

STATE OF WISCONSIN
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OF WISCONSIN**

Appeal Case No. 2016AP002009-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

JAVA I. ORR,

Defendant-Appellant.

ON APPEAL FROM AN ORDER DENYING
POSTCONVICTION RELIEF, ENTERED IN THE
MILWAUKEE COUNTY CIRCUIT COURT, THE
HONORABLE REBECCA F. DALLEY AND
JANET C. PROTASIEWICZ, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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DISTRICT I

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ISSUES PRESENTED

- I. Did Orr establish that his attorney provided ineffective assistance by providing inaccurate information regarding his pleas?

Answer: Judge Protasiewicz found that Attorney Domask's performance was not deficient.

- II. Did the fact that Orr received four days credit instead of 352 days sentence credit in this matter constitute a new factor which justified modification of the sentence?

Answer: Judge Protasiewicz found no new factor existed.

- III. Did the fact that Attorney Domask advised the court that Orr was entitled to 352 sentence credit, constitute inaccurate information, because following Orr's revocation he only received four days sentence credit toward this sentence?

Answer: Judge Protasiewicz found that Orr did not establish Judge Dallet relied on inaccurate information and that resentencing was not required.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. This case can be resolved by applying well-established legal principles to the facts of the case and will not meet the criteria for publication. Further, the briefs can fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. See Wis. Stat. (Rule) 809.23(1)(b), 809.23(4)(a), and 809.22(2)(a) and (b).

SUPPLEMENTAL STATEMENT OF THE CASE

On July 13, 2015 the State was ready to proceed on all counts in case 2014CM002949 and Count 2 in case 2015CF000431. (R52:3-4). The State's offer, prior to proceeding with the trial, was for Orr to plead guilty to one count of disorderly conduct, contrary to Wis. Stat. § 947.01(1), a class B Misdemeanor. As Judge Dallet discussed:

THE COURT: So the State is basically saying he only needs to plead guilty to one count, the disorderly conduct, that carries a 90-day maximum, \$1,000 fine, or both, and the other counts would be dismissed.

MR. DOMASK: That's true. And Mr. Orr has been in custody for 12 months.

THE COURT: So it wouldn't necessarily be a time-served disposition?

MR. DOMASK: The issue, Your Honor, is the conviction itself because if he is convicted, he faces revocation for about three and a half years, two and a half with the time he spent in. So that's what the issue. I'm quite certain this matter could be resolved, one, if the revocation wasn't pending; but, two, if there could be something worked out with the State and the Department of Corrections. But I don't know if that's possible.

THE COURT: They operate separately.

MR. DOMASK: I know.

(R52:7)

The trial proceeded. (R52:8). Outside the presence of the jury, the parties further discussed Orr's child's testimony for the jury trial. (R52:100). During the discussion regarding the child being available for cross-examination, Attorney Domask stated Orr "doesn't wish for the child to be on the stand." (R52:101). Attorney Domask reiterated a second time to Judge Dallet during the discussion, "Again, it's not my choice to put the child or my client's choice to put the child on the stand. It's the State's decision." (R52:101). The jury trial was then adjourned until the next day.

On July 14, 2015, prior to the jury being brought into court, the State made a record that the victim that morning stated Orr had been contacting her and other witnesses from jail. (R53:2). As a result of the victim's information, investigators reviewed the jail calls and located 63 calls by Orr to a number of different parties. *Id.* The State provided information of one call to Orr's daughter, which investigators believed to constitute intimidation. (R53:2).

Based on the 63 new calls the State extended a new offer to Orr. (R53:5). The State's offer to resolve was for Orr to plead to two counts of Battery, contrary to Wis. Stat. § 940.19(1), and one count of Disorderly Conduct, Contrary to Wis. Stat. § 947.01. (R53:5). The State would dismiss and read

in the remaining count in case 2015CF000431 and read in the 63 uncharged calls. (R53:5-6). At sentencing, the State agreed to recommend House of Correction, length to the court. (R53:6). Orr eventually accepted the offer. (R53:6).

During sentencing, the State advised Judge Dallet of numerous domestic violence referrals for Orr, dating back to 2003. (R53:17). Further, the State discussed the numerous violations of the no contact order by Orr during the pendency of the case, and also violations of domestic abuse injunctions and referrals through the years. (R53:18). The State further stated the sole reason for the offer in the matter was Orr's children. The State indicated:

And the sole reason why I agreed to the recommendation that I did is to have avoided those little girls from having to testify. Nine and ten-year-old little girls having to take the stand, everybody looking at them and having their dad having just called them two days before, oh, yeah, you have my back, right? I'm going to buy you this. I'm going to buy you that.

(R53:24).

Additionally, the State did address that fact Orr may be entitled to credit, but also noted Orr was placed on a revocation hold. (R53:25).

Attorney Domask began his sentencing argument with Orr's motivation to plead guilty. Attorney Domask stated:

...Mr. Orr has accepted responsibility, albeit we had started a trial, but there was the new information that came about. It's not as if there was he just changed his mind at the late stage in the game because the victim appeared or something along those lines, which is why somebody will last minute make a change of plea.

(R53:26).

During the sentencing, Attorney Domask presented Judge Dallet with the amount of time Orr had been in custody on cash bail which was a total of 352 days. (R53: 27). Attorney Domask noted that on top of Judge Dallet's sentence, Orr had a "high probability" of being revoked for a period of three years

and six months. (R53:28). Additionally Attorney Domask advised that one of the primary reasons Orr plead guilty was to spare his daughters from testifying, arguing that this showed the consideration he had for his children's interests. (R53:29, 30). Attorney Domask ended his argument by requesting that Judge Dallet sentence Orr to 352 days in jail, noting that no matter what, Orr was going to still be held in custody for his revocation. (R53:31).

When Orr addressed Judge Dallet, Orr stated his primary reason for not "even going through with this process" was his children and not putting his children through a trial. (R53: 31). Orr repeatedly stated that he pled guilty because he loves his children and want to be with them. (R53:31-39; R54:2-7). Orr further discussed his revocation proceedings and prior times in prison. (R53:32-34).

Judge Dallet also heard from Orr's probation agent during sentencing. Judge Dallet specifically requested information from Orr's agent as to potential penalty in the revocation, because it would affect her decision to some extent. (R54:9-10). Orr's agent informed Judge Dallet of Orr's history of supervision, including the fact Orr has never completed batterers intervention treatment. (R54:11-12). The agent stated Orr was facing over three years if revoked. (R54:12).

Judge Dallet then specifically asked Orr's agent about credit for the sentence.

Judge Dallet: "And if I give him credit for this, then it would be separate time? Or do they run those concurrent over –the revocations?"

Orr's agent: "I think it depends on if you say it's concurrent or consecutive."

(R54:12).

Orr's agent further stated to Judge Dallet that based on her fifteen years of experience and history of supervising Orr, she believed Orr was a risk regarding treatment groups, because of his manipulations. (R54:13).

Judge Dallet noted the three factors she considered at sentencing; the seriousness of the offense, the character of the defendant, and the need to protect the public. (R54:13). Judge Dallet stated how helpful Orr's agent's information was and that otherwise she would not have been aware of Orr's past treatment. (R54:14). Judge Dallet noted Orr's risk for repeating his conduct, stating "You're going to get mad, take it out on them, and then make it their fault; and that is classic domestic violence behavior." (R54:19).

Judge Dallet noted Orr had already served prison time in the past, and had numerous cases – charged, uncharged, dismissed, convictions – resulting in quite a history. (R54:17). Judge Dallet discussed how serious Orr's conduct was in this matter. (R54:20). Orr was on supervision and his children were present for the incident. (R54:20-21).

Judge Dallet stated she wanted to give Orr credit for accepting responsibility, but also notes the major benefit Orr received by not having the numerous jail calls charged. (R54:20). Judge Dallet further stated Orr's whole goal was to avoid accountability. (R:54:17). Judge Dallet stated "I'm glad you sat there for all this time. I don't know how much time you're going to be sitting going forward, but something has got to give here." (R54:17).

Judge Dallet sentenced Orr to nine months on Count 1, ninety days on Count 2, and six months on Count 3. Orr had not been revoked, so Judge Dallet provided Orr with sentence credit submitted by Attorney Domask, but also specifically stated the sentence was all consecutive. (R54:21). Judge Dallet again noted Orr had not been revoked, and that it was unclear what would happen with the revocation. (R54:21). Further, Judge Dallet noted that it was her intention that the sentences in this matter be consecutive to each other and any other sentence, still noting Orr's revocation was still pending. (R54:23) (R18).

Orr was revoked by the Department of Corrections and received credit while he was in custody from July 19, 2014, to January 15, 2015, and from January 27, 2015, until "present time" [March 2, 2016]. (R24). The Department of Corrections notified the circuit court that per Judge Dallet's order the sentence in case 2014CM002949 was to be served consecutive

to any other sentence; therefore, now that Orr was actually revoked there was an issue with the credit Judge Dallet previously granted (prior to revocation). (R24). The Department of Corrections notified Orr may have received duplicate credit contrary to *State. v. Boettcher*, 144 Wis. 2d 86, 423 NW 2d 533 (1988), (R24). The Department of Corrections requested clarification by the circuit court. (R24).

Judge Janet Protasiewicz, Judge Dallet's successor, reviewed the Department of Correction's letter. (R25). Judge Protasiewicz determined that per *Boettcher*, based on Orr's revocation sentence, Orr was entitled to credit on this matter for the period of January 13, 2015, when Orr's VOP hold was lifted, to January 17, 2015, when Orr was released from custody on a cash bond, or a total four days. (R25). Judge Protasiewicz ordered Orr's sentence credit to be amended to four days. (R25).

Orr submitted letters objecting to Judge Protasiewicz's amended sentence credit order. (R27, R28). Orr correctly noted in his letters that when Judge Dallet sentenced Orr, he had yet to be revoked and that Orr's credit had yet to be applied to any other sentence, at that point. (R27:3). Orr further discussed he was not revoked until months later. (R24:3). Orr argued that the Department of Corrections made an error in giving him double credit and tried to get the circuit court to fix the Department's mistake. (R27:3). Orr further stated that sentence credit goes to the first sentence, which Orr argued was case 2014CM002949. (R24:4).

Orr filed a postconviction motion requesting to withdraw his plea, be resentenced, and/or modify his sentence on August 16, 2016. (R32). Orr raised four claims:

1. Permitting Orr to withdraw his plea on the ground that withdrawal of plea is necessary to correct a manifest injustice.
2. Modifying the sentence previously imposed on the ground that a new factor exists and justifying that modification
3. Resentencing on the ground that Orr was sentenced on the basis of inaccurate information

4. Permitting Orr to withdraw this plea and/or modify his sentence or resentencing on the basis of ineffective assistance of counsel.

(R32:1-2).

Judge Protasiewicz scheduled the matter for a postconviction motion hearing. At that hearing, Attorney Domask testified as to his discussions with Orr regarding the decision to plead and sentence credit. (R55:9) As to sentence credit, Attorney Domask explained to Orr:

The reasons that I submitted the form for 352 days was that, at the time [Orr] also had a pending revocation. That revocation hearing was set for, I believe, the month after the jury trial date, and [Orr] had not yet been revoked. Therefore, the credit that was applied for and granted by the Court would go towards this case in the event that [Orr] was not revoked.

[Orr] was made aware that if [Orr] were to be revoked, which I did inform him was a likelihood, because his agent was sitting in court and, in fact, testified at the sentencing hearing, I made it clear - - as I've made it clear to every client that I've handled, both pending cases and revocation for the past 12 years - that he would not be given [dual] credit. He would not receive credit for the 352 days both for the pending case and for the revocation. He would receive the 352 days credit towards one of them.

(R55: 9-10).

Further, Attorney Domask testified that Orr decided to plead guilty in order to avoid the potential 63 new criminal charges and to avoid having his children testify, not because of any issue relating to sentence credit. (R55:13-14).

Orr testified during the postconviction motion. Orr stated that prior to entering his plea, Attorney Domask assured Orr that he would receive his sentence credit in case 2014CM002949. (R55:24). Orr also testified Attorney Domask never discussed how his credit would be affected if Orr was revoked. (R55:24). Orr then stated he was steadfast on going forward with trial because a conviction would result in his revocation. (R55:25). Orr testified that regardless of the 63

new calls, Orr wanted to proceed with trial. (R:25). Orr stated he ultimately pled, because he believed he would receive credit on this case. (R55:25).

As to ineffective assistance of counsel, Judge Protasiewicz found Orr had several reasons for pleading guilty: Orr's children, sentence credit, and the possible exposure from the additional 63 jail calls. (R55:43). Judge Protasiewicz found that it just made sense to take the State's offer. (R55:43). Judge Protasiewicz found Attorney Domask's testimony was very credible. (R55:43). Judge Protasiewicz found Attorney Domask explained to Orr that it is highly likely Orr would be revoked, and if revoked, the credit would go to the revocation matter. (R55:43). Judge Protasiewicz further found that Attorney Domask made it clear to Orr he would not get dual credit:

And [Attorney Domask] states that he made clear you were not getting [dual] credit. You are getting credit on either the revocation or you are getting credit on this case that you plead guilty to. He told you there's no choice in regard to his. Quote, "strong likelihood that you will be revoked." Credit will only count – credit will only count if these are concurrent...But he made it very, very clear.

(R55: 44).

Judge Protasiewicz, based on the totality of the circumstances, further found Orr not credible as to his testimony that he was not aware he would not get sentence credit on case 2014CM002949 if revoked. (*See* R55:44-45). Judge Protasiewicz held Orr's motion to withdraw based on ineffective assistance of counsel did "not hold water," stating "Attorney Domask was effective, not even a little effective; extremely effective." (R55:45).

Judge Protasiewicz further denied Orr's motion for resentencing based on inaccurate information or new information. Judge Protasiewicz, citing the plea/sentence hearing transcript, found Judge Dallet was aware that her decision to make Orr's sentence consecutive or concurrent to the prospective revocation would determine where Orr would receive sentence credit. (R55:52-53). Further, Judge Protasiewicz found:

. . . that Judge Dallet had considered that testimony and was going to take that into account when she rendered her sentence....she renders the sentence, giving the credit. And of course, giving the credit because nobody knew for absolute certain that [Orr] was going to be revoked. She carefully goes through the credit, she indicates they're all consecutive and indicates that she thinks she's made the record here and that it's clear.

(R55:53).

Judge Protasiewicz further stated "it's pretty clear" from Judge Dallet's sentencing transcripts that "it was intended that the 352 days was going to be consecutive and used in either one manner or the other, ether the revocation or on the cases that [Judge Dallet] sentenced [Orr] to; clearly not to both." (R55:53).

Judge Protasiewicz signed an order denying Orr's postconviction motion on October 3, 2016.

The State will present additional facts as necessary in the argument section of this brief.

ARGUMENT

I. Judge Protasiewicz Properly Rejected Orr's Ineffective Assistance of Counsel Claim.

A. Legal principals and standard of review.

A defendant seeking to withdraw a plea after sentencing must prove by clear and convincing evidence that refusal to permit withdrawal would result in "manifest injustice." *State v. Thomas*, 2000 WI 13, ¶ 16, 232 Wis. 2d 714, 605 N.W.2d 836; *see also State v. Bentley*, 201 Wis. 2d 303, 311, 548 N.W.2d 50 (1996). To establish "manifest injustice," a criminal defendant must show a "serious flaw in the fundamental integrity of the plea." *State v. Nawrocke*, 193 Wis. 2d 373, 379, 534 N.W.2d 624 (Ct. App. 1995) (citation omitted). Ineffective assistance of counsel is one type of manifest injustice. *See State v. Taylor*, 2013 WI 34, ¶ 49, 347 Wis. 2d 30, 829 N.W.2d 482.

If a defendant argues that he is entitled to withdraw his plea because of something outside of the plea colloquy, like ineffective assistance of counsel, plea withdrawal follows the *Nelson/Bentley* line of cases. *State v. Howell*, 2007 WI 75, ¶ 74, 301 Wis. 2d 350, 734 N.W.2d 48; *Nelson v. State*, 54 Wis. 2d 489, 195 N.W.2d 629 (1972). As to these claims, the burden does not shift to the State. *State v. Brown*, 2006 WI 100, ¶ 42, 293 Wis. 2d 594, 716 N.W.2d 906. Instead, the defendant bears the burden of proving by clear and convincing evidence that plea withdrawal is necessary to avoid a manifest injustice. *Bentley*, 201 Wis. 2d at 311. “[T]he manifest injustice test is met if the defendant was denied the effective assistance of counsel.” *Id.* (quotation marks and citation omitted).

In this case, Orr sought to withdraw his plea pursuant to the *Nelson/Bentley* line of cases. Orr must establish that counsel’s performance was deficient and that he suffered prejudice as a result. *See State v. Wesley*, 2009 WI App 118, ¶ 23, 321 Wis. 2d 151, 772 N.W.2d 232. In this context, the defendant may demonstrate a manifest injustice by proving that his counsel’s conduct was objectively unreasonable and that, but for counsel’s error(s), he would not have entered a plea. *See Bentley*, 201 Wis. 2d at 311-12.

The question of whether counsel’s actions constitute ineffective assistance is a mixed question of law and fact. The circuit court’s finding of fact will not be reversed unless they are clearly erroneous. *State v. Smith*, 207 Wis. 2d 258, 266, 558 N.W.2d 339 (1997) (internal citations omitted). “Findings of fact include ‘the circumstances of the case and the counsel’s conduct and strategy.’ ” *State v. Thiel*, 2003 WI 111, ¶21, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *State v. Knight*, 168 Wis. 2d 509, 514 n. 2, 484 N.W.2d 540 (1992)). Moreover, the court will not exclude the circuit court’s articulated assessments of credibility and demeanor, unless they are clearly erroneous. *State v. Thiel*, 2003 WI 111, ¶ 23, 264 Wis.2d 571. Whether trial counsel violated Orr’s right to effective assistance of counsel is a question of law that this court reviews de novo. *Smith*, 207 Wis. 2d, 266-67.

B. Judge Protasiewicz properly found Orr’s decision to plead was based on other factors than sentence credit and that Orr was advised his revocation proceedings would affect his sentence credit in case 2014CM002949.

Judge Protasiewicz’s finding that Orr was aware he might not receive 352 days sentence credit on case 2014CM002949, depending on his revocation proceedings, and that other factors lead to Orr’s decision to plead, were proper and supported by the record.

On appeal, Orr argues Judge Protasiewicz’s findings as to Orr’s decision to plead regarding sentence credit are contrary to the greater weight and clear preponderance of the evidence. (Defendant-Appellant Brief, p. 9). Orr argues there is “diametrically opposed versions of events” because Orr testified to something different than Attorney Domask, during the postconviction motion. (Defendant-Appellant Brief, p. 10). Orr argues Protasiewicz’s credibility determination is against the “great weight and clear preponderance of the evidence.” (Defendant-Appellant Brief, p. 12). However, Orr ignores the overwhelming support for Judge Protasiewicz’s finding at the postconviction motion and throughout the entire record.

In the postconviction motion, Orr argued Attorney Domask was ineffective in providing legal advice as to how Orr’s sentence credit would be applied. (R:32:4, Exhibit A). Orr testified he pled to the three charges after Orr asked Attorney Domask several times if he would receive 352 days sentence credit in this case. (R55:24). Orr testified Attorney Domask told Orr that his sentence credit would be applied to case 2014CM002949. (R55:24). Orr further testified that there were no conversations about sentence credit applying to case 2014CM002949 only if Orr was not revoked. (R55:24). Orr further testified he pled guilty because he believed he would get 352 days sentence credit on 2014CM002949. (R55:24).

Judge Protasiewicz concluded that Orr’s testimony that he was not aware he would not get 352 days credit if he was revoked was not credible. (R55:44-45). Judge Protasiewicz found Orr was aware he might not receive 352 days sentence credit on 2014CM002949, depending on his revocation

proceedings, and that Orr did not plead guilty only because Attorney Domask told Orr he would receive 352 days sentence credit on 2014CM002949. In reaching this decision, Judge Protasiewicz found Attorney Domask's testimony very credible. (R55:43). Judge Protasiewicz found Attorney Domask discussed with Orr it was highly likely he would be revoked and, if Orr was revoked, the sentence credit would apply to Orr's revocation case. (R55:44). Judge Protasiewicz found Attorney Domask made it clear to Orr that Orr would not receive dual credit, if revoked, and it would not be Orr's choice in the matter. (R55:44).

In making these findings, Judge Protasiewicz discussed the notes Attorney Domask took during his representation tracking the history of Orr's case, the course of the litigation, and why the matter resolved the way it did. (R55:44). Additionally, Judge Protasiewicz also noted the years of experiences Attorney Domask has practiced law in Wisconsin, including representing offenders in revocation proceedings. (R55:10). Attorney Domask's was familiar with sentence credit issues and had experience advising clients as to how revocation proceedings could affect sentence credit. Further, Judge Protasiewicz's findings are consistent with the well-established case law in Wisconsin which prohibits dual credit and requires time in custody with be credited to the sentence first imposed. *State. v. Boettcher*, 144 Wis. 2d 86, 423 NW 2d 533 (1988), (R24).

Judge Protasiewicz's findings are further support by Orr's postconviction claims being belied by Attorney Domask's and Orr's own statements at trial and during sentencing.

One day prior to the Orr pleading, Attorney Domask made it clear that sentence credit was not the issue for Orr; instead, the issue for Orr was the possibility of being revoked from supervision. (R52:7).

Further, during sentencing, Attorney Domask stated several reasons for Orr's change in plea, specifically the additional 63 jail calls and possible new charges. (R53:53). Attorney Domask further stated during sentencing:

one of the very big reasons that we did not proceed with trial is that we did not want to have – both of his daughters are here today and he didn't want to have to go through putting them through this. It's a conversation that we've had before and again today, especially since now they did appear.

(R53:29-30).

Attorney Domask's statements on July 13 and 14, 2015, as to Orr's decision to plead guilty were also consistent with the reasons Attorney Domask presented at the postconviction motion. (R55:13).

Further, when Orr had an opportunity to address Judge Dallet at sentence, Orr stated numerous times he plead guilty for his children. (R53:31, 34, 38, 39; R:54:2, 7). Never once did Orr state that his sentence credit was the reason he plead guilty during sentencing. (R53:31-43; R54:1-7). As Orr stated as his last comment to Judge Dallet, "...but I felt I had to do it for the sake of my children." (R54:7). Accordingly, Orr's assertion that he plead guilty because he believed he would receive 352 days sentence credit in 2014CM002949 is not creditable.

A review of the complete record demonstrates that Judge Protasiewicz's findings of facts are grounded in "the circumstances of the case and the counsel's conduct..." *Thiel*, 2003 WI 111, ¶ 21, 264 Wis.2d 571, 665 N.W.2d 305 (quoting *State v. Knight*, 168 Wis.2d 509, 514 n. 2, 484 N.W.2d 540 (1992)). Since Judge Protasiewicz's articulated assessments of credibility and demeanor are not clearly erroneous, her conclusions that Attorney Domask did not provide ineffective assistance should not be overturned. The circuit court's decision should be affirmed.

II. Judge Protasiewicz Properly Denied Orr's Motion to Modify His Sentence on the Basis of New Information.

A. Legal principals and standard of review.

A defendant seeking sentence modification must first demonstrate that there is a new factor justifying the motion. *State v. Hegwood*, 113 Wis. 2d 544, 546, 335 N.W.2d 399

(1983). A new factor, as defined in *Rosado v. State*, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975), 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.

(emphasis added). Whether facts constitute a new factor is a question of law that may be decided without deference to the lower court's determination. *Hegwood*, 113 Wis. 2d at 547, 335 N.W.2d 399.

Once the defendant establishes the existence of a new factor, then the circuit court must determine whether the new factor justifies modification of the sentence. *Id.* at 546, 335 N.W.2d 399. Although the decision whether a new factor exists is a question of law, which the appellate court reviews de novo, a circuit court's decision whether the new factor justifies sentence modification should only be overturned when the court erroneously exercised its discretion. *See State v. Hegwood*, 113 Wis.2d at 546, 335 N.W.2d 399; *State v. Smet*, 186 Wis.2d 24, 34, 519 N.W.2d 697 (Ct.App.1994).

B. Orr has not set forth a new factor warranting sentence modification.

Orr failed to set forth a new factor warranting sentencing modification, because Judge Dallet was well informed as to Orr's sentence credit and revocation at the time of Orr's sentencing.

On appeal, Orr asserts Judge Protasiewicz erroneously exercised her discretion in concluding that the change in sentence credit was not a new fact, because sentence credit was highly relevant to Judge Dallet's imposition of Orr's sentence. (Brief of Defendant-Appellant, p 15). In support of this argument, Orr states that Judge Dallet would not have granted the 352 days, if she believed that Orr was not entitled to that credit. *Id.*

In denying Orr's motion for sentence modification, Judge Protasiewicz explained why the modification of credit to

the four days ordered following Orr's revocation was not new information. Judge Protasiewicz found the following:

- Judge Dallet knew of and discussed Orr's pending revocation. (R55:47).
- Judge Dallet specifically questioned Orr's agent about how the sentence credit could be affected if Orr were revoked. (R55:50).
- Judge Dallet knew, prior to sentencing, Orr's credit in case 2014CM2949 would be affected depending on her decision to make Orr's sentence concurrent or consecutive to the revocation. (R55:50).

Further, Judge Protasiewicz found that since Orr had yet to be revoked at the time sentencing, Judge Dallet appropriately granted Orr sentencing credit, and noting Orr's sentences were consecutive to any sentencing. (R55:53).

Judge Protasiewicz noted that with all the information presented at sentencing, Judge Dallet specifically made Orr's sentence consecutive. (R55:52-53). Judge Protasiewicz noted Judge Dallet gave Orr 352 days credit on the sentencing date, because nobody knew for absolute certainty that Orr would be revoked. (R55:53). Judge Protasiewicz stated Judge Dallet clearly did not intend for the 352 days credit to be used on both. (R55:53). Judge Protasiewicz stated an important fact in reaching her decision was that Judge Dallet asked Orr's agent, prior to sentencing, how Orr's sentence credit would be applied if Orr was revoked.

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

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

(R54:12).

Judge Protasiewicz's finding that Orr failed to present a new factor is further supported by the sentencing record. Judge Dallet was clear Orr's conduct was very serious in light of all

Orr's history, record, the fact Orr was on supervision at the time of the offense, and Orr's children were present for the incident. (R54:21).

Judge Dallet, the State, Attorney Domask and the Department of Corrections all discussed Orr's long history with the Department of Corrections. Judge Dallet specifically talked with Orr's agent about his conduct and treatment while on supervision, including the fact Orr has never completed batterers intervention treatment. (R54:11-12). Judge Dallet was further aware that a prior revocation proceeding had failed, due to lack of witness cooperation. (R54:11). Additionally, it was clear to Judge Dallet, that based on Orr's pleas in this matter, Orr's revocation was highly probable. (R54:12).

During sentencing Judge Dallet noted Orr's domestic violence offense history and Orr's repeated pattern of power and control, including placing his own children in the middle of the criminal court proceedings. (R54:15-16). Judge Dallet further discussed how Orr's conduct models how to manipulate, control, get things, looking out for only oneself, covering up conduct, and disregarding court orders and no-contact orders. (R54:16). Judge Dallet further noted how prior time in prison has not changed Orr's conduct. (R54:17). Judge Dallet also stated that in the past Orr had prior treatment for batterers intervention, yet Orr is still committing the same type of power and control conduct. (R54:18).

Judge Dallet stated she wanted to give Orr credit for accepting responsibility, but at the same time noted the benefit to Orr of the State not pursuing all the additional jail calls located during the trial. (R54:20). Judge Dallet sentenced Orr to the maximum on Counts 1 and 2, and then six months on Count 3, consistent with the idea of giving Orr credit. (R54:20). Judge Dallet then stated all the counts are consecutive and noted that Orr was still facing additional time if revoked. (R54:21). Prior to finishing the sentencing hearing Judge Dallet again reiterated Orr's sentences were consecutive to each other and any other sentence, noting the revocation sentence was still pending. (R54:23).

Additionally, Wis. Stat. § 973.155 requires the circuit court to make a finding as to sentence credit at the time of

sentencing, which Judge Dallet did correctly. Orr's argument that Judge Dallet would not have granted Orr 352 days credit if Judge Dallet did not believe Orr was entitled to that credit, disregards Wis. Stat. § 973.155. The reason for the change in the amount of sentence credit nine months later was due to the fact Orr was revoked, which Judge Dallet knew was a high probability (but pending) at the time of Orr's sentence, when the decision was made to make the sentences consecutive. (R53:28).

In summary, Orr failed to meet his burden to prove that a new factor, that was not known to Judge Dallet at the time of original sentencing, exists. Judge Dallet and all parties were aware at the time of Orr's sentencing of the pending revocation and the effect of a consecutive sentence would have on Orr's sentence credit. The circuit court's decision should be affirmed.

Even if, this court believes Orr has meet his burden, given the factors discussed above, which Judge Dallet set forth as integral to Orr's sentencing and Judge Protasiewicz noted in the postconviction hearing, the modification in Orr's sentence credit does not warrant resentencing. *Hegwood*, 113 Wis. 2d at 546, 335 N.W.2d 399.

III. Orr Was Not Sentenced on Inaccurate Information.

A. Legal principals and standard of review.

A defendant has the right to be sentenced on accurate information, which is based on the due process clause of the federal and the State constitutions. *Townsend v. Burke*, 334 U.S. 736, 742 (1948); *State v. Tiepelman*, 2006 WI 66 ¶ 9, 291 Wis. 2d 179, 717 N.W.2d 1.

There is a two prong test required to show the court sentenced based on inaccurate information. *Tiepelman*, 291 Wis. 179 ¶ 2. First, the defendant has to show there was inaccurate information. *Id.* Second, the defendant has to show the circuit court actually relied on the inaccurate information when structuring the sentence. *Id.* Only if the defendant is able to satisfy this test does the burden shifts to the State to establish the error was harmless. *Id.* at ¶ 3.

The question of whether the defendant has been denied his constitutional right to be sentenced on accurate information is an issue of law for the court to review *de novo*. *Tiepelman*, 291 Wis. 179 ¶ 9.

B. Orr has not shown that Judge Dallet relied on inaccurate information in imposing sentence.

Judge Protasiewicz found Orr failed to meet his burden to prove both the information regarding his sentence credit was inaccurate and that Judge Dallet actually relied on the inaccurate information in the sentencing. Judge Protasiewicz found the amount of credit present at sentencing to Judge Dallet was accurate, because Orr had yet to be revoked.

Orr argues that the credit of 352 days, presented at sentencing to Judge Dallet constitutes a significant error. (Defendant-Appellant Brief, p. 17). However, as Judge Protasiewicz indicated during the postconviction motion, at the time of sentencing, prior Orr's revocation hearing, 352 days was the amount of credit Orr had obtained and was not inaccurate information. (R55:53). As required by Wis. Stat. § 973.155, which governs sentence credit, Judge Dallet ordered the correct amount of sentence credit Orr had at the time of sentence, prior to Orr's revocation, 352 days. During Orr's sentencing, Judge Dallet specifically questioned Orr's agent as to whether Orr's sentence credit would apply to the revocation or the pending matter. (R54:12). Judge Dallet was well aware that her decision to make Orr's sentence concurrent or consecutive would affect how the sentence credit would be applied, if Orr was actually revoked.

Judge Dallet then sentenced Orr and specifically stated the sentences were consecutive, with the knowledge Orr's credit would be affected if revoked. (R54:21). Judge Dallet proceeded to discuss the pending revocation proceedings, sentencing Orr consecutive to any other sentence and again referencing the revocation proceedings. (R54:23).

In order to prevail on a claim Orr was sentenced based on inaccurate information, Orr has to first prove the information was actually inaccurate. *Tiepelman*, 291 Wis. 179 ¶ 2. Here, Judge Protasiewicz identified there was no inaccurate

information before Judge Dallet when structuring the sentence. (R55:53). Further Judge Protasiewicz found Judge Dallet's intent was clear that the 352 days credit was going to be consecutive and used in either one manner or the other - if revoked on the revocation, or if not revoked, the present case. (R55:53). Judge Protasiewicz found Judge Dallet did not rely on inaccurate information, but instead clearly intended that Orr's sentence credit not be applied to both the present and possible revocation. (R55:53).

Additionally, Wis. Stat. § 973.155 requires the circuit court to make a finding as to sentence credit at the time of sentencing, which Judge Dallet did correctly. The reason for the change in the amount of sentence credit nine months later was due to the fact Orr was revoked, which Judge Dallet knew was a high probability at the time of Orr's sentence, when the decision was made to make the sentences consecutive. (R53:28). This non dual credit is consistent with the Wisconsin Supreme Court's decision in *State v. Boettcher*, 144 Wis. 2d at 87, 423 N.W.2d 533, in which the Court stated

...dual credit is not permitted that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155 Stats. Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to a run consecutively.

Further, Orr's case is distinct from *Tiepelman*. In *Tiepelman* the court relied on inaccurate information about the defendant's criminal history when structuring its sentence; whereas in this case, Judge Dallet did not have any inaccurate information. Judge Dallet had accurate information regarding Orr's sentence credit and the application of his sentence credit based on Judge Dallet's specific sentencing decision. Judge Dallet's expressed great concerns with Orr's past behavior and the serious conduct in the present case. For those reasons Orr received the sentence structured to impose almost the maximum confinement, consecutive to any possible revocation sentence. (R54:20-21). As Judge Protasiewicz found, Judge Dallet did not rely upon inaccurate information, but instead, wanted to insure Orr's sentence credit only be applied to either

the present case, or a revocation sentence if Orr was actually revoked. (R55:53).

In summary, Orr failed to meet his burden to prove that inaccurate information was presented at sentencing and that Judge Dallet relied on it. The amount of credit present at sentence was accurate, because Orr had yet to be revoked. Judge Dallet and all parties were aware at the time Orr's sentencing of the effect of consecutive versus concurrent sentence would have on Orr's sentence credit. The circuit court's decision should be affirmed.

If this court believes Orr has met his burden to show the court relied on inaccurate information, this matter should be remanded back to the circuit court to determine whether the error was harmless. *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d at 193.

CONCLUSION

For the foregoing reasons, the State respectfully requests this court affirms Judge Protasiewicz's decision denying Orr's postconviction motions.

Dated this _____ day of April, 2017.

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) and (c) for a brief produced with a proportional serif font. The word count of this brief is 6,398.

Date

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CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

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