

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0130-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

KENNETH G. HOPKINS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed.*

MYSE, J. Kenneth G. Hopkins appeals a judgment of conviction for two misdemeanors: resisting an officer and disorderly conduct. Hopkins contends that the State failed to prove venue during the trial, that his trial counsel was ineffective, and that the trial court erred by not granting him sentence credit for the time he spent on bond under certain restrictions. Because this court concludes that there is sufficient evidence demonstrating venue, that failure to

request a *Machner*¹ hearing deprives this court of jurisdiction to review his allegations of inadequate counsel, and that the restrictions on bond were insufficient to amount to confinement, the judgment is affirmed.

This case arose as a result of an altercation occurring between Hopkins and two law enforcement officers, officer Christopher Sybers from the Village of Siren and deputy sheriff Matt Olsen of Burnett County. As a result of the altercation, Hopkins was ultimately charged with felony counts of battery to a police officer and attempt to disarm a police officer, and misdemeanor counts of resisting an officer and disorderly conduct. The jury found Hopkins guilty of the two misdemeanor counts and not guilty of the two felony counts. During the course of the trial and closing arguments, Hopkins' attorney had conceded Hopkins guilt of the misdemeanor counts.

Following conviction, the trial court sentenced Hopkins to seven months' confinement in the county jail, the first thirty days without work release privileges, and imposed a \$1,000 fine plus costs. The trial court refused Hopkins' request of credit for time served during his pretrial confinement.

Hopkins first challenges the sufficiency of the evidence to demonstrate venue. As with other challenges to the sufficiency of evidence, this court's review of venue accords great deference to the factfinder. *See, e.g., Widell v. Tollefson*, 158 Wis.2d 674, 684, 462 N.W.2d 910, 913 (Ct. App. 1990). This court will search for credible evidence to sustain the jury's verdict, and accept all reasonable inferences that may be drawn from it. *See Fehring v. Republic Ins. Co.*, 118 Wis.2d 299, 305-06, 347 N.W.2d 595, 598 (1984) *overruled on other*

¹ *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App.1979), discussed *infra*.

grounds by, *DeChant v. Monarch Life Ins. Co.*, 200 Wis.2d 559, 547 N.W.2d 592 (1996). Convictions will not be defeated where proof of venue may be inferred from circumstantial evidence. *Piper v. State*, 202 Wis. 58, 61, 231 N.W. 162, 166-67 (1930).

While no witness specifically indicated that the altercation between Hopkins and the officers occurred in Burnett County, sufficient evidence existed allowing the jury to make this inference. The place where the incident occurred was described by at least three witnesses. Sybers testified that the incident occurred one and one-half miles south of Webster. Olson testified that the incident occurred on Highway 35 about one mile south of Webster. Dean Sandberg, a witness for the State, testified that the incident occurred just south of Webster along Highway 35. The town of Webster is located near the center of Burnett County, approximately ten miles from both north and south county lines. Each of these witnesses therefore placed the location of the incident well within the boundaries of Burnett County. This court therefore concludes that the evidence is sufficient to demonstrate that Burnett County was the proper venue for trial.

Hopkins' second contention is that his attorney was ineffective because he admitted guilt of the misdemeanor charges in his argument to the jury, failed to call character witnesses as to Hopkins' reputation for peacefulness, failed to obtain a psychiatric evaluation, and failed to attack the initial stop of Hopkins' vehicle as unreasonable. As proof of these claims, Hopkins relies solely on an affidavit executed by himself and filed as part of this appeal. No motion challenging defense trial counsel's effectiveness was made; no evidentiary hearing on defense trial counsel's conduct was held.

In asserting a claim for ineffective counsel, Hopkins is obligated to present evidence, inter alia, demonstrating that counsel's conduct did not conform to the standard required. See *State v. Elm*, 201 Wis.2d 452, 461-62, 549 N.W.2d 471, 475 (Ct. App. 1996). To make this demonstration, it is necessary to permit trial counsel to explain himself so this court can determine whether counsel's actions were the result of incompetence or deliberate trial strategies. *State v. Machner*, 92 Wis.2d 797, 804, 285 N.W.2d 905, 908 (Ct. App. 1979). It is the duty of Hopkins to preserve such testimony. See *id.* Because he has failed to do so, his right to review of this issue has been waived. *State v. Mosley*, 201 Wis.2d 36, 547 N.W.2d 806, 812 (Ct. App. 1996).

Hopkins' final contention is that the conditions of his release on bond were sufficiently restrictive to constitute constructive custody, and should be credited as time served. Hopkins' bond conditions permitted him to travel between his home and place of business, and eventually to one restaurant.

Sentence credit is authorized under § 973.155(1)(a), STATS., for "all days spent in custody in connection with the course of conduct for which sentence was imposed." Whether Hopkins is entitled to sentence credit is a matter of statutory construction which this court reviews as a question of law. See *State v. Collett*, 207 Wis.2d 321, 323, 558 N.W.2d 642, 643 (Ct. App. 1996). While electronic monitoring may create circumstances so restrictive as to amount to confinement, the issue is to be decided based upon the specific facts of each case. *Id.* at 324-25, 558 N.W.2d at 644-45.

In order to constitute confinement, the restrictions "must be so substantial as to amount to being locked in at night or its equivalent." *Id.* at 327, 558 N.W.2d at 645. Here, Hopkins was at home, and was allowed to travel to

work and to one restaurant. It cannot be contended that these terms are equivalent to confinement in the county jail. Hopkins had complete freedom of movement within his home and was able to spend an unlimited amount of time tending to his business affairs at his place of business. He was further privileged to move between these two points and the restaurant without restrictions. This court concludes that the trial court did not err by refusing Hopkins credit for time so served. For the forgoing reasons, the judgment is affirmed.

By the Court.—Judgment and order affirmed.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

