

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2017

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. 2016AP924-CR

Cir. Ct. No. 2013CF397

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANTONIO A. JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: DAVID M. REDDY, Judge. *Judgment modified and, as modified, affirmed; order reversed and cause remanded with directions.*

Before Reilly, P.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. Antonio Johnson challenges his judgment of conviction and the circuit court's order denying his motion for postconviction relief. He contends the court erred in rejecting his request for an additional three

days of sentence credit. In light of Wisconsin Supreme Court precedent, we must agree.

¶2 The parties agree that this case is controlled by the language of WIS. STAT. § 973.155(1)(a) (2015-16),¹ which states in relevant part that a defendant “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.” Johnson asserts that the phrase “all days spent in custody” is ambiguous and thus we should apply the rule of lenity which would result in our adoption of his reading of this provision—that “any part of a calendar day spent in custody equals one day for sentence credit purposes.” The State’s position is that a “day[] spent in custody” means a continuous twenty-four-hour period in which a person is in custody. Johnson’s position on the issue would result in a total of thirty-three days of sentence credit for him; the State’s position results in the thirty days the circuit court granted him.

¶3 As relevant to this case, Johnson was in custody from his arrest on drug-dealing charges at 7:30 a.m. on August 19, 2013, until his release on bond at 3:25 p.m. on August 20, 2013. He was again taken into custody on drug-dealing charges on September 16, 2013, and released less than an hour later. At 6:11 p.m. on September 26, 2013, Johnson was once again taken into custody, on allegations he violated his bond by dealing drugs, and he remained in custody until he posted bond and was released at 6:04 p.m. on October 25, 2013.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Johnson eventually pled to two drug-dealing charges. At sentencing, he requested thirty-three days of credit for the above-identified periods of custody, but the circuit court granted him only thirty days, based upon “August 19th, August 20th, one day. September 26th to October 25th, 29 days.” Johnson moved for postconviction relief, seeking inter alia the additional three days of sentence credit he had sought at sentencing. The circuit court denied the request, stating, “The policy of the court is that the time served would have to be more than 12 hours in order to get credit for a day ... [a]nd I am not talking cumulative, either; I am talking about at one time.”

¶5 The correct application of WIS. STAT. § 973.155(1)(a) is a matter of law we review de novo. *State v. Obriecht*, 2015 WI 66, ¶21, 363 Wis. 2d 816, 867 N.W.2d 387. Normally we would engage in more extensive discussion of the correct interpretation and application of this sentence credit statute; however, such discussion is unnecessary in this case, because our supreme court has already demonstrated its agreement with Johnson’s reading of the provision.

¶6 In *State v. Carter*, 2010 WI 77, ¶57 n.39, 327 Wis. 2d 1, 785 N.W.2d 516, the defendant was arrested at 12:45 p.m. on December 13, 2003, and remained in custody until he appeared in court on December 15, 2003. The court specifically addressed the defendant’s entitlement to sentence credit for this time period and accepted as correct the State and defendant’s joint calculation that three days was the appropriate amount of credit. *Id.*, ¶¶5, 25. Granting three days of credit, the court indicated that it considered December 13, 14, and 15 as “days” when the defendant “was actually in custody in connection with the conduct for

which he was sentenced.”² *Id.*, ¶79 n.69. Of particular relevance to the case now before us, we observe that the defendant in *Carter* was only in custody for eleven hours and fifteen minutes on December 13, less than the twelve hours the circuit court in the case now before us requires in order to credit a defendant with a sentence credit “day.”

¶7 In *State v. Johnson*, 2009 WI 57, ¶5, 318 Wis. 2d 21, 767 N.W.2d 207, the defendant was arrested on August 10, 2004, and released from jail on August 13, 2004, after posting cash bond. Our supreme court considered this to be four days for sentence credit purposes. *Id.*, ¶¶28, 48. And in *Obriecht*, the court counted the period from when the defendant was arrested and charged, February 2, 1998, to when he was released on bond, October 16, 1998, as 257 days of custody for sentence credit purposes. *Obriecht*, 363 Wis. 2d 816, ¶¶7, 10, 28.³

² The State argues that the *Carter* court was inconsistent, pointing to the opinion’s description of the period between December 15 and 21, for which no sentence credit was given, as six days rather than seven days. *State v. Carter*, 2010 WI 77, ¶17, 327 Wis. 2d 1, 785 N.W.2d 516. However, as Johnson points out in his reply brief, it is clear that the court was not counting December 15, a day for which Wisconsin credit was given. This is confirmed in the court’s chart titled “Timeline,” which indicates that Carter was due three days of credit for December 13 through 15, but that “[t]he six days (12/16-12/21) do not count” as Wisconsin sentence credit days. *Id.*, ¶24. It is also confirmed in a subsequent chart which calculates the period between and including December 13, 2003, and October 18, 2004, as “305 days,” and in doing so clearly excludes only the days from December 16 through 21, 2003. *Id.*, ¶25. Therefore, we see no inconsistency in the court’s counting method.

³ The State asserts that the *Obriecht* court “count[ed] the period between June 30 and November 19, 1999, [which was another sentence credit period] as 142 days when that period is 143 days when counting any portion of a day as a full day.” See *State v. Obriecht*, 2015 WI 66, ¶8, 363 Wis. 2d 816, 867 N.W.2d 387. The *Obriecht* decision subsequently clarifies, however, that the defendant “continued in custody” from November 19, 1999, through December 20, 1999. *Id.*, ¶¶9-10, 29. The court counted this latter period as thirty-two days, which necessarily means it counted November 19, 1999, as a sentence credit “day” within the November 19 through December 20 period of thirty-two days, and was not counting November 19 as a “day” within the June 30 through November 19 period. See also *id.*, ¶29 (“This additional 32 days of custody was solely in connection with the misdemeanor sentences.”).

In doing so, the court necessarily counted the day on which the defendant was arrested and the day on which he was released each as a “day” for sentence credit purposes.⁴

¶8 The facts of the case now before us provide us with no discernable, substantive basis for distinguishing this case from *Carter, Johnson*, and *Obriecht* as relevant to the sentence credit consideration. As a result, we are compelled to apply WIS. STAT. § 973.155(1)(a) in the same manner as our supreme court. *See Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Doing so, we conclude Johnson is entitled to a day of sentence credit for each calendar day during which he spent at least part of the day in custody. That means one day for August 19, 2013, one day for August 20, 2013, one day for September 16, 2013, and thirty days for the time period between and including September 26, 2013, and October 25, 2013—all totaling thirty-three days.⁵

¶9 We modify the judgment and the judgment, as modified, is affirmed. We reverse the order of the circuit court and remand this matter to the court. On remand, an amended judgment of conviction shall be entered granting Johnson a total of thirty-three days of sentence credit.

By the Court.—Judgment modified and, as modified, affirmed; order reversed and cause remanded with directions.

⁴ We presume it unlikely the defendants in *Johnson* and *Obriecht* were arrested or released on bond precisely as the clock turned over at midnight. Thus, it appears that in both *Johnson* and *Obriecht* our supreme court treated as a WIS. STAT. § 973.155 sentence credit “day” each day in which the defendant was in custody for any portion of the day.

⁵ The State makes no argument that any of the days for which Johnson seeks credit were days that were not “in connection with the course of conduct for which sentence was imposed.” *See* WIS. STAT. § 973.155(1)(a).

Recommended for publication in the official reports.

