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DISTRICT I

October 23, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP104-CRNM State of Wisconsin v. Donald L. Mulder (L.C. #2005CF2926)

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

Donald L. Mulder appeals from an order of the circuit court, reducing his pretrial sentence credit from 1439 days to 1291 days. Appellate counsel, Randall E. Paulson, has filed a no-merit report, pursuant to ***Anders v. California***, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32 (2011-12).[1] Mulder was advised of his right to file a response, and he has responded. Upon this court's independent review of the record as mandated by ***Anders***, counsel's report, and

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Mulder's response, we conclude there is no issue of arguable merit that could be pursued on appeal. We therefore summarily affirm the order.

The criminal complaint in this matter was filed, and an arrest warrant for Mulder issued, on May 16, 2005. Mulder was taken into custody in Colorado on May 30, 2005. He was in continuous custody from the time of his arrest and had no other criminal matters pending. In 2006, Mulder pled no contest to one count of second-degree sexual assault of a child and was sentenced. Mulder filed a postconviction motion and was resentenced in January 2008. Mulder filed another motion and was resentenced again in December 2008. At that time, the circuit court awarded 1439 days' sentence credit, based on a form submitted to the circuit court by defense counsel.

A third postconviction motion was denied. Mulder appealed. We affirmed in part and reversed in part, remanding for an evidentiary hearing on whether Mulder was entitled to withdraw his plea as not knowingly, intelligently, or voluntarily entered. *See* ***State v. Mulder***, No. 2009AP2306-CR, unpublished slip op. at ¶36 (WI App July 27, 2010). In January 2011, Mulder confirmed to the circuit court that he was abandoning that quest for relief.

By letter to the circuit court dated February 28, 2012, the State explained that the presentence credit calculation had been in error. The State explained that instead of 1439 days, Mulder should have only been entitled to 1291 days. Mulder filed a *pro se* objection. The Office of the State Public Defender then appointed counsel for Mulder, and counsel also filed an objection. In May 2012, the circuit court entered an order granting the State's request to modify the amount of the credit, and the judgment of conviction was amended accordingly.

The sole issue available for review is whether the circuit court improperly modified the amount of sentence credit.[2] Counsel notes that he "cannot dispute that 1291 days, and not 1439 days, elapsed from arrest on May 30, 2005, through the final sentencing on December 11, 2008[,]" and, ultimately, concludes there is no arguable merit to a challenge to the revision in light of existing case law. In his response, Mulder does not take issue with the math but raises various arguments that, fundamentally, boil down to either forfeiture/waiver or fairness arguments, given the relative lateness of the State's request.

"A convicted person should be given sentence credit for presentence incarceration for time spent in custody in connection with the course of conduct for which sentence was imposed." ***State v. Amos***, 153 Wis. 2d 257, 280, 450 N.W.2d 503 (Ct. App. 1989). There can be no doubt that, under this rule, a defendant cannot be entitled to more days of credit than he has spent in custody. *See generally* ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988) (explaining day-for-day nature of credit and why there is no dual credit for consecutive sentences).

A circuit court has the inherent power "'to correct formal or clerical errors … at any time.'" ***State v. Hungerford***, 76 Wis. 2d 171, 178, 251 N.W.2d 9 (1977). Public policy favors the circuit court's ability to exercise its power and correct judgments of sentencing. *See* ***id.***, 76 Wis. 2d at 178. Further, double jeopardy and the attendant due process concerns are not implicated when sentence credit to which an offender is not statutorily entitled is eliminated. *See*

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[2] Sentence credit is governed generally by WIS. STAT. § 973.155. "A defendant aggrieved by a determination by a court under this section may appeal in accordance with [WIS. STAT. RULE] 809.30." WIS. STAT. § 973.155(6).

State v. Lamar, 2011 WI 50, ¶48, 334 Wis. 2d 536, 799 N.W.2d 758. This is because "the same sentence existed before the modification as after." *See* ***Amos***, 153 Wis. 2d at 282.

While we understand Mulder's equity arguments, we simply cannot adopt them. "[I]t would be absurd to impose some form of equitable relief on a waiver ground to allow a *per se* wrong sentence credit to stand." *See* ***id.*** As the circuit court noted, Mulder is not entitled to a windfall of 148 days—or nearly five months—of sentence credit.[3] That it took the State three years to notice and seek revision of the credit amount is unfortunate, but not an automatic bar to correction. *See* ***Krueger v. State***, 86 Wis. 2d 435, 438-40, 272 N.W.2d 847 (1979) (allowing circuit court to review sentence for correctness more than four years after sentencing); *see also* ***State v. Prihoda***, 2000 WI 123, ¶44, 239 Wis. 2d 244, 618 N.W.2d 857 (twenty years elapsed from judgment of conviction not a bar to review).

We thus agree with counsel's assessment that there is no arguable merit to an appellate challenge to the circuit court's order correcting the sentence credit error. Any such argument, in light of the existing law, would be frivolous.

Our independent review of the record reveals no other potential issues of arguable merit.

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[3] Though we do not impute any motive beyond "mathematical error," we are compelled to note that it was defense counsel, not the State, who proffered the incorrect amount of credit. *Cf.* ***State v. Jones***, 2002 WI App 208, ¶14, 257 Wis. 2d 163, 650 N.W.2d 844 ("[W]hen a defendant makes a fraudulent representation to the sentencing court and the court accepts and relies upon that representation in determining the length of the sentence, the defendant has no reasonable expectation of finality in the sentence. The court may later declare the sentence void[.]").

Upon the foregoing, therefore,

IT IS ORDERED that the order is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Randall E. Paulson is relieved of further representation of Mulder in this matter. *See* WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals