

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 22, 2006

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. 2005AP491-CR

Cir. Ct. No. 2003CT3183

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICK A. WALZ,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
DANIEL R. MOESER, Judge. *Affirmed.*

¶1 LUNDSTEN, P.J.¹ Rick Walz appeals an order of the circuit court denying his motion for sentence credit. Walz was arrested for operating a motor

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

vehicle while intoxicated, while he was on probation for another crime. Walz's probation agent placed a "probation hold" on Walz following the OWI incident, and Walz was placed in custody for twelve days. Walz was convicted of OWI as a second offense, and was sentenced to ten days of jail time. Walz moved the court for sentence credit for the twelve days he spent on the probation hold. The circuit court denied that motion. We affirm.

Background

¶2 Walz was arrested for OWI while on probation for another crime. Walz's probation agent subsequently placed Walz on a probation hold for twelve days. Following a trial to the court, Walz was convicted of OWI as a second offense and sentenced to ten days of jail time.²

¶3 Walz filed a motion seeking sentence credit for the twelve days he spent in custody on the probation hold pursuant to WIS. STAT. § 973.155(1)(b).³

² Walz's ten-day sentence for this OWI was imposed and stayed pending this appeal.

³ WISCONSIN STAT. § 973.155 provides, 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.

(continued)

At a hearing on that motion, Walz’s probation agent testified. Following that hearing, the circuit court concluded that the probation agent had placed Walz on the probation hold not for the OWI, but for drinking, which violated a condition of his probation. The court concluded that, because the hold was not for the same course of conduct for which the sentence was imposed (the OWI), the time on the probation hold would not count as a sentence credit. Walz appeals.

Discussion

¶4 To receive sentence credit, “an offender must establish: (1) that he or she was in ‘custody’; and (2) that the custody was in connection with the course of conduct for which the sentence was imposed.” *State v. Dentici*, 2002 WI App 77, ¶5, 251 Wis. 2d 436, 643 N.W.2d 180 (citations omitted). Here, the parties do not dispute whether Walz was “in custody” for the twelve-day period at issue. The dispute concerns the circuit court’s factual finding regarding the *reason* Walz was in custody. The circuit court found that Walz’s probation agent placed him in custody for drinking, a violation of a condition of his probation. Walz contends that the agent’s testimony at the motion hearing conclusively establishes that the agent instituted the hold because of the OWI offense, not merely the drinking.

¶5 We will not overturn a trial court’s factual determinations unless the findings are clearly erroneous. *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983). A circuit court’s findings are not clearly erroneous

(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. 302.113(8m), 302.114(8m), 304.06(3), or 973.10(2) placed upon the person for the same course of conduct as that resulting in the new conviction.

merely because there is evidence in the record to support a contrary finding. *Id.* The contrary evidence, rather, must constitute the great weight and clear preponderance of the evidence. *Id.* at 643-44.

¶6 Walz asserts that his probation agent conclusively testified that the agent placed Walz on the probation hold because of the OWI. Walz cites the following exchange during the agent's testimony:

Q And are you aware that on October 5th of 2003, [Walz] was arrested on an operating while intoxicated offense?

A Right.

Q As a result of that, did you place him on a probation hold?

A Yes, I did.

Q And was there any reason, other than the operating while intoxicated offense, that he was placed on a probation hold?

A No. That was the reason.

¶7 If this were the only testimony, we would agree with Walz. But there was more. Walz's probation agent was asked about the conditions of Walz's probation, and this exchange followed:

A There's several. The main ones are no contact with his ex-wife and not to consume or possess alcohol, and he is to complete alcohol and drug treatment, domestic violence counseling again, and there are various other specific conditions, but those are the main conditions.

Q So even if you were to find out that he wasn't driving a vehicle, that he was just sitting in the passenger seat, but was drunk, you probably would have put a hold on him anyway, correct?

A Correct. Anytime Mr. Walz, if I believe that he's been drinking or have evidence that he's drinking or

has contact with his victim, his ex-wife, he would be put on a hold.

Q And that was because of his behavior in the previous case that you were concerned about those issues, correct?

A Correct.

(Emphasis added.)

¶8 Thus, the probation agent’s testimony may be read as saying that the arrest for the OWI was used by the agent as evidence that Walz violated a condition of his probation, namely, the condition that he not drink.

¶9 We might not have made the same factual finding as the circuit court, but this is not a fact-finding court. In order to succeed, Walz must demonstrate that the circuit court’s finding was against the great weight and clear preponderance of the evidence. He has not done so.

¶10 In his reply brief, Walz argues that, even if his probation agent placed him on the hold for drinking, he should still receive credit against his OWI sentence because the hold arose from the same “course of conduct” as the OWI. Walz failed to argue this theory to the circuit court or to include it in his brief-in-chief on appeal. Therefore, we conclude that he has waived this argument, and we decline to address it. *See State v. Mechtel*, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) (“We do not generally address arguments raised for the first time in reply briefs.”); *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997) (“The general rule is that issues not presented to the circuit court will not be considered for the first time on appeal.”). Furthermore, even if this argument had not been waived, it lacks merit. The OWI statutes do not prohibit possessing or consuming alcohol, which the circuit court found is the conduct Walz had been placed on a

probation hold for. Possessing or consuming alcohol is distinct from the conduct comprising the OWI, that is, *being* intoxicated and operating a vehicle. *See* WIS. STAT. § 346.63(1). Thus, Walz’s probation hold was not based on the same “course of conduct” as the OWI.

¶11 Finally, Walz argues that the circuit court erred in concluding that it had discretion as to whether it could order that sentence credit be given. Walz bases this argument on the fact that the judge stated the following:

So I’m not going to give credit. I don’t think it’s mandatory, and I think there is some discretion, and I’ve made it clear.

We agree that this statement indicates the circuit court mistakenly believed it had “some discretion” in awarding sentence credit. If that was the circuit court’s thinking, the court was in error. When there are undisputed facts, whether “time served” qualifies for sentence credit under WIS. STAT. § 973.155(1) is a question of law. *Dentici*, 251 Wis. 2d 436, ¶4. However, Walz has not demonstrated that there is reason to think that the circuit court denied him credit because of discretion, rather than simply disagreeing with his factual argument. We will not reverse based on speculation that the court’s possible misapprehension affected its decision, especially when the record shows that Walz’s counsel did not speak up and correct the court at the time.

By the Court.—Order affirmed.

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

