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October 3, 2018

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

2017AP1190-CR	State of Wisconsin v. Paul A. Adams (L.C. # 2010CF487)
2017AP1191-CR	State of Wisconsin v. Paul A. Adams (L.C. # 2008CF992)

Before Reilly, P.J., Gundrum and Hagedorn, 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).

Paul A. Adams, pro se, appeals from an order of the circuit court denying his motion for sentence credit. 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.

In March 2009, Adams was convicted of operating a motor vehicle while intoxicated (OWI), fifth offense. The circuit court imposed a five-year sentence—two years of initial confinement and three years of extended supervision—and credited him with 156 days of presentence time served. One year later, Adams was released through the Earned Release Program, WIS. STAT. § 302.05(3)(c), at which time his remaining confinement period was converted to extended supervision.

In May 2010, Adams was arrested for OWI, sixth offense. He pled no contest and was later given another five-year sentence—two years of initial confinement and three years of extended supervision—which was to run consecutively to his fifth-offense sentence. In July 2012, Adams was again released on extended supervision through the Earned Release Program.

In October 2013, Adams was arrested for OWI, seventh offense. At the time of his arrest, Adams had two years, six months, and seven days remaining on his fifth-offense sentence and three years, ten months, and fourteen days remaining on his sixth-offense sentence. He was imprisoned after his extended supervision for both sentences was revoked.

On May 3, 2017, while still incarcerated, Adams filed a pro se motion for sentence credit pursuant to WIS. STAT. § 973.155. Adams requested 328 days of credit be applied against his fifth-offense sentence. The next day, May 4, 2017, Adams filed a new motion for sentence credit

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

pursuant to § 973.155—presumably in place of the first. In addition to his renewed request for 328 days of credit against his fifth-offense sentence, Adams sought 450 days of credit to be applied against his sixth-offense sentence. The circuit court denied his motion due to the lack of an affidavit, certified records, or any credible evidence for which a determination could be made.

On June 6, 2017, Adams filed a third motion for sentence credit pursuant to WIS. STAT. § 973.155; this time the motion was accompanied by an affidavit and Department of Corrections records. He stated that he was owed 400 days of credit against his fifth-offense sentence for time served between October 1, 2009, and August 3, 2011, and 420 days of credit against his sixth-offense sentence for time served between October 1, 2009, and July 16, 2012, and between April 18, 2016, and May 18, 2017. The circuit court summarily denied the motion. Adams now appeals from that order.

On appeal, Adams contends that the circuit court erred by not considering his motion under the proper statute. He asserts that instead of determining whether he was entitled to sentence credit pursuant to WIS. STAT. § 973.155, the court should have considered whether he was entitled to positive adjustment time (PAT) pursuant to WIS. STAT. § 973.198. Adams acknowledges that in his motion he did not cite to the statute he now relies upon; however, he contends that, notwithstanding this deficiency, the court should have been on notice that he was seeking PAT. We disagree and conclude that Adams failed to preserve the issue of PAT for appeal.

While sentence credit and PAT are both addressed under the sentencing chapter of our criminal procedure statutes, they are functionally distinct forms of relief. This distinction is reinforced by the separate statutory means a petitioning party must use to pursue each one. On

the one hand, WIS. STAT. § 973.155(5) allows a person to petition the sentencing court for credit against his or her sentence for all days spent in custody for the course of conduct for which the sentence was imposed. After a petition of this kind has been filed, “proper verification of the facts alleged in the petition” must occur before credit can be applied against the sentence. *Id.* On the other hand, WIS. STAT. § 973.198(1) provides that an inmate serving a bifurcated sentence who meets certain statutory qualifications “may petition the sentencing court to adjust the sentence under this section” for PAT time earned between October 1, 2009, and August 3, 2011. The filing of such a petition enables the court to hold a hearing on the issue and, if PAT is found to have been earned, adjust the sentence by equally reducing the term of confinement and lengthening the term of extended supervision. Sec. 973.198(3), (5).

The record before us shows that Adams filed his motion pursuant to WIS. STAT. § 973.155, seeking relief in the form of “owed sentence credit.” He did not request that his sentences be adjusted pursuant to WIS. STAT. § 973.198, nor did the motion refer to PAT in any way. While Adams sought credit against one of his sentences for time served between the dates for which PAT applies—October 1, 2009, and August 3, 2011—his motion also requested credit for other ranges that fell outside of the applicable time period. Finally, in addition to § 973.155, Adams also cited to *State ex rel. Singh v. Kemper*, 2016 WI 67, 371 Wis. 2d 127, 883 N.W.2d 86, as a basis for his entitlement to sentence credit. Although *Singh* dealt with issues of entitlement to PAT, Adams specifically cited to a paragraph in one of its separate opinions that discusses “other adequate [non-PAT] remedies at law,” including sentence credit under § 973.155. *Singh*, 371 Wis. 2d 127, ¶183 (Ziegler, J., concurring/dissenting).

Thus, taken as a whole, Adams’s motion cannot be considered a petition for PAT pursuant to WIS. STAT. § 973.198. Moreover, nothing in the record suggests Adams ever filed a

petition of this kind. With that being the case, the circuit court's lack of consideration of his motion through this lens did not constitute error.

We also need not engage the merits of Adams's argument as to PAT, as we conclude that he forfeited this issue for purposes of his appeal. "It is a fundamental principle of appellate review that issues must be preserved at the circuit court." *State v. Huebner*, 2000 WI 59, ¶10, 235 Wis. 2d 486, 611 N.W.2d 727. Issues that are not preserved are considered waived or forfeited. *Id.*, ¶11 & n.2. The party raising an issue on appeal bears the burden of establishing that the issue was first raised before the circuit court. *Id.*, ¶10. Adams has not met his burden to show that the issue of PAT was raised before the circuit court. While he may well still be able to raise that issue before the circuit court, this court is not the forum where such proceedings originate.

To the extent that Adams still seeks our relief from the circuit court's denial of his request for sentence credit, that argument also fails. WISCONSIN STAT. § 973.155(1)(a) states, "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." As noted above, when Adams was sentenced for his fifth-offense OWI, the circuit court awarded him 156 days of presentence credit pursuant to § 973.155(1)(a). In reviewing Adams's motion, the court found no evidence suggesting that total was incorrect. Adams does not dispute this finding on appeal.

Likewise, Adams has not established that he is entitled to credit against his sixth-offense sentence. This sentence was ordered to run consecutively with his fifth-offense sentence, and therefore it could not be considered a basis for his presentence confinement as required by Wis.

STAT. § 973.155(1)(a). See *State v. Beets*, 124 Wis. 2d 372, 379-81, 369 N.W.2d 382 (1985) (rejecting the right to credit “where the period of confinement has nothing to do with the matter for which sentence credit is sought”).

Upon the foregoing reasons,

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

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

Sheila T. Reiff
Clerk of Court of Appeals