CASES DECIDED/FOUND AFTER PUBLICATION OF THE 2002 RESOURCE MANUAL

These are all published cases. However §809.23 allows an unpublished decision issued on or after 7/1/09 to be cited for persuasive value. Cases decided before 7/1/09 may NOT be cited.

NEWLY DISCOVERED EVIDENCE

State ex rel. Booker v. Schwarz, 2004 WI App 50, 270 Wis. 2d 745, 678 N.W.2d 361 (Ct. App. 2004)

> Booker's probation was revoked for battering a man named Marshall and he was ordered to serve a ten-year sentence for burglary. He served three and a half years of his sentence before filing a motion with DHA to reopen the probation revocation case. The motion alleged that Booker had "newly discovered evidence" that shows Marshall committed perjury when he testified about matters crucial to Booker's claim of self defense, namely whether or not Marshall was reaching for a gun when Booker struck him and the nature of their physical contact. DHA denied the motion citing, among other reasons, the lack of statutory authority for reopening a fully litigated revocation case.
>
> The Court of Appeals reversed and remanded the case to DHA for further proceedings. The Court held that due process requires that there be some procedure that allows an offender to present newly discovered evidence of his innocence. *See* ***State v. Bembenek***, 140 Wis.2d 248, 409 N.W.2d 432 (Ct. App. 1987). The first step in that procedure is the filing of a motion that alleges, with factual specificity, that the offender was not aware of the evidence at the time of the hearing or negligent in failing to seek it. The motion must also allege that the evidence is relevant to a contested issue, that it is not cumulative and that it will probably change the outcome of the case. If the motion alleges facts that satisfy each of these criteria, the offender is entitled to relief. Otherwise, the motion can be summarily denied. The offender has the burden of proof. He must present clear and convincing evidence that shows he is entitled to the relief he seeks. ***Bembenek, Id.,*** at 258.

REJECTION OF PROBATION

State v. Pote, 2003 WI App 31, 260 Wis. 2d 426, 659 N.W.2d 82 (Wis. Ct. App. 2003)

> The defendant was convicted of felony nonsupport and refused to sign probation rules that required him to pay child support for his non-marital child. Rather than seeking a revocation of the defendant's probation, the probation agent brought the case back into court for judicial review. At the review hearing, the court presented the defendant with the probation rules and informed him that a refusal to sign the rules would be deemed a rejection of probation. When the defendant still refused to sign

the rules, the court vacated its order placing the defendant on probation and proceeded to sentence him to a term of imprisonment. The appellate court concluded that the lower court was correct in determining that the defendant's conduct constituted a rejection of probation under *State v. McCready*, 2000 WI App 68, 234 Wis.2d 110, 608 N.W.2d 762.

TREATMENT/ATRS

Freedom from Religion Foundation v. McCallum, 324 F.3d 880 (7th Cir. 2003)

The plaintiff challenged the placement of offenders at Faith Works, a faith-based halfway house in Milwaukee. DOC places offenders at Faith Works as an alternative to incarceration. This is done pursuant to a contract that requires DOC to pay for their care and treatment. The plaintiff asserts that this arrangement violates the establishment clause of the First Amendment. Citing the school-voucher case, ***Zelman v. Simmons-Hatch***, 122 S. Ct. 2460 (2002), the Court of Appeals held that placing offenders in a faith-based program does not violate the First Amendment where the offender has the option of participating in a secular program. Moreover, agents are allowed to recommend faith-based programs when the program is consonant with the offender's religious beliefs.

CONDITIONS/RULES

State v. Beiersdorf, 208 Wis. 2d 492, 561 N.W.2d 749 (Ct. App. 1997)

The Court of Appeals held that a condition of probation requiring a defendant who was convicted of sexual assault to pay for DNA/genetic testing to determine paternity of a child conceived as a possible result of the sexual assault was reasonable and appropriate.

State v. Lo, 228 Wis. 2d 531, 599 N.W.2d 659 (Ct. App. 1999)

The court of appeals held to be constitutional a probation rule prohibiting contact with gang members or engaging in gang activity. Although the rules did not define "gang member" or "gang activity", it was not unreasonably vague because the terms are defined in the criminal code. Apparently, definitions from the criminal code may be applied to the rules and conditions of probation. The term "gang member" is defined in Wis. Stats. § 941.38(1)(b) and the term "gang activity" is defined in Wis. Stats. § 841.38(1)(b).

State v. Simonetto, 2000 WI App 17, 232 Wis. 2d 315, 606 N.W.2d 275 (Wis. App. 1999)

The Court of Appeals held that a condition prohibiting a sex offender from going places "where children might congregate" was constitutional. The condition was not overly broad because:

1. It required only the use of common sense.

2. The court gave a list of examples of places where children might congregate. (The list was not exhaustive.)
3. The sex offender could go to these otherwise prohibited places if he had prior permission from his agent.

State ex rel. Kaminski v. Schwartz, 2001 WI 94, 245 Wis. 2d 310, 630 N.W.2d 164 (2001)

Overrules *State ex rel. Kaminski v. Schwarz*, 2000 WI App 159, 238 Wis. 2d 16, 616 N.W.2d 148 (Ct. App. 2000). The Wisconsin Supreme Court held that a condition of probation that required a convicted sex-offender to notify his immediate neighbors of his status as sex-offender was constitutional. The court gave the following reasons:

1. The probation agent had the authority to impose such a rule under Wis. Admin. Code § 328.04(2)(d).The Sex Offender Registry Laws do not explicitly preclude imposition of the rule.
2. The rule met the dual purposes of protecting the public and rehabilitating the sex-offender.
3. It forced the sex offender to take responsibility for his crime.
   a. It allowed the neighbors to make informed decisions about their interactions with the sex offender.
   b. The rule only required that the sex offender tell his neighbors that he was convicted of a sex crime and DID NOT require the sex-offender to reveal details bout his crimes.

State ex rel. Tate v. Schwarz, 2002 WI 127, 654 N.W.2d 438 (Wis. 2002)

The Supreme Court affirmed the holding in *State ex rel. Tate v. Schwarz*, 2001 WI App 131, 246 Wis. 2d 293, 630 N.W.2d 761 (Ct. App. 2001) and extended Thompson/Evans protections to statements made during treatment.

Tate was required to sign a release that permitted any statements he made during sex offender treatment to be used against him in "any court proceeding". Tate refused to admit the facts underlying his conviction.

The Court held that because Tate had a direct appeal of his conviction pending, and because the release permitted Tate's statements to his treatment provider to be used in a criminal proceeding, that Tate had the right, under the Fifth Amendment to refuse to admit the facts underlying his conviction.

However, as stated above, the Court extended the protections created by *State v. Evans*, 77 Wis.2d 225, 252 N.W.2d (1977), and *State v. Thompson*, 142 Wis. 2d 821, 419 N.W.2d 564 (Ct. App. 1987) to offenders in sex offender treatment. Therefore, offenders can be compelled to make admissions during treatment ***if*** they are advised that statements made during treatment are protected from use and derivative use in criminal proceedings.

State v. Koenig, 2003 WI App 12, 656 N.W.2d 499 (Wis. Ct. App. 2002)

Koenig has an extensive history of stealing checks from her boyfriends and forging them, so the court imposed a special condition of supervision that requires Koenig to "introduced to her agent, immediately, any person she is dating to discuss her prior record." Koenig challenged that condition on appeal. She argued that the condition is unconstitutionally vague because it does not provide adequate notice of the prohibited conduct or an objective standard for enforcement. *See State v. Lo*, 228 Wis.2d 531, 599 N.W.2d 659 (Ct. App. 1999). The Court of Appeals upheld the condition. It held that Wis. Stats. § 813.12 (1) (ag), a statute that defines the phrase "dating relationship," provides a sufficient definitional framework.

In re Commitment of Burris, 2004 WI 91, 273 Wis. 2d 294, 682 N.W.2d 812 (2004)

Burris, a sexually violent offender under Wis. Stats. ch. 980 (1999-2000), appealed from an order revoking his supervised release. He argued that he was denied due process because Rule One, a standard rule of supervision, is unconstitutionally vague. The Wisconsin Supreme Court affirmed the order revoking Burris's supervised release. Rule One prohibits "conduct … that is not in the best interest of the public's welfare or [Burris's] rehabilitation." Burris argued that this rule is unconstitutionally vague because it fails to provide adequate notice of what conduct is prohibited. The Court rejected his challenge to Rule One for two reasons: First, Rule One clearly prohibits the conduct at issue in this case, namely the use of a "sexual-performance-enhancing drug" by a sexually violent offender without the knowledge of his supervising agent. Second, Burris attempted to conceal his use of the drug. Doing so demonstrates that he knew that using it fell within the range of conduct prohibited by Rule One. The Court also rejected several other notice objections because Burris failed to show that his ability to prepare and present a defense was prejudiced by any of the alleged errors.

State v. Agosto, 2008 WI App 149, 314 Wis. 2d 385, 760 N.W.2d 415 (Ct. App. 2008)

Agosto was charged with sexual assault. His mother posted $50,000. Agosto missed a court date and the $50,000 was forfeited and Agosto was charged with bail jumping in a separate case. The Court of Appeals held that the circuit court did not err and properly exercised its discretion when ordering Agosto to pay back the $50,000 to his mother as a condition of his extended supervision in the sexual assault case. (The court also noted that it would have also been proper to order the $50,000 to be paid as restitution in either the sexual assault case or the bail jumping case.)

State v. Harris, 2008 WI App 189, 315 Wis. 2d 537, 763 N.W.2d 206 (Ct. App. 2008)

Given the recent changes in law, making the ALJ's decision on reconfinement final, this case is of limited value, but FYI: At a reconfinement hearing, the circuit court

can impose new conditions of extended supervision. In this case, the court added a rule precluding contact with a woman that Harris battered during his extended supervision.

JURISDICTION

Bartus v. DHHS, 176 Wis. 2d 1063, 501 N.W.2d 419 (Wis. 1993)

Reversing the Court of Appeals in *Bartus v. DHHS,*168 Wis. 2d 775, 486 N.W.2d 36 (Ct. App. 1992), the Supreme Court held that the Division of Hearings and Appeals does not have the authority to reverse or void a facially valid circuit court judgment. "The hearing examiner's jurisdiction is limited to those matters either expressly grated to them or necessarily implied…neither the Division of Hearings and appeals nor the Department of Corrections has been granted the authority to void or reverse circuit court judgments."

The Department of Corrections need not notify the court when it intends to revoke probation. It is only required to notify the court of possible extensions of probation for unpaid restitution.

See also Non-payment of restitution

Riesch v. Schwarz 2005 WI 11, 278 Wis. 2d 24, 692 N.W.2d 219 (2005)

An inmate's refusal to sign parole rules and participate in treatment constitutes grounds for revoking his or her parole supervision, so long as the refusal to cooperate *persists up to or beyond* the mandatory release date. Under these circumstances, the department is not required to release the inmate from custody prior to commencing revocation proceedings. The commencement of parole, the violations and the parole hold are properly treated as simultaneous events, and continuous physical custody did not defer or preclude the commencement of parole supervision.

The holding in this case does not apply when the inmate is unlawfully detained beyond his or her mandatory release date. *Cf. State ex rel. Woods v. Morgan*, 224 Wis.2d 534, 591 N.W.2d 922 (Ct. App. 1999).

State ex rel. Darby v. Listcher, 2002 WI App 258, 258 Wis. 2d 270, 653 N.W.2d 160 (Ct. App. 2002)

Wis. Stats. § 973.03(2) provides, "a defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences and whether concurrent or consecutive in the state prisons." Darby received consecutive misdemeanor sentence while serving a prison term. He was paroled from the underlying prison sentence and the consecutive misdemeanor sentences; his parole was revoked and he was reincarcerated for the balance of each sentence. Darby argued that reincarceration on the misdemeanor sentences is contrary to the "misdemeanor" good time statues, namely Wis. Stats. §302.43 and §303.19(3). The Court of Appeals rejected this argument. It held that Wis. Stats.

§302.43 only applies to inmates confined to a county jail and Wis. Stats. §303.19(3) only applies to inmates confined to a house of correction. Darby was confined to a state prison by virtues of Wis. Stats. §973.03(2). He was, therefore, subject to the statues that govern parole released, parole revocation and reincarceration, even though he was serving misdemeanor sentences in prison.

State Dept of Corrections v. Schwarz, 2005 WI 34, 279 Wis. 2d 223, 693 N.W.2d 703 (2005)

Dowell, the defendant, was paroled in May 1997. Shortly after his release, Dowell committed a sexual assault, but the Department of Corrections was unaware of it. His parole was revoked in March 1998 for unrelated violations. The Department of Corrections released Dowel to a second period of parole on in July 2001. The Department then became aware of the 1997 sexual assault and sought revocation of Dowell's parole. Dowell argued that the Department lacked jurisdiction to revoke his current term of parole supervision.

The Supreme Court held that the Department of Corrections can seek revocation of a person's parole based upon violations that occurred during a previous term of parole. The court interpreted the phrase, "term of supervision" in Wis. Stats. § 304.072(3) to refer to the, "current term of supervision and any time prior to the final discharge from an underlying sentence."

State ex rel. Thomas v. Schwarz, 2007 WI 57, 300 Wis. 2d 381, 732 N. W.2d 1 (2007)

In June 1999, Thomas was convicted of two counts of forgery. The court imposed and stayed two, consecutive, two-year sentences and placed Thomas on probation. Thomas's probation was revoked in April 2000.

In May 2000, Thomas was convicted of burglary. Under the new "truth in sentencing" guidelines, the court imposed a *consecutive* eight-year sentence consisting of three years of initial confinement and five years of extended supervision.

Mr. Thomas completed the Challenge Incarceration Program and was released from prison on August 27, 2001. The Department of Corrections then sought revocation of Mr. Thomas's parole in the forgery case and his extended supervision in the burglary case.

Mr. Thomas argued that the Department did not have jurisdiction to revoke his extended supervision in the burglary case because his parole and extended supervision were two, separate sentences.

Interpreting Wis. Stats. §§ 302.11(1), 302.11 (3), 302.113(2), 302.113(4) and 973.15, the Supreme Court stated, "We disagree with Thomas' argument that he was required to complete his parole in the 1999 forgery case, before he could begin serving his

extended supervision in the 2000 burglary case. Rather, we are satisfied that, under the overall statutory scheme adopted by the legislature, parole and extended supervision are to be served as one continuous period of supervision."

State v. Collins, 2008 WI App 163, 314 Wis. 2d 653, 760 N.W.2d 438 (Ct. App. 2008)

Collins was on extended supervision in two, separate, consecutive cases. Collins argued that his extended supervision in the last case could not be revoked until he completed extended supervision on the first case. The Court of Appeals rejected this assertion, stating that, "according to the plain language of Wis. Stat. § 302.113(4), two consecutive periods of extended supervision are computed as one continuous period. Thus, 'both may be revoked upon violation of the conditions imposed.' *See Thomas*, 300 Wis. 2d 381, ¶ 47."

DUE PROCESS - RESCISSION

State ex rel. Purifoy v. Malone, 2002 WI App 151, 256 Wis. 2d 98, 648 N.W.2d 1 (Ct. App. 2002)

Citing Wis. Admin. Code PA1.07(5)(c), the court held that a parole grant may only be rescinded if there are circumstances subsequent to the issuance of the grant that require rescission. An offender has the right to be provided with the reasons for the parole rescission and the evidence supporting the rescission. The offender also has a right to a hearing before the Division of Hearings & Appeals, to present evidence and witnesses and to be represented by counsel at the hearing.

Applying the holding to Purifoy, the court determined that a new parole commissioner could not rescind a parole grant given by her predecessor without affording Purifoy due process as described above.

DUE PROCESS – WAIVER OF RIGHT TO COUNSEL

State v. Coleman, 2002 WI App 100, 253 Wis. 2d 693, 644 N.W.2d 283 (Ct. App. 2002)

NOTE: This case *does not* discuss what must be considered by an ALJ when an individual waives his/her right to counsel at a revocation hearing. However, this case does provide some guidance to ALJs in determining whether to accept a waiver of a right to counsel.

"When a defendant elects to proceed without counsel, the circuit court must insure that the defendant (1) has knowingly, intelligently and voluntarily waived the right to counsel; and (2) is competent to proceed. *Citation omitted.*…To establish the first prong, the circuit court must conduct a colloquy designed to ensure that the defendant 1) made a deliberate choice to proceed without counsel; (2) was aware of the challenges and disadvantages of self-representation; (3) was aware of the seriousness of the charges; and (4) was aware of the general range of penalties that could be imposed."

In making a determination regarding whether the defendant is competent to proceed, the circuit court should considered the defendant's education, literacy, fluency in English, and any physical or psychological disability that may significantly affect his or her ability to communicate.

A defendant may, by conduct, forfeit the right to counsel. When a defendant engages in conduct meriting forfeiture, the court must determine whether the defendant is competent to proceed without an attorney.

DUE PROCESS – HEARSAY- CONFRONTATION

U.S. v. Kelley, 446 F.3d 688 (7th Cir. 2005)

The 7th Circuit Court of Appeals held that ***Crawford v. Washington,*** 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) does not apply to revocation hearings stating, "revocation hearings are not 'criminal prosecutions' for purposes of the Sixth Amendment, so the 'full panoply of rights due a defendant in such a proceeding' does not apply." Citing *Morissey v. Brewer*, 408 U.S. at 480, 92 S.Ct. 2593. HOWEVER, the court goes on to state that, "Even in light of the flexible nature of revocation hearings, however, the district court ideally should have explained on the record why the hearsay was reliable and why that reliability was substantial enough to supply good cause for not producing the Pattersons [the declarants] as live witnesses. Still, we have not strictly required the district courts of make explicit reliability and good cause finding."

FYI: A party cited *Ash v. Reilly*, 354 F. Supp.2d.1, 65 Fed.R.Evid Serv. 1246, to support the contention that *Crawford* applied to revocation hearings. However, the decision was vacated and remanded in *Ash v. Reilly*, 431 F.3d 826 (D.C. Cir. Ct. of App. 2005) with the court of appeals stating that the use of hearsay did not necessarily deprive the defendant of his right to confront witnesses and that the district court needed to make findings regarding the reliability of the proffered hearsay.

HEARSAY – DOC FILE

State v. Keith, 216 Wis. 2d 61, 573 N.W.2d 888 (Ct. App. 1997)

Citing *Prellwitz v. Schmidt*, 73 Wis. 2d 35, 242 N.W.2d 227 (1976), the Court of Appeals held that probation/parole files compiled by the DOC fall under the public records exception to the hearsay rule under Wis. Stat. § 908.03(8) and are therefore, admissible. (Specifically, the records considered were findings of fact made during an investigation and activities or observations of the DOC)

The only foundation needed is that the records be identified by a competent witness. In this case the agent who identified the records used the records during her supervision of the offender.

SENTENCE CREDIT

State ex rel. Thorson v. Schwarz, 2004 WI 96, 274 Wis. 2d 1, 681 N.W.2d 914 (2004)

The issue in this case is whether an inmate who was detained pursuant to a Chapter 980 sexually-violent-offender proceedings is entitled to custody credit for that detention where the state fails to secure a Chapter 980 commitment and the

inmate's parole is subsequently revoked. Shortly before Thorson's mandatory release date, April 4, 2000, the state filed a petition for commitment under chapter 980 and Thorson was detained at the Wisconsin Resource Center (WRC). The commitment action failed at trial and Thorson was released to parole supervision on September 20, 2000. His parole was eventually revoked and he requested custody credit for the 170 days he was detained at WRC. The Wisconsin Supreme Court held that a detention under chapter 980 cannot be credited against the predicate sentence because it fails to meet the "in custody" and "in connection with" requirements specified in Wis. Stats. § 973.155.

State v. Hintz, 2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646 (Ct. App. 2007)

Hintz was on extended supervision for an OWI. He was arrested for burglary. The court granted Hintz a signature bond, but he was not released because of a DOC Hold issued, in part, because of the burglary. Hintz was convicted of the burglary, but was not given custody credit between the date of bond and his reconfinement hearing.

The Court of Appeals held that Mr. Hintz was, in fact, entitled to custody credit towards his sentence for the burglary between the date of the signature bond until the date he returned to court for the reconfinement hearing on the OWI case because the DOC hold arose, in part, from the same conduct underlying the burglary conviction. The court relied upon Wis. Stats. § 973.115(1)(a).

State v. Wright, 2007 WI App 138, 302 Wis. 2d 261, 732 N.W.2d 863 (Ct. App. 2007)

FACTS:

1. On February 16, 2005, West Allis (WI) police contacted the police in Bemidji Minnesota and stated that a warrant would be sent for Mr. Wright's arrest on charges of sexual assault of a child.
2. Bemidji police arrested Wright on February 17, 2009 based upon the verbal representation of the West Allis police that a warrant was issued from Wisconsin and on Minnesota charges of possession of child pornography (images of the WI sexual assault victim).
3. On February 23, 2005, the warrant was actually issued.
4. On April 18, 2005, Wright was sentenced to probation on the Minnesota charges.
5. On April 29, 2005, Wright was transported to Wisconsin, arriving in Milwaukee on May 8, 2005.
6. On September 30, 2005 Wright was sentenced to 50 years for the sexual assault charges. The court gave Wright pre-sentence credit from May 8, 2005 until September 30, 2005 for the time he spent in custody in Milwaukee.
7. The court later granted additional custody credit from April 15, 2008 the date of Sentencing in Minnesota, to May 8, 2005 the day Wright arrived in Milwaukee.

Wright contends that he is also entitled to custody credit towards his Wisconsin sentence from 2/17/05, the date of his arrest in Minnesota, to 4/15/08 the date of sentencing in Minnesota. The Court of Appeals agreed stating that Wright was entitled to custody credit because the Minnesota sentence and the Wisconsin sentence were concurrent and because Wright was held, in part, on the Wisconsin warrant. The court rejected the notion that custody credit could only be properly granted if Wright were held in custody on the Wisconsin warrant alone.

The Court of Appeals stated that the fact that the warrant wasn't actually issued on February 23, 2005 was irrelevant because Bemidji Police arrested Mr. Wright on February 17, 2005 based upon a good faith representation of Wisconsin authorities that the warrant existed and was therefore, in custody, in connection to the Wisconsin sexual assault charges. The court considered the verbal confirmation of the warrant sufficient to constitute a legal event, process or authority making the arrest, in part, based upon the Wisconsin warrant.

The Court of Appeals also granted the requested custody credit because it found that the Minnesota charges and Wisconsin charges arose out of the same course of conduct. "In the course of sexually assaulting the child in Wisconsin, Wright took the photographs that were the basis for the charges in Minnesota. Thus, but for the sexual assaults in Wisconsin, Wright could have come to possess child pornography in Minnesota. The two cases were clearly interrelated and based on the same course of conduct."

State v. Martinez, 2007 WI App 225, 305 Wis. 2d 753, 741 N.W.2d 280 (Ct. App. 2007)

Facts:

1. On August 4, 1993, Martinez was sentenced to 14 years of imprisonment in Wisconsin cases 92CF207 and 93CF240.
2. On January 31, 2001, Martinez was sentenced in Federal Court on case 99-CR-203-1 to 84 months, to be served consecutively to the Wisconsin Sentence. (Martinez was in Wisconsin serving his Wisconsin sentences at the time.)
3. On June 4, 2001, Martinez was paroled from his Wisconsin sentence and went directly to the federal government to serve the sentence in case 99-CR-203-1.
4. On February 13, 2006, Martinez was released from federal custody.
5. On May 14, 2006, Martinez was arrested for violating his Wisconsin parole.

Martinez argued he should receive custody credit towards his Wisconsin sentence for time spent in Federal custody from June 4, 2001 until February 13, 2006. The court of appeals, following holdings in *State v. Rohl*, 160 Wis. 2d 325, 466 N.W.2d 208 (Ct. App. 1991), held that Martinez was not entitled to such credit because the Wisconsin sentence and the federal sentence were "nonconcurrent" and that the Wisconsin sentence, at the time Martinez was serving the federal

sentence, was "speculative" since, it was possible that Mr. Martinez would not have had his Wisconsin Parole revoked.

State v. Carter, 2007 WI App 255, 306 Wis.2d 450, 743 N.W.2d 700 (Ct. App. 2007)

FACTS:

1. On July 23, 2003, Wisconsin issued a warrant for Carter's arrest due to a charge of First-Degree Endangering Safety.
2. On December 14, 2003, Carter was arrested for drunk driving, on an Illinois warrant for an armed robbery and on the Wisconsin warrant.
3. Wisconsin then placed a "hold" on him.
4. On March 11, 2004, a Wisconsin Governor's warrant was served upon Carter.
5. On October 20, 2004 extradition on the Wisconsin fugitive warrant was dismissed and the warrant vacated.
6. On November 2, 2004, the court in Illinois sentenced Carter to 14 years imprisonment for the armed robbery. Carter commenced serving the sentence forthwith.
7. Having been extradited from Illinois, Carter appeared in a Wisconsin court on June 1, 2005.
8. On August 30, 2005, the court sentenced Carter to 12.5 years for the Recklessly Endangering Safety.
9. The Wisconsin court gave Carter custody credit from June 1, 2005 until August 30, 2005.
10. It was undisputed that the Wisconsin sentence was concurrent to the sentence imposed in Illinois.

The parties disputed whether Carter should receive custody credit from December 14, 2003, the date of his arrest until November 2, 2004, when he was sentenced on the Illinois charge. (Carter agreed that he was not entitled to custody credit between November 2, 2004 and June 1, 2005 because, under State v. Beets, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), the sentencing in Illinois severed the connection between his custody and the Wisconsin charges.)

The Court of Appeals held that Carter was, in fact, entitled to custody credit from December 14, 2003 until November 2, 2004, based upon Wis. Stats. §973.155(1)(a). The Court of Appeals based its decision upon its finding that Carter was in custody in connection to the Wisconsin charge due to the Wisconsin arrest warrant and the Wisconsin Governor's warrant and entitled to custody credit and upon the undisputed fact that the Wisconsin and Illinois sentences ran currently to each other.

The Court of Appeals stated that there is no basis in law for the State's contention that custody in a foreign jurisdiction must arise solely from a Wisconsin warrant for that custody to be applied to a Wisconsin sentence.

It should be noted that the Court of Appeals distinguished warrants from detainers, stating that a detainer, "does not trigger sentence credit because it does not, 'legally authorize custody'; it simply notifies the jurisdiction in which the defendant is confined that 'his custody is desired elsewhere'." *Citing* State v. Demars, 119 Wis. 2d 19, 349, N.W.2d 708 (Ct.App.1984).

The Court of Appeals also distinguished Carter from *State v. Rohl*, 160 Wis.2d 325, 466 N.W.2d 208 (Ct. App. 1991), stating that Rohl was not given custody credit in Wisconsin for the time he was held in California, because his California sentence was consecutive to the Wisconsin sentence for which he was on parole.

Petition for Review by Supreme Court granted on March 18, 2008; 2008 WI 40, 308 Wis.2d 609. However, as of 9/15/09, nothing new has shown up on Westlaw.

RECONFINEMENT CONSIDERATIONS

State v. John C. Brown, 2006 WI 131, 298 Wis. 2d 37, 725 N.W. 2d 262 (2006)

Given that ALJs will be making the final decision on reconfinement in ES revocation hearings, this case just gives some guidance about what to consider in making reconfinement decisions. The criteria should sound familiar:

1. Nature and severity of the original offense
2. institutional conduct record
3. amount of reincarceration necessary to protect the public from risk of further criminal activity, taking into account defendant's conduct and nature of violation terms and conditions during extended supervision.
4. factors identified in *State ex rel. Hauser v. Carballo*, 82 Wis. 2d 51, 261 N.W.2d 133 (1978) (related in part to balancing need to protect society against 'facilitating the violator's transition between prison and unconditional freedom"
5. defendant's record, attitude and capacity for rehabilitation
6. rehabilitative goals to be accomplished by imprisonment for the time period in question in relation to the time left on the violator's original sentence.

The court stated that this list is not mandatory, but that an explanation should be given regarding the facts considered in deciding the amount of re-confinement time.

State v. Walker, 2008 WI 34, 308 Wis.2d 666, 747 N.W.2d 673 (2008)

I debated whether to include this decision, since it deals with reconfinement hearings, but ultimately decided to add it to the list on the off chance this comes up during a hearing after October 1, 2009.

Walker argued that the circuit court erred during his reconfinement hearing by failing to read the sentencing transcript. The Supreme Court reversed the holding in *State v.*

Gee, 2007 Wis. App 32, 299, Wis. 2d 518, 729 N.W.2d 424, stating that, while the sentencing transcript can be a useful too, there is no bright line rule requiring a court to read the original sentencing transcript at every reconfinement hearing. The court need only make itself familiar with the case.

"In making a reconfinement decision, 'we expect that the circuit courts will usually consider [the recommendation from DOC], the nature and severity of the original offense, the client's institutional record, as well as the amount of incarceration necessary to protect the public from the risk of further criminal activity, taking into account the defendant's conduct and the nature of the violation of terms and conditions during extended supervision…

The reconfinement period imposed should be the minimum amount that is necessary to protect the public, to prevent depreciation of the seriousness of the offense, and to meet the defendant's rehabilitative needs…

The circuit court may also considered what balance of time between renewed incarceration and further extended supervision is most likely to protect society and at the same to facilitate the violator's transition between prison and unconditional freedom…

Other facts that may be relevant include 'consideration of the defendant's record, attitude and capacity for rehabilitation and the rehabilitative goals to be accomplished by imprisonment for the time period in question in relation to the time left on the violator's original sentence." Citing *State v. John C. Brown*, 2006 WI 131, 298 Wis. 2d 37, 725 N.W. 2d 262.

PROBATION/PAROLE SEARCH AND SEIZURE

State v. Jones, 2008 WI App 154, 314 Wis. 2d 408, 762 N.W.2d 106 (2008)

This case is not practical for ALJs since illegally obtained evidence is admissible at revocation hearings, pursuant to HA 2.05(6)(c). However, just as an FYI: The court held that 1) The fact that police accompanied the agent and suggested the use of a lock smith when Jones's mother could not open his bedroom door did not transform the probation search into a police search requiring a warrant, 2) The agent had a reasonable basis to conduct the search given that Jones admitted to her that he was hiding a marijuana pipe in his room and given that a police detective told the agent that he had personal knowledge of love letters and nude photos of Jones that Jones gave to an underage girl and 3) the use of a lock smith to gain entry during a probation search was reasonable and not forcible, since it allowed the agent to gain entry without damaging the premises, as required by Wis. Admin. Code DOC §328.21 (3)(f).

EXTENSIONS

State v. Luu, 2009 WI App 91, 769 N.W.2d 125

This case is included only because extensions of probation are sometimes proposed as alternatives to revocation.

> The initial term of probation cannot exceed the maximum term of imprisonment for the subject crime. However, the court may, for cause, extend probation even if the total number of years on probation exceeds that maximum term of imprisonment for the subject crime.

INEFFECTIVE ASSISTANCE OF COUNSEL

State v. Walker, 2007 WI App 142, 302 Wis. 2d 735, 735 N.W.2d 582 (Ct. App. 2007)

This case is included only because I had not seen anything connecting ineffective assistance of counsel claims to revocation hearings.

NOTE!!!! This case is connected to State v. Walker, 2008 WI 34, 308 Wis. 2d 666, 747 N.W.2d 673 – The supreme court ***reversed*** *the court of appeals on the issue of whether the sentencing transcript needs to be read at reconfinement hearings. The Supreme Court did not address the ineffective assistance of counsel claim.*

> Walker claimed that his attorney was ineffective because the attorney advised him to give up his right to a hearing and because the attorney did not investigate alternatives to revocation. The Court of Appeals found that the attorney was not ineffective given the attorney's, "assessment that the administrative law judge who would preside over the revocation hearing would almost never consider alternatives for absconders, especially in the face of the agent's opposition, and [the attorney's] desire to get for Walker at least the perception that Walker was cooperative so as to lessen the chance that the administrative law judge's recommendation to the reconfinement court would be more severe than the agent's two-year recommendation…"
>
> "A lawyer's failure to investigate is not deficient performance if he or she reasonably concludes, based on facts of record, that any investigation would be mere wheel-spinning ad fruitless" citing *Greiner v. Wells*, 417 F.3d 305, 321 (2d Cir. 2005).

NON PAYMENT OF RESTITUTION

Bartus v. DHHS, 176 Wis. 2d 1063, 501 N.W.2d 419 (Wis. 1993)

> In determining whether an individual's supervision should be revoked for non-payment of restitution, the individual's ability to pay must be taken into consideration. The circuit court is, "expressly forbidden from incarcerating a

probationer solely because of indigency…If the defendant questions the propriety of the court's assessment in light of his alleged indigency then the sentencing court must render a determination on the matter…We conclude that these well-established standards for exercising judicial discretion in the sentencing process apply with equal force to the administrator's exercise of discretion during revocation proceedings."

In the case at hand, … "the Division of Hearings and Appeals also properly exercised its discretion when it decided to revoke Bartus's probation…Specifically, the hearing examiner solicited information in respect to Bartus's ability to pay restitution and revoked probation only after ascertaining that Bartus's failure to pay was his way of protesting the 1988 resentencing and not the result of indigency."

See also Jurisdiction