STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Case No. 2019AP002206 and 2019AP002207

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

WAR NAKULA MARION,

Defendant-Appellant.

ON NOTICE OF APPEAL FROM AN ORDER DENYING A POSTCONVICTION MOTION, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT ON OCTOBER 10, 2019, THE HONORABLE FREDERICK ROSA, PRESIDING

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BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE ISSUES

I. WAS MARION'S OCTOBER 1, 2019 MOTION PROCEDURALLY BARRED?

TRIAL COURT ANSWERED: The trial court did not address this procedural aspect of Marion's motion.

THIS COURT SHOULD FIND: The motion was barred.

II. DID MARION PROPERLY PRESERVE THE ISSUE OF SENTENCE CREDIT FOR APPELLATTE REVIEW?

TRIAL COURT ANSWERED: This issue was not presented to the trial court.

THIS COURT SHOULD FIND: that the issue of sentence credit was not raised in the October 1, 2019 motion, and therefore, has not been preserved for review in this appeal.

III. WAS MARION OTHERWISE ENTITLED TO RELIEF ON THE CLAIMS HE RAISED IN THE OCTOBER 1, 2019 MOTION?

TRIAL COURT ANSWERED: The issues raised needed to be addressed in a different forum.

THIS COURT SHOULD FIND: The issues Marion raised were not properly before the circuit court and are without merit.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. Argument will be unnecessary, pursuant to Wis. Stats. (Rule) §809.22(2)(a)2, as the briefs can fully present and meet the issues on appeal and fully develop the theories and legal authorities on each side. Because the issues involve no more than the application of well-settled rules of law to a recurring fact situation, and the decision will be issued by a single court of appeals judge, the decision will not meet the criteria for publication. Wis. Stats. (Rule) §809.23(1)(a) and (b).

STATEMENT OF THE CASE

In Milwaukee County circuit court case 14CM002943, War N. Marion was charged with 4 offenses: misdemeanor

battery, misdemeanor battery (domestic abuse), criminal trespass to dwelling (domestic abuse), and disorderly conduct (domestic abuse), contrary to Wis. Stats. §§ 940.19(1); 940.19(1) and 968.075(1)(a); 943.14 and 968.075(1)(a); and 947.01(1) and 968.075(1)(a), respectively. (R2)[1] The complaint was filed on July 29, 2014; Court Commissioner Rosa Barillas found probable cause and issued a warrant for Marion's arrest. (R1) At the time, Marion was on supervision with the Wisconsin Department of Corrections for Milwaukee County circuit court case number 01CF000818. (R67:1, App.103; R71:1-3; App. 107-109)

When Marion was arrested on the misdemeanor warrant on February 20, 2015, the Department of Corrections lodged a hold against him for a violation of his extended supervision in 01CF00818. (R56:1; R67:1-2, App. 103-104) Marion made his initial appearance on February 22, at which time bond was set at $1000 cash, subject to orders that he possess no dangerous weapons and have no contact with H.L.M. and J.S.M.[2] (R108:5-6) The case was assigned to Milwaukee County Circuit Court Br. 40, the Honorable Rebecca Dallet, presiding. (R108:7)

The charges in 14CM002943 were initially scheduled for jury trial on May 20, but the case was adjourned when Marion's attorney withdrew. (R110:3, 8, 9) With new counsel, the case was reset for trial, with an intervening final pretrial conference. (R111:5) By the final pre-trial date, the State had given notice that additional criminal charges might be forthcoming, so the case was scheduled for a second final-pretrial conference. (R112:10) Marion moved the court to discharge his second counsel, but Judge Dallet denied the motion. (R112:3, 8)

The second final pre-trial date was held before the Honorable David Borowski. Defense counsel moved to withdraw because Marion had filed an OLR complaint against

[1] Unless otherwise noted, all citations are to the record in court of appeals case no. 2019AP002207. References to items in the record in appeals case no. 2019AP002206 will be made as (2206 R__:__) All statutory citations are to the 2015-2015 edition, unless otherwise noted.

[2] Citizen victims and witnesses will be referred to by initials in this brief.

her. (R113:2) The court granted her motion and reset the matter for status of counsel on August 31. (R113:11) In the interim, the case was called on Judge Dallet's calendar on July 21, at which time Marion appeared with attorney Patrick Flanagan, whom Marion immediately moved to discharge, in favor of proceeding pro se. (R114:2, 7) After a colloquy with him, Judge Dallet found Marion competent to represent himself and allowed attorney Flanagan to withdraw, but required him to serve as stand-by counsel. (R114:7-16) The case was reset for final pre-trial and jury trial in September. (R114:17-18)

While 14CM002943 was pending the September final pre-trial date, Marion was charged with misdemeanor intimidation of a victim, H.L.M., as an act of domestic abuse, contrary to Wis. Stats. §§ 940.42, 939.51 (3)(a), 973.055(1) in 15CM002635. (2206 R1:2) His initial appearance was on July 30, 2015, at which time, Marion was still being held in custody on the $1000 bond in 14CM002943, as well as the violation of supervision hold from the Department of Corrections in 01CF00818. (2206 R87:5; R67:1; App. 103; R71:1-3; App. 107-109) The commissioner found probable cause on the new complaint and set bail at $500, subject to another no contact order. (2206 R87:6) Marion pled not guilty, and the case was assigned to Judge Dallet's court. (*Id*.)

15CM002635 was called on August 24, before the Honorable Dennis Flynn, who was sitting that day for Judge Dallet. (R115:6) Marion appeared without counsel, but Judge Flynn refused to find Marion competent to represent himself, appointed attorney Flanagan as counsel, and—at Marion's request—set the matter for a speedy trial. (2206 R88:5-6, 11)

Both cases were called for final pretrial on September 2, 2015. (R115) Marion renewed his request to represent himself in 15CM002635, and Judge Dallet granted that motion. (R115:3-4; 21)

The cases were called for a joined trial on September 28, at which time Marion remained in custody on bail and the DOC hold. (R116:2-3; R71:1-3; App. 107-109) H.L.M. was not present, but the court granted the State's motion for admission of her prior statements under the doctrine of the forfeiture by

wrongdoing (R116:4, 18-19, 23) The court denied the State's similar motion in regard to J.S.M's statements, and as a result, the second count in 14CM002943 was dismissed. (R116:27-29; R117:45) After the jury was selected, but before it was sworn, the trial was adjourned so that Marion could attempt to procure the attendance of several witnesses. (R117:63-70)

The cases proceeded to trial from October 5 to 7, 2015. (R118, R120-123) At the conclusion, the jury found Marion guilty of the four counts remaining in the cases, (R123:15) and the court entered judgments of conviction on the verdicts. (R123:20)

On October 30, 2015, Judge Dallet imposed the maximum sentence as to each count, to be served consecutive to each other and consecutive to any other sentence. (R124:33, 37; R59:1, App. 101) Attorney Flanagan, as stand-by counsel, requested 252 days of pre-trial credit, representing the period from Marion's initial arrest in 14CM002943 on February 20 through the sentencing date.[3] (R124:39) The court granted that credit against the battery charge in 14CM002943, with no credit against the other three sentences. (R59:1-2; App. 101-102; 2206 R38:1) A Notice of Intent to Pursue Postconviction Relief was timely filed (R58), and counsel was appointed to represent Marion on appeal.[4]

While the misdemeanors were pending trial, the Department of Corrections pursued revocation of Marion's extended supervision in 01CF000818. (R117:64; R67:1; App. 103; R71:1-3; App. 107-109) The administrative law judge found that Marion had violated the conditions of his extended supervision, ordered his supervised release to be revoked, and ordered him to be returned to Dodge Correctional Institution. (R71:1-3; App. 107-109) Marion was granted credit against that revocation term from July 1, 2013 to July 31, 2013, and from February 20, 2015 to his receipt at the institution. (R67:2; App. 104; R71:1-3; App. 107-109)

[3] By this point, Marion had been escorted from the courtroom, for his conduct during the hearing. (R124:32-33)

[4] Attorney Heather Johnson was appointed to represent Marion sometime before February 22, 2019, as that was when transcripts of the case were served on her. (R62)

On March 25, 2016, Marion filed a letter with the court regarding sentencing credit and requesting that the sentences in 14CM02943 and 15CM2653 be run concurrent to one another (R64:1) In its response, the court noted that Marion had received 252 days pre-trial credit against the sentence in 14CM02943, but did not take action on the correspondence, noting that Marion was represented by counsel and advising Marion that the court would not consider *pro se* filings by a represented defendant. (R65)

On May 6, 2016, the Department of Corrections wrote the court, asking it to review the sentence credit that had been granted in 14CM002943. (R67:1; App. 103) The Department noted that the credit awarded in 14CM002943 from February 20, 2015 through October 30, 2015 duplicated credit that had been granted against the sentence in 01CF000818. (*Id.*) Three days later, the circuit court vacated the 252 days credit awarded in 14CM002943. (R68; App. 110) The court found that the sentence in 14CM002943 was to be served consecutive to any other sentence and that the 252 days of credit awarded in the misdemeanor had also been awarded in 01CF00818. (*Id*.) The court ruled that under *State v. Boettcher*, 144 Wis.2d 86 (1988),[5] Marion was not entitled to dual credit. On May 10, 2016, the court amended the misdemeanor judgment of conviction accordingly. (*Id*.; R69:1-2; App. 111-112)

On May 25, 2016, Marion filed a "Motion to Reconsider Credit," in which he raised several claims. (R70) Among them he argued that because sentence was imposed in 14CM002943 before the revocation order was issued in 01CF00818, he was entitled to that credit against the misdemeanor sentence. (R70:1) Marion also raised certain complaints about Judge Dallet, the actions of the Department of Corrections, and the revocation process. (R70:2-3) The court denied that motion by order dated May 27, 2016. (R72:1-2; App 113-114)

Marion subsequently filed a motion for a *Machner* hearing, seeking redress against Heather Johnson, his post-conviction/appellate counsel, removal of the prosecutor, and a

[5] 423 N.W.2d 533

change of venue. (R88:1-2) The trial court denied that motion. (R89)

On October 1, 2019, Marion filed a "Motion Requesting Time Served with Concurrent Sentences" (R99) In it, Marion seemed to raise four complaints:

1. The Department of Corrections improperly extended his discharge date in case 01CF00818;
2. Because his "proper" discharge date on the felony case was February 10, 2018, by the time of the motion, he had completed service of the misdemeanor sentences, whether those were consecutive or concurrent to the felony;
3. The misdemeanor sentences must be served in the House of Corrections, not prison, because they were not enhanced, bifurcated sentences;
4. That, pursuant to *Drinkwater v. State*, 69 Wis.2d 60 (1975)[6] the court had no authority to order that the misdemeanor sentences be served consecutive to the prison term in 01CF000818.

Judge Frederick Rosa, sitting as successor to Judge Dallet, denied that motion by written order on October 10, 2019. (R100; App. 115) Judge Rosa determined that Marion's motion raised claims against the Department of Corrections which were not properly before the court and ruled that the proper forum for those complaints was a petition for writ of *habeas corpus*. (*Id.*) In a footnote, Judge Rosa noted that Marion had filed a previous habeas petition in Milwaukee County Circuit Court case 18CV00285, which had been dismissed because the petition was not verified. (*Id*.) Judge Rosa did not specifically address Marion's reference to *Drinkwater* and concurrent sentences. (*Id*.)

Marion filed a notice of appeal from the October 10, 2019 order on November 20, (R107), resulting in the current appeal.

[6] 230 N.W.2d 126

While Marion was raising those matters in the circuit court, appellate counsel pursued a no-merit appeal in the misdemeanor cases, in 2017AP2013-CRNM and 2017AP2014-CRNM. (R89; R92; R95) This court reviewed the issues and the record and, on June 30, 2020, summarily affirmed the convictions. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), pp. 1-6 (App. 116-123).[7] In its decision, the court observed that appellate counsel had filed a no-merit report which addressed whether the trial court properly resolved various pre-trial motions, whether the trial court erred when it included the self-defense instruction at the end of trial and whether there was arguable merit to a sentencing challenge. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), p. 3 (App. 118). Marion received a copy of that report and filed a 79 page response to the report, which the court also analyzed. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), p. 2 (App. 117). (*Id*.) Marion's response included claims that (1) the trial court erred in admitting certain exhibits at trial; (2) the trial court erred in giving the self-defense instruction when he had not requested it; (3) appellate counsel was ineffective "for among other reasons, not addressing all of the myriad of issues that Marion believes have arguable merit;" and other claims which "lack sufficient merit or importance to merit individual attention" in the court's decision. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), pp. 4-6 (App. 119-122). The court summarily affirmed, and relieved Attorney Johnson of further representation of Marion. *State v. Marion*, 2017AP2013 / 14-CRNM, unpublished slip op. (WI App. June 30, 2020), p. 6 (App. 122)

[7] This unpublished opinion is not included in the appellate record. The State cites it, not for precedential value, but as case history, and to support the State's position that Marion's motion was procedurally barred: Wis. Stat. § (Rule) 809.23(3)(a) provides that an unpublished opinion may not be cited in any court of this state as precedent or authority, except to support a claim of claim preclusion, issue preclusion, or the law of the case.

INTRODUCTION

As an initial matter, the State notes that the Brief of the Defendant-Appellant does not conform with the requirements of Wis. Stat. (Rule) § 809.19. Most seriously, Marion includes no citations to the appellate record and repeatedly makes reference to information which is not part of the appellate record (see, *e.g.*, Brief of Defendant-Appellant, pp. 5-6, 8, 9). Factual assertions which are not contained in the appellate record cannot be considered; *See Jenkins v. Sabourin,* 104 Wis. 2d 309, 313-14, 311 N.W.2d 600, 603 (1981). The extraneous factual assertions in Marion's brief should therefore be disregarded. Although *pro se* defendants generally are granted certain leeway, in recognition of the fact that they are ordinarily unfamiliar with the procedural rules and substantive law that might govern their appeal, see, e.g. *Rutherford v. LIRC*, 2008 WI App 66, ¶27, 309 Wis. 2d 498, 752 N.W.2d 897. The deficits in Marion's brief makes it difficult to parse his arguments.

In the Statement of Issues Presented for Review, Marion raises three claims:

1. The court erred in denying the "Motion Requesting Time Served with Concurrent Sentences;"
2. In denying the motion, the court erred in relying on the disposition of the petition in 18CV002855;
3. Because Marion's sentence credit claim was not raised in the petition in 18CV002855, he should have been able to raise it in the misdemeanor case.

(Brief of Defendant-Appellant, p. 3)

Reading the argument portion of his brief broadly, Marion seems to argue that:

1. The court did not have the authority to order the misdemeanor sentences consecutive to the felony sentence, because his extended supervision sentence had not yet been revoked; therefore, he has fully served the

misdemeanor sentences and should be released from custody. (Brief of Defendant-Appellant, pp. 6-7)

2. Even if those misdemeanor sentences were to be served consecutive to the felony revocation sentence, they must be served in the local jail, rather than prison, because they are not enhanced, bifurcated sentences; (Brief of Defendant-Appellant, pp. 6-7)
3. The court erred in vacating the sentence credit originally awarded against 14CM002943, because the Department did not award him that credit against the felony revocation terms and because sentence was imposed on the misdemeanor sentence before his extended supervision was revoked. (Brief of Defendant-Appellant, p. 9)

It is the State's position,

1. That the October 1, 2019 motion was procedurally barred;
2. That the issue of sentence credit is not properly before this court, as it was not raised in the October 1, 2019 motion; and,
3. That the issues raised lack merit.

STANDARDS OF REVIEW

Whether a postconviction motion or appeal is procedurally barred from review is a question of law reviewed de novo. *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 172, 517 N.W.2d 157, 158 (1994); *State v. Tillman*, 2005 WI App 71, ¶14, 281 Wis. 2d 157, 696 N.W.2d 574. Whether an individual is entitled to sentence credit and issues of statutory interpretation and application are similarly reviewed de novo. *State v. Peters*, 2003 WI 88, ¶¶ 13-14, 263 Wis. 2d 475, 481–82, 665 N.W.2d 171, 174

ARGUMENT

I. THE OCTOBER 1, 2019, POSTCONVISTION MOTION WAS PROCEDURALLY BARRED.

The State contends that several rules of procedure require a finding that Marion's October 1, 2019 motion was procedurally barred in the circuit court.

First, a defendant is barred from proceeding *pro se* during the pendency of an appeal in which he is represented by counsel. In *State v. Redmond*, 203 Wis. 2d 13, 16-17, 552 N.W.2d 115, 117 (Ct. App. 1996), the court concluded that,

> the rules of appellate procedure require that a defendant choose whether to proceed with the assistance of counsel or proceed pro se. If a defendant elects to be represented by counsel, that precludes simultaneous pro se activity.

Here, the record demonstrates that Marion was represented by Attorney Johnson from sometime before February 22, 2016 (R62), until the court relieved her of that representation on June 20, 2020. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), pp. 1-6 (App. 116-123) Marion filed the *pro se* motion at issue in this appeal during that period of representation. It was, therefore, barred.

Second, assuming that *Redmond* presented no impediment, the motion was barred by the principles of *Escalona-Naranjo*, *supra*. Generally, a defendant must raise all grounds for postconviction relief in his original motion or appeal, and is precluded from raising additional issues, including claims of constitutional or jurisdictional violations, in subsequent litigation if those issues could have been raised previously, unless he presents a sufficient reason for his failure. *Id*. Here, Marion filed several motions for post-conviction relief in 2016 (R64; R70; R88) To the extent that Marion raised new claims in the October 1, 2019 motion, Marion has offered no reason—much less a sufficient reason—for his failure to bring them earlier. To the extent that he reasserted previously raised claims, they were barred by *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991) ("[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue").

Third, the motion was barred by virtue of the then pending (now decided) no-merit appeal in 2017AP2013-CRNM and 2017AP2014-CRNM. *Escalona*'s procedural bar was extended to postconviction motions following no-merit appeals by *State v. Tillman*, 2005 WI App 71, 281 Wis.2d 157, 696 N.W.2d 574. There, the court wrote,

> We hold under *Escalona-Naranjo* and Wis. Stat. § 974.06(4) that a prior no merit appeal may serve as a procedural bar to a subsequent postconviction motion and ensuing appeal which raises the same issues or other issues that could have been previously raised.

Tillman, 2005 WI App 71, ¶ 27

Wis. Stat (Rule) 809.32 sets forth Wisconsin's no-merit procedure. First, appointed counsel examines the record for potential appellate issues of arguable merit. *See* Wis. Stat. (Rule) 809.32(1)(a). Next, the defendant has the opportunity to respond to the no-merit report and raise additional issues. Wis. Stat. (Rule) 809.32(1)(e). Then, the appellate court examines the no-merit report and independently scrutinizes the record to see if any potential appellate issues with arguable merit exist. Finally, the court's no-merit decision sets forth the potential appellate issues and explains in turn why each has no arguable merit. See, *Tillman*, 2005 WI App 71, ¶ 17.

A defendant is not *required* to file a response to a no-merit report; he is therefore not required to raise any issues in response to a no-merit report. *State v. Allen***,** 2010 WI 89**,** ¶ 4, 328 Wis.2d 1, 786 N.W.2d 124, (2010). However, he may not raise issues in a subsequent motion that he could have raised in response to a no-merit report, absent a "sufficient reason" for failing to raise them in the no-merit appeal. *Id.*

Of course, the *Tillman* bar is not absolute: before it is to be applied, the appellate court

> must pay close attention to whether the no merit procedures were in fact followed. In addition, the court must consider whether that procedure, even if followed, carries a sufficient degree of confidence

> warranting the application of the procedural bar under the particular facts and circumstances of the case.

Tillman 281 Wis.2d 157, ¶ 20, (footnote omitted).

Here, the court of appeals decision demonstrates that the no-merit procedure was properly followed. *State v. Marion*, 2017AP2013-CRNM, 2017AP2014-CRNM, unpublished slip op. (WI App. June 30, 2020), pp. 1-6 (App. 116-123). Appellate counsel filed a thorough report; Marion filed a 79 page response. (*Id*.) The court analyzed the issues raised and the record, and determined no arguable meritorious issues existed. (*Id*.)

That the motion at issue here was filed while the no-merit process was underway, rather than after its conclusion, provides no relief to the procedural bar: *Escalona*, *Tillman*, and *Allen* make it clear that if Marion wanted the issues raised in that motion to be considered by the court, he needed to raise them in his response to the no-merit report.

Accordingly, Marion's motion should be deemed procedurally barred.

II. EVEN IF THE MOTION WAS NOT BARRED, THE ISSUE OF SENTENCE CREDIT IS NOT PROPERLY BEFORE THIS COURT, BECAUSE MARION DID NOT RAISE IT IN THE OCTOBER 1, 2019, MOTION

One of Marion's arguments on appeal is that the trial court erred in vacating the sentence credit originally awarded against 14CM002943. (Brief of Defendant-Appellant, p. 9) However, Marion did not raise that issue in the October 1, 2019 motion, the denial of which is the subject of this appeal. (R99; R100) He did raise it in the May 25, 2016, "Motion to Reconsider Credit," (R70), which was denied two days later (R72:1-2; App 113-114). However, Marion did not appeal that decision, and this appeal is not timely to that order.

III. ASSUMING OTHER BARS DID NOT EXIST, MARION IS NOT ENTITLED TO RELIEF BECAUSE THE ISSUES HE RAISES ARE

WITHOUT MERIT

Were this court to address the merits of Marion's sentence credit and other claims, each should be denied.

A. The trial court had the lawful authority to order the misdemeanor sentences to run consecutive to the previously imposed felony sentence.

Marion's claim that the court lacked authority to impose the misdemeanor sentences consecutive to the felony sentence is governed by Wis. Stat. § 973.0165(2)(a). That statute provides,

> Except as provided in par. (b), the court may impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously.

Wis. Stat. § 973.0165(2)(a)

The sentence in 01CF000818 had been imposed at the time of the original sentencing in that case. Although that sentencing date is not part of this record, it was necessarily sometime before Marion's release to extended supervision on March 5, 2013 (R71:1-3; App. 107-109). Extended supervision is one component of a bifurcated sentence, Wis. Stat. § 973.01(2); a person on extended supervision is serving his sentence. Therefore, that Marion's extended supervision had not yet been revoked is irrelevant: the felony sentence had been imposed, and he was actually serving it when he was convicted of, and sentenced for, the misdemeanors.

B. By statute, misdemeanor sentences which are consecutive to prison sentences are served in prison.

Marion's argument that his misdemeanor sentences must be served in the local jail or County House of Corrections is controlled by Wis. Stat. § 973.03(2), which provides,

> A defendant sentenced to the Wisconsin state prisons and to a county jail or house of correction for separate crimes shall serve all sentences whether concurrent or consecutive in the state prisons.

Wis. Stat. § 973.03(2).

This language is clear and unambiguous, and defeats Marion's claim.

C. The trial court properly vacated the sentence credit awarded against the consecutive misdemeanor sentence, because that same period of credit was awarded against the felony sentence, following revocation.

Wis. Stat. § 973.155 provides, in relevant part,

> (1)(a) A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
> 2. While the offender is being tried; and
> 3. While the offender is awaiting imposition of sentence after trial.

Wis. Stat. § 973.155.

The award of credit is restricted, however, in that duplicate credit cannot be awarded against each of consecutive sentences. *State v. Boettcher*, 144Wis.2d 86, 423 N.W.2d 533 (1988).

Marion asserts that the Department of Corrections did not award him credit for the days he spent in custody from the time of his arrest through his sentencing on the misdemeanor cases. The record believes his contention: in the section titled "Jail Credit Due," the revocation order in 01CF00818 provided that Marion was given credit against the revocation term from

July 1, 2013 to July 31, 2013 and from February 20, 2013 until his receipt at the institution." (R71:1-3, App. 107-109) This encompasses the 252 days from February 20, 2015 through the October 30, 2015 sentencing date, which Judge Dallet awarded at sentencing (R59:1-2; App. 101-102; 2206 R38:1) Because the sentences were consecutive, *Boettcher* precludes credit against both the misdemeanor and felony terms.

It is immaterial to this analysis whether the misdemeanor sentence was imposed before or after Marion's extended supervision was revoked. Had his extended supervision not been revoked, Marion would have begun serving the misdemeanor sentences upon his discharge from the felony sentence, at which time the 252 days credit would have been applied. Because the extended supervision ***was*** revoked, the credit could be applied against only one of the consecutive sentences.

D. The trial court did not rely on the disposition of 18CV002855 in denying the motion

Marion asserts that the trial court erred in relying on the disposition of the petition in 18CV002855 when it denied the October 1, 2019 motion. Marion simply misreads the decision: the court did not rely on 18CV002855, it simply referenced the existence of that case. Instead, it denied the motion because Marion's claims regarding the Department of Corrections calculation of his release date were not properly raised by post-conviction motion, but, instead, needed to be brought in a different forum. (R100; App. 115) In this, the trial court was correct: allegations that the Department of Corrections erroneously calculated an inmate's release date or is holding an inmate past the proper discharge date must be brought by a petition for writ of certiorari or petition for writ of habeas corpus. See Wis. Stat. § 782.01(1) ("Every person restrained of personal liberty may prosecute a writ of habeas corpus to obtain relief from such restraint subject to ss. 782.02 and 974.06.").

CONCLUSION

For the reasons herein, the State asks that this court affirm the trial court's denial of Marion's postconviction motion.

Dated this _____ day of _____, 2020.

Respectfully submitted,

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Milwaukee County

_____
Karen Loebel
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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 4401.

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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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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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 one or more initials or other appropriate pseudonym or designation 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.

Dated this _____ day of August, 2020.

_____

Karen Loebel
Deputy District Attorney
State Bar Number 1009740

INDEX TO SUPPLEMENTAL APPENDIX