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.

REPLY BRIEF OF DEFENDANT-APPELLANT

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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.

The State argues that Caldiero was subject to an ignition interlock device, pursuant to sec. 343.301, Wis. Stats. Wis. Stat. § 343.301 (2015). The State relies solely upon the argument that a plain reading of the statute supports that finding. The State cites to no legal authority for its position.

The parties agree that Caldiero was convicted of his second impaired driving offense on September 21, 2015. (R. 1, R. 19, R. 119). The parties also agree, that 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).

In 2015, the statute requiring an order for ignition interlock provided that the court:

> shall order a person's operating privilege for the operating of 'Class D' vehicles be restricted to operating vehicles that are equipped with an ignition interlock device and, … 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 … .

Wis. Stat. § 340.301(1g) (2013-14). The plain language set forth in that section does nothing to establish two separate timelines for the applicability of the restriction. The duty to restrict a driver's operating privilege is directly tied to the duty to equip a vehicle owned, titled, or registered to the driver whose operating privilege is restricted.

Caldiero interprets the statutes to mean that a person is subject to a duty to install an ignition interlock device while his operating privileges are restricted because that is what the statute clearly provided for and that is what the trial court ordered when he was sentenced for his second offense:

> I will direct that during that period of revocation you operate vehicles equipped with ignition interlock devices.

(App. 11-12). When Caldiero was sentenced for his second offense OWI, the trial court ordered a 13-month revocation and a 13-month ignition interlock order and ordered that both begin immediately (on September 21, 2015).

The State argues that the plain language of the statute provides that any defendant who was sentenced in 2015 was subject to a requirement to install *and use* an ignition interlock device for the entire length of time that was set by the trial court. Therefore, the State argues that the plain language of the statute provided that Caldiero was required to install *and use* an ignition interlock device for a total of thirteen months before he was relieved from being subject to the order.

However, the portion of the statute that provided for the start date and term of the ignition interlock requirement does not support the State's argument. At best, the statute was ambiguous.

If, as the State asserts, the restriction on a person's operating privilege was not tied to the installation of the device, then Caldiero has never been subject to an ignition interlock order when it comes to his operating privileges. Under the State's interpretation of the statute, if the two requirements (privileges to drive and use of the ignition interlock device) are separate, then Caldiero has never yet been subject to a restriction on his driving privileges because as his trial attorney argued, he had never been issued his license.

The ignition interlock statute in 2015 provided that the restriction on a person's driving privilege would begin "on the date the department issues any license," by default. The State cannot argue that Caldiero's operating privileges were restricted by the ignition interlock requirement in 2015 and, also, argue that it had not yet begun because he didn't get his license.

That interpretation is contrary to the plain language of the statute. The statute very clearly provided for only two start dates relating to the ignition interlock requirements: upon licensure and upon immediate order by the Court. The ambiguity of the statute prompted the amendment of the statute in 2017.

The legislature amended the statute to preclude defendants from sitting out their ignition interlock requirement. (App. 9). The revised statute provided for the operating restriction to begin immediately when the order was imposed and for the minimum length to run from the date of licensure. The State's argument is

consistent with the new statute, but not with the law as it existed in 2015. Wis. Stat. § 343.301(2m) (2019).

At the time of Caldiero's sentencing for the second offense, the statute permitted the sentencing court to order "the installation of an ignition interlock device under sub. (1g)(am)1, immediately." Wis. Stat. § 340.301(2m) (2013-14). The plain language of the statute permitted a trial court to set the length of the order to which a defendant would be subject to the order and permitted the trial court to determine when the order would begin. In this case, the trial court set the length of Caldiero's ignition interlock term at thirteen months and ordered it to begin immediately.

Therefore, from the date that the thirteen months had run, in October of 2016, until Caldiero was arrested in this case (without having had a license reinstated), Caldiero was not subject to any requirement to have an ignition interlock device installed on his vehicle. That is consistent with the plain language of the statute.

The State's argument belies the common-sense application of the statute. Under the State's interpretation, the trial court ordered Caldiero to be subject to a restriction of his driving privileges, i.e., that Caldiero was prohibited from driving without an ignition interlock device during the thirteen months following his sentencing hearing but was not yet subject to a restriction of his driving privileges pertaining to the ignition interlock requirement.

Furthermore, the State relies upon no legal authority for its position. Furthermore, the plain language of the statute does not support the State's argument. Rather, the plain language of the statute clearly provides for the trial court to determine two things back in 2015: how long a defendant would be subject to an ignition interlock order and when it would begin. In this case, the judge ordered that Caldiero's ignition interlock order began immediately at the time of sentencing and ran for a period of thirteen months.

Caldiero maintains that under the legislative authority that existed in 2015, he was subject to the requirement to install an ignition interlock device (and was subject to the restricted prohibited alcohol concentration) immediately when he was sentenced on September 21, 2015, and, expiring in 2016. The statute did not provide for a continuance of the ignition interlock order beyond the time period specified by the trial court. Alternatively, if the restriction on his operating

privilege did not begin immediately when he was sentenced, then it never began because he was never issued a license, pursuant to sec. 343.301(2m) (2015).

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

The State concedes that from the moment Caldiero was arrested on January 11, 2019, until he was released on the probation hold on January 24, 2019, that Caldiero was held in connection with this case. (State's Br. At p. 9). The State acknowledges that the probation hold (from January 11, 2019, to January 24, 2019) was resulting from the arrest related to the charges in this case. Therefore, Caldiero should be granted an additional ten days of credit.

The State asks this Court to reject the Supreme Court's holding in *State v. Beets. State v. Beets*, 124 Wis. 2d 372, 380, 369 N.W.2d 382, 386 (Wis. 1985). In *Beets*, the Supreme Court clearly held that when a defendant is held on both current charges and a supervision hold related to those current charges, that the defendant is held in connection with both cases. *Id.*

However, the State asks this Court to find that if the defendant is later revoked on the hold, that the revocation itself breaks the tie warranting sentence credit to be granted toward the current charges. That argument is in direct contrast to the Supreme Court's rationale and holding. Therefore, Caldiero asks this Court to reject that argument.

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. Caldiero has shown, and the State agrees, that he was held in connection with this case when he remained in custody on a probation hold on January 14, 2019, to January 24, 2019. Therefore, he is entitled to the additional ten days of credit.

The State argues that the trial court "generally" would have intended to order this case consecutive to the earlier case. The State argues that the trial court was prohibited from ordering the sentence in this case to be consecutive to the revocation case because the case was served. Caldiero disagrees. Nothing permitted the trial court from ordering that this case was consecutive to any other sentences, thereby removing dual credit from being applicable in this case.

However, at the time of sentencing, the trial court was silent about whether this sentence was consecutive or concurrent to any other sentence. Nothing in this record supports a finding that the trial court intended the sentence to be consecutive. The State did not advocate for a consecutive sentence and the trial court did not specify a desire about the same. Therefore, by default, the sentence in this case is concurrent to any other sentence.

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: January 31, 2022.

Respectfully submitted,

Electronically Signed by Erica L. Bauer

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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 1,712 words.

Signed and dated: Monday, January 31, 2022.

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