

**FILED**

**FEB 8 1996**

**MARILYN L. GRAVES,  
CLERK OF COURT OF APPEALS  
NOTICE WISCONSIN**

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**February 8, 1996**

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

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

**No. 94-0708-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**Plaintiff-Respondent,**

**v.**

**ZACKERY D. BRADLEY,**

**Defendant-Appellant.**

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**APPEAL** from a judgment and an order of the circuit court for Dane County: **JACK F. AULIK**, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Sundby, and Vergeront, JJ.

**PER CURIAM.** Zackery D. Bradley appeals from a judgment convicting him of two counts of armed robbery, as a party to a crime, and from an order denying his motions for postconviction relief. Bradley raises three issues: (1) whether he is entitled to a new trial because a plea offer the prosecutor made to a key witness was not disclosed at trial; (2) whether he is entitled to credit against his

sentence for time he spent in jail prior to his conviction; and (3) whether he is entitled to resentencing because he received a more lengthy sentence than a co-defendant. We conclude that the trial court erred in failing to hold a hearing and issue a decision on Bradley's postconviction motions. Accordingly, we reverse and remand this matter to the trial court for a hearing and decision on the motions.

Bradley filed several motions for postconviction relief.<sup>1</sup> The trial court did not hold a hearing or issue a decision on the motions within sixty days, so the motions were deemed denied. See § 809.30(2)(i), STATS.<sup>2</sup> A trial court must hold an evidentiary hearing on a postconviction motion which alleges facts that, if true, would entitle the defendant to relief. See *State v. Washington*, 176 Wis.2d 205, 215, 500 N.W.2d 331, 336 (Ct. App. 1993). The trial court may deny the motion without a hearing "if the defendant fails to allege sufficient facts in his motion to raise a question of fact, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief." *Id.* (quoted source omitted).

In Bradley's postconviction motion for a new trial, he alleged facts that, if true, would entitle him to relief. Bradley alleged: (1) that the State represented

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<sup>1</sup> Bradley filed a motion for a new trial, a motion for modification of sentence, and a motion for bail pending appeal.

<sup>2</sup> Section 809.30(2)(i), STATS., provides: "The trial court shall determine by an order the defendant's motion for postconviction relief within 60 days of its filing or the motion is considered to be denied and the clerk of the trial court shall immediately enter an order denying the motion."

that it had not made an offer for favorable sentence recommendation to Edward Collins, Bradley's co-defendant, in exchange for Collins's testimony; (2) that contrary to the State's representation, the State did in fact make an offer to Collins if he would testify for the State against Bradley; (3) that Collins was instructed not to reveal that the prosecution had made such an offer; (4) that this offer provided Collins with the incentive to lie during the course of his testimony; and (5) that the testimony was of paramount importance in convincing the jury that Bradley was involved in the offenses.

Based on these allegations, Bradley was entitled to a hearing on his postconviction motion. *See Washington*, 176 Wis.2d at 215, 500 N.W.2d at 336. Collins was a key witness against Bradley and the only person who positively identified Bradley as a participant in the robberies. Collins may have been biased in his testimony against Bradley because of the failed plea negotiations. Collins may have believed that he would be treated favorably by the State if his testimony against Bradley was convincing. Given the unusual circumstances--the State's plea offer may have been withdrawn only because the State did not want Collins to testify that he was under an agreement with the State--Collins may have expected leniency if he gave testimony in favor of the State even though the agreement had been withdrawn. Bradley had a right to explore the prosecutor's offer in the presence of the jury to

bring out Collins's motives. *See State v. Lenarchick*, 74 Wis.2d 425, 447, 247 N.W.2d 80, 92 (1976).

We emphasize that a defendant's right to a fair trial is not usually jeopardized when a jury is not informed as to failed plea negotiations; however, this is not the usual case. The State may have tainted the process by conditioning an otherwise legitimate plea offer upon an unlawful condition. Therefore, we direct the trial court to conduct an evidentiary hearing to determine whether Collins's testimony may have been biased because of his knowledge of the failed plea negotiations.

Bradley next contends that he is entitled to sentence credit. When the trial court asked Bradley at sentencing whether he was entitled to credit for time already served, Bradley's attorney did not respond. Because the court received no response, it did not award any credit. Although Bradley moved the court on postconviction motion to credit him for the time already served, the motion was deemed denied because the trial court did not respond within the allotted time.

Where a trial court fails to respond to a defendant's postconviction motion for sentence credit, as was the case here, the appropriate remedy is for the defendant to petition the Department of Corrections for sentence credit. Section 973.155(5), STATS., which is entitled "Sentence credit," provides:

If this section has not been applied at sentencing to any person who is in custody or to any person who is on probation or parole, the person may petition the department to be given credit under this section .... If the department is unable to determine whether credit should be given, or otherwise refuses to award retroactive credit, the person may petition the sentencing court for relief....

Although petitioning the department would usually be the appropriate remedy, in this case the trial court should consider the sentence credit issue on remand since a postconviction motion hearing will be held.

Finally, Bradley argues that he is entitled to resentencing because he received a more lengthy sentence than Collins, his more culpable co-defendant. *See Jung v. State*, 32 Wis.2d 541, 553, 145 N.W.2d 684, 690 (1966) (the Due Process Clause of the Fourteenth Amendment requires "substantially the same sentence for persons having substantially the same case histories"), *cert. denied*, 386 U.S. 999 (1967). Because the trial court will hold a postconviction motion hearing in this case, we decline to rule on this issue. The trial court is better situated to evaluate the factors that bore on the sentencing of these two defendants. Like the previous issue, this should be decided on remand.<sup>3</sup>

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<sup>3</sup> Bradley has moved the court for release on bail pending appeal. Because the trial court will shortly consider Bradley's motions, we conclude that Bradley should petition the trial court for relief. After the trial court decides the postconviction motions, it can better determine whether Bradley is entitled to bail pending resolution of postconviction proceedings.

*By the Court.*—Order reversed and cause remanded with directions.

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