COURT OF APPEALS
DECISION
DATED AND FILED

December 12, 2006

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. 2006AP1716-CR

Cir. Ct. No. 2004CF7329

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEANDER JAMES ESSER,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed*.

¶1 KESSLER, J.[1] Defendant-Appellant Leander J. Esser appeals *pro se* from the following: (1) an order dated April 3, 2006 denying his March 31, 2006 postconviction motion for sentence credit; (2) an order dated May 2, 2006,

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[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04).

denying his April 25, 2006 motion for reconsideration of the April 3, 2006 denial; and (3) an order dated June 1, 2006, denying Esser's second postconviction motion for sentence credit filed on May 31, 2006. In his briefing to this court on his appeal, Esser also claims, for the first time, that his trial counsel's failure to object to the trial court's conclusion that Esser was entitled to no sentence credit constituted ineffective assistance of counsel. Because we find that the trial court properly applied WIS. STAT. § 973.155 (2003-04)[2] when it ruled that Esser was entitled to no sentence credit for the consecutive sentence it issued in case no. 04CF007329 and, as such, no objection by Esser's trial counsel was required, we affirm.

BACKGROUND

¶2 Esser was arrested by City of Milwaukee police officers on November 24, 2004. Because Esser was on extended supervision for a conviction in Milwaukee County Circuit Court case no. 00CF002473, his supervising agent that same day placed a violation of probation (VOP) hold on Esser and his extended supervision was revoked. As a result of the November 24, 2004 arrest, on December 4, 2004, Esser was charged with two felony counts: one count of burglary (pursuant to WIS. STAT. § 943.10(1m)(A)) and one count of possession with intent to deliver controlled substance (Schedule IV Substance) (pursuant to WIS. STAT. § 961.41(1m)(1)) in Milwaukee County Circuit Court case no. 04CF007329. On December 8, 2004, Esser made his initial appearance in case no. 04CF007329, and the court commissioner set bail as a $1500 personal

[2] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

recognizance bond, which was to revert to $1500 cash should the VOP hold be lifted. The personal recognizance bail continued throughout the pendency of the case.

¶3 As a result of the revocation of his extended supervision in case no. 00CF002473, on June 20, 2005, Esser was returned to confinement for an additional two years, with credit for the time spent in custody. Esser immediately began serving his confinement sentence on the revocation.

¶4 On September 28, 2005, the State filed a second amended complaint in case no. 04CF007329, removing the two felony counts and adding a single misdemeanor charge of criminal trespass to dwelling, habitual criminality. Esser pled guilty to the amended complaint. On October 26, 2005, Esser was sentenced to one year in the House of Correction, consecutive to any previously imposed sentence, with no credit for pretrial incarceration. The trial court also ordered Esser to pay all applicable court costs, surcharges and assessments.

¶5 On March 31, 2006, Esser filed a postconviction motion requesting sentence credit of 337 days for the time he had spent in custody between his November 24, 2004 arrest and VOP hold, and his sentencing in case no. 04CF007329. On April 3, 2006, the trial court denied Esser's motion, concluding:

> [Esser] appeared before Judge Franke on June 20, 2005 for a reconfinement hearing in 00CF002473 and received credit in that case in accordance with the revocation order that issued – from November 24, 2004 (the date the hold was placed).
>
> The defendant is not entitled to credit on the consecutive sentence that was imposed in 04CF007329. State v. Boettcher, 144 Wis. 2d 86 (1988). Because he received credit from the date the hold was placed in 00CF002473, he is not entitled to duplicate credit in 04CF007329.

¶6 On April 25, 2006, Esser filed a motion for "review of denying request for sentence credit" and argued that he had only received 108 days of credit for his sentence revocation and requested that he be given the remaining time (June 20 through October 26, 2005) as a credit against one of his sentences. On May 2, 2006, the trial court denied Esser's motion for reconsideration, ruling that Esser had presented no new information which would cause the court to reconsider its April 3, 2006 decision.

¶7 On May 31, 2006, Esser filed a new postconviction motion, requesting sentence credit of 309 days for the period November 24, 2004 through September 28, 2005. On June 1, 2006, the trial court denied the motion, holding that Esser had received all of the sentence credit to which he was entitled against his reconfinement sentence in case no. 00CF002473. Esser appealed. Esser filed a statement on transcript on July 12, 2006, stating: "All transcripts necessary for this appeal are already on file with the Milwaukee County Clerk's Office." No transcripts are part of the record on appeal in this case.

STANDARD OF REVIEW

¶8 Esser presents two issues on appeal. The first issue is whether the trial court erred in refusing to grant any pretrial credit toward Esser's sentence in case no. 04CF007329. Because the factual record underlying Esser's motion is undisputed, this issue is one of law and our review is *de novo*. *See* ***State v. Williams***, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981). Esser's second issue is whether his trial counsel's failure to object to this denial of sentence credit constituted ineffective assistance of counsel. Whether trial counsel's actions constitute ineffective assistance presents a mixed question of fact and law. ***State v. Pitsch***, 124 Wis. 2d 628, 633-34, 369 N.W.2d 711 (1985). We will not reverse

the trial court's factual findings regarding trial counsel's actions unless those findings are clearly erroneous. ***Id.*** at 634. Whether trial counsel's performance was deficient, and whether that behavior prejudiced the defendant, are questions of law we review *de novo*. ***Id.***

DISCUSSION

Sentence Credit

¶9 Our resolution of this issue is governed by WIS. STAT. § 973.155(1)(a), which provides, in 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." The key language, "in connection with the course of conduct for which sentence was imposed,"[3] was addressed in ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985). The supreme court summarized the key facts of ***Beets*** in a single sentence:

> The issue presented is whether a person who is on probation for an earlier crime (delivery of controlled

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[3] The complete text of WIS. STAT. § 973.155(1)(a) reads as follows:

> **973.155 Sentence credit. (1)** (a) 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. As used in this subsection, "actual days spent in custody" includes, without limitation by enumeration, confinement related to an offense for which the offender is ultimately sentenced, or for any other sentence arising out of the same course of conduct, which occurs:
>
> 1. While the offender is awaiting trial;
> 2. While the offender is being tried; and
> 3. While the offender is awaiting imposition of sentence after trial.

> substance), is apprehended for the commission of a new and separate crime (burglary), and then, after a period of custody on a probation violation hold, is revoked and is sentenced to state prison on the earlier drug crime is entitled to time credit on the burglary sentence for the days served under the prison sentence for the drug crime while awaiting trial and eventual sentencing on the second crime—the crime of burglary.

Id. at 373-74. The court concluded that, "[the defendant] is *not* entitled to time credit on the burglary [second] sentence for the period following the sentence on the drug [first] charge." ***Id.*** at 374 (emphasis added). The court reasoned that no credit was due since the sentence on the drug charge "was not related or connected to the burglary course of conduct." ***Id.*** at 378. The court explained that, "any connection which might have existed between custody for the drug offenses and the burglary was severed when the custody resulting from the probation hold was converted into a revocation and sentence." ***Id.*** at 379.

¶10 The facts of this case fall squarely under ***Beets***. Esser's confinement following revocation of his extended supervision on June 20, 2005, was solely for his conviction in case no. 00CF002473. We agree with the State that his custody at that point no longer had any connection with the new, pending charges for burglary and possession with intent to deliver controlled substances (Schedule IV Substances). Any connection that might have existed was severed once Esser began service of his sentence after revocation. *See* ***id.*** at 379-80. Accordingly, Esser is due no sentence credit for the time period June 20, 2005 through September 28, 2005, as during that period of time he was serving his revocation sentence and not eligible for release from custody, a prerequisite for the application of sentence credit. *See* ***id.*** at 379.

¶11 Esser also argues that he should be allowed to have credited against his sentence in case no. 04CF007329 the time between his November 24, 2004

arrest and his June 20, 2005 revocation, citing ***Klimas v. State***, 75 Wis. 2d 244, 249 N.W.2d 285 (1977) and ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), for this proposition. Esser is in error. Under ***Boettcher***, the Wisconsin Supreme Court specifically held that when consecutive sentences are given, sentence credit can only be applied to the first sentence. ***Boettcher***, 144 Wis. 2d at 87. In so holding, the court noted that this was due to an amendment of WIS. STAT. § 973.155 following the supreme court's decision and recommendation for clarification in its decision in ***Klimas***. ***Boettcher***, 144 Wis. 2d at 90.

¶12 In ***Boettcher***, the defendant was convicted of burglary and sentenced to a three-year term of imprisonment, which was stayed and the defendant was placed on probation. ***Id.*** at 87. After Boettcher was arrested on a VOP warrant for illegal possession of a firearm, he was released from custody on the firearm charge on a signature bond, but remained in custody on the VOP hold. ***Id.*** at 88. Three months after his arrest, his probation was revoked and he began serving his original three-year sentence, with a 100-day credit on that sentence for the period from his arrest to the date of revocation. ***Id.*** Two days after his revocation, Boettcher pled guilty to the firearms charge and was sentenced to a one-year term, consecutive to the burglary sentence, and the trial court allowed no credit to be applied against the second sentence. The court of appeals reversed, and the supreme court reversed the court of appeals and reinstated the trial court's sentence. ***Id.*** at 101. In so doing, the supreme court concluded:

> [D]ual credit is not permitted – that the time in custody is to be credited to the sentence first imposed – and that, where the sentences are consecutive, the total time to be served is thus reduced by the number of days in custody as defined by sec. 973.155, Stats. *Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively.*

Id. at 87 (emphasis added). In providing instruction to trial courts, the supreme court noted:

> [C]ustody credits should be applied in a mathematically linear fashion. The total time in custody should be credited on a day-for-day basis against the total days imposed in the consecutive sentences. For ease in calculation and clarity in respect to subsequent exercise of court discretion, *the credits should be applied to the sentence that is first imposed*.

Id. at 100 (emphasis added).

¶13 The present case falls squarely within the Wisconsin Supreme Court's decision in ***Boettcher***. In April 2004, Esser was arrested for a crime. Upon his arrest, his status of extended supervision was discovered and his supervising agent put him on VOP hold. Esser's extended supervision was then revoked, and he was sentenced to two years' confinement, with credit for the time he spent in custody between his arrest and his revocation. Subsequent to his revocation, he pled guilty to an amended misdemeanor charge arising out of his April 2004 arrest. The trial court sentenced Esser to one year confinement in the House of Correction, to run *consecutive* to his revocation sentence. The trial court correctly did not apply any dual or duplicative credit against this sentence, as it was required to do under ***Boettcher***. Accordingly, we conclude that the trial court correctly refused to grant Esser's postconviction motion requesting a sentencing credit be applied to his sentence in case no. 04CF007329.

¶14 Finally, Esser argues that he should be given sentence credit for the period of time he was on extended supervision. The State counters that Esser is not entitled to credit for his time on probation because: (1) he never raised this claim in any postconviction motion to the trial court; and (2) the plain language of WIS. STAT. § 973.155 defeats his contention because he was not "in custody"

during that period and the probation did not relate to the charges in case no. 04CF007329.

¶15 In ***State v. Gavigan***, 122 Wis. 2d 389, 362 N.W.2d 162 (Ct. App. 1984), we interpreted WIS. STAT. § 973.155(1)(a)[4] and specifically noted that "[t]his section requires two determinations: First whether the offender was 'in custody;' and second, whether the custody was 'in connection with the course of conduct for which sentence was imposed.'" ***Gavigan***, 122 Wis. 2d at 391. To make the first determination, we must define what is meant by "in custody." In ***State v. Magnuson***, 2000 WI 19, 233 Wis. 2d 40, 606 N.W.2d 536, our supreme court adopted a bright-line test for determining when an offender is "in custody" pursuant to WIS. STAT. § 973.155: "an offender's status constitutes custody whenever the offender is subject to an escape charge for leaving that status." ***Magnuson***, 233 Wis. 2d 40, ¶25. The ***Magnuson*** court reviewed a number of escape statutes and determined that "custody" includes, in addition to WIS. STAT. § 946.42(1)(a) (as previously held by the court in ***State v. Gilbert***, 115 Wis. 2d 371, 378-79, 340 N.W.2d 511, 513 (1983) to apply in § 973.155 sentence credit cases), "other statutory provisions in which the legislature has classified certain situations as restrictive and custodial by attaching escape charges for an unauthorized departure from those situations." ***Magnuson***, 233 Wis. 2d 40, ¶26.

¶16 In the present case, a review of WIS. STAT. § 946.42(1)(a) reveals that this statute is the controlling escape statute. Section 946.42(1)(a) states, in pertinent part: "'Custody' ... does not include the custody of a probationer, parolee or person on extended supervision by the department of corrections…."

[4] *See supra* note 2, for the text of WIS. STAT. § 973.155(1)(a).

Esser seeks sentence credit for his time on extended supervision. Pursuant to ***Magnuson***, Esser is not entitled to sentence credit for this time. Accordingly, the trial court did not err when it sentenced Esser without giving him sentence credit for his time on extended supervision.

Ineffective assistance of counsel

¶17 Esser raises for the first time on appeal an ineffective assistance of counsel claim, arguing that because his trial counsel "did not argue to the sentencing court that Esser should be granted sentencing credit for time spent in custody in relation to this case," "this would be ineffective assistance of counsel." Because the trial court has not had the opportunity to review and decide on Esser's ineffective assistance of counsel claim, we are not required to consider this issue. ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992) (An appellate court need not decide issues not properly raised in the trial court.). In the interest of preserving judicial resources, however, we will consider Esser's claims of ineffective assistance of counsel.

¶18 Courts follow a two-part test for ineffective assistance of counsel claims: the defendant must prove both that the attorney's performance was deficient and that the deficient performance was prejudicial. *See* ***Strickland v. Washington,*** 466 U.S. 668, 687 (1984); ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). An attorney's performance is deficient if the attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Strickland***, 466 U.S. at 687. The defendant must also prove counsel's allegedly improper acts prejudiced the defense by demonstrating a reasonable probability that the outcome would have been different, but for counsel's errors. ***State v. Koller***, 2001 WI App 253, ¶9, 248

Wis. 2d 259, 635 N.W.2d 838. The defendant must prevail on both parts of the test to be afforded relief. ***Johnson***, 153 Wis. 2d at 127.

¶19 We have determined that the trial court properly allowed Esser no sentence credit under WIS. STAT. § 973.155 and the above-cited case law. Accordingly, under the ***Strickland*** test, Esser was not prejudiced by any failure of his counsel to object to this disallowance because, "but for" any alleged errors Esser's counsel may have made[5] by failing to object, the outcome would have been the same: *i.e.*, Esser was not entitled to any sentence credit on his sentence in case no. 04CF002473. Therefore, Esser's ineffective assistance of counsel claim also fails.

¶20 Finally, Esser concludes that "I feel the Department of Corrections willfully and knowingly miscalculated my sentence computation that resulted in the current release date of August 19, 2007." Because Esser has not made this claim to the trial court in any of his postconviction motions nor argued this issue in his appeal, but simply offered this conclusory statement, we decline to address it. *See* ***Evjen***, 171 Wis. 2d at 688 (An appellate court need not decide issues not properly raised in the trial court.); ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (an appellate court need not review an issue inadequately briefed). *See also* ***Faretta v. California***, 422 U.S. 806, 834 n.46 (1975) (Pro se litigants do not have "license not to comply with relevant rules of procedural and substantive law."); ***Waushara County v. Graf***, 166 Wis. 2d 442,

[5] No transcripts were provided with the record; accordingly, "[g]iven an incomplete record, we will assume that it supports every fact essential to sustain the trial court's exercise of discretion." ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219 (Ct. App. 1986) (citation omitted).

451, 480 N.W.2d 16, 20 (1992) (While pro se litigants are allowed some leniency, a court has no "duty to walk pro se litigants through the procedural requirements or to point them to the proper substantive law.").

By the Court.—Orders affirmed.

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