STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2021AP000462 – CR

STATE OF WISCONSIN,

Plaintiff-Appellant,

v.

MICHAEL K. FERMANICH,

Defendant-Respondent-Petitioner.

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

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REPLY BRIEF OF DEFENDANT-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 6

The circuit court properly held that Mr. Fermanich's pretrial incarceration was "in connection with the course of conduct for which sentence was imposed" on all three counts, including count one. *See* Wis. Stat. § 973.155(1)(a). 6

A. Mr. Fermanich's pretrial incarceration was factually connected to the conduct underlying count one. 6

B. Dismissed and read in charges from Oneida County were part of the basis for which sentence was imposed on count one. 10

C. Count one arose from the same "course of conduct" as counts four and five. 12

1. *State v. Tuescher*'s holding applies to the situation where a defendant seeks credit for custody that was served in satisfaction of a separate, preexisting sentence, a situation not present here. 12

2. *Tuescher*'s interpretation of "course of conduct" as "specific act" should be disavowed. 13

3. The incident in Mr. Fermanich's case was a single "course of conduct." 18

CONCLUSION 19

CASES CITED

State v. Beets,
124 Wis. 2d 372,
369 N.W.2d 382 (1985) 12

State v. Beiersdorf,
208 Wis. 2d 492,
561 N.W.2d 749 (Ct. App. 1997),..... 8, 9

State v. Boettcher,
144 Wis. 2d 86
423 N.W.2d 533 (1988) 11, 13, 14, 15

State v. Carter,
2010 WI 77, 327 Wis. 2d 1,
785 N.W.2d 516 7

State v. Elandis Johnson,
2009 WI 57, 318 Wis. 2d 21,
767 N.W.2d 207 16

State v. Fermanich,
No. 2021AP462-CR,
unpublished slip op. (April 12, 2022) 16

State v. Floyd,
2000 WI 14, 232 Wis. 2d 767,
606 N.W.2d 155 ..... 9, 10, 11

State v. Gavigan,
122 Wis. 2d 389,
362 N.W.2d 162 (Ct. App. 1984)..... 12, 14

State v. Hintz,
2007 WI App 113, 300 Wis. 2d 583,
731 N.W.2d 646 9

State v. Tuescher,
226 Wis. 2d 465,
595 N.W.2d 443 (Ct. App. 1999).....12, passim

State v. Ward,
153 Wis. 2d 743,
452 N.W.2d 158 (Ct. App.1989)..... 16

State v. Zahurones,
2019 WI App 57, 389 Wis. 2d 69,
934 N.W.2d 905 ..... 9, 16

State ex rel. Kalal v. Circuit Court for Dane County,
2004 WI 58, 271 Wis. 2d 633,
681 N.W.2d 110 ..... 13, 15

State ex rel. Thorson v. Schwarz,
2004 WI 96, 274 Wis. 2d 1,
681 N.W.2d 914 16

STATUTES CITED

Wisconsin Statutes

973.155(1) 10

973.155(1)(a)..... 6, 11

OTHER AUTHORITIES CITED

Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/course (accessed 11/26/22). 13

Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/act (accessed 11/26/22) 13

Model Penal Code (MPC)..... 14

ARGUMENT

The circuit court properly held that Mr. Fermanich's pretrial incarceration was "in connection with the course of conduct for which sentence was imposed" on all three counts, including count one. *See* Wis. Stat. § 973.155(1)(a).

A. Mr. Fermanich's pretrial incarceration was factually connected to the conduct underlying count one.

Mr. Fermanich's argument is not simply that "the circumstances of his arrest establish a factual connection between his custody and Count 1." (*See* Resp. Br. at 15). He also relies on the subsequent legal proceedings, including the case consolidation and entry of a global plea. (*See* Pet. Br. at 18-20). Yet, the circumstances of his arrest *do* matter, because his arrest was the starting point for his custody—it was day 1 of 433.

The State appears to concede that Mr. Fermanich would be entitled to credit on count one for any time that Langlade County had an outstanding warrant for him. Langlade County issued a warrant on January 29, 2018, for failure to appear at the initial appearance. There was a return on warrant on February 6, 2018. (Resp. Br. at 9).[1] The State asserts

[1] For these facts, the State cites Wisconsin Circuit Court Access website (WCCA) for Langlade County Case No. 2017CF313. The appellate record in this case does not contain

that the purported lack of warrant after February 6, 2018, distinguishes *State v. Carter*, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516. The State argues that "Fermanich was not subject to a warrant, cash bail, or any other demand from Langlade County, and thus the primary basis for custody credit in *Carter* was not present here." (Resp. Br. at 28-29). However, the State fails to mention that Langlade County issued another warrant on March 5, 2018, which was not satisfied until August 23, 2018. This amounts to a total of 181 days (9 + 172).[2]

The State denies that it is arguing that the signature bond on count one is dispositive. (Resp. Br. at 26). It vaguely asserts that the signature bond is but "a reminder that Fermanich cannot show that his custody is in connection with his offense in Count 1..." (*Id*. at 28). However, Mr. Fermanich has repeatedly suggested that the State would not be contesting credit had Langlade County imposed even one dollar in cash bond, or had Mr. Fermanich not signed the bond form, and the State has not denied this. (*See* Pet. Br. at 20). When Langlade County imposed the $10,000 signature bond, Mr. Fermanich was already held on a $10,000 cash bond in Oneida County. He had not been able to post bond, and in the interim, he had been

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the warrants and several other items from the circuit court record. The bond forms were not in the record until Mr. Fermanich moved to supplement the record.

[2] It is not clear why Langlade County was issuing warrants instead of actually bringing Mr. Fermanich to court.

deemed indigent. It is difficult to see why the Langlade County court would impose yet more cash bond.[3]

The State cites, but does not actually discuss, *State v. Beiersdorf*, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997), a case where the existence of a signature bond was "part" of the reason for denying credit. (Resp. Br. at 26). Beiersdorf was arrested for sexual assault. *Id*. at 494. The court imposed a personal recognizance bond. *Id*. He returned to court and pled guilty. *Id*. He remained out of custody on bond awaiting sentencing. While on bond, he was arrested for new crimes and was charged in a second case. *Id*. at 495. Cash bail was imposed on the second case. He pled in the second case and was sentenced on both cases at the same time. *Id*. He sought credit toward the first case for the time he was in custody between the arrest on the second case, and sentencing on both cases. However, because there was a personal recognizance bond on the first case, the court of appeals held that the credit was not "in connection with the course of conduct for which sentence was imposed" on that case. *Id*. at 498.

The facts of Mr. Fermanich's case are clearly distinguishable. Beiersdorf's crimes were committed months apart and were factually unrelated. The credit that Beiersdorf sought was for time he spent in custody *after* his conviction on the first case.

[3] Whether or not defense counsel was ineffective for not advising him not to sign the form is not at issue in this appeal because Mr. Fermanich prevailed in the circuit court.

Mr. Fermanich's pled to his charges at the same time in a consolidated case number, pursuant to a global plea. When Beiersdorf's personal recognizance bond was imposed, he went free. Mr. Fermanich was confined on the $10,000 cash bond, and was never released from jail. The significance of *Beiersdorf* is simply that, "*Beiersdorf* underscores that a factual connection fulfills the statutory requirement for sentence credit, and that a procedural or other tangential connection will not suffice." *State v. Floyd*, 2000 WI 14, ¶17, 232 Wis. 2d 767, 606 N.W.2d 155.

In other cases, the existence of a signature bond was not a deciding factor. In *State v. Hintz*, 2007 WI App 113, ¶3, 300 Wis. 2d 583, 731 N.W.2d 646, the defendant was placed on a supervision hold. The hold was based in part on new charges. The new charges carried a signature bond. The court of appeals determined that Hintz was entitled to credit for the custody toward the sentences on the new charges, irrespective of the signature bond. *Id.*, ¶11. In *State v. Zahurones*, 2019 WI App 57, ¶5, 389 Wis. 2d 69, 934 N.W.2d 905, the defendant entered pleas and was placed on probation on three charges. She entered into a deferred entry of judgment agreement on a fourth charge. On that charge, the court imposed a signature bond. *Id.* Both probation and the deferred entry of judgment agreement were later revoked, and she was sentenced on all of the charges. The court of appeals held that she was entitled to credit for time she had spent in custody on probation holds toward the sentences on all of the charges, including the charge that carried a signature bond. *Id.*, ¶¶15-16, 18.

Sentence credit cases are highly fact-specific, and in Mr. Fermanich's case, the signature bond is not a deciding factor.

B. Dismissed and read in charges from Oneida County were part of the basis for which sentence was imposed on count one.

The State acknowledges that *Floyd*, 232 Wis. 2d 767, "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." (Resp. Br. at 29). Yet, the State claims that "Fermanich already received credit for his Oneida County custody against Counts 4 and 5" and therefore the credit would not be "lost" if not also applied to count one. (*Id*. at 29).

Floyd's holding was not based on a vague concern about "lost" credit. Floyd was arrested and charged with reckless endangerment, among other crimes. *Floyd*, 232 Wis. 2d 767, ¶2. He was released on a signature bond. While out on bond, he picked up an armed robbery. *Id*., ¶3. The court imposed a cash bond and Floyd remained in custody. Pursuant to a plea agreement, the armed robbery would be dismissed and read in, and the State would bring a new charge of bail jumping, to which Floyd would plead. Floyd would also plead to the reckless endangerment. *Id*., ¶4. At sentencing, the court imposed a prison sentence on the reckless endangerment, and consecutive probation on the bail jumping, with sentence imposed and stayed. *Id*. The armed robbery was read in.

This Court unanimously held that Floyd was entitled to credit on the reckless endangerment for the time between his arrest on the armed robbery and the date of sentencing because the armed robbery was read in at sentencing and, "pre-trial confinement on a dismissed charge that is read in at sentencing relates to 'an offense for which the offender is ultimately sentenced.'" *Id*., ¶32 (quoting Wis. Stat. § 973.155(1)(a)). Floyd involved a consecutive disposition. However, there is no reason to believe that he would not have been entitled to the credit on both cases had concurrent sentences been imposed instead. No subsequent case has limited *Floyd* to one concurrent sentence. Adding such a limitation here would be a modification of *Floyd*'s bright-line rule.

To be clear, Mr. Fermanich does not argue that he should receive credit on count one simply because his sentences are concurrent. (*See* Resp. Br. at 30). He argues that the act of dismissing and reading in Oneida County charges as part of the global plea agreement made the credit from those charges available on each of the charges for which he was sentenced. And because the sentences are concurrent, there is nothing to prevent the credit being granted on each sentence. *Cf. State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) (where sentences are consecutive, credit may only be applied to one sentence because credit is granted on a day-for-day basis).

C. Count one arose from the same "course of conduct" as counts four and five.

1. *State v. Tuescher*'s holding applies to the situation where a defendant seeks credit for custody that was served in satisfaction of a separate, preexisting sentence, a situation not present here.

Tuescher is part of a line of cases, including *Gavigan* and *Beets*, which established a rule that commencement of one sentence severs the connection between a defendant's custody and any other charge.[4] Mr. Fermanich's case does not involve this situation. His case involves multiple concurrent sentences that commenced at the same time. Notably, the State does not attempt to explain why pretrial credit was uncontested in *Gavigan*, *Beets*, and *Tuescher*, and only the time period following the commencement of one of the sentences was in dispute. It is because the pretrial credit accrued prior to the sentencing that severed the connection between the custody and pending charges.

Distinguishing *Tuescher* only requires this Court to acknowledge that the severance cases are in their own category. The State asserts that "adopting different legal standards for determining the 'in connection with' requirement based on the *type of*

[4] *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984); *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985); *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999).

custody would add another bit of complexity to an already challenging area of the law." (Resp. Br. at 31) (emphasis in original). Yet there is precedent for applying the sentence credit statute differently depending on the sentence structure. For example, consecutive sentences are treated differently than concurrent sentences. Even if custody is "in connection with the court of conduct for which sentence is imposed" on more than one consecutive sentence, credit is available against only one of the sentences. *Boettcher*, 144 Wis. 2d at 100-01.

2. *Tuescher*'s interpretation of "course of conduct" as "specific act" should be disavowed.

Alternatively, *Tuescher*'s definition of "course of conduct" as "specific act" should be disavowed. "Course of conduct" cannot mean "specific act" because the word "conduct" means "act." Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/act (accessed 11/26/22). The word "course" means "act or action of moving in a path from point to point" or "series of acts or events." Merriam-Webster Dictionary, *available at,* https://www.merriam-webster.com/dictionary/course (accessed 11/26/22). *Tuescher* did not conduct a plain-meaning interpretation of the statute. It was decided before the framework for statutory construction was authoritatively set forth in *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110. It reached an incorrect conclusion.

The State mischaracterizes the development of the "specific-act" definition. The State incorrectly asserts that *Gavigan* (which predated *Tuescher* by 15 years) applied the "specific-acts standard." (Resp. Br. at 20). That is incorrect. The *Gavigan* court found that the defendant was estopped from arguing that his charges arose from a single "course of conduct," and briefly noted that regardless, the robbery and fleeing charges appeared to be "separate and unrelated," having occurred 24 hours apart. *Gavigan*, 122 Wis. 2d at 395. The State further asserts that *Boettcher* "validated *Gavigan*'s narrow reading of 'course of conduct.'" (Resp. Br. at 20). However, *Boettcher* did not even cite *Gavigan*, let alone "validate it."

Tuescher's holding is not "deeply rooted" in *Boettcher*. (*See* Resp. Br. at 32). *Boettcher* is a dual credit case. The reason that the Court turned to the Model Penal Code (MPC) was because the defendant made an argument (that was "not comprehensively asserted") that the phrase course of conduct "somehow requires dual credit even in a consecutive-sentence situation." *Boettcher*, 144 Wis. 2d at 97. That is not Mr. Fermanich's argument. He did not receive consecutive sentences and does not seek dual credit. The only hypothetical mentioned in *Boettcher* supports a broader reading of "course of conduct." The Court cited a comment to the MPC which indicated that a defendant should receive credit on a battery conviction even if the defendant was originally charged with rape, as long as the offenses arose from the same "series of acts." *Id*. at 98. Rape and battery are not the same specific act. Yet, even if *Boettcher* does lend to a

"specific act" definition, it should be noted that, like *Tuescher*, it did not apply the *Kalal*-approved framework for statutory interpretation, but rather, consulted legislative history as a first resort. *See id*. at 92.

The State argues that Mr. Fermanich provides a "blinkered analysis of 'course of conduct'" because it "ignores the language that limits the phrase's scope in this instance: 'for which sentence was imposed.'" (Resp. Br. at 33). Mr. Fermanich agrees that the "course of conduct" that matters is "the course of conduct for which sentence was imposed." However, the State does not persuade that this language is limiting or compels a "narrow interpretation." (*See id*. at 34). The language simply directs the reader to what the "course of conduct" must be in connection with—that is, the sentence. The State argues that "[d]efendants are convicted of and sentenced for *crimes*, not a 'series of acts.'" (*Id*.) (emphasis added). But the Legislature did not use the word "crime." It used the phrase "course of conduct." *Boettcher*, 144 Wis. 2d at 97.

It is a stretch to say that a "body of case law has developed around *Tuescher*..." (*See* Resp. Br. at 36-37). In the twenty-three years since it was decided, *Tuescher* has been cited in thirteen published decisions. In the majority of cases, it was cited briefly or in passing, for a broad legal principle, such as the

standard of review.[5] This is unsurprising, given *Tuescher*'s highly unusual facts. There are two cases that contain more of a discussion. First, in *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶31, 274 Wis. 2d 1, 681 N.W.2d 914, this Court considered whether a person who was reincarcerated on a parole violation was entitled to sentence credit for time he previously spent in detention during a Chapter 980 proceeding, which was based in part on the same offense. This Court rejected the defendant's reliance on *Tuescher*, and held that the detention at issue was not "custody" for purposes of the sentence credit statute, and also relied on the fact that the detention was based on a separate civil matter. *Id.*, ¶¶29, 34.

The second case, *State v. Zahurones*, 389 Wis. 2d 69, seems to be the only case that has actually applied the "specific act" definition to a given set of facts. Police entered the defendant's home and located narcotics and drug paraphernalia. She resisted arrest. Later, her child tested positive for methamphetamine. *Id.*, ¶3. The State charged a six-count complaint. The court of appeals determined that the charges arose from "the same course of conduct." *Id.*, ¶15. If these

[5] This Court has in fact questioned part of the *Tuescher* decision, specifically, its suggestion that credit should be applied equally to all concurrent sentences. *State v. Elandis Johnson*, 2009 WI 57, ¶60, 318 Wis. 2d 21, 767 N.W.2d 207, (stating that *Tuescher* referenced "a suspect paragraph" from *State v. Ward*, 153 Wis. 2d 743, 452 N.W.2d 158 (Ct. App.1989)).

facts were a single "course of conduct," it is difficult to see how Mr. Fermanich's facts are not.[6]

The State's concern that Mr. Fermanich's proposed interpretation of the statutory language will "invite litigation in a corner of sentence credit law that was previously settled" and "has no obvious stopping point" is not well-founded. (*See* Resp. Br. at 34). First, the *Tuescher* definition is also fact-specific, and it will not always be obvious what constitutes one "specific act." In Mr. Fermanich's case, the State argues that count four (operating without owner's consent) and count five (fleeing) are also separate courses of conduct. (*See id.* at 25). Yet these offenses were committed simultaneously, while Mr. Fermanich was driving the third truck. The State seems to be focused on the elements of the statutory crimes. But again, the Legislature did not choose the word "crime." It chose the phrase "course of conduct."

Finally, there is no cause for concern about opening the floodgates of litigation. Interconnected criminal conduct will usually be charged in a single case number because the conduct will all have occurred in one county. Whatever bond is imposed will apply to all of the counts. Therefore, whether or not all of the counts are part of the same course of conduct will not be dispositive. The complication here is that

[6] 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." *State v. Fermanich*, No. 2021AP462-CR, unpublished slip op., ¶27 (April 12, 2022) (Pet-App. 15).

the incident straddled two counties and Langlade County did not impose cash bond.

3. The incident in Mr. Fermanich's case was a single "course of conduct."

The incident in this case was a continuous series of acts that occurred on a single night over a short period of time.[7] The temporal proximity of Mr. Fermanich's acts, similarity of acts, continuity of acts, and lack of intervening events all support a conclusion that all of the counts in the information, including counts one, four, and five, amounted to a single "course of conduct."

[7] The State asserts there are no factual findings in this case. (Resp. Br. at 12). However, the circuit court found that the incident occurred over a "short period of time." (R. 44:26; Pet-App.59).

CONCLUSION

This Court should reverse the court of appeals' decision overturning the circuit court's grant of 433 days of pretrial credit on count one.

Dated this 29th day of November, 2022.

Respectfully submitted,

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I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 3,134 words.

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This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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

Dated this 29th day of November, 2022.

Signed:

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