22-5067

ORIGINAL

No. (to be assigned)

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN M. WITHROW,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE WISCONSIN SUPREME COURT

PETITIONERS' PETITION FOR WRIT OF CERTIORARI

Benjamin M. Withrow, #534142
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Pro se for Petitioner

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QUESTION PRESENTED

1. Whether Petitioner is entitled to sentencing credit on multiple cases when there is a connection – not between the offenses but between the causes of the initial confinement on the separate charges, at least until the connection is severed?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

Petitioner is Benjamin M. Withrow. Counsel for petitioner below was Benjamin M. Withrow, W10237 Lake Emily Road, Post Office Box 200, Fox Lake, Wisconsin 53933-0200.

Respondent is the State of Wisconsin. Counsel for respondents below was Nicholas S. DeSantis, Assistant Attorney General, Wisconsin Department of Justice, Post Office Box 7857, Madison, Wisconsin 53707-7857.

OPINIONS BELOW

The order of the Wisconsin Court of Appeals is reported as *State of Wisconsin vs. Benjamin M. Withrow*, Appeal No. 2020AP1703-CR (Ct. App., (Wis.) Mar. 2, 2022)(summary disposition); appear in Appendix A attached hereto.

The order of the Wisconsin Supreme Court is reported as *State of Wisconsin vs. Benjamin M. Withrow*, Appeal No. 2020AP1703-CR (Ct. App., (Wis.) May 18, 2022); it appears in Appendix B attached hereto.

JURISDICTION

The opinion and judgment of the Wisconsin Court of Appeals affirming the Winnebago County Circuit Court's decision declaring that petitioner's request for double sentence credit cannot be applied to sentences that are not concurrent was issued on March 2, 2022. The opinion of the Wisconsin Supreme Court summarily denying review was issued on May 18, 2022.

Pursuant to 28 U.S.C. § 2101(c), the present petition for a writ of certiorari was required to be filed, within ninety (90) days of the entry of the judgment, on or before August 16, 2022. The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES

The Fourteenth Amendment to the United States Constitution provides as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

The petitioner, *pro se*, initiated this action by filing a notice of motion and motion for sentence credit in the Winnebago County Circuit Court, Wisconsin seeking an additional 171 days of sentence credit towards the service of his sentence. At hearing, the circuit court, the Honorable Barbara H. Key presiding, held that petitioner was only entitled to 281 days of sentence credit, not the additional 171 days requested.

Notice of Appeal was filed by the petitioner and briefs were submitted to the Wisconsin Court of Appeals. The respondent did not seek to appeal any portion of the decision of the circuit court.

On appeal, in an opinion filed March 2, 2022, the Wisconsin Court of Appeals affirmed the Winnebago County Circuit Court's order (Appendix A). Petitioner then, *pro se*, filed a petition for review to the Wisconsin Supreme Court. The court denied review (Appendix B).

STATEMENT OF FACTS

On July 17, 2017, Withrow, on probation in Outagamie County Case Numbers 16-CM-1165, 15-CF-692, and 15-CF-143, is arrested for a new offense; a probation hold is imposed;

Withrow begins to earn presentence credit toward both the sentence for the course of conduct (here, the new offense) and in the Outagamie County cases in which the probation hold was issued up to the time that one of the four sentences is imposed.

On July 21, 2017, Withrow made an initial appearance on the new charge (Winnebago County Case No. 17-CF-443); Withrow was offered a $50,000 cash bond; cash bond was *not* paid by Withrow; probation hold remains in effect, so Withrow remains in continuous custody.

On November 20, 2017, Division of Hearings and Appeals Assistant Administrator Diane E. Norman ordered Withrow's probation in Outagamie County Case Numbers 16-CM-1165, 15-CF-692, and 14-CF-143 be revoked and to hold Withrow for sentencing pursuant to Wis. Stat. § 973.10(2).

On January 4, 2018, Withrow was sentenced to 300 days in the county jail on Outagamie County Case No. 16-CM-1165; credit for 177 days is awarded; eligible for good time in accordance with Wis. Stat. § 973.155(4); credit accruing toward the instant matter (Winnebago County Case No. 17-CF-443) is severed based on this sentencing.

On January 5, 2018, Withrow was sentenced to 270 days in the county jail on Outagamie County Case No. 14-CF-143 to be served concurrent to Outagamie County Case No. 16-CM-1165; credit for 256 days is awarded; eligible for good time in accordance with Wis. Stat. § 973.155(4).

On January 5, 2018, Withrow was sentenced to 90 days in the county jail on Outagamie County Case No. 15-CF-692 to be served consecutive to Outagamie County Case Nos. 14-CF-143 and 16-CM-1165; credit for 3 days is awarded; eligible for good time in accordance with Wis. Stat. § 973.155(4).

On February 22, 2018, 123 days later (5-7-18) minus 76 days good time on the 300 day sentence, the 300 day sentence in Outagamie County Case No. 16-CM-1165 is completed; Withrow begins to serve the consecutive 90 day sentence in Outagamie County Case No. 15-CF-692.

On April 27, 2018, 87 days later (5-13-18) minus 23 days good time on the 90 day sentence, the 90 day sentence in Outagamie County Case No. 15-CF-692 is completed; Withrow remains in custody as he has not paid the cash bond in Winnebago County Case No. 17-CF-443 and begins to earn credit once again in the instant matter.

On February 1, 2019, Withrow was sentenced on the instant case to a 15 year bifurcated prison sentence (consisting of 7 years initial confinement and 8 years of extended supervision);[1] credit for 265 days is awarded.

ARGUMENT

Prior to addressing the real controversy of this case, there appears to be an issue that deserves to be addressed at its outset. That is, which road is most appropriate for the petitioner to challenge his criminal case in the Supreme Court of the United States (SCOTUS). At present, there are three roads a state prisoner can take to challenge his state court judgment in SCOTUS.

First, there is the usual path of direct appeal. Following this path, the case works its way through the state appellate courts immediately after a conviction, ultimately ending in SCOTUS. This is not the path that has been taken in this case.

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[1] On June 17, 2019, Department of Corrections Offender Records Supervisor Ann Wells contacted Winnebago County Circuit Court and requested review of the Amended Judgment of Conviction dated February 21, 2019 (73:1-3). Since Withrow's crime is listed as a Class E felony, Ms. Wells believed that the term of extended supervision did not meet the statutory requirements of Wis. Stat. § 973.01(2)(d)4, which states that, "For a Class E, F, or G felony, the term of extended supervision may not exceed 5 years." (75:1). The circuit court reduced Withrow's portion of extended supervision to 5 years (80:1-3).

The second route is by way of the convoluted path of federal habeas corpus. This road trip starts with a state postconviction challenge in the state trial court, winds its way through the state appellate courts, and then on to the federal courts. Once in the federal courts, it starts again with a petition in the federal trial court (district court), slogs its way through the federal court of appeals, and potentially makes it way to SCOTUS. This road has a lot of potholes and roadblocks that most habeas petitioners and lawyers cannot navigate on their own. It's a rough road, but a familiar one to many state prisoners. Relief is rarely granted by any of the several courts along the way. This route is also not the path this case has taken to challenge the state court judgment in SCOTUS.

The third and less traveled road is what some have begun calling "direct collateral review" (DCR). This trip starts like the habeas path above in the state trial court but never goes to the federal courts. Instead, after taking (and losing) their postconviction challenge to the state supreme court (or top appellate court within the jurisdiction), a prisoner takes their state postconviction challenge directly to SCOTUS.

DCR is not just another form of habeas corpus in SCOTUS, however. Under the habeas statutes, the Court gets its jurisdiction from 28 U.S.C. § 2254 to hear state prisoners' claims. But under DCR, the Court gets its jurisdiction from 28 U.S.C. § 1257(a), the same as a direct appeal taken to SCOTUS from a state court judgment. This distinction is important because it removes DCR from the realm of habeas corpus and all of its restrictions.

This road appears to be the best path to challenge petitioner's state court judgment because he will have better luck with a DCR petition for at least three reasons. First, this avenue avoids the Antiterrorism and Effective Death Penalty Acts (AEDPA) restrictions on habeas relief

and allows SCOTUS to grant relief to state prisoners when it sees fit to do so. *E.g., Madison v. Alabama*, 139 S. Ct. 718 (2019).

Second, petitioner firmly believes that AEDPA's restrictions forbids the federal habeas court from granting him relief even if it wanted to on the underlying issue. *See* 28 U.S.C. § 2254(d). Particularly because petitioner has found no "clearly established federal law" that squarely governs his challenge at issue here. Moreover, the state courts judgment cannot be said to be an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding" because they were bound by its factual precedent (*State v. Jackson*, 2000 WI App 41, 233 Wis.2d 231, 607 N.W.2d 338). Whether or not *Jackson* was properly decided is a matter that will be argued if certiorari is granted.

Third, the issue at hand is an important federal right and the DCR route provides a viable avenue for creating new "clearly established federal law" that can apply not only on direct appeal and DCR but also in future federal habeas cases filed by state prisoners.

Turning to the real controversy of this case: The Fourteenth Amendment guarantees "a person [may] not serve more time than that for which he is sentenced." *State v. Carter*, 2010 WI 77, ¶51. As the Wisconsin Supreme Court has explained, the provisions of the sentence credit law, Wis. Stat. § 973.155(1), are mandatory. *Id.*

Courts deal with sentence credit every day. The real task in this case is determining the basic rule of sentence credit in Wisconsin. The basic rule established by § 973.155(1)(a) is that an offender is entitled to sentence credit if the person was in custody in connection with the course of conduct for which sentence is imposed.[2]

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[2] Importantly, subsection (1)(b) states, in relevant part, "the categories in par. (a) ... include custody of the convicted offender which is in whole or in part the result of a probation ... hold ... placed upon the person for the same course of conduct as that resulting in the new conviction."

In Wisconsin, there are two lines of sentence credit cases. The concurrent sentence line of cases, *see State v. Beets*, 124 Wis.2d 372, 369 N.W.2d 382 (1985), and the consecutive sentence line of cases. *See State v. Boettcher*, 144 Wis.2d 86, 423 N.W.2d 533 (1988).

In *Beets*, the defendant was on probation for his conviction of two drug crimes when he was arrested for burglary and taken into custody on the burglary charge. *Id.*, 124 Wis.2d at 374. A few days later he was also in custody on a probation hold for the alleged violation of his probation. *Id.* About one month later, his probation on the drug offenses was revoked and later Beets was sentenced on the drug crimes. *Id.* at 375. For the period from his arrest to his sentencing, Beets was given credit for his custody in connection with the sentences on the drug crimes. *Id.* About six months after his sentencing on the drug crimes, Beets later pled guilty to the burglary charge and was sentenced to prison. Just like the credit petitioner is seeking, *Beets* sought sentence credit on the burglary charge for the same period of time previously credited on the drug sentences (i.e., the period from his arrest to his revocation sentencing). ***The trial court granted Beets' request.***

However, Beets also sought additional credit for the period of confinement following his revocation sentencing on the drug charges and the sentencing on the burglary charge. The trial court denied this request and the court of appeals affirmed. *Id.* at 376. Upon further review, the Wisconsin Supreme Court identified the issue as whether *Beet's* confinement following his prior sentencing on the drug charges was "in connection with the course of conduct for which sentence was imposed" pursuant to Wis. Stat. § 973.155(1). *Id.* at 377. Affirming the court of appeals, the Wisconsin Supreme Court ruled that it was not. The Court explained that "any connection which might have existed between custody for the drug offenses and the burglary was severed when the

custody resulting from the probation hold was converted into a revocation and sentence." *Id.* at 379.

In whatever manner or way, the State did not challenge Beets' award of sentence credit for confinement *prior* to the sentencing on the drug charges. Indeed, the Wisconsin Supreme Court expressly noted that the propriety of this grant of dual credit was not before the court. *Id.* at 378 n.5.

In *Boettcher*, the defendant was convicted of burglary and was placed on probation; a three-year sentence was imposed but stayed. While on probation, he was arrested on a probation hold warrant for possessing a firearm. *Id.*, 144 Wis.2d at 88. One hundred days later, his probation status was revoked and his 3-year stayed sentence for burglary began to run. *Id.* Boettcher was given 100 days of credit toward the burglary sentence for the time he spent in custody prior to revocation. *Id.*

Boettcher later pleaded no contest to the firearm charge and received a one-year sentence, consecutive to his burglary sentence *Id.* at 89. Boettcher argued that the 100 days of credit he received toward his burglary sentence should also be applied to his firearm sentence, because he was in custody in connection with the course of conduct for which the firearm sentence was imposed. *Id.* The Wisconsin Supreme Court disagreed. *Id.* The Court explained that "custody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed in the ***consecutive*** sentences." *Id.* at 100 (emphasis added).

Here, the Wisconsin Court of Appeals concluded that petitioner's sentence was "neither consecutive nor concurrent to any other sentence." Thus, the difficulty becomes: If petitioners sentence is neither consecutive nor concurrent to any other sentence, is the trial court required to

return to the plain language of the sentence credit statute and award credit for "all days spent in custody in connection with the course of conduct for which sentence was imposed?"

A. There is a split between the state appellate courts.

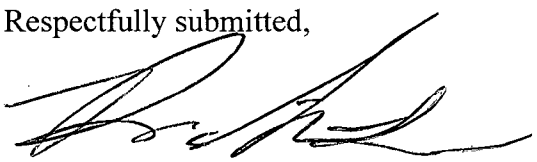
Here, there can be no doubt that petitioner was in custody in connection with the course of conduct for which sentence was imposed. Thus, defendant should have received jail-credit on his current sentence. *See e.g. State ex rel. Gater v. Burgess,* 128 S.W.3d 907 (Mo. Ct. App. W.D. 2004)(defendant's sentence for current offense was not "consecutive" to prior sentence for purpose of statute authorizing credit for time served when custody is related to offense for which a defendant is sentenced, and thus defendant was not precluded from jail-time credit, even though defendant did not receive his current sentence until after he completed his prior sentence).

CONCLUSION

For the reasons above, a writ of certiorari should issue to review the judgment and opinion of the Wisconsin courts.

Dated this 3 day of June, 2022.

Respectfully submitted,



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