

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2015

Diane M. Fremgen
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. 2014AP2697-CR

Cir. Ct. No. 2011CF1315

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOSE M. NIETO,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: TAMMY JO HOCK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Jose Nieto appeals a judgment sentencing him to five years' initial confinement and five years' extended supervision and an order denying his motion for sentence credit. He contends he is entitled to 301 days of sentence credit because his trial attorney was ineffective for failing to seek

revocation of his bail after Nieto was charged with additional offenses. The circuit court denied the motion without a hearing. We affirm the judgment and order.

¶2 In circuit court case No. 2011CF1315, Nieto was charged with several drug offenses and was eventually released on \$10,000 bail. Fourteen months later, after suppression motions were denied and trial dates were set, Nieto was charged in case No. 2013CF80 with additional offense, and held on \$50,000 cash bail on the new offenses. Neither his attorney at that time nor replacement counsel sought revocation of Nieto's bail in 2011CF1315. As a result, after Nieto entered no contest pleas in both cases and the court imposed concurrent sentences in each case, Nieto did not receive 301 days' sentence credit on the sentences imposed in 2011CF1315 for the time he was confined on the \$50,000 cash bail until his plea and sentencing. *See State v. Johnson*, 2009 WI 57, ¶33, 318 Wis. 2d 21, 767 N.W.2d 207; *State v. Beiersdorf*, 208 Wis. 2d 492, 498-99, 561 N.W.2d 749 (Ct. App. 1997). Nieto contends his trial counsel was ineffective for failing to move for revocation of his bail in 2011CF1315 and failing to advise him of the sentence credit implications of that decision, and the circuit court erred by denying his motion without a hearing

¶3 A defendant alleging ineffective assistance of counsel must establish both deficient performance and prejudice to his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The circuit court may deny a postconviction motion without a hearing if the motion fails to provide sufficient detail for the court to meaningfully assess the claim or if the record conclusively demonstrates that the defendant would not be entitled to relief. *State v. Balliette*, 2011 WI 79, ¶¶50, 58, 78, 336 Wis. 2d 358, 805 N.W.2d 334. Whether the motion is sufficient to require a hearing is a question of law that this court reviews independently. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶4 Nieto's motion was properly denied without a hearing for several reasons. First, he faults his attorneys' failure to seek revocation of bail using the skewed perspective that results from hindsight. *See Balliette*, 336 Wis. 2d 358, ¶25. His attorneys had no reason to believe the court would impose concurrent sentences for a defendant who committed additional crimes while released on bail. If the court had imposed consecutive sentences, Nieto would not have been entitled to dual credit, *see State v. Boettcher*, 144 Wis. 2d 86, 99, 423 N.W.2d 533 (1988), and he would have received no benefit from forfeiture of the \$10,000. Nieto contends his bail could have been revoked without having this money forfeited. WISCONSIN STAT. § 969.13(1)¹ requires forfeiture of bail if a defendant fails to comply with the conditions of bond. Subsection (2) allows the court to set aside the forfeiture of bail if justice requires. Nothing in the record suggests that justice would require setting aside the forfeiture. Therefore, counsels' failure to seek revocation of bail, thereby calling to the court's attention Nieto's failure to comply with the conditions of bond, would constitute a reasonable strategic decision that does not fall below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687.

¶5 Second, Nieto's motion does not allege he would have forfeited bail in order to be eligible for additional sentence credit. While it might be apparent that a defendant would trade \$10,000 for 301 days of prison time, it is not self-evident that he would pay \$10,000 for the additional sentence credit if he believed he would be acquitted, if consecutive sentences might be imposed or if, as

¹ All references to the Wisconsin Statutes are to the 2013-14 version.

addressed below, the number of days of sentence credit might be substantially less than 301.

¶6 Third, Nieto does not allege when the allegedly deficient performance occurred. He assumes his counsel would have known from the date of the complaint in case No. 2013CF80 that the charges in case No. 2011CF1315 would not be resolved for 301 days. Had those charges been quickly resolved by a trial or pleas, the relative value of forfeiting the \$10,000 bond would be greatly reduced.

¶7 Fourth, Nieto maintained his innocence and demanded a trial. If he had been found not guilty, he would have forfeited the \$10,000 for nothing.

¶8 Finally, the reason a defendant receives sentence credit for pretrial incarceration is to provide equal treatment for defendants who are not financially able to post bail. *See State v. Floyd*, 2000 WI 14, ¶¶21-22, 232 Wis. 2d 767, 606 N.W.2d 155. A defendant who is financially able to post bail and does so, and then seeks revocation of his bail, would arguably not fall within the purview of the sentence credit statute. No court interpreting WIS. STAT. § 973.155 has held that a defendant's request to revoke bail would mean he is in custody in connection with the initial criminal conduct. Because the law is not settled on that question, counsel was not deficient for failing to raise the issue. *See State v. McMahon*, 186 Wis. 2d 68, 84, 519 N.W.2d 621 (Ct. App. 1994).

¶9 Because we conclude Nieto's motion fails to establish deficient performance by either of his trial attorneys, we need not address whether he was prejudiced by his counsels' actions. *See Strickland*, 466 U.S. at 697.

By the Court.—Judgment and order affirmed.

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

