

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 27, 2008**

David R. Schanker  
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. 2007AP876-CR**

**Cir. Ct. No. 2003CF702**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ROY L. HALL,**

**DEFENDANT-APPELLANT.**

---

APPEAL from orders of the circuit court for Waukesha County:  
LINDA M. VAN DE WATER, Judge. *Reversed and cause remanded with  
directions.*

Before Brown, C.J., Anderson, P.J., and Snyder, J.

¶1 PER CURIAM. Roy L. Hall has appealed from an order reconfining him for a period of two years after the revocation of his extended supervision and from an order denying his motion for postdisposition relief. The

sole issue is whether the trial court erroneously exercised its discretion by using sentence credit as a factor in determining the amount of time that Hall should be reconfined. Because we conclude that the trial court erroneously considered sentence credit in determining the period of reconfinement, we reverse the orders and remand the matter for a new reconfinement hearing.

¶2 When a defendant's extended supervision is revoked, the trial court may order that he be returned to prison for any specified period of time that does not exceed the time remaining on his bifurcated sentence. WIS. STAT. § 302.113(9)(am) (2005-06).<sup>1</sup> A reconfinement hearing is analogous to a sentencing hearing. See *State v. Swiams*, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452. As such, it is reviewed under an erroneous exercise of discretion standard. *State v. Gee*, 2007 WI App 32, ¶9, 299 Wis. 2d 518, 729 N.W.2d 424. An erroneous exercise of discretion occurs when a trial court considers irrelevant or improper factors. See *State v. Brown*, 2006 WI 131, ¶22, 298 Wis. 2d 37, 725 N.W.2d 262.

¶3 As at sentencing, a reconfinement order must provide the defendant with any sentence credit to which he is entitled in accordance with WIS. STAT. § 304.072 and WIS. STAT. § 973.155. See WIS. STAT. § 302.113(9)(am). When awarding sentence credit, a trial court is required to first determine the appropriate sentence, then determine the time previously served, and finally credit that time toward the sentence imposed. *Struzik v. State*, 90 Wis. 2d 357, 367, 279 N.W.2d 922 (1979). "The time previously served should not be a factor in the exercise of sentencing discretion because such credit is a constitutional right of the defendant

---

<sup>1</sup> All references to the Wisconsin Statutes are to the 2005-06 version.

which exists independently of what the trial judge determines to be the appropriate punishment for a given offense.” *State v. Walker*, 117 Wis. 2d 579, 586, 345 N.W.2d 413 (1984).

¶4 In *Struzik*, the Wisconsin Supreme Court held that a sentence of five years and fourteen days was improper where it was clear that the trial court added an additional fourteen days to the five-year sentence it deemed appropriate so that the sentence after the application of sentence credit would still constitute the sentence as originally deemed appropriate. *Struzik*, 90 Wis. 2d at 367-68. The court held that “[t]his technique subverts the constitutional right of a convicted prisoner to have time previously served (in circumstances where the time should be credited) applied toward the reduction of an appropriate sentence.” *Id.* at 367.

¶5 At Hall’s reconfinement hearing, the prosecutor recommended reconfinement for a period of eighteen months. Hall’s defense counsel and probation agent recommended reconfinement for seven months. The parties agreed that Hall was entitled to 138 days of sentence credit.

¶6 After listening to the parties’ arguments, the trial court discussed Hall’s criminal history, his prior failures on supervision, his drug and alcohol problems, and his violation of his rules of extended supervision despite past participation in numerous treatment programs. It concluded that Hall was not amenable to treatment and presented a danger to the community and that reconfinement was necessary to protect the community from him. After noting that five years, two months and twenty days was available for reconfinement, it stated:

The State is requesting that I reincarcerate you for 18 months. Obviously, you’re seeking less time than that.

And the probation memorandum recommends seven months' incarceration.

I would note you have 138 days of credit that the State is not objecting to. And rather than give you the entire five years and two months, the Court believes that a two-year reincarceration would be appropriate, *particularly in light of the credit that you're going to get*. You apparently need some substantial time to be confined, to work on AODA treatment, and decide whether or not, when you do get released, you're going to be serious about not consuming alcohol, not consuming drugs, and not committing any additional offenses. (Emphasis added.)

¶7 Hall subsequently moved the trial court to reduce the reconfinement term from two years to eighteen months, contending that the trial court had erred by using the sentence credit to which Hall was entitled as a factor in determining the length of reconfinement. The trial court denied the postdisposition motion in a written decision, stating:

The Court considered the original sentencing transcript, the probation revocation summary and arguments of counsel, as well as the aggravating factors of the initial crime, the lack of self-control while on extended supervision, the danger to the community, and *additionally the pre-sentence credit available to Mr. Hall*. The record, from both the original sentencing hearing and the reconfinement hearing, supports the sentence imposed on this defendant. The defendant's motion referenced the Court's comments out of context. The Court did not solely consider the amount of pre-sentence credit. (Emphasis added.)

¶8 The trial court further stated:

The pre-sentence credit was considered to allow the sentence to be in line with the recommended sentence of 18 months as requested by the state. A total sentence of two years, less 138 days credit, results in a total amount of confinement of 18 months, 47 days. The amount of presentence credit is a factor that may be considered to achieve the court's goal in sentencing. *See State v. Fenz*, 258 Wis. 2d 281 (Ct. App. 2002). Here, the Court's goal was to reincarcerate Mr. Hall for an appropriate amount of time to ensure that the community would be protected and that his rehabilitative needs would be met.

¶9 As contended by Hall, it is clear from the trial court's statements at the reconfinement hearing and in its postdisposition decision that, rather than determining the appropriate sentence and then applying 138 days of sentence credit to that sentence, the trial court used the 138 days of sentence credit as a factor in determining the length of reconfinement. It appears to have considered the appropriate sentence to be the eighteen-month period recommended by the State or something close to it, but increased the sentence to eliminate the impact of the 138 days of sentence credit to which Hall was entitled. Structuring a sentence to negate sentence credit is impermissible, as discussed in *Struzik*.

¶10 Contrary to the State's argument, the trial court's reconfinement decision is not permissible under *State v. Fenz*, 2002 WI App 244, 258 Wis. 2d 281, 653 N.W.2d 280. In *Fenz*, the court acknowledged that the general rule for applying sentence credit requires a trial court to first determine the sentence that is appropriate and then determine the amount of credit and apply it to the sentence. *Id.*, ¶¶8-10. However, under the facts of the case before it, this court held that the trial court properly considered sentence credit in determining the appropriate sentence. *Id.*, ¶11.

¶11 The trial court had determined that, based on the severity of Fenz' crimes and failure on probation, protection of the public required that Fenz receive institutional sex offender treatment. *Id.*, ¶3. Correctional authorities advised the trial court that completion of such a program required at least six years of incarceration. *Id.* The trial court then considered the sentence credit to which Fenz was entitled, along with his first parole eligibility date and likely mandatory release date, and imposed a sentence that ensured that he remained in prison for more than six years. *Id.*

¶12 In affirming the trial court, this court held:

The circuit court determined that Fenz needed to receive institutional sex offender treatment and that completion of that program required at least six years incarceration. In order to accomplish this very specific incarceration goal, it was necessary for the court to consider those factors that would influence the amount of time Fenz actually would spend in prison.

*Id.*, ¶10. This court concluded that the trial court properly employed the rule set forth in *Struzik* and *Klimas v. State*, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1977), “because it articulated a *specific time-related incarceration goal* and that goal required the court to consider the presentence credit due Fenz.” *Fenz*, 258 Wis. 2d 281, ¶10 (emphasis added).

¶13 In contrast to the situation in *Fenz*, nothing in the trial court’s decision or the record provides a basis for concluding that the trial court had a specific time-related incarceration goal in reconfining Hall for two years. While the trial court indicated that its goal was to reconfine Hall for a period of time appropriate to ensure that the community would be protected and his rehabilitative needs would be met, these are general sentencing goals. The trial court had no specific time-related incarceration goal as contemplated by *Fenz*.<sup>2</sup>

¶14 Because the trial court erroneously exercised its discretion by considering the 138 days of sentence credit to which Hall was entitled as a factor in determining the length of reconfinement, we reverse its reconfinement order

---

<sup>2</sup> As noted by Hall, if this court were to construe *State v. Fenz*, 2002 WI App 244, 258 Wis. 2d 281, 653 N.W.2d 280, to permit consideration of sentence credit under these circumstances, the *Fenz* exception would swallow the rule enunciated in *State v. Struzik*, 90 Wis. 2d 357, 367, 279 N.W.2d 922 (1979), and *Klimas v. State*, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1977).

and the order denying postdisposition relief. We remand the matter for a new reconfinement hearing.<sup>3</sup>

*By the Court.*—Orders reversed and cause remanded with directions.

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

---

<sup>3</sup> In remanding the matter for a new reconfinement hearing, we have considered Hall's argument that we should remand with instructions to the trial court to modify the reconfinement term to eighteen months. We decline to do so because it is not clear that, ignoring the 138 days of sentence credit, the trial court would have determined that an eighteen-month period of reconfinement was appropriate. On remand, the trial court must exercise its discretion to determine the appropriate period of reconfinement without regard to Hall's sentence credit.

