

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 1, 2011

A. John Voelker
Acting 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. 2008AP766-CR

Cir. Ct. No. 2005CF60

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSEPH ALLEN NITCHALS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County:
ROBERT W. WING, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Joseph Nitchals was convicted of fleeing a traffic officer and possession of methamphetamine. Nitchals moved for postconviction relief, requesting additional sentence credit. The circuit court entered an amended judgment of conviction, awarding him credit for 826 days of presentence custody.

On appeal, Nitchals argues he is entitled to credit for an additional seventy-seven days. We disagree and affirm.

BACKGROUND

¶2 Nitchals was charged in Pierce County with fleeing a traffic officer and possession of tetrahydrocannabinols. While those charges were pending he was charged in St. Croix County with possession of methamphetamine and possession of drug paraphernalia. The two cases were consolidated in Pierce County. Nitchals pled guilty to fleeing a traffic officer and possession of methamphetamine, and the remaining charges were dismissed. The court withheld sentence and placed Nitchals on probation for three years. After Nitchals's probation was revoked, the court imposed consecutive sentences of eighteen months' initial confinement and two years' extended supervision on each count. The court initially awarded Nitchals 620 total days of sentence credit.

¶3 Nitchals moved for postconviction relief, arguing he was entitled to additional sentence credit. After a hearing, the court granted Nitchals credit for an additional 206 days. However, the court denied credit for seventy-seven days Nitchals was in custody under a cash bond in an unrelated Pierce County case. While Nitchals was in custody under the cash bond, a warrant had been issued for his arrest in the St. Croix County case. Nitchals argued that, because of the outstanding St. Croix County warrant, the seventy-seven days he spent in custody

in Pierce County were in connection with the St. Croix County case.¹ The circuit court disagreed, and Nitchals now appeals.

DISCUSSION

¶4 Determining the proper amount of sentence credit in this case requires us to apply WIS. STAT. § 973.155² to undisputed facts. This is a question of law that we review independently. *State v. Dentici*, 2002 WI App 77, ¶4, 251 Wis. 2d 436, 643 N.W.2d 180.

¶5 “[T]o 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.” *Id.*, ¶5 (citations omitted); WIS. STAT. § 973.155(1)(a). The connection between the custody and the sentence imposed must be factual; a mere procedural connection will not suffice. *State v. Johnson*, 2009 WI 57, ¶33, 318 Wis. 2d 21, 767 N.W.2d 207. Here, it is undisputed that Nitchals was in custody during the seventy-seven-day period at issue. The question is whether that custody was in connection with the sentence imposed in the St. Croix County case.

¶6 Nitchals argues his custody in Pierce County was connected to his St. Croix County case because of the outstanding St. Croix County warrant. He concedes that “he was held in custody in Pierce County throughout this period at

¹ Nitchals was actually held in Pierce County under the cash bond for eighty-three days, from July 5 to September 26, 2005. However, the St. Croix County warrant was not issued until July 11, 2005. On appeal, Nitchals only seeks credit for the seventy-seven-day period that the warrant was outstanding, July 11 to September 26, 2005.

² All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

least in part due to the cash bond issued in the unrelated [Pierce County] charges.” However, he argues, “It is undisputed that if the cash bond had either been posted by Nitchals or reduced to a signature bond, Nitchals would have remained in custody until the St. Croix Court ... quashed the warrant.” He contends that, because of the St. Croix County warrant, he “was not free to leave the jail.” Essentially, he argues he is entitled to sentence credit because his seventy-seven days in Pierce County jail were at least partially caused by the St. Croix County warrant.

¶7 However, the record does not support Nitchals’s assertion. There is no indication in the record that Nitchals’s custody in Pierce County was even partially due to the St. Croix County warrant. Nothing in the record indicates that the Pierce County Circuit Court was aware of the warrant at any time before September 26, 2005, the day the warrant was quashed. Neither the record nor CCAP³ shows that St. Croix County authorities filed any detainer or other notice requesting that Pierce County authorities keep Nitchals in custody if he satisfied the cash bond or if the bond was converted to a signature bond. There is no indication that anyone served the warrant on Nitchals or arrested him under the warrant’s authority during his custody in Pierce County. In short, the record does not show that Nitchals was ever held in response to the St. Croix County warrant. There is simply no connection between the St. Croix County warrant and the time Nitchals spent in custody under the cash bond in Pierce County.

³ Consolidated Court Automation Programs (CCAP) provides online records of court proceedings in Wisconsin.

¶8 Nitchals argues our supreme court’s recent decision in *State v. Carter*, 2010 WI 77, 327 Wis. 2d 1, 785 N.W.2d 516, supports his position. Carter was charged with first-degree recklessly endangering safety in Milwaukee County and a warrant was issued for his arrest. *Id.*, ¶¶58-59. He was subsequently arrested in Chicago, based on both the Wisconsin warrant and an Illinois probation violation warrant. *Id.*, ¶¶62. After Carter was convicted in the Milwaukee County case, he sought sentence credit for the time he spent in custody in Illinois. *Id.*, ¶¶10-11. The supreme court accepted the circuit court’s finding that Carter’s presentence custody in Illinois was “custody resulting in part from the Wisconsin warrant,” noting that the Illinois arrest report listed the Wisconsin warrant as the first basis for the arrest. *Id.*, ¶¶62, 79. The court therefore concluded Carter was entitled to sentence credit because there was a factual connection between the presentence custody and the Wisconsin sentence. *Id.*, ¶78.

¶9 Nitchals argues that *Carter* allows sentence credit in his case because, as long as his custody flowed at least in part from the St. Croix County warrant, “[t]he fact that there were additional reasons [he] was held in custody is irrelevant.” This argument is fatally flawed because it rests on the unsupported assumption that Nitchals’s custody was even partially connected with the St. Croix County warrant. As already discussed, the record does not show any factual connection between the warrant and Nitchals’s custody. *See supra*, ¶7.

¶10 The sentence credit in *Carter* depended on a key fact missing from Nitchals’s case: the Illinois authorities actually arrested Carter and held him in custody based on the outstanding Wisconsin warrant. *Carter*, 327 Wis. 2d 1, ¶62. In contrast, the record in this case does not show any exercise of custody by Pierce County authorities in response to the St. Croix County warrant. *Carter* does not hold that the mere existence of an outstanding warrant establishes a factual

connection with custody imposed while the warrant is outstanding. Rather, the custody must be imposed at least partially in response to the warrant. *Id.*, ¶¶62, 78; accord *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995) (“unexecuted arrest warrant” not sufficient to establish custody for purposes of awarding sentence credit). Because there is no evidence that Nitchals’s Pierce County custody was imposed even partially in response to the St. Croix County warrant, Nitchals is not entitled to additional sentence credit.

By the Court.—Judgment affirmed.

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

