COURT OF APPEALS
DECISION
DATED AND FILED

April 12, 2018

Sheila T. Reiff
Acting Clerk of Court of Appeals

Appeal No. 2017AP1337-CR **Cir. Ct. No. 2015CF326**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ZACHARY S. FRIEDLANDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Jefferson County: DAVID WAMBACH, Judge. *Reversed and cause remanded with directions.*

Before Sherman, Blanchard and Kloppenburg, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Zachary Friedlander appeals the order of the circuit court denying him sixty-five days of sentence credit for time that he should have

been in custody of the Jefferson County Jail, but was not, after prison officials released him from Oshkosh Correctional Institution and failed to transfer him to the jail or otherwise order him to report to the jail, and he met repeatedly with his probation agent who did not tell him to report to jail. Friedlander argues that, under ***State v. Riske***, 152 Wis. 2d 260, 448 N.W.2d 260 (Ct. App. 1989), and ***State v. Dentici***, 2002 WI App 77, 251 Wis. 2d 436, 643 N.W.2d 180, he earned sixty-five days' credit because he was absent from jail through no fault of his own. We agree. We reverse the order denying Friedlander's request for sentence credit and remand the cause with directions to amend the judgment of conviction to reflect an additional sixty-five days of credit, to be applied in the event that his probation is revoked and sentence is imposed.[1]

BACKGROUND

¶2 In this case, on April 15, 2016, Zachary Friedlander pled no contest to and was sentenced for one count of felony bail jumping as the result of a plea bargain. At the time of sentencing, Friedlander was serving a prison sentence in Oshkosh Correctional Institution for an unrelated drug conviction in another case. The plea agreement in this case consisted, in pertinent part, of a joint recommendation for a withheld sentence, three years' probation to run concurrent with the unrelated conviction, and eight months in the Jefferson County Jail as a condition of probation. The circuit court followed the joint recommendation, ordering the conditional jail time to begin the day of sentencing, concurrently with the sentence Friedlander was then serving in prison. The court and the parties

[1] As we explain below, the parties agree that the sentence credit will be applied only in the event that Friedlander's probation is revoked and sentence is imposed.

agreed on the record that the eight months of conditional confinement could extend beyond the time left on the prison sentence Friedlander was then serving, and as a result Friedlander would spend some time in jail after being released from prison, in order to complete the eight months conditional time.

¶3 Following sentencing, jail personnel lodged a detainer for Friedlander with the Department of Corrections. However, on September 27, 2016, officials at Oshkosh released Friedlander from prison, without notifying jail personnel of Friedlander's impending release or otherwise arranging to have Friedlander transferred to the jail. Immediately upon his release from prison, and regularly thereafter, Friedlander met with his probation agent who did not tell him to report to jail.

¶4 On November 11, 2016, the sheriff's office in Jefferson County discovered that the prison had released Friedlander. That same day, sheriff's office officials contacted Friedlander's probation agent, who instructed Friedlander to contact Jefferson County Captain Scott, which he promptly did. On November 23, 2016, Captain Scott wrote to the circuit court asking for "direction for [Friedlander's] Probation Agent and the jail as to what should be done with Mr. Friedlander: should he report for the remainder of the time until his original release date on the 8 month sentence 12/11/2016? And what should be done with the days he was not in jail."

¶5 The circuit court held a hearing on December 1, 2016. The court determined that while in prison Friedlander had served 165 days of the conditional confinement, concurrently with the prison sentence, and that seventy-five days of conditional confinement remained outstanding.

¶6 Friedlander argued that he had earned sentence credit for the sixty-five days that he spent at liberty, following his prison release, through no fault of his own, between September 27, 2016, and December 1, 2016. The circuit court denied Friedlander's request for sentence credit and ordered him to begin serving the remainder of the conditional confinement time.

¶7 We will relate additional facts, particularly as to the testimony of Friedlander and jail officials at the December 1, 2016 hearing, in the discussion that follows.

DISCUSSION

¶8 At issue is whether Friedlander earned sixty-five days of sentence credit for the time that he should have been in custody but was not, after state officials released him from prison and failed to transfer him to the jail or otherwise arrange for him to report to the jail, and while he had multiple interactions with his probation agent. The parties agree that, if Friedlander prevails on this issue, the sentence credit that he seeks would apply in the event that his probation is revoked and sentence is imposed. Whether a defendant is entitled to sentence credit pursuant to WIS. STAT. § 973.155 (2015-16) is a question of law that we review de novo.[2] ***State v. Davis***, 2017 WI App 55, ¶7, 377 Wis. 2d 678, 901 N.W.2d 488; ***State v. Tuescher***, 226 Wis. 2d 465, 468, 595 N.W.2d 443 (Ct. App. 1999).

¶9 Before we answer this question, we first dispose of two arguments raised by the State asserting that we need not reach the issue of sentence credit.

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

The first argument is that a circuit court may not apply sentence credit to confinement time as a condition of probation because neither probation nor conditional confinement time are "sentences" within the meaning of WIS. STAT. § 973.155. As we explain, the State has forfeited this argument, and it is not material to the issue on appeal.

¶10 The record shows that the State made no argument in the circuit court in opposition to Friedlander's request for sentence credit. Now, on appeal, the State argues that sentence credit is not available for confinement time ordered as a condition of probation. "Arguments raised for the first time on appeal are generally deemed forfeited," and we reject this argument on this basis. ***State Farm Mut. Auto. Ins. Co. v. Hunt***, 2014 WI App 115, ¶32, 358 Wis. 2d 379, 856 N.W.2d 633 (quoted source omitted).

¶11 Moreover, even if the argument were not forfeited, we agree with Friedlander that the issue on appeal is different, namely, whether he earned sentence credit for the time he spent in custody as a condition of probation when he was at liberty through no fault of his own, to be applied in the event that his probation is revoked and sentence is imposed. Friedlander preserved before the circuit court his request "[o]n the general topic of whether credit is due" without limiting his request to his confinement time, and on appeal Friedlander clearly states that the credit he argues he earned would be applied against any sentence that may be imposed should the probation that he is currently serving be revoked. Accordingly, because he is not arguing for credit against confinement time given as a condition of probation, this argument by the State is not material to the issue on appeal.

¶12 The State's second argument why we need not reach the issue of sentence credit is that Friedlander's claim is moot, because his claim is for credit against his confinement time and he has served that time. However, again, the State ignores the consequences of the fact, which the State does not dispute, that if Friedlander is entitled to the sentence credit, it would be for purposes of potential application against revocation time. And, the State does not develop any argument that the issue properly before us on appeal—whether Friedlander earned sentence credit for time spent "at liberty through no fault of one's own" to be applied against revocation time—is not ripe for adjudication. *See* WIS JI-Criminal SM34A at 5 ("Although § 973.155 does not explicitly require that the sentence credit determination be made in cases where sentence is withheld and probation ordered, making the finding in probation cases will document the finding of credit due up to the date of disposition and make it available if probation is later revoked."). Accordingly, we will not consider such an undeveloped argument further. *See* ***Clean Wisconsin, Inc. v. PSC***, 2005 WI 93, ¶180 n.40, 282 Wis. 2d 250, 700 N.W.2d 768 ("We will not address undeveloped arguments.").

¶13 We now address the issue stated at the start of our discussion, namely whether Friedlander earned sixty-five days of sentence credit for the time that he should have been in custody but was not, when officials released him from prison and failed to transfer him to the jail or otherwise order him to report to the jail, and he met repeatedly with his probation agent who did not tell him to report to jail.

¶14 WISCONSIN STAT. § 973.155 provides that

> (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.

¶15 In deciding whether Friedlander earned sentence credit under the statute, we must make two determinations: (1) whether Friedlander was "in custody," within the meaning of WIS. STAT. § 973.155(1)(a); and (2) whether all or part of the "custody" for which sentence credit is sought was "in connection with the course of conduct for which sentence was imposed." ***Id.***; ***State v. Johnson***, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207. Here, the parties dispute only the first of these two determinations: whether Friedlander was "in custody" within the meaning of WIS. STAT. § 973.155(1)(a).

¶16 Friedlander argues that: ***Riske***, 152 Wis. 2d 260, and ***Dentici***, 251 Wis. 2d 436, control this case; those cases hold that a defendant is "in custody" within the meaning of WIS. STAT. § 973.155(1)(a) when a defendant is at liberty through no fault of his own; and here Friedlander was "in custody" after he was released from prison on September 27, 2016, until he was "remanded" to jail on December 1, 2016, because during that period he was at liberty through no fault of his own. We agree.

¶17 In ***Riske***, the circuit court sentenced Riske to one year in the county jail on April 6, 1987. 152 Wis. 2d at 262. On that same day, Riske attempted to surrender himself to the county jail, but was turned away by a jailer who "told Riske the jail could not accommodate him and to report back on May 1, 1987." ***Id.*** Riske did not report back on May 1, 1987, and the circuit court ultimately

issued an execution for his arrest and incarceration to serve his sentence. ***Id.*** The issue on appeal was whether Riske was entitled to credit against his sentence for the entire period from the date he was turned away from the jail to the date he was arrested. ***Id.*** at 263-65. We held that Riske had earned credit towards his one-year sentence only

> for the period he was out of the jail at the direction of the sheriff, April 6 through May 1, 1987. This is because Riske was out of the jail through no fault of his. Sentences are continuous, unless interrupted by escape, violation of parole, or some fault of the prisoner, and "where a prisoner is discharged from a penal institution, without any contributing fault on his part, and without violation of conditions of parole, … his sentence continues to run while he is at liberty." ***White v. Pearlman***, 42 F.2d 788, 789 (10th Cir. 1930)…. [W]e conclude that credit on Riske's sentence stopped on May 1, 1987, the date he was to have reported back to the jail. He failed to do so, and he was at liberty for the balance of his sentence through his own fault.

Riske, 152 Wis. 2d at 263-65.

¶18 In ***Dentici***, 251 Wis. 2d 436, ¶2, the sentencing court placed Dentici on probation and, as a condition of probation, ordered Dentici to serve sixty days in the House of Correction. When Dentici arrived at the House of Correction, a jailer told him that the jail was overcrowded and that he should return in twenty-five days. ***Id.*** Dentici returned, as ordered, twenty-five days later. ***Id.*** After completing his conditional confinement, Dentici's probation was revoked and Dentici was sentenced to two years' imprisonment. ***Id.,*** ¶3. Dentici sought credit against his two-year sentence for the twenty-five days he was at liberty from the House of Correction after having been turned away. ***Id.,*** ¶4. We concluded that, pursuant to ***Riske***, Dentici was entitled to sentence credit because he was absent from jail through no fault of his own. ***Id.,*** ¶1.

¶19 Here, as in ***Riske*** and ***Dentici***, Friedlander was at liberty between the date that he was released from prison and the date he was remanded to jail, not through any fault of his own but through the fault of government officials. Accordingly, under ***Riske*** and ***Dentici***, we conclude that Friedlander earned sentence credit for those sixty-five days of liberty.

¶20 The State makes two arguments against this application of the ***Riske*** and ***Dentici*** holdings. We address and reject each in turn.

¶21 First, the State argues that there are two material factual differences that distinguish ***Riske*** and ***Dentici*** from this case, namely, that: (1) "Riske and Dentici did report to jail but were turned away," whereas here, "Friedlander was aware he had not served his entire confinement, but did not do anything to resolve the matter"; and (2) the periods of liberty enjoyed by Riske and Dentici were like authorized "furloughs," whereas here, Friedlander was "not authorized ... to be at liberty." We are not persuaded.

¶22 It is undisputed that on September 27, 2016, prison officials released Friedlander from Oshkosh, did not notify the jail of Friedlander's release, and did not make transportation or other arrangements for Friedlander to be transferred to the jail. Friedlander testified that between September 27, 2016, and November 11, 2016, the first time Friedlander's probation agent told him to contact Deputy Scott about the unserved jail time, he met regularly with his probation agent, his probation agent did not tell him to report to jail, and he received no communication from either jail or prison officials. The record is devoid of evidence that Friedlander was ever ordered to report to jail until the circuit court remanded him to jail on December 1, 2016.

¶23 Like the defendants in ***Riske*** and ***Dentici***, Friedlander was released from a penal institution and was at liberty without any contributing fault on his part. The State fails to persuade us that the difference in why the release occurred—overcrowding in ***Riske*** and ***Dentici*** and apparent confusion or lack of communication among jail and prison officials here—matters. To conclude that Friedlander was at fault for his liberty, as the State suggests, would be to place on defendants the burden of administering their own sentences when government officials charged with that responsibility fail to do so, contrary to the reasoning in ***Riske*** and ***Dentici***. We conclude that the "broader principle" set forth in ***Riske*** and affirmed in ***Dentici*** applies here,[3] where Friedlander was at liberty through no fault of his own, indeed when he apparently did nothing but follow directions as they were provided to him, because government officials failed to transfer him from prison to jail and subsequently failed to order him to report to jail.

¶24 The State's other asserted material factual distinction, that Riske's and Dentici's periods of liberty were like "furloughs" and Friedlander's period of liberty was not like a furlough because it was "not authorized," is undeveloped, including through a lack of pertinent support in the record. The State fails to develop a persuasive argument based on this "not authorized" concept. It is sufficient to note that, as we have explained, the record reveals that prison officials intentionally and unambiguously authorized Friedlander's liberty when they released him from prison, failed to take any steps to arrange for him to report to the jail, and affirmatively and actively (at a minimum, through the actions of the

[3] *See* ***Riske***, 152 Wis. 2d at 265 (stating the "broader principle that a person's sentence for a crime will be credited for the time he [or she] was at liberty through no fault of the person"); ***Dentici***, 251 Wis. 2d at 439 (applying the "holding in ***Riske***, that a person who is absent from jail through no fault of his [or her] own is entitled to sentence credit").

probation agent) led him to believe that he had no further obligation regarding confinement.

¶25 Second, the State argues that ***Riske*** and ***Dentici*** do not apply because Friedlander was not "in custody," citing the holding in ***State v. Magnuson***, 2000 WI 19, ¶25, 233 Wis. 2d 40, 606 N.W.2d 536, that "'an offender's status constitutes custody' for sentence credit purposes 'whenever the offender is subject to an escape charge for leaving that status.'" Specifically, the State argues that: the court in ***Magnuson*** relied on WIS. STAT. § 946.42(1)(a), Wisconsin's escape statute; "WISCONSIN STAT. § 946.42(1)(a)2. provides that '[c]ustody' does not include constructive custody of a … person on extended supervision"; and when Friedlander was released from prison he was released to extended supervision, which "is not constructive custody that would subject him to an escape charge." We are not persuaded.

¶26 The State selectively quotes from ***Magnuson*** to suggest that WIS. STAT. § 946.42(1)(a) is the exclusive means by which to determine whether a defendant is in "custody." The plain language of the court in ***Magnuson*** reveals to the contrary: "we do not limit the inquiry to the definition of custody contained only in WIS. STAT. § 946.42(1)(a)." 233 Wis. 2d 40, ¶26; *see also* ***Dentici***, 251 Wis. 2d 436, ¶13 ("As established in ***Magnuson***, the definition of custody is not limited to the definition of custody established in WIS. STAT. § 946.42(1)(a).").

¶27 In addition, the court in ***Magnuson*** was not presented with the "at liberty through no fault of his own" issue that Friedlander presents here. As Friedlander points out, ***Magnuson*** was decided after ***Riske*** and did not suggest that it was intended to modify, overrule, or otherwise abrogate the holding in ***Riske***. Accordingly, the "broader principle" stated in ***Riske***, that a defendant is "in

custody" when he is at liberty through no fault of his own, remains good law by which we are bound. *See* ***Riske***, 152 Wis. 2d at 265 ("Applying the broader principle and not deciding whether [Riske] 'escaped,'" when he did not return as directed by the sheriff, the court concluded that Riske was entitled to sentence credit only from the time that he was turned away by the jailer until the time he was told to return); ***Dentici***, 251 Wis. 2d 436, ¶13 ("although ***Riske*** was decided before ***Magnuson***, the ***Riske*** definition of custody coexists with the ***Magnuson*** definition").

CONCLUSION

¶28 For the foregoing reasons we reverse the order of the circuit court and remand with directions to amend Friedlander's judgment of conviction to reflect an additional sixty-five days to be credited in the event that his probation is revoked and sentence is imposed.

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.