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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREW MATTHEW OBRIECHT,

Defendant-Appellant.

REPLY BREIF OF DEFENDANT—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:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ISSUE PRESENTED

1. THE CIRCUIT COURT DID NOT PROPERLY DENY OBRIECHT RELIEF BECAUSE THE DOC'S INTERPRETATION OD SENTENCE CREDIT IN A REVOCATION CASE IS INCORRECT.

The State contends that it is fair and legal for the DOC to inadvertently not give Obriecht the 107 days credit for time he spent in custody in prior to revocation of his probation on count one of 98CF271 back in 2001. The State relies on Wis. Stat. § 302.11 (7)(b) for it's position that time that should have been given to Obriecht back in 2001 should now be taken off his future parole time rather than his current re-confinement after revocation of parole.. The State's application of Wis. Stat. § 302.11 was incomplete. It completely overlooked Wis. Stat. § 302.11 (7) (am).

All parties agree, prior to sentencing after revocation in 2001 on count one, Obriecht spent 107 days in custody and that the circuit court properly awarded that credit in this case by amended judgment of conviction dated February 5th 2013. (267, 269, 270). Therefore, Wis. Stat. § 302.11 (7) (b) required the DHA to "determine the amount of re-confinement time that was appropriate when it revoked Obriecht's parole" in 2012. (State's Brief, page 5). Then Wis. Stat. § 302.11 (7) (am) required the DHA to impose that necessary time, "less time served in custody prior to parole" and "the revocation order shall provide the parolee with credit in accordance with ...973.155." So, the DHA was required to give Obriecht the time they felt he needed to be re-confined for the infractions of his parole, less the time he previously spent in custody prior to parole. It is clear the time he spent in custody prior to the 2001 sentencing after revocation was "time served prior to parole." The fact the DHA did not properly put in on the revocation order in 2001 does not mean they should not have done so when he was revoked again in 2012.

As Obriecht pointed out in his opening brief 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 then he is sentenced." ***State v. Johnson,*** 2007 WI 107, at ¶ 37 (2007). Appellant's Brief at page 2. Obriecht should not have had to spend that extra 107 days in prison because the DHA made a mistake in 2001 by not including the credit in the revocation order. If the 107 days is taken off Obriecht's parole term, not his confinement time, he will have served 107 days more than he was sentenced by the circuit court and DHA. The State has not refuted this point on appeal and has conceded it.

Obriecht also correctly pointed out that Wis. Stat. § 973.155 (2) required the DHA, "In the case of revocation of ... parole ... shall make the [sentence credit] finding, which shall be included in the revocation order." They did not do this

back in 2001, so Obriecht correctly asked the circuit court to apply the time under Wis. Stat. § 973.155 (5) which provides, "If this section has not been applied...to any person who is on probation,...parole, [back in 2001] the person may petition the department to be given credit under this section. Upon proper verification of the facts alleged in the petition, **this section shall be applied *retroactively* to the person.** If the department is unable to determine whether credit should be given, or otherwise refuses to award credit, the person may petition the sentencing court for relief. *This subsection applies to any person, regardless of the date he or she was sentence.*"

So, when the DHA did not correctly apply the proper credit upon his 2001 revocation in the revocation order, which he did not notice until February 2013, and Obriecht petitioned the sentencing court for relief, which was granted, and "regardless of the date" Obriecht "was sentenced" the credit "must be applied retroactively." That is, the DHA according to Wis. Stat. § 302.11 (7) (am) was required to impose that necessary time, "less time served in custody prior to parole" and "the revocation order" should have provided Obriecht "with credit in accordance with ...973.155." Again, when Obriecht was revoked in 2013, the DHA did not apply the 107 days he "served in custody" prior to the revocation of his parole. Obriecht spent the 107 days in custody prior to parole and the application of said credit is retroactive.

The State did not refute on appeal Obriecht's recognition that, "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 Obriecht'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." Appellant Brief page 3. The State has conceded Obriecht's position that the 2001 sentence credit can be applied retroactively regardless of the date of sentencing by the court or DHA. The State has not put forth one iota of law for the position that Obriecht's sentence credit cannot be applied retroactively to his current term of confinement.

Besides, the State could not contend with the persuasive authoritative position Obriecht cited, so they ignored it in their brief and have conceded it:

> 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***." 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, Obriecht's position on ***Pegues*** was correct, irregardless of whether Pegues was on extended supervision and Obriecht 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 Obriecht has been sentenced (KMCI), nothing about parole. Accordingly, the credit the circuit court ordered regarding Obriecht'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 Obriecht's re-confinement time as a matter of fairness and to assure Obriecht receives the credit for time he served in custody.

Appellant's Brief page 3. The State has conceded the credit must attach to Obriecht's current re-confinement time and that ***Pegues*** is the persuasive, although not precedent authority on the issue. The State has conceded, when credit is awarded, as it was here, it must be computed "retroactively" "as if the convicted offender has served such time in the institution to which he or she has been sentenced (KMCI)."

2. THE STATE'S MARCH 18TH 2013 LETTER WAS NOT PROPERLY BEFORE THE COURT.

After the circuit court heard arguments from the State and Obriecht and issued its order and granted 107 days sentence credit, the DOC wrote the court a letter arguing the credit should not be applied toward his confinement after re-incarceration, but rather should be applied toward his parole term. (271). The DOC disguised their argument of law and fact (i.e., practicing law without a license) as a request for clarification of a sentence.

The circuit court should have declined to award the DOC by agreeing with its erroneous interpretation of the law because their request was not properly before the court. The State and Obriecht had an opportunity to present their arguments to the court. The DOC's cloaking its legal argument as a request to clarify the sentence is not persuasive when the State was already before the court precisely because Obriecht requested credit toward his confinement. Moreover, if the DOC wants to make legal arguments, they should have had the A.D.A. do it who is licensed to practice law. The State's failure to present the argument that their interpretation of the law requires Obriecht to receive the credit toward his parole, rather than his current confinement time was not properly before the court. Obriecht should be awarded credit toward his current confinement time.

3. IF THE STATE'S POST-HEARING LETTER IS RIPE FOR REVIEW, SO IS OBRIECHT'S.

The State argues that Obriecht's position concerning receiving an additional 43 days was not properly before the court since he raised it in letters after the circuit court issued its decision to award him 107 days. However, if the court deems the State's arguments concerning application of the 107 days properly before the court, it should deem Obriecht's properly before the court also.

The DOC was compelled by statute to apply one-third credit to an after 1984 but prior to 1999 sentence for a crime under Wis. Stat. 302.11(1) when the credit was in reality suppose to be given at a time when Obriecht was entitled to a mandatory release on the seven year sentence imposed during sentencing after revocation on count one. It was common knowledge, or to be expected, once the court verified Obriecht was entitled to the pre-parole release credit, the DOC would automatically bestow the extra 43 days credit during the sentence computation. The fact the DHA did not give Obriecht the proper sentence credit he was due when he was revoked in 2001 on the revocation order, which would have been adjusted to include the 43 days, does not take away the fact Obriecht should have received it absent that mistake.

Obriecht has now brought the DHA's 2001 mishap to the court's attention and the court awarded the 107 days, which was lawfully pre-sentence after revocation credit that should be computed to include the 43 days. It should not be held to Obriecht's detriment that he gave the DOC the benefit of reasonable doubt, that they would comply with Wis. Stat. 302.11(1) and give him his one-third additional credit.

CONCLUSION

Based upon the foregoing, Obriecht 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 1,875 words.

CERTIFICATION OF MAILING

I certify that I deposited this brief and appendix in the United States mail on October 23rd 2013 for first-class, postage paid delivery to:

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Sincerely-

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