COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2618-CR **Cir. Ct. No. 1996CF960674**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN DAVID TIGGS, A/K/A A'KINBO J.S. HASHIM,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: PAUL R. VAN GRUNSVEN and JEFFREY A. WAGNER, Judges. *Affirmed*.

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

¶1 PER CURIAM. John David Tiggs, *pro se*, appeals from orders of the circuit court, denying him sentence credit and denying his motion for sentence modification. We affirm.

BACKGROUND

¶2 In March 1996, Tiggs pled guilty to two counts of armed robbery in Milwaukee County. He was sentenced to 112 months' imprisonment, or nine years and four months, on count one. On count two, he was sentenced to a consecutive fifteen years' imprisonment, though that sentence was stayed in favor of a concurrent fifteen-year term of probation. Tiggs was released from confinement on December 18, 2007, after also serving consecutive sentences from Racine and Grant Counties; he remained on probation in the Milwaukee County case.

¶3 On June 25, 2008, Tiggs was arrested on sexual assault and battery charges. His probation was revoked, and the administrative law judge awarded Tiggs sentence credit from June 25, 2008, "until his receipt at the institution." In Tiggs's most recent appeal, we reversed and remanded that part of the circuit court order that refused to review the credit award because we were unable to discern from the Record the date of Tiggs's "receipt at the institution." *See* ***State v. Tiggs***, No. 2010AP2873-CR, unpublished slip op. ¶15 (WI App May 1, 2012).

¶4 On October 19, 2012, the circuit court entered an order denying any additional credit.[1] It determined that Tiggs had been received at the institution on March 17, 2009, but also determined that Tiggs had been appropriately credited for that time. In a footnote, the circuit court also declined to grant Tiggs 112 months' sentence credit for time served on the first armed robbery conviction

[1] This order was entered by the Honorable Paul R. Van Grunsven.

against the now-imposed, previously stayed fifteen-year sentence for the second armed robbery conviction.

¶5 On November 7, 2012, Tiggs moved for sentence modification in the circuit court, alleging a "new factor." Specifically, Tiggs claimed his original sentence structure was an "unconstitutional application" of the statutes. The circuit court denied the motion as patently frivolous.[2]

DISCUSSION

I. Sentence Credit

¶6 In his main appellate brief, Tiggs does not address the circuit court's specific findings on remand regarding the credit ordered by the administrative law judge.[3] Instead, he claims an additional sixty-nine days credit based on the original judgment of conviction.[4] Tiggs also seeks 112 months' credit for time served on the first armed robbery conviction. Tiggs is not entitled to either amount of credit.

¶7 Tiggs's basis for claiming the sixty-nine days credit is based on language in the judgment of conviction for count one. Near the middle of the page, the judgment recites that Tiggs is "sentenced to prison for one-hundred twelve (112) months, credit for 69 days." (Formatting in original.) Tiggs does not

[2] This order was entered by the Honorable Jeffrey A. Wagner, who, coincidentally, had originally imposed Tiggs's sentences in 1996.

[3] Accordingly, we accept the State's analysis demonstrating why the circuit court was correct to conclude the administrative law judge had already properly credited Tiggs for the period of time between June 25, 2008, and March 17, 2009.

[4] It does not appear that the sixty-nine days' credit was raised in the circuit court.

claim he did not receive this credit against his first sentence. Near the bottom of the judgment of conviction is a line that says, "IT IS ADJUDGED that days sentence credit are due pursuant to s.973.155 Wis. Stats. and shall be credited if on probation and it is revoked[.]" Tiggs believes this means he is also entitled credit on count two's sentence because he was on probation and it was revoked.

¶8 The judgment of conviction upon which Tiggs relies imposed the sentence for count one only. There was no probationary sentence for count one, so there is no sentence against which the credit would be applicable if Tiggs were "on probation and it is revoked."[5] We presume instead that the sixty-nine days' credit was appropriately applied against the period of incarceration for count one. Thus, crediting Tiggs on count two with sixty-nine days that have presumably been credited against the sentence for count one would result in double credit to which Tiggs is not entitled. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533, 534 (1988).

¶9 As for Tiggs's claim that he is entitled to 112 months' credit for time served on count one, his imprisonment terms were ordered to be consecutive. He does not get credit against the second term for time served on the first term, even though he was concurrently serving probation on the second count. *See* ***ibid.*** To be eligible for sentence credit, a defendant must be in custody "'in connection with the course of conduct for which sentence was imposed.'" *See* ***State v. Johnson***, 2009 WI 57, ¶32, 318 Wis. 2d 21, 38, 767 N.W.2d 207, 216 (citing WIS. STAT. § 973.155(1)(a)). Tiggs's 112 months in custody were for his conduct relating to

[5] The line is missing any specification of the amount of credit; Tiggs reads it in from the earlier section.

count one, not count two. *See* ***Johnson***, 2009 WI 57, ¶76, 318 Wis. 2d at 54, 767 N.W.2d at 223 ("The fact that sentences are concurrent and are imposed at the same time does not alter the statutory mandate that credit toward service of a sentence be based on custody is 'in connection with' the course of conduct giving rise to that sentence[.]"). Tiggs will not receive dual credit.

II. Illegal Sentence

¶10 Tiggs also sought sentence modification on an alleged "new factor"—that his sentence structure was illegal. Tiggs believes that WIS. STAT. §§ 973.09(1)(a) & 973.15(2)(a) required the circuit court to order his term of probation be served consecutively, rather than concurrently.

¶11 WISCONSIN STAT. § 973.09(1)(a) provides, in relevant part:

> [I]f a person is convicted of a crime, the court, by order, may withhold sentence or impose sentence under s. 973.15 and stay its execution, and in either case place the person on probation to the department for a stated period…. The period of probation may be made consecutive to a sentence on a different charge, whether imposed at the same time or previously.

WISCONSIN STAT. § 973.15(2)(a) allows a circuit court to "impose as many sentences as there are convictions and may provide that any such sentence be concurrent with or consecutive to any other sentence imposed at the same time or previously."

¶12 Tiggs appears to believe that the two statutes must be read together and, because WIS. STAT. § 973.15(2)(a) provides that a sentence may be concurrent *or* consecutive, it was wrong of the circuit court to make his imposed

and stayed sentence consecutive when the probation was concurrent.[6] Tiggs is incorrect.

¶13 WISCONSIN STAT. § 973.15(2)(a) allows the circuit court to make a sentence concurrent or consecutive. WISCONSIN STAT. § 973.09(1)(a) then allows the circuit court to stay the sentence so that it can impose probation. During the stay, the sentence has no effect—it is neither concurrent nor consecutive—and, if the probationer is successfully discharged, the sentence will never have to be served. But the circuit court is also allowed to set parameters for the probationary term. While § 973.09(1)(a) allows the circuit court to make the term consecutive, it does not prohibit the term from being concurrent. Nothing in § 973.09(1)(a), alone or in combination with § 973.15(2)(a), requires the probationary term's structure to match the imposed-and-stayed sentence's structure.[7] Indeed, the same sentence structure that Tiggs received—two consecutive prison terms, the longer one imposed and stayed for concurrent probation—was affirmed in ***State v. Aytch***, 154 Wis. 2d 508, 453 N.W.2d 906 (Ct. App. 1990).

¶14 In any event, we also note that under no circumstances is this allegedly "unconstitutional" sentence structure a new factor. A new factor is a fact

[6] Tiggs accuses the circuit court—specifically, Judge Wagner—of ignoring the statutes seventeen years ago, and asserts, "This type of judicial arrogance is utterly ineffatable [*sic*] and explains the backlog of the Higher Courts sorting through the too frequent sentence quandaries created by the overimaginative sitting circuit court judges." We caution Tiggs that a cardinal rule of effective appellate writing is to avoid disparaging the court. *See* ***State v. Rossmanith***, 146 Wis. 2d 89, 89, 430 N.W.2d 93, 93 (1988) (per curiam).

[7] It is also not clear why Tiggs believes this matters. If his probation had been consecutive rather than concurrent, he would still have been serving it when he was arrested in 2008. It would presumably still have been revoked, he would still have started his imposed-and-stayed fifteen-year sentence, and he would still not be entitled to any sentence credit for time served on the first armed robbery conviction.

or set of facts that is "highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69, 73 (1975); *see also* ***State v. Harbor***, 2011 WI 28, ¶40, 333 Wis. 2d 53, 74, 797 N.W.2d 828, 838. If the sentence structure was unconstitutional, it was unconstitutional at the time it was imposed and Tiggs could have objected at the time of original sentencing. Though Tiggs blames the circuit court for overlooking the illegality, the new factor must have been unknown to the circuit court *and* unknowingly overlooked *by the parties*. Tiggs never claims that either party unknowingly overlooked the issue, so he has failed to identify a new factor.[8]

By the Court.—Orders affirmed.

This opinion shall not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[8] Although we stress, of course, that there actually was no unconstitutional sentence issue that required objection.