COURT OF APPEALS
DECISION
DATED AND FILED

February 18, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-1105-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

PAUL E. MAGNUSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Reversed.*

Before Eich, Deininger and Vergeront, JJ.

EICH, J. Paul Magnuson was convicted of several security-fraud offenses and sentenced to eight years in prison. He appeals from an order denying his postconviction motion for credit against his sentence for the period of time in which he was subject to a signature bond containing several conditions, including electronic monitoring. He claims these conditions were so restrictive of his

freedom as to constitute "custody" within the meaning of § 973.155(1)(a), STATS., thus entitling him to sentence credit.[1] We agree and reverse the order.

Magnuson was initially charged with eight counts of securities fraud, and bail was set at $12,000 per count. He was unable to post bond and remained in the Dane County Jail. He eventually moved for modification of his bail and the court granted the motion, releasing him on $10,000 signature bonds on each count. The bonds contained several conditions which required Magnuson to: (a) reside with Rev. John and Julie Clark, and to be continually present in their home between the hours of 7:00 p.m. and 7:00 a.m. every night;[2] (b) participate in drug and alcohol treatment and submit to random urinalysis; (c) surrender his passport; (d) have no contact with named victims; (e) refrain from using or possessing alcohol, illegal drugs or drug paraphernalia; (f) make all court appearances; (g) commit no new crimes; (h) remain within Dane County; and (i) participate in the County's bail monitoring program.

Persons participating in Dane County's bail monitoring program are required to wear an electronic ankle bracelet which, during "curfew" hours, transmits information as to the person's whereabouts to a monitoring officer every sixteen seconds. Participants also must submit to random urinalyses and are required to meet with a program officer once a week. Magnuson remained out on the signature bonds for six months, from June 12, 1996 until December 12, 1996. At that time, after Rev. Clark had informed the program officer that he was no longer agreeable to having Magnuson reside in his home, the court revoked the

[1] The statute provides in relevant part that "[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."

[2] Magnuson's "curfew" was later extended to 9:30 and 11:00 p.m. on various days to permit him to attend church and counseling sessions.

signature bonds and reinstated cash bail. Unable to post the required bail, Magnuson was returned to the Dane County Jail.

The charges against Magnuson were eventually plea-bargained. He pled no contest to one count of making misleading files regarding securities and two counts of fraudulent sale of securities (party to the crime) and, as indicated, was sentenced to eight years in prison. He was given credit against that sentence for 229 days he had spent in jail prior to execution of the signature bonds, and after their revocation. He filed a postconviction motion seeking a modification of his sentence, as well as additional sentence credit for the time he spent out of jail on the signature bonds. The motion was denied, and Magnuson appeals that portion of the court's order denying his sentence-credit request.

Magnuson argues that he is entitled to credit because the conditions of his bail were so onerous as to render him "in custody" within the meaning of § 973.155(1)(a), STATS., *supra*, note 1. The question is one of statutory construction, and we review the trial court's decision *de novo*. ***State v. Gavigan***, 122 Wis.2d 389, 391, 362 N.W.2d 162, 164 (Ct. App. 1984).

We look to the escape statute, § 946.42(1)(a), STATS., to determine whether a person is "in custody" for sentence-credit purposes. *See* ***State v. Gilbert***, 115 Wis.2d 371, 378-79, 340 N.W.2d 511, 515-16 (1983). That statute provides in part:

> "Custody" includes without limitation actual custody of an institution, including a secured correctional facility, as defined in s. 938.02 (15m), a secured child caring institution, as defined in s. 938.02 (15g), a secure detention facility, as defined in s. 938.02 (16), a Type 2 child caring institution, as defined in s. 938.02 (19r), or a juvenile portion of a county jail, or of a peace officer or institution guard and constructive custody of prisoners and juveniles subject to an order under s. 48.366, 938.183, 938.34 (4d), (4h) or (4m) or 938.357 (4) or (5) (e) temporarily outside the institution whether for the purpose of work, school,

> medical care, a leave granted under s. 303.068, a temporary leave or furlough granted to a juvenile or otherwise.

In denying Magnuson's request for credit, the circuit court relied on ***State v. Pettis***, 149 Wis.2d 207, 441 N.W.2d 247 (Ct. App. 1989), where we concluded the defendant was not entitled to sentence credit for time spent on "home detention" as a condition of his signature bond. The bond required Pettis to remain at home during all hours in which he was not at work or receiving treatment; and while Pettis was not wearing an electronic monitoring device, as Magnuson was, he was, like Magnuson, monitored by a program officer. Looking to the definitions in the escape statute to determine whether the restrictions entitled Pettis to sentence credit, we concluded that they did not.[3]

The trial court considered ***Pettis*** to be "right on point," and concluded that if Pettis's restrictions did not constitute custody for sentence credit purposes, neither did Magnuson's.

> Even though [Pettis] could suffer consequences for violating home detention, the restrictions on his movements did not constitute custody, and I think the same is true here unless the Court of Appeals thinks the fact that Mr. Magnuson was on Electronic Monitoring overnight, somehow escalates the degree of confinement. In some respects Mr. Magnuson's confinement was less than Mr. Pettis's, because ... he was free to do whatever he

[3] In so deciding we stated that Pettis had failed to show that he had been "locked in at night or otherwise confined," or that he was "physically detained by an institution." ***State v. Pettis***, 149 Wis.2d 207, 211-12, 441 N.W.2d 247, 249-50 (Ct. App. 1989) (internal quotations omitted). The quoted language is taken from our decision ***State v. Cobb***, 135 Wis.2d 181, 185, 400 N.W.2d 9, 11 (Ct. App. 1986), where, referring to the supreme court's statement in ***State v. Schaller***, 70 Wis.2d 107, 111, 233 N.W.2d 416, 418 (1975), that the escape statute defines custody as a "limitation of either imprisonment or physical detention," we said that "[t]herefore, custody depends upon physical detention by an institution, institution guard or peace officer." In a more recent case, ***State v. Collett***, we considered the "custody-as-physical-detention" inquiry to be the equivalent of an analysis of the restrictions actually placed on the defendant's freedom in a given case to determine whether they equate with "being under the State's control for a substantial period of time." ***Id.,*** 207 Wis.2d 319, 325, 558 N.W.2d 642, 645 (Ct. App. 1996).

> wanted during the nonnight hours, whereas Mr. Pettis could only go out to go to work and still wasn't found to be in custody.

Magnuson argues that the restrictions in ***Pettis*** were much less severe than his own, and he says that when we consider his situation under the guidelines set forth in ***State v. Collett,*** 207 Wis.2d 319, 558 N.W.2d 642 (Ct. App. 1996)***,*** we must conclude that he was indeed "in custody." We said in ***Collett*** that the custody determination must be made in each case based on an evaluation of the restrictions placed on the defendant's freedom by the particular program, and that a person may be said to be in custody for sentence-credit purposes if those restrictions infringe upon his or her freedom to such a degree that they are the "functional equivalent of confinement," and "equate with being under the State's control for a substantial period of time." ***Id.*** at 325, 558 N.W.2d at 645. We agree that ***Collett*** requires a case-by-case analysis in sentence-credit cases; and that, under ***Cook v. Cook***, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997), we may not overrule or modify our prior published decisions. We believe, however, that a bright-line rule—at least in cases where credit is sought for time spent under electronic monitoring—would better serve the administration of justice at both the trial and appellate levels. Such a rule, whether granting or denying credit in such instances, would relieve the trial courts of the burden of having to make the type of detailed, balancing analyses required by ***Collett*** in sentencing proceedings—where such requests have become routine, and are normally interposed at the hearing's conclusion.

In this case, for example, a restriction-by-restriction comparison of the conditions imposed on Magnuson's release with those imposed on the defendant in ***Pettis*** seems a cumbersome method of resolving the issue—

particularly for the trial court at sentencing. While the defendant in ***Pettis***, like Magnuson, was monitored by a program officer, he was not subject to electronic monitoring. Unlike Magnuson, Pettis was confined to his home during all non-working hours; and, by his own description, was "not free to attend church, grocery shop, travel to friends' homes, go to the dentist or doctor, assist his family members or otherwise engage in tasks and occurrences which are commonly taken for granted." Brief of Defendant-Appellant at 10, ***State v. Pettis***, No. 88-1138-CR. (Magnuson, as indicated, was confined to the Clarks' home, at a minimum, only between the hours of 7:00 p.m. and 7:00 a.m.) Also like Magnuson, Pettis was subject to monitoring at his home by random telephone calls from the program officer to confirm his presence. Magnuson, however, was not confined during "curfew" hours in his own home, as Pettis was, but in the home of Rev. Clark. More importantly, we think, his whereabouts during that time were electronically monitored every sixteen seconds. And while, again unlike Pettis, who could leave his home only to attend his job, there were few restrictions on Magnuson during those times between 7:00 a.m. and 7:00 p.m. when he was not at work (he couldn't leave the county, possess or use non-prescription drugs, contact witnesses, or commit new crimes). We think the every-sixteen-second electronic monitoring of his nighttime whereabouts, when considered in light of the other restrictions on his freedom, were the "functional equivalent of confinement," in that they were "so substantial as to amount to being locked in at night or its equivalent." ***Collett***, 207 Wis.2d at 325, 558 N.W.2d at 645.[4]

[4] The State points to another case, ***State v. Harris,*** 168 Wis.2d 168, 483 N.W.2d 808 (Ct. App. 1992), as one in which we denied sentence credit on facts more onerous than those in either ***Pettis*** or the instant case. The case is wholly inapposite, however, for it never considered whether the defendant was "in custody" within the meaning of the escape statute, but only whether § 303.425, STATS., which gives county sheriffs authority to place jail prisoners in "home detention programs"—and states that prisoners who are so released are still "considered to be … (continued)

Based on our independent review of the record and applicable law, we conclude that Magnuson is entitled to credit against his sentence for the time so spent, noting again our preference for a bright-line rule either granting or denying credit for prisoners released on electronic monitoring programs.

By the Court.–Order reversed.

Not recommended for publication in the official reports.

jail prisoner[s]"—was applicable. We held that it was not, since the defendant was not released by a sheriff, but rather by a federal special master pursuant to a consent decree entered in an action contesting overcrowding in the Milwaukee County Jail; and the conditions of his release were set by the special master wholly independent of the § 302.425 home detention program. ***Id.*** at 173, 483 N.W.2d at 810. And we said that "[s]ince Harris's status as a home detainee is not one of a 'jail prisoner,' we need not address … whether a jail prisoner is 'in custody' for purposes of the sentence credit statute." ***Id.*** at 174, 483 N.W.2d at 810.