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DISTRICT III

January 30, 2024

To:

Hon. Gregory E. Grau
Reserve Judge

Michael J. Conway
Electronic Notice

Hon. Gregory J. Strasser
Circuit Court Judge
Electronic Notice

Dennis Schertz
Electronic Notice

Kelly Schremp
Clerk of Circuit Court
Marathon County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP589-CR

State of Wisconsin v. Kevin O. Spencer (L. C. No. 2009CF425)

Before Stark, P.J., Hruz and Gill, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Kevin Spencer appeals an order denying his October 2019 motion for additional sentence credit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We dismiss this appeal for lack of jurisdiction.

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

Spencer was arrested for the offenses at issue in this case on July 1, 2009, and was held in custody at the Marathon County Jail. The following day, the State issued a criminal complaint charging Spencer with one count of repeated sexual assault of a child and two counts of sexual assault of a child under age sixteen, all three counts as a repeater.

Spencer was granted a signature bond on July 2, 2009. However, at the time of the alleged offenses, Spencer was serving the extended supervision portion of his sentence in Marathon County case No. 1999CF362 (“the 1999 case”). As a result of the charges in this case, the Department of Corrections (DOC) began proceedings to revoke Spencer’s extended supervision in the 1999 case. Consequently, even though a signature bond had been issued in this case, Spencer remained in custody pending the revocation of his extended supervision in the 1999 case. Spencer’s extended supervision in the 1999 case was ultimately revoked, and he was ordered to serve two years, four months, and six days of reconfinement time. Spencer began serving his reconfinement sentence in the 1999 case on October 30, 2009.

In 2011, while this case remained pending, Spencer filed a motion for immediate release from his sentence in the 1999 case. As grounds for the motion, Spencer argued that an error by the DOC had resulted in him serving his sentence in the 1999 case consecutively to his sentence in Marathon County case No. 1998CF593 (“the 1998 case”), rather than concurrently, as the judge that sentenced him in both of those cases had intended. Spencer asserted that, as a result of this error, his incarceration time in the 1998 and 1999 cases had been increased by at least two years and three months. The circuit court presiding over the 1999 case agreed, and during a hearing on June 28, 2011, the court ordered that Spencer be released from his sentence in the 1999 case. The court subsequently amended Spencer’s judgment of conviction in the 1999 case to grant him 820 days of sentence credit.

On June 29, 2011—the day after Spencer was ordered released from his sentence in the 1999 case—his signature bond in this case was converted to a cash bond. Spencer could not post bond, and he therefore remained in custody awaiting the resolution of this case. Pursuant to a plea agreement, Spencer ultimately entered a guilty plea to the repeated sexual assault of a child charge, as a repeater.² In exchange for Spencer’s plea, the remaining charges were dismissed and read in.

On March 2, 2012, the circuit court imposed upon Spencer a prison sentence consisting of twelve years’ initial confinement followed by eight years’ extended supervision. The parties agreed that Spencer was entitled to 247 days of sentence credit for the time he spent in custody on the cash bond in this case from June 29, 2011, until sentencing. The defense argued, however, that Spencer was also entitled to credit for the time he spent in custody from November 2, 2010—the date that defense counsel claimed Spencer should have been released in the 1999 case—through June 28, 2011. The court granted Spencer the undisputed 247 days of sentence credit but declined to grant him any additional credit. Spencer did not appeal his judgment of conviction.

In June 2014, Spencer filed a pro se motion seeking 484 days of additional sentence credit. Spencer asserted that he was entitled to credit for the time he spent in custody between April 3, 2010 (the date he alleged that he should have been released in the 1999 case) and July 11, 2011 (the date he claimed that he actually was released in that case). Following a hearing, the circuit court denied Spencer’s motion, concluding that Spencer could not receive

² The Honorable Gregory E. Grau accepted Spencer’s guilty plea and presided over his sentencing hearing. Judge Grau also denied Spencer’s June 2014 motion for additional sentence credit.

credit in this case for any time that he spent in custody while he was serving his sentence in the 1999 case or while the signature bond in this case was in place.

In June 2016, Spencer, through counsel, filed another motion for additional sentence credit and for sentence modification. With respect to sentence credit, Spencer argued that he was entitled to 121 additional days of credit—from July 1, 2009 (the date of his arrest in this case) until October 30, 2009 (the date he began serving his reconfinement sentence in the 1999 case). With respect to sentence modification, Spencer argued that at the time of his sentencing in this case, both the circuit court and the parties unknowingly overlooked the fact that Spencer had “spent 704 days in prison in connection with [the 1999 case], in error, that he never got usable credit for.” Spencer contended that if the sentencing court had known that he “served almost 2 additional years in prison by mistake, and received no usable credit or benefit for that time,” it might have considered imposing less initial confinement time in this case. Spencer therefore asked the court to “reduce his sentence by 704 days (or 583 days if the court also decides to add 121 days of credit for July 1, 2009 to October 30, 2009, to this case).”

During a September 2016 hearing on Spencer’s motion, the State conceded that Spencer was entitled to 121 days of sentence credit for the time period between July 1, 2009, and October 30, 2009. The circuit court therefore granted Spencer 121 days of additional sentence credit.³

³ The Honorable Gregory J. Strasser presided over the September 2016 hearing on Spencer’s motion for sentence credit and sentence modification. Judge Strasser also denied each of Spencer’s subsequent motions for sentence credit, including the October 2019 motion that is at issue in this appeal.

Addressing Spencer's request for sentence modification, the circuit court concluded that Spencer had demonstrated the existence of a new factor—i.e., the amount of time that Spencer erroneously spent in custody in the 1999 case and the fact that he did not receive usable sentence credit for that time in the 1999 case. The court further concluded that if the sentencing court in this case had been fully aware of these facts, it might have imposed a shorter sentence. The court therefore exercised its discretion to modify Spencer's sentence by granting him 100 additional days of sentence credit. In November 2016, the court entered an amended judgment of conviction that awarded Spencer a total of 468 days of credit—comprised of the original 247 days awarded by the sentencing court, plus 121 days, plus 100 days.

In June 2018, Spencer, pro se, wrote to the circuit court asserting that he was entitled to an additional 599 days of sentence credit. In support of that request, Spencer cited this court's decision in *State v. Johnson*, 2018 WI App 2, 379 Wis. 2d 684, 906 N.W.2d 704 (2017). The court denied Spencer's motion, noting that Spencer's judgment of conviction had been amended in November 2016 to grant him 468 days of credit. The court stated that it did not "find any reason to adjust [Spencer's] sentence credit at this time." Spencer did not appeal the court's denial of his June 2018 motion.

Spencer filed two more pro se motions for additional sentence credit in November 2018 and March 2019, respectively, each seeking 583 additional days of credit. The circuit court denied both motions, each time noting that it had previously addressed the issue of sentence credit during the September 2016 hearing. Spencer did not appeal the denial of either motion.

On October 23, 2019, Spencer filed the pro se motion for sentence credit that is at issue in this appeal, asserting that he was entitled to 573 days of sentence credit.⁴ The circuit court denied Spencer’s motion the same day it was filed, explaining: “I have decided this motion previously per a motion decided on September 8, 2016. I sent letters to you on January 17, 2019 and March 14, 2019 stating as much. On this basis, your motion is denied.”

Spencer now appeals, arguing that the circuit court erred by denying his October 2019 motion for additional sentence credit.⁵ In response, the State asserts that we should dismiss this appeal for lack of jurisdiction. The existence of appellate jurisdiction presents a question of law that we review independently. *State v. Scaccio*, 2000 WI App 265, ¶4, 240 Wis. 2d 95, 622 N.W.2d 449.

We conclude that we lack jurisdiction to consider Spencer’s appellate arguments because Spencer did not timely appeal the circuit court’s denial of his June 2018 motion for additional

⁴ Like the State, we assume that Spencer intended to request 583 days of sentence credit, consistent with his prior motions, rather than 573 days. However, Spencer’s October 2019 motion did not contain any explanation of how Spencer calculated the amount of additional sentence credit to which he claimed to be entitled.

In the motion, Spencer asserted that he was in custody in connection with the course of conduct for which his sentence in this case was imposed from July 1, 2009—the date of his arrest—until March 2, 2012—the date of his sentencing. By our calculation, the number of days between those dates is 975, not counting the date of sentencing. See *State v. Kontny*, 2020 WI App 30, ¶12, 392 Wis. 2d 311, 943 N.W.2d 923 (“[A] defendant is not entitled to sentence credit for the date on which he or she is sentenced.”). Spencer’s amended judgment of conviction granted him 468 days of sentence credit. The difference between 975 days and 468 days is 507 days. Thus, it is unclear why Spencer believed that he was entitled to either 573 or 583 days of additional sentence credit. On appeal, Spencer asserts that he is entitled to 464 days of additional sentence credit.

⁵ Spencer’s appointed appellate attorney initially filed a no-merit report, asserting that there would be no arguable merit to a claim that the circuit court erred by denying the October 2019 motion. After considering the no-merit report, Spencer’s response, and a supplemental no-merit report, we rejected the no-merit report and converted this matter to a merit appeal. Appointed counsel did not raise lack of appellate jurisdiction as a basis for the no-merit report.

sentence credit, which raised the same issue as his October 2019 motion. As discussed above, the court amended Spencer’s judgment of conviction in November 2016 to grant him a total of 468 days of sentence credit. It did so based on the State’s concession that Spencer was entitled to 121 days of additional sentence credit and the court’s conclusion that Spencer had established the existence of a new factor warranting sentence modification. Spencer then moved for additional sentence credit in June 2018, citing *Johnson*, a case issued after his prior motion was decided. The court denied Spencer’s June 2018 motion on July 16, 2018.

A defendant aggrieved by a circuit court’s determination of sentence credit “may appeal in accordance with [WIS. STAT. RULE] 809.30.” WIS. STAT. § 973.155(6). RULE 809.30 requires a defendant to file a notice of intent to pursue postconviction relief within twenty days after a final adjudication. RULE 809.30(2)(b). Spencer did not file a notice of intent to pursue postconviction relief within twenty days after the circuit court denied his June 2018 motion, nor did he seek an extension of the time in which to do so. Instead, Spencer filed three more motions for additional sentence credit—each citing *Johnson* as the basis for his request—the last of which was the October 2019 motion underlying this appeal. Spencer did not file a notice of intent to pursue postconviction relief until after the court denied his October 2019 motion.

We agree with the State that a defendant cannot enlarge the time to appeal the denial of a motion for sentence credit “by submitting a perfunctory restatement of the same motion and then appealing from its denial as if the [original motion] had not already been litigated.” As the State persuasively argues, allowing a litigant to unilaterally restart the time to initiate an appeal in this manner “would render the timeframe for initiating an appeal superfluous, which is untenable as a matter of statutory interpretation.” See *State v. Sher*, 149 Wis. 2d 1, 9, 437 N.W.2d 878 (1989) (“A statute will be construed so as to not render any part of it superfluous if such a construction

can be avoided.”). If Spencer wanted to appeal the circuit court’s denial of his June 2018 motion for sentence credit, he was required to file a notice of intent to pursue postconviction relief within twenty days. Spencer’s filing of multiple additional motions raising the same issue does not remedy his failure to timely appeal the denial of his June 2018 motion.

In his reply brief, Spencer argues that the State “cites no case that would even suggest that a defendant cannot bring a motion under WIS. STAT. § 973.155 at any time after he is sentenced, to ensure that he receives the correct amount of sentence credit pursuant to that statute.” Spencer also notes that an award of sentence credit under § 973.155 is “mandatory.” *See State v. Carter*, 2010 WI 77, ¶51, 327 Wis. 2d 1, 785 N.W.2d 516. Be that as it may, Spencer cites no legal authority permitting him to extend the time to appeal the denial of a motion for sentence credit by repeatedly filing what is essentially the same motion and waiting to file a notice of intent to pursue postconviction relief until after that motion has been denied for the fourth time.

Furthermore, even if Spencer’s October 2019 motion could be construed as a belated motion for reconsideration of the circuit court’s denial of his June 2018 motion, this court would still lack jurisdiction. “No right of appeal exists from an order denying a motion to reconsider which presents the same issues as those determined in the order or judgment sought to be reconsidered.” *Silverton Enters., Inc. v. General Cas. Co. of Wis.*, 143 Wis. 2d 661, 665, 422 N.W.2d 154 (Ct. App. 1988). Spencer’s October 2019 motion did not raise any new issue not previously raised in his June 2018 motion. Both motions sought over 500 days of additional sentence credit based on this court’s decision in *Johnson*. As such, even if we construed the October 2019 motion as a motion for reconsideration, we would still lack jurisdiction over the present appeal.

Upon the foregoing,

IT IS ORDERED that this appeal is dismissed for lack of jurisdiction.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals