COURT OF APPEALS
DECISION
DATED AND FILED

August 30, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-1953

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDRICK P. ROBINSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL L. KONKOL, Judge. *Reversed and cause remanded with directions*.

Before Vergeront, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Edrick Robinson appeals an order denying his motion for sentence credit. The issue is whether he is entitled to sentence credit for time spent confined in a Texas jail, on a pending Texas charge, while at the same time a Wisconsin probation violation warrant was also filed against him in

Texas. We conclude that the record is insufficient to make this determination, and we reverse and remand for further proceedings.

¶2 Robinson was convicted of a felony in Wisconsin in 1995. His sentence was imposed and stayed, and he was placed on probation. His probation supervision was then transferred to Texas. There, in February 1996, he was arrested for alleged possession of a stolen firearm. About a month later, based on that allegation, Wisconsin issued a "violation warrant." Robinson remained confined in Texas until March 1997. At that time, the prosecution dismissed the firearm charge because Robinson's brother confessed to the crime. Wisconsin released its violation warrant the next day, and Robinson was released from custody.

¶3 In 1999, Robinson's probation on the 1995 Wisconsin conviction was revoked for reasons unrelated to the Texas incident. He was then returned to prison in Wisconsin to serve the sentence imposed and stayed in 1995. Robinson requested sentence credit under WIS. STAT. § 973.155 (1999-2000)[1] for the time he spent in the Texas jail while he was the subject of Wisconsin's violation warrant. The Department of Corrections and the circuit court denied that request, and Robinson appeals.

¶4 Except for the fact that Robinson is seeking sentence credit for time spent in custody outside of Wisconsin, his situation is a fairly common one: a probationer is suspected of a new crime, arrested for the new crime, and then simultaneously placed on a probation hold. At that point, the defendant is being

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

held in jail for two separate legal reasons. One of the cases Robinson relies on arose from precisely this situation. In ***State v. Boettcher***, 144 Wis. 2d 86, 94-95, 423 N.W.2d 533 (1988), the court recognized that in these dual custody situations, the credit for the time in jail can be applied to either the sentence on the new charge, or the sentence that follows from revocation of the probation. The credit should be applied to whichever sentence is imposed first, but the defendant does not get credit on both sentences unless they are concurrent. ***Id.*** at 100.

¶5 In Robinson's case, unlike ***Boettcher,*** he was not convicted of a second crime, because the Texas charge was dismissed. However, Robinson argues that he should still receive sentence credit for his time in the Texas jail because the Wisconsin violation warrant prevented his release on bail. Citing ***Boettcher***, he argues that the credit should be applied to the first (and only) sentence imposed on him, which was the sentence previously imposed and stayed in 1995.

¶6 On appeal, the State does not dispute Robinson's reading of ***Boettcher***, and gives us no reason to doubt that it remains good law. Instead, the State offers several arguments as to why the result should be different in this case because Robinson is seeking credit for confinement out of state.

¶7 The State first relies on a conclusion of the Wisconsin Jury Instructions Committee. The Committee has stated that a defendant is not in custody, for purposes of awarding sentence credit, when the defendant is detained in another state for an offense committed in that state, even if a Wisconsin warrant or detainer has also been filed. *See* WIS JI—CRIMINAL SM-34A at 5-6 (2001). The Committee cites one case in support of this conclusion, ***State v. Rohl***, 160

Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991). Robinson argues that this case does not support the Committee's conclusion. We agree.

¶8 ***Rohl*** has some similarities to the present case. Rohl was a Wisconsin parolee who went to California and was held on new charges there. ***Id.*** at 328. Based on the new charges, Wisconsin issued a "parole violation warrant." ***Id.*** Rohl was convicted and imprisoned on the California charges, and received sentence credit there for his pre-sentence incarceration. ***Id.*** Upon release from California, Rohl was returned to Wisconsin, his parole was revoked, and he was incarcerated in a Wisconsin prison. ***Id.*** He sought sentence credit in Wisconsin for his California pre-sentence time, during which he had also been held pursuant to Wisconsin's parole violation warrant. ***Id.*** at 328-29. This court held that Rohl was not entitled to that credit because he had already received that credit against his California sentence, and to give it to him again on the Wisconsin sentence would be contrary to ***Boettcher***'s rule that the credit can be given on only one of the sentences, unless the sentences are concurrent, which Rohl's were not. ***Id.*** at 329-30, 332.

¶9 In its discussion of ***Rohl***, the Jury Instructions Committee provides an accurate description of the opinion, including a statement that sentence credit was not given "because Rohl had received full credit in California." WIS JI—CRIMINAL SM-34A at 16 n.13. However, the Committee does not explain why it believes the ***Rohl*** opinion supports its conclusion that sentence credit should not be given when a defendant is held in another state and a Wisconsin warrant or detainer has been filed. It is clear to us, as stated in the Committee's own description of the opinion, that the ***Rohl*** decision was based on the fact that Rohl had already received the sentence credit in California, and *not* on the fact that he

was held outside of Wisconsin, as the Committee's citation of ***Rohl*** implies. We decline to apply the Committee's conclusion to the case before us.

¶10 The State also relies on another statement by the Jury Instructions Committee. The Committee opined that a person is entitled to credit when detained in jail in another state, if that detention results "exclusively from a Wisconsin warrant or detainer." WIS JI—CRIMINAL SM-34A at 5. The Committee determined that credit should not be granted when, for example, a Wisconsin parolee, already in custody in Illinois on Illinois charges, has a Wisconsin hold or warrant filed against him. WIS JI—CRIMINAL SM-34A at 16 n.8. The Committee stated: "This is consistent with the conclusion that filing a detainer against one already in custody in Wisconsin does not result in 'custody' under § 973.155 on the charge which is the subject of the detainer." ***Id.*** The Committee's footnote then cited three Wisconsin cases in support.[2] However, none of those cases support the Committee's conclusion.

¶11 Only one of the Committee's citations needs to be discussed in detail, ***State v. Demars***, 119 Wis. 2d 19, 349 N.W.2d 708 (Ct. App. 1984). In addition to ***Demars***, the Committee relies on ***State v. Nyborg***, 122 Wis. 2d 765, 364 N.W.2d 553 (Ct. App. 1985), which is simply a straightforward application of ***Demars*** to similar facts, and on ***Rohl***, 160 Wis. 2d at 330, which we have already discussed above.

[2] We note that this citation appears to include a typographical error. The Committee directs the reader to the cases "cited in note 10, below." However, it appears that the correct cross-reference should be to note 15.

¶12 In ***Demars***, the defendant was held in Fond du Lac County on a probation hold and on new charges. ***Demars***, 119 Wis. 2d at 21. During that time, a separate criminal complaint was filed against him in Winnebago County, and that county then filed a "detainer" requesting that Fond du Lac County detain him if he should post bond and the probation hold be lifted. ***Id.*** When Demars was eventually convicted of the Winnebago County offenses, he sought credit against those sentences from the date the "detainer" was filed against him. ***Id.*** at 22. We held that a defendant is not in custody in connection with an offense unless there is "the occurrence of a legal event, process, or authority which occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." ***Id.*** at 26. We further held that Demars was not entitled to credit from the date of the "detainer" filed by Winnebago County because the "deainer" was not a document with any legal effect under Wisconsin law. ***Id.*** at 23-26.

¶13 The Jury Instructions Committee uses ***Demars*** to support its conclusion that when a person is being held on charges in another state, the simultaneous filing of a Wisconsin detainer does not entitle the person to sentence credit on the Wisconsin charge. However, the Committee's reading of ***Demars*** is unsupportably broad. Our conclusion in ***Demars*** did not apply to all documents labeled as detainers, but rather to *intrastate* detainers, which we concluded have no legal effect within Wisconsin, as a matter of Wisconsin law. An *interstate* detainer is a wholly different matter. Interstate detainers do have certain legal effects in Wisconsin, as set forth in WIS. STAT. §§ 976.05 and 976.06. Presumably they also have legal effects in the other states that have joined that multi-state agreement. We need not decide in this case whether the Committee is ultimately right in its conclusion on interstate detainers, because Robinson was subject to a violation warrant, not a detainer. Rather, our point is to emphasize

that the Committee's conclusion cannot simply be extrapolated from ***Demars*** based on the use of the word "detainer." The real issue would be the specific legal effect of the interstate detainer, and whether it "occasions, or is related to, confinement on the charge for which the defendant is ultimately sentenced." ***Demars***, 119 Wis. 2d at 26. Applying ***Demars*** in our current case, the key question becomes, what was the legal effect of the Wisconsin violation warrant that was filed against Robinson in Texas, and did it occasion or relate to his confinement?

¶14 The State briefly addresses that question on appeal. It argues that the warrant had no legal effect, like the intrastate detainer in ***Demars.*** The State asserts that the warrant was merely "a mechanism to let Texas know that Wisconsin wanted Robinson back" for possible revocation proceedings once the Texas charge was resolved. However, the State cites no legal authority or other explanatory information that allows us to determine the legal effect of an interstate probation violation warrant in Texas. Robinson argues that the violation warrant prevented his release on bail on the Texas charge. However, he too has not cited any legal authority on the relationship between bail and an interstate probation violation warrant under Texas law. And, the record on this appeal contains no factual information about what actually occurred in the Texas court on the subject of bail, and it does not contain the violation warrant itself.

¶15 The State acknowledges the possibility that we may conclude additional fact-finding is necessary to fully evaluate Robinson's claim for sentence credit, and that is indeed our conclusion. Additional evidentiary material, findings of fact, and legal analysis are necessary to resolve his claim.

¶16 In remanding to the trial court, it is necessary for us to clarify some points that are *not* appropriate for further consideration. On appeal, in responding to Robinson's argument that he was denied bail because of the violation warrant, the State noted that the record was silent as to the reason Robinson was not released on bail. The State suggested that the reason might have been that he was not able to make whatever amount of cash bail was set, or that he was denied bond altogether. Neither of these issues is relevant to the issue of sentence credit, for the following reasons.

¶17 It does not matter whether Robinson could not raise a required cash amount. Robinson directs our attention to ***Klimas v. State***, 75 Wis. 2d 244, 249 N.W.2d 285 (1977). In that case, the court held that equal protection requires sentence credit to be given for pre-sentence custody of defendants who cannot make bail. ***Id.*** at 248-49. If such credit is not given, the indigent defendant who is convicted ends up serving a longer total sentence than a defendant who was able to make bail, because the indigent person actually serves the imposed sentence plus pre-trial incarceration. ***Id.*** We agree with Robinson that his financial inability to post bail would have no bearing on his sentence credit determination.

¶18 And, even if a Texas court denied Robinson bail altogether, he may still receive sentence credit, because the test for sentence credit is not a "but for" test. To receive sentence credit, it is not necessary that the violation warrant was the only legal force keeping Robinson in custody. The State's brief argues that the test is whether Robinson would have been released "but for" the Wisconsin violation warrant. However, the State is wrong. If the test were "but for," in a dual custody situation a defendant would never receive sentence credit, because in each of the two cases the State would be able to argue that it was "the other case" that kept the defendant in custody. The "but for" test could never be satisfied

when there are two separate legal reasons a defendant was held in custody. However, as we know from ***Boettcher***, discussed above, a defendant can indeed receive sentence credit when being held for multiple reasons. Therefore, even if the refusal of a Texas court to grant bail blocked Robinson's release, he can get sentence credit for that time, if the Wisconsin violation warrant "occasion[ed], or [was] related to, confinement on the charge" against which Robinson now seeks sentence credit. ***Demars***, 119 Wis. 2d at 26.

¶19 On remand, the parties and the trial court may face certain practical difficulties in adding to the factual record. Ideally, Robinson would be able to provide a transcript of any Texas proceedings relating to his bail. But because that Texas charge was dropped, those transcripts were probably never prepared, assuming that the bail proceedings were even recorded in the first place. Robinson may face significant obstacles in attempting to obtain any Texas transcripts at this point. It is possible that the Texas courts retain some type of minute information that would state whether he was granted bail, and on what terms, but this information may not be enough to answer whether his release was affected by the violation warrant. Although these would be the best sources of information, in their absence, perhaps Robinson himself can testify about what he heard in Texas court, or what he was told by his attorney.

¶20 It may also be difficult for Robinson to obtain a copy of the violation warrant, but presumably the State has easier access to that document. Although the burden of proof is ordinarily on the defendant seeking sentence credit, we encourage the State to add the violation warrant to the record if it can, in the interest of a speedy and efficient resolution of Robinson's claim.

¶21 Finally, it may be necessary for the parties to research Texas law to determine what legal effect the Wisconsin violation warrant had on Robinson's release. As possible guidance, we note that like Wisconsin, Texas has adopted the Uniform Act for Out-of-State Parolee Supervision. TEX. CODE CRIM. PROC. ANN. art. 42.11 (Vernon 2001).[3] The uniform act is also enacted as WIS. STAT. § 304.13.

¶22 In summary, we reverse and remand for the circuit court to take additional evidence, make findings as necessary, and reach a conclusion as to whether Wisconsin's violation warrant occasioned or was related to Robinson's confinement in the Texas jail.

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

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

[3] Recent Texas legislation has affected the status of the Uniform Act in that state. *See* 2001 TEX. SESS. LAW SERV. ch. 543 (Vernon) (ratifying the Interstate Compact for Adult Offender Supervision effective June 11, 2001; repealing TEX. CODE CRIM. PROC. ANN. art. 42.11 (Vernon 2001) effective on the first anniversary of the effective date of the new Interstate Compact).