

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 20, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-0575-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID A. MORRIS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 HOOVER, P.J.¹ David Morris appeals the circuit court's order denying his motion for sentence credit on his disorderly conduct conviction. Morris claims that because the court ordered the disorderly conduct sentence to be

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

served concurrent with an unrelated sentence, he is entitled to dual credit from the time he was sentenced on the unrelated charge until sentenced on this charge. This court disagrees. Under the rationale enunciated in *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), Morris is not entitled to the credit he seeks. Accordingly, the order is affirmed.

¶2 Morris was convicted upon his no contest plea of disorderly conduct with a repeater sentence enhancement on March 18, 1999. The court withheld sentence and placed Morris on probation for two years with the condition that he serve forty-five days in jail. Morris spent from April 22 to May 5, 1999, in jail on a probation hold.

¶3 Morris was again subject to a probation hold on August 16, 1999, because of criminal conduct in Shawano County. As a result of the new criminal activity, obstructing an officer, he was sentenced in Shawano County to one year in prison on August 23, 1999. His probation on the earlier disorderly conduct conviction was revoked September 29. On November 5, he was sentenced on his disorderly conduct conviction to eighteen months' imprisonment, concurrent with the Shawano County sentence. The court awarded Morris fifty-nine days' credit, consisting of the day after his arrest, the forty-five days imposed as a probation condition, and the thirteen days from April 22 to May 5, 1999. Morris subsequently brought a motion requesting sentence credit from August 23 to November 5, 1999.² The circuit court denied his motion.

² Morris does not question whether he is entitled to sentence credit for the period from August 16 to August 23 while on a probation hold. He was granted credit for that period on the Shawano County conviction.

¶4 Morris contends that because the disorderly conduct sentence was ordered concurrent to the Shawano County conviction, he is entitled to credit on the disorderly conduct charge for the time from August 23 until November 5.

¶5 Sentence credit is a question of law, and an appellate court reviews the circuit court's ruling de novo. *See State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶6 WISCONSIN STAT. § 973.155 governs sentence credit:

(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.

¶7 Morris is in the atypical situation of being convicted and sentenced on the revocation-triggering offense before his probation was revoked and he was sentenced on the original offense. Although no published opinion directly addresses this precise factual situation, the theme underlying Wisconsin appellate decisions informs that Morris is not entitled to the dual credit he seeks.

¶8 In *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984), this court denied dual credit for time spent on one sentence before a later unrelated sentence was imposed and ordered to be served concurrently. Gavigan was arrested for fleeing an officer. *See id.* at 390. After his arrest, he was charged with a robbery he had committed two days before. *See id.* Thirty-nine days after his arrest, he pled guilty to the misdemeanor fleeing charge and was sentenced to sixty days' imprisonment. *See id.* He was later tried and convicted of the robbery charge and sentenced to a three-year prison term to be served concurrently with the balance of the fleeing sentence. *See id.* at 391. This court held that Gavigan was not entitled to presentence credit on the robbery sentence for the time he spent serving the fleeing sentence because the two charges were unrelated. *See id.* at 395.

¶9 In *Beets*, the supreme court held that the time served on a sentence after probation revocation and before sentencing on the revocation triggering offense is not to be credited against the later sentence on the revocation triggering offense. It stated that "it is clear that, unless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges." *Id.* at 383.

¶10 Beets was on probation from drug convictions when he was arrested for burglary. *See id.* at 374. Seventy-eight days after his arrest, and after probation revocation, the trial court imposed a three-year sentence for the drug convictions. *See id.* at 375. One hundred and ninety-two days after sentencing on the drug charges, Beets was sentenced to three years for the burglary, to run concurrently with his drug sentence. *See id.* Beets received only seventy-eight days' credit toward his three-year burglary sentence. The supreme court held that he was not entitled to credit for the 192 days during which he was serving his

sentence on the drug charge because once Beets began serving the drug sentence, his confinement was no longer "in connection with the course of conduct for which sentence [for burglary] was imposed." *Id.* at 378.

¶11 Thus, under *Beets*, a defendant is not entitled to credit for custody while awaiting sentencing when that custody is also satisfying a "sentence" for a different offense. The supreme court explained that the connection between an original offense and a revocation triggering offense is a temporal connection: That there is a relationship, not between the charges, but between the causes of confinement on two separate charges. *See id.* The connection between the separate charges is severed upon sentencing on one of the charges. *See id.* at 383.

¶12 Morris seeks credit for the period of time during which he was serving a prison term of one year for the Shawano County obstruction charge. Whatever connection there was between that case and the present case was severed upon Morris's conviction and sentencing on the Shawano County charge. From that time on, Morris was in prison serving a sentence. As a result, Morris was not then in custody in connection with the course of conduct for which the sentence was imposed within the meaning of WIS. STAT. § 973.155(1)(a).

¶13 That Morris was also awaiting sentencing on the disorderly conduct charge is immaterial, because his freedom from confinement was not in any way related to his disorderly conduct conviction. The court could have sentenced him to time served, and Morris would still have been in confinement. Thus, as in *Beets*, there is no logical reason why credit should be given on the disorderly conduct charge for his service of sentence on a separate crime.

¶14 Nevertheless, Morris contends that because the obstruction and disorderly conduct sentences were concurrent, he is entitled to dual credit for the

period of time between August 23 and November 5. His argument finds no support in *Beets* or *Gavigan*. The sentences imposed in both cases were concurrent to each other.

¶15 Moreover, during the time for which Morris seeks credit, he had not been sentenced on his disorderly conduct conviction. "So-called 'dual credit'—where an offender can receive credit for a single episode of jail time toward two (or more) sentences—will be granted only for *sentences* which are concurrent." *Rohl*, 160 Wis. 2d at 330 (emphasis added). It was not until Morris was sentenced on the disorderly conduct conviction that the two sentences could run concurrently. Accordingly, the order denying Morris sentence credit for the period from August 23 to November 5, 1999, is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

