STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2018AP1623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASEY T. WITTMANN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICITON AND AN ORDER DENYING SENTENCE MODFICATION, ENTERED IN OUTAGAMIE COUNTY CIRCUIT COURT, THE HONORABLE MARK J. MCGINNIS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the trial court erroneously exercise its discretion by lengthening Defendant-Appellant Casey T. Wittmann's sentence to cancel out the credit due for the 245 days he spent in custody unable to post bail?

The trial court relied on a number of relevant factors before imposing sentence. Wittmann did not object to the factors it considered or argue that the court considered an improper factor—the time he spent in custody unable to post bail—in determining the length of his sentence. He did not object and argue that the court had to impose sentence before it could determine how much credit was due.

On postconviction review, the court denied that it intended to extend Wittmann's sentence by nine months to cancel out the credit due for the 245 days he spent in custody unable to post bail.

This Court should affirm the judgment and order.

POSITION ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case involves a fact-specific determination whether the trial court erroneously exercised its sentencing discretion by relying on an improper factor.

INTRODUCTION

Wittmann failed to prove that the trial court erroneously exercised its sentencing discretion because he failed to prove by clear and convincing evidence that it relied on an improper factor—sentence credit for time spent in custody unable to post bail—to lengthen his sentence.

Wittmann seems to be arguing that whenever a court determines the amount of time a defendant spent in custody

unable to post bail before, rather than after, it imposes sentence, it is a per se erroneous exercise of discretion. He calls for this Court to create a legal presumption that, if the trial court did not wait until after it imposed sentence to determine sentence credit, it intended to cancel out that credit with a longer sentence. (Wittmann's Br. 9–10.) The remedy would be either to reduce the sentence by the amount of time spent in custody (Wittmann's Br. 14), or to hold a postconviction hearing to ascertain the sentencing court's subjective intent (R. 41:9, 11–12), but the court's statements as to its intent "are not dispositive." (Wittmann's Br. 12.) That is not the law.

The sentencing court is not required to blindfold itself to the amount of sentence credit due until after it imposes sentence. The court is required by law to make a "finding" as to the amount of time the defendant spent in custody unable to post bail after it imposes sentence and then credit it against the imposed sentence. Wis. Stat. § 973.155(2). That is precisely what the court did here.

This Court need not, however, address Wittmann's imaginative argument because he forfeited the right to appellate review of his claim that he is entitled to sentence reduction or to a postconviction subjective-intent hearing by not timely objecting at sentencing.

The record conclusively shows that the trial court properly exercised its sentencing discretion in reliance on relevant and proper sentencing factors.

STATEMENT OF THE CASE

After plea negotiations with the State, Wittmann pled no contest on August 1, 2017, to one count of child enticement with intent to have sexual contact. (R. 40:5–21, 29–30.) Two other counts were dismissed and read into the record for sentencing purposes. (R. 40:27–28.) The maximum penalty

Wittmann faced after the plea was twenty-five years in prison. (R. 40:27.) The court ordered a presentence investigation. (R. 40:30.)

Sentencing

The trial court imposed sentence on October 30, 2017. (R. 32.) As it normally does at the outset of sentencing (R. 41:9–11), the court inquired of the parties whether there were any issues with the presentence investigation report (there were none) (R. 32:2), whether the State satisfied the victim notification requirements (it had) (R. 32:3), and whether restitution was requested (it was not). (*Id.*) The court then asked how much sentence credit was due Wittmann for custody "since he was arrested." The parties tentatively agreed it was 245 days, but the prosecutor said he would verify that figure before the end of the hearing. (*Id.*)

The prosecutor recommended five years of initial confinement followed by five years of extended supervision. (R. 32:4.) The presentence investigation report recommended four or five years of initial confinement followed by four or five years of extended supervision. (*Id.*) Defense counsel recommended, alternatively, either a withheld sentence or three years of initial confinement with "a prolonged period of extended supervision." (R. 32:12.)

In his sentencing remarks, the prosecutor emphasized the serious and aggravated nature of Wittmann's criminal conduct, which consisted of his acting out his bizarre fetishes involving teenage girls that, if he is not incarcerated, threatened public safety. The prosecutor noted Wittmann's prior record and that he had contacted other young girls on the internet seeking similar bizarre sexual gratification. (R. 32:4–12.)

In his sentencing remarks, defense counsel noted that there was no victim here; Wittmann was caught by an undercover officer posing as a teenage girl on the internet.

Counsel argued that Wittmann has made progress and is less of a risk to reoffend if released. His treatment needs can be addressed in the community. (R. 32:12–18.) Wittmann declined to exercise his right of allocution. (R. 32:18.)

In exercising its sentencing discretion on the record, the trial court considered the following factors: the serious and bizarre nature of Wittmann's criminal conduct (R. 32:19–22); his prior record of sexual offenses, one of which involved a teenage girl, and his past failure on supervision (R.32:22–23); the risk that he will reoffend (R. 32:23–24); the need to protect the community and "to impress upon you that this is just simply not acceptable" (R. 32:24); and the need to deter Wittmann "a third-time sex offender" from engaging in this conduct in the future when he gets the urge (R. 32:24–25).

As it was about to impose sentence, the court made sure that the parties had accurately determined the amount of time to be credited against his sentence that Wittmann spent in custody unable to post bail. The parties agreed that he should be credited with 245 days. (R. 32:25.) The trial court then imposed a ten-year sentence, bifurcated as follows: three years and nine months of initial confinement in prison, followed by six years and three months of extended supervision. The court then gave Wittmann credit for 245 days of custody against the ten-year sentence. (R. 32:25.)

Wittmann did not object on the ground that the court erroneously determined the amount of sentence credit before, rather than after, it imposed sentence. Wittmann did not object on the ground that the court tacked an additional nine months on to his term of initial confinement to deny him credit for those 245 days of custody.

The postconviction hearing

Wittmann moved to modify his sentence on the ground that the trial court increased it by nine months to cancel out the credit for his custody unable to post bail, contrary to Wis.

Stat. § 973.155(2) and the Equal Protection Clause of the United States Constitution. (R. 26.) Wittmann asked that his sentence to initial confinement be reduced by 245 days. (R. 26:4.) The State filed a response in opposition. (R. 27.)

The trial court held a postconviction hearing on the motion August 18, 2018. (R. 41.) Defense counsel argued that the court added nine months to the period of initial confinement to cancel out any credit for the 245 days of custody ("an impermissible cancellation of credit"). (R. 41:5.) The court adamantly denied lengthening Wittmann's sentence by nine months to cancel out the 245 days to be credited against it: "[T]here's nothing in the transcript at all including during my explanation of the sentence" that mentioned custody unable to post bail as a sentencing factor. (R. 41:7.) Defense counsel "agree[d] that the Court did not expressly state that it was intending to use the pretrial custody as a factor in its sentence." (*Id.*)

The court explained that it normally determines at the outset of the sentencing hearing, as it did here (R. 32:3), how much (if any) sentence credit is due after it goes through the presentence investigation report with the parties, makes sure that the State complied with the victim-notification requirements, determines whether restitution is requested and, if so, for how much (R. 41:9–10). The court explained that it determines sentence credit at the outset of the hearing to avoid overlooking it later on. (R 41:10–11, 20.)

Wittmann argued that the court must impose sentence first before it determines sentence credit. (R. 41:11.) When the court deviates from that procedure, and determines sentence credit first, there is apparently a presumption of judicial wrongdoing, and there must be a postconviction hearing to determine whether the court intended to cancel out the credit when it imposed sentence. (R. 41:11–12.) "[I]t depends on what the subjective intent of the decision-maker was," Wittmann argued. (R. 41:15.)

In response, the court clarified that it did not intend to extend Wittmann's sentence by nine months to cancel out the 245 days to be credited for his custody unable to post bail. "I mean if you want me to just say it point blank, the sentence credit that was stipulated to by the parties is not the reason that I imposed a three-year-nine-month sentence of initial confinement." (R. 41:12.) The court added the common-sense observation that the parties and the court are normally aware of the amount of time to be credited for custody unable to post bail before sentence is imposed; it is often noted in the presentence investigation report. (*Id*.) The court held that it complied fully with section 973.155(2) when it ordered after it imposed sentence that Wittmann be credited with 245 days of custody against it. (R. 41:13.)

The court went on to cite the many relevant and proper factors it relied on before imposing sentence. These included the serious and bizarre nature of Wittmann's criminal conduct, Wittmann's prior convictions and past failure on supervision, the need to protect the public, and the interests in deterring and rehabilitating Wittmann. (R. 41:15–17.) In contrast, the court never mentioned the time Wittmann spent in custody unable to post bail as a relevant factor. (R. 41:17–18.) "So I thought I gave him a prison sentence that was less than what was being recommended but was sufficient to impress upon him the seriousness of it and, hopefully, specifically deter him in the future." (R. 41:19.) "It had nothing to do with the fact that he had served either one day or 245 days." (*Id*.) "I did not rely on it at all." (R. 41:20.)

Wittmann appeals. (R. 30.)

STANDARD OF REVIEW

Review of a sentence is limited to whether the trial court erroneously exercised its discretion. *State v. Harris*, 2010 WI 79, ¶ 3, 326 Wis. 2d 685, 786 N.W.2d 409. "Sentencing decisions are afforded a presumption of

reasonability consistent with Wisconsin's strong public policy against interference with a circuit court's discretion." *Id*.

The sentencing court erroneously exercises its discretion when it "actually relies on clearly irrelevant or improper factors." *Harris*, 326 Wis. 2d 685, ¶ 66. The defendant must prove the court actually relied on irrelevant or inaccurate factors by clear and convincing evidence. *Id*. *See also id*. ¶ 30; *State v. Loomis*, 2016 WI 68, ¶ 31, 371 Wis. 2d 235, 881 N.W.2d 749 (same). Only if the defendant meets that daunting burden of proof does the burden then shift to the State to prove that the error was harmless. *Harris*, 326 Wis. 2d 685, ¶ 32 (citing *State v. Tiepelman*, 2006 WI 66, ¶ 26, 291 Wis. 2d 179, 717 N.W.2d 1).

ARGUMENT

This Court should affirm because: (a) Wittmann forfeited his challenge, (b) there was no error, (c) Wittmann received the hearing he wanted, and (d) the court relied on proper sentencing factors.

A. Wittmann forfeited the right to appellate review of his claim that the trial court erroneously cancelled out the credit for his pre-sentence custody by not timely objecting.

Wittmann argues that he is entitled to reduction of his sentence by 245 days because the sentencing court erred when it determined he was to be credited with that amount before, rather than after, it imposed sentence. (Wittmann's Br. 12.) Wittmann did not object when the court determined the amount of sentence credit due before it imposed sentence. (R. 32:3, 25.)

Had Wittmann objected at sentencing, we would not be here. The court would have explained that it was not

considering the time he spent in custody unable to post bail as a factor in determining sentence length.

Failure to object in the trial court generally precludes appellate review of a claimed error, even an error of constitutional dimension. *See State v. Huebner*, 2000 WI 59, ¶¶ 10–11, 235 Wis. 2d 486, 611 N.W.2d 727; *State v. Davis*, 199 Wis. 2d 513, 517–19, 545 N.W.2d 244 (Ct. App. 1996); *State v. Edelburg*, 129 Wis. 2d 394, 400–01, 384 N.W.2d 724 (Ct. App. 1986). *See also State v. Pinno*, 2014 WI 74, ¶¶ 56–66, 356 Wis. 2d 106, 850 N.W.2d 207, *cert. denied, Pinno v. Wisconsin*, 135 S. Ct. 870 (2014) (claimed denial of the structural public trial right at voir dire was forfeited by failure to timely object).

To properly preserve an objection for review, the litigant must "articulate the specific grounds for the objection unless its basis is obvious from its context[ ] . . . so that both parties and courts have notice of the disputed issues as well as a fair opportunity to prepare and address them in a way that most efficiently uses judicial resources." *State v. Agnello*, 226 Wis. 2d 164, 172–73, 593 N.W.2d 427 (1999) (citations omitted).

Wittmann forfeited his claim that the trial court erroneously determined sentence credit before, rather than after, it imposed sentence by not objecting when the court mentioned sentence credit at the outset of sentencing (R. 32:3), and again when the parties agreed he was entitled to 245 days credit just before the court imposed sentence. (R. 32:25). At the very least, Wittmann should have objected immediately after the court imposed sentence and argued that it had improperly added nine months to cancel out the 245-day credit.

The basis for this objection was not obvious. *Agnello*, 226 Wis. 2d at 172–73. A timely objection would have allowed the parties and the court to address it at sentencing, rather

than at a postconviction hearing, when any error could have been corrected immediately and scarce judicial resources would not have been squandered. *Id*.

Because this alleged error did not matter enough to stir Wittmann to timely object, this Court should not excuse his forfeiture of this imaginative appellate challenge to his sentence.

B. The trial court complied with Wis. Stat. § 973.155(2) to the letter.

Wittmann complains that the trial court failed to comply with ("subverted") Wis. Stat. § 973.155(2), which provides: "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." (Wittmann's Br. 12.) The trial court did precisely what the statute requires.

Immediately after it imposed sentence, the court made "a specific finding of the number of days" of custody to be credited against the sentence. Wis. Stat. § 973.155(2). "Mr. Wittmann, you are going to be sentenced to the Wisconsin state prison system for a period of ten years. The initial term of confinement in prison is three years nine months. The time you will serve on extended supervision is six years three months. *The credit that you'll be given, as agreed upon, is 245 days*; and that sentence will be consecutive to any and all other sentences." (R. 32:25–26.) The court made the finding only after it imposed sentence. The credit for 245 days was then included in the judgment of conviction. (R. 24:2.) The court followed the statute to the letter. There was no error.

C. Wittmann received the relief to which he claimed to have been entitled: a postconviction hearing to determine the sentencing court's intent.

Wittmann argued in the alternative that, when the court determines the amount of credit for custody unable to post bail before it imposes sentence, rather than after, the defendant is entitled to a postconviction hearing to ascertain the court's subjective intent to make sure that sentence credit was not a factor in determining sentence length. (R. 41:9–10.)

Wittmann had that subjective-intent hearing and lost. (R. 26.) The court stated unequivocally at the postconviction hearing that it did not add nine months to the initial confinement portion of the ten-year sentence to cancel out the 245-day credit. (R. 41:7, 12.) The court insisted that it considered only relevant and appropriate factors in determining the length of his sentence. (R. 41:15–19.) Wittmann presented no evidence to counter the court's determination as to its subjective intent.

Wittmann argues that the court's statement of intent "is not dispositive," and he asks this Court to disbelieve the trial court when it assured him at the postconviction hearing that it did not factor in his time spent in custody when determining sentence length. (Wittmann's Br. 11, 13.) Again, Wittmann offered nothing at the hearing to counter the court's unequivocal statement of its intent. The sentencing transcript conclusively shows that the court did not consider his time spent in custody when determining sentence length. (R. 32:19–25.) Because Wittmann offered no evidence to counter the court's statement of intent, it is "dispositive" here. Wittmann failed to prove at the postconviction subjective-intent hearing that the court "act[ed] with the improper purpose of depriving [him] of sentence credit by enlarging the sentence." *State v. Armstrong*, 2014 WI App 59, ¶ 27, 354 Wis. 2d 111, 847 N.W.2d 860.

D. The record conclusively shows that the trial court did not add nine months to Wittmann's sentence to cancel out the 245 days of sentence credit.

Wittmann speculates that the court might have added nine months (270 days) to the period of initial confinement to cancel out the 245-day credit; otherwise, why not just impose three years? If that was its intent, the court was off by 25 days. (R. 41:8.)

Most likely, the court intended to impose a bifurcated sentence of an even ten years regardless of whether or for how long Wittmann was in custody unable to post bail. The court achieved that objective by combining three years and nine months of initial confinement with six years and three months of extended supervision. The fact remains that the length of initial confinement imposed was less than that recommended by both the presentence investigation report and by the State. (R. 32:4.) It was only nine months more than that alternatively recommended by Wittmann. (R. 32:12.)

Wittmann complains that the court did not specify why it imposed a three-year-nine-month term of initial confinement rather than something shorter. It is black-letter law that the sentencing court is not required to explain why it chose a specific number of years so long as it explains the general range of the sentence imposed. *State v. Gallion*, 2004 WI 42, ¶¶ 49–50, 54–55, 270 Wis. 2d 535, 678 N.W.2d 197. *State v. Klubertanz*, 2006 WI App 71, ¶¶ 17, 22, 291 Wis. 2d 751, 713 N.W.2d 116. The court explained why it decided to impose the ten-year sentence even though it did not parse each of its bifurcated parts down to days and months. (R. 32:19–25.) The court was not required to explain why it chose three years and nine months of extended supervision rather than three years.

E. This Court should reject a rule of law that keeps the sentencing court in the dark about sentence credit until after it imposes sentence.

Wittmann seems to be arguing that a sentencing court may not, as a matter of law, determine the amount of time the defendant spent in pre-sentence custody until after it imposes sentence. The court is to be kept in the dark until then. (Wittmann's Br. 10–11.) He is wrong. The court may consider the length of pre-sentence custody when determining an appropriate sentence. *Armstrong*, 354 Wis. 2d 111, ¶ 30. The court just cannot lengthen the sentence to cancel out the credit for the time spent in custody. *Id.*

A rule requiring the court not to determine sentence credit until after it imposes sentence, and to be kept in the dark about it until then, will only invite the sort of confusion seen in *Armstrong* where no one was sure how much time the defendant spent in pretrial custody. This uncertainty resulted in a remand for a sentence modification hearing because the uncertainty as to the length of the defendant's custody may have improperly contributed to the length of his sentence. *Id.* ¶¶ 2–7, 16–18. Had everyone known ahead of time exactly how much credit was due, this problem would have been avoided in *Armstrong*.

Wittmann analogizes this situation to that presented in *Struzik v. State*, 90 Wis. 2d 357, 279 N.W.2d 922 (1979). In *Struzik*, the defendant spent 14 days in pretrial custody. The court imposed a sentence of five years plus fourteen days. *Id.* at 367. "The peculiar length of the sentence transparently reveals that the trial court added to the appropriate sentence the time already served, so that the sentence after the application of the credit would still constitute the sentence originally determined." *Id.*

That is certainly not what happened here. There was nothing "peculiar" about Wittmann's sentence. There was

nothing to "transparently" show that the court "added" nine months to his sentence to cancel out the credit for 245 (*not* 270) days of custody. Unlike the court in *Struzik*, the court here "did not tack onto the sentence chosen the amount of time served." *State v. Fenz*, 2002 WI App 244, ¶ 11, 258 Wis. 2d 281, 653 N.W.2d 280.

F. The record conclusively shows that the trial court properly exercised its sentencing discretion in reliance on relevant and appropriate factors.

The primary factors the court considers when exercising sentencing discretion are: the gravity of the offense, the character of the offender, and the need to protect the public. *Harris*, 326 Wis. 2d 685, ¶ 28. The court may consider a variety of other factors including: the defendant's criminal history, his personality and social traits, results of a presentence investigation, the aggravated nature of the crime, the defendant's culpability, his age and education, his remorse or lack thereof, his cooperation, his need for close rehabilitative control, and the rights of the public. *Id.*

The sentencing court is presumed to have acted reasonably, and Wittmann bears the burden of proving an unreasonable or unjustifiable basis on the record for the sentence imposed. *State v. Davis*, 2005 WI App 98, ¶ 12, 281 Wis. 2d 118, 698 N.W.2d 823. Due to this presumption of reasonableness, the burden imposed on him to prove an erroneous exercise of sentencing discretion is a "heavy" one. *Harris*, 326 Wis. 2d 685, ¶ 30.

The court discussed on the record all of the relevant and appropriate factors it relied on for the ten-year sentence it imposed. Those factors did not include time spent in custody unable to post bail. Rather, the court considered the seriousness of the offense, Wittmann's character and

rehabilitation needs, his criminal history, deterrence, and the need to protect the public. (R. 32:19–25; 41:15–17.)

Wittmann failed to prove by clear and convincing evidence that the trial court relied on an improper factor to lengthen his initial confinement by nine months, the amount of time he spent in custody unable to post bail. *Loomis*, 371 Wis. 2d 235, ¶ 31. He failed to prove that the court erroneously exercised its sentencing discretion.

CONCLUSION

This Court should affirm the judgment of conviction and the order denying sentence modification.

Dated this 9th day of January, 2019.

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 length of this brief is 3,991 words.

Dated this 9th day of January, 2019.

_____
DANIEL J. O'BRIEN
Assistant Attorney General

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 this 9th day of January, 2018.

_____
DANIEL J. O'BRIEN
Assistant Attorney General