

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 11, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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. 99-2396-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SEAN W. OTTMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with
directions.*

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

¶1 PER CURIAM. Sean Ottman appeals an order denying him sentence credit for thirty days' jail time ordered to be served as a condition of probation concurrently with a prison term previously imposed on unrelated

charges. We reverse the order and remand with directions to award Ottman thirty days' presentence credit.

¶2 On August 6, 1997, Ottman pled no contest to forgery. Sentence was withheld and probation imposed with the condition that Ottman serve thirty days in jail. The court ordered that the thirty-day jail condition was to be served concurrently with a previously imposed prison sentence that Ottman was then serving on an unrelated charge.

¶3 Ottman's probation was subsequently revoked and, on September 24, 1998, he was sentenced to five years in prison on the forgery charge. The sentencing court denied his request for thirty days' credit for time served as a condition of his probation. Ottman then filed motions requesting that his sentence be credited with the thirty days, but the trial court denied his motions.

¶4 Ottman argues that he is entitled to thirty days' sentence credit for the time he served as a condition of probation. We agree. WISCONSIN STAT. § 973.155 (1997-98) governs sentence credit.¹ In *State v. Gilbert*, 115 Wis.2d

¹ WISCONSIN STAT. § 973.155 (1997-98) provides:

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 held under s. 304.06 (3) or

(continued)

371, 340 N.W.2d 511 (1983), our supreme court addressed the question whether § 973.155 requires that a defendant be granted credit toward his sentence for the time he spent in the county jail as a condition of probation. It held that “Sec[ti]on 973.155(1)(a), Stats., is not susceptible to more than one interpretation; there is no basis for interpreting the statute as excluding custody as a condition of probation from the statute’s coverage.” *Id.* at 377.

¶5 The court explained that there was no question that the condition of probation jail time related to the same course of conduct for which sentence was imposed within the meaning of WIS. STAT. § 973.155(1)(a). It further reasoned that the common meaning of the word “custody” included confinement in a county jail as a condition of probation. The court concluded that “[t]he clear intent of sec. 973.155, Stats., is to grant credit for each day in custody regardless of the basis for the confinement as long as it is connected to the offense for which sentence is imposed.” *Id.* at 380.

¶6 The State relies on *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988); *State v. Gavigan*, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984); *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (Ct. App. 1985); *State v.*

973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

(2) After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction. In the case of revocation of probation, extended supervision or parole, the department, if the hearing is waived, or the division of hearings and appeals in the department of administration, in the case of a hearing, shall make such a finding, which shall be included in the revocation order.

(3) The credit provided in sub. (1) shall be computed as if the convicted offender had served such time in the institution to which he or she has been sentenced.

All statutory references are to the 1997-98 edition.

Morrick, 147 Wis. 2d 185, 432 N.W.2d 654 (Ct. App. 1988); and *State v. Amos*, 153 Wis. 2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989), for the proposition that Ottman is not entitled to presentence credit because the jail time served as a condition of probation was served concurrently with an unrelated criminal sentence. It contends that to credit him with the jail time condition that was served concurrently with an unrelated prison sentence would impermissibly afford him dual credit. None of the cases the State cites addresses the precise issue before us. We conclude that because the court ordered that his jail condition was to be served concurrently with an unrelated prison term, Ottman is entitled to the credit he requests.

¶7 In *Boettcher*, the question posed was “whether it is permissible under the law to allow additional time-credit reduction on an arrest-related consecutive sentence when the credit for the same period in custody has already been applied upon revocation of probation to reduce a prior-imposed stayed sentence.” *Id.* at 87. Boettcher was arrested for violating the conditions of his probation by possessing firearms and remained in custody for 100 days on a probation hold until revoked. On revocation, a previously imposed, but stayed, three-year burglary sentence commenced. *See id.* at 88. Boettcher’s three-year burglary sentence was credited with the 100 days spent in custody on the probation hold.

¶8 Thereafter, Boettcher was sentenced to a one-year term on the charge of being a felon in possession of a firearm, to be served consecutively to the burglary sentence. *See id.* at 89. Boettcher argued that he was entitled to 100 days’ credit on the firearm sentence as well as the burglary sentence because he had been in custody in connection with both the firearm charge and the pending burglary probation revocation. *See id.* Our supreme court disagreed: “While

acknowledging that in cases where sentences are concurrent dual credit may be permissible ... no dual credit is allowable where consecutive sentences are imposed.” *Id.* at 90. It concluded that “[t]he objective with consecutive sentences is to assure that credit is awarded against one, but only one, of the consecutive sentences.” *Id.* at 101 (citation omitted).

¶9 Because *Boettcher* involved consecutive, not concurrent, sentences, it does not control. The State’s reliance on *Amos* is similarly misplaced because *Amos* also involved the question of sentence credit as applied to consecutive sentences. *See Amos*, 153 Wis. 2d at 280.

¶10 *Gavigan* similarly offers no guidance. Gavigan was arrested for fleeing an officer. After his arrest, he was charged with a robbery he had committed two days before. *See Gavigan*, 122 Wis. 2d at 390-91. Thirty-nine days after his arrest, he pled guilty to the misdemeanor fleeing charge and was sentenced to sixty days’ imprisonment. *See id.* at 390. 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. Our court held that he 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.

¶11 *Gavigan* does not support the State’s position here because *Gavigan* denied dual credit for time spent on one sentence before a later unrelated sentence was imposed and ordered to be served concurrently. Here, Ottman was in custody simultaneously on both the previous unrelated sentence and the jail probation condition. As a result, the simultaneous concurrent custody was in connection with both the previous sentence and the forgery sentence.

¶12 The *Morrick* case is even less analogous to the State's position. *Morrick* involved a claim of sentence credit for time spent in jail after an arrest for criminal damage to property. At the time of the arrest, Morrick was on probation for an earlier unrelated offense. See *id.* at 186. Morrick posted bond for the criminal damage to property arrest, but remained in jail because the arrest triggered a probation hold on the earlier offense. After his probation on the earlier offense was revoked, he was sentenced to 100 days in jail, but was credited with the thirty-two days spent on probation hold. See *id.* at 186-87. When Morrick was sentenced to sixty days in jail on the criminal damage to property charge, he requested credit for the thirty-two days he spent on the probation hold due to the earlier offense. We affirmed the trial court's rejection of the request on the ground that he had already received credit on the previous 100-day sentence. See *id.* at 187.

¶13 We conclude that time spent in custody on a probation hold on an unrelated charge is not analogous to time spent in custody as a condition of probation concurrent to a previously imposed sentence. Accordingly, *Morrick's* reasoning is inapplicable to the case before us.

¶14 *Beets* also fails to support the State's argument. *Beets* held that a defendant is not entitled to credit on a burglary sentence for the time spent in custody for an unrelated drug crime. See *id.* at 374. It did not involve custody ordered to be served concurrently and, as a result, is not controlling.

¶15 The State's brief fails to provide legal authority or factual support for denying Ottman the sentence credit sought. We conclude that *Gilbert* controls and to the extent its application results in dual credit, this result was contemplated in the court's order that the jail condition and the previous unrelated sentence be

served concurrently. “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.” *State v. Rohl*, 160 Wis. 2d 325, 330, 466 N.W.2d 208 (Ct. App. 1991). Consequently, Ottman is entitled to credit for the thirty days spent in custody as a condition of probation on the forgery charge that was served concurrently with the previously imposed unrelated prison term.²

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

² The State suggests that Ottman may have been awarded the 30 days’ credit in yet another case, but fails to indicate this argument was made at the trial level and fails to support this argument with sufficient factual reference to permit it to be considered on appeal. See *State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

