

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 29, 2014

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 Nos. 2013AP2114-CR
2013AP2115-CR**

**Cir. Ct. Nos. 2005CF18
2009CF223**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DON M. SUMMERS,

DEFENDANT-APPELLANT.

APPEALS from an order of the circuit court for Barron County:
JAMES C. BABLER, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Don Summers, pro se, appeals an order denying his motion for additional sentence credit in Barron County Circuit Court case No. 2005CF18. We reject Summers' arguments and affirm the order.

¶2 In case No. 2005CF18, Summers was convicted of one count of delivering heroin and one count of delivering cocaine. The court imposed concurrent eight-year sentences consisting of four years' initial confinement and four years' extended supervision. Summers was released to extended supervision on February 29, 2008. In Barron County Circuit Court case No. 2009CF223, Summers was convicted of party to the crime of delivering THC. In a May 25, 2010 judgment of conviction, the court withheld sentence and imposed three years' probation, concurrent with "whatever community supervision he is currently on." The court also imposed six months in jail as a condition of probation.

¶3 On January 6, 2012, Summers' extended supervision and probation were revoked. In case No. 2005CF18, Summers was reconfined for three years and received sentence credit for the periods of August 31, 2009 to September 25, 2009; December 1, 2009 to January 8, 2010; September 10, 2011 to September 14, 2011; and October 26, 2011 to February 2, 2012. In case No. 2009CF223, the court imposed a three-year sentence, consisting of one year initial confinement and two years' extended supervision, to run consecutively to Summers' reconfinement sentence in case No. 2005CF18. Summers received 268 days of sentence credit, including the six months he spent in jail as a probation condition from June 14, 2010 to December 11, 2010. Summers filed the underlying motion for additional sentence credit in case No. 2005CF18, the circuit court denied the motion and this appeal follows.

¶4 Whether a defendant is entitled to sentence credit pursuant to WIS. STAT. § 973.155 is a question of law we review independently.¹ *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). In order to 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. *State v. Dentici*, 2002 WI App 77, ¶5, 251 Wis. 2d 436, 643 N.W.2d 180. Summers claims he is entitled to additional sentence credit in case No. 2005CF18 for the six months he spent in jail as a probation condition in case No. 2009CF223. Summers is mistaken.

¶5 First, as the State points out, Summers did not serve the jail time in connection with the course of conduct for which he was sentenced in case No. 2005CF18. Rather the jail time was imposed as a condition of his probation in case No. 2009CF223—a case that had nothing to do with the crimes he committed in case No. 2005CF18.

¶6 Second, awarding the additional credit sought would result in dual credit to Summers in violation of *State v. Boettcher*, 144 Wis. 2d 86, 90, 423 N.W.2d 533 (1988). There, our supreme court held that “no dual credit is allowable where consecutive sentences are imposed.” *Id.* Thus, “[t]he total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences.” *Id.* at 100. Here, the court properly credited the jail time against Summers’ sentence after revocation in case No. 2009CF223.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶7 Summers nevertheless contends that the sentences were not consecutive because his original probation in case No. 2009CF223 was ordered to be served concurrent with his extended supervision in case No. 2005CF18. Summers, however, is not seeking credit against his original sentence in case No. 2005CF18; he is seeking credit against the reconfinement sentence imposed after his extended supervision was revoked. As noted above, Summers received consecutive sentences after the revocation of both his extended supervision in case No. 2005CF18 and his probation in case No. 2009CF223. Because credit for the six-month jail term was already applied in case No. 2009CF223, Summers is not entitled to dual credit for the consecutive sentence imposed in case No. 2005CF18.²

By the Court.—Order affirmed.

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

² We note that Summers offered no reply to the arguments in the State's brief. Arguments not refuted are deemed admitted. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

