COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0508-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKY JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Kenosha County: BRUCE E. SCHROEDER, Judge. *Affirmed in part; reversed in part and cause remanded.*

NETTESHEIM, J. Ricky Jones appeals pro se from a postconviction order which denied his request for a hearing in support of his claim of ineffective assistance of trial counsel and for credit against his prison sentence. We affirm the trial court's rejection of Jones's motion seeking a hearing on his ineffective assistance of counsel claim. However, we reverse the court's rejection

of Jones's sentence credit request without a hearing. We remand for a hearing on that question.

PROCEDURAL HISTORY

This case has a protracted procedural history which has been complicated by Jones's repeated filing of numerous pro se motions, both in the trial court and this court, despite being represented by counsel.

On August 6, 1996, Jones was charged with resisting an officer and operating after revocation (OAR). He was originally represented by appointed counsel, Attorney Karen Sampson-Johnson. On August 14, 1996, citing a breakdown in communication with Jones, Sampson-Johnson asked permission of the trial court to withdraw as Jones's counsel. The court denied this request. However, the court advised Jones that if he filed a written request for a substitution of counsel, the court would consider that request. Jones did not file such a request and Sampson-Johnson continued to represent Jones.

However, on November 4, 1996, Sampson-Johnson renewed her motion to withdraw, again citing a breakdown in communication between her and Jones. This time the trial court granted the request. Attorney Anthony Milisauskas was then appointed to represent Jones. Milisauskas negotiated a plea agreement whereby Jones would plead guilty to both charges in exchange for the State's agreement to recommend concurrent sentences. This plea agreement was formalized at a plea hearing on February 12, 1997. Pursuant to the plea agreement, Jones was convicted of both resisting an officer and OAR. Jones was sentenced as a repeat offender to concurrent three-year terms of imprisonment. The sentences were made consecutive to a prison sentence that Jones was already serving, although the record is unclear as to when the underlying sentence was

imposed. The court took under advisement Jones's request for sentence credit. The court directed the parties to investigate the matter and report back to the court. The ensuing judgment of conviction did not recite any sentence credit.

On February 13, 1997, Milisauskas filed a notice of intent to seek postconviction relief on Jones's behalf. On April 3, 1997, despite being represented by Milisauskas, Jones filed a pro se motion seeking forty-eight days of credit against his sentences. On May 29, 1997, Attorney Margaret Asterlin was appointed to represent Jones for purposes of postconviction relief.

On July 10, 1997, despite being represented by Asterlin, Jones filed a pro se motion seeking release on bail pending appeal. While Jones's pro se motions were pending, Asterlin filed a motion challenging the three-year sentence on Jones's OAR conviction. Asterlin contended that the maximum permitted sentence was six months. At a hearing on August 29, 1997, the trial court granted this motion and reduced Jones's concurrent sentence on the OAR conviction to six months. The court also granted Jones's motion for bail pending appeal and ordered cash bail in the amount of $7500. Jones did not post this bail and he remained in custody for the balance of the proceedings.

On September 9, 1997, despite his representation by Asterlin, Jones filed another pro se motion which raised a host of issues. This motion claimed that: (1) Sampson-Johnson was ineffective for failing to seek a substitution of judge; (2) the trial court had failed to follow the procedures set out in § 971.14, STATS., because there was reason to doubt Jones's competency to proceed; (3) Milisauskas was ineffective for failing to adequately consult with Jones regarding his pleas; (4) the State had incorrectly stated the potential prison terms; (5) the State had failed to adequately provide Jones notice of the prior conviction by

failing to allege the date of the conviction; (6) the trial court had failed to adequately obtain Jones's concession that the prior conviction was within the five-year time limit set out in § 939.62(2), STATS.; (7) Jones did not sufficiently admit to the prior conviction; (8) the element of knowledge as to the resisting charge was not established at the plea hearing; and (9) Sampson-Johnson had improperly continued to represent Jones after he had requested that she withdraw as his trial counsel. With the exception of the last claim, Jones renews all of these arguments on this appeal.

However, this pro se motion was never heard by the trial court. Instead, on November 26, 1997, Asterlin filed a notice of appeal from the judgment of conviction. Although still represented by Asterlin, Jones continued his pattern of pro se filings with both the trial court and this court during the pendency of the appeal. This produced a stream of orders from this court and responses from Jones, Asterlin and the State. Ultimately, Jones requested this court to discharge Asterlin, to permit him to represent himself and to dismiss his appeal so that he might undertake further proceedings in the trial court. We repeatedly warned Jones of the perils of pro se representation. Nonetheless, Jones persisted in his wish to proceed pro se and on January 7, 1998, this court granted Jones's motion to discharge Asterlin and to dismiss his appeal in order to allow him to pursue further postconviction relief in the trial court.

That history brings us to the present matter. On January 8, 1998, Jones filed the postconviction motion which is the subject of this appeal. Jones entitled his motion "Motion To Be Produced, Motion For ***Machner***[1] Hearing,

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

Motion For Jail Credit." In the motion, Jones noted that his pro se motion filed on September 9, 1997, had raised ineffective assistance of counsel issues. Jones's motion also sought credit against his sentences.

The trial court rejected Jones's motion without a hearing. By handwritten notations on Jones's motion, the court stated that it could not consider Jones's request for a ***Machner*** hearing because at the time Jones filed his September 9, 1997 pro se motion, he was represented by counsel. Alternatively, the court ruled that Jones's September 9 motion was "facially meritless." The court also denied Jones's sentence credit request because the sentences in this case were consecutive to a sentence which Jones was already serving. Jones appeals.

DISCUSSION

As we have noted, on this appeal Jones raises seven of the eight issues which he raised in his September 9, 1997 pro se motion. However, as we have also noted, the trial court never ruled on this motion. Instead, Asterlin, who was then representing Jones, proceeded to file a notice of appeal from the judgment. We later granted Jones's request to discharge Asterlin and his further request to dismiss his appeal. Therefore, to the extent that Jones seeks to resurrect in this appeal nearly all the issues he raised in his September 9, 1997 pro se motion, we must reject that attempt. We have nothing to review because that motion was never heard by the trial court.

Therefore, the only issues properly before us are those raised in Jones's January 8, 1998 motion. That motion renewed only two of the eight claims which Jones had raised in his September 9, 1997 pro se motion—his request for a ***Machner*** hearing on his claim of ineffective assistance of counsel

and his request for sentence credit. The trial court's order rejecting this motion is the order appealed, and we confine our decision to a review of that order.

Ineffective Assistance of Counsel

The trial court rejected Jones's request for a ***Machner*** hearing on his claim of ineffective assistance of counsel because at the time Jones originally raised this claim in his September 9, 1997 pro se motion, Jones was represented by counsel. As to Jones's standing to bring his September 9, 1997 motion *at that time*, the court was correct. In ***State v. Debra A.E.***, 188 Wis.2d 111, 138, 523 N.W.2d 727, 737 (1994), the supreme court rejected the notion of "hybrid representation" during postconviction proceedings. The supreme court said that a defendant's choices when dissatisfied with postconviction counsel are to terminate counsel's representation and proceed pro se or to continue with counsel's representation and then to seek relief on grounds of ineffective assistance of appellate counsel. *See* ***id***.

However, when Jones renewed this claim via his January 8, 1998 pro se motion, he was no longer represented by counsel. Thus, Jones was not then in a "hybrid representation" situation. Therefore, we disagree with the trial court that Jones was barred from asserting an ineffective assistance of counsel claim in his January 8, 1998 motion.

Nonetheless, we agree with the trial court's alternative holding that Jones's motion was meritless on its face. Jones's motion alleged that Sampson-Johnson was ineffective because she "proceeded for 6 months thinking that she was precluded from filing motions, planning strategy, etc. before ruling was issued on substitution of judge." These conclusory allegations do not suffice to state a basis for relief. *See* ***State v. Bentley***, 210 Wis.2d 303, 313, 548 N.W.2d 50, 54

(1996). Jones's allegations do not advise as to what motions counsel should have filed or what strategy counsel should have pursued. Moreover, Jones's motion is completely silent as to any prejudice. Jones failed to support his motion with the requisite objective factual assertions. *See* ***id***.

The same is true as to Jones's allegations against Milisauskas. Jones alleged that Milisauskas did not sufficiently consult with him regarding the plea and that Milisauskas reviewed the jury instruction regarding the charge of obstructing, not the charge of resisting to which Jones pled guilty. Again, these are conclusory allegations. Jones fails to recite what Milisauskas stated regarding the elements of the offense or what the jury instruction used by Milisauskas actually stated. This is important given the substantial similarity and the subtle differences between the crimes of obstructing and resisting an officer. *See* § 946.41(1), STATS. Moreover, we note that the waiver of rights form signed by Jones and Milisauskas recites the elements of resisting—not obstructing. And again, Jones makes no claim or showing of prejudice. Even in the face of sufficient factual allegations, a postconviction motion may be rejected without a hearing "if the record conclusively demonstrates that the defendant is not entitled to relief." ***Bentley***, 210 Wis.2d at 309-10, 548 N.W.2d at 53.

We affirm the trial court's rejection of Jones's ineffective assistance of counsel claims without a hearing.

Sentence Credit

As we have previously noted, the trial court expressly reserved a ruling on Jones's request for sentence credit at the sentencing proceeding. The court directed Milisauskas to investigate the matter and then report the result of his investigation to the State. If the parties could agree on the amount of credit to

which Jones was entitled, they were directed to submit that agreement to the trial court. If they could not agree, the court stated it would resolve the matter. Later, Jones made a pro se request for forty-eight days of presentence credit. Despite the trial court's assurance that it would resolve the matter, the appellate record does not show any trial court proceeding at which the question of Jones's sentence credit request has been meaningfully addressed.

In its appellate brief, the State concedes that Jones is entitled to five days of credit. The State contends that any further credit beyond this would constitute improper dual credit under ***State v. Boettcher***, 144 Wis.2d 86, 90, 423 N.W.2d 533, 535 (1988). The State's computation is based on an examination of a court file in a Racine county case which produced the sentence which Jones was apparently serving when he was sentenced in this case. But, as the State candidly acknowledges, that file is not part of the record in this case.

The trial court rejected Jones's credit request without a hearing, noting that sentences in this case were "consecutive." This suggests that the court construed Jones's request as an improper request for dual credit under ***Boettcher***. However, consecutive sentences do not bar sentence credit per se. Rather, what the law bars is dual credit. Jones's motion to the trial court, repeated in his appellate brief to us, contends that although he was released on bail from the Racine county charge, he nonetheless remained in custody in this case. What is unclear under the present state of the record is whether Jones was at liberty in the Racine county case for any of the time period in which he was incarcerated in this case. The State apparently thinks so, at least as to a portion of Jones's credit request. But given the lack of an adequate record, we are unable to say with certainty whether the State's analysis is correct.

At sentencing, the trial court prudently deferred the question of credit until the parties presented the court with sufficient information. If the parties could not agree on this question, the trial court said that it would resolve the matter. The court should now do that.

We reverse the trial court's rejection of Jones's motion and remand for a hearing on the question of the proper sentence credit, if any.[2]

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. *See* Rule 809.23(1)(b)4, STATS.

[2] We leave it to the discretion of the trial court as to whether Jones's presence is required at the remand hearing.