

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2009

David R. Schanker
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 No. 2008AP2399-CR

Cir. Ct. No. 2006CF4609

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY SEAN GORAK,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
TIMOTHY M. WITKOWIAK, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Gregory Sean Gorak appeals from an order denying his motion to reconsider an order denying his motion for sentence credit. The issues are whether Gorak was entitled to sentence credit on the six-year sentence (imposed for his possession of a Molotov cocktail), whether that sentence

was imposed illegally, and whether the trial court violated Gorak's rights to equal protection and due process by denying him the sentence credit he seeks. We conclude that Gorak is not entitled to sentence credit on the six-year sentence because it was imposed consecutively to a 118-month federal sentence for which he is entitled to that same credit; that sentence was not imposed illegally, and his constitutional claims that are dependent on his sentence credit issue that we now reject also necessarily fail. Therefore, we affirm.

¶2 Gorak pled guilty to possessing a Molotov cocktail as a party to the crime, in violation of WIS. STAT. §§ 943.06(2) (2005-06) and 939.05 (2005-06), and to carrying a concealed weapon, in violation of WIS. STAT. § 941.23 (2005-06); he also entered a no-contest plea to burglary, in violation of WIS. STAT. § 943.10 (2005-06).¹ For the Molotov cocktail conviction, the trial court imposed a six-year sentence comprised of three-year periods of initial confinement and extended supervision. That sentence was imposed to run consecutively to a 118-month federal sentence imposed the previous day. For carrying a concealed weapon, the trial court imposed a nine-month sentence, and for the burglary, the trial court imposed a ten-year sentence comprised of five-year respective periods of initial confinement and extended supervision. Those sentences were imposed to run concurrently to each other and to the Molotov cocktail and federal sentences.

¶3 Gorak moved for 318 days of sentence credit on each of the three state sentences. The trial court granted sentence credit on the concurrent sentences

¹ A no-contest plea means that the defendant does not claim innocence, but rather refuses to admit guilt. *See* WIS. STAT. § 971.06(1)(c) (2005-06); *see also Cross v. State*, 45 Wis. 2d 593, 599, 173 N.W.2d 589 (1970). All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

for burglary and carrying a concealed weapon.² The trial court denied credit on the Molotov cocktail (“count two”) sentence because it was imposed consecutive to a federal sentence. Gorak moved for reconsideration, seeking correlative sentence credit for the count two sentence and also for the trial court to expressly designate that sentence as running concurrent to the burglary sentence, rather than as consecutive to the federal sentence. The trial court denied reconsideration. Gorak appeals.

¶4 Gorak’s principal claim is that he is entitled to sentence credit on the count two sentence. He also contends that although that sentence was imposed to run consecutive to the federal sentence, the concurrent structure of the burglary and carrying a concealed weapon sentences renders the count two sentence concurrent to those sentences; he also seeks the consecutive designation on that sentence to be modified to concurrent. He further contends that the denial of sentence credit constitutes the denial of his constitutional rights to equal protection and due process. Incident to his constitutional contentions, he also claims that he is entitled to plea withdrawal, resentencing (for a different reason than his claim for sentence credit), and to rescind a no-contact order against an individual who is now deceased. We address Gorak’s principal claim seeking sentence credit first because our decision on that claim disposes of most of his other claims.

¶5 WISCONSIN STAT. § 973.155(1)(a) entitles “[a] convicted offender ... [to] credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.” The

² The trial court actually ordered a time-served disposition on the nine-month concurrent sentence for carrying a concealed weapon and ordered the sentence credit requested on the concurrent burglary sentence.

State does not dispute that the federal and three state convictions all involve the same “course of conduct.” There also is agreement that Gorak has been in custody for this course of conduct since July 25, 2006. The dispute centers on whether Gorak is entitled to sentence credit on the count two sentence that was imposed consecutively to the federal sentence.

¶6 A defendant is entitled to one day of sentence credit for each day served, but credit “is not to be duplicatively [given] to more than one of the sentences imposed to run consecutively.” *State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

[C]ustody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences. For ease in calculation and clarity in respect to subsequent exercise of court discretion, the credits should be applied to the sentence that is first imposed.

Id. at 100. The application of sentence credit is reviewed independently of and without deference to the trial court’s decision. *See State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶7 The trial court’s decisions, however, are instructive.³ The trial court granted sentence credit for the burglary and carrying a concealed weapon sentences, it denied credit for the count two sentence. It denied sentence credit because that sentence was imposed consecutively to the federal sentence and

³ The trial court denied Gorak’s motions for sentence credit, and subsequently, for reconsideration. We address both orders, as the former offers context for the latter.

awarding dual credit is not permissible.⁴ See *Boettcher*, 144 Wis. 2d at 87. The trial court reiterated that reasoning and authority when it denied Gorak's reconsideration motion. On reconsideration, Gorak also seeks the reclassification of the count two sentence from consecutive to concurrent because the sentence is concurrent to the other state court sentences (for burglary and carrying a concealed weapon). The trial court denied that reclassification request because it "cannot ignore the consecutive designation" given to that sentence by the trial court when it imposed that sentence.

¶8 It is undisputed that the federal sentence was imposed "first," and the state court sentences were imposed (one day) later. The trial court imposed the count two sentence consecutively to the federal sentence; it imposed the other two sentences (for burglary and carrying a concealed weapon) concurrently to each other and to the count two sentence. The trial court, in denying sentence credit initially, explained that "[t]he defendant would have received credit towards his federal sentence, and he is not entitled to duplicate credit on the consecutive sentence imposed in state court on count two." Gorak does not challenge that explanation, nor does he claim that he was not entitled to sentence credit on the federal sentence. As *Boettcher* explains, credit is applied to the sentence imposed first. See *id.* at 100. In Gorak's situation, the federal sentence was imposed first, and it is that sentence for which he has/may receive(d) credit. See *id.* If credit were awarded on the count two sentence he would be receiving dual credit: once on the federal sentence, and again on the count two sentence. The latter sentence

⁴ The order denying the motion for sentence credit, as opposed to reconsideration, was decided by the Honorable William Sosnay.

was imposed consecutively to the former. Gorak is entitled to credit for one of those consecutive sentences, namely the first (federal) sentence. *See id.*

¶9 Gorak also seeks reclassification of the count two sentence from consecutive to concurrent because, although the trial court expressly imposed that sentence to run consecutive to the federal sentence, it effectively was imposed concurrently to the other state court (burglary and carrying a concealed weapon) sentences. The trial court imposed the sentence to run consecutive to the federal sentence; reclassification would ignore the trial court's pronouncement. Reclassification would also circumvent *Boettcher*'s preclusion against awarding dual credit; that is not what was contemplated by the trial court when it imposed that sentence to run consecutively. The fact that imposition of the other sentences to run concurrently may effectively alter that sentence to run concurrently to the other state court sentences does not alter the fact or consequence of the imposition of that sentence to run consecutively to the federal sentence.

¶10 Gorak contends that the imposition of this sentence consecutively (to the federal sentence) when it effectively runs concurrently (to the state sentences) results in a split sentence (a sentence imposed to run consecutively in part and concurrently in part) that is prohibited by *State v. Bagnall*, 61 Wis. 2d 297, 312, 212 N.W.2d 122 (1973), *modified on other grounds by State v. Rabe*, 96 Wis. 2d 48, 55-60, 291 N.W.2d 809 (1980). Notwithstanding Gorak's contention to the contrary, the count two sentence was imposed to run consecutively to the federal sentence; the fact that the other state sentences were imposed to run concurrently to that sentence does not render it a split sentence. For the same reasons that we reject Gorak's reclassification contention, we also reject his contention that the count two sentence was imposed illegally.

¶11 Gorak also contends that he was denied his constitutional right to equal protection and due process by the denial of sentence credit. Our rejection of his sentence credit challenges necessarily defeats his dependent constitutional challenges.

¶12 Gorak also raises for the first time on appeal, that he is entitled to plea withdrawal, sentence modification (for a challenge unrelated to sentence credit), and vacatur of the no-contact order. His failure to raise these issues in the trial court constitutes waiver, as the trial court never had the opportunity to rule on these issues in the first instance. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (generally, an appellate court will not consider an issue raised for the first time on appeal), *superseded on other grounds by* WIS. STAT. § 895.52.⁵

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).

⁵ Additionally, Gorak fails to substantiate his sentencing and no-contact challenges; his plea withdrawal challenge is belied by the record.

