is not defined in Wis. Stat. § 973.155. It has been construed in the case law. However, Mr. Fermanich questions the cases' methodology, and the resulting statutory construction. Statutory construction is a question of law, subject to de novo review. *Noffke v. Bakke*, 2009 WI 10, ¶9, 315 Wis. 2d 350, 760 N.W.2d 156.

In *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), this Court examined a Legislative Council note to determine what was meant by the phrase "course of conduct." The note indicated that the Legislature had considered the federal sentence credit statute as well as the Model Penal Code (MPC). The federal statute used the phrase "in connection with the offense or acts for which sentence was imposed." *Id.*, at 93 (citing 18 U.S.C.A. sec. 3568). Wisconsin section 973.155(1)(a), by contrast, uses the phrase "in connection with the course of conduct for which sentence was imposed." However, the court concluded

that there was "no meaningful difference between these words." *Id*. at 93.[11]

The *Tuescher* court summarized this Court's analysis in *Boettcher* and settled on the definition, "specific act." 266 Wis. 2d, at 479. As noted above, this was in the context of considering the potential *Beets* exception to the severance rule. There is inconsistency in the terms used in *Beets*, *Boettcher*, and *Tuescher*. *Beets* used the phrase "truly related or identical" (124 Wis. 2d at 383); *Boettcher* used the phrase "offense or acts" (144 Wis. 2d at 93); and *Tuescher* used the phrase "specific act." Yet an offense could encompass multiple acts. And an offense could be "truly related" while not being "identical" or the same "specific act."

Had the Legislature intended "course of conduct" to mean "specific act," it would seem that it would have chosen that phrase. *See State ex. rel. Kalal v. Circuit Court for Dane Cty.,* 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110 ("judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute"). It is notable that "course of conduct" is used in other statutes, and has a defined meaning in those statutes. Stalking, for

[11] The court observed that the MPC used the phrase "for the crime for which such sentence is imposed." *Id*. at 97. A comment to the MPC suggested that the term "crime," might be avoided as it could be interpreted to mean statutory crime. *Id.* at 97. This could pose a problem where a person is charged with one crime but convicted of another for the same conduct, and could explain why the legislature did not use this term. *Id.*

example, means "one who intentionally engages in a course of conduct" that would cause a reasonable person to suffer fear of physical harm or serious emotional distress. Wis. Stat. § 940.32. In turn, "'[c]ourse of conduct' means a series of 2 or more acts carried out over time, however short or long, that show a continuity of purpose, including any of the following . . .". Wis. Stat. § 940.32(1)(a). *See also*, Wis. Stat. § 947.013(1)(a) (harassment) ("'course of conduct' means a pattern of conduct composed of a series of acts over a period of time . . ."); Wis. Stat. § 707.06(3) (contracts involving time shares) ("course of conduct" means "the totality of a party's conduct.").

Even if this Court does not overrule *Tuescher*'s interpretation of the phrase "course of conduct," it should consider whether the definition "specific act" should be limited to the specific circumstances present in *Tuescher*: application of a narrow exception to the *Beets* severance rule.

Finally, clarification is warranted because the court of appeals, in a recent published decision, applied a more liberal definition of "course of conduct." In *State v. Zahurones*, 2019 WI App 57, 389 Wis. 2d 69, 934 N.W.2d 905, the defendant entered a plea involving four counts. She was placed on probation on counts one, three, and five, and a deferred entry of judgment agreement on count one. *Id.*, ¶5. A signature bond was imposed on count one. *Id.* Subsequently, she was taken into custody on probation holds. *Id.*, ¶6. The signature bond remained on count one. Ultimately, probation and the deferred entry of judgment were

revoked, and she was sentenced on all of the charges. *Id.*, ¶8. The court of appeals concluded that the charges arose from a single course of conduct where, police entered the defendant's home and found drugs and drug paraphernalia, and after finding the contraband, attempted to arrest her, but she resisted. Her child was removed from the home and tested positive for methamphetamine. *Id.*, ¶15.[12]

In the court of appeals, Mr. Fermanich pointed to *Zahurones* as a basis on which the court could find that his case, like *Zahurones*, did in fact involve a single course of conduct. As in *Zahurones*, his case involved multiple charges stemming from a series of interconnected crimes that occurred in close temporal proximity. The court of appeals dismissed *Zahurones* in a footnote, asserting "the state in *Zahurones* did not dispute the 'course of conduct' issue, so the holding in that case is of little value here." (App.14-15, ¶27, n.7).

III. If the Court grants review it should reverse the court of appeals and hold that Mr. Fermanich is entitled to the 433 days of pretrial credit on count one.

The circuit court correctly determined that Mr. Fermanich is entitled to 433 days of pretrial credit on count one. 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

[12] The *Zahurones* court also relied on the interconnected nature of the deferred entry of judgment agreement and conditions of probation. *Id.*, ¶¶16-17.

311, 943 N.W.2d 923. 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 still serve the same amount of time for their crimes. *Klimas v. State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977).

A person seeking sentence credit must establish: (1) that he or she was "in custody" during the relevant time period; and (2) that the custody was "in connection with the course of conduct for which sentence was imposed." *State v. Elandis Johnson*, 318 Wis. 2d 21, ¶27, 767 N.W.2d 207 (quoting Wis. Stat. § 973.155(1)(a)). To be "in connection with" a sentence, the custody must be "factually connected with the course of conduct for which sentence was imposed." *Id*., ¶3. "[A] mere procedural connection will not suffice." *Id*., ¶33. A person is eligible for credit on more than one sentence as long as each charge "is part of the reason for the custody." *Carter*, 327 Wis. 2d 1, ¶38.

There is no dispute that Mr. Fermanich was in custody, and therefore the question is whether the custody was factually connected with the course of conduct for which sentence was imposed on count one. It was. Mr. Fermanich was arrested and placed in custody on September 30, 2017, after taking three vehicles, one immediately after the other, before trying to evade police and being arrested. (R.1-2). This conduct violated more than one statute and led to more than one charge. Yet, the custody was factually connected to all of the charges stemming from the incident. Both Oneida County and Langlade County

filed charges. Both circuit courts found probable cause. Both courts imposed bond. The cases proceeded along parallel tracks, ultimately resolving in a consolidated case number with a global plea. (R.12, R.13). Finally, the circuit court imposed identical concurrent sentences on each count. (R.43:12-13).

The court imposed a signature bond in the Langlade County case, which included count one, but this does not mean that the custody was not in connection with count one. The sentence credit statute does not differentiate between cash bond and signature bonds.

Several cases grant credit on charges on which the court had imposed a signature bond. In *State v. Hintz*, 2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646, the defendant was on a signature bond on the charges for which he sought credit. However, he was meanwhile held in custody on a supervision hold. The court rejected the State's argument that credit should be denied "just because a judicial officer released Hintz on a signature bond." *Id.*, ¶11.

In addition, as discussed above, in *Zahurones*, 389 Wis. 2d 69, ¶5, the defendant was on probation on three counts, and a deferred entry of judgment agreement on a fourth. The fourth charge carried a signature bond. *Id.* After probation and the deferred entry of judgment were revoked, she was sentenced on all of the charges. *Id.*, ¶8. She received credit for time spent on probation holds for all four charges, even the

charge that carried a signature bond at the time of the holds. *Id.*, ¶¶15, 18.

In other circumstances, the issuance of a signature bond may be a factor in concluding that a period of custody was not "in connection" with a sentence. In *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997), the defendant was arrested for sexual assault and then released on a signature bond. While out on bond, he was arrested for bail jumping and held on cash bail on that charge. The signature bond on the original charge remained in effect. The defendant was not entitled to credit for the custody because he was released on the signature bond. *Id.* at 496.

Mr. Fermanich's case is distinguishable. Unlike the defendant in *Beiersdorf*, Mr. Fermanich's offenses occurred on the same day. Unlike in *Beiersdorf*, he was never released on his signature bond. Whereas in *Beiersdorf* the signature bond was issued first and cash bail imposed second, in Mr. Fermanich's case, the order was reversed. When the defendant's signature bond was imposed in *Beiersdorf*, his signature was the only restraint on his liberty. But Mr. Fermanich would not have been released until and unless he posted $10,000 cash bail.

The Langlade County circuit court would have been hard-pressed to justify cash bail. There was already $10,000 cash bail in Oneida County. Mr. Fermanich had been found indigent by the State Public Defender, and had not been able to post bail.

Under Wis. Stat. § 969.01(1), "[b]ail may be imposed at or after the initial appearance *only* upon a finding by the court that there is a reasonable basis to believe that bail is necessary to assure appearance in court." (Emphasis added). Adding more cash bail would not serve the statute's purpose. It is unjust for Mr. Fermanich to lose 433 days of freedom simply because the Langlade County Circuit Court did not impose cash bail—when cash bail was likely not justifiable.

A final reason why the credit is owed on count one is the fact that there were read-in charges from Oneida County. When offenses are "read in" for purposes of sentencing in another case, the person is entitled to credit for custody connected to the read-in offenses, regardless of whether the read-in offenses are factually connected to the course of conduct for which sentence was imposed. *State v. Floyd*, 2000 WI 14, ¶2, 232 Wis. 2d 767, 606 N.W.2d 155.[13] In *Floyd*, the defendant was on a signature bond on the charges for which he was sentenced. At the same time, he was held on a separate charge on a cash bond. The charge with the cash bond was dismissed and read in to a plea to the charge with the signature bond. *Id.*, ¶4. The defendant was entitled to credit for the custody. *Floyd*, 232 Wis. 2d 767, ¶26. *See Johnson*, 318 Wis. 2d 21, ¶40 (*Floyd* holds that "read-in charges become a factual consideration in the sentencing determination.").

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

In Mr. Fermanich's case, multiple counts that were originally charged in the Oneida County case were dismissed and read in. Mr. Fermanich was held on a cash bond on those charges. Therefore, pursuant to *Floyd*, the custody from those charges must be applied to count one. The court of appeals distinguished *Floyd* on the fact that Mr. Fermanich pled to other Oneida County charges. It reasoned that, "Fermanich received credit . . . on Counts 4 and 5 for the time served on the dismissed and read-in Oneida County counts." (App. 15, ¶28).

Yet, simply because Mr. Fermanich received the credit on counts four and five does not mean he is not *also* entitled to the credit on count one. Mr. Fermanich is entitled to the credit on all three sentences because there was a factual connection between the custody and each of them, and the circuit court imposed the sentences concurrently. *Johnson* 318 Wis. 2d 21, ¶¶65-66 (custody is credited on each concurrent sentence as long as the custody was in connection with each sentence.). *C.f. Boettcher*, 144 Wis. 2d 86, (1988) (if the sentences are consecutive, credit is granted on only one of the sentences).

The decision of the court of appeals should be reversed.

CONCLUSION

Mr. Fermanich respectfully asks the Court to grant his petition for review.

Dated this 10th day of May, 2022.

Respectfully submitted,

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Attorney for Defendant-Appellant-Petitioner

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this petition conforms to the rules contained in §§ 809.19(8)(b) and (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 4,977 words.

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this petition, including the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic petition is identical in content and format to the printed form of the petition filed on or after this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated this 10th day of May, 2022.

Signed:

_____

COLLEEN MARION
Assistant State Public Defender