COURT OF APPEALS
DECISION
DATED AND FILED

February 27, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2005AP356-CR **Cir. Ct. No. 2004CF260**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TAYWAN TERRILL GIPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN and JOHN SIEFERT, Judges. *Judgment affirmed; order affirmed in part, reversed in part and cause remanded with directions*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Taywan Terrill Gipson appeals from a judgment of conviction for cocaine-related offenses, and from a postconviction order partially

denying his motion for sentence credit and confirming his ineligibility for the Challenge Incarceration and Earned Release Programs.[1] The issues are whether Gipson was entitled to sentence credit from the date of his arrest for the cocaine-related charges to the date his reconfinement period for previous cocaine-related convictions was determined, and whether the trial court erroneously exercised its discretion in deciding that Gipson was ineligible for the Challenge Incarceration and Earned Release Programs. We conclude that our recent decision in ***State v. Presley***, 2006 WI App 82, ¶15, 292 Wis. 2d 734, 715 N.W.2d 713, controls the sentence credit issue, requiring sentence credit on Gipson's concurrent sentences from the date of his arrest on the "new" charges to the date of the determination of the reconfinement period on his "previous" convictions, and that the trial court adequately exercised its discretion in declaring Gipson ineligible for the Challenge Incarceration and Earned Release Programs after considering the entirety of its sentencing remarks. Therefore, we affirm the judgment of conviction, reverse that part of the postconviction order partially denying Gipson's motion for sentence credit and remand the cause for further proceedings consistent with this order.

¶2 Gipson was serving a sentence on extended supervision for cocaine-related ("previous") convictions when, on January 10, 2004, he was arrested for and later charged with the cocaine-related ("new") offenses in this case, delivering no more than one gram of cocaine, in violation of WIS. STAT. § 961.41(1)(cm)1g. (created Feb. 1, 2003), and for possessing between one and five grams of cocaine with intent to deliver, in violation of WIS. STAT. § 961.41(1m)(cm)1r. (amended Feb. 1, 2003). On February 11, 2004, Gipson's extended supervision for the

[1] The Honorable Timothy G. Dugan imposed sentence and entered the judgment of conviction. The Honorable John Siefert decided Gipson's postconviction motion.

previous offenses was revoked. On April 5, 2004, Gipson pled guilty to the new offenses. On May 5, 2004, the trial court determined the reconfinement period for the previous offenses (for which Gipson's extended supervision was revoked when arrested on the new charges), and on June 3, 2004, the trial court imposed sentence for those new charges.[2] It imposed these sentences consecutive to one another, but concurrent to the previously imposed sentence (for the offenses for which reconfinement was imposed a month earlier).

¶3 Gipson moved for postconviction relief, seeking 117 days of sentence credit from the date of his arrest (January 10, 2004) to the date his reconfinement sentence was determined (May 5, 2004).[3] The postconviction court partially granted the motion, crediting Gipson for the thirty-three days between his arrest (January 10, 2004) and the revocation of his extended supervision on the previous conviction (February 11, 2004).[4] Gipson appeals, seeking credit until the date of his reconfinement determination.

¶4 At the time of briefing, this precise issue was also pending before this court in ***Presley***, and both counsel in this appeal were also counsel in ***Presley***. We placed this appeal on hold awaiting our decision in ***Presley***.

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[2] For delivering no more than one gram of cocaine, the trial court imposed a seven-year sentence, comprised of two- and five-year respective periods of confinement and extended supervision, and for possessing between one and five grams of cocaine with intent to deliver, the trial court imposed a nine-year sentence, comprised of four- and five-year respective periods of confinement and extended supervision.

[3] Gipson also sought "meaningful[]" review of the trial court's determination of his ineligibility for participation in the Challenge Incarceration and Earned Release Programs.

[4] The postconviction court also denied the remainder of the motion seeking "meaningful[]" review of his ineligibility determination, which we address later in this opinion.

¶5 In ***Presley***, we held that the defendant was

> entitled to sentence credit on the new charge from the date of his arrest until the day of sentencing … because while his extended supervision was revoked, his 'resentencing' had not yet occurred….[I]t was the intent of the trial court to sentence Presley to concurrent time; therefore, he is entitled to sentence credit on both sentences.

Id., 292 Wis. 2d 734, ¶15. ***Presley*** controls, and we therefore reverse that part of the postconviction order denying Gipson sentence credit for the eighty-four additional days of sentence credit from the date his extended supervision on the previous charges was revoked (February 11, 2005) to the date of his reconfinement determination (May 5, 2004). We direct the trial court to grant Gipson eighty-four days of sentence credit pursuant to ***Presley***. *See* ***id.***

¶6 On appeal, Gipson also contends that the trial court failed to exercise discretion in determining his ineligibility for the Challenge Incarceration and Earned Release Programs.[5] Determining eligibility for the Challenge Incarceration and Earned Release Programs involves a threshold determination of eligibility for each program, and then an exercise of discretion demonstrating the trial court's reasons for its decision on a defendant's ultimate eligibility beyond the threshold determination. *See* WIS. STAT. §§ 302.045(2) (amended July 26, 2003); 302.05(3)(a) (created July 26, 2003); 973.01(3g) (created July 26, 2003) and (3m) (amended Feb. 1, 2003); ***State v. Steele***, 2001 WI App 160, ¶8, 246 Wis. 2d 744, 632 N.W.2d 112. A proper exercise of discretion requires a reasoned and

[5] Both the Challenge Incarceration and Earned Release Programs allow an eligible inmate who successfully completes either program to be released from prison early to extended supervision. *See* WIS. STAT. §§ 302.045(1) and (3m) (amended July 26, 2003); 302.05(3)(c)2. (created July 26, 2003). The time remaining on the confinement portion of the inmate's sentence is then converted to extended supervision time so only the confinement portion is reduced, not the total sentence. *See* §§ 302.045(3m); 302.05(3)(c)2.

reasonable determination. *See* ***McCleary v. State***, 49 Wis. 2d 263, 277, 182 N.W. 2d 512 (1971).

¶7 In its sentencing remarks, the trial court considered the primary sentencing factors, and properly exercised its discretion in imposing sentence. Reflecting about its exercise of that discretion, the trial court explained:

> The aggravating factors here, unfortunately, are, first, the quantity of drugs. The 5.11 grams are substantial. They have a big impact on the community. They affect the lives of many people. And your prior criminal record, you have two prior drug-dealing convictions; the possession of cocaine with intent, the delivery of cocaine. You were sentenced to two years. You served two years in prison. You were on extended supervision with probation hanging over your head at the time that this incident occurred. This was a for-profit motive, and again that goes to the very heart of your knowing from your experiences what drugs did to people, and yet you're willing to subject [others to] that and destroy the lives of others so you can have some money.
>
> Unfortunately that reflects that you can't be supervised in the community; that if you're going to rehabilitate yourself, turn your life around, it's going to have to happen in a structured, confined setting.

¶8 After it had imposed sentence, the trial court explained how bad faith lawsuits or violating conditions of extended supervision could result in extending his period of confinement. Incident to that explanation, the trial court also stated, "[c]onsidering all of the factors and circumstances the court is going to find the defendant is not eligible for the [c]hallenge incarceration program nor is he eligible for the earned-release program." Denying that part of Gipson's postconviction motion, the court concluded that

> Judge Dugan's determination that defendant was not eligible for the Challenge Incarceration Program or Earned Release Program shall stand. This determination is totally discretionary, and the court need not explain reasons for its determination. Judge Dugan considered the totality

> of the circumstances presented, including the defendant's actions, the fact that revocation occurred in another case, and the need for protection in the community.

Gipson contended that the trial court did not exercise its discretion when it declared him ineligible for these programs, and that the postconviction court compounded this error by demonstrating that it did not understand the concept of discretion.

¶9 The trial court explained that Gipson had the opportunity to rehabilitate himself when he was released to extended supervision for the previous convictions and instead, continued his unlawful conduct. The trial court consequently told Gipson that "you can't be supervised in the community; that if you're going to rehabilitate yourself, turn your life around, it's going to have to happen in a structured, confined setting." This explanation at sentencing clearly conveys the trial court's reasons and reasoning on why it refused to offer Gipson another opportunity for early release from confinement (such as the Challenge Incarceration and Earned Release Programs). That the trial court could have exercised its discretion differently or more "meaningfully" is not the standard. *See* ***Hartung v. Hartung***, 102 Wis. 2d 58, 66, 306 N.W.2d 16 (1981) (our inquiry is whether discretion was exercised, not whether it could have been exercised differently). The standard is a proper exercise of discretion. *See* ***Steele***, 246 Wis. 2d 744, ¶8. Reviewing the entirety of its sentencing remarks, the trial court properly exercised its discretion in determining that Gipson was ineligible for the Challenge Incarceration and Earned Release Programs. Having done so, it is unnecessary to address the postconviction court's refusal to "meaningfully" review the trial court's eligibility determinations.

¶10 We therefore reverse that part of the postconviction order denying the requested sentence credit, and remand this cause with directions to the trial court to credit Gipson with eight-four days of sentence credit. We affirm the judgment of conviction and the remainder of the postconviction order.

By the Court.—Judgment affirmed; 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)5. (2003-04).