COURT OF APPEALS
DECISION
DATED AND FILED

June 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3239-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GERALD J. VAN CAMP,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

MYSE, P.J. Gerald J. Van Camp appeals an order denying sentence credit for a period of probation he served on a subsequently reversed false imprisonment conviction toward his current sentence imposed for misdemeanor

battery and trespass to a dwelling convictions.[1] Van Camp contends that the trial court erred when it denied the sentence credit because the two current convictions arose from the same course of conduct as the prior false imprisonment conviction. Van Camp argues that failing to credit his current sentence violates Wisconsin's double jeopardy clause, Wis. Const., art. I, § 8, and sentence credit statute, § 973.155, STATS. Because we conclude that Van Camp's double jeopardy rights have not been violated and because we conclude § 973.155 does not apply to probationary terms, we affirm the trial court's order denying sentence credit.

Van Camp was originally charged with one count of kidnapping as party to a crime. The charge stemmed from allegations that Van Camp participated in forcing Ronald Guerts from his home and into Van Camp's vehicle, and then subjecting Guerts to almost three hours of intermittent physical abuse. An amended information added a second charge of false imprisonment. Van Camp ultimately pled no contest to the false imprisonment count. The kidnapping charge was dismissed and read in for sentencing purposes. On July 21, 1995, the trial court withheld sentence and placed Van Camp on probation for three years. One of the probation conditions included a nine-month jail sentence. Van Camp filed a motion for postconviction relief, which the trial court granted. The court then stayed the jail sentence and released Van Camp on a signature bond. The court did not, however, stay the probation supervision.

Van Camp moved to withdraw his no contest plea, but the trial court denied the motion. The court of appeals affirmed in an unpublished decision, and Van Camp sought supreme court review. On October 23, 1997, the supreme

[1] This opinion is by a three-judge panel pursuant to the court's March 22, 1999, order.

court, in ***State v. Van Camp***, 213 Wis.2d 131, 569 N.W.2d 577 (1997), reversed and remanded with directions to allow Van Camp to withdraw his no contest plea. The decision also discontinued Van Camp's probation supervision, which had commenced July 21, 1995.

When the case returned to the trial court, the parties entered into another plea agreement whereby Van Camp would plead no contest to amended charges of misdemeanor battery, contrary to § 940.19(1), STATS., and misdemeanor criminal trespass to a dwelling, contrary to § 943.14, STATS. The trial court accepted the no contest pleas to the amended charges and withheld sentence, ordering two years of concurrent probation on each count. One of the probation conditions was a four-month jail sentence. Van Camp then filed a motion seeking sentence credit for the time he served on probation supervision between July 21, 1995, and October 23, 1997, toward the probation term imposed on his current convictions. The trial court denied sentence credit, and this appeal ensued.

Van Camp first contends that the sentence credit denial violated his constitutional right to protection against double jeopardy under art. I, § 8, of the Wisconsin Constitution. Whether an individual has twice been placed in jeopardy in violation of art. I, § 8, is a question of law we decide independently. *See* ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992) (citing ***State v. Kramsvogel***, 124 Wis.2d 101, 107, 369 N.W.2d 145, 147-48 (1985)).[2]

[2] For purpose of this constitutional analysis, probation is considered punishment. ***State v. Pierce***, 117 Wis.2d 83, 85, 342 N.W.2d 776, 778 (Ct. App. 1983).

The double jeopardy clauses of the federal and state constitutions are the same in scope and purpose, and our supreme court has accepted decisions of the United States Supreme Court as governing on the double jeopardy provisions of both constitutions. *See* ***Day v. State***, 76 Wis.2d 588, 591, 251 N.W.2d 811, 812-13 (1977). The double jeopardy clause precludes multiple punishments for the same offense. ***State v. Lechner***, 217 Wis.2d 392, 401, 576 N.W.2d 912, 917 (1998). This constitutional guarantee requires that punishment already exacted must be fully credited in imposing sentence on a new conviction for the same offense. ***North Carolina v. Pearce***, 395 U.S. 711, 718-19 (1969). This does not mean that whenever a defendant's conviction is reversed and he is convicted and sentenced for a different offense arising from the same incident, he must receive credit for any time served in connection with the earlier invalidated conviction. A defendant may be charged and convicted of multiple crimes arising out of one criminal act when the legislature intends it. ***State v. Kuntz***, 160 Wis.2d 722, 754, 467 N.W.2d 531, 543 (1991). The constitutionality of multiple punishments depends on whether the legislature intended that the violations constitute a single offense or two offenses. ***State v. Gordon***, 111 Wis.2d 133, 137, 330 N.W.2d 564, 567 (1983).

The scope of double jeopardy protection depends upon the meaning of the words "same offense." ***Sauceda***, 168 Wis.2d at 492, 485 N.W.2d at 3. Wisconsin employs a two-part test to determine whether the legislature intended to allow multiple punishments of one defendant for the "same offense" arising from a single course of conduct. *See* ***id***. at 493-94, 485 N.W.2d at 4. The first prong requires that we inquire whether each offense requires proof of an additional element or fact which the other offense or offenses do not require. ***Id***. Only this first prong implicates the double jeopardy clause. ***Id***. Once it is determined that the

offenses are different in law or fact, double jeopardy concerns are not involved. ***State v. Grayson***, 172 Wis.2d 156, 159 n.3, 493 N.W.2d 23, 25 n.3 (1992).[3]

Whether offenses are different in law is determined by the "elements-only" test set forth in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). Under this test, two offenses are different in law if each statutory crime requires for conviction proof of an element which the other does not require. ***Lechner***, 217 Wis.2d at 405, 576 N.W.2d at 919. In this case, Van Camp was initially charged with false imprisonment. After that conviction was reversed, a plea agreement resulted in charges of battery and trespass to a dwelling. Therefore, we look at the elements of false imprisonment and the elements of battery and trespass to a dwelling to determine whether the offenses are different in law. ***Id***. at 405-06, 576 N.W.2d at 919.

An examination of the elements of these offenses discloses that they are dissimilar in every way and contain no elements that would make them similar to one another. False imprisonment is committed by intentionally confining or restraining another, without the person's consent, knowing there is no lawful authority to restrain him. Section 940.30, STATS. The crime of battery contains none of these elements. A battery is committed by causing bodily harm to another, with intent to cause that harm, and without the consent of the person to be harmed. Section 940.19(1), STATS. The crime of criminal trespass to a dwelling also contains none of the elements of false imprisonment. Criminal trespass is

[3] The second prong of the multiplicity analysis involves inquiry into other factors that would evidence contrary legislative intent. ***State v. Rabe***, 96 Wis.2d 48, 63, 291 N.W.2d 809, 816 (1980). Although not violative of double jeopardy, charging multiple counts may nevertheless be multiplicitous as contrary to public policy if the legislative intent behind the criminal statute indicates that the allowable unit of prosecution should be one count. ***Id***. at 69, 291 N.W.2d at 819.

committed by intentionally entering another's dwelling, without the occupant's consent to enter, under circumstances tending to create or provoke a breach of the peace. Section 943.14, STATS.

Furthermore, the pertinent statutes each requires proof of a fact that the other does not require. Proof of the false imprisonment charge requires a showing that Van Camp restrained Guerts in the vehicle; such proof, however, is not required to establish a factual basis for the battery and criminal trespass to a dwelling charges. Proof of the battery charge requires a showing that Van Camp harmed Guerts; such proof, however, is not required to establish false imprisonment. Proof of criminal trespass to a dwelling requires a showing that Van Camp broke into Guerts' home under circumstances that would tend to cause a disturbance; such proof, however, is not required to establish false imprisonment. Because false imprisonment, battery and criminal trespass to a dwelling are different in both law and fact, they are not the same offense for purposes of the first prong of the double jeopardy analysis. Because double jeopardy concerns are not implicated under the first prong, no further analysis is required.

We conclude, therefore, that because the offenses do not share common elements, double jeopardy does not mandate credit for the time Van Camp spent on probation for the false imprisonment conviction against the sentence subsequently imposed on the battery and criminal trespass to a dwelling convictions.

Next, we consider whether sentence credit must be accorded under § 973.155, STATS., the sentence credit statute. In addition to a double jeopardy analysis, Wisconsin has adopted a statute mandating that credit be given under

certain circumstances. Determining whether Van Camp is entitled to sentence credit under § 973.155 requires application of the statute to undisputed facts, which is a question of law we decide independently. *See* ***State v. Abbott***, 207 Wis.2d 624, 627, 558 N.W.2d 927, 928 (Ct. App. 1996).

Sections 973.155(1)(a) and (b), STATS., provide:

> **(1)** (a) 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. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
> 2. While the offender is being tried; and
> 3. While the offender is awaiting imposition of sentence after trial.
>
> (b) The categories in par. (a) include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold under s. 304.06(3) or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

We conclude, for two reasons, that sentence credit is not mandated under § 973.155, STATS. First, the statute by its unambiguous language requires that credit be given toward *a sentence* for time spent in custody. In this instance, Van Camp's two current convictions resulted in a withheld sentence with two years concurrent probation imposed on each count and, among the probation conditions, four in months jail. Wisconsin has long held that probation or jail time as a condition of probation is not a sentence. ***State v. Maron***, 214 Wis.2d 384, 389-90, 571 N.W.2d 454, 457 (Ct. App. 1997). Thus, because the statute provides

for credit toward a sentence and because Van Camp's current probation term is not a sentence, § 973.155's sentence credit provisions do not apply, and he is not entitled to sentence credit under the statute.

Second, § 973.155(1), STATS., provides credit for time spent in custody. A probationer is in custody only when he is physically detained. *See* ***State v. Cobb***, 135 Wis.2d 181, 185, 400 N.W.2d 9, 11 (Ct. App. 1986). Our supreme court has concluded that a defendant is entitled to sentence credit under § 973.155 for time actually spent in jail as a condition of probation. ***State v. Gilbert***, 115 Wis.2d 371, 380, 340 N.W.2d 511, 514-15 (1983). Here, Van Camp's previous probation on the false imprisonment conviction included jail time as a probation condition. That jail time was stayed, and only the probation supervision remained effective. Because Van Camp was not, therefore, in custody while serving his previous probation term, § 973.155's sentence credit provisions do not apply, and he is not entitled to sentence credit under the statute.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.