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DISTRICT IV

March 16, 2017

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

2016AP888-CR

State of Wisconsin v. Todd K. Weyher (L.C. # 2003CF111)

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

Todd K. Weyher appeals an order denying his motion for sentence modification. 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 (2015-16).¹ We affirm.

Weyher was convicted of felony murder for an arson-related homicide occurring in 1999. Weyher's involvement came to light following his 2003 arrest in Michigan for arson-related

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

charges occurring in that state. Weyher was sentenced in connection with his Michigan offenses in 2003 and returned to Wisconsin to resolve the outstanding Wisconsin charges. At the January 10, 2005 sentencing hearing, Weyher's attorney informed the circuit court that the Michigan sentence was likely to be "recalculated" due to an erroneous computation in light of Michigan's "strict guidelines." The circuit court imposed an indeterminate forty-year sentence to run consecutive to Weyher's Michigan sentence.²

Weyher's conviction was affirmed on direct appeal. *State v. Weyher*, No. 2005AP3083-CRNM, unpublished op. and order (WI App Aug. 28, 2008). In 2010, hoping to receive credit toward his Wisconsin sentence for the time he served in Michigan, Weyher moved the circuit court to modify his Wisconsin sentence to run concurrent with Michigan's sentence. Weyher asserted that on June 11, 2009, having been discharged from his Michigan sentence, he had to start serving his Wisconsin sentence "at the beginning again" due to its consecutive nature. The circuit court denied Weyher's motion because he failed to show a new factor: "It is clear from the file that [the original sentencing judge] intended that the [Wisconsin] sentence be consecutive because of the serial nature of the offenses committed." Weyher apparently did not appeal this order, but filed another motion in 2013, arguing that his successful mental health treatment in Michigan constituted a new factor warranting sentence modification. Weyher again requested that his Wisconsin sentence be modified to run concurrent with the Michigan sentence.

² Over the State's objection, the circuit court awarded Weyher 702 days of presentence credit. Though the State pointed out that Weyher was not entitled to credit for 510 of those days spent serving his Michigan sentence, the circuit court chose to award all 702 days "rather than raise the issue."

The circuit court denied the motion. Weyher appealed and we affirmed. *State v. Weyher*, No. 2013AP1562-CR, unpublished op. and order (WI App Nov. 21, 2014).

In May 2015, Weyher filed a third “motion to modify sentence.” For the first time, Weyher challenged the circuit court’s authority to order a consecutive sentence. Relying on the circuit court’s awareness at Weyher’s January 10, 2005 sentencing hearing that Michigan might recalculate its sentence along with Weyher’s assertion that his Michigan sentence was subsequently recalculated,³ Weyher argued that the circuit court lacked authority, under WIS. STAT. § 973.15(2)(a), to order that its sentence run consecutive “to an illegal Michigan sentence that was to expire when it was vacated.” The circuit court denied the motion as well as Weyher’s motion for clarification.

On appeal, Weyher presents a variety of legal theories and claims. As in his circuit court motion, though Weyher purports to request a sentence modification, he fails to assert a legally sufficient new factor or other colorable ground supporting modification. Instead, he argues that his Wisconsin sentence ran afoul of WIS. STAT. § 973.15(2)(a), because “[t]here was no underlying sentence upon which to add a consecutive term of imprisonment.” In terms of relief, asserting that his Wisconsin sentence should have commenced on March 9, 2005, he requests an award of sentence credit for the period from March 9, 2005, to June 11, 2009, the date his Wisconsin sentence commenced.

³ Weyher’s motion asserted that Michigan recalculated its sentence on March 9, 2005, and that the resulting order stated the sentence was “concurrent with any other cases sentence.” In support, Weyher attached various documents which, as the State points out on appeal, were unauthenticated and incomplete. Weyher also argued that due to the March 2005 sentencing event in Michigan, “the discretionary sentencing ability shifted from Wisconsin as ‘first-in-time’ to sentence, to Michigan as ‘last-in-time.’”

Weyher's request for additional sentence credit rests on his theory that the circuit court exceeded its authority by ordering a consecutive sentence and that the sentence's consecutive nature should be without effect.⁴ We conclude that Weyher's claims are procedurally barred.⁵ See WIS. STAT. § 974.06(4); *State v. Escalona-Naranjo*, 185 Wis. 2d 168, 181-82, 184-86, 517 N.W.2d 157 (1994) (successive motions and appeals are procedurally barred unless the defendant can show a sufficient reason why the newly-alleged errors were not previously raised). Here, Weyher's motion offered no reason at all for failing to raise the circuit court's alleged sentence structure errors on direct appeal or in earlier motions. As evidenced by his prior motions, Weyher was well aware that his Wisconsin sentence was running consecutive to his Michigan sentence and that this prevented him from obtaining sentence credit. See *State v. Casteel*, 2001 WI App 188, ¶¶16-17, 247 Wis. 2d 451, 634 N.W.2d 338 (where alleged "new factor" existed at the time of but was not raised in defendant's previous motions and appeals, the new factor claim was procedurally barred).

⁴ Weyher's appellate argument focuses on his March 2005 Michigan sentencing event and speculates as to its nature, for instance, whether it was more akin to a resentencing. Weyher's appellate argument does not meaningfully rely on sentence credit law. Further, as a threshold matter, to be entitled to credit, Weyher would need to show that his Wisconsin sentence was running concurrent with his Michigan sentence, see *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988) (no dual credit is permitted when consecutive sentences are imposed), and not barred by *State v. Beets*, 124 Wis. 2d 372, 379-81, 369 N.W.2d 382 (1985) (sentence credit should not be granted for time during which the defendant was actually serving another sentence for an unrelated crime). In short, Weyher's request for "sentence credit" goes no further unless he can show there is a flaw in Wisconsin's January 2005 judgment imposing a consecutive sentence. Weyher's claims are properly characterized as a challenge to the circuit court's authority.

⁵ Though the circuit court denied Weyher's motion on other grounds, this court may affirm a circuit court's correct decision on a different theory. See *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals