

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2012

Diane M. Fremgen
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. 2012AP702-CR

Cir. Ct. No. 2011CM4087

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CECIL LENNEL HUDSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
ELLEN R. BROSTROM, Judge. *Affirmed.*

¶1 KESSLER, J.¹ Cecil Lennel Hudson appeals a trial court order denying his postconviction motion for pretrial incarceration credit. We affirm.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND

¶2 On July 8, 2011, Hudson was charged with one count of disorderly conduct. At the time of Hudson's 2011 arrest, Hudson had eighteen months of extended supervision remaining on a 2008 felony drug conviction. *See* Milwaukee County Circuit Case No. 2008CF2102. On July 28, 2011, a pretrial conference was held before the trial court on Hudson's disorderly conduct charge. Hudson's defense counsel advised the trial court that Hudson was facing revocation in his 2008 felony case and proposed adjourning the disorderly conduct case until after Hudson's revocation hearing.

¶3 Hudson's disorderly conduct case was ultimately set for trial on October 4, 2011. Hudson remained incarcerated from the time of his arrest through that date. On October 4, 2011, Hudson pled guilty to disorderly conduct. The State informed the trial court that Hudson's extended supervision in the 2008 felony case had been revoked. Hudson's defense counsel did not dispute that statement. Hudson's defense counsel requested that the trial court impose a concurrent sentence in the disorderly conduct case and informed the trial court that Hudson was currently serving an eighteen month revocation sentence on the 2008 felony case. The trial court imposed a ninety-day sentence on the disorderly conduct charge to run consecutively to any other sentence Hudson was serving. Defense counsel agreed with the trial court's determination that Hudson was not entitled to a pretrial incarceration credit on the disorderly conduct charge because the trial court imposed a consecutive sentence. It is undisputed that Hudson did receive pretrial incarceration credit on his eighteen month revocation sentence.

¶4 On January 27, 2012, Hudson filed a postconviction motion and a motion seeking a stay pending appeal, arguing, as relevant to this appeal, that he

was entitled to pretrial incarceration credit on the disorderly conduct sentence. The trial court, in a written decision, denied Hudson's motion stating:

[The defendant] believes that he is entitled to 94 days of credit for the period July 10, 2011 to October 4, 2011, even though the court imposed a consecutive sentence. The defendant was placed in custody on an extended supervision hold in case 2008CF2102 on July 9, 2011. The defendant's extended supervision term was revoked on October 11, 2011, and he was administratively reconfined for one year and six months. The revocation order shows that the defendant received continuous custody credit from July 9, 2011 in 08CF002102. He is therefore not entitled to credit for the same period in 11CM004087 because the sentence is consecutive....

It makes no difference for purposes of [*State v. Boettcher* [144 Wis. 2d 86, 423 N.W.2d 533 (1988)],] that the defendant was sentenced in this case before his extended supervision was revoked. The defendant was originally sentenced in 2008CF002101 before he was sentenced in 11CM004087, and therefore, the credit is properly applied to the first imposed sentence. The sentence in 2008CF002102 was imposed in 2008, far before the defendant was sentenced in 11CM004087. An administrative reconfinement decision does not constitute the imposition of a sentence for purposes of sentence credit under section 973.155, Wis. Stats., and therefore, the court finds that it properly determined that the defendant is not entitled to sentence credit in this case.

(Emphasis and bolding added.) This appeal follows.

DISCUSSION

¶5 Hudson argues that he was erroneously denied a presentence credit of eighty-nine days towards his ninety-day sentence. Hudson argues that the trial court's determination that he was not entitled to a presentence credit because his ninety-day sentence was ordered to run consecutive to his revocation sentence is in violation of WIS. STAT. § 973.155(1). This case therefore requires interpretation of WIS. STAT. § 973.155. Questions of statutory interpretation are reviewed

independently of the trial court. *Spiegelberg v. State*, 2006 WI 75, ¶8, 291 Wis. 2d 601, 717 N.W.2d 641.

¶6 WISCONSIN STAT. § 973.155(1) explains when sentence credit for pretrial incarceration should be granted. The statute provides:

(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) and sub. (1m) 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.

¶7 It is undisputed that Hudson received credit for pretrial incarceration when his extended supervision was revoked, however, on appeal, Hudson essentially seeks dual credit on his consecutive sentences. Hudson contends that our decision in *State v. Wolfe*, 2001 WI App 66, 242 Wis. 2d 426, 625 N.W.2d 655, supports his request. In *Wolfe*, the defendant pled guilty to burglary and possession of burglarious tools as a repeater. *Id.*, ¶2. Because the defendant could not make bail, he was in custody until sentencing for a total of 331 days. *Id.* The trial court sentenced Wolfe to the maximum ten years on the first count and to a consecutive six years on the second count. *Id.* The court then stayed the six year

sentence and placed Wolfe on probation for four years. *Id.* The court applied the 331 days of credit for time Wolfe had spent in custody prior to sentencing to the six year sentence for which the court had placed Wolfe on probation. *Id.* On appeal, we reversed, ordering that Wolfe be given 331 days of pretrial incarceration credit on the first count. *Id.*, ¶9. In reaching that conclusion, we noted that “the possible effect of this action would be to nullify the 331 days of credit, we view this result as a ‘clear abuse of discretion.’” *Id.* at ¶7 (citation omitted).

¶8 Unlike in *Wolfe*, Hudson actually did receive a pretrial sentence credit on the 2008 case. Our supreme court’s decision in *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988) prohibits dual credit on consecutive sentences:

The basic question ... is whether it is permissible under the law to allow additional time-credit reduction on an arrest-related consecutive sentence when the credit for the same period in custody has already been applied upon revocation of probation to reduce a prior-imposed stayed sentence. We conclude that dual credit is not permitted-that the time in custody is to be credited to the sentence first imposed-and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats.

Boettcher, 144 Wis. 2d at 87.

¶9 At the time of Hudson’s plea and sentencing hearing on the disorderly conduct charge, Hudson’s trial counsel was aware that Hudson was going to be serving an additional eighteen months on the 2008 case. The trial court ordered Hudson’s sentence on the disorderly conduct charge consecutive to any other sentence. Hudson’s trial counsel correctly acknowledged that Hudson was not due any pretrial incarceration credit. *See State v. Tuescher* 226 Wis.2d 465, 469, 595 N.W.2d 443 (Ct. App. 1999) (Under the sentence credit statute,

when multiple sentences are imposed at the same time, time spent in presentence custody is credited toward each sentence if the sentences are concurrent, but if the sentences are consecutive, time in presentence custody is credited towards only one sentence.). *See also State v. Rohl*, 160 Wis. 2d 325, 329-330, 466 N.W.2d 208 (Ct. App. 1991) (WISCONSIN STAT. § 973.155 provides that credit for the same course of conduct for which the offender is ultimately sentenced means that credit is awarded on a day-for-day basis against the total days of incarceration imposed against an offender for sentences which are consecutive. This is regardless of whether the offender seeks credit against consecutive sentences, both of which have yet to be served or one sentence which already has been served; credit should be applied to the sentence that is first imposed.).

¶10 Hudson contends that because he was sentenced on the disorderly conduct charge on October 4, 2011, but the revocation order on the 2008 case was not issued until October 11, 2011, the trial court could not have known at the time it denied his pretrial sentence credit that Hudson's revocation was going to be revoked. However, the record does not support Hudson's contention. Although the revocation order and warrant is dated October 11, 2011, the order states: "on July 8, 2011 [Hudson] violated the conditions of [extended supervision] as determined by the Division on September 22, 2011." (Emphasis added.) Because the administrative decision predates Hudson's sentencing on the disorderly conduct charge, the trial court properly denied Hudson's request for pretrial credit.

¶11 For the foregoing reasons, we affirm the trial court.

By the Court.—Order affirmed.

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

