

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 1, 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 No. 2009AP860-CR

Cir. Ct. No. 2007CF103

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

IRA A. ANTONE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.*

¶1 HOOVER, P.J.¹ Ira Antone appeals a judgment of conviction granting three hundred days' sentence credit and an order denying his motion for

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

sentence credit requesting an additional thirty-four days' credit. Antone argues he is entitled to the additional credit because his reconfinement sentence in another case did not commence until he was received at the correctional institution. We agree and reverse and remand with directions to grant the requested sentence credit.

BACKGROUND

¶2 Following conviction in this case, Antone received a withheld sentence and two years' probation. At the time, Antone was also on extended supervision in another case from Vilas County. Antone subsequently violated the terms of supervision and was taken into custody pursuant to a hold by the Department of Corrections. Both the probation and extended supervision were ultimately revoked.

¶3 On September 10, 2008, Antone was ordered reconfined in the Vilas County case. However, he was not immediately transferred to the state prison system. Antone was instead held in the county jail awaiting his sentencing after probation revocation in this case. On October 14, 2008, the circuit court sentenced Antone to two years' imprisonment, with a one-year period of initial confinement. The court ordered the sentence to run concurrent to the Vilas County case and awarded three hundred days' sentence credit, consisting of one hundred seventy-six days served prior to the original sentencing hearing and one hundred twenty-four days spent in custody on the supervision hold until the date of the Vilas

County reconfinement hearing.² The circuit court denied Antone's postconviction motion requesting additional sentence credit and Antone now appeals.

DISCUSSION

¶4 Antone argues he is entitled to an additional thirty-four days' sentence credit for the time spent in custody from the Vilas County reconfinement hearing until the sentencing hearing in the present case. We independently review the application of the sentence credit statute to an undisputed set of facts. *State v. Abbott*, 207 Wis. 2d 624, 628, 558 N.W.2d 927 (Ct. App. 1996).

¶5 We are not aware of any prior case involving the situation presented here. WISCONSIN STAT. § 973.155 provides that 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." This includes "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." WIS. STAT. § 973.155(1)(b). The statute does not, however, address what happens when, as here, a person is serving both extended supervision and probation, the person is placed in custody on a hold, both supervisions are revoked for the rules violation, the person is ordered reconfined on the extended supervision case but not transferred to prison, and the person is later sentenced to concurrent confinement on the probation case.

² Antone's postconviction motion notes he had already served the entire one-year period of confinement and been released to extended supervision at the time of its filing. Thus, the additional credit will be applied to the remaining term of extended supervision.

¶6 Antone argues he is entitled to the “dual credit” because it is the commencement of a separate sentence that severs the connection between a pending case and any custodial confinement. The State, on the other hand, contends it is the sentencing that severs the connection. Often these two events coincide. However, in the case of revoked extended supervision, the reconfinement hearing will typically not coincide with actual commencement of the sentence. This is because:

The sentence of a revoked parolee or person on extended supervision resumes running on the day he or she is received at a correctional institution subject to sentence credit for the period of custody in a jail, correctional institution or any other detention facility pending revocation according to the terms of s. 973.155.

WIS. STAT. § 304.072(4).

¶7 In two prior cases, the court held it was the date of the first sentencing hearing that severed the connection and terminated dual credit. *See State v. Beets*, 124 Wis. 2d 372, 374, 383, 369 N.W.2d 382 (1985); *State v. Presley*, 2006 WI App 82, ¶13, 292 Wis. 2d 734, 715 N.W.2d 713. However, both of those cases involved situations different from that here. More importantly, both were based on the premise that commencement of the sentence severed the connection. It just so happened that both sentencing and sentence commencement occurred at the same time in the former, and that both the reconfinement hearing and sentencing hearing occurred on the same date in the latter.

¶8 *Beets* involved a probation hold, revocation, and sentencing and a subsequent sentencing on new charges stemming from the conduct causing the probation hold. *Beets*, 124 Wis. 2d at 373-74. The sentence on the probation case immediately commenced at the time of sentencing. There, the circuit court, court

of appeals, and supreme court all concluded Beets was no longer entitled to dual credit on the new case after sentencing on the probation case because he was then in custody serving the probation case sentence. *Id.* at 376, 379, 383 (“We conclude that the trial court correctly credited time only for the period prior to the time Beets’ custody commenced on the sentences for the” probation case.).

¶9 The facts in *Presley*, involving a revocation of extended supervision, are closer to those here. However, there the sentencing on both the revoked extended supervision and the new charge occurred on the same day.³ *Presley*, 292 Wis. 2d 734, ¶2. Applying *Beets*, we concluded Presley was entitled to dual credit for the time he was on the supervision hold through the date of the reconfinement hearing, rather than only until the date of revocation. *Presley*, 292 Wis. 2d 734, ¶15. We also relied in part on WIS. STAT. § 304.072(4), which indicates a revocation sentence does not commence on either the date of revocation or the date of the reconfinement hearing, but upon reception at prison. *Presley*, 292 Wis. 2d 734, ¶14. Adopting the State’s position here would conflict with § 304.072(4), just as it would have in *Presley*.⁴

³ We observed in *Presley* that a reconfinement hearing is considered a sentencing hearing for sentence credit purposes. *State v. Presley*, 2006 WI App 82, ¶10, 292 Wis. 2d 734, 715 N.W.2d 713 (citing *State v. Swiams*, 2004 WI App 217, ¶23, 277 Wis. 2d 400, 690 N.W.2d 452).

⁴ The Criminal Jury Instructions Committee also recognizes, in the sentence credit context, that sentences after revocation of parole or extended supervision do not commence until reception at prison. See WIS JI—CRIMINAL SM-34A, V.A.3.b., cmt. 23 (June 1995) (citing WIS. STAT. § 57.072(4), which was renumbered to § 304.072(4) and amended to included reference to extended supervision. See 1989 Wis. Act 31, § 1704; 1997 Wis. Act 283, § 244).

While the special materials do not constitute binding authority, we give their interpretations careful scrutiny because they are prepared by an exceedingly well qualified group of lawyers, judges, and scholars. See *State v. Beets*, 124 Wis. 2d 372, 383 n.7, 369 N.W.2d 352 (1985) (citing *State v. Gilbert*, 115 Wis. 2d 371, 379, 340 N.W.2d 511 (1983)).

¶10 Therefore, although in both cases the court concluded the connection between cases was severed on the date of sentencing, we interpret *Beets* and *Presley* as standing for the proposition that it is the commencement of the separate sentence that actually severs the connection.⁵ Because Antone’s first sentence did not commence until the date of his sentencing in the probation case, he is entitled to dual credit for the entire period of confinement up to that point.

¶11 Additionally, although not critical to our holding, we note that had Antone been sentenced the same day of his reconfinement hearing, like in *Presley*, he also would have received the dual credit because the sentences were to be served concurrently. Thus, as in *Presley*, 292 Wis.2d 734, ¶12, our “interpretation is consistent with and advances the underlying purpose of WIS. STAT. § 973.155—fairness.”

By the Court.—Judgment affirmed in part and reversed in part; order reversed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

⁵ Our interpretation of *Beets* in this regard mirrors that of the Criminal Jury Instructions Committee. See WIS JI—CRIMINAL SM-34A, V.A.3., V.A.3.b., cmt. 17 (June 1995).

