

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 3, 2005

Cornelia G. Clark
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. 2004AP1450-CR

Cir. Ct. No. 2000CF251

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

CLARK J. NEKLEWICZ,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Marathon County:
PATRICK M. BRADY, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. The State appeals an amended judgment of conviction granting Clark Neklewicz two years and thirty-five days' sentence credit for the time he was confined before his no contest plea to OWI fifth offense, plus the time he was confined awaiting sentencing after he violated his probation.

We reverse the amended judgment because Neklewicz is not entitled to credit for time spent in custody fulfilling a sentence for an unrelated crime.

¶2 At the time of his offense, Neklewicz was on parole for a 1992 drug offense. Because of this OWI arrest, his parole was revoked and he was incarcerated for one year before he was again released on parole. On the OWI fifth offense, the court placed Neklewicz on probation concurrent with the drug sentence. Pursuant to WIS. STAT. § 346.65(2)(e),¹ Neklewicz was required to serve six months' incarceration as a condition of probation. That time was served concurrent with the one-year incarceration on the revoked parole.

¶3 Neklewicz violated his parole and probation by committing an OWI sixth offense. He was returned to prison for five months and twenty-three days to complete the sentence on the drug offense. He was sentenced on the OWI fifth charge seven months and eleven days after completing the drug sentence. The court initially imposed a prison sentence consecutive to all other sentences, with credit for one year and eleven days. That sentence credit included the six months Neklewicz served as a condition of probation plus six months and eleven days that the prosecutor miscalculated from the date Neklewicz completed the drug sentence to the date of sentencing following the probation revocation.

¶4 Except for the mathematical error, we conclude the initial judgment reflected the correct formula for calculating Neklewicz's sentence credit. Imposition of probation is not a sentence. *See Prue v. State*, 63 Wis. 2d 109, 114, 216 N.W.2d 43 (1974). Therefore, probation time is not credited against a

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

subsequent sentence. The amended judgment improperly credited Neklewicz with the full year he was incarcerated on the drug sentence while on probation for the OWI fifth charge. Six months of that year is not “in connection with the course of conduct for which [the OWI 5th] sentence was imposed.” See *State v. Beets*, 124 Wis. 2d 372, 377-78, 369 N.W.2d 382 (1985). A prisoner serving time following parole revocation for committing a new crime does not get sentence credit on the new sentence for time served on the parole revocation sentence. *Id.* The State conceded that Neklewicz should get credit for the concurrent six months’ incarceration required by WIS. STAT. § 346.65(2)(e) and the initial judgment credited that time.

¶5 The amended judgment also improperly credited Neklewicz with all of the time [thirteen months and four days] he spent incarcerated on the probation hold following his arrest for OWI sixth until the date of sentencing on OWI fifth. Five months and twenty-three days of that time should not have been credited because Neklewicz was completing the sentence for the drug offense and the court ultimately imposed a consecutive sentence for the OWI fifth offense. When consecutive sentences are imposed, each day of confinement is credited against only one sentence. See *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988).

¶6 We agree with Neklewicz that the State’s arguments are confusing and inconsistent with positions it took in the trial court. Nonetheless, the law does not entitle him to credit on the OWI fifth charge for time served on the drug charge. On remand, the trial court is directed to enter an amended judgment of conviction crediting Neklewicz with the six months he served as a condition of probation plus seven months and eleven days he spent awaiting sentence following expiration of the drug sentence.

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

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

