COURT OF APPEALS
DECISION
DATED AND FILED

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2035 **Cir. Ct. No. 2007CF1347**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

EDGAR IVAN MATTA,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Edgar Ivan Matta, *pro se*, appeals an order denying his postconviction motion brought pursuant to WIS. STAT. § 974.06 (2009-10).[1]

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Matta's primary argument is that his sentence should be reduced because the police should have not have been allowed to make multiple controlled drug buys from him. He also argues that he received ineffective assistance of trial counsel. We affirm.

¶2 Law enforcement made four controlled drug purchases from Matta. The first purchase was for 1.7 grams of heroin, the second was for 4.4 grams of heroin, the third purchase was for 11.5 grams of heroin and the final purchase was for 25 grams of heroin. All four of the purchases were made within one month. Pursuant to a plea agreement, Matta pled guilty to delivering 11.5 grams of heroin, and the State agreed not to charge Matta with the other three deliveries. Matta also agreed that the uncharged offenses could be considered by the circuit court for sentencing purposes. The circuit court sentenced Matta to eleven years of imprisonment, with six years of initial confinement and five years of extended supervision, and imposed restitution.

¶3 After sentencing, Matta filed several postconviction motions. Matta first moved to vacate the restitution order, which the circuit court granted. Matta then moved the circuit court to reconsider his eligibility for the earned release and challenge incarceration programs. The circuit court denied the motion. Matta then filed a motion to have his DNA surcharge vacated, which the circuit court denied. Finally, Matta filed a postconviction motion for sentence modification. The circuit court denied the motion. This appeal is taken from that order.

¶4 Matta argues that his sentence should be reduced because the circuit court considered the three uncharged controlled drug purchases when it sentenced him. Matta contends that the police should not be allowed to make multiple controlled drug purchases from a suspect for the purpose of enhancing the

suspect's sentence exposure and coercing him or her into pleading guilty. In support of his argument, Matta points to two cases in which the Indiana Supreme Court modified consecutive sentences as manifestly unreasonable where the state had sponsored a series of drug buys in a sting operation. *See* ***Beno v. State***, 581 N.E.2d 922 (1991) (three consecutive maximum sentences totaling seventy-four years in prison modified to concurrent terms totaling fifty years of imprisonment), and ***Gregory v. State***, 644 N.E.2d 543 (1994) (four consecutive maximum sentences totaling one hundred and twenty years of imprisonment modified to concurrent terms totaling fifty years in prison).

¶5 The police acted properly in making multiple drug purchases from Matta as part of their investigation of illicit drug dealing. There is no law that requires law enforcement to stop an investigation at the first discovery of criminal activity. There is also no basis in the record for Matta's assertion that the additional drug buys were made solely to coerce Matta into pleading guilty. To the contrary, the record shows that Matta freely entered a plea agreement and received a substantial benefit for doing so—he was charged with only one offense even though he committed four offenses. As part of the deal, Matta admitted the facts pertaining to the other offenses and agreed that the circuit court could consider the uncharged offenses in sentencing him; he was not coerced. As for the Indiana cases cited by Matta, they are inapposite. In both cases, the Indiana Supreme Court concluded that maximum consecutive sentences stemming from multiple counts based on a series of drug buys made close in time to one another were manifestly unreasonable. Here, however, Matta was charged with only one count and, although the circuit court considered the other drug buys, Matta

received nothing close to the maximum sentence. We reject Matta's argument that he is entitled to sentence modification.[2]

¶6 Matta next argues that he received ineffective assistance of trial counsel. To prove a claim of ineffective assistance of counsel, a defendant must show both that the lawyer's representation was deficient and that he suffered prejudice as a result of the deficient performance. ***State v. Love***, 2005 WI 116, ¶30, 284 Wis. 2d 111, 700 N.W.2d 62. "To prove constitutional deficiency, the defendant must establish that counsel's conduct falls below an objective standard of reasonableness." ***Id.*** "To prove constitutional prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** (citation and quotation marks omitted).

¶7 Matta contends that his attorney was deficient for failing to challenge evidence pertaining to the series of drug buys made by the police. For the reasons previously explained, this argument would not have prevailed, and thus cannot serve as the basis of an ineffective assistance of counsel claim. Matta contends that his attorney was deficient for advising him to waive his preliminary hearing. We reject this argument because Matta does not explain why his attorney's advice to waive the hearing was erroneous and how it adversely affected him. Matta also contends that he received ineffective assistance of counsel because his attorney did not timely provide him with discovery materials.

[2] While we have addressed Matta's motion for sentence modification on the merits, we note that the motion is untimely. The deadline for challenging the sentence on direct appeal under WIS. STAT. RULE 809.30 has already elapsed, as has the deadline for moving for sentence modification under WIS. STAT. § 973.19, which is ninety days from the date of sentencing. There is no "new factor" present that would allow for bringing the motion beyond the time limits.

However, Matta acknowledges that he received the materials two weeks before the plea hearing, and does not explain why this period of time was insufficient for him to review the materials and ask his attorney for advice. Therefore, we reject the argument that Matta received ineffective assistance of counsel.[3]

¶8 Finally, Matta argues that he is entitled to additional sentence credit based on the admitted, but uncharged, offenses. Matta received a total of 122 days of sentence credit on his conviction, one day for each day he was in jail between his arrest and his sentencing. He is not entitled to multiple days of credit for each day he spent in jail simply because he admitted to multiple uncharged offenses. As explained by the Supreme Court, "[c]redit is to be given on a day-for-day basis…." ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988). Matta is entitled to only one day of credit for each day he spent in jail. Therefore, we reject Matta's argument that he is entitled to additional sentence credit.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

[3] Matta contends that the circuit court should have held a hearing to consider his claim of ineffective assistance of counsel. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." ***State v. Allen***, 2004 WI 106, ¶14, 274 Wis. 2d 568, 682 N.W.2d 433. Matta has not met this threshold requirement, so he was not entitled to a hearing.