

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 1, 2012

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 No. 2010AP2873-CR

Cir. Ct. No. 1996CF960674

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOHN DAVID TIGGS, A/K/A A'KINBO J.S. HASHIM,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PAUL R. VAN GRUNSVEN, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. John David Tiggs, *pro se*, appeals from an order rejecting his challenge to the Department of Corrections' revocation of his probation and denying his request for sentence credit, and from an order denying

reconsideration. We agree with the circuit court that the proper way to challenge the revocation was by *certiorari*, a step not taken here. We also agree that Tiggs is not entitled to credit in this case for time served on sentences from Racine and Grant Counties. However, we reverse and remand the orders with respect to Tiggs's second claim for sentence credit because we conclude that the record is insufficiently developed and fact-finding will be necessary.

BACKGROUND

¶2 In March 1996, Tiggs pled guilty to two counts of armed robbery in Milwaukee County. On the first count, he was sentenced to 112 months' imprisonment, or nine years and four months. On the second count, he was sentenced to a consecutive fifteen years' imprisonment, imposed and stayed in favor of a concurrent fifteen-year term of probation.

¶3 In May 1999, Tiggs was convicted on one count of battery in Racine County. He was sentenced to six months' imprisonment, to be served consecutively to any other sentence. In July 2003, he was convicted of another count of battery in Grant County. He was sentenced to two years' initial confinement and three years' extended supervision, to be served consecutively. In neither instance did the Department move to revoke his probation.

¶4 Tiggs began serving the Racine County sentence on or about June 2, 2005. He began serving the Grant County confinement term on or about December 1, 2005. On December 18, 2007, Tiggs was released from prison to his extended supervision term in the Grant County case; he remained on probation in the Milwaukee County case.

¶5 On June 25, 2008, Tiggs was arrested on sexual assault and battery allegations. On July 10, 2008, the Department informed him that it would be moving to revoke the probation and extended supervision terms. An administrative law judge issued a revocation decision on March 17, 2009, finding that the assault and battery allegations had been sufficiently proven to warrant revocation of the probation and extended supervision. Revocation of the probation meant that Tiggs would begin serving the consecutive fifteen-year stayed sentence on the second armed robbery conviction from Milwaukee County. As part of the order revoking Tiggs's probation, the administrative law judge ordered that Tiggs receive sentence credit in the Milwaukee County case from "6/25/08 until his receipt at the institution." Tiggs administratively appealed the decision; it was affirmed.

¶6 Relevant to this appeal, Tiggs filed a motion in the circuit court in July 2010, challenging the probation revocation and seeking sentence credit. Tiggs argued that the Department had lost competency to revoke his probation through noncompliance with its own procedures. He claimed entitlement to thirty months' credit against the now-imposed Milwaukee County sentence for the time served in the Racine and Grant County cases. He also claimed credit against the Milwaukee County sentence for the period between June 25, 2008, the date of his arrest for the assault and battery charges, and April 15, 2010, the date of his reconfinement hearing in Grant County.

¶7 By order dated July 29, 2010, the circuit court denied relief. It explained that Tiggs had to challenge his probation revocation by a petition for a writ of *certiorari*, which the motion was not, so the circuit court had no jurisdiction to consider that issue. It also told Tiggs that, pursuant to WIS. STAT.

§ 973.155(2) (2009-10),¹ he would first need to seek sentence credit from the Department.

¶8 Tiggs wrote to the Department, seeking the credit. The Department responded with a letter, telling Tiggs that credit was applied towards the fifteen-year Milwaukee County sentence “based on the revocation order and warrant dated March 17, 2009.” However, the letter does not appear to specify how much credit was actually applied.

¶9 Upon receipt of the Department’s letter, Tiggs moved the circuit court for reconsideration of its July 2010 order. He claimed again that he was entitled to credit for the thirty months he served in the Racine and Grant County cases, and for the period from June 25, 2008, “through the present date,” which at the time was October 24, 2010. In the same motion, Tiggs claimed that credit was due from June 25, 2008, through December 3, 2009.

¶10 The circuit court denied the motion. It explained that Tiggs was not entitled to credit for time served on the Racine and Grant County sentences because his custody was in connection with those sentences, not the Milwaukee County sentence. It also ruled that Tiggs “is entitled to no more credit in this case than that which is set forth in the revocation order and warrant dated March 17, 2009.” Tiggs appeals.

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

DISCUSSION

¶11 The first issue we address is Tiggs’s claim that the Department lost competency to revoke his probation and impose the stayed fifteen-year sentence because it allegedly failed to follow its own rules on probation revocation hearings. The proper method for challenging probation revocation is by writ of *certiorari*. See *State ex rel. Griffin v. Smith*, 2004 WI 36, ¶22, 270 Wis. 2d 235, 677 N.W.2d 259; *State ex rel. Vanderbeke v. Endicott*, 210 Wis. 2d 502, 522, 563 N.W.2d 883 (1997). The circuit court was correct to note that because Tiggs’s motion was not a petition for a writ of *certiorari*, the circuit court lacked jurisdiction to consider his challenge to the validity of the probation revocation. Similarly, we are also unable to review the revocation. That portion of the orders is affirmed.

¶12 The second issue we address is Tiggs’s claim for sentence credit for the period June 2, 2005, through December 18, 2007, the period in which Tiggs served six months for his Racine County battery conviction and two years for his Grant County battery conviction, concurrent with his probationary term. An offender is entitled to credit “for all days spent in custody in connection with a course of conduct for which sentence was imposed.” WIS. STAT. § 973.155(1)(a). The custody’s “connection” to the sentence “must be factual; a mere procedural connection will not suffice.” See *State v. Johnson*, 2009 WI 57, ¶33, 318 Wis. 2d 21, 767 N.W.2d 207. Neither statutory nor case law justifies credit for time spent in custody “that is not related to the matter for which sentence is imposed.” See *id.*, ¶32. The defendant seeking credit “has the burden of demonstrating both ‘custody’ and its connection with the course of conduct” for which sentence was imposed. *State v. Carter*, 2010 WI 77, ¶11, 327 Wis. 2d 1, 785 N.W.2d 516.

¶13 Here, Tiggs has not attempted to meet the burden established by *Carter*. On that ground alone, we could affirm. However, the circuit court was correct to deny Tiggs credit. Tiggs’s custody from June 2, 2005, through December 17, 2007, was not custody in connection with the Milwaukee County armed robbery sentence. Tiggs was on probation for that case and, *but for the Racine and Grant County convictions*, he would not have been in custody. The time spent in custody during that period has no connection to any Milwaukee County sentence. We therefore affirm this portion of the orders as well.

¶14 The last issue we address is the issue of credit for time Tiggs spent in custody beginning with his arrest on June 25, 2008. The problem we face here is that while the administrative law judge ordered Tiggs to receive credit from “6/25/08 until his receipt at the institution,” we are unable to determine the date on which Tiggs was received at the institution. He has claimed credit through December 3, 2009; December 9, 2009; April 15, 2010; and October 24, 2010. He also appears to assert that the Department calculated the credit to apply through March 17, 2009. The State asserts that records will show Tiggs was returned to the institution on March 20, 2009.² We, however, simply cannot derive an end date from the record before us.

² Though Tiggs appears to concede this date in his reply brief, we nevertheless remand for fact-finding, as the document he has submitted to support the concession is not presently part of the record.

¶15 The State appears to acknowledge the record’s inadequacy on this point, suggesting remand would be appropriate.³ Because we cannot engage in fact-finding, *see Wurtz v. Fleischman*, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155 (1980), we agree that remand is appropriate. We therefore reverse and remand the portions of the orders that refused to amend the credit Tiggs received for the time period beginning June 25, 2008. On remand, the circuit court shall take whatever steps are necessary to determine the date on which Tiggs was “recei[ved] at the institution” as contemplated by the administrative law judge’s March 17, 2009 order. Sentence credit shall then be ordered accordingly.

By the Court.—Orders affirmed in part, reversed in part, and cause remanded with directions.

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

³ The State suggests that, on remand, there should also be fact-finding about whether Tiggs’s custody beginning on June 25, 2008, was “in connection with” the Milwaukee County sentence by virtue of a formal probation hold entered on that date. However, the answer to this question was effectively determined when the administrative law judge ordered that Tiggs receive credit on the Milwaukee County sentence beginning June 25, 2008. The State has never challenged that determination before now.

