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**DISTRICT III/I**

March 22, 2016

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

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2015AP112-CRNM      State of Wisconsin v. Derrick L. Smith (L.C. #2007CF362)

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

Derrick L. Smith appeals from a judgment imposing sentence after probation revocation. Appellate counsel, George S. Pappas, Jr., has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967) and WIS. STAT. RULE 809.32 (2013-14),<sup>1</sup> to which Smith has

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

responded. By order dated December 9, 2015, we requested a supplemental no-merit report, which counsel filed and to which Smith has also responded. Upon this court's independent review of the record, the reports, and the responses, we conclude that an arguably meritorious issue exists with respect to sentence credit. We reject the no-merit report and extend the time for Smith to file a postconviction motion.

In the case underlying this appeal, Marathon County Circuit Court case No. 2007CF362, Smith pled no contest to one count of felony bail jumping. Smith's sentence was withheld in favor of two years' probation, concurrent to "any other probation" Smith was then serving. At the time, Smith was also serving a term of extended supervision in Marathon County Circuit Court case No. 2005CF723. There was no direct appeal of the felony bail jumping conviction.

Holds were placed on Smith's probation and extended supervision on June 5, 2012. It was determined in September 2012 that Smith had violated the rules of his community supervision. In December 2012, the Division of Hearings and Appeals revoked Smith's extended supervision in the 2005 case and ordered him reconfined for one year, two months, and fifteen days.

A sentencing-after-revocation hearing in this case was not held until March 12, 2014. At the start of the hearing, the circuit court noted its calculations that Smith would be eligible for 658 days' sentence credit. The State responded that it had determined Smith was entitled to 651 days' credit if the sentence was concurrent with the reconfinement sentence, but 147 days' credit if the revocation sentence was consecutive. The circuit court imposed a consecutive revocation sentence of three years' initial confinement and three years' extended supervision with 147 days' credit.

Upon our review of the record, however, it appeared that Smith might be entitled to additional sentence credit in this case.<sup>2</sup> The 147 days' credit against the revocation sentence, applied as a single block, would suggest that Smith's custody for the revocation case began on October 16, 2013. But while Smith had been released from the reconfinement sentence on August 6, 2013, he nevertheless remained in custody after August 6, and a convicted offender is to receive credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." *See* WIS. STAT. § 973.155(1)(a).

Exhibit 8 of Smith's response to the no-merit report indicates that when he was released from the reconfinement sentence on August 6, 2013, it was to the Marathon County Sheriff for a detainer in Marathon County Circuit Court case No. 2012CF386, which suggests that Smith's custody was "in connection with" the 2012 case. However, exhibit 2 of Smith's response is a "waivers and custody decision" from the Department of Corrections, indicating that Smith should remain in custody for the revocation case pending its resolution. All told, it appeared that Smith might be entitled to an additional sixty-seven to seventy-one days of credit, although we noted that there may be documentation outside the record to explain why Smith's 147 days of credit was ultimately accurate. We therefore directed counsel to file a supplemental report.

Counsel's supplemental report notes that it "appears the Court is correct. It appears Mr. Smith may be entitled to an additional 67 days of sentence credit." Counsel notes the 2012 detainer but also states that Smith "was being held in the case before this Court, too, ... [a]nd, there does not seem to be a double credit issue" because the 2012 case remains open and there

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<sup>2</sup> Smith raised the possibility of additional sentence credit in his response to counsel's no-merit report.

has been no sentence imposed against which Smith would receive credit in that matter. Counsel concludes by indicating he “has no further information to provide this Court on the issue of sentence credit.”

A no-merit report is only appropriate if further proceedings would be wholly frivolous. *See McCoy v. Court of Appeals*, 486 U.S. 429, 437 (1988). In light of the above, we cannot conclude that a motion for additional sentence credit would be frivolous.

Therefore,

IT IS ORDERED that the no-merit report in appeal No. 2015AP112-CRNM is rejected and the appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that the deadline for filing a postconviction motion or notice of appeal in this matter is extended to May 23, 2016.

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*