

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 8, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 99-0401-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ARNOLD E. LOUNSBURY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:
JAMES L. CARLSON, Judge. *Reversed and cause remanded with directions.*

SNYDER, J. Arnold E. Lounsbury appeals from a trial court order denying § 973.155(1)(a), STATS., sentence credit. Lounsbury walked away from a remedial jail sanction for contempt and was convicted of escape from custody contrary to § 946.42(2)(c), STATS., upon his plea of guilty.¹ He was sentenced to a

¹ A violation of § 946.42(2)(c), STATS., is a Class A misdemeanor subjecting a defendant to a fine not to exceed \$10,000 and/or incarceration not to exceed nine months. See § 939.51(3), STATS.

six-month jail term consecutive to the remedial jail commitment. The trial court denied Lounsbury's request for credit because the sentence was consecutive to the remedial sanction and because the credit was only applicable against the remedial sanction. We reverse and remand with instructions to grant Lounsbury's sentence credit request.

The facts are undisputed. On May 2, 1998, a § 785.04(1)(b), STATS., remedial contempt commitment of six months with Huber privileges was imposed on Lounsbury for failure to pay child support.² On June 2, 1998, Lounsbury did not report back to the Huber dorm, resulting in an escape from custody charge. On July 6, 1998, Lounsbury was apprehended and sent to the Walworth County Jail; on July 10, 1998, the trial court set \$10,000 cash bail at the State's request. Bail continued in that amount through the date of conviction and sentencing, September 4, 1998.³

At sentencing, the following discourse occurred between the trial court and Lounsbury's attorney, Scott Letteney, concerning entitlement to sentence credit on the escape conviction:

THE COURT: And I would assume there's no dead time credit then?

MR. LETTENEY: Well, that's another question I have. I don't know whether [Lounsbury is] currently serving at this

² According to the criminal complaint, the remedial commitment order was issued in *Anderson v. Lounsbury*, No. 84-FA-52 (Walworth County Family Court). The order required that Lounsbury be incarcerated for six months or until such time as he purged himself of the contempt by paying an arrearage of \$2700. While the family court record is not before us, Lounsbury does not contest either the conviction of escape from custody or the civil remedial jail sanction in this appeal, and we accept the information alleged in the criminal complaint as factual.

³ The cash bail condition was not changed during court appearances on July 14, 1998; August 28, 1998; or September 2, 1998.

moment the civil contempt time. He's been in on \$10,000 bond since he was arrested on July 6th. So I'd ask for 60 days dead time credit.

THE COURT: He's been in since when?

MR. LETTENEY: July 6. That's 60 days as of yesterday.

THE COURT: Well, he should get that against the underlying commitment, I would assume, and I think they calculate when it's consecutive, such as not to give double credit. So I will just leave it at that.

MR. LETTENEY: So you are not granting credit on this?

THE COURT: I'm not granting any credit on this. If it runs over his commitment period, then it should run against this, obviously.

In addition, the following discussion occurred concerning the status of the remedial sanction jail term during the period from July 6 to September 4, 1998:

MR. LETTENEY: Since this sentence is consecutive to the civil commitment time, as of today the bond is lifted and he should be back on the civil commitment time. So he should be returned, I guess, to the Huber dorm, where he'd be serving his civil commitment.

THE COURT: Well, if he's got civil commitment rights under that for Huber, yes, he would, right.

Lounsbury contends that the appellate issue involves entitlement to sentence credit under § 973.155(1)(a), STATS. Whether he is entitled to sentence credit requires the application of that statute to undisputed facts, a question of law that we review de novo. See *State v. Collett*, 207 Wis.2d 319, 321, 558 N.W.2d 642, 643 (Ct. App. 1996).

The State does not directly respond to Lounsbury's § 973.155, STATS., argument in its brief. Rather, the State frames the appellate issue as addressing the § 946.42(4)(a), STATS., requirement to impose a sentence for

escape from custody consecutive to any sentence imposed for “any crime or offense for which the person was in custody when he or she escaped.” Citing *State v. Boettcher*, 144 Wis.2d 86, 87, 423 N.W.2d 533, 534 (1988) (dual sentence credit is not permitted where sentences are consecutive), the State argues that Lounsbury is not entitled to sentence credit because such credit would duplicate time served under the remedial jail commitment. We initially address the State’s position.

First, Lounsbury agreed that the escape from custody sentence be imposed consecutive to the civil commitment and does not appeal from the legality of that imposition.⁴ Second, while we agree that *Boettcher* holds that dual credit is not permitted, it does not abandon a § 973.155, STATS., analysis for a request for credit: “We conclude 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. Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.” *Boettcher*, 144 Wis.2d at 87, 423 N.W.2d at 534. We agree with Lounsbury that the appellate issue here is whether he is entitled to § 973.155 sentence credit based upon the undisputed facts in this case.

Section 973.155(1)(a), STATS., grants sentence credit for each day in custody regardless of the basis for confinement as long as it is connected to the offense for which the sentence is imposed. *See State v. Gilbert*, 115 Wis.2d 371, 377, 340 N.W.2d 511, 515 (1983). Lounsbury was apprehended for criminal

⁴ We have previously held that a sentence for escape and a commitment for nonpayment of a fine may be imposed consecutively. *See State v. Way*, 113 Wis.2d 82, 87, 334 N.W.2d 918, 920 (Ct. App. 1983) (“[I]f courts do not have the authority to make commitments consecutive, then the statutory power to order commitment ... would be meaningless.”).

escape from custody on July 6, 1998, and cash bail was set in the amount of \$10,000. The bail remained in effect until Lounsbury was sentenced on September 4, 1998. We are satisfied that Lounsbury's incarceration from July 6 to September 4, 1998, was related to the escape from custody charge.

We next address whether § 973.155(1)(a), STATS., credit can be granted to a consecutive § 785.04(1)(b), STATS., civil commitment. Section 973.155(1)(a) reads as follows:

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.

Section 973.155(1)(a), STATS., requires that credit be given toward "the service of his or her *sentence*" for the "conduct for which *sentence* was imposed." (Emphases added.) It further defines confinement requiring credit as "related to an offense for which the offender is ultimately *sentenced*, or for any other *sentence* arising out of the same course of conduct." *Id.* (emphases added). Lounsbury's § 785.04(1)(b), STATS., incarceration is a civil commitment. A commitment is not a sentence. See *State v. Way*, 113 Wis.2d 82, 86, 334 N.W.2d 918, 920 (Ct. App. 1983). Because § 973.155(1)(a) directs that Lounsbury shall receive "sentence" credit for confinement related to the escape from custody

sentence, we conclude that the trial court erred in holding that the sentence credit applies to a consecutive civil commitment.

The State suggests that if Lounsbury was also serving the civil commitment during the period from July 6 to September 4, 1998, he would not be entitled to any § 973.155, STATS., credit against the consecutive escape sentence. Credit is not to be duplicatively applied to more than one of the sentences imposed to run consecutively. *See Boettcher*, 144 Wis.2d at 87, 423 N.W.2d at 534. However, the argument fails because there is only one sentence here resulting from the escape from custody conviction. The argument also fails because even if § 973.155(1)(a) provided credit against civil commitments, the record does not support that Lounsbury was in custody under the civil commitment order during July 6 to September 4, 1998.

Lounsbury was apprehended on the escape from custody charge on July 6, 1998, and the trial court agreed with defense counsel's statement at sentencing that "[s]ince this [escape from custody] sentence is consecutive to the civil commitment time, as of today [, September 4, 1998,] the [\$10,000 cash bail] bond is lifted and he should be back on the civil commitment time. So he should be returned, I guess, to the Huber dorm, where he'd be serving his civil commitment." The State did not object to the concession that Lounsbury had not been in jail on the civil commitment order during the period in question.

In sum, while the civil commitment and escape from custody sentence are consecutive, the incarceration from July 6 to September 4, 1998, related to the escape charge and was not duplicative of credit under the civil commitment order. Because § 973.155(1)(a), STATS., directs the granting of "sentence" credit, and because Lounsbury's consecutive civil commitment is not a

sentence, the credit must be granted against the escape from custody incarceration. We reverse the trial court's denial of sentence credit against the escape from custody sentence and remand with directions that the credit be granted.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.