

**COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT IV
Appeal No. 2013AP1345-CR**

**State of Wisconsin,
Plaintiff-Respondent,**

v.

**Andrew M. Obrieht,
Defendant-Appellant.**

BREIF AND APPENDIX OF PLAINTIFF—APPELLANT

**APPEAL FROM THE ORDER ENTERED June 4th 2013 IN THE CIRCUIT
COURT OF DANE COUNTY
The Honorable William E. Hanrahan, Presiding
Trial Court Case No. 1998CF271**

Respectfully submitted:

ANDREW OBRIEHT #338265—Unit 10
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ISSUE PRESENTED

1. MAY PRE-SENTENCE CREDIT BE APPLIED TOWARD A TERM OF PAROLE SUPERVISION?

Trial Court Answered: Yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Obrieht does not request oral argument because this case may be resolved by briefing well-established legal principles to the facts of this case. Publication is requested to prevent reoccurrence.

STATEMENT OF THE CASE AND FACTS

Obrieht's request for sentence credit derived from pre-sentence credit Obrieht should have received toward his prison sentence served on Dane County Case No. 98CF000271 from April 2001 through March 2011 prior to his release on parole. Obrieht was released to parole status March 23rd 2011, but was taken into custody on September 23rd 2011 regarding allegations he violated his parole. The DOC refused to give Obrieht the proper credit. Obrieht moved the circuit court for sentence credit pursuant to §973.155(1) by motion filed August 27th 2012. R: 267. A hearing was held on the motion February 1st 2013 where circuit court granted Obrieht's request for 107 days sentence credit. R: 269. Assistant District Attorney Robert J. Kaiser appeared on behalf of the State and agreed Obrieht was entitled to the 107 days sentence credit for pre-sentence custody regarding Dane County Case No. 98CF000271. On February 5th 2013, the circuit court Forwarded an amended Judgment of Conviction to the Kettle Moraine Correctional Institution (KMCI) indicating, **"IT IS ADJUDGED that 107 days sentence credit are due pursuant to §973.155, Wisconsin Statutes."** R: 270. On March 18th 2013, Martin (KMCI records supervisor) sent a letter to the circuit court arguing it was her "interpretation of the law" that the 107 days sentence credit ordered by circuit court should be applied to Obrieht's term of parole when he is released, rather than his current term of re-incarceration time on count one in Dane County Case No. 98CF000271. R: 2271. By letter dated March 20th 2013, Obrieht argued it was not fair or equitable to apply time he spent in custody toward a period of parole. By informal writing on a letter from Obrieht dated March 20th 2013 circuit court wrote, "DOC interpretation of the law in correspondence dated 3/18/13 is correct." R: 272. By letters dated April 8th 2013 and March 17th 2013(a typographical error, it should have read April 17th 2013), Obrieht stated local and court of appeals authority why his pre-sentence credit, should be applied to the confinement portion of his remaining sentence. R: 273-74. By informal writing on a letter from Obrieht dated March 17th 2013 (a

typographical error, it should have read April 17th 2013), circuit court wrote, “Pegues case did not involve parole revocation issue that is presented here. It is not controlling authority.” R: 274. The circuit court did not address Dane County Judge Berz’s decision in the *Waugh* case, nor Obrieht’s request for a transcript of the *Waugh* proceeding or Obrieht’s request for a hearing if the circuit court intended on denying his position. Obrieht moved for reconsideration. R: 276. The circuit court denied Obrieht’s motion for reconsideration by order dated June 4th 2013. R: 277. Obrieht filed notice of appeal. R: 278.

ARGUMENT

1. MAY PRE-SENTENCE CREDIT BE APPLIED TOWARD A TERM OF PAROLE SUPERVISION?

Obrieht spent time confined “in custody” at the Dane County Jail during the applicable dates stated at the February 1st 2013 hearing and in his Motion for Sentence Credit. R: 278. The Wisconsin Supreme Court has recognized that the purpose of §973.155 in providing sentence credit is “to afford fairness” and “ensure that a person not serve more time than he is sentenced.” *State v. Johnson*, 2007 WI 107, at ¶ 37 (2007).

Obrieht’s probation was revoked on count one in Dane County Case No. 98CF271 in 2001. On August 17th 2001, Judge Robert DeChambeau sentenced Obrieht on count one to seven-years in prison consecutive to any other sentences. When revoked in 2001, David H. Schwarz, Administrator of the Division of Hearing and Appeals (or the Assistant Administrator or other designee acting on his behalf) and the DOC, failed to make the proper finding regarding the 107 days sentence credit in the revocation order pursuant to Wisconsin Statute 973.155 (2). Consequently, Judge DeChambeau and Intake at Dodge Correctional Institution (DCI) did not apply the proper earned pre-sentence credit to Obrieht’s sentence in 98CF000271. As a result, Obrieht’s mandatory release date was set at March 22nd 2011. When Obrieht’s parole was revoke in 2001, he should have received 107 days sentence credit for the days spent in custody prior to sentencing on count one in 98CF271. Had the proper sentence credit finding been made on the revocation order and warrant or by the court, the 107 days sentence credit pursuant to §973.155(2) would have been computed and adjusted pursuant to 302.11 by the DOC to include 36 days for a total of 143 days off the March 22nd 2011 mandatory release. Therefore, Obrieht should have been released on or about November 1st 2010, not March 22nd 2011.

While the unrightfully served 143 days can be mended by applying the 143 days to Obrieht’s re-confinement now, Martin, without relying on any controlling authority, but rather her preference (a “long standing administrative practice”) feels time Obrieht served in custody should be credited toward time he will serve on parole in the future, which makes no sense. Martin’s “interpretation of the

law” does not comport with fairness and will require Obrieht to serve 143 days more than sentenced by the Court. Obrieht was released on parole March 22nd 2011 (after spending 143 days too much in custody) and his parole was revoked again September 23rd 2011. The Legislature was careful to ensure an offender always received the credit he was due when they wrote §973.155(5), which provides, “Upon proper verification of the facts alleged in the petition (the February 1st 2013 hearing), *this section should be applied retroactively to the person. ... This section applies to any person, regardless of the date he or she was sentenced*”. So, the credit can be applied now retroactively, which is the only way to “to afford fairness” and “ensure that a person not serve more time than he is sentenced.” Johnson, Supra.. If the 143 days is not retroactively applied toward Obrieht’s re-confinement time, he will be forced to serve more time in prison than what he was sentenced, i.e., false imprisonment and cruel and unusual punishment contrary to the Wisconsin and U.S. Constitutions.

Obrieht relied on the clear holding in *State v Pegues*, 2011 WI App. 19, 331 Wis. 2d 486, 795 N.W. 2d 62, as an authority which, at Head Note 2 held, “Pursuant to the express language of Wis. Stat. § 973.155(1)(a) (2007-08), a convicted defendant is entitled to credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which the sentence was imposed. By its terms, § 973.155(1) (a) provides for credit toward the service of a sentence. Within the meaning of § 973.155(1) (a), a sentence to which credit can attach requires *confinement or incarceration*.” Exhibit F 3. In response the circuit court scribbled on the letter, “PEGUES CASE DID NOT INVOLVE PAROLE REVOCATION ISSUE THAT IS PRESENTED HERE. IT IS NOT CONTROLLING AUTHORITY.” R: 274.

However, Obrieht’s position on *Pegues* was correct, irregardless of whether Pegues was on extended supervision and Obrieht was on parole, the *Pegues* holding on the meaning and intent of § 973.155 is what is important. In harmony with the *Pegues* ruling, legislative authority § 973.155(3) is clear on this issue, “The credit provided in sub. (1) or (1m) shall be computed as if the convicted offender has served such time in the institution to which he or she has been sentenced.” It speaks of an institution to which Obrieht has been sentenced (KMCI), nothing about parole. Accordingly, the credit the circuit court ordered regarding Obrieht’s request pursuant to §973.155(1) must be construed by Martin as directed by the Legislature, i.e., “as if the convicted offender has served such time in” KMCI, and it must be applied toward Obrieht’s re-confinement time as a matter of fairness and to assure Obrieht receives the credit for time he served in custody.

CONCLUSION

Based upon the foregoing, Obrieht respectfully moves this Honorable Court to reverse the circuit court's decision and order the department of corrections to apply 143 days credit to his current term of confinement.

CERTIFICATION

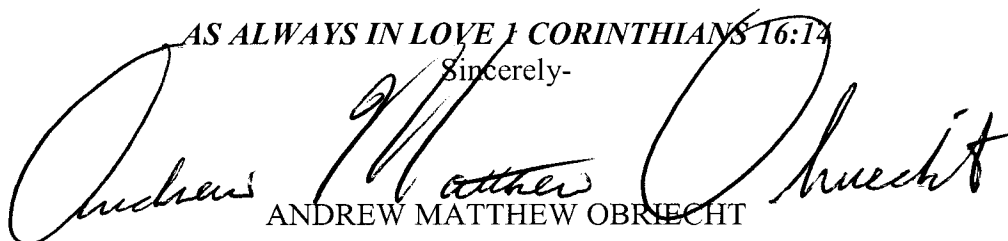
Pursuant to section 809.19(8)(d), Stats., I certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a document produced with a proportional font. The length of this brief is 1,500 words.

CERTIFICATION OF MAILING

I certify that I deposited this brief and appendix in the United States mail on July 30th 2013 for first-class, postage paid delivery to:

Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688
(five copies)

Mr. Gregory M. Weber
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AS ALWAYS IN LOVE 1 CORINTHIANS 16:14
Sincerely-

ANDREW MATTHEW OBRIEHT

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Circuit Court Order dated June 4th 2013