

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 23, 2000

Cornelia G. Clark
Acting 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. 99-0948-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES A. POH,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County: PATRICK J. FIEDLER, Judge. *Affirmed.*

¶1 DEININGER, J.¹ James Poh appeals an order which denied his motion for sentence credit for a period during which he participated in a Department of Corrections electronic monitoring program while released on parole. Following the supreme court's release of its opinion in *State v.*

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1997-98).

Magnuson, 2000 WI 19, No. 99-1105-CR, Poh concedes that his participation in the electronic monitoring program while on discretionary parole does not entitle him to sentence credit for the days in question. Accordingly, we affirm the appealed order.

¶2 Poh was convicted of possession of a controlled substance, as a repeater, and was sentenced to serve six-months of imprisonment, consecutive to other sentences he was then serving in the state prison system. He was subsequently released on discretionary parole, and as a condition of his parole, he agreed to participate in an electronic monitoring program administered by the Department of Corrections. Under this program, Poh wore an electronic transmitter on his ankle, and his confinement to his residence was thereby monitored. Poh was required to be at his residence during evening hours, and he was only permitted to be absent from the residence for the purposes of work, church attendance, participation in treatment, or meetings with his parole agent. Poh successfully completed ninety-one days in the electronic monitoring program. Subsequently, however, Poh violated the terms of his parole, his parole was revoked and he returned to prison.

¶3 Poh moved the trial court for an order granting him sentence credit for the ninety-one days he spent in the electronic monitoring program. The trial court denied the motion and Poh appeals.

¶4 Poh initially argued that the trial court erred in denying sentence credit for the time he spent in the electronic monitoring program because the restrictions on his freedom under that program “were the functional equivalent of confinement.” See **State v. Collett**, 207 Wis. 2d 319, 325, 558 N.W.2d 642 (Ct. App. 1996). The State responded that **Collett** and other cases interpreting

WIS. STAT. § 973.155 (1997-98)² were not applicable because WIS. STAT. § 304.072 governs the computation of Poh's sentence following his parole revocation, but in any event, that our opinion in *State v. Swadley*, 190 Wis. 2d 139, 526 N.W.2d 778 (Ct. App. 1994), establishes that credit should not be given for time spent in an electronically monitored home detention program.

¶5 Because we were aware that the supreme court had accepted *Magnuson* for review, and that it also had before it a certification from this court concerning the issue at hand, we stayed submission of Poh's appeal until the supreme court had issued an opinion in one of the pending cases. The court has now released its opinion in *Magnuson*, where it concluded:

In summary, we conclude that an offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status. We reject the burdensome case-by-case analysis established in *Collett* and replace it with a rule intended to provide clear guidelines for sentencing courts in their determination of sentence credit.

Magnuson, 2000 WI 19 at ¶47.

¶6 Both parties were invited to submit letter briefs discussing the application of the holding in *Magnuson* to the facts of this case. In Poh's submission, he acknowledged that he was *not* subject to a charge of escape for violating the conditions of the electronic monitoring program while on discretionary parole; neither was he in the actual custody of any institution, nor constructively so while temporarily absent from it. Had Poh violated the terms of the electronic monitoring program, he was subject to parole revocation for a rules

² All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

violation, but not to a new criminal escape charge.³ Poh concedes that he “is now not entitled to credit for the time he spent on parole in the [electronic monitoring] program.”

¶7 Accordingly, we affirm the appealed order.

By the Court.—Order affirmed.

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

³ Poh was *not* paroled to the Division of Intensive Sanctions, but had agreed to participate in the electronic monitoring program as a condition of receiving “regular” parole. Had he been paroled to DIS, a different result might accrue. See WIS. STAT. § 301.048(5); *State v. Magnuson*, 2000 WI 19 at ¶29.

