

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

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

**RECEIVED**

**05-15-2017**

**CLERK OF COURT OF APPEALS  
OF WISCONSIN**

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STATE OF WISCONSIN,  
PLAINTIFF-RESPONDENT,

v.

JAVA I. ORR,  
DEFENDANT-APPELLANT.

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

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REPLY BRIEF OF DEFENDANT-APPELLANT

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**REPLY BRIEF OF DEFENDANT-APPELLANT**

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**REPLY ARGUMENT**

- 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.**

Mr. Orr's motion to withdraw his pleas was denied based on the Court's credibility determination,

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 determination is against the great weight and clear preponderance of the evidence.

Although this Court's credibility "...consideration is limited to the written word and rarely can credibility be judged by words alone. More often, credibility, or lack thereof, is revealed by a close examination of the witness's demeanor. The cold record does not reflect the witness's demeanor and all its facets; the circuit court has the advantage of observing them." *State v. McCallum*, 208 Wis.2d 463, 479-80, 561 NW 2d 707 (1997)

The Circuit Court made no further findings on this credibility issue. There was no analysis of the permissive factors listed in WIS JI-CRIMINAL 300, but rather a simple statement that the Court did not believe Mr. Orr.

A comparison of the testimony of Mr. Orr and trial counsel, does not lead to this conclusion.

To the contrary, Mr. Orr's testimony on this issue (R 55: pp. 22-27) is clear, concise and specific.

Mr. Orr is entitled to have the credibility of his testimony weighed in the same manner as any other witness, which in this instance renders his version of events at least as credible as trial counsel, if not more so.

Under that weighing of credibility, Mr. Orr should have been permitted to withdraw his pleas.

## **II. A New Factor Existed Justifying Sentence Modification.**

Mr. Orr moved for sentence modification alleging that a new factor existed justifying modification of his sentence.

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)

As noted in §973.155(2) "After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction."

When Mr. Orr was sentenced on July 14, 2015, and awarded credit, he was entitled to rely on that judicial determination.

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 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, 291 Wis. 2d 179, 717 N.W.2d 1.

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.

At a minimum, as noted in the State's brief (State's Brief, p.21), this matter should be remanded to determine if this error is harmless.

### **CONCLUSION**

For the reasons offered in this reply brief and in Mr. Orr's principal brief, 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: May 12, 2017.

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**CERTIFICATIONS**

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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 7 pages and 1,023 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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