

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal No. 2016AP002009 CR
Circuit Court Case No. 2014CM002949

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**CLERK OF COURT OF APPEALS
OF WISCONSIN**

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

JAVA I. ORR,
DEFENDANT-APPELLANT.

ON NOTICE OF APPEAL TO REVIEW A JUDGMENT ENTERED
IN MILWAUKEE COUNTY CIRCUIT COURT THE HONORABLE
REBECCA F. DALLET AND JANET C. PROTASIEWICZ
PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

Mr. Orr Should Have Been Permitted to Withdraw His Plea on the Ground that Counsel Provided Incorrect Information to Mr. Orr Inducing His Pleas, Thereby Rendering Ineffective Assistance of Counsel.

The circuit court found that counsel's performance was not deficient.

A New Factor Existed Justifying Sentence Modification.

The circuit court found that a new factor justifying sentence modification did not exist.

**Mr. Orr Was Sentenced on the Basis of Inaccurate Information
And Should Have Been Resentenced.**

The circuit court found that resentencing was not required.

**STATEMENT ON ORAL ARGUMENT AND
PUBLICATION**

The opportunity for oral argument is welcomed, but not requested because the briefs will adequately address the issues presented. Neither does publication appear necessary because the issues involve no more than the application of well-settled rules of law to a recurring fact situation. Sec. 809.23(1)(b)1 stats. Further, the issues will be decided based on controlling precedent and no reason appears for questioning or qualifying the precedent. Sec. 809.23(1)(b) 3 stats.

STATEMENT OF THE CASE

In Milwaukee County case number 2013CM002949, Mr. Orr was charged by criminal complaint (R 1; App. p. 101-02) subscribed on or about July 28, 2014, in count one with battery contrary to § 940.19(1) stats., in count two with disorderly conduct § 947.01(1) stats. alleged to have occurred on July 11, 2014. An additional count of battery contrary to § 940.19(1) stats. was added to that complaint on July 14, 2015.

On July 14, 2015, Mr. Orr entered guilty pleas to those three counts.

The Court sentenced Mr. Orr that day to serve nine (9) months on count 1, with credit for nine (9) months, time served, on count 2, to serve ninety (90) days, with credit for eighty-two (82) days, time served, and on count 3, to serve six (6) months, with zero (0) credit.

Notice of Intent to Pursue Postconviction Relief was filed on July 31, 2015.

Counsel was appointed on September 8, 2015.

The last transcript was received on March 16, 2016.

On March 2, 2016, the Department of Corrections sent a letter to the Circuit Court indicating that the credit awarded by the Court on July 14, 2015, was duplicate credit. (R 24; App. p.120)

On March 3, 2016, the Court, without hearing, entered an order amending the judgment of conviction, reducing the credit awarded in this case to four (4) days. (R 25; App. p. 124)

On July 13, 2016, the Court of Appeals enlarged the time within which to file a notice of appeal or postconviction motion until August 16, 2016.

Mr. Orr's postconviction motion (R 32) was filed on August 16, 2016.

That motion was denied following hearing on September 23, 2016.

Notice of Appeal was filed on October 12, 2016.

The record was received by this Court on December 5, 2016.

By order dated January 31, 2017, this Court enlarged the time for filing defendant-appellant's brief to February 24, 2017.

STATEMENT OF FACTS

In Milwaukee County case number 2014CM002949, Mr. Orr was charged by criminal complaint subscribed on or about July 28, 2014, in count one with battery contrary to § 940.19(1) stats., in count two with disorderly conduct § 947.01(1) stats. alleged to have occurred on July 11, 2014.

Mr. Orr was also charged in Milwaukee County case number 2015CF000431, by criminal complaint filed on January 26, 2015, in count one with intimidation of a witness in furtherance of a conspiracy, contrary to § 940.43(4), alleged to have occurred on July 19, 2014, in counts two and three with intimidation of a witness, contrary to § 940.42, alleged to have occurred on October 11, 2014.

On February 4, 2015, both case number 2014CM002949 and 2015CF000431 were before the court. Mr. Orr waived preliminary examination in the felony case. Both cases were then adjourned to February 17, 2015. On that date, counsel for Mr. Orr withdrew. On February 26, 2015, new counsel appeared for Mr. Orr. The cases were scheduled for final pre-trial on March 24, 2015 and jury trial on

May 18, 2015. Final pre-trial conferences were held on March 24, 2015, April 27, 2015 and May 8, 2015.

Although these cases tracked together, the cases were never formally joined.

On May 8, 2015, the jury trial was adjourned to July 13, 2015.

On July 13, 2015, the parties appeared for trial. The cases were passed from morning to afternoon. The state advised the court that in case number 2015CF000431, it intended to proceed only on count 2 and that in case number 2014CM002949, it intended to proceed on both counts. (R 52, p 3, ll. 14-16) Upon defense motion, the court dismissed count three in case number 2015CF000431, reflecting that count one had been previously dismissed. (R 52, p 4, ll. 9-16)

During the afternoon of July 13, 2015, the court conducted voir dire, jury selection and the parties gave opening statements. The jury was excused until 8:45 a.m. on July 14, 2015. (R 52, pp. 95-96)

On the morning of July 14, 2015, the state advised court and counsel that additional evidence in the form of jail calls had come to the state's attention. (R 53, pp. 2-4)

Based on this information, further negotiations ensued. Pursuant to those negotiations, case number 2015CF000431 was dismissed in its entirety. (R 53, pp. 5-6). The state moved and the court permitted amendment of the criminal complaint in case number 2014CM002949 to include a count three alleging battery , contrary to § 940.19(1) stats. (R 53, p. 5, ll. 18-22). There was not an amended complaint filed. The state's proffered amendment did not specify a date, but in examining Mr. Orr regarding his pleas, the court described all counts as having occurred on July 11, 2014, at 3967 North 13th Street. (R 53, p. 10, ll. 17-20) The judgment also reflects that date of offense. (R 20; App. 103-04)

Mr. Orr entered guilty pleas to those three counts.

The court, the Honorable Rebecca F. Dallet, presiding, sentenced Mr. Orr on that day to serve nine (9) months on count 1, with credit for nine (9) months, time served, on count 2, to serve ninety (90) days, with credit for eighty-two (82) days, time served, and on count 3, to serve six (6) months, with zero (0) credit.

On March 2, 2016, the Department of Corrections (DOC) directed a letter to the court:

Pursuant to Wis. Admin. Code DOC § 302.22, we are requesting that the Court review the sentence credit granted on the Judgment of Conviction (JOC) dated 07-15-2015 for case 14CM2949.

Please note some of the 352 days on the JOC appears to be duplicate credit, reference State v. Boettcher, 144 Wis. 2d 86, 423 N.W.2d 533 (Wis. 1988).

To explain, Mr. Orr received credit on the amended Revocation Order and Warrant (ROW) dated 01-04-2016 from 07-19-2014 to 01-13-2015 and from 01-27-2015 until the present towards the revocation of Washington County case 08CF323 and Milwaukee County case 12CM1952. The Court ordered the sentence in case 14CM2949 to be served consecutive to any other sentence, thus it would appear that granting all credit on case 14CM2949 would duplicate credit previously granted to cases 08CF323 and 12CM1952. Enclosed please find copies of the JOC and the ROW for your review.

Please advise if all credit granted for this case is appropriate.

(R 24; App. 120)

The court, the Honorable Janet C. Protasiewicz, presiding, entered an order amending the judgment of conviction:

By letter dated March 2, 2016, the Department of Corrections has asked the court to review this case for duplicate sentence credit. Judge Rebecca Dallet sentenced the defendant on counts one, two and three of this case on July 14, 2015. The record reflects that Judge Dallet granted a total of 352 days of credit for the periods of January 19, 2014 to January 17, 2015, and January 27, 2015 to July 14, 2015. The court applied 270 days of credit towards the nine-month sentence on count one and the balance of 82 days towards the 90-day sentence on count two. All three sentences are consecutive.¹ The Department has informed the court that the defendant received credit for the periods of July 19, 2014 to January 13, 2015, and from January 27, 2015 until received at the institution towards his reconfinement in case 12CM001952 and Washington County case 08CF323. (See Revocation Order and Warrant dated January 4, 2016). The defendant is not entitled to credit for the same period in 14CM002949 because the sentences are consecutive. See State v. Boettcher, 144 Wis. 2d 86 (1988) (dual credit on a consecutive sentence is not permitted). Accordingly, the court finds that the defendant is entitled to credit in this case for the period of January 13, 2015, when the VOP hold was lifted, to January 17, 2015, when the defendant was released from custody on a cash bond, or four days.

THEREFORE, IT IS HEREBY ORDERED that the judgment of conviction shall be amended to reflect a total of four (4) days of sentence credit on count one and zero (0) days of sentence credit on count two. A copy of the amended judgment shall be reported to the Dodge Correctional Institution, where the defendant is presently incarcerated.

(R 25; App. p. 121)

Mr. Orr then filed a postconviction motion seeking:

1. to withdraw his plea on the ground that withdrawal of the pleas was necessary to correct a manifest injustice because he had entered the pleas on advice from his attorney that he

would in fact received the sentence credit as originally granted by Judge Dallet;

2. modification of the sentence previously imposed on the ground that a new factor exists justifying that modification;
3. resentencing on the ground that Mr. Orr was sentenced on the basis of inaccurate information; and,
4. to withdraw his plea and, or modify his sentence and, or resentencing on the basis of ineffective assistance of counsel.

A hearing was conducted on that motion on September 23, 2016. Following hearing before Judge Protasiewicz, the motion was denied in its entirety. (R 55, pp. 52-53; App. 122-23)

That denial was reduced to written order dated October 3, 2016. (R 34; App. 124)

Further facts will be stated as necessary.

I. Mr. Orr Should Have Been Permitted to Withdraw His Plea on the Ground that Counsel Provided Incorrect Information to Mr. Orr Inducing His Pleas, Thereby Rendering Ineffective Assistance of Counsel.

A. Standard of Review

A claim of ineffective assistance of counsel presents mixed questions of fact and law. This Court will uphold a circuit court's factual findings so long as they are not clearly erroneous. *State v. Shata*, 2015 WI 74, ¶ 31, 364 Wis.2d 63, 868 N.W.2d 93 (citing

State v. Carter, 2010 WI 40, ¶ 19, 324 Wis.2d 640, 782 N.W.2d 695). "Whether counsel's performance satisfies the constitutional standard for ineffective assistance of counsel is a question of law, which we review de novo." *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis.2d 571, 665 N.W.2d 305.

B. The Circuit Court's Factual Determinations Are Contrary To the Great Weight and Clear Preponderance of the Evidence.

To establish ineffective assistance of counsel, a defendant must satisfy a two-part test. First, he must show that his counsel's performance was deficient. Second, he must prove that the deficient performance prejudiced the defense. See *State v. Griffin*, 220 Wis.2d 371, 390, 584 N.W.2d 127, 135 (Ct.App.), review denied, 221 Wis.2d 654, 588 N.W.2d 631 (1998).

Mr. Orr acknowledges that the circuit court's findings of evidentiary or historical facts will be sustained unless "clearly erroneous". § 805.17(2) more particularly describes as contrary to the great weight and clear preponderance of the evidence. *State v. Bangert*, 131 Wis.2d 246, 283-284, 389 N.W.2d 12, 30 (1986). Even if the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding. *Sellers v. Sellers*, 201 Wis.2d 578, 586,

549 N.W.2d 481, 484 (Ct.App.,1996) citing *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct.App.1983).

“The credibility of the witnesses and the weight of the evidence is for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. Reasonable inferences drawn from the evidence can support a finding of fact and, if more than one reasonable inference can be drawn from the evidence”. *Johnson v. State*, 55 Wis.2d 144, 147, 197 NW 2d 760, (1972).

Additionally, even in the absence of specific findings, this court may search the record to determine whether the evidence supports the trial court's decision. *Davidson v. Davidson*, 169 Wis.2d 546, 558, 485 N.W.2d 450 (Ct.App.1992)

The circuit court was presented with diametrically opposed versions of events.

Trial counsel testified that:

the reason why Mr. Orr decided to change his plea was because of 63 potential counts against him, not because of the sentence credit.

In the motion filed, it states that one of his main reasons for changing his plea was because he had

the credit. That is incorrect. That is never one of the reasons he mentioned as far as changing his plea. In the sentence transcript, he tells Judge Dallet that his main reason for changing his plea was that he did not want his daughters to testify at trial.
(R 55, p. 13, ll. 6-15)

In contrast, Mr. Orr testified:

And prior to the plea being entered, I talked to Mr. Domask at the defense table about if I plead guilty to these things, I will receive my sentence credit. And he assured me that I would, and he told me that I, you know, we calculated the sentence credit.

A conversation about one of them going either toward my revocation or toward the sentence of Judge Dallet never occurred at that time. And in fact, I agreed to plead to the three charges after I asked him several times, will I receive my credit in this case, and he told me, yes, the sentence credit will be applied to this case. There was no conversation about it would be applied to this case if you weren't revoked [sic]
(R 55, p. 24, ll. 3-16)

The court considered the testimony and stated:

First of all, I have no doubt that your children played into it. I have no doubt that the

credit played into it, in part, that you were going to get it on one case or the other.
(R 55, p. 43, ll. 2-5);

But it's highly likely that you're going to be revoked, and if you are, it's going to go to the other case.

(R 55, pp. 43-44). The court concluded:

But the part I don't find credible, under the totality of the circumstances, is your testimony that you were not aware, that you were not going to get the credit for 352 days.

(R 55, pp. 44-45).

That credibility determination, albeit within the exclusive province of the trier of fact, *State v. Zdiarstek*, 53 Wis. 2d 776, 784, 785, 193 N. W. 2d 833, (1972), is against the great weight and clear preponderance of the evidence.

II. A New Factor Existed Justifying Sentence Modification.

A. Standard of Review

Whether a fact or set of facts constitutes a new factor is a question of law reviewed de novo. *State v. Lechner*, 217 Wis. 2d 392, 424, 576 N.W.2d 912 (1998). However, whether a sentence should be

modified based upon a new factor is committed to the circuit court's discretion, which will not be disturbed unless it was erroneously exercised. *Id.*

B. A New Factor Existed Justifying Modification of Mr. Orr's Sentence

A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975)

Sentence modification involves a two-step process. First, the defendant must demonstrate that there is a new factor justifying a motion to modify a sentence. If a defendant demonstrates the existence of a new factor, then the circuit court must undertake the second step in the modification process and determine whether the new factor justifies modification of the sentence. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399 (1983).

"[T]he new factor here is the unknowingly overlooked fact that Armstrong was entitled to eight months rather than approximately two years of sentence credit, and that the record plainly reflects that this amount of sentence credit was highly relevant to the circuit court's

imposition of the sentence.” *State v. Armstrong*, 2014 WI App 59, ¶ 9, 354 Wis.2d 111, 847 N.W.2d 860.

The sentencing Court questioned the application of sentence credit during the sentencing hearing:

THE COURT: And if I give him credit for this, then it would be separate time? Or do they run those concurrent over -- the revocations?

MS. BONDAR: I think it depends on if you say it's concurrent or consecutive.

THE COURT: Okay.

(R 54, p 12, ll. 17-22). The Court then imposed sentence:

on Count 1, I'm going to impose nine months in the House of Correction. I'll give you credit for nine months. On Count 2, I'm imposing 90 days. I'll give you credit for 90 days. And for Count 3, I'm imposing six months

270 days credit on Count 1. That leaves 82 days -- right -- on the rest? So 82 days towards the 90 on Count 2 and six months on Count 3. They're all consecutive.

(R 54, p 21, ll. 4-8; ll. 14-17).

In response to Mr. Orr's postconviction motion, the Court found:

it's pretty clear to me that it was intended that the 352 days was going to be consecutive and used in either one manner or the other, either on the revocation or on the cases that she sentenced him to; clearly not to both.

(R 55, p. 53, ll. 13-17; App. 127)

Mr. Orr posits that this is not an accurate view of the original sentencing and that the sentencing Court, being possessed of this information would not have granted credit if the Court believed that he was not entitled to that credit.

The amount of sentence credit was highly relevant to the circuit court's imposition of sentence. To have that credit swept away some nine (9) months later is a new factor that justifies sentence modification.

III. Mr. Orr Was Sentenced on The Basis of Inaccurate Information And Should Have Been Resentenced.

A. Standard of Review

A defendant must prove that the information was inaccurate, and that the court actually relied on that inaccurate information. If the defendant shows this, the burden shifts to the State to prove that the error was harmless. *State v. Tiepelman*, 2006 WI 66, ¶ 26 291 Wis.2d 179, 717 N.W.2d 1.

Review is limited to determining if the circuit court erroneously exercised its discretion. Discretion is erroneously exercised when a sentencing court actually relies on clearly irrelevant or improper factors, and the defendant bears the burden of proving such reliance by clear and convincing evidence. *State v. Harris*, 2010 WI 79, ¶ 30, 326 Wis. 2d 685, 786 NW 2d 409.

B. Mr. Orr Demonstrated that the Sentence Credit Information Supplied to the Court Was Inaccurate and the State Failed to Prove that this Error Was Harmless.

A defendant has a constitutionally protected due process right to be sentenced upon accurate information and a fair sentencing process — one in which the court goes through a rational procedure of selecting a sentence based on relevant considerations and accurate information. *State v. Tiepelman*, 2006 WI 66, ¶ 9, 26,291 Wis. 2d 179, 717 N.W.2d 1.

A defendant who requests resentencing due to the circuit court's use of inaccurate information must show (1) that the information was inaccurate and (2) that the circuit court relied on the inaccurate information. If the defendant meets both these standards, the burden shifts to the State to prove the error was harmless. An error is harmless if there is no reasonable probability that it contributed to the outcome. *State v. Payette*, 2008 WI App 106, ¶

46, 313 Wis. 2d 39, 756 N.W.2d 423, citing *State v. Groth*, 2002 WI App 299, ¶¶ 21-22, 258 Wis.2d 889, 655 N.W.2d 163

Resentencing is the remedy when a defendant has been sentenced on the basis of inaccurate information. *State v. Schultz*, 2009 WI App 1, ¶ 12, 315 Wis.2d 768, 762 N.W.2d 863

The amount of credit represented to the Court as being available was clearly significantly in error and violated Mr. Orr's due process right to be sentenced upon accurate information.

The State failed to prove that this error was harmless.

Under those circumstances, Mr. Orr should have been resentenced.

CONCLUSION

For the reasons stated, Mr. Orr respectfully requests that this Court find that the circuit court erroneously exercised its discretion in determining that counsel was not ineffective and further erroneously exercised its discretion in determining that a new factor did not justify sentence modification.

Alternatively, this case should be remanded for resentencing on the ground that the Court relied on inaccurate information in imposing sentence and the State has failed to demonstrate that this error was harmless.

Dated: February 21, 2017.

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 20 pages and 2,993 words.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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ELECTRONIC CERTIFICATION

I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief pursuant to § 809.19(12).

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