

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

January 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2191-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN D. CATHEY,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for La Crosse County: JOHN J. PERLICH, Judge. *Affirmed.*

DYKMAN, P.J. This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS. Steven Cathey appeals from a judgment convicting him of misdemeanor battery and an order denying his motion for postconviction relief. The requested postconviction relief was a sentence credit of 120 days. He raises no other issues. Because we conclude that Cathey was not entitled to the sentence credit he requested, we affirm the trial court's judgment and order.

On November 11, 1993, pursuant to a plea bargain, Cathey pleaded guilty to two misdemeanors: pandering, contrary to § 944.33(1)(b), STATS., and battery, contrary to § 940.19(1), STATS. For each count, the trial court placed Cathey on probation for two years. The probations were to run concurrently and with certain conditions. As a condition of probation on count one, the pandering charge, the court ordered Cathey to spend sixty days in jail. As a condition of probation on count two, the battery charge, the court ordered Cathey to do fifty hours of community service. Apparently, Cathey did not begin his sixty-day jail term immediately.

In February 1994, the trial court revoked Cathey's Huber law privileges for the final thirty-two days of his sixty-day term because of Cathey's violations of the terms of his probation. On October 5, 1994, the Department of Corrections asked the trial court to amend Cathey's judgment of conviction by incarcerating Cathey due to further probation violations. The trial court did so, saying: "I'm going to order as to, I believe it's Count One, he will be incarcerated for 120 days without Huber."

Cathey served the 120 days. On September 25, 1995, the trial court extended Cathey's terms of probation for two years pursuant to Cathey's stipulation with the Department of Corrections. On December 4, 1995, the Department of Corrections discharged him from probation on count one, the pandering charge. But Cathey apparently violated the terms of his probation on the battery charge because his probation was revoked, and on January 18, 1996, the trial court sentenced him to nine months in jail on that charge. In a postconviction motion, Cathey asked that the 120 days in jail he received at the October 5, 1994 hearing be credited against his sentence. The trial court refused, and Cathey appealed.

Sentence credit is governed by § 973.155, STATS., which reads in pertinent part:

(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 ...

(Emphasis added.)

Cathey seeks to link his convictions for pandering and for battery to comply with § 973.155, STATS. He does so by noting that he served 120 days in jail "for failure to pay restitution or do community service ordered as a condition of probation on the count for which he was later sentenced after revocation."

Cathey's failure to pay restitution and do community service was in part the subject of the October 5, 1994 hearing. The trial court heard Cathey's probation and parole officer explain that Cathey had not paid restitution and had not done community service. The court also heard that Cathey had violated the terms of his probation in other ways. At the time of that hearing, Cathey was on probation for both pandering and battery. Cathey asserts that his failure to perform community service and failure to pay restitution was a cause of his probation revocation and resulting 120-day jail sentence. Therefore, he concludes, the 120 days should be credited to the nine-month sentence he later received.

But Cathey was sentenced to 120 days in jail on the pandering charge. Cathey was ordered to perform community service as a condition of his probation on the battery charge. Cathey's attempt to tie his failure to perform community service to his 120-day pandering sentence must therefore fail.

Cathey's failure to pay restitution is somewhat different. The trial court could not have revoked Cathey's probation on the pandering charge for failure to pay restitution on the battery charge. There is nothing in either Cathey's judgment of conviction or the transcript of the original sentencing hearing which permits this. Cathey does not show where he was ordered to pay restitution on the pandering charge as a condition of probation on the battery charge. The fact is that paying restitution was a condition of probation on both charges. Unless Cathey can show that paying restitution on the pandering charge was a specific condition of his probation for his battery conviction, the 120-day sentence was neither in connection with the course of

conduct for which he was sentenced for battery nor related to the battery for which he was ultimately sentenced. He has not made that showing.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.