

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 6, 2016

Diane M. Fremgen
Clerk of Court of Appeals

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.

Appeal No. 2015AP2137-CR

Cir. Ct. No. 2014CM824

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LAZERIC R. MAXEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County:
BRUCE E. SCHROEDER, Judge. *Affirmed.*

¶1 NEUBAUER, C.J.¹ Lazeric R. Maxey appeals from an order denying his motion for a 138-day credit against his sentence after revocation of

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2013-14). All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

probation in this misdemeanor case. The circuit court properly denied Maxey's motion for sentence credit. The record indicates that the 138 days Maxey spent incarcerated were the result of two extended supervision holds on a prior felony conviction, arising first from the commission of the misdemeanor at issue in this case, and later, from new criminal charges. His probation in this misdemeanor case was also revoked as a result of the new criminal charges. Maxey argues he is entitled to sentence credit in this case for the time spent in custody during the extended supervision holds because of the overlap. The circuit court ordered the sentence after revocation of probation in this misdemeanor case to run consecutive to the felony sentence. The sentence on the felony was imposed first, and there was more than sufficient time remaining on the felony against which to apply the sentence credit for the extended supervision holds. The credit must be applied linearly—to the first applicable sentence. Maxey is not entitled to double credit and has failed to establish that he is entitled to credit on this consecutive misdemeanor sentence. We affirm.

¶2 Under Kenosha County case No. 2011CF453 (the felony), Maxey pled guilty to battery to a law enforcement officer and possession with intent to deliver nonnarcotics in violation of WIS. STAT. §§ 940.20(2) and 961.41(1m)(b), respectively. In exchange for his guilty plea, Maxey received a sentence of eighteen months of initial confinement followed by thirty months of extended supervision. On November 13, 2012, Maxey was released from confinement and began extended supervision.

¶3 On June 13, 2014, while still on extended supervision, Maxey was charged in this case, Kenosha County case number 2014CM824 (the misdemeanor), with obstructing an officer as a repeat offender in violation of WIS. STAT. §§ 939.62(1)(a) and 946.41(1). The record shows that he was released from

custody on that charge on a signature bond dated June 13, 2014. However, Maxey remained on an extended supervision hold on the felony case from June 16, 2014, until September 3, 2014, the date he pled guilty and was sentenced on the misdemeanor case. Sentence was withheld and Maxey was placed on probation for eighteen months.

¶4 On October 14, 2014, Maxey was again placed in custody, and subsequently Maxey's probation in this misdemeanor case and extended supervision on the felony were revoked based on new charges of armed robbery. The revocation order and warrant and the revocation summary provided by the department of corrections to the circuit court on December 8, 2014, stated that Maxey was being held on the felony sentence as of October 14, 2014. The summary indicated that Maxey had two years, six months, and two days available for reincarceration on the felony sentence. The department of corrections stated that Maxey was entitled to sentence credit on his felony sentence for days spent incarcerated between June 16, 2014, and September 3, 2014, and between October 14, 2014, and the date he was received at an institution, which occurred on December 12, 2014.

¶5 A consolidated court automation programs entry dated December 22, 2014, indicates that Maxey's extended supervision was revoked by the department of corrections and sentenced.² *See* WIS. STAT. § 302.113(9)(am) (stating that if a person released to extended supervision violates a condition of extended supervision, "the reviewing authority"—here, the department of

² *See* WIS. STAT. § 902.01(2)(b) (stating that a court may take judicial notice of a fact capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

corrections because Maxey waived his right to a hearing—may revoke that person’s extended supervision and “shall order the person to be returned to prison for any specified period of time that does not exceed the time remaining on the bifurcated sentence”).³

¶6 On February 13, 2015, Maxey was returned to the circuit court for sentencing because the court previously withheld sentence. He was sentenced on the misdemeanor case to eighteen months of initial confinement to be followed by six months of extended supervision. Defense counsel asked the circuit court to run the sentence concurrent to that of the felony case. If the court did so, counsel argued, he believed Maxey “would be entitled to 132 days of credit on” the misdemeanor case.⁴ The court, however, ordered the sentence on the misdemeanor case to run consecutive to any previously pronounced sentence.

¶7 Shortly thereafter, Maxey moved pro se for sentence credit, arguing that he was entitled to credit for the time he spent incarcerated between June 16, 2014, and September 3, 2014, and between October 14, 2014, and December 12, 2014, against the misdemeanor case. At a hearing on the motion, the State noted that the sentences on the misdemeanor and felony cases were made to run consecutively to one another. It was the State’s “understanding” that Maxey had received credit for those days on the felony case. Now to credit those days also against the misdemeanor case would constitute an impermissible double credit. The circuit court denied the motion. The court suggested that Maxey apply

³ During the hearing in this misdemeanor case, counsel for Maxey represented that his client had waived his right to a revocation hearing in the felony case.

⁴ It is undisputed that the number of days at issue is 138.

for credit to the judge who presided over the felony case. If the credit could not be applied to the felony sentence, then Maxey could come back and ask that it be applied to the misdemeanor case.

¶8 Maxey moved for reconsideration, relying on *State v. Obriecht*, 2015 WI 66, 363 Wis. 2d 816, 867 N.W.2d 387. Maxey, however, did not provide any proof that he had been denied credit on the felony sentence.⁵ Rather, he asserted that the court presiding over the misdemeanor case was the proper one from which to seek relief. The circuit court denied the motion. The court reiterated that it would “allow credit against the sentence in this [misdemeanor] case only if the time cannot be credited against the sentence in” the felony case. Maxey appeals.

¶9 Whether the denial of a sentencing credit was proper is a question of statutory interpretation and application, which we review independently while benefitting from the prior decision of the circuit court. *See id.*, ¶21.

¶10 Under WIS. STAT. § 973.155(1)(a), a convicted offender is entitled to a 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.” This includes “custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold ... placed upon the person for the same course of conduct as that resulting in the new conviction.” Sec. 973.155(1)(b). Confinement credit is a matter of fairness, for a person should

⁵ Neither Maxey nor the State provided the circuit court in this misdemeanor case with any further documentation from the department of corrections relating to Maxey’s reconfinement after revocation in the felony case.

not serve more time than for which he or she is sentenced. *See State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985).

¶11 As recounted above, on June 13, 2014, while still on extended supervision, Maxey was charged with obstructing an officer as a repeat offender. While he was released on a signature bond in that case, he remained on an extended supervision hold on the felony case from June 16, 2014, until September 3, 2014, when he pled guilty and was sentenced on the misdemeanor case. Maxey does not dispute that during this seventy-nine-day period he was incarcerated “for violating his extended supervision [in the felony case] by committing a new crime.”

¶12 Similarly, between October 14, 2014, and December 12, 2014, a period of fifty-nine days, Maxey was incarcerated on a second extended supervision hold in his felony case. On October 13, 2014, Maxey allegedly committed an armed robbery, resulting in his being taken into custody the next day. He remained in custody until December 12, 2014, the date he was received at an institution.

¶13 As he did before the circuit court, Maxey argues only that there was no incarceration time remaining on the felony case to which to apply these 138 days. The record is to the contrary. Extended supervision on the felony case was revoked in November 2014. The revocation order and warrant and the revocation summary provided by the department of corrections to the circuit court, the State, and defense counsel, states that there were two years, six months, and two days available for reincarceration on the felony case. Thus, the time remaining on the felony case, running prior to the consecutive misdemeanor case, was more than sufficient to receive the 138 days of sentencing credit.

¶14 “[W]hen sentences are consecutive, sentence credit is not issued to more than one sentence so long as the first sentence to be served is sufficient to receive the sentence credit at issue.” *Obriecht*, 363 Wis. 2d 816, ¶36; see *State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338 (dual credit is not permitted on consecutive sentences). Thus, application of a custody credit “in a mathematically linear fashion” is “[f]or ease in calculation and clarity.” *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988); see *Obriecht*, 363 Wis. 2d 816, ¶40 (“we apply sentence credit granted to the earliest period of custody eligible for the credit.”). The sentence on the felony case was imposed first, and there being more than sufficient time remaining on the felony case to receive a sentencing credit, the credit for the extended supervision holds must first be applied to the felony case.⁶

¶15 Finally, we note that the State represented during the hearing on Maxey’s motion that he had already received the 138-day credit on the felony case. The record on appeal includes the revocation summary’s recommendation of the department of corrections to apply the credit to the felony case upon reconfinement. Maxey does not address his release on signature bond in this case, that his extended supervision in the felony case was revoked, the State’s representation that credit was applied to that sentence, and the revocation order and warrant and the revocation summary from the department of corrections recommending the same. For purposes of this appeal, Maxey has failed to establish entitlement to sentence credit on this misdemeanor sentence.

⁶ If Maxey never received credit for the extended supervision holds, he can petition the department of corrections. See WIS. STAT. §§ 967.02(2), 973.155(5).

By the Court.—Order affirmed.

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

