

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 13, 2009

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 Nos. 2008AP494-CR
2008AP495-CR**

**Cir. Ct. Nos. 2001CF5821
2002CF690**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARIO D. THOMAS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
DANIEL L. KONKOL, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Mario D. Thomas appeals from reconfinement orders and from orders denying his postdisposition motions. The only issue is

whether the circuit court properly denied his requests for sentence credit.¹ We affirm.

BACKGROUND

¶2 Thomas was convicted of three burglary offenses in 2002 and sentenced to three concurrent terms of imprisonment. Thomas served his initial confinement and was released to serve four years of extended supervision in November 2006.

¶3 On December 17, 2006, Thomas was arrested in Illinois for an alleged battery. On January 25, 2007, the Wisconsin Department of Corrections (the Department) placed an extended supervision hold on Thomas. The State of Illinois elected not to prosecute Thomas for battery and returned him to Wisconsin on January 29, 2007.

¶4 The Department of Administration, Division of Hearings and Appeals revoked Thomas's extended supervision and Thomas returned to circuit court for a reconfinement hearing. The circuit court ordered Thomas reconfined for concurrent terms of three years, with credit for presentence custody from January 25, 2007, until the date of the reconfinement hearing. Thomas moved for postdisposition relief, seeking additional presentence credit for the period from December 17, 2006, until January 25, 2007. The circuit court denied relief, and this appeal followed.

¹ Appeal No. 2008AP494-CR arises from circuit court case No. 2001CF5821 and involves one count of burglary. Appeal No. 2008AP495-CR arises from circuit court case No. 2002CF690 and involves two counts of burglary. Thomas moved for sentence credit in each case and the circuit court entered identical orders denying relief in both cases. We granted Thomas's motion to consolidate the two cases for purposes of appeal.

DISCUSSION

¶5 Sentence credit determinations present questions of law. *State v. Odom*, 2006 WI App 145, ¶34, 294 Wis. 2d 844, 720 N.W.2d 695. We review questions of law *de novo*. *State v. Ploeckelman*, 2007 WI App 31, ¶8, 299 Wis. 2d 251, 729 N.W.2d 784.

¶6 WISCONSIN STAT. § 973.155(1) (2005-06)² provides, in pertinent part:

Sentence credit. (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, 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.

(b) The categories in par. (a) ... include custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold ... placed upon the person for the same course of conduct as that resulting in the new conviction.

Pursuant to this statute, an offender must satisfy two conditions to be awarded sentence credit: (1) the offender “must have been ‘in custody’ for the period in

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

question; and (2) the period ‘in custody’ must have been ‘in connection with the course of conduct for which the sentence was imposed.’” *State ex rel. Thorson v. Schwarz*, 2004 WI 96, ¶15, 274 Wis. 2d 1, 681 N.W.2d 914 (citation omitted). The offender has the burden of demonstrating both conditions. *State v. Villalobos*, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

¶7 Neither party disputes that Thomas was in custody from the date of his arrest in Illinois on December 17, 2006, until January 25, 2007, when the Department placed him on an extended supervision hold. The issue on appeal is whether, as Thomas contends, that period of custody was in connection with the course of conduct for which Thomas was ultimately reconfined in Wisconsin.

¶8 Thomas places substantial reliance on *State v. Presley*, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713, and *Odom*. In both cases, the defendants were arrested and charged with new offenses while on extended supervision for prior convictions. *Presley*, 292 Wis. 2d 734, ¶2; *Odom*, 294 Wis. 2d 844, ¶¶2-3. Ultimately, the defendants in both cases received dual credit for their time in custody from the day of arrest until the day they were sentenced. *Presley*, 292 Wis. 2d 734, ¶15; *Odom*, 294 Wis. 2d 844, ¶¶5, 33-34. We conclude that these authorities are inapplicable here.

¶9 Unlike the instant case, *Presley* and *Odom* do not involve a dispute over whether a defendant was in custody on both old and new charges upon arrest. In *Presley*, the parties disagreed as to the event that severed the existing connection between both offenses and the defendant’s custody. *Presley*, 292 Wis. 2d 734, ¶10. We concluded that the connection between custody for an older and a newer offense is severed after the defendant is ordered reconfined for

the older offense. *Id. Odom* presented a similar issue, and we applied our holding in *Presley* to resolve it. *Odom*, 294 Wis. 2d 844, ¶34.

¶10 The State accurately points out that the basis for a relationship between the defendant’s criminal conduct and the defendant’s custody at the time of arrest simply was not relevant in either *Presley* or *Odom* and is not disclosed in either decision. *Presley* and *Odom* are concerned with determining when an established connection between custody and conduct is severed. Here, our task is to determine when Thomas’s custody originating from a new criminal allegation was first in connection with the older course of conduct for which he was eventually reconfined. See WIS. STAT. § 973.155(1)(a). Neither *Presley* nor *Odom* can assist in that inquiry. We must look elsewhere.

¶11 We recently determined that a defendant may receive credit against a Wisconsin sentence for time spent in out-of-state custody “on [his] Wisconsin charge.” *State v. Carter*, 2007 WI App 255, ¶30, 306 Wis. 2d 450, 743 N.W.2d 700. In *Carter*, we concluded that credit was due from the date that the defendant was arrested in Illinois under a Wisconsin fugitive warrant until the date that the defendant was sentenced for an Illinois charge. *Id.*, ¶¶2, 4. *Carter* makes plain, however, that the defendant was entitled to credit as of the date of arrest because the Wisconsin fugitive warrant and resulting hold that were in effect on that date constituted legal authority from Wisconsin for the custody. See *id.*, ¶¶2-3, 15-18, 31.

¶12 Thomas offers no argument that Wisconsin authorities issued a warrant or placed a hold on him on the date of his arrest in Illinois. He also fails to suggest any alternative “lawful process or authority resulting in custody” originating from Wisconsin that went into effect on the date of his arrest. See *id.*,

¶15 (listing examples of lawful process or authority, including arrest, sentence, temporary stop for questioning, probation or parole holds, and periods of confinement imposed as condition of probation). Accordingly, *Carter* does not support Thomas’s claim for additional sentence credit.

¶13 Thomas asserts that the Division of Hearings and Appeals considered the Illinois battery allegation when deciding to revoke his extended supervision, and that the circuit court considered the battery allegation when ordering him reconfined. Thomas argues that all of his time in Illinois custody following arrest for the battery was therefore in connection with the course of conduct for which he was eventually reconfined. *See* WIS. STAT. § 973.155(1). We disagree.

¶14 This court previously established that the phrase “course of conduct” should be narrowly construed to mean “the specific offense or acts embodied in the charge for which the defendant is being sentenced.” *Thorson*, 274 Wis. 2d 1, ¶31 (citing *State v. Tuescher*, 226 Wis. 2d 465, 471, 479, 595 N.W.2d 443 (Ct. App. 1999)). Thus, Thomas must show that his custody in Illinois stemming from the battery allegation was for the same specific acts as those for which Thomas was revoked and reconfined in Wisconsin. Thomas’s assertion that Wisconsin authorities considered the battery allegation during revocation and reconfinement proceedings is insufficient to satisfy this requirement.

¶15 To the contrary, “[t]he sentence [a defendant] is required to serve upon revocation is the punishment for the crime of which he has previously been convicted.... Revocation is thus a continuing consequence of the original conviction from which parole was granted.” *State v. Beets*, 124 Wis. 2d 372,

378, 369 N.W.2d 382 (1985) (citation omitted, ellipsis in original). This principle is equally applicable to revocation of extended supervision. *Cf. State v. Brown*, 2006 WI 131, ¶6, 298 Wis. 2d 37, 725 N.W.2d 262 (extended supervision and reconfinement are substitutes for the parole system).

¶16 Moreover, a circuit court may consider many factors, including uncharged crimes, in making reconfinement decisions. *Id.*, ¶¶34-38. The reconfinement court's consideration of uncharged criminal activity during extended supervision does not mean the reconfinement term constitutes a punishment for that activity. *See State v. Jackson*, 110 Wis. 2d 548, 553, 329 N.W.2d 182 (1983) (defendant not punished for pending charges when those charges are considered during sentencing for an earlier conviction); *see also Witte v. United States*, 515 U.S. 389, 402 (1995) (sentencing court imposes a punishment only for offense of conviction, even when other relevant criminal conduct is considered for purposes of fashioning an appropriate sentence). Thus, factors considered in revocation and reconfinement decisions, including uncharged criminal offenses, are not part of the course of conduct for which reconfinement is imposed. Reconfinement is punishment for the crimes of conviction.

¶17 The State asserts that the Department first placed an extended supervision hold on Thomas effective January 25, 2007. Thomas does not dispute that assertion, and we deem the point conceded. *See State v. Peterson*, 222 Wis. 2d 449, 459, 588 N.W.2d 84 (Ct. App. 1998) (unrefuted arguments are deemed admitted). Thomas properly received presentence credit against his reconfinement from January 25, 2007, until the date he was reconfined. *See Carter*, 306 Wis. 2d 450, ¶¶2, 30. He has not established any basis for concluding that his time in Illinois custody prior to January 25, 2007, was connected to his

reconfinement for Wisconsin burglaries. Accordingly, he shows no right to additional credit.

By the Court.—Orders affirmed.

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

