

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 21, 2000

Cornelia G. Clark
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. 00-1131-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RENEE L. REEK,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Dane County: STUART A. SCHWARTZ, Judge. *Affirmed.*

¶1 DYKMAN, P.J.¹ Renee L. Reek appeals from a judgment convicting her of four misdemeanors and an order denying her postconviction motion for additional sentence credit. Reek argues that time she served in custody

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

on probation and parole holds must be credited against her sentence in this case even though she received credit for the time on an earlier sentence because the two sentences were concurrent. The trial court denied Reek's postconviction motion for dual credit, concluding that Reek had already received credit on a day-for-day basis. We agree with the trial court and therefore affirm.

I. Background

¶2 On December 8, 1997, Reek was convicted of four misdemeanors. This appeal arises out of that conviction. Reek was placed on probation for the four misdemeanors, although at the time of her arrest for the misdemeanors, she was already serving an earlier sentence on parole. On December 10, 1997, she was arrested pursuant to an apprehension request and confined on a probation and parole hold until December 22, 1997, when she was released. On February 28, 1998, Reek was arrested for another misdemeanor, as well as for a probation violation.

¶3 From February 28, 1998,² through July 13, 1998, Reek was again confined, at least in part because of a probation and parole hold. After being released on July 13, 1998, Reek was arrested pursuant to an apprehension request and a bench warrant on January 19, 1999. It appears that Reek remained in custody on a probation and parole hold after January 19, 1999, until April 8, 1999, when the Division of Hearings and Appeals revoked Reek's probation and parole, and ordered her returned to Taycheedah Correctional Institution to serve out her earlier sentence. Her revocation summary indicates that she was on hold

² Reek's revocation summary states the date as both February 26 and February 28, on alternate pages. Because the trial court used February 28, as do the parties on appeal, we also use February 28 as the correct date.

“1/19/99 - present.” The trial court found that Reek was returned to Taycheedah on May 14, 1999, then released from Taycheedah and transferred to the county jail on July 13, 1999.

¶4 On August 2, 1999, Reek appeared in court for sentencing on the four misdemeanors in this case, the other misdemeanor, and two additional felonies.³ On the four misdemeanors at issue here, Reek received four concurrent one-year terms. At the time of sentencing, the trial court did not specify whether these terms were to be concurrent or consecutive to any time remaining on Reek’s earlier sentence.

¶5 The trial court entered a revised judgment of conviction, reflecting the new sentence and thirty-six days of sentence credit. Reek pursued postconviction relief, moving the trial court to hold a hearing on sentence credit and to amend the judgment to grant her additional days of credit on her new sentence. The trial court denied her motion, concluding that Reek was not entitled to any additional days. In its decision denying her motion, the trial court determined that her sentence in this case ran concurrent with her earlier sentence. However, the trial court also concluded that Reek was not entitled to additional credit against her sentence in this case because she had already received day-for-day credit for time served. Reek appeals.

³ While the trial court imposed most of the terms as jail time, and one as a prison sentence, the court determined that the jail time could be served in the prison system. Reek’s aggregate term of incarceration for all seven crimes was six years, not including any sentence credit.

II. Analysis

¶6 Reek argues that she is entitled to have 262 additional days of sentence credit applied to her sentence in this case for the following periods she spent in custody: Twelve days for December 10, 1997, to December 22, 1997; 135 days for February 28, 1998, to July 13, 1998; and 115 days for January 19, 1999, to May 14, 1999. Although she admits that amount of time was already credited to her earlier sentence, Reek contends that she is entitled to the same credit on this sentence, or “dual credit,” because the trial court determined that this sentence and her earlier sentence were concurrent. The State contends that Reek’s sentences cannot be concurrent because, by the time the trial court imposed her sentence in this case, her earlier sentence was “in every meaningful way, fully served.”⁴ We conclude that Reek is not entitled to additional sentence credit because most of her earlier sentence has been separately served, therefore she has already received day-for-day credit.

¶7 Whether Reek is entitled to the additional sentence credit involves the application of the sentence credit statute, WIS. STAT. § 973.155 (1997-98), to

⁴ The State also argues that *State v. Beets*, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), disposes of this case. We cannot agree. In *Beets*, the defendant asserted he was entitled to credit on one sentence for time he spent in prison serving another sentence. *Id.* at 376. The supreme court concluded that the defendant was not so entitled, in part because the two sentences were not connected by the same course of conduct. *Id.* at 378. Reek is not asking for the same thing that the defendant in *Beets* was. During the periods for which Reek seeks dual credit, she was not in custody serving time on a prison sentence with the possible exception of the brief period when she was ordered returned to Taycheedah on April 8, 1999, and actually transferred to Taycheedah on May 14, 1999. During all other periods for which Reek seeks dual credit, she was in custody on probation and parole holds, at least in part as a result of her conduct in this case. Because we have concluded that Reek received day-for-day credit, we need not determine whether the *Beets* rule provides another ground precluding Reek from receiving dual credit for the period from April 8, 1999, to May 14, 1999.

the particular facts before us.⁵ This is a question of law that we review de novo. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶8 When sentences are consecutive, time spent in pre-sentence custody is only applied to one sentence. *State v. Tuescher*, 226 Wis. 2d 465, 469, 595 N.W.2d 443 (Ct. App. 1999), *review denied*, 228 Wis. 2d 175, 602 N.W.2d 761 (1999). In contrast, when sentences are concurrent, offenders may receive “dual credit” on the concurrent sentences. *Rohl*, 160 Wis. 2d at 330. In other words, time spent in pre-sentence custody is credited toward each concurrent sentence. *Tuescher*, 226 Wis. 2d at 469. Applying credit against only one of the concurrent terms would defeat the concurrent nature of the sentence. *State v. Ward*, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989).

⁵ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted. WISCONSIN STAT. § 973.155 states, in part:

(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 hold under s. 304.06 (3) or 973.10 (2) placed upon the person for the same course of conduct as that resulting in the new conviction.

¶9 This basic dichotomy is deceptively simple, and sentences cannot always be neatly categorized as concurrent or consecutive. “Determining the sentence credit is more complex ... when multiple sentences are imposed at different times.” *Tuescher*, 226 Wis. 2d at 469-70; *see also* WIS JI—CRIMINAL SM-34A. The Special Materials appended to the criminal Wisconsin Jury Instructions state that the guiding principle in multiple sentence cases is that an offender is entitled to day-for-day credit: “[a]n offender is entitled to have his or her total sentence credited with one day for each day spent in custody.” WIS JI—CRIMINAL SM-34A.⁶

¶10 In *State v. Boettcher*, 144 Wis. 2d 86, 100-01, 423 N.W.2d 533 (1988), the supreme court discussed this day-for-day principle in the context of consecutive sentencing. We have applied the rationale of *Boettcher* and the day-for-day principle in cases involving sentences that were not neatly categorized as consecutive or concurrent. *See State v. Jackson*, 2000 WI App 41, ¶¶17-19, 233 Wis. 2d 231, 607 N.W.2d 338; *State v. Morrick*, 147 Wis. 2d 185, 191, 432 N.W.2d 654 (Ct. App. 1988).

¶11 In *Morrick*, Donald Morrick sought dual credit for two separately-imposed sentences. *Morrick*, 147 Wis. 2d at 188-89. Morrick argued that because one of his sentences did not begin immediately after the other, the sentences were not consecutive and were therefore concurrent for sentence credit purposes. *Id.* at 188. We rejected Morrick’s argument. *Id.* The reason Morrick’s sentences were not “consecutive” in the technical sense of the term was because the earlier

⁶ In complex sentence credit cases, we look to the Special Materials appended to the Wisconsin Jury Instructions for guidance. *State v. Tuescher*, 226 Wis. 2d 465, 469-70 & n.1, 595 N.W.2d 443 (Ct. App. 1999).

sentence had long since been completed when the new sentence was imposed. *Id.* at 187. Instead of adopting a hypertechnical definition of a consecutive sentence, we turned to *Boettcher* and the day-for-day principle in denying Morrick dual credit. *See id.* at 191. We concluded as follows:

We agree with the *Boettcher* court that sec. 973.155, Stats., requires that “[t]he total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences.” And we see no difference in principle between consecutive sentences and the two separate and distinct sentences at issue here with respect to computation of presentence detention credit. Were we to adopt Morrick’s position, we would be authorizing double credit for time served ... in violation of the spirit, if not the letter, of *Boettcher*. Morrick is entitled to day-for-day credit for the time served, no more and no less; and that is what he received.

Id. (Citation omitted).

¶12 In *Jackson*, we were presented with a similar fact pattern to that in *Morrick*, and we again rejected the defendant’s request for dual credit. *Jackson*, 2000 WI App 41 at ¶19. We concluded, “[t]he core idea of *Boettcher* is that ‘dual credit is not permitted’ where a defendant has already received credit against a sentence which has been, or will be, separately served.” *Id.*

¶13 We concede that Reek’s situation is not exactly like the offenders in *Jackson* or *Morrick* because Reek had not been discharged from her earlier sentence at the time the trial court imposed her sentence in this case. We do not agree with the State that Reek’s earlier sentence was “in every meaningful way, fully served.” A sentence does not end when an offender is released from prison on parole, but continues until a defendant is actually discharged from the sentence. *Grobarchik v. State*, 102 Wis. 2d 461, 468, 307 N.W.2d 170 (1981). “Unlike a mandatory release situation where an inmate’s sentence technically continues

while on parole, a discharge date signals the end of a criminal sentence.” *State v. Thomas*, 2000 WI App 162, ¶19, 238 Wis. 2d 216, 617 N.W.2d 230, *review denied*, 2000 WI 121, ___ Wis. 2d ___, ___ N.W.2d ___. Nothing in the record shows that Reek was discharged from her prison sentence when she was released from Taycheedah on July 13, 1999. In fact, according to a certified copy of Taycheedah records, Reek’s maximum discharge date for her earlier sentence was not until September 22, 2000, after she began serving time on her new sentence.

¶14 Nevertheless, we conclude that *Jackson* and *Morrick* and the day-for-day principle support our conclusion that Reek is not entitled to dual credit. As in *Jackson* and *Morrick*, Reek’s two sentences do not fit neatly into either the consecutive or concurrent box. In response to Reek’s postconviction motion, the trial court determined that Reek’s two sentences were concurrent. However, Reek began serving her earlier sentence years before she began serving her sentence in this case. She began serving the earlier sentence well before May 1997,⁷ and she began serving her sentence in this case on August 2, 1999.⁸ The chronological reality is that the two sentences are much more consecutive than concurrent, and for the most part, her earlier sentence has been separately served.

¶15 We are convinced that denying Reek dual credit under these circumstances is most consistent with the day-for-day credit principle and with *Boettcher*, *Morrick*, and *Jackson*. Reek concedes that she has already received the credit she seeks here on her earlier sentence. While her earlier sentence was

⁷ The record shows that Reek was granted parole in her earlier sentence on May 19, 1997.

⁸ WISCONSIN STAT. § 973.15(1) provides in part, “[e]xcept as otherwise provided in this section, all sentences commence at noon on the day of sentence”

not “previously served” in full as in *Morrick* and *Jackson*, she has nevertheless received day-for-day credit because the non-overlapping portion of the earlier sentence and the sentence in this case constitutes far more than the 262 days in dual credit she seeks.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports. WIS. STAT.
RULE 809.23(1)(b)4.

