COURT OF APPEALS
DECISION
DATED AND RELEASED

APRIL 22, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-2505-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY KLATT,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Marinette County: CHARLES D. HEATH, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Gary Klatt appeals a judgment and an order denying postconviction relief following his no contest plea to one count of burglary, contrary to § 943.10(1)(a), STATS. He was sentenced to seven years in

prison to be served consecutively to sentences Klatt is serving in Michigan. Three days of presentence credit was ordered.

Klatt argues that (1) the trial court erroneously calculated his presentence incarceration credit; (2) the sentence is unduly harsh; and (3) new factors entitled him to sentence modification. Based upon the State's concession that the sentencing court miscalculated the presentence credit by one day, we conclude the judgment should be modified to provide for an additional day of presentence credit. We reject Klatt's remaining arguments. We affirm in part, reverse in part and remand for the trial court to modify the judgment to reflect four days of presentence credit.

On or about September 1, 1993, in Marinette, Wisconsin, Klatt and an accomplice broke into a J.C. Penney department store and stole several thousands of dollars worth of jewelry. On August 2, 1994, Klatt was arrested on burglary and theft charges. He posted bond on August 5. On January 23, 1995, Klatt pled no contest to the burglary in Marinette County. Klatt states: "At about this same time, [Klatt] was convicted of one count of unarmed robbery and one count of breaking and entering a building, in Michigan." On February 7, Klatt was sentenced in Michigan to a two- to ten-year term for breaking and entering, and a three- to ten-year term for unarmed robbery.

On June 20, 1995, the circuit court signed an "Agreement on Detainers: … REQUEST FOR TEMPORARY CUSTODY" of Klatt. On July 26, 1995, it signed a writ of habeas corpus for production of Klatt. On September 18, after a presentence investigation, Klatt received a seven-year prison term on the burglary conviction, to be served consecutively to the Michigan sentences. The

trial court ordered presentence credit from August 3, 1994, to the day he posted bond, August 5, 1994.

Klatt argues that the trial court made an error of law when it failed to order presentence credit from the time it signed the "Agreement on Detainers," June 20, 1995, to the day he was sentenced, September 18, 1995. Alternatively, Klatt contends the trial court should have ordered presentence credit from July 26, 1995, at the time it signed the writ of habeas corpus, to the day of sentencing. We disagree.

A convicted offender is entitled to sentence credit for all days spent in custody in connection with the course of conduct for which the sentence was imposed. Section 973.155, STATS. Nonetheless, an offender is not entitled to sentence credit for the time spent in custody awaiting sentence when he is simultaneously in custody serving a sentence for another crime. ***State v. Beets***, 124 Wis.2d 372, 380-81, 369 N.W.2d 382, 386 (1985). Here, Klatt was serving Michigan sentences during the time for which he seeks presentence credit. Under ***Beets***, Klatt is not entitled to the credit for time spent in custody while serving a Michigan sentence.

Klatt argues that he is entitled to credit under ***State v. Gilbert***, 115 Wis.2d 371, 340 N.W.2d 511 (1983). We disagree. The issue in ***Gilbert*** was whether time spent incarcerated as a condition of probation was "in custody" within the meaning of § 973.155, STATS. Because that issue is not before us, ***Gilbert*** does not apply.

Klatt also argues that he is entitled to credit under the rationale in ***State v. DeMars***, 119 Wis.2d 19, 349 N.W.2d 708 (Ct. App. 1984). We disagree. ***DeMars*** did not address the issue whether an offender is entitled to presentence

credit for time spent in custody while serving an out-of-state sentence. It merely decided that the event occasioning "custody" within the meaning of § 973.155, STATS., was DeMars' surrender from one county to another pursuant to a writ of habeas corpus, followed by an initial appearance and the setting of bail. ***Id***. at 26, 349 N.W.2d at 712. It concluded that the detainer, standing alone, was not an event occasioning custody. ***Id***. at 24, 349 N.W.2d at 710-11.

Because there is no dispute that Klatt was serving a Michigan sentence at the time for which he seeks presentence credit in Wisconsin, we reject his contention. We note, however, that the State concedes error with respect to the three days of credit awarded. The State notes that credit should have been awarded from August 2 through August 5, for a total of four days. Based upon the State's concession, we remand the matter to the trial court to modify the judgment for four days of presentence credit.

Next, Klatt argues that the sentence was unduly harsh. We reject his argument. Sentencing is addressed to trial court discretion. ***State v. Echols***, 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993). The primary factors are the gravity of the offense, the character and rehabilitative needs of the offender, and the public's need for protection. ***Id.*** at 682, 499 N.W.2d at 640.

The trial court considered Klatt's extensive record, stating:

> Mr. Klatt[,] just recently turned 21 I believe, has an extensive record, has two counts of assault and battery convictions in Menominee, a breaking and entering or a burglary in Menominee, unarmed robbery in Menominee, and then as a juvenile, two more counts of larceny of a building, what we would call burglary over here, and a count of receiving stolen property and a fourth count of being a party to the crime of larceny of a building.

The court observed that the crime to which Klatt pled was a "serious crime with over $14,000 in damages to the victim." It concluded that Klatt had not yet learned that crime does not pay.

Based upon the serious nature of the crime and Klatt's record, the court concluded that a sentence beyond the guidelines was necessary. The court rejected the suggestion that Klatt should be allowed to serve his Wisconsin sentence in Michigan concurrent to the Michigan sentences, "because then he does not pay a penalty for the serious crime he's committed here." The court determined that Klatt should be sentenced to seven years in prison to be served consecutively to the Michigan sentences. The record discloses a reasonable exercise of sentencing discretion.

Next, Klatt argues that he is entitled to sentence modification because he is now rehabilitated. We disagree. Klatt acknowledges that in a felony case, rehabilitation is not a new factor. *See* ***Jones v. State***, 70 Wis. 2d 62, 72, 233 N.W.2d 441, 446-47 (1975). However, rehabilitation may be a new factor in misdemeanor cases where the offender has no recourse to the parole system. ***State v. Kluck***, 200 Wis.2d 837, 842, 548 N.W.2d 97, 99 (Ct. App. 1996), *review granted,* 201 Wis.2d 435, 549 N.W.2d 732 (1996). Klatt argues that as a felon incarcerated in Michigan, he has no recourse to the Wisconsin parole system. He contends that he should be treated like an offender serving a misdemeanor sentence in Wisconsin, and given an opportunity for sentence modification based upon rehabilitation. We decline Klatt's invitation to extend ***Kluck*** to provide resentencing options for felons serving sentences out of state.

Based upon the State's concession, we remand the matter for the trial court to enter an amended judgment reflecting four days of presentence credit.

We conclude that the sentence represents a reasonable exercise of sentencing discretion and conclude that Klatt has demonstrated no new factor to entitle him to sentence modification.

By the Court.—Judgment and order affirmed in part; reversed in part and cause remanded with directions.

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