

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 24, 2003

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. 02-1325-CR
STATE OF WISCONSIN**

Cir. Ct. No. 00 CF 6416

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

MICHAEL P. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed.*

Before Vergeront, P.J., Roggensack and Lundsten, JJ.

¶1 PER CURIAM. Michael Thompson appeals a judgment convicting him of being party to the crime of robbery and two postconviction orders. He claims the trial court erroneously exercised its discretion in sentencing him and then erred in reducing his sentence credit, *sua sponte*. We disagree and affirm.

BACKGROUND

¶2 Thompson was arrested for armed robbery on April 6, 2001. On July 19, 2001, while Thompson was in custody awaiting resolution of the charge, his probation was revoked in another case. Thompson entered a guilty plea to the reduced charge of being party to the crime of robbery on November 14, 2001, and was sentenced at the same hearing to three years of initial confinement, concurrent to any other sentence, to be followed by four years on extended supervision, with restitution in the amount of \$2105, plus costs and fees. The court also awarded 222 days of sentence credit, from the date of arrest to the date of sentencing.

¶3 Thompson moved to modify his sentence on the grounds that the trial court had failed to adequately consider certain mitigating factors, or to explain why it was a prison, rather than probation, case. The trial court denied the motion, and upon reviewing the record, also downwardly adjusted the sentence credit to 105 days, from the date of arrest to the date Thompson's probation was revoked.

DISCUSSION

¶4 As a preliminary matter, each party presents reasons why the other party should be procedurally barred from arguing the merits. The State claims that Thompson waived the sentence credit issue and failed to appeal a reconsideration order which addressed it, while Thompson contends that the State should be estopped from supporting the reduction in sentence credit because it agreed to the original calculation. We are not persuaded by any of these arguments. We are satisfied that Thompson filed an amended notice of appeal citing a postconviction order that gives us jurisdiction over the sentence credit issue and that estoppel

against the State does not apply here because the sentence credit reduction was initiated by the court *sua sponte*.

Length of Sentence

¶5 Thompson argues that the trial court failed to properly exercise its sentencing discretion when said it was “obvious” this was a prison case without fully discussing the usual sentencing factors. The record shows, however, that defense counsel had proposed thirty months of initial confinement to be followed by extended supervision. Thompson cannot now complain that the trial court should have explained on the record why probation was inappropriate. *See State v. Scherreiks*, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989) (a defendant may not challenge on appeal a sentence that he already approved).

¶6 Moreover, because the trial court is in the best position to consider the relevant sentencing factors and the demeanor of the defendant, we are reluctant to interfere with its sentencing discretion and we presume that it acted reasonably. *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984). Thus, sentence determinations that are not explicitly based upon an improper factor or otherwise illegal as a matter of law, and that are not so disproportionate as to “shock the conscience” and thus violate the Eighth Amendment, are given a presumption of reasonableness in this state. *State v. Paske*, 163 Wis. 2d 52, 69-70, 471 N.W.2d 55 (1991); *Harris*, 119 Wis. 2d at 622. To overcome the presumption, the defendant “must show some unreasonable or unjustifiable basis in the record for the sentence complained of.” *State v. Krueger*, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). While the trial court could have given a fuller explanation of its sentence, the sentence given was well within the allowable sentence range, and there is nothing to indicate that it was based on any improper

factor. In sum, we see nothing in the record sufficient to overcome the presumption of reasonableness.

Sentence Credit

¶7 Contrary to Thompson's contentions, Wisconsin law establishes that an offender is not entitled to sentence credit for pretrial incarceration during which the offender was serving another sentence. *State v. Beets*, 124 Wis. 2d 372, 374, 369 N.W.2d 382 (1985). Thus, Thompson was initially granted sentence credit that he was not entitled to for the days following the revocation of his probation on another case.

¶8 Thompson nonetheless claims that his due process right and his right to be free from double jeopardy were violated by the downward reduction in his sentence credit. Both of these contentions, however, were rejected in *State v. Amos*, 153 Wis. 2d 257, 281-82, 450 N.W.2d 503 (Ct. App. 1989). Thompson was accorded due process when the court considered his reconsideration motion on the sentence credit issue, and double jeopardy was not implicated because the same actual sentence existed both before and after the modification of the sentence credit. *See id.*

By the Court.—Judgment and orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5 (2001-02).

