STATE OF WISCONSIN

COURT OF APPEALS-DISTRICT III

Case No. 2018AP001623-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CASEY T. WITTMANN,

Defendant-Appellant.

Appeal of a Judgment of Conviction and Order
Denying Postconviction Relief, filed in the
Outagamie County Circuit Court,
the Honorable Mark J. McGinnis, Presiding

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. When sentencing Mr. Wittmann, the circuit court departed from the proper sentencing procedure and deprived Mr. Wittmann of his lawfully-earned sentence credit under Wis. Stat. § 973.155, so sentence modification is warranted.

The state does not appear to challenge Mr. Wittman's request for an independent standard of review when a circuit court departs from the procedure outlined in Wis. Stat. § 973.155 and deprives a defendant of sentence credit; rather, the state argues that the circuit court followed the directive of § 973.155 so there was no error and Mr. Wittmann offered no evidence to counter the court's statement of intent. (State Br. 9-11). The state also argues that Mr. Wittmann forfeited his challenge in this case because he did not object at sentencing and that the court properly relied on the sentencing factors in imposing sentence. (State Br. 7-9).

For the following reasons, the state is wrong, and Mr. Wittmann established that: (1) the court departed from the correct procedure of sentencing first and determining sentence credit second; and (2) the court improperly deprived him of his 245 days of sentence credit by increasing his sentence by 9 months. Under *Struzik*, Mr. Wittmann is entitled to a sentence modification. *State v. Struzik*, 90 Wis. 2d 357, 368, 279 N.W.2d 922 (1979).

A. A postconviction motion is the proper vehicle to challenge the circuit court's erroneous exercise of sentencing discretion.

On appeal, the state argues for the first time that Mr. Wittmann was required to object at sentencing to the sentencing court's determination of credit. The state has forfeited this argument because it was not raised in the circuit court. *See State v. Kaczmarski*, 2009 WI App 117, ¶¶6-8, 320 Wis. 2d 811, 772 N.W.2d 811 (arguments not raised in the circuit court are generally not considered on appeal).

Moreover, the state is wrong. Case law does not support the state's argument that a defendant is required to object to the circuit court's erroneous deprivation of sentence credit at the time of sentencing. Consider, for example, *State v. Fenz*, where at the sentencing hearing, the court determined that the defendant should receive institutional sex offender treatment, which required at least six years of incarceration, and explicitly considered his 342 days of sentence credit in setting the length of sentence. *Fenz*, 2002 WI App 244, ¶3, 258 Wis. 2d 281, 653 N.W.2d 280. The defendant brought a postconviction motion arguing that the circuit court erroneously considered his sentence credit as a factor in determining appropriate sentence length. *Id.*, ¶5. The circuit court denied this claim. *Id.*

On appeal, the court of appeals affirmed the circuit court, but in doing so, did not find that the defendant had forfeited his right to challenge the

circuit court's exercise of discretion because he failed to do so at sentencing. *See, generally*, *Id.*, ¶¶8-13. Rather, the court of appeals held that the circuit court had a "very specific incarceration goal" and that a "court may, in specific circumstances, consider presentence credit as a factor in determining an appropriate sentence." *Id.*, ¶¶10, 12; *see also State v. Coles*, 208 Wis. 2d 328, 332-337, 559 N.W.2d 599 (Ct. App. 1997) (postconviction challenge to deprivation of sentence credit denied but not due to forfeiture).

Furthermore, the state fails to articulate why this court should carve out exception that a contemporaneous objection is necessary here, when the accepted method for challenges to a circuit court's exercise of sentencing discretion is a postconviction motion. *See, e.g. State v. Gallion*, 2004 WI 42, ¶¶14-18, 270 Wis. 2d 535, 678 N.W.2d 197 (review of whether the sentencing court erroneously exercised its discretion brought pursuant to postconviction motion). The state does not provide any law to support its contention that a defendant must object at sentencing when a circuit court erroneously exercises its discretion and considers an improper factor. (State Br. at 8).[1]

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[1] The state cites to several cases to support its contention that failure to object in the trial court forfeits review of the error, but none of the cases involved a challenge to a circuit court's exercise of sentencing discretion: *State v. Huebner*, 2000 WI 59, 235 Wis. 2d 486, 611 N.W.2d 727 (challenge to six-person jury waived because no objection);

Mr. Wittmann properly filed a postconviction motion challenging the circuit court's exercise of discretion when it erroneously determined sentence credit first and deprived him of sentence credit. (26). The state had the opportunity to respond, and the circuit court held a hearing on the motion. (27; 41; App. 114-137). As such, Mr. Wittmann has not forfeited his continued challenge to the circuit court's erroneous deprivation of his sentence credit in imposing sentence.

B. An independent appellate standard of review applies.

The state does not appear to directly challenge Mr. Wittmann's request for an independent standard of a review in situations where the circuit court first determines credit and then imposes the sentence, but instead argues that the circuit court did comply with the statute and that Mr. Wittmann has not met his burden to establish that the court erroneously exercised its discretion. (State Resp. 9-13).

The state also appears to contend that the plain language of Section 973.155(2) *does not* establish an order for courts to follow in sentencing and setting sentence credit. (State Br. at 12-13). As argued in his

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State v. Davis, 199 Wis. 2d 513, 545 N.W.2d 244 (Ct. App. 1996) (challenge to a police officer's testimony that a defendant refused to submit to chemical test waived at trial because no objection); and *State v. Pinno*, 2014 WI 74, 356 Wis. 2d 106, 850 N.W.2d 207, *cert. denied, Pinno v. Wisconsin*, 135 S. Ct. 870 (2014) (defendant forfeited a right to public voir dire because no objection).

brief-in-chief, Mr. Wittmann maintains the plain language, and caselaw interpreting Wis. Stat. § 973.155(2) is clear, and it requires the court to first determine the appropriate sentence and then determine sentence credit. (Brief-in-Chief 4-10). This procedure is also required to protect defendants' right to equal protection. *Klimas v. State*, 75 Wis. 2d 244, 250-252, 249 N.W.2d 285 (1976).

Mr. Wittmann asks this court to independently review whether the circuit court deprived him of his sentence credit. This independent standard of review would just be present in challenges to the erroneous deprivation of sentence credit where the court departs from this established procedure—by considering sentence credit first and then imposing sentence after—and without expressing a sentencing-related purpose for considering sentence credit. (Brief-in-Chief 4-10).

This sort of claim is similar to a claim that the sentencing court relied on inaccurate information, and so the reviewing court should independently review the record to determine whether error occurred. *State v. Travis*, 2013 WI 38, ¶48, 347 Wis. 2d 142, 832 N.W.2d 491 ("A reviewing court must independently review the record of the sentencing hearing to determine the existence of any actual reliance on inaccurate information.").

Under an independent standard of review, a circuit court's after-the-fact assertion of non-reliance on sentence credit is not dispositive. *See id.*, ¶48.

C. Mr. Wittmann was deprived of his right to sentence credit. Sentence modification is warranted.

Mr. Wittmann has demonstrates that that the circuit court erroneously deprived him of his sentence credit. While the court asserted at the postconviction hearing that it had not acted with the intent to deprive Mr. Wittmann of sentence credit, this retrospective review is not dispositive. *See Travis*, 347 Wis. 2d 142, 77 ("We are not, however, bound by the circuit court's retrospective review of its sentencing decision that was made almost a year before.").

Here, the circuit court did not take the sentence credit into account because it needed to ensure a sentence length that would allow Mr. Wittmann the opportunity to complete treatment, as in *Fenz*. *Fenz*, 2002 WI App 244, ¶¶3, 10. Moreover, the court did not explain, either at the sentencing hearing or the postconviction hearing, how it reached the 3 years and 9 months figure. Here, as in *Struzik*, the court did not express a sentencing-related purpose for considering sentence credit, and the court's sentence shows that the defendant was in fact deprived of sentence credit, so reversible error occurred. The remedy is sentence modification. *Struzik,* 90 Wis. 2d 357, 368.

CONCLUSION

For the reasons stated above, Mr. Wittmann respectfully asks the court to reverse to the circuit court and remand with instructions to modify Mr. Wittmann's sentence to 3 years of initial confinement with 245 days of sentence credit.

Dated this 22nd day of February, 2019.

Respectfully submitted,

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CERTIFICATIONS

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,406 words.

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after 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 22nd day of February, 2019.

Signed:

CATHERINE R. MALCHOW
Assistant State Public Defender