

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

September 3, 1998

Marilyn L. Graves  
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 § 808.10 and RULE 809.62, STATS.

**No. 97-2572**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CLIFFORD A. FERGUSON,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Adams County:  
DUANE POLIVKA, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

DYKMAN, P.J. Clifford Ferguson appeals from an order denying his post-conviction motions. Ferguson pleaded guilty to one count of sexual contact with a person under the age of thirteen and one count of sexual intercourse with a person under the age of thirteen, contrary to § 948.02(1), STATS. He was

sentenced to prison for six and ten years respectively. The sentence of ten years was stayed, however, and Ferguson was placed on a period of probation to run concurrently with his six-year prison sentence. His probation was subsequently revoked after a violation, and he was placed back in prison to serve his stayed ten-year sentence.

Ferguson argues that the sentencing court lacked authority to impose concurrent terms of imprisonment and probation. We disagree and conclude that the sentencing statutes and case law provide authority to impose probation concurrent with a sentence of imprisonment. Ferguson next contends that because the sentences were ordered to run concurrently, he is entitled under § 973.155(1)(a), STATS., to receive credit toward his ten-year sentence for the time served on his six-year sentence. We disagree and conclude that § 973.155(1)(a) gives a defendant credit only for time served prior to sentencing. Ferguson argues as an alternative that he should receive credit toward his ten-year sentence for time he served prior to sentencing. We agree and direct the trial court to amend the judgment of conviction to reflect a credit of 188 days toward his ten-year sentence. Therefore, we affirm in part and reverse in part.

### **BACKGROUND**

On May 21, 1990, Clifford Ferguson pleaded guilty to having sexual contact and sexual intercourse with his girlfriend's twelve-year-old daughter. He was sentenced to six years in prison for one count of sexual contact with a person under the age of thirteen (count one). Ferguson also was sentenced to ten years in prison for one count of sexual intercourse with a person under the age of thirteen (count two). The ten-year prison sentence for count two was stayed pursuant to

§ 973.15(8)(a)2, STATS., and Ferguson was placed on probation for a period of fifteen years to run concurrent to his six-year prison term for count one.

The judgment of conviction for count one stated that Ferguson was to receive 116 days of credit toward his six-year prison term for time served prior to sentencing. However, the judgment of conviction for the second count stated that Ferguson was entitled to zero days of credit toward his stayed ten-year sentence.

On August 8, 1990, Ferguson filed a motion asking that he receive an additional seventy-two days of sentence credit for the time that he was detained in Illinois awaiting extradition to Wisconsin. The motion was granted on November 6, 1990, and Ferguson received a total of 188 days of sentence credit toward his six-year sentence for count one. The trial court, however, did not credit Ferguson's sentence for count two.

Ferguson served four years in prison for count one and was released on parole on November 9, 1993. Although Ferguson was subsequently discharged from supervision on count one, he remained on probation for count two. On April 15, 1996, Ferguson violated a term of his probation. His probation was revoked and he was returned to prison to serve the ten-year stayed sentence.

On June 9, 1997, Ferguson filed several post-conviction motions. In his memorandum in support of these motions, Ferguson alleged that: (1) the court did not have authority to impose a term of probation concurrent with a term of imprisonment; (2) the four years he served on his six-year sentence should be credited against his ten-year sentence; and (3) if the court concluded that he could not receive credit for the time served on the six-year sentence, he should receive

the same 188 days of credit against his ten-year sentence that he received toward his six-year sentence.

The trial court denied Ferguson's motions, noting that the "sentence speaks for itself and the Wisconsin State prison system is charged with enforcing it." Ferguson appeals.

## DISCUSSION

Ferguson first argues that the trial court did not have statutory authority to sentence him to a term of probation concurrent with his term of imprisonment. We addressed this issue in *State v. Aytch*, 154 Wis.2d 508, 453 N.W.2d 906 (Ct. App. 1990). In *Aytch*, the trial court sentenced the defendant to two consecutive prison sentences for burglary. *Id.* at 511, 453 N.W.2d at 907. One of the sentences was stayed, and Aytch was placed on probation for five years concurrent with his three-year prison sentence. *Id.* Aytch argued that the trial court had no statutory authority to impose such sentences. *Id.* After reviewing the relevant statutory provisions,<sup>1</sup> we concluded that the trial court did have the authority to impose such sentences. *Id.* at 512, 453 N.W.2d at 908.

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<sup>1</sup> The relevant statutory provisions at issue in *Aytch* were §§ 973.09(1)(a) and 973.15(2), STATS, 1989-90. Section 973.09(1)(a) read, in pertinent part, as follows:

[I]f a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under § 973.15 and stay its execution, and in either case place the person on probation .... The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

Section 973.15(2), STATS., 1989-90, read as follows:

The court may impose as many sentences as there are convictions and may provide that any such sentence be

(continued)

Ferguson requests that we now modify the *Aytch* decision, and its interpretation of §§ 973.09(1)(a) and 973.15(2), STATS. Only the supreme court has the power to overrule, modify or withdraw language from a published court of appeals opinion. *Cook v. Cook*, 208 Wis.2d 166, 189-90, 560 N.W.2d 246, 256 (1997). The language of these two statutes has not changed since the *Aytch* decision. Until the supreme court decides differently, trial courts have the authority under these statutory provisions to impose concurrent periods of probation and imprisonment for separate charges.

Ferguson next argues that the six-year sentence for count one and the ten-year sentence for count two were to be served concurrently; therefore, he should receive credit against his ten-year sentence for the time he served on his six-year sentence. The judgment of conviction does not specifically state that the six-year sentence and the ten-year sentence were concurrent; however, the State does not dispute that the sentences were concurrent.<sup>2</sup> While we do not here decide the issue stipulated by the State, we accept the stipulation for purposes of this appeal.

Ferguson contends that under § 973.155(1)(a), STATS., he is entitled to receive credit toward his ten-year sentence for the time he served on his six-year sentence. The State responds that § 973.155(1)(a) only allows a defendant to

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concurrent with or consecutive to any other sentence imposed at the same time or previously.

<sup>2</sup> Although the parties agree that the six- and ten-year sentences were imposed concurrently, the ten-year sentence was stayed pursuant to § 973.15(8)(a)2, STATS. The ten-year sentence did not commence until after Ferguson's probation was revoked. Ferguson cannot receive credit for any imprisonment which occurred before his ten-year sentence commenced, except as provided under § 973.155, STATS., which is addressed later in this opinion.

receive credit for time served prior to sentencing, not for time served after sentencing. As a result, the State contends that the statute does not entitle Ferguson to receive credit for the time served on his six-year sentence.

This presents an issue of statutory interpretation. The goal of statutory interpretation is to ascertain the intent of the legislature. *MCI Telecomm. Corp. v. State*, 203 Wis.2d 392, 400, 553 N.W.2d 284, 287 (Ct. App. 1996), *aff'd*, 209 Wis.2d 310, 562 N.W.2d 594 (1997). Our first inquiry is directed to the language of the statute. *Id.* If the meaning of the language is clear and unambiguous, our inquiry ends, and we do not look to the canons of statutory construction or other extrinsic aids for guidance. *Id.* at 400, 553 N.W.2d at 288. We simply apply the language of the statute to the facts of the case before us. *Id.* However, if the statute is ambiguous, we may examine the scope, history, context, subject matter and purpose of the statute. *Id.*

We begin with the statutory language. Section 973.155(1)(a), STATS., which is entitled “Sentence Credit,” reads as follows:

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.

We conclude that the language of § 973.155(1)(a) is unambiguous. It allows a defendant to receive credit for time served prior to sentencing, but does not entitle a defendant to receive credit for time served after sentencing. Therefore, Ferguson is not entitled to receive credit for the time served *after* being sentenced to prison.

In the alternative, Ferguson argues that he should receive credit pursuant to § 973.155(1)(a), STATS., for the days he served prior to sentencing. The State agrees. Ferguson was credited with 116 days toward his six-year sentence on count one, but the judgment of conviction for count two states that no credit should be given toward his ten-year sentence. However, at sentencing, the transcript indicates that the trial court awarded Ferguson 116 days credit against both sentences.<sup>3</sup> The Wisconsin Supreme Court has held that where an unambiguous oral pronouncement of sentence conflicts with a written judgment, the oral pronouncement controls. *State v. Perry*, 136 Wis.2d 92, 113-14, 401 N.W.2d 748, 757-58 (1987). As a result, Ferguson should be given 116 days credit toward his ten-year sentence for count two.

Ferguson also was credited with an additional seventy-two days toward his six-year sentence for time he served in Illinois awaiting extradition to Wisconsin. Because this jail time arose “out of the same course of conduct” that resulted in the conviction on count two, the State concedes that Ferguson should also be given an additional seventy-two days of credit toward his ten-year sentence for count two. *See* § 973.155(1)(a), STATS. We agree. Ferguson is therefore entitled to a total of 188 days of sentence credit.

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<sup>3</sup> When the trial court addressed the issue of sentence credit, it stated the following:

Now, sir, you have already spent time. The time spent apparently is 116 days and you will be given full credit on your *terms* of the 116 days.





## CONCLUSION

We conclude that the sentencing court had authority to impose concurrent terms of probation and imprisonment. We also conclude that the trial court correctly read § 973.155(1)(a), STATS., to only allow a defendant to receive credit for time served prior to sentencing. However, we conclude that Ferguson should have received 188 days' credit toward his ten-year sentence pursuant to § 973.155(1)(a). Therefore, we remand to permit the trial court to amend the judgment of conviction to credit Ferguson for the 188 days he served prior to sentencing.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reports.

