

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 26, 2016

Diane M. Fremgen
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 Nos. 2015AP141-CR
2015AP142-CR
STATE OF WISCONSIN**

**Cir. Ct. Nos. 2013CF188
2013CF525**

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHANE A. CLARK,

DEFENDANT-APPELLANT.

APPEALS from judgments and orders of the circuit court for Rock County: KENNETH W. FORBECK, Judge. *Affirmed.*

Before Kloppenburg, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. In these consolidated appeals, Shane A. Clark challenges judgments of conviction based on negotiated pleas and orders denying his motion for postconviction relief. Clark contends that he is entitled to 320 days

of sentence credit because defense counsel was ineffective for failing to take the appropriate steps to secure Clark's right to this amount of sentence credit. Clark also contends that no factual basis exists to support two of his convictions and therefore they must be vacated. The circuit court denied Clark's motions after a hearing. We affirm.

BACKGROUND

¶2 The following facts are undisputed. In January 2013, Clark was charged with operating with a prohibited alcohol concentration (PAC), 8th offense in Rock County case No. 2013CF188 (Rock I). Clark was released on \$500 cash bail. One month later, Clark was arrested and charged with operating while intoxicated (OWI), 9th offense, and two counts of unlawful telephone use, as a domestic abuse incident, under WIS. STAT. § 968.075(1)(a) (2013-14) in Rock County case No. 2013CF510 (Rock II).¹ The unlawful telephone use charges arose from phone calls Clark made to the victim. Although Clark was "free" on cash bail in Rock I, Clark remained in custody on a \$13,000 cash bond in Rock II. Clark's defense counsel did not seek revocation of Clark's bail in Rock I. While in custody on Rock II, Clark allegedly made phone calls from the jail to the victim, which gave rise to the charges of contact after domestic abuse arrest and

¹ The appellant bears the responsibility to insure that the record includes all documents pertinent to the issues raised on appeal. See *Schaidler v. Mercy Med. Ctr. of Oshkosh, Inc.*, 209 Wis. 2d 457, 469, 563 N.W.2d 554. Here, Rock II is not part of the record on appeal. In its brief on appeal, the State maintains that the two counts of unlawful telephone use included domestic abuse modifiers under WIS. STAT. § 968.075(1)(a). Clark does not challenge this contention in his reply brief and for that reason we assume it is conceded for the purposes of appeal. See *Raz v. Brown*, 2003 WI 29, ¶25, 260 Wis. 2d 614, 660 N.W.2d 647.

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

felony bail jumping in case No. 2013CF525 (Rock III). This charge was based on his arrest in Rock II of unlawful telephone use as a domestic abuse incident under § 968.075(1)(a).

¶3 On January 8, 2014, Clark entered guilty pleas in all three cases, and he was sentenced in all three cases at a subsequent hearing. At the plea hearing, in Rock I, Clark pled guilty to the PAC charge. In Rock II, Clark pled guilty to OWI, 9th offense, one count of unlawful telephone use as domestic abuse incident, and felony bail jumping. In Rock III, Clark pled guilty to contact after a domestic abuse arrest and felony bail jumping. At the conclusion of the plea hearing, the circuit court revoked the bond in Rock I.

¶4 At sentencing, the circuit court imposed concurrent sentences on the PAC (Rock I) and OWI (Rock II) counts. The court granted Clark 55 days of sentence credit for the PAC conviction in Rock I for the in-custody time between the date Clark entered his pleas and the date he was sentenced in Rock I. The court also granted 375 days of sentence credit for the OWI conviction in Rock II, from the date Clark was arrested and placed in custody in Rock II to the date he was sentenced in Rock II.

¶5 Clark filed a postconviction motion seeking 320 days of additional sentence credit in Rock I—from the date he was arrested in Rock II to the date he entered his pleas and the bond in Rock I was revoked. Clark argued that he was entitled to 375 days (320 days plus the 55 that he was already granted) on the ground that defense counsel provided ineffective assistance by failing to move for revocation of the \$500 cash bail Clark posted in Rock I. Clark also sought an order vacating his convictions in Rock III on the ground that his pleas to the charges of contact after a domestic abuse arrest and bail jumping lacked a factual

basis. After a hearing, the circuit court denied the postconviction motion. Other pertinent facts are included in our discussion section below, as appropriate. For the reasons that follow, we affirm the circuit court.

DISCUSSION

I. Ineffective Assistance of Counsel and Equal Protection Claims²

¶6 The first issue in this case centers on Clark’s claim that he is entitled to 320 days of additional sentence credit, which, he contends, he would have received but for defense counsel’s failure to take the proper steps to secure the additional days of sentence credit—namely, by moving to revoke the bond in Rock I when he was arrested in Rock II. Because of how Clark frames this issue, we begin by explaining the legal principles related to awarding sentence credit and ineffective assistance of counsel. We then apply those principles to the facts and explain why we affirm the court’s conclusion that counsel did not provide ineffective assistance.

a. Legal Principles

Sentence Credit

¶7 WISCONSIN STAT. § 973.155(1)(a) establishes how sentence credit is awarded, and provides that a defendant shall receive sentence credit for “all days

² Clark appears to present a separate argument related to defense counsel’s failure to file a motion to revoke bond in Rock I. As we understand it, Clark argues that WIS. STAT. § 969.13(1) should be interpreted to require the revocation of bond where the terms of the bond have not been complied with. Clark does not fully develop this argument and what he does write is more akin to an expression of hope that an appellate court will someday take up this issue. Thus, we do not address this issue.

spent in custody in connection with the course of conduct for which sentence was imposed.” “All days spent in custody” include the days the defendant spends in custody awaiting a trial, being tried, and awaiting sentencing. § 973.155(1)(a).

¶8 Under Wisconsin law, sentence credit is calculated differently for sentences imposed concurrently as opposed to consecutively. In *State v. Tuescher*, we explained that where multiple sentences are imposed at the same time and the sentences are imposed concurrently, “time spent in pre-sentence custody is credited toward each sentence.” *Tuescher*, 226 Wis. 2d 465, 469, 595 N.W.2d 443 (Ct. App. 1999); see also *State v. Ward*, 153 Wis. 2d 743, 745, 452 N.W.2d 158 (Ct. App. 1989) (defendant is entitled to sentence credit against multiple offenses where custody for each offense was “in connection with” all of the concurrent sentences); see WIS. STAT. § 973.155(1)(a).

¶9 On the other hand, we also explained in *Tuescher* that “if the [multiple] sentences are consecutive, time in pre-sentence custody is credited toward only one sentence.” *Tuescher*, 226 Wis. 2d at 469.

¶10 Pertinent to this case, in *State v. Beiersdorf*, 208 Wis. 2d 492, 497-98, 561 N.W.2d 749 (1997), this court held that a defendant who is released on bond in one case, but is in custody on cash bail for a subsequent new charge, is not entitled to sentence credit for days in custody under WIS. STAT. § 973.155(1)(a) on the case that the defendant was released on bond.

Ineffective Assistance of Counsel

¶11 A defendant alleging ineffective assistance of counsel must establish both deficient performance and prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). “To prove deficient performance, a

defendant must show specific acts or omissions of counsel that are ‘outside the wide range of professionally competent assistance.’” *State v. Arredondo*, 2004 WI App 7, ¶24, 269 Wis. 2d 369, 674 N.W.2d 647 (quoted source omitted). “Prejudice occurs where the attorney’s error is of such magnitude that there is a reasonable probability that, absent the error, ‘the result of the proceeding would have been different.’” *State v. Erickson*, 227 Wis. 2d 758, 769, 596 N.W.2d 749 (1999) (quoted source omitted). If the defendant fails on either prong—deficient performance or prejudice—the ineffective-assistance-of-counsel claim fails. *See Strickland*, 466 U.S. at 697.

¶12 Whether counsel was ineffective is a mixed question of fact and law. The circuit court’s findings of fact will not be disturbed unless shown to be clearly erroneous. The ultimate conclusion as to whether there was ineffective assistance of counsel is a question of law. *State v. Balliette*, 2011 WI 79, ¶ 19, 336 Wis. 2d 358, 805 N.W.2d 334.

b. Analysis

¶13 As we indicated, Clark was released on cash bail in Rock I. Approximately one month later, Clark was arrested and held in custody for conduct that led to the charges in Rock II. The circuit court ordered cash bail in an amount that Clark was unable to pay. As a result, Clark was in custody in connection with the charges in Rock II from the time of his arrest until sentencing. Because bond in Rock I had not been revoked before Clark entered his pleas, Clark was “free” with respect to Rock I during the time he was in custody for Rock II until he entered his pleas and the court revoked the bond in Rock I. As a result, the days he spent in custody before he entered his pleas and the court revoked the Rock I bond were not in connection with Rock I. *See Beiersdorf*, 208

Wis. 2d at 496-97; WIS. STAT. § 973.155(1)(a). Rather, he was “in custody” in connection with Rock I only for the 55 days from the date he entered his pleas and the court revoked the Rock I bond, to the date he was sentenced.

¶14 Clark complains that defense counsel failed to provide effective assistance by failing to move for revocation of the bond in Rock I when he was arrested and held in custody for Rock II (320 days before he entered his pleas). Clark appears to suggest that counsel’s failure to seek revocation of bond in Rock I was deficient because it was inconsistent with the common practice of seeking bond revocation after a defendant is arrested on a subsequent charge and is in custody on cash bail. Clark refers to two unidentified appellate decisions that, in his view, “approvingly recognized” that seeking revocation of bond for the purpose of securing sentence credit is a “professional norm,” and that counsel is deemed deficient for failing to file a motion to revoke bond.

¶15 We assume that the two cases Clark refers to are cases he cites earlier in his brief, *Beiersdorf* and *State v. Johnson*, 2008 WI App 34, 307 Wis. 2d 735, 746 N.W.2d 581. We do not read either case as establishing a “professional norm” that defense counsel must follow in providing effective representation. In *Beiersdorf*, this court commented that attorneys seek bond revocation when defendants are arrested on subsequent charges “in countless cases,” but we did not establish that practice as a legal requirement or a performance standard. *Beiersdorf*, 208 Wis. 2d at 499 n.2. In *Johnson*, this court noted steps counsel could have taken in that case along the lines noted in *Beiersdorf*, but neither we nor our supreme court, upon review of that case, recognized any such common practice as suggested by Clark. See *State v. Johnson*, 307 Wis. 2d 735, ¶32; *State v. Johnson*, 2009 WI 57, ¶75, 318 Wis. 2d 21, 767 N.W.2d 207.

¶16 We understand Clark also to argue that counsel ineffectively failed to consider the possibility that the court would impose concurrent as opposed to consecutive sentences, which would have preserved the possibility of Clark receiving the 320 days of sentence credit he asserts he is entitled to. Clark criticizes counsel for failing to explain at the *Machner*³ hearing why he failed to “protect against contingencies” in the event the sentencing court ordered Clark to serve his sentences concurrently rather than consecutively.” We are not persuaded.

¶17 After hearing testimony from defense counsel and Clark, the circuit court concluded that counsel’s failure to move to revoke bond did not rise to the level of being ineffective. The court cited two reasons in support of its decision.

¶18 First, the court credited counsel’s “strategic” and “reasonable” decision not to revoke bail based on counsel’s demonstrated belief that there was not “much or any chance” that Clark would receive concurrent sentences on the PAC and OWI charges. Counsel testified that he had “seen” two or three hundred OWI sentences in his legal career and that Clark’s case was the first case he had seen where the court ordered OWI sentences to be served concurrently. The court observed that counsel’s experience mirrored its experience, noting that it was standard practice for the court during its long tenure as a judge to sentence 8th- and 9th-degree alcohol-related offenses consecutively, not concurrently, as was the case here. Stated differently, the court apparently agreed with counsel that counsel’s experience with literally hundreds of sentencings in OWI cases provided

³ *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

a sufficient reason for counsel to believe that there was little to gain by moving to revoke cash bail.

¶19 Second, the stipulated plea agreement entailed a recommendation that the OWI and PAC sentences be served consecutively (consistent with counsel’s stated expectation noted above) and the bail-jumping charge to be served concurrently. The court expressed concern about holding counsel responsible for strategic decisions that have unanticipated consequences. That is, the court rejected the notion that counsel should be faulted for a decision that was detrimental only in hindsight, but reasonable at the time the strategic decision was made.

¶20 In sum, based on the testimony at the *Machner* hearing, we conclude that the circuit court’s factual findings are not clearly erroneous and that based on these facts Clark fails to persuade us that counsel’s performance was “so deficient that there [was] an injustice here.”

c. Equal Protection

¶21 In an argument that is difficult to follow, Clark contends that defense counsel’s failure to seek modification or revocation of his bond in Rock I, “ensured that he would not receive sentence credit and denied him ... equal protection under the law.” (Alteration in original.) This argument goes nowhere for at least two reasons.

¶22 First, Clark’s argument is not fully developed. Clark’s “argument” consists solely of quotations from two cases, but Clark fails to include any constitutional analysis of how those cases give support to his equal protection claim.

¶23 Second, any equal protection argument that Clark could have made in this particular appeal would have failed. As the State aptly explains on appeal, “[i]n the sentence-credit context, equal protection concerns the denial of sentence credit solely because a defendant’s indigency prevents the defendant from obtaining release pending trial or sentencing (or both).” With respect to Rock I, indigency did not prevent Clark from posting \$500 cash bail and obtaining pre-sentencing release. Moreover, to the extent that Clark’s equal protection claim is targeted at his inability to post bond in Rock II, that issue is not properly before us. This appeal focuses only on Rock I and Rock III; Clark does not appeal Rock II.

II. Factual Basis Claims

¶24 The second issue in this case concerns Clark’s claim that his guilty pleas on the charges of contact after domestic abuse arrest and bail jumping in Rock III lack a factual basis. We begin our discussion of this issue with additional pertinent facts.

¶25 To repeat, the circuit court sentenced Clark in Rock I, II, and III at the same hearing. Clark was charged in Rock II with two counts of unlawful telephone use as a domestic abuse incident under WIS. STAT. § 968.075(1)(a). Clark pled guilty to one of the counts. Significant to this case, by pleading guilty to the unlawful telephone use as a domestic abuse incident, Clark necessarily admitted that his conduct in Rock II constituted domestic abuse within the meaning of § 968.075(1)(a). That is, with his guilty plea to the unlawful telephone use charge, Clark necessarily conceded that his conduct in Rock II constituted a “*physical act* that may cause the other person reasonable to fear imminent engagement” of intentional infliction of physical pain, physical injury or illness, or impairment of physical condition. *See* § 968.075(1)(a) (emphasis added). The

Rock II conviction of unlawful telephone use as a domestic abuse incident is necessary to support the Rock III conviction of contact after domestic abuse arrest.

¶26 On appeal, Clark argues that no factual basis exists to support his conviction of contact after domestic abuse arrest in Rock III because the acts underlying the conviction for unlawful telephone use as a domestic abuse incident in Rock II do not constitute a “domestic abuse incident,” as defined by WIS. STAT. § 968.078(1)(a). Clark correctly points out that an essential element of the Rock III charge is that the defendant had been previously arrested for a “domestic abuse incident.” Clark argues that because his conduct in Rock II did not properly constitute a “domestic abuse incident,” his conviction for *contact after* domestic abuse in Rock III does not contain all of the essential elements of the charge and therefore cannot stand.

¶27 Clark’s contention that his conduct in Rock II did not properly constitute a “domestic abuse incident” hinges entirely on his assertion that the charged conduct in Rock II (telephone calls) does not fall within the statutory definition of domestic abuse. Domestic abuse has four meanings described in WIS. STAT. § 968.075(1)(a)1.-4. One definition is that an adult engages in “[a] physical act that may cause the other person reasonably to fear imminent engagement in the conduct described” in the other subsections of the statute. § 978.075(1)(a)4. Clark argues that a reasonable reading of “physical act” cannot include calling a person on a telephone, and therefore his telephone calls to the victim in Rock II could not constitute domestic abuse.

¶28 The State argues that Clark is estopped from advancing this argument because on appeal Clark “unequivocally declared that he does not challenge his conviction in Rock II.” We agree with the State’s argument but

phrase our discussion in terms of Clark’s improper collateral attack on his Rock II conviction.

¶29 At its core, Clark’s factual basis argument is a collateral attack on his Rock II conviction. *See Oneida Cty. DSS v. Nicole W.*, 2007 WI 30, ¶¶27-28, 299 Wis. 2d 637, 728 N.W.2d 652 (a collateral attack is an attack on a judgment in a proceeding other than in a direct appeal proscribed by law and instituted for the purpose of vacating, reviewing, or annulling it.). To succeed in his insufficient factual basis argument in this case, Clark must persuade us that under the facts of Rock II, using the telephone to harass the victim was not a “physical act” within the meaning of WIS. STAT. § 968.075(1)(a)4. However, that avenue is closed to him. Clark has chosen not to appeal Rock II and present the argument he wants us to address in this appeal—using the telephone in Rock II was not domestic abuse because it did not involve a “physical act” of violence. Significantly, collateral attacks on prior judicial orders or judgments are generally prohibited unless the prior orders or judgments were procured by fraud. *Id.*, ¶28. Clark does not argue that the Rock II judgment was procured by fraud. *Id.* Accordingly, his collateral attack on the judgment in Rock II fails.

¶30 Clark also argues that no factual basis exists to support the felony bail-jumping charge in Rock III. Clark argues that two possible foundations exist for the felony bail-jumping charge: first, the contact after domestic abuse charge in Rock II, which as explained above, Clark argues lacks a factual basis and therefore cannot be used to support the felony bail-jumping charge; second, Clark’s violation of his bond in Rock II which prohibited contact with the victim, which Clark argues the court cannot rely on because the conduct was not included in the probable cause portion of the felony bail-jumping charge. We are not persuaded.

¶31 As to the first foundation stated by Clark, we have rejected his factual basis challenge to the contact after domestic abuse charge in Rock III. Thus, that charge properly served as a basis to charge Clark with felony bail jumping in Rock III.

¶32 As to the second foundation stated by Clark, the problem with Clark's argument is that violation of the Rock II bond is not the only basis for the Rock III bail-jumping charge. As the State points out, the probable cause portion of the Rock III complaint alleges that Clark violated the conditions of bond in *both* Rock I and Rock II.⁴ One of the conditions of bond in Rock I was that Clark not commit any crimes while on release. It is beyond dispute that Clark violated this condition by committing crimes while on release from custody in Rock I, namely, the OWI and unlawful telephone use charges.⁵

CONCLUSION

¶33 For the reasons set forth above, we reject Clark's arguments regarding ineffective assistance of counsel and equal protection. We similarly reject Clark's argument that no factual basis exists to support either conviction in Rock III. Accordingly, we affirm the circuit court's order denying Clark's motions for postconviction relief.

⁴ Clark stipulated to the probable cause portion of the Rock III complaint as establishing the factual basis for his plea to the Rock III bail-jumping charge. The probable cause portion of the complaint listed violation of the Rock I bond as one of two separate bases for the bail-jumping charge.

⁵ Having concluded that Clark's violation of his bond in Rock I can be used as a basis for his felony bail-jumping charge, we need not address Clark's argument that he was not out of custody for the purposes of violating his Rock II bond. There is no dispute that Clark was out of custody for the purposes of Rock I at the time he violated his bond.

By the Court.—Judgments and orders affirmed.

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

