

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2017

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. 2015AP2182-CRAC

Cir. Ct. No. 2005CF285

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

STEVEN F. ZASTROW,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Outagamie County:
MARK J. MCGINNIS, Judge. *Reversed and cause remanded with directions.*

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

¶1 SEIDL, J. Steven Zastrow appeals an order denying his motion for postconviction relief. He argues the Department of Corrections (DOC) erroneously calculated the date of his release to extended supervision when it determined his prison sentence in Outagamie County case No. 2002CF1013 began

on January 31, 2008—the date his sentence in Winnebago County case No. 2005CF158 was vacated. We conclude Zastrow’s prison sentence in Outagamie County case No. 2005CF285—the only Outagamie County case he appeals and which sentence was consecutive to the imposed sentence in Outagamie County case No. 2002CF1013—began on October 18, 2013. We therefore reverse the order denying postconviction relief and remand to the circuit court with directions that the DOC recalculate the date of Zastrow’s release to extended supervision.

BACKGROUND¹

¶2 On June 20, 2006, Zastrow was sentenced to two years’ initial confinement and two years’ extended supervision in Winnebago County case No. 2005CF158. On October 18, 2006, Zastrow was sentenced to a total of eleven years’ initial confinement and fourteen years’ extended supervision in five Outagamie County cases. As relevant here, Zastrow was sentenced to a total of five years’ initial confinement and four years’ extended supervision in Outagamie County case No. 2002CF1013, which was ordered to be served consecutive to the Winnebago County sentence. Zastrow was also sentenced to a total of two years’ initial confinement and four years’ extended supervision in Outagamie County case No. 2005CF284, which was to be served consecutive to the sentence in

¹ On appeal, Zastrow relies on information contained in his appendix that is not in the record. The appendix is not the record. *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, ¶1 n.2, 302 Wis. 2d 245, 733 N.W.2d 322. This opinion relies only upon facts contained in the record.

Outagamie County case No. 2002CF1013.² Zastrow was sentenced to a total of four years' initial confinement and six years' extended supervision in Outagamie County case No. 2005CF285, which was to be served consecutive to his other sentences.³

¶3 On January 31, 2008, Zastrow's sentence in Winnebago County case No. 2005CF158 was vacated. The Winnebago County Circuit Court then imposed and stayed a sentence of two years' initial confinement and two years' extended supervision, and it placed Zastrow on three years' probation to be served consecutive to his sentences in the five Outagamie County cases.

¶4 In May 2015, the DOC determined Zastrow's prison sentence in Outagamie County case No. 2002CF1013 began on January 31, 2008—the date his sentence in Winnebago County case No. 2005CF158 was vacated—and recalculated the date of Zastrow's release to extended supervision based on this determination. Zastrow subsequently moved for postconviction relief before the Outagamie County Circuit Court. The circuit court denied his motion. Zastrow now appeals.

² The Outagamie County Circuit Court did not specifically order Zastrow's sentence in Outagamie County case No. 2005CF284 to be served consecutive to his sentence in Winnebago County case No. 2005CF158. However, the circuit court ordered: (1) Zastrow's sentence in Outagamie County case No. 2005CF284 to be served consecutive to his sentence in Outagamie County case No. 2002CF1013; and (2) Zastrow's sentence in Outagamie County case No. 2002CF1013 to be served consecutive to his sentence in Winnebago County case No. 2005CF158. As a result, the circuit court effectively ordered Zastrow's sentence in Outagamie County case No. 2005CF284 to be served consecutive to his sentence in Winnebago County case No. 2005CF158.

³ Zastrow was also sentenced to a total of two years' initial confinement and two years' extended supervision in Outagamie County case No. 2006CF320, which was to be served concurrent to his other sentences. Finally, Zastrow was sentenced to a total of two years' initial confinement and two years' extended supervision in Outagamie County case No. 2006CF327, which also was to be served concurrent to his other sentences.

DISCUSSION

¶5 Zastrow argues the DOC erroneously calculated the date of his release to extended supervision in Outagamie County case No. 2005CF285 when it determined his prison sentence in Outagamie County case No. 2002CF1013 began on January 31, 2008—the date his sentence in Winnebago County case No. 2005CF158 was vacated.⁴ Specifically, Zastrow argues his prison sentence in Outagamie County case No. 2002CF1013 began on October 18, 2006, the date that sentence was imposed.

¶6 Zastrow’s sentence in Outagamie County case No. 2002CF1013 was ordered to be served consecutive to the Winnebago County sentence. However, when the Winnebago County sentence was vacated, the Winnebago County sentence became void. *See State v. Lamar*, 2011 WI 50, ¶39, 334 Wis. 2d 536, 799 N.W.2d 758 (“To vacate means ‘to nullify or cancel; make void; invalidate.’” (quoting BLACK’S LAW DICTIONARY 1435 (9th ed. 2009))). As a result, the vacated Winnebago County sentence “lack[ed] force or effect and place[d] the parties in the position they occupied before entry of the [sentence].” *See id.*, ¶39 n.10 (citation omitted). In other words, it was “as if there had been no [Winnebago County sentence].” *See id.* (citation omitted).

⁴ Zastrow also argues various statutes, such as WIS. STAT. § 302.113 and WIS. STAT. § 973.04 (2015-16), are unconstitutional as applied to him. But Zastrow did not first raise those arguments with the circuit court. Therefore, we deem them forfeited. *See Schonscheck v. Paccar, Inc.*, 2003 WI App 79, ¶¶11-12, 261 Wis. 2d 769, 661 N.W.2d 476 (declining to address argument not first raised before the circuit court). We also do not address Zastrow’s argument that certain sentences in the five Outagamie County cases were to be served concurrently to one another rather than consecutively, as he withdrew that argument in his reply brief.

There are no substantive differences between the various versions of the Wisconsin Statutes that were in effect during the relevant years in this case. Therefore, all references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶7 Because the Winnebago County sentence ceased to exist once it was vacated, Zastrow’s prison sentence in Outagamie County case No. 2002CF1013 began on October 18, 2006, the date he was sentenced in that case. *See* WIS. STAT. § 973.15 (“Except as otherwise provided in this section, all sentences commence at noon on the day of sentence”). It follows that Zastrow’s sentence in Outagamie County case No. 2005CF285—the only Outagamie County case he appeals—began on October 18, 2013, the date he completed serving the initial confinement portions of his sentences in Outagamie County case Nos. 2002CF1013 and 2005CF284. Thus, the DOC is required to use October 18, 2013, as the start date to recalculate Zastrow’s release date to extended supervision based upon this proper understanding of when Zastrow began serving his consecutive sentences in the Outagamie County cases.

¶8 Our conclusion is consistent with the rule enunciated in *Tucker v. Peyton*, 357 F.2d 115 (4th Cir. 1966). “The rule set forth in *Tucker* is that when a defendant is sentenced on consecutive sentences for related offenses and the earlier sentence is invalid, the later sentence must be advanced to the date it would have begun but for the intervening invalid sentence.” *State v. Allison*, 99 Wis. 2d 391, 393, 299 N.W.2d 286 (Ct. App. 1980) (footnote omitted); *accord Miller v. Cox*, 443 F.2d 1019, 1020-21 (4th Cir. 1971) (recognizing that “where a prisoner serving consecutive sentences on several convictions succeeds in having one of the sentences invalidated after it has been fully or partially served” the *Tucker* rule requires “an adjustment of the administrative records of the prison authorities so that service on the remaining valid sentences would commence at an earlier date”).

¶9 Although Zastrow’s original Winnebago County sentence was vacated, Zastrow was subsequently resentenced for the same crime. The State argues that, pursuant to WIS. STAT. § 973.04, the DOC correctly credited the time

Zastrow served in custody on his original Winnebago County sentence toward his new Winnebago County sentence and, therefore, the DOC correctly determined the start date for Zastrow’s sentence in this case was January 31, 2008.⁵ Section 973.04 states: “When a sentence is vacated and a new sentence is imposed upon the defendant for the same crime, the [DOC] shall credit the defendant with confinement previously served.” But “[t]he operative language of § 973.04—[namely,] that the defendant shall be credited ‘with confinement previously served’—must be interpreted in light of the nature of the particular sentences imposed.” *Lamar*, 334 Wis. 2d 536, ¶35.

¶10 As mentioned previously, Zastrow’s original Winnebago County sentence was vacated, meaning his prison sentence in Outagamie County case No. 2002CF1013 began on October 18, 2006. *See supra* ¶7. In addition, Zastrow’s new Winnebago County sentence consisting of two years’ initial confinement and two years’ extended supervision was imposed and stayed, with three years’ probation ordered to be served consecutive to his sentences in the five Outagamie County cases. Because Zastrow’s new Winnebago County sentence is now consecutive to the Outagamie County sentences, Zastrow is not entitled to sentence credit toward his new Winnebago County sentence under WIS. STAT. § 973.04 for the time he served in custody after his sentence in Outagamie County case No. 2002CF1013 began on October 18, 2006. *See Lamar*, 334 Wis. 2d 536,

⁵ We note the State cites *State v. Zastrow*, Nos. 2009AP512-CR, 2009AP513-CR, unpublished slip op. (WI App Mar. 9, 2010), without filing and serving a copy of that opinion with its brief, in violation of WIS. STAT. RULE 809.23(3)(c). We also note Zastrow cites *State v. Wagner*, No. 2002AP963, unpublished slip op. (WI App Aug. 27, 2003)—which the DOC relied on when determining Zastrow’s prison sentence in Outagamie County case No. 2002CF1013 began on January 31, 2008—without filing and serving a copy of that opinion with his brief, in violation of RULE 809.23(3)(c). We admonish the parties that future violations of the Rules of Appellate Procedure may result in sanctions. *See* WIS. STAT. RULE 809.83(2).

¶¶35-37 (concluding the defendant was not entitled to sentence credit under § 973.04 toward his new sentence when the new sentence was imposed consecutively to an existing sentence and the time for which the defendant sought credit was previously served in satisfaction of the preexisting sentence). Additionally, Zastrow is not entitled to sentence credit toward his new Winnebago County sentence under § 973.04 for the time he served in custody from June 20, 2006 to October 17, 2006.

¶11 In October 2006, the Outagamie County Circuit Court granted Zastrow 268 days of sentence credit toward Outagamie County case No. 2002CF1013, presumably under WIS. STAT. § 973.155, for time he served in custody prior to October 18, 2006. Thus, the DOC's decision to grant Zastrow sentence credit toward his new Winnebago County sentence under WIS. STAT. § 973.04 for the time he served in custody from June 20, 2006 to October 17, 2006 results in impermissible dual credit. *See State v. Boettcher*, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988) (“Credit is to be given on a day-for-day basis, which is not to be duplicative credited to more than one of the sentences to run consecutively.”); *see also State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338 (explaining that “[t]he core idea of *Boettcher* is that ‘dual credit is not permitted’ where a defendant has already received credit against a sentence which has been, or will be, separately served”). We therefore conclude the DOC erroneously credited the time Zastrow served in custody on his original Winnebago County sentence toward his new Winnebago County sentence under § 973.04.

¶12 Therefore, we reverse the circuit court order denying postconviction relief and remand to the circuit court to direct the DOC to use October 18, 2013, as

the start date to recalculate Zastrow's release date to extended supervision in Outagamie County case No. 2005CF285.

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

Not recommended for publication in the official reports.

