

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 14, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2011AP1372-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2002CF198

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RONALD L. MILLER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Reversed and cause remanded with directions.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Ronald L. Miller appeals from an order for reconfinement after revocation of his extended supervision and from an order denying his motion to modify his sentence. The sole issue on appeal is whether Miller is entitled to additional sentence credit for custody served as a condition of

probation. We agree with Miller that he is entitled to additional sentence credit; however, we conclude that it is for a shorter period of time than he requests. Accordingly, we reverse the orders of the circuit court and remand with directions that the court provide Miller with three months of additional sentence credit against his sentence.

¶2 Miller was convicted following a guilty plea of one count of second-degree recklessly endangering safety and two counts of battery while armed. The circuit court imposed sentence on December 12, 2002. It withheld sentence on the second-degree recklessly endangering safety conviction and placed Miller on probation for five years. The court also withheld sentence on the first battery while armed conviction and placed Miller on probation for three years to run concurrent. Finally, the court imposed a jail sentence on the second battery while armed conviction of one year to run consecutive to any other jail time.¹

¶3 On April 5, 2003, Miller absconded from his Huber facility. He was eventually arrested in Ohio and returned to Wisconsin. As a result of his absconding, Miller received an alternative to revocation (ATR). The ATR required Miller to serve nine months in jail as a condition of his probation on his conviction for second-degree recklessly endangering safety. In an order dated October 17, 2003, the court indicated that the nine months was effective as of October 10, 2003. Miller served this time (along with the time remaining on his other sentences) and was released from jail on July 10, 2004.

¹ This appeal arises from Walworth county case No. 2002CF198. At the time of Miller's sentencing in that case, the circuit court also imposed sentences in three other cases: Walworth county case Nos. 2002CM61, 2002CM211, and 2002CT253. We will discuss those cases as necessary to address the issue on appeal.

¶4 Miller's probation was later revoked and he returned to the circuit court for sentencing. On December 14, 2005, the circuit court sentenced Miller to two years of initial confinement and two years of extended supervision on the second-degree recklessly endangering safety conviction. The court also imposed a consecutive sentence of nine months on one battery while armed conviction.² The court indicated that it would determine sentence credit at a later time.

¶5 On December 6, 2006, after several delays, the circuit court held a sentence credit hearing. Prior to that hearing, both the division of hearings and appeals and the assistant district attorney recommended that Miller receive credit for the time spent in custody between October 10, 2003, and July 10, 2004. However, the assistant district attorney subsequently changed her position, arguing that Miller should not receive credit for a portion of that period (from April 2, 2004, to July 2, 2004), because he was serving a jail sentence on a separate case (Walworth county case No. 2002CT253). Ultimately, the circuit court adopted the assistant district attorney's latter position and awarded Miller partial sentence credit (six months) for the nine months spent in custody between October 10, 2003, and July 10, 2004.³

¶6 Miller's extended supervision was later revoked on his second-degree recklessly endangering safety conviction. On July 17, 2009, the circuit

² The circuit court also purported to impose a consecutive sentence of nine months on the other battery while armed conviction. However, as noted, Miller had only been placed on probation for one of the two battery while armed convictions; he had previously served a jail sentence to satisfy the other conviction. Because it does not appear that a judgment of conviction was ever entered to try to implement that unlawful second sentence, Miller does not pursue that issue on appeal.

³ The circuit court's total award of sentence credit was for 516 days. The award included several different time periods from several different cases. We need not delve into the details of the award, as they are not relevant to the issue on appeal.

court imposed the maximum term available for reconfinement of two years and three days. Miller subsequently moved to modify his sentence, arguing that he was entitled to additional sentence credit for custody served as a condition of probation. The circuit court denied the motion.⁴ This appeal follows.

¶7 WISCONSIN STAT. § 973.155 (2009-10),⁵ which governs sentence credit, provides in relevant part 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.” Sec. 973.155(1)(a). Whether a defendant is entitled to sentence credit under this statute is a question of law that this court reviews de novo. *State v. Lange*, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480.

¶8 On appeal, Miller renews his argument that he is entitled to additional sentence credit. Specifically, Miller contends that he is entitled to nine months of sentence credit for custody served as a condition of probation between October 10, 2003, and July 10, 2004.

¶9 The State disagrees with Miller. Like the assistant district attorney, the State notes that Miller was serving a jail sentence in a separate case (Walworth county case No. 2002CT253) for a portion of that time period (April 2, 2004, and July 2, 2004). Unlike the assistant district attorney, the State also suggests that

⁴ The circuit court denied Miller’s motion on the ground that the matter had been fully litigated. Given the delay in determining sentence credit, it is unclear whether Miller could have appealed in time to get relief before he was released from his sentence after revocation. Accordingly, we will address the merits of Miller’s argument.

⁵ All references to the Wisconsin Statutes are to the 2009-10 version.

any custody that Miller served as a condition of probation was actually for a different case (Walworth county case No. 2002CM211) than the present one.⁶

¶10 Upon review of the record, we conclude that the custody Miller served as a condition of probation was for the present case. We base this conclusion on the circuit court order of October 17, 2003, which clearly requires Miller to serve nine months in jail as a condition of his probation on his conviction for second-degree recklessly endangering safety in Walworth county case No. 2002CF198. The order references no other case.

¶11 We further conclude that Miller has already received sentence credit for six of the nine months that he spent in custody between October 10, 2003, and July 10, 2004. We base this conclusion on our review of the sentence credit hearing held on December 6, 2006. As noted, there the circuit court adopted the assistant district attorney's recommendation that Miller was entitled to the entire time period, save three months (from April 2, 2004, to July 2, 2004) for when he was serving a jail sentence on a separate case (Walworth county case No. 2002CT253).

¶12 Thus, the only remaining question is whether Miller is entitled to three months of additional sentence credit for the time spent in custody between April 2, 2004, and July 2, 2004, when he was simultaneously serving a jail sentence in Walworth county case No. 2002CT253 and conditional jail time in this case, Walworth county case No. 2002CF198. We conclude that he is. In *State v.*

⁶ Admittedly, there is some confusion about this in the record. For example, at various times in the circuit court, both Miller and his attorney suggest that a nine month ATR might also have been ordered in Walworth county case No. 2002CM211.

Yanick, 2007 WI App 30, ¶1, 299 Wis. 2d 456, 728 N.W.2d 365, we held that a person serving conditional jail time, whose term is interrupted by a transfer to prison on an unrelated sentence, remains in conditional jail time status and continues to serve the conditional term while in prison. Miller's situation is sufficiently analogous. Therefore, under the holding of *Yanick*, Miller completed his conditional jail time while serving his separate jail sentence and is entitled to credit on that time.

¶13 For the reasons stated, we reverse the orders of the circuit court and remand with directions that the court provide Miller with three months of additional sentence credit against his sentence.

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

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

