

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 98-1017-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

THOMAS J. MOLA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
SARAH B. O'BRIEN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

PER CURIAM. Thomas Mola appeals from an order which denied several of his motions for postconviction relief following the revocation of his probation. He asks this court to set aside his conviction on the grounds that there was an insufficient factual basis to support his plea; the State withheld exculpatory evidence and breached the plea agreement; and he was afforded ineffective

assistance of both trial and appellate counsel. Alternatively, he argues for an additional forty-five days of sentence credit. We conclude that none of the plea withdrawal issues are properly before this court, and Mola has already received all of the sentence credit to which he is entitled. Accordingly, we affirm the order of the circuit court.

BACKGROUND

The complaint alleged that Mola cashed a number of checks which he knew were written by another individual on a closed account. On January 10, 1996, Mola pleaded no contest to one count of being party to the crime of issuing worthless checks as a repeat offender and one count of felony bail jumping. In exchange for the plea, the State dropped an additional repeat offender allegation for the bail jumping count and agreed to recommend probation with conditions of restitution and thirty days in jail. The Dane County Circuit Court followed the State's recommendation and withheld sentence. Mola did not appeal the judgment of conviction.

On May 19, 1996, Mola was arrested for a first offense of operating a motor vehicle while intoxicated (OWI) and operating a motor vehicle after revocation (OAR) in Dodge County. As an alternative to the revocation (ATR) of his probation on the worthless check charge, he was placed on an electronic monitoring bracelet under the Department of Intensive Sanctions (DIS) program. However, on January 25, 1997, Mola was arrested again for violating the conditions of his home confinement. This time, he was placed in jail pending the revocation of his probation.

On March 20, 1997, Mola was sentenced to sixty days in jail on the OAR charge following a plea of no contest. The sentence was to be served

“concurrent with any other sentence,” and the transcript of the hearing shows that the Dodge County sentencing court believed that Mola would be “serving his time on DIS.”

On July 22, 1997, the Dane County Circuit Court sentenced Mola to four years in prison on the worthless check charge. On October 29, 1997, we extended the time for Mola to file a motion for postconviction relief from that sentence. Mola then filed a motion challenging the amount of his sentence credit. At a hearing on December 12, 1997, the State conceded that Mola was entitled to 209 of the 254 days credit he was requesting. However, Mola subsequently filed additional motions claiming entitlement to the remaining forty-five days of credit and challenging the validity of his plea on several different grounds. The trial court denied the second sentence credit motion on March 26, 1998, after determining that Mola had already been credited with forty-five of the days he spent on probation hold. It denied the plea withdrawal motion at the same hearing after noting that the time for deciding postconviction motions unrelated to the sentence had expired.

SCOPE OF REVIEW

As a threshold matter, we wish to clarify the scope of our review on this appeal. Mola filed a notice of intent to pursue postconviction relief in the circuit court on July 25, 1997. The notice indicated his intention to challenge the sentence entered on July 22, 1997, but did not seek relief from the initial judgment of conviction. In fact, it could not have done so, because the deadline for appealing the judgment of conviction had long since passed. *See* RULE 809.30(1)(b) and (2)(b), STATS. (requiring that a notice of intent to appeal a felony conviction be filed within twenty days after the imposition of sentence, including

probation). Similarly, our order of October 29, 1997, extended only the time for Mola to seek relief from the sentence entered on July 22, 1997. It did not extend the time for Mola to raise any issues from the initial judgment of conviction. Finally, Mola's notice of appeal sought relief from the circuit court order entered on March 26, 1998, and not from either the initial judgment of conviction or the sentencing hearing. Our appellate review is therefore limited to any issues arising from the July 22, 1997 sentencing which were addressed in the March 26, 1998 order. Accordingly, we will consider Mola's claim for additional sentence credit, but his plea withdrawal issues are not properly before this court.¹

STANDARD OF REVIEW

Assuming that there is no factual dispute over the dates on which an offender was in custody, the determination of the appropriate amount of sentence credit is a question of law which we review de novo. *State v. Abbott*, 207 Wis.2d 624, 628, 558 N.W.2d 927, 928 (Ct. App. 1996). However, we will not overturn factual findings made by the circuit court unless they are clearly erroneous. Section 805.17(2), STATS.

ANALYSIS

The circuit court did not explicitly decide whether the parties had stipulated to the amount of credit due at the first hearing, and the precise nature of any agreement is difficult to determine from the transcripts because the parties went off the record to do the sentence credit calculations. However, a finding that

¹ Mola also attempts to raise a claim of ineffective assistance of appellate counsel. However, the proper mechanism for such a claim is a petition for a writ of habeas corpus. *See State v. Knight*, 168 Wis.2d 509, 520, 484 N.W.2d 540, 544 (1992).

Mola had not conceded his right to maintain his challenge to the remaining days is implicit in the trial court's decision to address the sentence credit question on the merits, and is not clearly erroneous. There seems to have been some confusion about when Mola was in custody for what. However, the circuit court's ultimate finding that Mola spent the disputed forty-five days in jail "both as a sanction for his escape from DIS and serving a sentence" on the OAR charge was supported by the record and is not clearly erroneous.

Section 973.155(1)(a), STATS., provides that an "offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which [the] sentence was imposed." However, sentence credit should not be granted for presentence time during which the defendant was serving a previously imposed sentence for an unrelated crime. *See State v. Beets*, 124 Wis.2d 372, 379, 369 N.W.2d 382, 385 (1985); *State v. Amos*, 153 Wis.2d 257, 280-81, 450 N.W.2d 503, 512 (Ct. App. 1989); *State v. Gavigan*, 122 Wis.2d 389, 394, 362 N.W.2d 162, 165 (Ct. App. 1984). Therefore, the trial court properly subtracted the forty-five days which Mola had spent serving his OAR sentence from the presentence credit which he was due for the time he spent in DIS custody and on a probation hold in connection with the worthless check charge.

We understand how Mola might be confused by the "concurrent with any other sentence" language in the OAR judgment and conclude that the time he served on that sentence would also apply to his worthless check sentence. The problem with his theory, however, is that the four-year worthless check sentence had not yet been imposed at the time he was sentenced on the OAR charge. The Dodge County court had no power to determine whether future sentences would be served concurrently or consecutively with its sentence. *See*

§ 973.15(2)(a), STATS. (it is the later-sentencing court that is empowered to determine whether a new sentence will be concurrent or consecutive to a prior sentence). Therefore, the language in the OAR judgment does not affect our sentence credit analysis for the worthless check charge.

By the Court.—Order affirmed.

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

