

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**July 3, 2002**

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. 01-2646-CR  
STATE OF WISCONSIN**

**Cir. Ct. No. 90-CF-383**

**IN COURT OF APPEALS  
DISTRICT II**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**DAVID J. CLARK,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for Waukesha County:  
MARK S. GEMPELER, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

Before Brown, Anderson and Snyder, JJ.

¶1 PER CURIAM. David J. Clark has appealed from an order entered in the trial court on September 12, 2001. In the order, the trial court awarded Clark additional sentence credit in the amount of 202 days for the time he spent in custody between August 28, 1990 and March 15, 1991. No challenge is made to

this portion of the trial court's order on appeal, and this portion is affirmed. However, Clark also requested additional credit as discussed more fully below. We reverse the trial court's order to the extent that it denies the additional credit requested by Clark, and remand the matter with directions to award Clark the additional credit.

¶2 Clark was found guilty of two counts of first-degree sexual assault in Waukesha county circuit court case no. 90-CF-383 on October 16, 1990. On March 15, 1991, the trial court withheld sentence and placed Clark on twenty years of probation as to each count. The probation terms were ordered to run concurrent to each other. However, as a condition of probation as to each count, Clark was ordered to serve one year in the county jail. The jail terms were to be served consecutively to each other.

¶3 After serving two years in jail, Clark was released on probation. His probation was subsequently revoked, and in 1997 he was sentenced to concurrent prison terms of five years each for the two sexual assault counts.

¶4 After the entry of several amended judgments of conviction, Clark was eventually awarded 837 days of sentence credit against both counts, consisting of 365 days for one year spent in jail as a condition of probation, 263 days for the period spent in custody between revocation proceedings on June 14, 1996 and sentencing on March 14, 1997, and 209 days as stipulated to by the parties for various probation holds.

¶5 In his initial appeal in court of appeals case no. 00-1317-CR, Clark alleged that he was entitled to the following additional credit: (1) 10 days of additional sentence credit for the time he spent in custody from June 14, 1996 to March 14, 1997, which was miscalculated at the time of sentencing as 263 days

when it should have been 273 days; (2) 206 days of credit for pre-probation custody from August 24, 1990 to the date of his original sentencing on March 15, 1991; (3) 105 days of credit for time spent on a probation hold from June 1, 1994 to September 14, 1994; and (4) 365 days of credit for the second year spent in jail as a condition of probation.

¶6 In the first appeal, the State conceded that Clark was entitled to the 10 additional days of credit based upon the miscalculation, and to the first 4 days of the 206 days requested for the time spent in custody between August 24, 1990 and March 15, 1991. As to the remaining 202 days of the requested 206-day period, and the 105-day period, the State requested a remand to the trial court to determine whether Clark has already received credit for these time periods against a Milwaukee county sentence.

¶7 In an order issued on January 16, 2001, this court summarily reversed the trial court's order denying Clark's request for additional sentence credit, and remanded the matter for further proceedings. Specifically, this court ordered that Clark must be granted 14 days of additional sentence credit, representing the 10 days that were miscalculated at sentencing and the 4-day period conceded by the State from August 24, 1990 to August 28, 1990. This court then remanded the matter for a determination of whether the 202-day period from August 28, 1990 to March 15, 1991 had already been credited against the Milwaukee county sentence. We also remanded for a determination of whether the 105 days for the probation hold had already been credited to the Milwaukee county sentence. The trial court was also directed to determine whether the consecutive one-year jail terms imposed as a condition of probation were valid

under *State v. Pierce*, 117 Wis. 2d 83, 85, 342 N.W.2d 776 (Ct. App. 1983) and WIS. STAT. § 973.09(4) (1999-2000).<sup>1</sup>

¶8 On remand, the trial court awarded Clark 202 days of credit for the period between August 28, 1990 and March 15, 1991. However, for unknown reasons, it failed to address the other requests for credit. As a result, Clark has again appealed, requesting that he be awarded the additional 14 days that this court ordered in our January 16, 2001 decision, as well as the 105 days for the probation hold and 365 days for the second year served in jail as a condition of probation.

¶9 Although the trial court did not discuss the 105-day probation hold from June 1, 1994 to September 14, 1994, the State acknowledges that the record now establishes that Clark did not receive credit for this time period on any other sentence. The State therefore concedes that Clark is entitled to 105 days of additional credit on his sentences in this case. The States also reiterates its concession from Clark's first appeal, acknowledging that he is entitled to 14 days of credit as ordered in our January 16, 2001 decision.

¶10 The State disputes, however, that Clark is entitled to an additional 365 days of credit for the second year spent by him in jail as a condition of probation. In its own words, “[t]he State recognizes that on a gut level this seems unfair to Clark. On a gut level, it seems like Clark should receive 730 days of sentence credit against each sentence because he sat in jail for 730 consecutive days. However, sentence credit is governed by statute, not by gut reactions.”

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version.

¶11 We disagree with the State's contention that WIS. STAT. § 973.155 defeats Clark's claim for an additional 365 days of credit. Initially, we conclude that we need not address whether the trial court properly ordered Clark to serve consecutive jail terms totaling two years in jail as conditions of his concurrent terms of probation. Regardless of whether the two years in jail was valid when ordered, it was served by Clark. The only issue before us is whether he is entitled to credit for two years of jail time against both of his five-year sentences.

¶12 The five-year sentences imposed by the trial court after revocation are concurrent, as were the probation terms ordered by the trial court in 1991. Confinement in the county jail as a condition of probation constitutes custody for purposes of WIS. STAT. § 973.155(1)(a). *State v. Gilbert*, 115 Wis. 2d 371, 377-78, 340 N.W.2d 511 (1983). “[A] sentencing court must give credit to a defendant for presentence incarceration because ‘a person [may] not serve more time than that for which he is sentenced.’” *State v. Ward*, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989) (quoting *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985)). When concurrent sentences are imposed at the same time, credit for presentence incarceration must be applied against both sentences. *See Ward*, 153 Wis. 2d at 745-46.

¶13 The State points out that Clark served one year in jail as a condition of probation in connection with one of the sexual assault counts, followed by one year in jail as a condition of probation in connection with the other sexual assault count. Because 365 days was attributable to each count, the State contends that Clark is entitled to only 365 days of credit on the five-year sentence for each count.

¶14 We disagree. Clark was placed on concurrent twenty-year terms of probation. He served 730 days in jail in connection with these concurrent probation terms, not merely 365 days. If credit is denied, he will have served two years in jail as a condition of concurrent terms of probation, but will receive credit for only one year on his concurrent five-year sentences. This conflicts with the principle that a defendant is entitled to have his or her total sentence credited with one day for each day spent in custody. *See id.* at 746.

¶15 To clarify a confusing situation, we point out that Clark was thus entitled to a total of 1523 days of sentence credit on each of the concurrent five-year sentences in Waukesha county circuit court case no. 90-CF-383. This 1523-day total is comprised of the 837 days of credit ordered by the trial court prior to Clark's first appeal; the 202 days of credit awarded by the trial court in its September 12, 2001 order; the 14 days of credit ordered by this court in our January 16, 2001 decision; 105 days as conceded by the State in this appeal; and 365 days as directed in this decision, based upon Clark's service of two years in jail as a condition of probation. Clark's judgment of conviction shall be amended on remand accordingly.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

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

