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October 2, 2017

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

2016AP1181-CR	State of Wisconsin v. Thomas D. Brooks (L.C. # 2015CF187)
2016AP1182-CR	State of Wisconsin v. Thomas D. Brooks (L.C. # 2015CF265)

Before Sherman, Blanchard and Fitzpatrick, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

In this consolidated appeal of two circuit court cases, Thomas Brooks appeals judgments of conviction and a circuit court order denying postconviction relief. Brooks argues that the circuit court erred in denying him sentence credit for time he spent in custody for two 2013 misdemeanor convictions. Specifically, he argues that the circuit court erroneously determined that his sentences for various offenses committed in 2015 ran consecutively to the sentences for

the 2013 misdemeanors, rather than concurrently. 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 reject Brooks' arguments and affirm.

In 2013, Brooks was convicted of two misdemeanor offenses for domestic violence. He was sentenced to two years' probation on each count, to run concurrently with each other. While on probation in 2015, Brooks committed additional acts of domestic violence against the same victim and eventually pleaded guilty to several counts, including felony strangulation. In May 2015, the circuit court set his revocation sentences for the 2013 misdemeanors, imposing concurrent sentences totaling nine months of jail time. For the 2015 convictions, the court sentenced Brooks to a total of three years of probation plus nine months of conditional jail time. The court expressly stated that the conditional jail time was consecutive to the 2013 misdemeanor sentences.

Shortly after beginning his sentence for the 2013 misdemeanors, Brooks absconded to Chicago while on Huber release. He was arrested and returned to custody in Wisconsin, where he faced probation revocation for the 2015 convictions. In October 2015, the court conducted a revocation sentencing hearing and also accepted Brooks' guilty plea for a new charge of felony escape. For the 2015 felony strangulation conviction, the court imposed a total of four and one-half years in the Wisconsin prison system, which included eighteen months of initial confinement and three years of extended supervision. The court sentenced Brooks to shorter sentences for the remaining 2015 convictions, including the new escape conviction, and ordered

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

that all these shorter sentences would be concurrent to the longer sentence on the strangulation count. Pursuant to the parties' stipulation, the court also awarded Brooks eighty days of sentence credit for the time he had spent in custody since absconding to Chicago.

After the October sentencing, Brooks filed a postconviction motion arguing that he was entitled to an additional sentence credit for the time he had previously spent in custody in connection with the 2013 misdemeanors, before his convictions for the 2015 offenses.² *See* WIS. STAT. § 973.155(1)(a) (“A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed.”). Whether a defendant received the appropriate statutory sentence credit is a question of law that we review de novo. *State v. Johnson*, 2007 WI 107, ¶27, 304 Wis. 2d 318, 735 N.W.2d 505.

The parties agree that the central question for this appeal is whether the sentences for the 2015 convictions were intended to run consecutively or concurrently to the sentences for the 2013 misdemeanors. If the applicable sentences were intended to run concurrently, then the court erred in denying Brooks additional sentence credit for the time in custody on the misdemeanor cases. If the applicable sentences were intended to run consecutively, Brooks is not entitled to any additional sentence credit. *See State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338 (credit for pretrial custody not permitted when the credit has already been awarded on another sentence that “has been, or will be, separately served”).

² Brooks initially claimed an additional 113 days sentence credit. He now argues that the required credit is ninety-four days. He offers no explanation for the disparity between what he argued in the circuit court and what he is arguing now, but the difference is not an issue that matters to our resolution of this appeal.

The circuit court denied Brooks' postconviction motion, concluding that he was not entitled to more than the 80 days of credit already awarded. Brooks filed a motion for reconsideration, which the circuit court also denied. The circuit court stated that its unequivocal intent was that the sentences it imposed in October 2015 were consecutive to the sentences for the 2013 misdemeanors.

In this appeal, Brooks argues that the circuit court's determination that the sentences were consecutive is erroneous. The main contention in Brooks' opening brief is that at the October 2015 sentencing, the circuit court stated that the felony sentences were to begin "forthwith." According to Brooks, the use of the term "forthwith" necessarily implies that the felony sentences were to be served concurrently with the misdemeanor sentences. But the problem with this argument is that Brooks has not cited anywhere in the sentencing transcripts where the circuit court used the term "forthwith." Indeed, when the circuit court denied his motion for reconsideration, the court expressly rejected this characterization of the record. In his reply brief, Brooks concedes that this is a faulty argument.³

Brooks' fallback argument is that, in the absence of a statutory or judicial declaration to the contrary, the sentences are deemed to be concurrent. *State v. Rohl*, 160 Wis. 2d 325, 330-31, 466 N.W.2d 208 (Ct. App. 1991) ("[W]here an offender is actually or constructively serving a sentence for one offense and is then ordered to serve another sentence for a different offense, the

³ We pause to express our concern about the fact that Brooks made the same unsupported argument on appeal. An appellate attorney has a duty to support arguments with citations to the record. See WIS. STAT. § 809.19(1)(e). To continue to press the claim that the circuit court used the term "forthwith" in the absence of any record evidence appears to us to be, at best, careless and, at worst, an intentional misstatement. See SCR 20:1.1 (duty of competence) and SCR 20:3.3(a) (duty of candor to the tribunal).

second sentence will be deemed to run concurrently with the first sentence in the absence of a statutory or judicial declaration to the contrary”). The State concedes that the circuit court made no explicit mention at the October 2015 hearing of whether the sentences for the 2015 convictions would be concurrent or consecutive to the 2013 misdemeanor sentences that Brooks was serving at that time. However, the State argues that we need not take the “mechanistic” approach of deeming the sentences concurrent. *See State v. Coles*, 208 Wis. 2d 328, 332-34, 559 N.W.2d 599 (Ct. App. 1997) (in cases where the intent is ambiguous, appellate courts have rejected a mechanistic approach and instead look to the entire record in order to best preserve “the trial court’s sentencing structure”).

The State asks us to focus on five aspects of the record that support a determination that the sentences are consecutive. First, at the May 2015 hearing, the court specifically ordered the conditional jail time for the 2015 convictions to run consecutively to the 2013 misdemeanor sentences. The State argues that this signaled the court’s intent to treat these offenses as separate and distinct.

Second, at the October 2015 hearing, the circuit court expressed reluctance about accepting the parties’ joint recommendation that the sentences for the 2015 convictions run concurrently with one another. However, the court ultimately decided to impose concurrent sentences because the offenses occurred close in time. The State argues that this hesitation demonstrates the court’s initial inclination to make all Brooks’ sentences consecutive, which in turns makes it reasonable to infer that the court intended the 2015 sentences to be consecutive to the misdemeanor sentences.

Third, and relatedly, the State argues that the circuit court's approach to explaining and clarifying the concurrent sentences for the 2015 convictions stand in stark contrast to its silence as to the misdemeanor sentences. Accordingly, the court's silence regarding the misdemeanor sentences should be interpreted as an indication that it intended the period of incarceration for the 2015 convictions to remain consecutive to the 2013 misdemeanor sentences, as the court explicitly stated at the May 2015 hearing.

Fourth, the State argues that we may infer the circuit court's intent from its analysis of whether Brooks would be eligible for early release programs. In declining to find Brooks eligible for work release, the court explained that the eighteen month sentence on the strangulation count, minus the credit already awarded, was the minimum necessary to protect the public. The State argues that if the strangulation sentence ran concurrently with the 2013 misdemeanor sentences, then this would defeat the court's stated intention to have Brooks serve that particular minimum sentence.

Fifth, the State points out that Brooks committed the offenses in the 2013 misdemeanor cases more than a year before the 2015 offenses. This in turn bolsters the inference that the court intended to treat them as separate and distinct. Indeed, the court questioned why Brooks should get the benefit of an additional sentence credit for acts that had occurred more than a year later.

In his reply brief, Brooks makes various arguments that downplay the significance of the record evidence relied upon by the State. However, aside from his faulty contention that the circuit court stated that the sentences for the 2015 convictions would begin "forthwith," we do not see a developed argument from Brooks that the record demonstrates that the sentences were intended to be concurrent. *See Associates Fin. Servs. Co. of Wis., Inc. v. Brown*, 2002 WI App

300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (we need not consider conclusory and undeveloped arguments).

The crux of Brooks’ argument appears to be that the circuit court could have expressly made the sentences for the 2015 convictions consecutive to the 2013 misdemeanor sentences but chose not to do so. Brooks’ contention that the circuit court’s silence evinces a conscious choice to impose concurrent sentences is particularly weak when the circuit court has expressly told us that its normal practice is to specify when sentences are concurrent and that the unequivocal intent of its silence was that the sentences for the 2015 convictions were to run consecutive to the 2013 misdemeanor sentences. Although our review is *de novo* and we therefore do not defer to the circuit court’s after-the-fact explanation, we note that it is wholly consistent with its careful analysis and detailed record in reluctantly imposing concurrent sentences for the 2015 convictions.

We therefore conclude that review of the entire record is sufficient to overcome the presumption that the court’s silence means that the sentences must be deemed to be concurrent. *See Coles*, 208 Wis. 2d at 333-35. While each of the State’s arguments support this conclusion to varying degrees, we are particularly persuaded by the State’s fourth point, which focuses on the circuit court’s statement that the specific sentence imposed in October 2015 was the minimum necessary to protect the public. As we explained in *Coles*, an overly mechanical approach of deeming the sentences concurrent unless otherwise specified is problematic if it results in a sentence that is no longer “individualized to meet the particular facts of the case.” *Id.* at 334-35. Here, the sentencing court made a specific, individualized determination about the

minimum sentence necessary to protect the public from Brooks.⁴ Deeming that sentence concurrent to the misdemeanor sentences would “thwart the trial court’s sentencing structure.” *Id.* at 334.

Brooks’ present claim for sentence credit rests on his argument that the applicable sentences are concurrent. Because we reject this argument, we conclude that the circuit court correctly denied Brooks’ request for the additional credit. Accordingly, we affirm the circuit court decision denying his motion for postconviction relief.

Upon the foregoing reasons,

IT IS ORDERED that the judgments and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Diane M. Fremgen
Clerk of Court of Appeals

⁴ Brooks argues that, because there were other reasons why he was not eligible for early release, we should disregard the circuit court’s statement that it wanted Brooks to serve the minimum sentence of eighteen months. We reject his contention that the circuit court’s alleged lack of discretion on this issue means that we should ignore the court’s clear statement regarding the appropriate sentence in this case.