

**FILED
12-17-2021
CLERK OF WISCONSIN
COURT OF APPEALS**

STATE OF WISCONSIN
COURT OF APPEALS

DISTRICT IV

Case No. 2021AP1163 - CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DOMINIC A. CALDIERO,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT ENTERED IN WAUPACA COUNTY
CASE 2019CT34, THE HONORABLE JUDGE RAYMOND S. HUBER,
PRESIDING.

BRIEF OF DEFENDANT-APPELLANT

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STATEMENT OF ISSUES

ISSUE ONE: Was the defendant subject to a prohibited alcohol concentration of 0.02, pursuant to sec. 340.01(46m), Wis. Stats.?

The trial court answered no.

ISSUE TWO: Is the defendant entitled to additional sentence credit, pursuant to sec. 973.155, Wis. Stats., for the time he was held on both a probation hold, and a cash bond?

The trial court answered no.

STATEMENT ON ORAL ARGUMENT

Oral argument is not requested because the facts and legal analysis can be sufficiently developed in writing.

STATEMENT ON PUBLICATION

Publication is not requested because the facts presented in this case relating to whether the defendant was subject to a prohibited alcohol concentration have been eliminated by the legislature's amendment of the statute applicable to this case. (App. 9). Therefore, the facts before this case are unlikely to recur. In addition, the law relating to sentence credit is well-settled.

STATEMENT OF THE CASE

Dominic A. Caldiero (hereinafter referred to as "Caldiero") was charged with four criminal offenses: Operating a Motor Vehicle While Intoxicated (3rd Offense), Operating While Revoked, Failure to Install Ignition Interlock Device, and Operating with a Prohibited Alcohol Concentration (3rd Offense). (R. 19).

Count three, Failure to Install an Ignition Interlock Device was dismissed by the trial court prior to trial on a motion to dismiss filed by Caldiero. (R. 105:23). Caldiero's motion(s) asserted that Caldiero was not subject to an order requiring him to have an ignition interlock device installed and therefore, was not

in violation of installing the same. (App. 4-8; R. 14). The trial court dismissed count three. However, the trial court refused to dismiss count four.

Count one, Operating While Intoxicated, was dismissed by the State prior to trial. (R. 106:4-5). Caldiero pled no contest to count two, Operating While Revoked. (R. 106:19-24). The trial court sentenced Caldiero to pay a fine and court costs on that conviction. (R. 106:305).

The only remaining charge of Operating with a Prohibited Alcohol Concentration (count four) was decided by a jury. The jury returned a verdict of guilty. (R. 65) Caldiero was sentenced to complete a diversion program with 14 days of jail to be served and an additional 46 days of conditional jail for use by the program. (R. 106:305-306). The trial court stayed all but the first 48 hours of jail, pending appeal. (R. 106:307-309).

STATEMENT OF RELEVANT FACTS

Caldiero was convicted of his second Operating While Intoxicated on September 21, 2015. (R. 19; R. 119; App. 21). At the sentencing hearing for that second offense, the trial court ordered that Caldiero's operating privilege was revoked for 13 months, effective immediately. (App. 11; R. 35:9). The trial court further ordered that during Caldiero's immediate, 13-month period of revocation, that he was ordered to "operate vehicles equipped with ignition interlock devices." (App. 12; R. 35:10).

Caldiero's certified driving record also reflects that his revocation was forthwith immediately on September 21, 2015, for 13 months (for that second offense). (App. 21). According to his certified driving record, Caldiero was eligible for reinstatement following that revocation on June 9, 2016. (App. 21).

The criminal complaint in this case, alleges that the driving offense in this case was a third offense. (R. 1:2; R. 19:3). The complaint alleged that Caldiero had been convicted of only two prior impaired driving offenses. Caldiero's certified driving record confirms the same. (App. 19-23).

Prior to trial, Caldiero moved to dismiss both counts three and four. (R. 14; R. 25). Specifically, Caldiero argued that the law in effect at the time Caldiero was sentenced for his second impaired driving offense provided that the restriction(s) on driving privileges would begin on the date that a license was later

issued, unless the trial court had immediately ordered the installation of an ignition interlock device, citing to sec. 343.301(2m), Wis. Stats. (2013-14).

As such, Caldiero argued that when the trial court imposed his sentence for his second offense, the trial court had ordered that his ignition interlock order was effective *immediately* for 13 months from his sentencing. Therefore, Caldiero argued that both had expired (effective June of 2016) and were no longer in effect at the time of his 2019 arrest. Thus, Caldiero argued that he was no longer subject to the ignition interlock order and asked that both counts three and four should be dismissed.

The trial court granted Caldiero's motion to dismiss count three, the ignition interlock charge, but did not dismiss count four, the prohibited alcohol charge. (R. 105:23). Therefore, count four proceeded to trial.

The jury was asked to decide whether the State had presented evidence to convince the jury beyond a reasonable doubt, whether Caldiero had been driving while he had a level of alcohol in his bloodstream that was above 0.02. (R. 66; R. 68). At trial, evidence was presented that Caldiero's blood-alcohol content when tested was 0.072. (R. 78). The jury returned a verdict of guilty. (R. 65).

On appeal, Caldiero filed a post-conviction motion, additionally arguing that the trial court's ruling to dismiss count three was inconsistent with its ruling as to count four. (App. 15-18, R. 120). Caldiero argued that if he was not subject to a requirement to have an ignition interlock device installed, he was also not subject to a 0.02, lesser, prohibited alcohol concentration.

Caldiero also asked the trial court to grant him fourteen days of sentence credit for the time he was held in custody from the date of his arrest (January 11, 2019) until he was released from a probation hold (January 24, 2019). (App. 26-27, R. 121). Caldiero filed a copy of the final revocation paperwork which confirmed that the probation violations for the hold stemmed from the allegations in this case. (R. 118).

The trial court denied Caldiero's post-conviction motion to dismiss count four a second time. In doing so, the trial court found that "Caldiero was under an obligation until such time as he had applied for and been granted some type of license which was a triggering point for when his period would expire." (App. 24;

R. 135:14). The trial court's finding was entered as a written order. (App. 25; R. 129). Caldiero now appeals and seeks reversal from this Court. (R. 131; R. 140).

The trial court also denied Caldiero's post-conviction motion, in part, for additional sentence credit. The trial court granted Caldiero for four days of credit for the four days in which he was held on a cash bond. However, the trial court refused to give Caldiero the additional ten days after then, when he remained in custody on a probation hold stemming from the allegations filed in this case.

ARGUMENT

I. The State improperly charged Caldiero in count four because he was not subject to a prohibited alcohol concentration of 0.02 and therefore, the criminal complaint was defective and should have been dismissed.

a. *Relevant Law*

A criminal complaint that fails to properly allege a criminal law violation is void and without a proper complaint, the court does not have jurisdiction over the defendant. *State v. Bonds*, 469 N.W.2d 184, 161 Wis.2d 605 (Wis. App. 1991); citing *Champlain v. State*, 53 Wis.2d 751, 754, 193 N.W.2d 868, 871 (Wis. 1972). A defective criminal complaint is a jurisdictional defect. *Id.*

Count four alleged that Caldiero was subject to a 0.02 prohibited alcohol concentration, because he was subject to an order under sec. 343.301, Wis. Stats., and that he drove or operated a motor vehicle with a prohibited alcohol concentration of 0.07. Wis. Stat. § 346.63(1)(b) (2019). However, the criminal complaint did not properly allege that Caldiero was subject to a prohibited alcohol concentration. Therefore, the complaint was defective.

Caldiero challenged the sufficiency of the criminal complaint before trial and asked the trial court to set aside the judgment. Therefore, the issue is properly brought before this Court on appeal.

b. *Caldiero was subject to a 0.08 prohibited alcohol concentration; therefore, the criminal complaint was defective.*

The State improperly charged Caldiero, alleging that he was subject to a prohibited alcohol concentration of 0.02, pursuant to sec. 340.01(46m)(c), Wis.

Stats.; however, Caldiero was not subject to such an order. Wis. Stat. § 340.01(46m) (2019). The trial court abused its discretion in denying Caldiero's pretrial motion to dismiss count four and likewise, abused its discretion in denying Caldiero's post-conviction motion to vacate the conviction entered on that count.

Caldiero was arrested January 11, 2019, and subsequently charged with operating a motor vehicle with a prohibited alcohol concentration. At the time of his arrest, the alcohol limit for a defendant was defined by sec. 340.01(46m):

(46m) "Prohibited alcohol concentration" means one of the following:

(a) If the person has 2 or fewer prior convictions, suspensions, or revocations, as counted under s. 343.307(1), an alcohol concentration of 0.08 or more.

(c) If the person is subject to an order under s. 343.301 or if the person has 3 or more prior convictions, suspensions, or revocations, as counted under s. 343.307(1), an alcohol concentration of more than 0.02.

Wis. Stat. § 340.01(46m) (2019).

Caldiero was subject to the standard, 0.08 prohibited alcohol concentration, pursuant to sec. 340.01(46m)(a). Wis. Stat. § 340.01(46m)(a) (2019). Caldiero had two qualifying offenses under sec. 343.307(1), Wis. Stats. (R. 1, R. 19, R. 119). Contrary to the State's argument, he was not subject to an order, requiring him to install in ignition interlock device, pursuant to sec. 343.301, Wis. Stats. Wis. Stat. § 343.301 (2019).

The defendant was convicted of his second impaired driving offense on September 21, 2015. (R. 1, R. 19, R. 119). At that time, sec. 343.301, Wis. Stat. provided for a mandatory, minimum, one-year order for installation of an ignition interlock device because Caldiero had a prior and current conviction for operating while intoxicated. Wis. Stat. § 343.301 (2015). The issue in this case centers on when the one-year order began and ended.

At the time of Caldiero's sentencing for the second offense, the statute provided for a default start-date of the ignition interlock requirement, but provided that the sentencing court "may order the installation of an ignition interlock device under sub. (1g)(am)1, immediately." (*Id.*)

In 2015, the legislative language (pertaining to issuing an ignition interlock order) simply stated that it had to be an order for at least one year, "beginning on the date the department issues any license," but then later stated that the trial court

“may order” that it begin immediately. (*Id.*) Nothing in the language of the statute indicated that, if it was ordered immediately, that the term of the order was affected. In other words, the length of the order or the requisite term during which a defendant was required to comply with the order and install/use an ignition interlock device was finite. In this case it was fixed at a length of thirteen months.

When Caldiero was sentenced for the second offense, the trial court ordered that he install and use an ignition interlock device for 13 months and the trial court provided for the ignition interlock order to begin immediately, alongside his 13-month revocation of his driver’s license. (R. 35:9-10). Caldiero was sentenced in that case on September 21, 2015. Therefore, Caldiero was subject to an ignition interlock order from September 21, 2015, to October 20, 2016.

At the time of Caldiero’s arrest in this case, over two years after the expiration of the ignition interlock order and more than three years after he was sentenced for his second offense, Caldiero was no longer subject to an ignition interlock order. Therefore, Caldiero’s prohibited alcohol concentration was 0.08.

c. Caldiero’s judgment of conviction on count four must be vacated.

As a result of the defective charging document, Caldiero was tried as though his prohibited alcohol concentration was 0.02. The jury was instructed to decide whether Caldiero drove with a blood alcohol content above 0.02, not 0.08. However, even if they had been properly instructed, the facts of the case do not support a guilty verdict for a prohibited alcohol level of 0.08.

Caldiero’s blood-alcohol content according to the State Crime Laboratory testing was 0.072, which is less than 0.08. (R. 78). As such, the criminal complaint failed to state a sufficient factual basis to support the charge. Likewise, the evidence at trial, that Caldiero had a blood-alcohol content of 0.072 is insufficient to support a conviction on that charge.

When a defendant is improperly charged by a defective criminal complaint or information, any conviction resulting from that defective charge must be reversed. *State v. Williams*, 527 N.W.2d 338, 343, 190 Wis.2d 1, 13 (Wis. App. 1994). Therefore, the judgment entered on count four must be vacated.

II. Caldiero is entitled to an additional ten days of sentence credit.

a. *Relevant Law*

An appellate court reviews the application of the sentence credit statute to an undisputed set of facts, independently. *State v. Abbott*, 207 Wis.2d 624, 628, 558 N.W.2d 927 (Wis. App. 1996).

Section 973.155(1)(a) provides that a defendant “*shall* be given credit ... for all days spent in custody in connection with the course of conduct for which sentence was imposed.” Wis. Stat. § 973.155(1) (2019) (italics added for emphasis). Wisconsin Stat. § 973.155(1)(a) requires two determinations. *State v. Gavigan*, 122 Wis.2d 389, 391, 362 N.W.2d 162 (Wis. App. 1984). The first is whether a defendant was in custody. *Id.* The second is whether the custody was “in connection with course of conduct for which sentence was imposed.” *Id.*

The legislature declared that a defendant is entitled to credit for days he is held on a cash bond, awaiting trial, and, also, for the days when a defendant is in custody on a revocation hold, if the hold was placed in part, “for the same course of conduct” that the defendant is sentenced for. Wis. Stat. § 973.155(1)(a)1 and (b); *State v. Presley*, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713; *State v. Hintz*, 300 Wis. 2d 583, 731 N.W.2d 646 (Wis. App. 2007).

Therefore, when a defendant is held on a probation hold, at least in part, for new charges and is later sentenced on the new charges, he is entitled to that credit, with two exceptions. First, if the new charges are ordered consecutive to the revocation sentence, then the defendant is not entitled to dual credit. *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533, 539 (Wis. 1988). Second, the connection between the probation hold, and the new charges is severed when the defendant is sentenced for the revoked case(s) and begins serving a sentence. *State v. Beets*, 124 Wis. 2d 372, 380, 369 N.W.2d 382, 386 (Wis. 1985).

Section 973.155, Wis. Stats. requires that when a defendant is confined prior to trial, in connection with a case, he must be granted credit. *State v. Carter*, 2010 WI 77, ¶ 56, 327 Wis. 2d 1, 785 N.W.2d 516.

b. Caldiero was in custody from the date of his arrest until he was released on a probation hold.

Caldiero was arrested on January 11, 2019. (R. 118). A probation hold was placed on Caldiero, for the alleged driving offenses charged in this case. (*Id.*) Caldiero was released January 24, 2019, back to the community and later revoked for additional alleged violations. Caldiero was in custody, at the jail, from January 11, 2019, until January 24, 2019, for fourteen days.

c. During the fourteen days that Caldiero was in custody, he was held in connection with the course of conduct for which sentence was imposed and therefore, he is entitled to the credit.

Caldiero was in custody from January 11, 2019, until January 24, 2019, in connection with the course of conduct for which sentence was imposed. The probation hold was based at least in part upon the impaired driving allegations in this case. Wis. Stat. § 973.155(1)(b).

The sentence in this case was not ordered consecutive to Caldiero's revocation case (Waupaca County Case 2018CM204). Therefore, dual credit is not barred by *Boettcher*. *Boettcher*, 144 Wis. 2d at 100. Furthermore, Caldiero was not serving a sentence during those fourteen days, he was held on a probation hold.

Therefore, the sentence credit statute provides that Caldiero *shall* be granted credit for that time. The sentencing court granted Caldiero only four days of credit. Therefore, if the judgment entered on count four is not set aside, Caldiero asks this Court to grant him the additional ten days of credit for a total of fourteen days.

CONCLUSION

The defendant respectfully requests that this Court vacate the judgment entered against Caldiero on count four. If the judgment is not vacated, then Caldiero respectfully request that an amended judgment be ordered to reflect that he is entitled to fourteen days of pretrial confinement credit.

Signed and dated: December 17, 2021.

Respectfully submitted,

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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 the brief is 2,774 words.

Signed and dated: Friday, December 17, 2021.

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