

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 25, 2005

Cornelia G. Clark
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. 2004AP2364-CR

Cir. Ct. No. 2001CF157

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY L. EVERTS,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: WILBUR W. WARREN III, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

¶1 ANDERSON, P.J.¹ Gary L. Everts appeals from judgments of conviction for thirteen misdemeanors, including two counts of theft of moveable

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

property and one count of receiving stolen property, each as party to a crime and a repeat offender. He also appeals from an order denying in part and granting in part his motion for postconviction relief. The trial court concluded that the 2004 reduction of his 2001 probation revocation sentence in an unrelated 1996 sexual assault case from three years to one year was not a new factor warranting sentence modification in this case. The trial court further rejected Everts' argument that, as a result of the amended sentence in the 1996 case, he should be granted sentence credit in this case for time served from October 6, 2001, until his sentencing on February 1, 2002. However, the court also concluded that Everts was entitled to twenty-five days of sentence credit for time served from January 6, 2002, until February 1, 2002.

¶2 We conclude that the amendment of his sentence in the 1996 sexual assault conviction was not a new factor warranting sentence modification in this case. However, we also conclude that Everts is not entitled to any sentence credit. We therefore affirm in part, reverse in part, and remand with directions to amend the judgments of conviction to reflect the proper sentence.

¶3 **Facts.** In March 2001, the State filed a twenty-two-count information against Everts. On May 11, Everts' was sentenced to three years' imprisonment in an unrelated sexual assault conviction. In November 2001, a jury found Everts guilty on thirteen of the twenty-two counts in this case. On February 1, 2002, the trial court sentenced Everts to three years' imprisonment for each of the counts of theft of moveable property and for the count of receiving

stolen property.² The sentences were to run consecutive to one another and to Everts' three-year prison sentence in the 1996 sexual assault conviction.

¶4 On March 11, 2004, Everts' prison sentence in the 1996 conviction was amended from a three-year to a one-year sentence, nunc pro tunc to the date of the original sentence, May 11, 2001. He was also granted sentence credit of 125 days.³

¶5 In May 2004, Everts filed a motion for sentence credit and sentence modification in this matter based upon the reduction of the sentence in the 1996 case. He argued that he would have completed his term of incarceration for the 1996 conviction on October 6, 2001, and therefore he was entitled to sentence credit in this case for time served from October 6, 2001, until his sentencing on February 1, 2002. He computed this by applying the mandatory release statute, WIS. STAT. § 302.11, and the 125 days of sentence credit to his reduced sentence in the 1996 matter. In the alternative, he submitted that the sentence in the 1996 case should run concurrent with, rather than consecutive to, the first sentence in this case.

¶6 The trial court interpreted Everts' alternative argument as a request for sentence modification based on a new factor and determined that there were no

² With respect to the remaining ten counts, the court withheld sentence and placed Everts on probation for four-year concurrent terms. This was to run consecutive to each of the three-year prison sentences and the sentence in the 1996 matter.

³ We question whether the trial court had the authority to reduce the sentence to one year after Everts had already served nearly three years; however that issue is not before us in this appeal. It is also not clear from the record why the court granted Everts 125 days of sentence credit in the 1996 case.

new factors justifying sentence modification.⁴ The court then granted Everts twenty-five days' presentence incarceration credit for the time served between January 6, 2002, and February 1, 2002. The court reasoned:

The sentence in [the 1996 case] was changed from a three year to a one year sentence, nunc pro tunc to the date of the original sentence, May 11, 2001. The sentence ended May 10, 2002.... With the credit of 125 days given under the [1996] sentence, the end of the sentence would be January 6, 2002. Although I do not believe this Court is required to do so, the defendant will be given separate credit for the time between January 6, 2002 and the date of sentencing, February 1, 2002 or an additional 25 days.

Everts appeals the trial court's decision pro se.

¶7 **Discussion.** Everts essentially raises two arguments on appeal.⁵ He argues that the amendment of his sentence in the 1996 conviction for sexual assault is a new factor warranting sentence modification. He asks that the first of his sentences in this case run concurrent with the sentence in the 1996 matter. He also submits that, as a result of the amended sentence in the 1996 case, he should be granted sentence credit pursuant to WIS. STAT. § 973.155 for the entire time

⁴ The State seems to complain that Everts' motion for sentence credit did not specifically raise the issue of sentence modification based on a "new factor" and therefore the trial court should not have addressed the issue. We remind the State that we, and the trial court, will liberally construe documents filed by pro se defendants in criminal cases in an effort to effect substantial justice. See *bin-Rilla v. Israel*, 113 Wis. 2d 514, 520, 335 N.W.2d 384 (1983). In his motion, Everts did request that the trial court "in the alternative" to granting sentence credit, "Amend the Judgment of Conviction to 2 consecutive terms of 3 years, and the Receiving stolen Property count to concurrent." A fair liberal reading of this argument could have reasonably led the trial court to conclude that Everts was also requesting sentence modification based on a "new factor."

⁵ In making his arguments, Everts relies on documents that were not made part of the trial court record. We will not consider these documents in our review of Everts' appeal. *State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) ("An appellate court's review is confined to those parts of the record made available to it.").

served between October 6, 2001, and February 1, 2002. We address each argument in turn.

¶8 *Sentence modification.* To obtain sentence modification, a defendant must establish that (1) a new factor exists and (2) the new factor justifies sentence modification. *State v. Franklin*, 148 Wis. 2d 1, 8, 434 N.W.2d 609 (1989). In order to succeed on a claim for sentence modification based on a new factor, an inmate must prevail in both steps of new factor analysis by proving the existence of a new factor and that it is one which should cause the trial court to modify the original sentence. *See id.*

¶9 Whether a fact or set of facts constitutes a new factor presents a legal issue which we decide de novo. *Id.* Whether a new factor justifies sentence modification, however, presents an issue for the trial court's discretionary determination, subject to our review under the erroneous exercise of discretion standard. *Id.* We will uphold a trial court's discretionary determination if there is any reasonable basis to sustain it. *See Domain Indus., Inc. v. Thomas*, 118 Wis. 2d 99, 103, 345 N.W.2d 516, 518-19 (Ct. App. 1984).

¶10 Even assuming that the reduction of the 1996 sentence constitutes a new factor, we see no reason to disturb the trial court's discretionary determination that modifying Everts' sentence so that it runs concurrent with the sentence in the 1996 case is nonetheless unwarranted. In its order denying Everts' sentence modification motion, the trial court indicated that "[i]f anything" the fact that it imposed a sentence consecutive to a now reduced sentence may have caused it "to impose a longer sentence so as to account for the total time in custody on both cases, rather than a shorter or concurrent time." The sentencing hearing transcript supports the court's assertion.

¶11 At sentencing, the court stated that its primary concern was for the protection of the public. The court noted Everts' long history of criminal behavior and his failed attempts to comply with probation and parole. The court also remarked that rehabilitation would be most effectively provided in a confined setting. Only a lengthy prison sentence could achieve these ends. Thus, it was entirely reasonable for the trial court to conclude that the shorter prison sentence in the sexual assault case would not have worked in Everts' favor at sentencing and to decline Everts' invitation to amend the sentence in the present matter. Accordingly, we affirm the partial denial of Everts' postconviction motion.

¶12 *Sentence credit.* WISCONSIN STAT. § 973.155, which governs sentence credit, provides in relevant part that “[a] convicted 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 sentence was imposed.” Sec. 973.155(1)(a). Whether a defendant is entitled to sentence credit pursuant to § 973.155 is a question of law which we review de novo. *State v. Rohl*, 160 Wis. 2d 325, 329, 466 N.W.2d 208 (Ct. App. 1991).

¶13 We conclude that Everts is not entitled to any sentence credit under WIS. STAT. § 973.155 for the period from October 6, 2001, to February 1, 2002. Simply put, Everts may not receive double credit. *See State v. Boettcher*, 144 Wis. 2d 86, 100-01, 423 N.W.2d 533 (1988) (time is credited toward only one sentence when multiple sentences run consecutive to one another). The 25 five days of sentence credit the trial court granted in this case (from January 6, 2002, to February 1, 2002) was part of the 125 days of sentence credit already awarded in the 1996 matter. Further, because the sentences in the two cases are to run consecutive to one another, Everts' period of incarceration for the first of the three convictions in this case commenced at the completion of his period of

incarceration for the 1996 conviction or, in other words, at the Department of Correction's mandatory release date.⁶ *See State ex rel. O'Connor v. Williams*, 95 Wis. 2d 378, 383, 290 Wis. 2d 533 (Ct. App. 1980) (consecutive sentences are to run at the date of mandatory release, pardon or parole of a convict's prior sentence). Accordingly, we reverse, in part, the trial court's grant of Everts' motion for sentence credit and direct the court on remand to amend the judgments of conviction to reflect our decision that Everts is not entitled to the 25 days of sentence credit it awarded him.

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

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

⁶ We pass no judgment on whether Everts correctly calculates his mandatory release date as being October 6, 2001.