

STATE OF WISCONSIN
C O U R T O F A P P E A L S
D I S T R I C T I I I

Case No. 2015AP2182-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

VS.

STEVEN F. ZASTROW,
Defendant-Appellant.

R E P L Y B R I E F O F D E F E N D A N T - A P P E L L A N T
FROM AN ORDER DENYING MOTION FOR SENTENCE MODIFICATION, ENTERED IN
THE OUTAGAMIE CIRCUIT COURT, THE HONORABLE
MARK J. MCGINNIS, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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STATEMENT ON ORAL ARGUMENT

The Defendant-Appellant does NOT require oral argument, BUT the Defendant-Appellant DOES request PUBLICATION. This Court can as such resolve this appeal by this Defendant-Appellant by applying established Wis. Statutes and legal principals to the facts being presented by this Defendant-Appellant pro se.

REPLY TO THE STATE'S STATEMENT OF FACTS

At State's Paragraph One at Page 1 of the Brief of Plaintiff-Respondent, This defendant-Appellant agrees to the State's overall statement concerning the Outagamie County Circuit Court having sentenced (Me) to a total of Eleven Years of Initial Confinement and Fourteen years of Extended Supervision, from a mix of concurrent and consecutive senetnces, as stated in the State's reference to the noted Outagamie cases at tthe bottom of Page 1, beginning with Case 2002CF1013; and following are 2005CF0284; 2005CF0285; 2006-CF0320 and 2006CF0327.

I Defendant-Appellant does argue that the State is incorrect in its implication that the Outagamie cases except for (2005CF0285) do not pertain to this appeal, because all cases are and were a part of a global plea agreement, and this case does follow the first case I was sentenced to by Hon. Judge Harold Froehlich, being 2002CF1013 and then 2005CF0284 leading to this case in succession, and of which are ALL affected by the WI DOC's Sentence Computation (Defendant-Appellant Issue No. Two). In My Brief.

(I) agree to the State's statement at Paragraph Two at Page 2 as to all Outagamie cases were ORIGINALLY sentenced CONSECUTIVE to the Winnebago County case 2002CF0158.

(I) agree to the State's statement at Paragraph Three beginning at Page 2 and ending at Page 3, in connection with (Defendant-Appellant Issue No. One). In My Brief.

(I) will bring to this Court's attention, that the State left out the additional "facts" that in my Motion to correct or modify my sentence I submitted to Hon. Judge Mark McGinnis ~~ix~~ also addressing the issue of what the Wis. DOC Records Office had done in its new Sentence Computation dated July 30, 2015, in which i had motioned/ requested the Circuit Court to review and submit an order to the Wis. DOC in my favor regarding when my Outagamie Cases were to begin following having my Winnebago case Vacated and reimposed to run CONSECUTIVE to the Non-Vacated outagamie Cases following Wis. Stat. § 973.04(3) and how the Wis. DOC had overlooked Section Three Criteria in Wis. Stat. § 973.04 as applied to me in my case.

The Circuit Denied all Motions, I now appeal.

End of Defendant-Appellant Reply To The State's Statement Of Facts.

**DEFENDANT-APPELLANT'S MOTION FOR LIMITED VOLUNTARY DISMISSAL
OF DEFENDANT-APPELLANT'S ISSUE NUMBER ONE, ONLY**

(I) agree with the State, regarding the difficulty in ascertaining what the trial court may or may not have stated off record in regards to Ct.6 and Ct.7 being intended to run concurrent to Ct.1 in this case, and being that (Issue Number Two) in (My) Appeal before this Court is of greater importance, I therefore motion the Court to grant Voluntary Dismissal of (Issue Number One of My Brief in this Appeal) and to move onto Issue Number Two accordingly.

If the Court does not grant Voluntary Dismissal of Issue Number One, I then as stated above agree with the State, and concede Issue Number One, and move to Issue Number Two hereafter.

ARGUMENT IN REPLY TO THE STATE'S RESPONSE TO ISSUE NUMBER TWO

(I) first reply to the State's incorrect statement at Paragraph Two Page 5 by stating that I argue that the time I spent in custody for my ORIGINAL Winnebago County sentence should not be credited to my new sentence in that case, but to my Outagamie County case instead is incorrect.

I certainly never had argued at any time that I want the time I spent in prison serving the initial confinement portion of Winnebago 2005-CF0158 should be given as credit to this case or to any of my Outagamie cases, that is incorrect by the State's interpretation of my appeal to this Issue Number Two.

I also point out that the State is also incorrect in its reading of what Hon. Judge Barbara Key had done in my Winnebago case in the Courts 3rd Amended Judgment of Conviction and its Order dated on November 20, 2015 in that Amended JOC, being that Judge Key had recognized that I was "DUE" Jail Credit for TIME SERVED from date of arrest (April 06, 2006) through to the date in which I was sentenced by Outagamie County Hon. Judge Harold Froenlich (October 18th, 2006) which as stated on the 3rd Amended JOC totaling 195 days of jail credit under Wis. Stat. § 973.155 (See Exhibit-2).

The State incorrectly believes and argues that I am not entitled to dual-credit by applying what I believe the States believes is the 195 days jail credit to apply that credit to my Outagamie cases, as stated by the State at Paragraph Two Page 5.

Again, I certainly did not and am not arguing that time served AT ANY TIME on Winnebago case 2005CF0158 should in any way be applied to this or any other Outagamie County case I have served or am serving mentioned in this appeal before this Court.

I will ask this Court to note that the State's Only Argument as far as I can tell in relation to arguing against Issue Number Two in my Brief in Support of My Appeal is the Paragraph Two on Page 5 of the State's Brief of Plaintiff-Respondent filed by Ms. Noet.

I argue that the State failed to recognize the fact that I had in fact included in my Motion To Correct And Or Modify Sentence dated August 06, 2015 (See Exhibit 6) beginning at Paragraph Three on Page 1 and continuing through the remainder of that motion, I had argued to Judge McGinnis exactly what the Wis. DOC had done to affect the length of my Outagamie Cases with the new Sentence Computation dated July 30, 2015 that changed my date of release on the outagamie Cases, as well as how the Wis. DOC viewed when exactly I was to have began serving the Outagamie Cases, following the Winnebago Court having Vacated the original sentence that the Outagamie Cases originally had followed consecutively, to the Winnebago Judge then Resentencing the Winnebago Case of Probation with a Stayed and Withheld Prison term to run consecutive to the Outagamie cases.

I argue to this Court that the State has waived argument to Issue Number Two because the State certainly did not present any argument against my situation regarding the Sentence Computation having not applied SECTION 3 of Wis. Stat. § 973.04, and how the Wis. DOC is only applying the what I call is the First Paragraph of Wis. Stat. § 973.04 and ignoring how the "section" applies to me on whether or not I am due jail credit after Judge Key vacated and resented me **consecutively** to the non-vacated Outagamie cases, as stated in the Wis. Statute at Section 3 that I argue applies to me.

I argue that the State has failed to recognize that I argued to the Circuit Court that the Circuit Court had jurisdiction to review what the Wis. DOC had done in its new Sentence Computation dated July 30, 2015 because the Circuit Court had an ability to review when the DOC was stating when I was to begin serving my Outagamie cases, and when I should reach my date of release to (ES) on those same Outagamie Cases it has overall jurisdiction over.

The Jail Credit mentioned is for the period of time I had served in prison from August 25, 2006 through to January 31, 2008 on Winnebago Case 2005CF0158, which the State I argue also has failed to address because the Wis. DOC I argue incorrectly believes that I would receive that jail credit (if) I was ever to be revoked off the withheld and stayed portion of the new sentence Judge Key resented me to.

As i argued in my Brief, Judge Key clearly gave me all the jail credit I am entitled to in the Winnebago Case she presides over, and that time includes time spent in prison from August 25, 2006 through to October 18, 2006, which Judge Key knew that I would not be due any additional jail credit after October 17, 2006 because since she had vacated my original case sentence and reimposed it consecutive to follow my Outagamie Cases, she knew that my Outagamie cases should as such have began on October 18, 2006 which is the date Judge Froehlich had sentenced me. I argue that the State has failed to see and to present argument against the above facts that are documented and presented as Exhibits in this appeal regarding what exactly Judge Kay did in my Winnebago case and what the Wis. DOC had done in the new Sentence Computation and when the DOC was to have began calculating my Outagamie Cases to have began, which I argue is on October 18, 2006 and not January 31, 2008 when following Wis. Stat. § 973.04(3) an dwhat Judge Key reimposed the new sentence to be following my outagamie Cases.

The State I argue seems to believe that I am arguing without Merit the Constitutionality of § 973.04 and § 302.113(4) for the first time after previous motions and appeals I had filed, but I argue the State has failed to not only see, but to recognize that the reason I am arguing that if the DOC Sentence Computation is allowed to stand, and I am made to serve the additional 1-year, 3-months and 13-days beyond my original date of release to (ES) on the outagamie cases, it is then that I argue that § 973.04 is un constitutional as applied to me in this instant case, because Section Three would be ignored as it I argue applies to me, and therefore if allowed to stand would violate my rights under the U.S. 14th Amendment and Wis. Constitution Art. 1 § 8 because I would as i argued in my brief and to the Circuit Court being made to serve more time in prison on the outagamie cases than allowed by law, as I will have served 12 years 3 months and 13 days beyond the 11 years initial confinement I have been sentenced to serve. My 11 years of initial confinement factually ends on January 17, 2017, from 2006, being 2006 plus 11 years bring my release to 2017.

Therefore, I argue that the State has waived argument to Issue Number Two in this Appeal as the State argues Issue Number One and Number Three extensively, but without recognizing what Issue Number Three is factually

pertaining to if the Sentence Computation is allowed to stand and I am made to serve the additional 1 year 3 months and 13 days the Wis. DOC Sentence computation causes to occur.

The State I argue had failed to recognize and argue against is that I am not asking for jail credit from Winnebago case to Be applied to this or any of the other consecutive Outagamie cases, but that my argument is that the Court should order the Wis. DOC to recognize Section Three of Wis. Stat. § 973.04 as to what factually occurred in my Winnebago case and to recalculate my Outagamie cases to have began on October 18, 2006 following the Circuit Courts Judgment of Conviction on each Outagamie case starting with 2002CF1013 and then 2005CF0284, and then 2005CF0285 and so forth as I was sentenced.

I am not asking the Circuit Court nor This Court to grant me any jail credit at all, as the State incorrectly believes, and that is because Judge Key vacated my original prison term in 2005CF0158 and she then reimposed the new sentence Consecutive to the Non-Vacated Outagamie cases, which therefore does not allow me to receive jail credit for the time I served between August 25, 2006 when I entered the DOC on 2005CF0158 and to January 31, 2008 when she vacated that original sentence. Judge Key gave me jail credit that includes the time between August 25, 2006 through October 17, 2006 that i served in prison, as this can be verified by this Court on date I arrived at Dodge Correctional to begin serving the Winnebago case (08-25-2006) and so as shown at Exhibit-2 she gave me 195 days total on the Winnebago case. I have no additional jail credit coming on that case.

As to Issue Number Three, I am putting my belief that this Court will recognize that the Wis. DOC failed to recognize nad apply Section 3 of Wis. Stat. § 973.04 following the action on my Winnebago Case, and that this Court will order the Wis. DOC to recalculate my Sentence Computation on my Outagamie Cases, to have began on October 18, 2006 and not aas the DOC believes is January 31, 2008, and that this Court will make sure I do not serve more time in prison on the Outagamie Cases as allowed by law beyond the 11 years of initial confinement total.

So by placing my belief that this Court will Affirm this Appeal as to Issue Number Two which would thus grant my Motion to Order the Wis. DOC to recalculate my Sentence on my outagamie cases accordingly, I therefore Motion this Court to grant a Voluntary Dismissal of Issue Number Three as argued in my Brief if this Court affirms my appeal as stated above, as there would be no need for the Court to address the arguments I presented in Issue Number Three as they would be null.

If the Court does not affirm Issue Number Two of this appeal, then I withdraw my motion to dismiss Issue Number Three, as I do beleive my argument pertaining to how Wis. Stat. § 973.04 is being applied without regard to Sections 3 in that statute I argue affirms my position concerning the Sentence Computation an dmy date of release to Extended Supervision to be on Jnauary 17, 2017 not May 03, 2018 as it now stands.

I argue that any issue that the State has failed to argue against and or has failed to present argument in opposition of my motion to the Circuit Court and to this Court of Appeals, should be considered as being waived in favor of this Defendant-Appellant.

I argue that the issue of the Action of the Wis. DOC and how my Sentence Computation directly affects the length of time I am to serve in prison on the Outagamie cases was not present in any previous appeal before this court, and that this appeal has merit for the Court to hear and order its decision upon what has occurred on both my Winnebago Case and outagamie cases, and that I certainly had no idea what the Wis. DOC would do to change my date of release on my Outagamie cases until after I received the Sentence Computation July 31, 2015 as I did.

I believe that Judge McGinnis should have heard the Motion regarding the Wis. DOC Sentence computation, but he refused, and so I appear before this Court to please review what occurred and so forth.

I was hoping that Wis. SPD Attorney joseph Ehmann would assist with this appeal to Issue Number Two, as he did tell me on 11-19-2015 I was in fact correct, and the DOC is ignoring Section 3 of 973.04. But he has

chosen to ignore my rights on not serving more time than allowed by law and to back up his agreement to my argument against the DOC.

FINAL ARGUMENT IN SUPPORT OF DEFENDANT-APPELLANT'S MOTION REGARDING
THE WI DOC'S SENTENCE COMPUTATION DATED 07/30/2015

(I) argue that the Wis. Statute under Section 3 of 973.04 is clear when it states "An Offender is NOT entitled to additional credit under this section when:

- 1) The vacated sentence was originally imposed concurrent to a separate sentence;
- 2) The separate sentence is not vacated;
- 3) **The Vacated Sentence Is Reimposed Consecutively to the Non Vacated Sentence,** and
- 4) The time that the defendant requested was served in _____ of the sentence that was not vacated.

I argue that Section 3 above applies to me, as it is clear that Hon. Judge Barbara Key had Vacated my original sentence in 2005CF0158, and that she then reimposed a sentence of probation with a withheld and stayed prison term and (ES) term that was to run Consecutive to the Outagamie County Cases...which the Outagamie cases certainly were not and are not vacated.

I argue that I am not due jail credit beyond the 195 days jail credit that Judge Key gave me on 11-19-2015 after reviewing the DOC sentence computation and calculating my actual days I am to be given credit for on her case...up to the date my Outagamie cases are to begin, which as shown on the Outagamie JOC's of October 18, 2006 and not 01/31/2008 as the DOC incorrectly believes stemming from not applying Section 3 of 973.04, as the DOC only recognizes the Statute of 973.04 but not the sections that I argue applies to me in this case at hand.

I argue that I originally had a 13 year combined term of prison with both the Winnebago and Outagamie cases, and when Judge Ket vacated my Winnebago case that dropped down my total prison term to only the

eleven years to serve on my outagamie cases, and IF i am made to serve the additional 1 year 3 months and 13 days beyond January 17, 2017 as the Wis. DOC is trying to make me serve, would be outside the law for I will have served a total of 12 years 3 months and 13 days which is incorrect and unlawful.

I argue under State v. Lamar, 2011 WI 50, 334 Wis.2d 536, 799 N.W.2d 758, 2011 Wisc. LEXIS 341 at:

HN1 it clearly states that as applied to me, Section 3 does apply to me following the action of Judge Key that affects my sentence computation but not for the Wis. DOC to extend my period of imprisonment that causes me to serve more time than allowed by law and statutes of Wis.

I argue further that HN3 applies, as Statutory interpretation is a question of law that a reviewing court reviews de novo. I argue that this Court is the reviewing court in this appeal, and I have faith that this Court will interpret Section 3 of Wis. Stat. § 973.04 to factually apply to me in this case.

I argue that HN4 and HN8 as well as HN9 in State v. lamar also has merit in this appeal before this Court as applied to my case and the issue of application of Section 3 of 973.04 and how it affects the length of my prison term to serve on my Ouatgamie cases.

The difference between State v. lamar and my case is that Judge Key in my case reimposed the new sentence consecutive to my non vacated Outagamie cases.

I argue that Wis. Stat. § 973.155(1)(a)3 or 973.155 does not apply to me, as that statute applies to credit for custody while the offender is waiting imposition of sentence after trial. I certainly argue that that statute does not apply to me in this case, but the Wis. DOC I argue incorrectly refers to that statute. My original sentence was vacated and reimposed consecutively, 973.155 I argue does not apply in this case.

CONCLUSION

I ask the Court to AFFIRM my appeal as to Issue Number Two, and for this Court to use its Authority to instruct and or order the Wis. DOC to apply Section Three of Wis. Stat. § 973.04 on my Outagamie County Cases, and thereafter recalculate my outagamie County cases, beginning with 2002CF1013 and all following cases including this case, to begin on the date of sentencing of which was October 18, 2006.

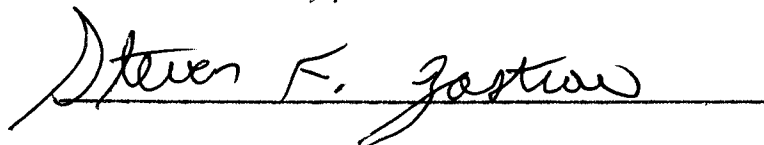
I ask this court to let the Wis. DOC know that my Winnebago case was Vacated and reimposed Consecutive to my outagamie cases of which were not Vacated, which then Section 3 of 973.04 applies to my sentence calculation and so forth.

I ask this Court to instruct the Wis. DOC that my date of release to (ES) on my Outagamie Cases should revert back to 01/17/2017 as it was, and that as it stand will result in this offender serving more time in prison on my Outagamie cases than allowed by law.

I believe this Court can render its Opinion on instruction to the Wis. DOC as this Court is the reviewing Authority over my Outagamie Cases, and review of what Judge Key did in my Winnebago case that shortened my total combined length of imprisonment.

I am pro se, and ask this Court to please carefully review all that occurred and how Section 3 of 973.04 does apply to me in this case, and to affirm my appeal.

Most sincerely,

A handwritten signature in cursive script, reading "Steven F. Justice", is written over a horizontal line.

Dated this 7th day of November, 2016