

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 10, 2008

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. 2007AP2544-CR

Cir. Ct. No. 2006CF254

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC ZENDEJAS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: RICHARD J. DIETZ and TIMOTHY A. HINKFUSS, Judges.¹
Affirmed.

Before Hoover, P.J., Peterson and Brunner, JJ.

¹ Judge Richard J. Dietz presided at the trial and entered the judgment of conviction. Judge Timothy A. Hinkfuss heard the postconviction motion and entered the order denying postconviction relief.

¶1 PER CURIAM. Eric Zendejas appeals a judgment of conviction for second-degree sexual assault of a child and an order denying his motion for sentence credit. Zendejas sought credit for the time between entry of his no contest plea and the date of sentencing for this offense, even though he was simultaneously serving prison sentences for unrelated offenses. Because we conclude Zendejas is not entitled to additional credit, we affirm the judgment and order.

¶2 Zendejas committed the present crime while he was on probation for two offenses. In one of those cases, a four-year prison sentence was imposed and stayed. In the other, sentence was withheld and he was placed on probation. When he committed the present offenses, he was held on a probation hold as well as the present charge, but was granted bail on the present charge. After he was sent to prison for the other offenses, he entered a no contest plea to the present charge and the court revoked his bail. The court ultimately imposed a sentence of six years' initial confinement and five years' extended supervision for the present offense, concurrent with the other sentences. Zendejas argues that he is entitled to sentence credit from the day his bail was revoked in the present case until the date of sentencing.

¶3 As explained in *State v. Beets*, 124 Wis. 2d 372, 379, 369 N.W.2d 382 (1985), jail credit was initially a matter of equal protection, i.e., a person who could not make bail because of indigency was being denied a liberty right that a wealthy person could exercise. See *Klimas v. State*, 75 Wis. 2d 244, 249, 249 N.W.2d 285 (1987). When a defendant is awaiting sentencing while simultaneously serving another prison term, there is no equal protection consideration because he would not be released from custody regardless of his ability to make bail. *Beets* also recognizes that the sentence credit statute, WIS.

STAT. § 973.155 (1981-82) is broader than the equal protection rights recognized in *Klimas*. The statute was substantially based on the comparable federal statute. *Beets*, 124 Wis. 2d at 379. The federal courts have uniformly denied sentence credit for time in custody spent serving state sentences and simultaneously awaiting federal sentencing. *Id.* at 380.

¶4 The trial court correctly concluded Zendejas is not entitled to the sentence credit he seeks. Zendejas' incarceration from the date he pled no contest and his bail was revoked on the present charge to the date of sentencing on this charge was not time spent in custody "in connection with" this offense because he was serving a sentence for an unrelated crime.

¶5 Zendejas attempts to distinguish *Beets* because his bail was revoked while the *Beets*' court apparently assumed Beets' cash bail remained in effect. That distinction fails because the *Beets* court held:

Beets was in prison serving an imposed and unchallenged sentence; and whether he was also awaiting trial on the burglary charge was irrelevant, because his freedom from confinement—his right to be at liberty—was not in any way related to the viability of the burglary charge. His ability to make bail on the burglary charge became immaterial.

Whether Zendejas was denied bail or could not make bail is immaterial for the time he was incarcerated for other offenses.

¶6 Zendejas cites *State v. Yanick*, 2000 WI App 30, ¶1, 299 Wis. 2d 456, 728 N.W.2d 365, for the proposition that credit may be granted for jail time that "overlapped" an unrelated prison sentence. In *Yanick*, the court allowed dual credit for a prison sentence and jail imposed as a condition of probation. Zendejas, like Beets, is seeking credit for time before he was sentenced in the

present case, not for time served after the sentence was imposed. *Yanick* is not applicable to the facts of this case.

¶7 Zendejas also notes dicta in *State v. Boettcher*, 144 Wis. 2d 86, 99-100, 423 N.W.2d 533 (1988), where the court, addressing whether a probation hold was an entirely different category than detention, noted that the statute allows dual credit “in appropriate cases.” In a footnote, the court suggests an example of an appropriate case “when a new sentence is imposed to run concurrently with a revoked probation.” That situation would arise if the court simultaneously imposed concurrent sentences for a new crime and the revoked probation. The footnote does not overrule the express holding in *Beets*.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

