

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 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. 98-0034

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE COMMITMENT OF STEPHEN J.
WEISSENBERGER, JR.:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

v.

STEPHEN J. WEISSENBERGER, JR.,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for La Crosse County:
DENNIS G. MONTABON, Judge. *Affirmed.*

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

PER CURIAM. Stephen J. Weissenberger, Jr. appeals from an order adjudicating him to be a sexually violent person and committing him to the custody of the Department of Health and Social Services for treatment. He also

appeals from a subsequent order denying his motion for post-verdict relief. He claims that the circuit court lacked competency to proceed under Chapter 980, STATS., because, due to a miscalculation of his sentence credit, he was being illegally held in prison for more than ninety days preceding the time the commitment petition was filed. However, because we conclude that Weissenberger received the proper amount of credit for his sentence, we affirm.

BACKGROUND

In 1988, Weissenberger was convicted of one count of first-degree sexual assault and one count of attempted third-degree sexual assault. The circuit court imposed and stayed a two-year sentence on the first count, subject to a five-year probation period, and withheld sentence on the second count, subject to a consecutive ten-year probation period. Weissenberger was also required to serve fourteen months in jail as a condition of his probation on the first count.

In 1990, Weissenberger was convicted of one count of issuing a worthless check and one count of felony bail jumping. His probation on the sexual assault cases was revoked as a result of this criminal activity. On August 7, 1990, Judge Mulroy sentenced Weissenberger to five years, with forty-seven days' credit, on the worthless check count, and imposed a consecutive ten-year period of probation on the bail jumping count. Three days later, Judge Montabon ordered Weissenberger to commence the previously imposed and stayed two-year prison term on the first-degree sexual assault charge, concurrent to the worthless check sentence, and also imposed an additional consecutive two-year prison term on the third-degree sexual assault count. On July 25, 1994, Judge Montabon amended the sexual assault judgment to reflect fourteen months of sentence credit on the first-degree charge.

The State filed a Chapter 980, STATS., petition against Weissenberger within ninety days of his scheduled release from prison. Weissenberger claimed that the petition was untimely, however, because he believed that his fourteen months of sentence credit on the first-degree sexual assault case should also have been applied to his concurrent worthless check sentence. The circuit court denied Weissenberger's motion to dismiss, and he appeals.

STANDARD OF REVIEW

We will independently review the application of the sentence credit statute to an undisputed set of facts. *State v. Abbott*, 207 Wis.2d 624, 628 558 N.W.2d 927, 928 (Ct. App. 1996).

ANALYSIS

Section 973.155(1)(a), STATS., provides that an "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 [the] sentence was imposed." A sentencing court has the authority to determine whether a new sentence will be served concurrent or consecutive to a contemporaneous or prior sentence. *See* § 973.15(2)(a), STATS. Sentence credit which is due on one sentence should be applied to all other concurrent sentences imposed for the same course of conduct. *State v. Ward*, 153 Wis.2d 743, 746, 452 N.W.2d 158, 160 (Ct. App. 1989). However, sentence credit should not be granted for presentence time during which the defendant was serving another sentence for an unrelated crime. *State v. Amos*, 153 Wis.2d 257, 280-81, 450 N.W.2d 503, 512 (Ct. App. 1989).

Weissenberger relies upon *Ward* for the proposition that the DOC must apply any credit which is granted on one sentence to all other concurrent sentences, regardless of when they were imposed or whether they stemmed from the same course of conduct. We disagree. First of all, in *Ward*, we held only that the sentence credit which was granted for pre-sentence time served on one count of delivery of marijuana be applied to two concurrent sentences for delivery of marijuana arising from the same course of conduct. Unlike this case, the presentence detention time at issue in *Ward* bore some relation to each of the concurrent sentences to which we held it should be applied. We did not require that the same credit also be applied to another concurrent sentence that *Ward* had been given in an unrelated case; in fact, we did not even address that issue. Moreover, in *State v. Beets*, 124 Wis.2d 372, 379, 369 N.W.2d 382, 385 (1985), we noted that:

confinement credit is designed to afford fairness [by insuring] that a person not serve more time than that for which he is sentenced.... [T]here is no ... right to credit against confinement in criminal matters where the period of confinement has nothing to do with the matter for which sentence credit is sought.

The fourteen months that Weissenberger spent in jail as a condition of his probation on the sexual assault conviction bore no relation to his worthless check conviction. In fact, Weissenberger had not yet even committed the worthless check offense at the time he served the fourteen months. Therefore, Weissenberger cannot be said to have served more time on his worthless check conviction than the five years he was sentenced to serve. Nor, since he was given credit on the sexual assault sentence, did he serve more than his two years for that conviction.

Weissenberger nonetheless complains that unless he receives credit for the fourteen months against both the sexual assault and worthless check sentences, he will serve the same amount of time as if he had not received credit on either one. While this is true, we see nothing in the statutes or common law that would prohibit such a result. The fact that time spent in custody as a condition of probation may not be credited to a concurrent sentence for a subsequent, unrelated offense is merely an additional consequence of an offender's violation of his probation.

By the Court.—Orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

