**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**September 23, 2014**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal Nos. 2014AP198-CR**
**2014AP199-CR**

**Cir. Ct. Nos. 2013CF951**
**2013CM2737**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**XAVIER DEMETRIUS HARRELL,**

**DEFENDANT-APPELLANT.**

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APPEALS from judgments and an order of the circuit court for Milwaukee County: DENNIS FLYNN, Reserve Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Xavier Demetrius Harrell appeals from two judgments of conviction and from a trial court order denying his postconviction motion. He argues that the trial court erroneously denied his motion for additional sentence credit and he asks this court to enter an order granting him an additional

seventy-seven days of sentence credit. We reject his arguments and affirm the judgments and order.

## BACKGROUND

¶2 On August 12, 2013, Harrell appeared before the trial court on four separate Milwaukee County criminal cases.[1] The parties told the trial court that they had reached a plea agreement that would resolve all four cases. Pursuant to that agreement, Harrell agreed to plead guilty to one count of attempted battery by a prisoner, contrary to WIS. STAT. §§ 940.20(1) and 939.32 (2011-12), in case No. 2013CF951.[2] Harrell also agreed to plead guilty to one count of disorderly conduct, contrary to WIS. STAT. § 947.01(1), in case No. 2013CM2737. The State agreed to recommend that Harrell be sentenced to prison, with the length of time "up to the Court." The State also said that it was "moving to dismiss and read in" one count of retail theft in case No. 2012CM4633. Finally, with respect to the fourth case, No. 2012CF5625, the State said:

> [T]he State is simply going to dismiss that case. The case involves the defendant and his grandmother. The State felt that as the case progressed that there would be some proof problems. I will be talking a bit about this case in my sentencing argument only because this case led to the attempt[ed] battery by [a] prisoner [to which Harrell pled guilty in case No. 2013CF951].

[1] The Honorable Dennis Flynn, Reserve Judge, accepted Harrell's guilty pleas, sentenced him, and denied his postconviction motion for additional sentence credit.

[2] The habitual criminality penalty enhancer for this crime was dismissed on the State's motion.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶3 The trial court accepted Harrell's two guilty pleas, found him guilty, and proceeded to sentencing. For the attempted battery by a prisoner, the trial court sentenced Harrell to eighteen months of initial confinement and eighteen months of extended supervision. The trial court granted Harrell 276 days of sentence credit against that sentence. For the disorderly conduct, the trial court imposed a ninety-day sentence, concurrent to the sentence for attempted battery. Although the trial court did not explicitly state that it was awarding Harrell sentence credit for the second case, the judgment of conviction for the disorderly conduct count indicated that Harrell was given 276 days of sentence credit.

¶4 After the judgments of conviction were entered, the Department of Corrections wrote to the trial court and stated that "the 276 days of credit on both judgments appears to be excessive." The letter explained: "Mr. Harrell committed the crime on January 25, 2013 for case [20]13CF951 and was sentenced on August 12, 2013 which is 199 days later. Mr. Harrell committed the crime on February 15, 2013 for case [20]13CM2737 and was sentenced on August 12, 2013 which is 178 days later." In response, the trial court issued an order amending the judgments of conviction so that Harrell was awarded 199 days of sentence credit in case No. 2013CF951 and 178 days of sentence credit in case No. 2013CM2737.[3]

¶5 Harrell, now represented by a different lawyer, filed a motion for postconviction relief. He alleged that he was entitled to 276 days of sentence credit in both cases because he was in custody for 276 days for case

[3] The Honorable Dennis P. Moroney issued the order amending the judgments of conviction.

No. 2012CM4633, a case that was dismissed and read in at sentencing.[4] *See* ***State v. Floyd***, 2000 WI 14, ¶1, 232 Wis. 2d 767, 606 N.W.2d 155 (holding that WIS. STAT. § 973.155(1) "requires sentence credit for confinement on charges that are dismissed and read in at sentencing"), *abrogated on other grounds by* ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835.[5]

¶6 The trial court not only denied Harrell's motion for additional sentence credit, it also reduced the credit applied to both cases. First, the trial court explained, Harrell was taken into custody on November 9, 2012, on case No. 2012CF5625, not case No. 2012CM4633.[6] Second, the trial court said that because case No. 2012CF5625 was "dismissed outright" and was not read in at sentencing, the reasoning of ***Floyd*** did not apply and Harrell was not entitled to sentence credit for the days he spent in custody on case No. 2012CF5625. Finally, the trial court said that the proper date from which to calculate sentence credit for case No. 2013CF951 and case No. 2013CM2737 was the date when the criminal complaints were filed in those cases, not the date the crimes were committed.

[4] In the alternative, Harrell sought: (1) resentencing on grounds that the trial court "was informed of and granted 276 days of sentence credit;" or (2) plea withdrawal on grounds that his pleas were "not knowingly and voluntarily entered because he was informed that he was entitled to 276 days of sentence credit when he accepted the plea agreement" and his attorney provided ineffective assistance. The trial court denied those requests. On appeal, Harrell has not challenged the trial court's decision on those issues, so we will not discuss Harrell's arguments or the trial court's reasoning. *See* ***Reiman Assoc., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (Issues that are not briefed on appeal are deemed abandoned.).

[5] In ***State v. Straszkowski***, 2008 WI 65, 310 Wis. 2d 259, 750 N.W.2d 835, the Wisconsin Supreme Court held "that no admission of guilt from a defendant is required for a read-in offense to be dismissed and considered for sentencing purposes." *See* ***id.***, ¶6. ***Straszkowski*** is considered to have abrogated contrary language in ***State v. Floyd***, 2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155, and other cases.

[6] The trial court explained that Harrell was granted a signature bond in case 2012CM4633 and that bond was never revoked.

Accordingly, the trial court ordered that the judgments be amended to grant Harrell 163 days of credit against his sentence in case No. 2013CF951 and 56 days of credit against his sentence in case No. 2013CM2737. These appeals follow.

## DISCUSSION

¶7 On appeal, Harrell does not challenge the trial court's finding that he was taken into custody on November 9, 2012 in case No. 2012CF5625 rather than case No. 2012CM4633. Harrell also does not challenge the trial court's decision to reduce the amount of sentence credit based on the dates the criminal complaints were filed in case No. 2013CF951 and case No. 2013CM2737. The only issue on appeal is whether Harrell is entitled to sentence credit for the time he spent in jail on case No. 2012CF5625, the case that was dismissed and not read in at the combined plea and sentencing hearing. Harrell bears the burden of demonstrating that he is entitled to additional sentence credit under WIS. STAT. § 973.155(1), *see* ***State v. Carter***, 2010 WI 77, ¶96, 327 Wis. 2d 1, 785 N.W.2d 516 (Roggensack, J., concurring/dissenting), and whether he is entitled to sentence credit pursuant to that statute is a question of law we review *de novo*, *see* ***State v. Rohl***, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶8 Harrell presents two reasons why he believes he is entitled to additional sentence credit for the time he spent in jail on case No. 2012CF5625.[7]

[7] In a single paragraph, Harrell also criticizes his trial counsel for negotiating a plea agreement that did not include case No. 2012CF5625 as a read-in crime. However, Harrell does not present an argument that the trial court erred when it rejected Harrell's claim that he was denied the effective assistance of counsel, and Harrell does not indicate that he continues to seek resentencing or plea withdrawal. We conclude that Harrell has abandoned his ineffective-assistance-of-counsel claim by not briefing it, and we will therefore not address his statements about his trial counsel's performance. *See* ***Reiman Assoc., Inc.***, 102 Wis. 2d at 306 n.1.

First, Harrell acknowledges that ***Floyd*** "distinguish[ed] read-ins from other charges that may be considered by a sentencing court." He argues, however, that the Wisconsin Supreme Court's subsequent holding in ***State v. Frey***, 2012 WI 99, 343 Wis. 2d 358, 817 N.W.2d 436, calls for an extension of the holding of ***Floyd***.

¶9 In ***Frey***, the court recognized the "longstanding rule" that "a circuit court may consider dismissed charges in imposing sentence." ***Id.***, 343 Wis. 2d 358, ¶5. The court rejected the defendant's argument "'that when a circuit court approves a plea agreement in which a charge will be dismissed outright, it is also agreeing not to consider that charge at sentencing.'" ***Id.***, ¶¶41, 48 ("Agreements not to reveal 'relevant and pertinent' information to a sentencing court are contrary to public policy" and "the defendant's suggestion conflicts with longstanding public policy.").

¶10 ***Frey*** did not mention sentence credit or WIS. STAT. § 973.155(1), which governs sentence credit. Nonetheless, Harrell argues:

> The same reasoning that the Court applied in ***Fl[oy]d*** for a read-in count applies to a dismissed count following the decision in ***Frey***. In both scenarios the sentencing court is considering the conduct as part of the defendant's character for which he is ultimately sentenced. The trial court's consideration of either a read-in count or a dismissed count can lead to a lengthier sentence and therefore relates to "an offense for which the offender is ultimately sentenced."

(Quoting § 973.155(1); bolding added.)

¶11 In response to Harrell's argument that ***Floyd***'s reasoning should be extended to offer sentence credit where a case is dismissed and not read in, the

State asserts that ***Floyd*** rejected such a result.[8] The State explains: "The ***Floyd*** court specifically limited its holding to read-in charges, concluding that there is an 'important distinction between read-ins and other charges, including pending charges, acquittals or dismissals.'" *See* ***id.***, 232 Wis. 2d 767, ¶31 (bolding added).

¶12 We agree with the State that ***Floyd*** limited its holding to read-in charges. ***Floyd*** explained: "The unique nature of read-in charges and this state's read-in procedure, viewed in the context of the legislative history and purpose of the sentence credit statute, lead us to conclude the legislature intended that WIS. STAT. § 973.155(1) provide sentence credit for these charges." ***Floyd***, 232 Wis. 2d 767, ¶31. Further, ***Frey*** did not address the issue of sentence credit. We are not convinced that ***Frey*** overruled or expanded ***Floyd***, and this court is not empowered to overrule ***Floyd***'s holding that read-in charges are distinguished from dismissed charges when considering the availability of sentence credit under § 973.155(1). *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997) ("The supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case.").

¶13 Moreover, Harrell did not file a reply brief, and he therefore did not respond to the State's detailed analysis of WIS. STAT. § 973.155(1), ***Floyd***, and other sentence credit cases that led the State to conclude that Harrell is not entitled to sentence credit on case No. 2012CF5625. Unrefuted arguments are deemed admitted. ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

[8] In a footnote, the State also asserts that not only does ***Floyd*** "not govern this case," ***Floyd*** was wrongly decided. The State explains that it is making "this argument only to preserve its objections to ***Floyd*** in the event of supreme court review of this case." (Bolding added.)

¶14 The second argument Harrell makes in support of his request for additional sentence credit is only two sentences long: "Additionally, in this case Mr. Harrell was sentenced for Attempt[ed] Battery by Prisoner. His custody status was an element of the offense for which he was ultimately sentenced." This court is unsure what Harrell intends to argue. This argument is inadequately briefed and we decline to develop an argument for Harrell. *See* ***Industrial Risk Insurers v. American Eng'g Testing, Inc.***, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (court will not abandon its neutrality to develop argument for a litigant); ***Vesely v. Security First Nat'l Bank of Sheboygan Trust Dep't***, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985) (we do not decide inadequately briefed arguments).

¶15 For the foregoing reasons, we conclude that Harrell has not demonstrated that he is entitled to sentence credit for the time he spent in jail awaiting trial on a case that was ultimately dismissed and not read in as part of a plea agreement on other charges. We affirm the judgments and the trial court's order denying Harrell's motion for additional sentence credit.

*By the Court*.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.