

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 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. 2007AP1421-CR

Cir. Ct. No. 2006CF1454

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DEVAILLOUS ROY HANKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: TIMOTHY M. WITKOWIAK and WILLIAM SOSNAY, Judges. *Affirmed.*

Before Curley, P.J., Wedemeyer and Kessler, JJ.

¶1 WEDEMEYER, J. Devailloous R. Hankins appeals from a judgment and orders following his guilty plea to one count of possession with intent to deliver cocaine. Hankins' complaint is that the trial court erred when it

denied him 139 days of sentence credit that he believes he should receive. Because the trial court did not err in denying Hankins credit for the 139 days during which he was serving a sentence on a fleeing conviction until the time he was sentenced for possession, we affirm.

BACKGROUND

¶2 On March 9, 2006, the police attempted to stop a van being driven by Hankins. The police had received a tip that the van was being used for dealing drugs. Hankins initially stopped the van, but as the police officers were approaching, he accelerated again and fled the scene. The police returned to their vehicles and a chase ensued. During the chase, the police officers observed Hankins hold a plastic bag with a white powdery substance out the window until the contents of the bag had spilled out. Hankins then dropped the bag out the window. The chase lasted approximately twenty minutes before Hankins was eventually stopped and arrested.

¶3 The police officers recovered the bag dropped, which had not been completely emptied and determined that the substance remaining in the bag was cocaine. The police also discovered cocaine on the seats and floor of the vehicle as well as in the center console. The amount of cocaine recovered was in excess of twenty-five grams, an amount indicating the cocaine was going to be sold rather than used for personal use.

¶4 Hankins was arrested and charged with four counts: two counts of second-degree recklessly endangering safety, one count of possession of cocaine with intent to deliver, and one count of fleeing an officer. The case was tried to a jury in June 2006. On June 22, 2006, the jury found Hankins guilty on the fleeing charge, but was unable to reach a verdict on the other three counts.

¶5 On June 27, 2006, Hankins was sentenced on the fleeing conviction to three and a half years, granting him sentence credit of 110 days for the time he spent in custody between his March 9th arrest and the June 27th sentencing. The court also re-set the remaining three counts for another trial to be held October 2, 2006. Instead of going to trial on that date, the State and Hankins advised the court that a plea agreement had been reached. Hankins agreed to plead guilty to the possession charge and the State agreed to dismiss the reckless endangerment charges. The trial court accepted the plea, and on November 13, 2006, Hankins was sentenced on the possession charge to ten years, consisting of five years initial confinement, followed by five years of extended supervision, to run concurrent to the previously imposed sentence on fleeing, which Hankins was currently serving.

¶6 On December 8, 2006, Hankins filed a motion pursuant to WIS. STAT. § 973.155 (2005-06),¹ requesting sentence credit on the possession count for the entire time period from his March 9th arrest through the November 13th sentencing on the possession count. The trial court granted the request in part, allowing the sentence credit for the 110 days from the March 9th arrest through June 27th, the date Hankins was sentenced on the fleeing conviction. The trial court denied sentence credit for the time following the June 27th sentencing, reasoning that based on *State v. Tuescher*, 226 Wis. 2d 465, 595 N.W.2d 443 (Ct. App. 1999), once Hankins was sentenced on the fleeing conviction, he was serving the fleeing sentence, and because possession is not the “same course of conduct” as fleeing, he is not entitled to credit on the possession conviction for the time he was serving the fleeing sentence.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶7 Hankins filed a postconviction motion challenging the court’s ruling, which was denied. He now appeals from the order denying his postconviction motion.

DISCUSSION

¶8 The issue in this case is whether, under the facts and circumstances presented here, Hankins is entitled to 139 days sentencing credit for the possession conviction. He asserts that because the possession charge and the fleeing charge arose from the same criminal episode that we should interpret the convictions to be the same course of conduct. He points out that the State charged these crimes together, that they occurred at about the same point in time—Hankins was attempting to dispose of the cocaine at the same time he was fleeing the police, and that if the jury had convicted him of possession during the first trial, he would have been sentenced on both fleeing and possession at the same time. If that had occurred, he would have received sentence credit on the possession conviction. He asserts that it is unfair to not receive the sentence credit in these circumstances and that he should not have to serve an additional 139 days simply because the jury deadlocked on the possession charge during his trial. He argues that not allowing sentence credit in these circumstances violates constitutional protections of due process and equal protection. Although this court acknowledges that the fortuitous events of this case resulted in a sentence credit outcome that on some level does appear to be unfair, we are bound by the case law set forth in *Tuescher*, and therefore must affirm.

¶9 The issue in this case involves the interpretation of the sentence credit statute as applied to undisputed facts. Accordingly, the issue presents a

question of law, which this court reviews independently. *State v. Abbott*, 207 Wis. 2d 624, 628, 558 N.W.2d 927 (Ct. App. 1996).

¶10 Hankins makes a compelling argument. He was convicted of two crimes, both of which occurred during the same general criminal episode on March 9th. However, he was sentenced at separate times for each crime. The first sentence was for the fleeing charge on June 27th, following a jury trial at which he was found guilty for fleeing. The jury deadlocked on the other charges. He then entered into a plea agreement with the State, wherein he pled guilty to the possession charge in exchange for dismissal of the reckless endangerment charges. Thus, he was sentenced on the possession charge 139 days after his sentencing on the fleeing charge. On a common sense level, because the sentences were imposed concurrently, it appears that he should be granted sentence credit for those 139 days. After all, if the jury had convicted on the possession at the same time as the fleeing, Hankins would have received the same sentence credit for both crimes. Likewise, if the fleeing sentencing had been postponed until the possession charge was resolved, and Hankins was sentenced on both cases, he would have received sentence credit on both the fleeing and possession convictions.

¶11 However, the law is not about what ifs and would haves. It is based on interpretation of statutory language and case law. Here, the sentence credit

statute, WIS. STAT. § 973.155(1)(a),² provides that credit is granted toward a defendant's sentence for all days spent in pre-sentence custody, so long as the custody is connected to the course of conduct for which the sentence is imposed. Thus, our analysis focuses on whether the fleeing conviction "is connected to the course of conduct" for the possession conviction. Guiding us in that determination is the *Tuescher* case, which despite Hankins' attempt to factually distinguish it from his case, is as factually similar to the instant case as two different cases can get.

¶12 In *Tuescher*, a jury convicted Tuescher of attempted second-degree intentional homicide, attempted burglary while armed and possession of a firearm by a felon. *Id.*, 226 Wis. 2d at 467-68. Each of these convictions arose out of the same criminal episode. *Id.* Tuescher burglarized a restaurant while armed with a shotgun and as he left the restaurant, he was confronted by police. *Id.* at 467. He exchanged gunfire with them and wounded an officer. *Id.* At his sentencing on October 23, 1995, the trial court sentenced him to concurrent prison terms and

² WISCONSIN STAT. § 973.155(1)(a) states:

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.

granted 224 days of sentence credit on each of his concurrent sentences for the time he spent in custody prior to sentencing. *Id.* at 468. On March 31, 1997, the trial court set aside the attempted homicide conviction on the grounds that he was entitled to a lesser-included offense jury instruction. *Id.* On January 26, 1998, Tuescher pled guilty to the lesser charge of first-degree reckless injury. *Id.* The trial court sentenced him to fifteen years in prison for this offense to be concurrent with the sentences for burglary and possession of a firearm, which he was already serving. *Id.* The trial court granted Tuescher sentence credit from the date of his arrest to the date that the attempted homicide conviction was vacated, but denied his request for credit after that date and during which time he was serving the sentences solely in connection with his burglary and firearm convictions. *Id.*

¶13 Tuescher asserted in his appeal that he should be granted additional sentence credit as all three of his crimes arose from the same course of conduct and because all three sentences were imposed concurrently. *Id.* at 470-71. This court acknowledged that although his three crimes were related in the sense that they were committed almost simultaneously, we concluded that they did not arise out of the same course of conduct. *Id.* at 478-80. We held that the phrase “course of conduct” as used in WIS. STAT. § 973.155(1) is ambiguous and that the language should be narrowly construed to refer to the same specific acts:

For the foregoing reasons, we conclude that a defendant earns credit toward a future sentence while serving another sentence only when both sentences are imposed for the same specific acts. Accordingly, Tuescher is not entitled to credit toward his reckless injury sentence for time he spent serving his sentences for burglary and possession of a firearm after his attempted homicide conviction was vacated, because those sentences did not arise out of the same “course of conduct” as that phrase is used in § 973.155.

Tuescher, 226 Wis. 2d at 479. Based on this case, we conclude that Hankins is not entitled to the 139 days of sentence credit that he seeks. As of June 27th, Hankins was serving a sentence on the fleeing conviction. The time between the sentence on the fleeing and the sentence on the possession, he was serving his sentence for the fleeing conviction. And, although the fleeing and possession arose out of the same criminal episode, they are not the same specific act. Fleeing is driving his van away from police and the possession charge involved having a large amount of cocaine in his vehicle. These acts, therefore, do not constitute the same course of conduct as that term is used in the sentence credit statute. Thus, the possession conviction is not connected to the same “course of conduct” as the fleeing conviction for which Hankins was “in custody” on from June 27th until November 13th. Accordingly, Hankins is not entitled to the 139 days of sentence credit and the trial court did not err in so ruling.

¶14 We are also not convinced by Hankins’ argument that *State v. Yanick*, 2007 WI App 30, 299 Wis. 2d 456, 728 N.W.2d 365, requires the granting of sentence credit for the 139 days at issue in this case. *Yanick* involves the revocation of probation and addressed the issue of sentence credit for conditional jail time overlapping with time Yanick spent serving an unrelated prison sentence. *Id.*, ¶1. Thus, the facts in *Yanick* are entirely different from the facts presented in the instant case.

¶15 Hankins also directed this court’s attention to the recently released case of *State v. Johnson*, 2008 WI App 34, ___ Wis. 2d ___, 746 N.W.2d 581. *Johnson*, however, addresses a different issue than what we are presented with in the instant case. It discusses “whether the ‘in connection with the course of conduct’ requirement applies individually to each concurrent sentence imposed at the same time.” *Id.*, ¶7. The facts of this case are distinguishable from *Johnson*,

which both parties conceded during oral argument in this court. Accordingly, we need not address *Johnson* further.

¶16 Based on the foregoing analysis, we conclude that this case is controlled by the holding in *Tuescher*, and although it may appear on the surface to be unfair not to grant Hankins 139 days of sentence credit, we are bound by the statutory law and the cases interpreting it. Our opinions cannot be based on the appearance of unfairness, but must be grounded in the laws of this State. Accordingly, we affirm the judgment and orders of the trial court.³

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

³ Hankins also claims that this result violates his constitutional rights. This claim, however, was not fully developed, and therefore will not be considered by this court. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992).

