STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2021AP001163

Waupaca County Circuit Court Case No. 19CT34

STATE OF WISCONSIN,

Petitioner-Respondent,

v.

DOMINIC A. CALDIERO

Respondent-Appellant.

On Appeal from a Dispositional Order
Entered in the Circuit Court for Waupaca County,
The Honorable Raymond S. Huber, Presiding

BRIEF OF PETITIONER-RESPONDENT

Danuta E. Kurczewski
Assistant District Attorney
State Bar No. 1023083

Waupaca County District Attorney's Office
811 Harding Street
Waupaca, WI 54981
(715) 258-6444
danuta.kurczewski@da.wi.gov

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ISSUE PRESENTED

1. Was Dominic Caldiero subject to an Ignition Interlock Device Order under Wis. Stat. § 343.301 at the time of his arrest on January 11, 2019, therefore making his prohibited alcohol concentration level of .02 pursuant to Wis. Stat. § 340.01(41m)(c)?

Trial Court answered: Yes.

2. Is Dominic Caldiero entitled to an additional 10 days of sentence credit?

Trial Court Answered: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. The issue on appeal is not complicated. The resolution of the issue will rely primarily on legal arguments that can be adequately developed and argued within the briefs.

STATEMENT OF THE CASE

The State exercises its option not to present a full statement of the case pursuant to Wis. Stat. § 809.19(3)(a). The State includes a description of the procedural status of the case leading up to the appeal and the statement of facts relevant to the issues presented for review below.

STATEMENT OF FACTS AND PROCEDURAL FACTS

On January 11, 2019, Trooper Glick with the Wisconsin State Patrol arrested Mr. Caldiero for Operating a Motor Vehicle while Intoxicated, Third Offense [hereinafter OWI], Operating a Motor Vehicle While Revoked [hereinafter OAR] and Failure to Install Ignition Interlock Device [hereinafter IID] after an investigation following a stop for failure to stop at a stop sign. (R. 1:1-2).

The State filed a Criminal Complaint charging Mr. Caldiero in Count 1 with OWI, Third Offense; in Count 2 with OAR; and in Count 3 with Failure to Install IID and an Amended Complaint adding count 4, Operating with Prohibited Alcohol Concentration, Third Offense, [hereinafter PAC] which alleged that Mr. Caldiero drove a motor vehicle with a prohibited alcohol concentration of 0.02 or more to an order under s. 343.301, and that he had a blood alcohol level of .072. (R. 19).

Mr. Caldiero's Certified Driving Record at that time indicated that his driving privilege had been continually revoked since September 21, 2015, that he has never obtained a valid driver's license and he has never installed an IID device in his vehicle at any time between 2015 and 2019. (R. 119, 127:1-2). The said document showed that Mr. Caldiero continued under a driving restriction of "no alcohol concentration > .02" and under an IID restriction. (R. 119, 127:1).

The revocation of driver's license and the IID requirement reflected in the Certified Driving Record was imposed on Mr. Caldiero in Waupaca County case 2015CT55 where he was convicted of Operating While Intoxicated [hereinafter: OWI], Second Offense. (R. 119, 127). The Judgment of Conviction entered in Waupaca County case 2015CT55 shows that Mr. Caldiero was then sentenced, inter alia, to 13 months of driver's license revocation with administrative credit as determined by Department of Transportation and 13 months of IID. (R. 18:3) The sentencing transcript states in relevant parts:

> THE COURT: I will revoke his driving privileges for a period of 13 months. Did you drive here today, sir?
> THE DEFENDANT: No, your Honor.
> THE COURT: I will make the revocation effective forthwith giving him credit for any period of administrative suspension that may have been put into place.

> [...]
> I will revoke your driving privileges for a period of 13 months. If I didn't indicate, the revocation is 13 months. I will direct that during that period of revocation you operate vehicles equipped with ignition interlock devices.

(R. 35:9-10).

On July 2, 2019, the trial court heard Mr. Caldiero's Motion to Dismiss Court 3, Failure to Install IID, and Count 4, PAC, Third Offense. (R. 105). Mr. Caldiero argued that Counts 3 and 4 should be dismissed because the order issued in Waupaca County Case 2015CT55 requiring him to operate vehicle(s) equipped with an IID did not yet take effect on January 11, 2019. He argued that the IID order never took effect when entered because the law required the defendant to reinstate his license as a precondition to the IID order taking effect. [1] Since Mr. Caldiero never reinstated his license between 2015 and 2019, trial counsel argued that there was no 0.02 PAC restriction on his license when he drove in January 2019. (R.25). The Court's ruling on all issues was brief:

> I am satisfied that Count 3, the failure to install the IID device, should be at least at this point be dismissed without prejudice. I am, however, satisfied when I consider the reasoning of Judge Blanchard in the Quisling decision, I consider it persuasive authority perhaps partially because it agrees with my concept of case law. But I think he was subject to 02 PAC. So I'll dismiss without prejudice Count 3. But Counts 1, 2 and 4 remain.

(R. 105:23)

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[1] Appellate counsel incorrectly summarizes the trial counsel's argument when she states, "Caldiero argued that [his IID order] 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..." Brief of Defendant-Appellant, p. 6. The trial counsel in fact argued that Caldiero's IID order had not yet began to run at the time of his 2019 arrest and that he was not yet subject to the ignition interlock order. The trial counsel wrote, "Because Caldiero was unlicensed, he was not required to operate vehicles only equipped with ignition interlock devices: his IID restriction *had not yet* started to run." (R. 25, ¶12). "[T]he IID order *had not yet* began to run." (R. 25, ¶13).

On the first day of the trial, the State dismissed Court 1, OWI, Third Offense, and the defendant stipulated to Count 2, OAR. The sole count tried to the jury was Count 4, PAC, Third Offense. (R.106:1-2, 19-24) The jury found the defendant guilty. (R. 106:296).

On June 25, 2021, the trial court heard Mr. Caldiero's Post-Conviction Motion to Vacate the Judgment of Conviction on Count 4 and for additional sentence credit. (R. 120 and 121). At that hearing, Mr. Caldiero no longer claimed that the IID order had not yet gone into effect. He now claimed that the IID order expired or was satisfied on October 2016 because the "counting" of 13 months (the court-ordered length for the physical installation of the IID device) started immediately upon the September 2015 conviction. In other words, Mr. Caldiero "waited out" the .02 PAC restriction and "waited out" the requirement of equipping his car with an IID without ever having to comply. (R. 120) The trial court denied Mr. Caldiero's Post-Conviction Motion. (R. 135:18).

Mr. Caldiero also filed a post-conviction motion for an additional sentence credit. (R. 121). In the case at bar Mr. Caldiero was sentenced, inter alia, to serve 60 days in the county jail. (R. 106:306). The parties agreed that Mr. Caldiero was arrested on January 11, 2019 and signed a signature bond on January 14, 2019. (R. 135:15). He then remained incarcerated on a probation hold in Waupaca County case 18CM204 until January 24, 2019. (R. 135:15). Mr. Caldiero's probation in Waupaca County case 18CM204 was ultimately revoked and on December 20, 2019 he was sentenced to 87 days in jail, which sentence included time served on the probation hold from January 11, 2019 until January 24, 2019. (R. 135:16-18). Mr. Caldiero's trial counsel acknowledged that Mr. Caldiero was not entitled to any credit for that probation hold. (R. 106:303-304)

The trial court, based on the State's stipulation, gave Mr. Caldiero four days credit for in-custody time without bond but denied additional credit. (R. 135:16-19).

ARGUMENT

I. STANDARD OF REVIEW.

This case requires the appellate court to interpret Wis. Stat. §343.301 (2013-2014). Statutory interpretation presents a question of law that the Court of Appeals reviews de novo. *Harnischfeger Corp. v. LIRC*, 196 Wis.2d 650, 659, 539 N.W.2d 98 (1995).

The application of the sentence credit statute, Wis. Stat. § 973.155 to a particular set of facts presents a question of law that the Court of Appeals reviews independently. See *State v. Hintz*, 2007 WI App 113, ¶5, 300 Wis. 2d 583, 731 N.W.2d 646. In so doing, the Court will uphold any factual findings made by the circuit court unless they are clearly erroneous. *Id.*

I. THE PLAIN LANGUAGE OF WIS. STATS. § 340.01(46m) AND § 343.301(1g) REQUIRES A FINDING THAT UPON THE ENTRY OF SEPTEMBER 21, 2015 IID ORDER, CALDIERO BECAME SUBJECT TO PAC OF .02 AND THAT SUCH ORDER REMAINED IN EFFECT AT THE TIME OF THE ARREST ON JANUARY 11, 2019 BECAUSE CALDIERO FAILED TO HAVE AN IID INSTALLED IN HIS VEHICLE(S) FOR 13 MONTHS.

On September 21, 2015, in Waupaca County case 15CT55, Mr. Caldiero was convicted of OWI, Second Offense, and upon this conviction he became subject to the IID order under Wis. Stat. § 343.301(2013-14) (R. 35).

Under Wis. Stat. § 340.01(46m)(c)[2] a person "subject to" an IID order under Wis. Stat. § 343.301, is subject to a prohibited alcohol concentration of 0.02. The statute says in pertinent parts,

(46m) "Prohibited alcohol concentration" means […]:

[2] Wis. Stat. § 340.01(46)(2013-14) was identical.

> (c) If the person is subject to an order under s. 343.301 [...], an alcohol concentration of more than 0.02.

Wis. Stats. § 340.01(46m)(c) must be read together with Wis. Stat. § 343.301(1g) (Wis. Stats. 2013-14), which states in relevant parts,

> A court shall order a person's operating privilege for the operation of "Class D" vehicles be restricted to operating vehicles that are equipped with an ignition interlock device and, except as provided in sub. (1m), shall order that each motor vehicle for which the person's name appears on the vehicle's certificate of title or registration be equipped with an ignition interlock device if either of the following applies: [...]
> (b) the person violated s. 346.61(1) or (2) [...] and had an alcohol concentration of 0.15 or more at the time of the offense.

Wis. Stat. § 343.301(1g) (Wis. Stats. 2013-14) describes two separate components of any IID order: (1) the component restricting operating privilege to vehicles equipped with an IID and (2) the component directing physical installation of the device in each vehicle owned by or registered to the defendant. The statute plainly differentiates between the IID restriction on operating privilege and the act of equipping the vehicle(s) with an IID device. A person who is "subject to" an IID order remains under .02 PAC restriction on his operating privilege until he or she fulfills the obligation to install an IID device in his or her vehicle(s) for the court-order length of time.

Mr. Caldiero interprets these statutes to mean that when the person subject to the IID order never installs an IID device in his or her vehicles as ordered, that person ceases to be "subject to" the IID order once the court-ordered length of time for installation of the device lapses. In other words, if the person subject to the IID order "waits out" the specified duration without installing the IID, the person completely avoids the consequences of such order and (1) the IID restriction on the driver's license goes away and (2) the obligation to equip the person's vehicle(s) with an IID goes away. Thus, Mr.

Caldiero argues that the September 21, 2015 order imposing the .02 PAC restriction on his operating privilege and requiring him to install an IID device on his vehicle(s) expired exactly 13 months later, specifically on October 20, 2016, regardless of his noncompliance. That is not what the relevant statutes say and any such interpretation of the statutory scheme is contrary to public policy.

"Subject to an order" language of Wis. Stat. §340.01(46m)(c) refers to a person who has been ordered by a court to have an IID in his or her vehicle(s) for the court-ordered period of time. Whether the person subject to the IID order takes weeks, months, or years to comply with the installation process, the order remains in effect. The person continues to remain subject to the order's component of .02 PAC restriction until she or he fully complies with the order by installing the IID device in his or her vehicle for the period of time ordered by the court. Once the IID device is installed for the period of time ordered by the Court, the IID restriction is removed from the person's operating privilege. In other words, if the person chooses not to install the IID device in his or her vehicle(s) for several years, the IID restriction remains on that person's driving record for several years. Once the person installs the device, the device needs to remain in his or her vehicle only for the period of time ordered by the court. After that period, the IID restriction is removed from the person's driving record.

By making the IID order effective immediately, the law imposes on the person subject to the order an immediate IID/.02 PAC restriction regardless of when that person choses or is able to equip his or her vehicle(s) with IID device(s). As a result, the person's PAC becomes greater than .02 until the person has completed the terms of that order. There is no ability for that person to delay or manipulate when they become

subject to the order and when a PAC of .02 begins. To allow a person convicted of an OWI and subject to an IID order to "wait out" that order is in direct contradiction of the plain language of the cited statutes.

Here, Mr. Caldiero was ordered to equip vehicles owned by or registered to him for 13 months. The Court made the IID order effective on September 21, 2015, but he did not order Mr. Caldiero to install the IID device on September 21, 2015. The IID restriction, PAC of .02 went immediately in effect. Since Mr. Caldiero never equipped his vehicle(s) with an IID between 2015 and 2019, he continued to be under the IID restriction on his license for that entire time, including the day of his arrest on January 11, 2019.

Applying a plain meaning interpretation to Wis. Stats. § 340.01(46m) and § 343.301(1g)(2013-14) of the relevant statues, Mr. Caldiero became "subject to an order under s. 343.301" upon entry of the September 21, 2015 order and he remained a "person subject" to that order in January 11, 2019 because he has never installed an IID in his vehicle(s) at any time.

II. MR. CALDIERO IS NOT ENTITLED TO AN ADDITIONAL 10 DAYS OF SENTENCE CREDIT.

When Mr. Caldiero was arrested on January 11, 2019 in the case at bar, he was also placed on a probation hold in Waupaca County case 18CM204 where he was convicted of battery with a domestic abuse enhancer (the "battery case"). (R. 118:1, 3). Mr. Caldiero remained in dual custody until January 14, 2021, when he signed a signature bond in the case at bar (the "PAC case"). (R.135:16) Mr. Caldiero remained in custody in the battery case on a probation hold until January 24, 2019. (R. 118:6).

Mr. Caldiero was re-confined in the battery case on October 15, 2019 and was ultimately revoked. (R. 188:6). He was sentenced in the battery case on December 20,

2019, which sentence included the full 14 days of credit he served on the probation hold from January 11, 2019 to January 24, 2019. (R. 135:18).

The State agreed that Mr. Caldiero should receive pre-sentence credit for four days served from January 11, 2019 to January 14, 2021 because he served them without bond. (R.188). The trial court denied the request for the additional 10 days of credit. The trial court stated that typically its intent would be to order an OWI/PAC-type of sentence to be served consecutively to a sentence on an unrelated battery case but here Mr. Caldiero has completed serving the sentence in the battery case over one year prior to the sentencing in the PAC case. In other words, the trial court indicated that it would not make sense to make the jail sentence in the PAC case consecutive to the jail sentence in the battery case because the defendant has completed serving the battery sentence in the past.

Wis. Stat. § 973.155 reads, in relevant part, as follows:

> (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.
>
> (b) The categories in par. (a) [...] include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

The State asserts that although the probation hold in the battery case resulted from the PAC arrest, that connection was severed when the custody resulting from the probation hold was converted into a revocation and fully completed jail sentence in the battery case.

See State v. Beets, 124 Wis.2d 372, 379, 369 N.W.2d 382 (1985). The *Beets* court held once a person begins serving one of the sentences, his "custody" is no longer "in connection with" the other pending charge. Here, the battery charge was fully served and completed at the time when the court sentenced Mr. Caldiero in the PAC case. Mr. Caldiero argues that *Beets* does not apply because he was not serving a sentence during the probation hold. Mr. Caldiero ignores the fact that the entire period of his probation hold was later fully included in the sentence he served in the battery case. In sum, the "severance" concept of *Beets* applies here because the sentence in the battery case was completed and fully served at the time when the court was making the sentencing decision in the PAC case.

Mr. Caldiero further argues that he is entitled to dual credit pursuant to *State v. Presley*, 2006 WI App 82, 292 Wis.2d 734, 715 N. W.2d 713; and *State v. Hintz*, 2007 WI App 113, 300 Wis.2d 583, 731 N.W.2d 646. Neither *Hintz* nor *Presley* has any application here; both cases involve the calculation of sentence credit where the circuit court imposed concurrent sentence terms. Here, the court could not order the PAC sentence to be either concurrent or consecutive to the battery sentence because at the time of the PAC sentencing, the battery sentence was fully served and completed.

For these reasons, Mr. Caldiero is not entitled to additional 10 days of sentence credit.

CONCLUSION

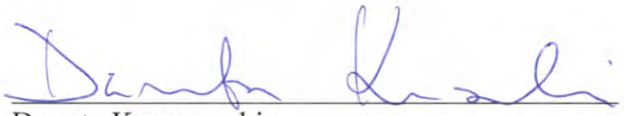
For the reasons stated above, the State respectfully requests that this Court uphold the Judgment of Conviction in the case at bar and denies Mr. Caldiero's request for additional sentence credit.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court uphold the Judgment of Conviction in the case at bar and denies Mr. Caldiero's request for additional sentence credit.

Dated this 14th day of January, 2022.

Respectfully Submitted,



Danuta Kurczewski
Assistant District Attorney
State Bar No. 1023083

Waupaca County District Attorney's Office
811 Harding Street
Waupaca, WI 54981
715-258-6444
Danuta.Kurczewski@da.wi.gov

Attorney for the Plaintiff-Respondent

CERTIFICATION AS TO FORM/LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 3,256 words.

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I hereby certify that I have submitted an electronic copy of this brief complies with the requirement of §809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

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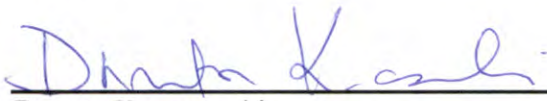

Danuta Kurczewski
Assistant District Attorney
State Bar No. 1023083