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DISTRICT IV

April 30, 2014

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

2013AP2136-CR State of Wisconsin v. Adam M. Sturdevant (L.C. # 2011CF424)

Before Blanchard P.J., Lundsten and Kloppenburg, JJ.

Adam Sturdevant appeals a judgment convicting him of a fifth or subsequent offence of operating a motor vehicle while under the influence of an intoxicant (OWI-5th), and an order denying his postconviction motion for sentence modification. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21(1) (2011-12).[1] We affirm.

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

Sturdevant was charged in this Columbia County case in November 2011. At the initial appearance, he waived the time limits for a preliminary hearing in anticipation of subsequently waiving the hearing, and asked the court to instead schedule pretrial and "return" dates (which apparently meant the next date for the parties to return to court), which the court set for December. While released on bond, Sturdevant was arrested on a bail-jumping charge in Dane County. As a result of that bail-jumping case, the Columbia County court rescheduled the pretrial and return dates in this case—at Sturdevant's request—to March 2012. Sturdevant did not appear in court on the March return date, however, because he was being held in the Dane County Jail on additional charges. The Columbia County court scheduled another return date for this case in May, to allow successor counsel to determine Sturdevant's bail status in the second Dane County case.

In April, the prosecutor petitioned for a writ of habeas corpus to produce Sturdevant for the May return date, because Sturdevant was by then being held in the Dane County Jail on both the new Dane County charges and a probation hold from the prior Dane County bail-jumping case. The Columbia County court issued the writ but, for unknown reasons, the Dane County Sheriff's Department did not execute it. In Sturdevant's absence, his second attorney informed the court at the May hearing that Sturdevant had indicated that he wanted to accept a plea offer that had been made back in November, and requested the next earliest possible return date. The court set a new return date in June, and issued a second writ of habeas corpus. The Dane County Sheriff's office did not execute the second writ either, however, because Sturdevant had a hearing scheduled in Dane County the same day.

When Sturdevant was finally able to appear in the Columbia County court in August by means of a third writ of habeas corpus, he was represented by a third attorney, who informed the

court that the State Public Defender was in the process of appointing a fourth attorney for Sturdevant.[2] At the request of an acting assistant district attorney—who informed the court that the plea offer had been withdrawn—the court set a date for a preliminary hearing in September.

At the September hearing, Sturdevant appeared with his fourth attorney and waived his right to a preliminary hearing; the State filed an information; and Sturdevant entered a no-contest plea to the OWI charge and asked the court for a date to argue sentencing. The sentencing hearing was held in October, by which time Sturdevant had already been sentenced on the Dane County cases. The Columbia County court then imposed a sentence in this case consecutive to the Dane County sentences.

Sturdevant filed a pro se postconviction motion, arguing that he was improperly denied an opportunity to enter an earlier plea in this case due to ineffective assistance of counsel and governmental error, in violation of his statutory right to be present in court and his constitutional due process rights. Based upon these alleged violations, Sturdevant sought to have his sentence retroactively modified to have an earlier starting date and to be served concurrent to the sentences that were imposed in the two Dane County cases. He now raises essentially the same sentence modification claim on this appeal, adding additional, related arguments that the chain of events also violated his right to a speedy trial and that counsel provided ineffective assistance by failing to protect his various rights. However, Sturdevant's sentence modification claim is premised upon a series of speculative factual allegations and erroneous legal assertions.

[2] Sturdevant alleges that he fired the third attorney at the hearing because the attorney refused to raise issues relating to the missed writs, sentence credit, and consolidation with the Dane County cases, and because the attorney would not allow Sturdevant to directly address the court.

First, Sturdevant alleges that, if he had been properly produced for the May return date, he would have entered a plea on that date and promptly proceeded to have been sentenced. That allegation ignores a number of pertinent facts: that the State had withdrawn the plea offer in April after Sturdevant was arrested on the second Dane County case; that Sturdevant had not yet waived the preliminary hearing; and that the State had not yet filed an information. Under WIS. STAT. §§ 971.01(2) and 971.05, the State has thirty days after a preliminary hearing or hearing waiver to file an information, at which time the defendant shall be arraigned and enter a plea. Thus, while Sturdevant could perhaps have waived his preliminary hearing if he had been produced in May, he could not have entered a plea on that date unless the State had also been prepared to file an information at that time—which it was not obligated to do. Moreover, since the plea offer had been withdrawn in April and there was no agreement on sentencing, the matter would still have needed to be set for another hearing even if the State had filed an information at the May hearing.

Assuming for the sake of argument that the State would, in fact, have immediately filed the information at the May hearing if Sturdevant had waived his preliminary hearing, allowing Sturdevant to be arraigned and enter a plea at that time; and further assuming that a sentencing hearing could have been held on the date of the next scheduled return in June; Sturdevant next contends that the statutorily required revocation of his bond upon conviction under WIS. STAT. § 969.01(2)(a) would have "begun his time" on this case and automatically made his sentence concurrent to the subsequently imposed Dane County cases under WIS. STAT. § 973.15(2).

While it is true that Sturdevant's bond would have been revoked upon his conviction, and that the Columbia County court could not have imposed a consecutive sentence before the Dane County court imposed its sentences, it does not follow that Sturdevant would ultimately have

been given concurrent sentences or that he would have been entitled to dual sentence credit if he had been sentenced first in Columbia County. Rather, the Dane County court would then have needed to make the decision as to whether to impose *its* sentences concurrently or consecutively. Moreover, once Sturdevant had begun serving his time on the Columbia County sentence, he would not be entitled to any additional presentence credit on the Dane County cases.

We next note that Sturdevant forfeited his additional claims of a speedy trial violation and ineffective assistance of counsel by failing to raise them in the circuit court. *See* WIS. STAT. § 974.02(2); ***State v. Hayes***, 167 Wis. 2d 423, 425-26, 481 N.W.2d 699 (Ct. App. 1992) (For any issue other than the sufficiency of the evidence to be raised as a matter of right on appeal, it must first be preserved in the trial court by a timely objection or a postconviction motion.). Moreover, even if those claims had been preserved, Sturdevant has presented no authority for the proposition that a court may modify a sentence by retroactively changing the start date of the sentence so that it commences before the plea was entered.

IT IS ORDERED that the judgment of conviction and the order denying postconviction relief are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals