COURT OF APPEALS
DECISION
DATED AND FILED

July 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-3442-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT L. FLICK,

DEFENDANT-APPELLANT.

APPEAL from an amended judgment and an order of the circuit court for Lincoln County: J. MICHAEL NOLAN, Judge. *Affirmed.*

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

PER CURIAM. Robert Flick appeals an amended judgment and order that denies him sentence credit for a portion of the time he was a prisoner in the Division of Intensive Sanctions program (DIS). We conclude that under ***State v. Collett,*** 207 Wis.2d 319, 558 N.W.2d 642 (Ct. App. 1996), the trial court

correctly rejected his claim. Therefore, we affirm the amended judgment and order.

In 1994, upon his guilty plea, Flick was convicted of taking and driving a vehicle without consent and was placed on five years probation. In June 1996, as an alternative to revocation, he was placed in the DIS program. Initially, Flick was placed in his employer's home and was subject to electronic monitoring. In February 1997, his participation in DIS ended when he was arrested on a new charge.

In March 1997, Flick's probation was revoked and he was sentenced to three years imprisonment. Upon Flick's motion, the sentencing court amended the judgment to provide for eighty days credit for the time Flick served in residential confinement subject to electronic monitoring under phase II of the DIS program. The trial court denied credit for the time under phases III and IV, between August 31, 1996 and February 1, 1997, when Flick was no longer subject to electronic monitoring.

Flick argues that he is entitled to sentence credit for the time he served between August 31, 1996, and February 1, 1997, as a prisoner in the DIS program. We disagree. Section 973.155(1)(a), STATS., authorizes sentence credit and reads: "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." "Whether [Flick] is entitled to sentence credit involves a matter of statutory construction." *See* ***Collett***, 207 Wis.2d at 321, 558 N.W.2d at 643. Statutory construction presents questions of law that we review without deference to the trial court. ***Id***.

"[C]ustody depends upon physical detention by an institution, institution guard or peace officer." ***Id***. at 324, 558 N.W.2d at 645. "A participant in the DIS program is entitled to sentence credit only if he is in 'custody.'" ***Id***. at 324, 558 N.W.2d at 644-45.

> While the general rule regarding the definition of custody for sentencing purposes involves an examination of whether the person was in custody so that an escape charge would lie if the person improperly leaves custody, this test is not applicable to DIS prisoners.

Id. at 323, 558 N.W.2d at 644.

The DIS program allows for a wider variety of restrictions on liberty than just nightly confinement. ***Id***. It has a wide range of sanctions available that restrict freedom to varying degrees, for example, assignments in the program could range from community service to confinement in a jail. ***Id***. Further, these restrictions can be used in conjunction with one another over the course of an individual's placement in the program with some days or time spent in confinement and other time spent in one of the other programs. ***Id***. at 324, 558 N.W.2d at 645. "While each case must be individually determined, sentence credit is only given if the restriction on a participant's freedom is the functional equivalent of confinement. Custody exists only if the individual's DIS program sufficiently infringes upon his or her freedom to equate with being under the State's control for a substantial period of time." ***Id***. at 325, 558 N.W.2d at 645.

After August 31, Flick was required to submit weekly schedules to his probation officer but was no longer subject to electronic monitoring. He was allowed to work, worship, shop and have recreational time. At the end of November, he was moved to phase IV, which no longer required weekly

schedules. He was still required to attend work, school, and adhere to a curfew. As Flick explained:

> I was living in a hotel. I had to give Dick Larkin the address and the phone number of the hotel room and stay under my curfew, so if he called that hotel room and I wasn't there when I was supposed to be, I was done basically is what he said.

We conclude that the trial court correctly applied ***Collett*** to the facts of record. We have "implicitly rejected the theory that restriction on movement constitutes custody simply because negative consequences can result from failure to obey the restrictions." ***State v. Pettis***, 149 Wis.2d 207, 212, 441 N.W.2d 247, 250 (Ct. App. 1989). The trial court properly concluded that restraints on Flick's liberty did not constitute the functional equivalent of confinement and therefore was not custody within the meaning of § 973.155(1)(a), STATS.

Flick argues that the ***Collett*** analysis does not go far enough because it fails to resolve whether the legal status of a DIS prisoner "necessarily satisfies the definition of 'custody' set forth in § 942.42(1)(a), STATS.," the escape statute.[1]

[1] Section 946.42, STATS., provides:

> **Escape (1)** In this section:
>
> (a) "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. Under s. 303.08 (6) it means, without limitation, that of the sheriff of the county to which the prisoner was transferred after conviction. It

(continued)

Flick's argument ignores our rejection of a bright line rule. ***Collett***, 207 Wis.2d at 325, 558 N.W.2d at 645 ("Because of the variety of restrictions on liberty within the DIS program, we conclude a bright line rule is impractical."). We explained:

> Although an individual commits an escape when leaving an electronic home monitoring without permission, this is "irrelevant to the question of sentence credit." In linking the escape penalty to § 946.42(3)(a), STATS., rather than WIS. STAT. ANN. § 946.42(1)(a) (1996), the legislature was determining the appropriate penalty for leaving these programs and not determining whether participants in the DIS program would be given sentence credit.

Id. at 323, 558 N.W.2d at 644 (citations omitted).

Flick's argument that by statute a participant in DIS is in custody and a prisoner for purposes of sentence credit essentially asks us to overrule ***Collett***. As Flick recognizes, we are bound by our prior published decisions. ***Cook v. Cook***, 208 Wis.2d 166, 189-190, 560 N.W.2d 246, 254 (1997). As a result, we reject his argument that between August 31, 1996, and February 1, 1997, Flick was, as a matter of law, in the "actual custody of an institution."

> does not include the custody of a probationer, parolee or person on extended supervision by the department of corrections or a probation, extended supervision or parole officer or the custody of a person who has been released to aftercare supervision under ch. 938 unless the person is in actual custody or is subject to a confinement order under s. 973.09 (4).

By the Court.—Amended judgment and order affirmed.

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