

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 2, 1999

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. 99-0647-CR
99-0648-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JAMES GULLEY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
EDWIN C. DAHLBERG, Judge. *Reversed and cause remanded with directions.*

Before Eich, Roggensack and Deininger, JJ.

¶1 PER CURIAM. James Gulley appeals from an order denying his postconviction motion for additional sentence credit. He claims the trial court improperly denied him credit for time he spent in jail simultaneously awaiting trial and sentencing on charges in two separate cases for which concurrent sentences

were ultimately imposed. We agree, and therefore reverse the trial court's order denying relief and remand with directions that the credit be granted in accordance with this opinion.

BACKGROUND

¶2 On December 7, 1992, Gulley was among a group of men who fired a gun into a residence occupied by three people and then led police on a high speed chase. He was arrested and charged with three counts of recklessly endangering safety, with a weapon, as a repeat offender, based on that incident.¹ On April 5, 1993, he was released from custody pursuant to a speedy trial motion. After he failed to appear for his trial, however, a warrant was issued for his arrest. He was apprehended in Illinois and held in custody there for thirty-eight days pending extradition.²

¶3 Gulley was again arrested in Wisconsin and brought before the court on July 15, 1994, to face the reckless endangerment charges. At that time, the State added two additional charges of possession of a firearm by a felon and obstructing an officer, both relating back to the events of December 7, 1992. A jury found Gulley guilty of the three counts of reckless endangerment on December 9, 1994. On February 13, 1995, Gulley pleaded no contest to the charges of obstruction of an officer and possession of a firearm by a felon.

¶4 On March 28, 1995, the trial court sentenced Gulley to two years in prison for the possession of a firearm conviction and to a consecutive nine-month

¹ An additional charge was later dismissed.

² For reasons not relevant here, Illinois eventually released Gulley without extradition.

prison term for the obstruction conviction. On April 5, 1995, the trial court sentenced Gulley to consecutive nine-year prison terms on two of the reckless endangerment convictions, and withheld sentence and placed Gulley on probation for the third conviction. The reckless endangerment sentences were to be served concurrently with the sentences imposed on the firearm and obstruction convictions.

¶5 The trial court awarded Gulley 255 days of sentence credit on the firearm and obstruction convictions, representing the entire time between July 15, 1994 and March 28, 1995, during which he had been held in jail on those charges. The trial court awarded Gulley 156 days of sentence credit on the reckless endangerment convictions, representing the original 118 days Gulley spent in jail awaiting trial, from December 7, 1992 until April 5, 1993, plus the thirty-eight days he spent in custody in Illinois, awaiting extradition after he had absconded. The trial court refused to award Gulley credit on the reckless endangerment convictions for the 255 days he had spent in custody between July 15, 1994 and March 28, 1995, apparently because he had already been given credit for that time on the firearm and obstruction convictions.

¶6 Gulley unsuccessfully appealed the reckless endangerment convictions on grounds of evidentiary error and ineffective assistance of counsel. He subsequently filed three *pro se* motions, including the present motion for additional presentence credit on the reckless endangerment convictions. For the first time on appeal, he also argues that the trial court illegally imposed an additional penalty for habitual criminality, after the State had dismissed one or more of the habitual criminality allegations.

STANDARD OF REVIEW

¶7 As a preliminary matter, the State contends that this appeal should be procedurally barred under *State v. Escalona-Naranjo*, 185 Wis.2d 168, 185, 517 N.W.2d 157, 164 (1994), because Gully did not raise the sentence credit or habitual criminality issues in his prior appeal. *Escalona-Naranjo* generally³ requires all grounds for postconviction relief to be raised in a single proceeding, absent good cause. We note, however, that Gulley was never afforded an opportunity to present the trial court with evidence on the question of whether he had good cause, such as ineffective assistance of counsel, for failing to raise the sentence credit issue earlier. Therefore, we decline to apply the procedural bar set forth in *Escalona-Naranjo*, and will address the merits of Gulley's claim on that issue. See *State v. Avery*, 213 Wis.2d 228, 570 N.W.2d 573 (Ct. App. 1997). As there is no factual dispute over the dates on which Gulley was in custody, we will determine *de novo* the appropriate amount of sentence credit. See *State v. Abbott*, 207 Wis.2d 624, 628, 558 N.W.2d 927, 928 (Ct. App. 1996).

¶8 We need not consider the application of *Escalona-Naranjo* to the habitual criminality issue because we agree with the State's alternate contention that Gulley has failed to preserve the issue for review by first bringing it to the

³ This court has recognized at least one exception to *Escalona-Naranjo*. See *State v. Flowers*, 221 Wis.2d 20, 586 N.W.2d 175 (Ct. App. 1998), *review denied*, 222 Wis.2d 675, 589 N.W.2d 630 (1998) (allowing a challenge to the validity of an enhanced penalty for habitual criminality to be raised in a successive postconviction motion without a showing of good cause). Moreover, it appears to be an open question whether *Escalona-Naranjo* has extended the statutory bar to successive motions brought under § 974.06, STATS., claiming sentence credit under § 973.155, STATS. However, because neither party raises the issue of the applicability of *Escalona-Naranjo* to sentence credit motions, we do not address it here.

trial court's attention.⁴ See *State v. Hayes*, 167 Wis.2d 423, 425-26, 481 N.W.2d 699, 700 (Ct. App. 1992); § 974.02(2), STATS.

DISCUSSION

¶9 Section 973.155(1)(a), STATS., provides that an “offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which [the] sentence was imposed,” including time spent awaiting trial, being tried, and awaiting sentence.

¶10 The State contends that Gulley was not being held for the charges of reckless endangerment between July 15, 1994 and March 28, 1995, but only for firearm possession and obstruction. Therefore, it claims, that period of incarceration did not arise out of the same course of conduct as the reckless endangerment charges. The record, however, plainly contradicts the State's assertion. The transcript from a hearing held on July 15, 1994, shows that the trial court set cash bond in the amount of \$5,000 on each of the reckless endangerment charges. Therefore, Gulley *was* being held in custody on the reckless endangerment charges between July 15, 1994 and March 28, 1995, as well as on the other charges.

¶11 Because the sentences imposed on the reckless endangerment convictions were to run concurrently with the sentences on the firearm possession and obstruction convictions, dual credit is appropriate. See *State v. Boettcher*, 144

⁴ Furthermore, there could be no prejudice even if the judgment of conviction did erroneously include a habituality allegation which had been dismissed, because the nine-year sentences imposed on counts one and two did not exceed the five-year penalty proscribed for a Class D felony under § 939.50(3)(d), STATS., plus the four-year enhancer proscribed for using a dangerous weapon under § 939.63(1)(a)3, STATS.

Wis.2d 86, 99-100, 423 N.W.2d 533, 539 (1988). Gulley is therefore entitled to an additional 255 days of sentence credit on the reckless endangerment convictions. Gulley is not, however, entitled to any additional credit for the time he spent in custody awaiting sentencing between March 28, 1995 and April 5, 1995, because by that time he was serving another sentence for an unrelated crime. *See State v. Amos*, 153 Wis.2d 257, 280-81, 450 N.W.2d 503, 512 (Ct. App. 1989).

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

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

