

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 6, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP563-CR

Cir. Ct. No. 2004CM972

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY R. MALKMUS,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
JOHN A. DES JARDINS, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Gary Malkmus appeals an order denying his request for additional sentence credit. Malkmus received 147 days of credit on one of his

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

two consecutive sentences. There is no evidence to support Malkmus's claim that he deserves sentence credit for twelve months. This court therefore affirms the order.

BACKGROUND

¶2 On December 15, 2004, the court convicted Malkmus of violating WIS. ADMIN. CODE §§ ATCP 110.02(7)(c) and 110.05(3) (2003), as it relates to home improvement contracts. Violation of these codes is a misdemeanor offense. For each offense, the court withheld Malkmus's sentence. The court placed Malkmus on probation for one year on each count, concurrent with each other. On August 3, 2005, Malkmus's probation and parole agent placed Malkmus in custody on a Department of Corrections hold to allow the agent time to investigate alleged violations. In October, the department revoked Malkmus's probation on these counts and his parole in an unrelated case. On December 29, following the revocation of his probation, Malkmus appeared for sentencing. The court ordered Malkmus to serve one year in jail on each count, consecutive to each other and to any other sentence. The court inquired about sentence credit, and Malkmus's attorney replied that Malkmus was due 147 days. The court credited Malkmus with 147 days toward the first of the two one-year sentences. In a postconviction motion, Malkmus requested that the trial court grant him additional credit toward his sentence. Without holding a hearing, the trial court denied Malkmus's request.

DISCUSSION

¶3 Malkmus contends he is due additional credit for the time he sat in prison² prior to his sentencing. Sentence credit is a question of law we will address without deference to the trial court. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991). WISCONSIN STAT. § 973.155(1)(a) requires the court to give the offender “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.” Credit for pre-sentence confinement is only appropriate on one of two or more consecutive sentences. *See State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988).

¶4 The State argues that Malkmus is attempting to receive dual credit. Dual credit is not permitted. *Id.* at 87; *see also State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338. Here, the court ordered two periods of incarceration to run consecutive to one another. Malkmus’s attorney requested 147 days of credit. The court applied the 147 days of credit to the first of the two sentences. To give Malkmus credit towards the second count would result in impermissible dual credit. *See Boettcher*, 144 Wis. 2d at 100.

¶5 However, Malkmus’s brief does not seem to argue that he should receive 147 days’ credit for each count. Rather, Malkmus argues that he deserves credit for twelve months that he was incarcerated related to the offense for which the sentence was imposed. Malkmus fails to identify how he calculates that he spent twelve months incarcerated on this offense. Malkmus does not state the

² Malkmus contends that he was in prison, though he does not state where he was incarcerated. Given the length of time that Malkmus contends he was incarcerated, he would more likely have been in jail than prison.

dates he spent incarcerated, or why he was incarcerated. This court may decline to consider issues that are inadequately briefed. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992). Regardless, the record reveals no evidence to support Malkmus's claim. The facts show that on August 3, 2005, Malkmus's probation and parole agent placed Malkmus in custody on a Department of Corrections hold, and on December 29 Malkmus appeared before the court for sentencing. There is no evidence to support Malkmus's argument that he is entitled to sentence credit for twelve months.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

