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DISTRICT IV

August 31, 2015

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

2014AP2145-CR	State of Wisconsin v. Tyler S. Ress (L.C. # 2012CF424)
2014AP2146-CR	State of Wisconsin v. Tyler S. Ress (L.C. # 2012CF425)

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

Tyler Ress appeals his judgments of conviction and an order denying his postconviction motion for sentence modification. He argues on appeal that the circuit court erroneously exercised its discretion when it considered his sentence credit before imposing sentence. 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 (2013-14).¹ We summarily affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Ress was convicted, after entry of no contest pleas, of possession of narcotic drugs, as a habitual criminal, and of three counts of domestic abuse as a repeater. The domestic abuse counts included one count of second-degree recklessly endangering safety contrary to WIS. STAT. § 941.30(2), one count of strangulation and suffocation contrary to WIS. STAT. § 940.235(1), and one count of false imprisonment contrary to WIS. STAT. § 940.30.

The parties offered a joint sentencing recommendation of two years of initial confinement on the possession count. On the domestic abuse counts, the parties jointly recommended five years of initial confinement on the first count, concurrent with an unrelated case, and three years of initial confinement on the second and third counts, concurrent with the sentence on the first count. The circuit court deviated from the joint sentencing recommendation. On the possession count, it withheld sentence and placed Ress on probation for four years. On the first domestic abuse count, the court imposed six years of initial confinement and four years of extended supervision, consecutive to the unrelated case. On the second and third domestic abuse counts, the court imposed three years of initial confinement and three years of extended supervision on each count, concurrent with the sentence on the first domestic abuse count.

Ress filed a motion to modify his sentence, arguing that the circuit court improperly considered his sentence credit in fashioning his sentence. After 60 days passed without a decision on the motion, Ress prepared a denial order, which the circuit court signed and entered. Ress now appeals.

Ress contends that the court did not follow the proper procedure in fashioning his sentence. Under *Klimas v. State*, 75 Wis. 2d 244, 252, 249 N.W.2d 285 (1977), a sentencing court should (1) first decide an appropriate sentence without regard to credit, (2) then determine

the amount of time already served, and (3) credit the time served to the sentence imposed. Ress argues that, in his case, the court considered the credit question “too early” by asking about the number of days of credit at the plea hearing, which took place two months prior to sentencing. Ress also points out that, near the beginning of the sentencing hearing, the court asked how many days of credit were applicable, to which the prosecutor replied 402 days. Ress acknowledges that courts are not always barred from considering available sentence credit when fashioning a sentence, citing *State v. Fenz*, 2002 WI App 244, ¶3, 258 Wis. 2d 281, 653 N.W.2d 280. However, Ress argues that, in *Fenz*, the court gave a rational explanation for why it considered credit before imposing sentence, and that no such explanation was given in this case.

The State counters that the circuit court properly exercised its discretion when it considered Ress’s sentence credit in order to determine an appropriate sentence. Based on the record in this case, we agree. The transcript of the sentencing hearing reflects that, in pronouncing Ress’s sentence, the court first discussed the standard sentencing factors and their application to the case. *See generally State v. Gallion*, 2004 WI 42, ¶¶39-46, 270 Wis. 2d 535, 678 N.W.2d 197.

The court began by addressing the possession count, stating that while heroin is a “horrible drug” the possession count paled in comparison to the domestic violence charges. The court then moved on to the domestic violence counts, discussing the gravity of the offenses and their effects on the victim. Regarding the domestic abuse counts, the court noted that the victim had been pregnant and that Ress told her he was trying to cause an abortion. Ress kicked in a door, got hold of the victim, and held her against her will, then punched her in the stomach and struck her several more times on other parts of her body, including her head. He strangled her, grabbed her wrists, and told her that he would kill her. Ress then dragged her out to the garage,

told her that he would light her on fire, doused her with gasoline, and flicked a lighter near her. He then took her inside and told her to get out of her clothes.

The court also considered Ress's character, including his rehabilitation needs. The court stated that probation was not appropriate in this case, given that he had had his probation revoked on several other occasions. The court also stated that it did not believe five years would be enough for Ress to make the changes that he needed to make, and that those changes would take the focus and hard work that he would receive only in prison. The court emphasized the need to protect the public as well, citing the harm Ress had done to the victim.

After discussing the standard sentencing factors, the court then imposed sentence for each of the three domestic violence counts. Finally, the court granted Ress 402 days of sentence credit. We are satisfied, based on the record, that the procedure followed by the circuit court was consistent with *Klimas*, 75 Wis. 2d at 249-50, and with WIS. STAT. § 973.155(2) (“After the imposition of sentence, the court shall make and enter a specific finding of the number of days for which sentence credit is to be granted”).

To the extent that the circuit court considered Ress's sentence credit by asking about it prior to pronouncing sentence, we agree with the State that such consideration was appropriate under *Fenz*. In *Fenz*, 258 Wis. 2d 281, ¶10, we concluded that the circuit court's consideration of presentence credit was proper because the court articulated a specific time-related incarceration goal. The same is true in this case. The court stated that more than five years in prison were required for Ress to properly rehabilitate. Therefore, inquiring about the credit to which Ress was entitled in this case by inquiring about his previous sentences was appropriate

under the circumstances because the court wanted to ensure that Ress remained in prison for more than five years on the domestic abuse charges in this case.

Ress also asserts that the circuit court's failure to explain its sentencing rationale in a decision on his postconviction motion raises questions about the court's motives at sentencing. We reject this argument as speculative. The circuit court was not obligated to issue a decision on the motion or to explain its decision. Under WIS. STAT. RULE § 809.30(2)(i), "the circuit court shall determine by an order the person's motion for postconviction or postdisposition relief within 60 days after the filing of the motion or the motion is considered to be denied and the clerk of circuit court shall immediately enter an order denying the motion." That is what occurred in this case, and we have no basis to read any unstated meaning into the circuit court's failure to enter an order within 60 days.

IT IS ORDERED that the judgments and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals