COURT OF APPEALS
DECISION
DATED AND FILED

March 26, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2007AP553-CR
2007AP554-CR

Cir. Ct. No. 2003CF401
2003CF454

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY J. LILLEY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Washington County: ANNETTE K. ZIEGLER, Judge. *Affirmed*.

Before Anderson, P.J., Snyder and Neubauer, JJ.

¶1 SNYDER, J. Timothy J. Lilley appeals from a judgment of conviction for delivery of a controlled substance, marijuana, and a judgment of conviction for burglary. His appeal goes to the circuit court's sentencing after

revocation on both charges. He further appeals from an order denying his motion for postconviction relief. Lilley contends that the circuit court deprived him of his constitutional right to receive credit for time already served by imposing consecutive prison terms. He also contends that his trial counsel was ineffective for failing to object to comments made by the prosecutor during sentencing and that the court improperly denied his postconviction motion without an evidentiary hearing. We disagree with Lilley and affirm the judgments and order of the circuit court.

BACKGROUND

¶2 Lilley was charged with three counts of delivering THC, contrary to WIS. STAT. § 961.41(1)(h)1. (2005-06).[1] The three sales of marijuana involved small amounts, for which Lilley received a total of $330. While out on bail, Lilley served as a lookout in the burglary of a local business. Consequently, he was charged with one count of party to a crime and, because abstaining from criminal activity was a condition of his bail bond in the drug case, he was also charged with felony bail jumping.

¶3 Lilley ultimately agreed to enter a plea to one count of delivery of a controlled substance and to the burglary charge. In exchange, the State agreed to dismiss the three remaining charges, which would be read in for sentencing. Following the plea colloquy, the circuit court accepted Lilley's guilty pleas and then gave him the opportunity to speak before sentencing. The court considered the appropriate sentencing criteria and noted that several things favored Lilley.

[1] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

The court considered Lilley's acceptance of responsibility for his actions, his youth, and his support role in the burglary. On the burglary charge, the court withheld sentence and ordered five years of probation with the condition that he serve eight months in jail with Huber privileges. On the drug charge, the court withheld sentence and ordered five years of probation with additional conditions. The court warned Lilley that he would receive no further leniency stating, "If you come back to this court for sentencing on a withheld sentence, you'll be going to prison and you'll probably go for a long time."

¶4 On June 13, 2006, approximately two years later, the Department of Corrections revoked Lilley's probation. The DOC cited fourteen parole violations that occurred between December 2004 and May 2006. These violations included use of marijuana and alcohol, failure to report job status changes, failure to comply with AODA program requirements, termination from the Challenge Incarceration Program, and various other acts of noncompliance. The DOC recommendation report stated that Lilley needs to be confined to protect the public, that allowing Lilley to remain in the community would unduly depreciate the seriousness of his criminal behavior, and that possible alternatives to revocation of probation had been unsuccessful.

¶5 Lilley returned to the circuit court for sentencing. The DOC report recommended that Lilley be sentenced to eighteen months in prison plus two years of extended supervision for the drug conviction. It further recommended that he be sentenced to four years in prison plus four years of extended supervision on the party to the crime of burglary conviction. Lilley and the State agreed that the DOC's recommendation for each individual conviction was appropriate. They did disagree, however, on whether the sentences should run concurrently or

consecutively. This disagreement and the exchange in the courtroom about appropriate sentence credit form the basis of this appeal. The parties generally agreed that Lilley was entitled to more than two years of presentence credit. Relevant portions of the courtroom dialogue went as follows:

> STATE: I was going to recommend consecutive. Normally, I'd say four years is enough, but given the fact [Lilley's] done so much, I think he needs to spend some time in prison given the fact that he—he has all this credit coming.
>
> And, as [defense counsel] pointed out to me, I guess at one level, it's not been the easiest eight months condition time…. [Lilley] also was in the Challenge Incarceration Program, but on the other hand … he's certainly been given a lot of chances by the [DOC]….
>
> ….
>
> Just given all that and given the serious nature of both charges, delivery of marijuana and a burglary, I'd be asking for the time to run consecutive rather than concurrent. That's all.
>
> ….
>
> DEFENSE: I think that when we take a look at the whole situation, I don't have any objection and I don't think my client has any objection to the recommended sentences, but we think that they should run concurrently as opposed to consecutively, and I understand the State's argument, but the time that Mr. Lilley did was some pretty hard time.
>
> He had pre-trial incarceration time, which obviously is straight time. He had the condition time of eight months … and then almost a year's worth of time he was either being held in custody … and the balance of that of about … nine months he was at Challenge, which as everyone knows, is a difficult program.
>
> ….
>
> I think when we take a look at the conduct here and take a look at Mr. Lilley, he's a young man. He's only 22 years of age at this point, won't be 23 until November. According to what he indicates to me, has one prior

> conviction, and he's going to be clearly under supervision for a substantial period of time, even if the Court imposes this as a concurrent type of disposition.
>
> This Probation Officer is recommending four years of initial incarceration followed by four years of extended supervision, so he's going to be under supervision for a substantial period of time. I really don't necessarily think that adding an additional 18 months on to his sentence by making these consecutive is going to be of any benefit either to the State, society or to Mr. Lilley.

¶6 The circuit court imposed the recommended sentences to be served consecutively. The court emphasized that it had given Lilley a chance and had warned him not to waste it. The court stated that Lilley had "absolutely and repeatedly and flagrantly failed on probation." The court went on to consider Lilley's criminal record, which it characterized as "egregious," and the nature of his crimes, which it called "very serious offenses." The court also addressed protection of the community, noting Lilley's "undesirable behavior pattern" and the public's right to a community where Lilley is not "out there and burglarizing places or selling drugs." The court noted that Lilley had been given many chances, particularly in the juvenile justice system where treatment was the focus, but also in the adult probation system where alternatives were offered. In its sentencing remarks, the court never made reference to credit for time already served.

¶7 Lilley moved for postconviction relief, seeking sentence modification or, in the alternative, resentencing. Lilley asserted that the court's comment that the State's sentencing recommendation was "reasonable," implied that the court had improperly crafted the sentence to deprive Lilley of the presentence credit due him. Lilley also argued that his attorney was ineffective for failing to object to the State's reference to presentence credit as a sentencing

consideration. Lilley requested a ***Machner***[2] hearing to pursue his claim of ineffective assistance.

¶8 In its decision denying Lilley's motion, the court reviewed the procedural history of Lilley's cases. The court specifically reviewed each sentencing factor that it considered, including Lilley's extensive prior record, the recommendations of counsel, the defendant's conduct and considered, "foremost, the protection of the community." The court reflected on Lilley's failure to take probation seriously and his failure to take advantage of the services and opportunities offered to him.

¶9 Specifically responding to Lilley's motion, the court stated that it had considered all proper sentencing factors under ***State v. Gallion***, 2004 WI 42, 270 Wis. 2d 535, 678 N.W.2d 197, and that regarding sentence credit, "the court did not utilize that as a factor in pronouncing the defendant's sentence, and, in fact, that was only addressed after sentence was pronounced." The court imposed a consecutive sentence "to give [Lilley] the time where he does not use drugs and figure out how serious this behavior is and where he is headed…. The credit received had nothing to do with the sentence imposed." Responding to Lilley's allegation of ineffective assistance of counsel, the court stated that the "attorney outlined the factors that needed to be considered by the court and appropriately argued for his client. Counsel sought and argued for a concurrent sentence." Concluding that the sentence was "abundantly reasonable," the court denied Lilley's motion for relief. Lilley appeals.

[2] ***State v. Machner***, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

DISCUSSION

¶10 Lilley presents three issues for our review. First, he contends that the circuit court tailored his sentence to deprive him of approximately 768 days of sentence credit for time Lilley already served. In doing so, Lilley argues, the court placed him in double jeopardy because it subjected him to multiple punishments for the same offense. Next, Lilley contends that his trial attorney was ineffective for failing to object to the State's references to presentence credit during sentencing arguments. Finally, he argues that the circuit court erred when it ruled on his motion without holding a ***Machner*** hearing. We take each issue in turn.

¶11 Sentencing is reviewed for an erroneous exercise of discretion. ***McCleary v. State***, 49 Wis. 2d 263, 278, 182 N.W.2d 512 (1971). There is a strong policy against interfering with the sentencing discretion of the circuit court. ***Id.*** at 281. This deference stems from the circuit court's superior position to observe the demeanor of the defendant, weigh the available evidence, and consider the relevant factors. *See* ***State v. Bizzle***, 222 Wis. 2d 100, 105, 585 N.W.2d 899 (Ct. App. 1998). However, when a court imposes a harsher sentence for the purpose of canceling out sentence credit, it runs afoul of the constitution's double jeopardy clause. *See* ***North Carolina v. Pearce***, 395 U.S. 711, 718-19 (1969) (a defendant has an absolute right to be "fully credited" for time served for an offense). An erroneous exercise of discretion may occur when the sentence is based on a clearly improper factor. ***State v. Fenz***, 2002 WI App 244, ¶7, 258 Wis. 2d 281, 653 N.W.2d 280. Lilley carries the heavy burden of showing that the circuit court relied on an unreasonable or improper factor when imposing sentence. *See* ***State v. Ramuta***, 2003 WI App 80, ¶23, 261 Wis. 2d 784, 661 N.W.2d 483.

¶12 Lilley spends a significant amount of effort reviewing general tenets of sentencing law. We ascertain no dispute between the parties that a court must impose the minimum amount of punishment that will protect the public given the gravity of the crime and rehabilitation needs of the defendant. ***Gallion***, 270 Wis. 2d 535, ¶44. Furthermore, to do this effectively, the court needs to consider all relevant and available information. ***State v. Carter***, 208 Wis. 2d 142, 156, 560 N.W.2d 256 (1997). After truth-in-sentencing, "judges have an enhanced need for more complete information upfront, at the time of sentencing." ***Gallion***, 270 Wis. 2d 535, ¶¶33-34 (prior to TIS, parole boards served as a check on excessive sentences). As always, a court must explain its reasons for imposing the chosen sentence. *See* ***McCleary***, 49 Wis. 2d 280-88.

¶13 Lilley directs us to ***State v. Walker***, where our supreme court stated that "trial judges are first to determine and impose an appropriate sentence independently of any time previously served." ***State v. Walker***, 117 Wis. 2d 579, 586, 345 N.W.2d 413 (1984). Lilley also relies on WIS. STAT. § 973.155(2), which states in relevant part, "After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted, which finding shall be included in the judgment of conviction." Lilley asserts that because the statute directs a court to grant sentence credit *after* the imposition of the sentence, his rights were violated when the prosecutor and his own defense attorney discussed Lilley's sentence credit prior to addressing any other sentencing factors. Most egregiously, he argues, the prosecutor told the court: "Normally, I'd say four years is enough, but given the fact that [Lilley has] done so much, I think he needs to spend some time in prison given the fact that he —he has all this credit coming." That statement, which Lilley asserts the court "implicitly" adopted, forms the basis of his appeal.

¶14 In ***Struzik v. State***, 90 Wis. 2d 357, 279 N.W.2d 922 (1979), the sentencing court imposed a peculiar sentence obviously intended to subvert the defendant's right to credit for time served. The court imposed five years and fourteen days in prison and then allowed fourteen days of credit for time already served. ***Id.*** at 367. Our supreme court modified the sentence to five years and then applied the fourteen-day credit. ***Id.*** at 368. The supreme court explained that the "sentence transparently reveal[ed] that the trial court added to the appropriate sentence the time already served, so that the sentence after the application of the credit would still constitute the sentence originally determined." ***Id.*** at 367.

¶15 Here, Lilley argues, the court's decision to impose the eighteen-month sentence to be served consecutively reveals a similar thought process to that used by the sentencing court in ***Struzik***. Nonetheless, Lilley concedes that the circuit court did not mention sentence credit as a factor it considered when crafting the sentence and that the eighteen-month sentence does not mirror the 768 days of credit due; however, Lilley argues, a court's silence on the issue of credit "masks a court's true intent." He characterizes the court's on-the-record rationale as containing a "glaring omission of *any* mention of how the court used Lilley's sentence credit—a factor heavily argued by both sides." Lilley is unwilling to accept the proposition that the court was silent on the topic because the court did not consider it for sentencing purposes. Here, Lilley is in the unenviable position of trying to create something from nothing. He argues that because the circuit court imposed consecutive sentences, "exactly as the State urged," we must presume that the court "implicitly considered" all of the presentence credit described by the prosecutor at sentencing. He seeks to demonstrate a thought process on the part of the sentencing court that is simply not evident from the record.

¶16 Twice the circuit court had the opportunity to explain its sentencing rationale and on both occasions it focused on Lilley's extensive record, the need to protect the community, Lilley's drug habit, and his failure to change his behavior despite the opportunities offered on probation. The court specifically stated its goal of having Lilley spend sufficient time in prison to address his ongoing drug problem. The court accomplished this goal by imposing consecutive sentences.

¶17 In ***State v. Fenz***, 258 Wis. 2d 281, ¶10, we held that a circuit court may articulate a specific time-related incarceration goal and may consider presentence credit as a factor in meeting that goal. Reasoning that the circuit court is required to consider all legally relevant factors to craft an appropriate sentence, we held that under certain circumstances a court may consider presentence credit as a factor in determining the appropriate sentence. ***Id.***, ¶¶11-12. Therefore, the State argues that even if the circuit court did consider Lilley's time served when imposing sentence, the court's time-related rehabilitation goal justified the court's rationale.[3] We need not address this alternate argument because we are satisfied that the circuit court did not use Lilley's presentence credit as a mechanism for extending his incarceration beyond what it should have been. The circuit court followed the procedure in WIS. STAT. § 973.155(2) when it first imposed its sentence and then awarded 768 days sentence credit.

[3] Lilley argues that ***State v. Fenz***, 2002 WI App 244, 258 Wis. 2d 281, 653 N.W.2d 280, was wrongly decided and therefore should not be followed. He argues that ***State v. Walker***, 117 Wis. 2d 579, 586, 345 N.W.2d 413 (1984), explicitly provided that presentence credit was not a legally relevant factor. We do not read ***Fenz*** to conflict with ***Walker***, and we decline Lilley's invitation to abandon ***Fenz***. *See* ***Fenz***, 258 Wis. 2d 281, ¶11 (noting that the court's analysis comported with the teachings of ***Walker***).

¶18 Lilley also argues that his attorney was ineffective for failing to object to the prosecutor's comments about presentence credit. To demonstrate ineffective assistance of counsel, Lilley must show that his attorney's performance was deficient and that Lilley was prejudiced as a result of that deficiency. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). An attorney's performance is deficient if the attorney made serious mistakes which cannot be justified as the "exercise of reasonable professional judgment." ***Id.*** at 690. Prejudice results where there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. ***Id.*** at 694.

¶19 We reject Lilley's claim of ineffective assistance of counsel. As we have already concluded, the record does not support Lilley's assertion that the circuit court inappropriately tacked on extra prison time to subvert his presentence credit. The circuit court indicated that it did not rely on the presentence credit calculation when choosing to impose consecutive sentences. Counsel's failure to object to the prosecutor's statements could not have affected the outcome and the result of the sentencing proceeding would not have been altered. Thus, even assuming deficient performance, Lilley cannot demonstrate that he was prejudiced. A defendant must show both deficient performance and prejudice to establish ineffective assistance of counsel, and we need not address both components if the defendant fails to make an adequate showing on either one. *See* ***id***, at 697.

¶20 Lilley's final claim is that he was denied an evidentiary hearing at which he could pursue his allegations of ineffective assistance of counsel. A properly pleaded claim triggers an evidentiary hearing at which defense counsel testifies regarding his challenged conduct. *See* ***State v. Machner***, 92 Wis. 2d 797,

804, 285 N.W.2d 905 (Ct. App. 1979). To obtain a hearing on a postconviction motion, the defendant must allege facts that, if true, entitle him or her to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Here, the underlying assumption in Lilley's motion was that the court imposed consecutive sentences to counteract the impact of the presentence credit. Lilley's motion needed to demonstrate a "reasonable probability" of a different sentence absent his attorney's failure to object to the State's comments on presentence credit. *See* ***State v. Tomlinson***, 2001 WI App 212, ¶39, 247 Wis. 2d 682, 635 N.W.2d 201, *aff'd*, 2002 WI 91, 254 Wis. 2d 502, 648 N.W.2d 367. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** In this case, then, Lilley is entitled to a ***Machner*** hearing only if there is a "reasonable probability" that the court would have imposed concurrent sentences had his attorney objected to the prosecutor's discussion of presentence credit. *See* ***Tomlinson***, 247 Wis. 2d 682, ¶39**.** Based on our review of the record and our previous analysis, we conclude no such probability exists here.

CONCLUSION

¶21 The circuit court stated that Lilley's presentence credit played no role in its decision to impose the two sentences to be served consecutively. Nothing in the record contradicts this statement. Our review demonstrates that the circuit court considered appropriate sentencing factors, identified a particular goal of rehabilitation of Lilley's drug problems, and imposed sentence based upon legally relevant information. The circuit court's decision to deny Lilley's postconviction motion for relief without holding a ***Machner*** hearing is also supported by the record. Lilley is unable to establish that there is a reasonable probability a different sentence would have been imposed had his attorney

objected to the discussion of presentence credit. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgments and order affirmed.

Not recommended for publication in the official reports.