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COURT OF APPEALS

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

DISTRICT III

Case No. 2015AP2182-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STEVEN F. ZASTROW,

Defendant-Appellant.

APPEAL FROM AN ORDER DENYING MOTION FOR
SENTENCE MODIFICATION, ENTERED
IN THE OUTAGAMIE CIRCUIT COURT,
THE HONORABLE MARK J. MCGINNIS, PRESIDING.

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT

The State requests neither oral argument nor publication. This Court may resolve this case by applying well-established legal principles to the facts presented.

SUPPLEMENTAL STATEMENT OF THE CASE AND STATEMENT OF FACTS

As respondent, the State exercises its option not to present a full statement of the case. Wis. Stat. § (Rule) 809.19(3)(a)2.¹ Instead, the State will present the following summary and provide additional facts, as necessary, in the argument portion of its brief.

At a single sentencing hearing on October 18, 2006, the Outagamie County Circuit Court sentenced Steven F. Zastrow on criminal charges that spanned five separate cases. (*See Zastrow's Br. Ex. 1.*)² All together, Zastrow received a mix of concurrent and consecutive prison terms totaling 11 years of initial confinement and 14 years of extended supervision. (34:1; *see Zastrow's Br. Ex. 1:24-26.*)

¹ Unless indicated otherwise, all citations to Wisconsin Statutes refer to the 2013-14 edition.

² Those Outagamie cases were: 2002-CF-1013, 2005-CF-284, 2005-CF-285, 2006-CF-320 and 2006-CF-327. (*See Zastrow's Br. Ex. 1:1, 24-28.*) Only 2005-CF-285 is at issue in this appeal. Exhibit 1 to Zastrow's appellate brief appears to be a copy of the sentencing hearing transcript for all five cases. This appeal and Zastrow's underlying postconviction motion, however, only pertain to one of the five cases, 2005-CF-285, and the record on appeal does not include a copy of that transcript. (*See Record Index; 75; 79.*) The State has relied on the transcript attached to Zastrow's brief for some limited information about his convictions and related sentences in these cases, and the absence of an official transcript in the record should not have a material effect on the resolution of this appeal.

For one of Zastrow's convictions, the court withheld sentence and ordered Zastrow to serve three years' probation, consecutive to all of his other cases. (*See* Zastrow's Br. Ex. 1:28.)

All of Zastrow's Outagamie County sentences were consecutive to an earlier prison sentence he received on June 20, 2006 in Winnebago County Circuit Court Case No. 2005-CF-0158.³ On January 31, 2008, the Winnebago County Circuit Court vacated Zastrow's original sentence in that case, resentenced him, and placed him on probation for three years with an imposed and stayed prison term of four years (two years' of initial confinement and two years' of extended supervision). (*See* 76:2, 4, Zastrow's Br. Ex. 3.) The court ordered Zastrow's probation to be consecutive to his sentences in Outagamie County sentences. (*See* 76:2, Zastrow's Br. Ex. 3.)

On August 10, 2015, Zastrow filed a motion to correct or modify his sentence in one of his Outagamie County cases, 2005-CF-285, arguing that the Outagamie Circuit Court had "unintentionally overlooked its intent to have ordered Ct. 6 and Ct. 7 to be concurrent not just to one another but also concurrent to Ct. 1," which would shorten his total term of

³ For purposes of this appeal, the State accepts Zastrow's representation that he was sentenced to two years' initial confinement and two years' extended supervision in the Winnebago case. (Zastrow's Br. 1 Ex. 3.) The appellate record here contains only scant information about the case, and it comes from Zastrow's submissions and unauthenticated attachments to those submissions. (*See* 76:2, 4.) Nonetheless, the Wisconsin Circuit Court Access website does indicate that Zastrow was sentenced in the Winnebago case on June 20, 2006, and Zastrow has submitted what appears to be a Winnebago County Circuit Court order that refers to his "previously imposed sentence of two years confinement and two years of extended supervision[.]" (76:4, Zastrow's Br. Ex. 3.)

initial confinement from 11 to 9 years. (75:2.) As proof, Zastrow offered his recollection of hearing the sentencing court, the prosecutor and his trial counsel making that agreement during an off-the-record discussion at his sentencing hearing. (75:2.) Following a short hearing, the circuit court denied Zastrow’s motion, finding that there was no factual or legal basis to grant relief. (79; 81:5.)

Zastrow appeals.

ARGUMENT

I. Zastrow is trying to get duplicate sentence credit for prison time that was properly applied to his sentence in Winnebago County.

Generally, to receive sentence credit, a defendant must demonstrate: (1) that he was in custody for the time at issue, and (2) that he was in custody during that time “in connection with’ the course of conduct” that resulted in the new conviction. *State v. Hintz*, 2007 WI App 113, ¶ 6, 300 Wis. 2d 583, 731 N.W.2d 646 (citation omitted).⁴ And, “[w]hen a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the department shall credit the defendant with confinement previously served.” Wis. Stat. § 973.04 (2007-08) and (2013-14). Even then, however, a defendant is not entitled to dual custody credit when he receives *consecutive* sentences like Zastrow did in

⁴ In Wisconsin, “[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.” Wis. Stat. § 973.155(1)(a). This includes “custody of the convicted offender which is in whole or in part the result of a probation, extended supervision or parole hold . . . placed upon the person for the same course of conduct as that resulting in the new conviction.” Wis. Stat. § 973.155(1)(b).

this case. *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988).

Until January 31, 2008, Zastrow was serving his Winnebago County prison sentence. Later, when the Winnebago County Circuit Court vacated that sentence and resentenced Zastrow, he properly received all of that time as credit toward the new imposed and stayed Winnebago sentence. See Wis. Stat. § 973.04 (2007-08) and (2013-14). As explained in a November 9, 2015 letter to Zastrow from the Department of Corrections:⁵

Outagamie County case 02CF1013 was ordered to be served consecutively to Winnebago County case 05CF158. Therefore, the service of case 02CF1013 could not begin until January 31, 2008, the date case 05CF158 was vacated. Credit for time spent in custody serving case 05CF158 may only be applied to case 05CF158 under Wis. Stat. § 973.04 and is not applied to a consecutive sentence. Beginning the service of case 02CF1013 prior to January 31, 2008 would result in you receiving double, or duplicate, credit toward the service of both cases 05CF158 and 02CF1013.

(Zastrow's Br. Ex. 18.)

To circumvent this result, Zastrow offers two equally unsupported and incredible arguments. First, he claims that although the sentencing transcript “does not show the [Outagamie Circuit] Court going off [the] record,” he recalls the court doing exactly that and expressing its intent to make his sentences in case 2005-CF-285 concurrent to all of his other sentences. (Zastrow's Br. 5-6.) Specifically, Zastrow

⁵ Again, the letter is only an attachment to Zastrow's brief, not part of the appellate record. The State has no reason to doubt its accuracy or authenticity.

claims that the court said “it appears that the State and defense agree to Counts Six and Seven being concurrent to one another and Ct. 1 in the case before me.” (Zastrow’s Br. 5.) In the highly unlikely event that this self-serving claim were somehow true, it wouldn’t even matter. The statement that Zastrow attributes to the court does nothing more than acknowledge a possible and non-binding agreement between the prosecutor and defense counsel as to whether the counts should be concurrent or consecutive. More importantly, both the court’s sentencing remarks and the written judgment were clear, and the court unambiguously ordered the sentences on Counts 6 and 7 to be served consecutively with the sentence on Count 1. (34:1; *see* Zastrow’s Br. Ex. 1:24-26.)

Next, Zastrow argues that the time he spent in custody for his original Winnebago County sentence should not be credited to his new sentence in that case, but to his Outagamie County case instead. (Zastrow’s Br. 6-12.) Zastrow’s argument represents a fundamental misunderstanding and misapplication of the law. His time served on the original Winnebago County sentence was correctly credited to the amended Winnebago County sentence, Wis. Stat. § 973.04, and he is not entitled to dual credit by applying this credit to his consecutive sentences in Outagamie County sentences as well. *Boettcher*, 144 Wis. 2d at 100.

The circuit court correctly denied Zastrow’s motion to modify his sentences in this case.

II. Even though Zastrow’s “as applied” constitutional claims against Wis. Stat. §§ 973.04 and 302.114(4) are meritless, this Court should decline to address them because he failed to raise the claims in the postconviction motion underlying this appeal and his prior postconviction/appellate proceedings.

On this appeal, Zastrow argues for the very first time that two statutes concerning sentence credit and structure, Wis. Stat. § 973.04 and Wis. Stat. § 302.113(4), are unconstitutional as applied to him. (Zastrow’s Br. 12-15.) As discussed above, Wis. Stat. § 973.04 ensures that a defendant gets sentence credit in the event his original sentence is vacated for some reason and he receives a new sentence for the same crime. Wisconsin Stat. § 302.113(4) provides that consecutive sentences be served as one continuous sentence, and that any applicable terms of extended supervision be served only after a defendant completes all of his confinement time.

Despite myriad opportunities to do so previously, this appeal represents the first time that Zastrow has raised these constitutional claims. Zastrow’s direct appeal in this case was decided over six years ago. *State v. Zastrow*, Nos. 2009AP512–CR & 2009AP513–CR, 2010 WL 778017 (Wis. Ct. App. Mar. 9, 2010) (unpublished). Although the appeal addressed the circuit court’s denial of Zastrow’s motion for sentence modification, it did not include the constitutional issues he now seeks to pursue on this appeal. In addition to his direct appeal, Zastrow has filed a long series of postconviction and appellate pleadings. (*See* 32; 35; 37; 38; 50; 55; 57; 58; 59; 60; 66; 68; 70; 71; 72; 73; 75.) Although he sought modification of his sentences in several of those matters, he did not raise his current constitutional claims in any of them – including the postconviction motion underlying this appeal. (75.)

This Court generally does not consider arguments raised for the first time on appeal. *See Gorton v. American Cyanamid Co.*, 194 Wis. 2d 203, 226–27 n.10, 533 N.W.2d 746 (1995). Furthermore, “as applied” constitutional challenges like Zastrow’s are also subject to the common law principles of waiver, which exist to promote efficiency and fairness in our court system. *In re Commitment of Bush*, 2005 WI 103, ¶ 19 n.8, 283 Wis. 2d 90, 699 N.W.2d 80 (citations omitted), *holding modified by City of Eau Claire v. Booth*, 2016 WI 65, 370 Wis. 2d 595, 882 N.W.2d 738 (citations omitted). For both reasons, this Court should decline to address Zastrow’s constitutional claims on the merits.

It is worth noting, however, that Zastrow’s constitutional arguments make little sense. His claim that Wis. Stat. § 973.04 is unconstitutional as applied to him is simply a restatement of his earlier argument that the time he spent serving his original Winnebago County sentence should be credited to his Outagamie County cases instead of his new sentence in the same Winnebago County case. (Zastrow’s Br. 12.) Zastrow then argues that Wis. Stat. § 302.113(4) is unconstitutional as applied to him because if he had been released to extended supervision on the first of his consecutive sentences before beginning the confinement time on his remaining sentences, he would have been able to show the circuit court that he deserved to have his prison time reduced. (Zastrow’s Br. 13-14.)

Despite their length, neither argument is properly supported by applicable legal authority – and with good reason. Both arguments defy not just the law, but common sense. Zastrow may believe that Wis. Stat. § 973.04 and Wis. Stat. § 302.113(4) are unfair because they prevent him from getting out of prison sooner than he’d like, but he hasn’t proven how and why they are unconstitutional as applied to

him. Aside from a conclusory invocation of the Due Process Clause (Zastrow's Br. 13), Zastrow does not identify a single constitutional provision that could possibly be implicated, and the State can imagine none. Zastrow's constitutional claims are both undeveloped and inadequately briefed, and this Court should disregard them. *State v. Flynn*, 190 Wis. 2d 31, 58, 527 N.W.2d 343 (Ct. App. 1994).

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's denial of Steven F. Zastrow's motion to correct or modify his sentences.

Dated: October 6, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 2,004 words.

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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: October 6, 2016.

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