OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT IV

November 5, 2019

To:

Hon. Nicholas McNamara
Circuit Court Judge
Branch 5
215 S. Hamilton St.
Madison, WI 53703

Carlo Esqueda
Clerk of Circuit Court
Dane County Courthouse
215 S. Hamilton St., Rm. 1000
Madison, WI 53703

Erin Hanson
Assistant District Attorney
215 S. Hamilton St., Rm. 3000
Madison, WI 53703

Courtney Kay Lanz
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707

Don S. Harden 335240
Green Bay Correctional Inst.
P.O. Box 19033
Green Bay, WI 54307-9033

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

2018AP239-CR State of Wisconsin v. Don S. Harden (L.C. # 2008CF483)

Before Fitzpatrick, P.J., Kloppenburg and Nashold, 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).

Don Harden, pro se, brings this appeal after being sentenced following the revocation of his probation. 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(1).[1] We affirm.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted. The pertinent statutory language has not changed during the times relevant to Harden's sentence.

In 2009, Harden was convicted of a drug offense upon entry of an ***Alford*** plea. The circuit court withheld sentence and ordered eight years of probation. Harden's probation was revoked and, in May 2015, the court imposed a revocation sentence consisting of three years of initial confinement and five years of extended supervision. Harden filed a postconviction motion that the court denied.

Harden raises a number of issues. However, the only issues we discuss are those relating to Harden's revocation sentence, as Harden's appeal does not bring the original judgment of conviction before us. *See* ***State v. Scaccio***, 2000 WI App 265, ¶10, 240 Wis. 2d 95, 622 N.W.2d 449 ("A challenge to a post-revocation sentence does not bring the original judgment of conviction before the court."); *see also generally* ***State v. Drake***, 184 Wis. 2d 396, 515 N.W.2d 923 (Ct. App. 1994). We choose to note that, even if the other issues that Harden raises were properly before us, we would have rejected Harden's arguments as to these issues. Each of those arguments was waived by Harden's ***Alford*** plea, or is insufficiently developed, or both. We turn to Harden's arguments relating to his revocation sentence.

Harden first argues that counsel was ineffective by failing to object to alleged misstatements by the prosecutor at sentencing. For the reasons that follow, we disagree that counsel was ineffective in this respect.[2]

[2] Harden also argues that the prosecutor's statements constituted prosecutorial misconduct. Because Harden did not object to the statements, we consider them only within the context of ineffective assistance of counsel. *See* ***State v. Haywood***, 2009 WI App 178, ¶15, 322 Wis. 2d 691, 777 N.W.2d 921 ("[The defendant] did not object to what the prosecutor did, and this forfeits his right to have review other than in an ineffective-assistance-of-counsel context.").

To show ineffective assistance of counsel, the defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 687-88. To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

Harden contends that counsel ineffectively failed to object to several inaccurate statements by the prosecutor. However, the only statement that Harden shows to be inaccurate is the prosecutor's statement that Harden had "prior convictions for heroin dealing." Regardless of whether counsel performed deficiently in regard to this statement, Harden does not establish prejudice because the circuit court's sentencing decision shows that Harden's sentence was not influenced by whether he had prior heroin-related convictions. Rather, the court made clear that Harden's sentence was based primarily on the conduct alleged in this case. The court stated that "[t]he case here is the primary basis for the sentence here," and that "the gravity of the offense was the primary factor driving the sentence." As a secondary factor, the court considered evidence that Harden had a long history of involvement with heroin dealing, but the court did not rely on whether Harden had prior heroin-related convictions.

As to the remaining prosecutor statements that Harden complains of, Harden at most shows that the prosecutor presented an exaggerated version of certain facts. However, the record establishes that Harden's trial counsel effectively sought to rebut these statements. For example, in response to the prosecutor's statement that there was a "mountain of evidence" against Harden in this case, counsel pointed out that, prior to Harden's ***Alford*** plea, the case was tried and

resulted in a hung jury. In sentencing Harden, the circuit court acknowledged the hung jury, and the court did not rely on the amount of evidence against Harden as a factor.

Harden argues that, by relying on the prosecutor's statements, the circuit court sentenced him based on inaccurate information in violation of his right to due process. We reject this argument because, for the reasons already explained, Harden does not show that the court relied on any inaccurate statements by the prosecutor.

Harden next makes a new-factor argument. Specifically, he argues that the dismissal of a Winnebago County case that was pending at the time of his sentencing is a new factor that justifies sentence modification. We are not persuaded. When a defendant shows the existence of a new factor, the circuit court has discretion to determine whether that new factor justifies sentence modification. ***State v. Harbor***, 2011 WI 28, ¶¶36-37, 333 Wis. 2d 53, 797 N.W.2d 828. Here, assuming without deciding that the dismissal of the Winnebago County case was a new factor, the court reasonably concluded that it did not justify sentence modification because the court at sentencing did not rely on the pending status of the Winnebago County case as an aggravating factor. To the contrary, the court's sentencing remarks made clear that the merits of the Winnebago County case were not before the court and were not being factored into Harden's sentence.

We turn to Harden's argument that he is entitled to additional sentence credit. The sentence credit statute provides that "[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." WIS. STAT. § 973.155(1)(a). "A defendant seeking sentence credit in Wisconsin has the burden of demonstrating both 'custody' and its connection

with the course of conduct for which the Wisconsin sentence was imposed." ***State v. Carter***, 2010 WI 77, ¶11, 327 Wis. 2d 1, 785 N.W.2d 516. Harden has not met his burden. Rather, Harden's assertions as to sentence credit in effect ask this court to meet that burden by searching Harden's lengthy appendices for the relevant facts and constructing a legal argument around those facts. Although we make some allowances for the failings of pro se parties, "[w]e cannot serve as both advocate and judge." ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). Accordingly, we reject Harden's argument that he is entitled to sentence credit.

We are also not persuaded by Harden's argument that his trial counsel was ineffective by failing to pursue sentence credit, or by Harden's argument that the circuit court erred by failing to consider sentence credit allegations in an amended postconviction motion. Because Harden has not made a developed sentence credit argument in his briefing, he has also not shown that he was prejudiced or otherwise harmed by these alleged failures.

Finally, Harden argues in the concluding pages of his brief that the circuit court erred by not holding an evidentiary hearing. We reject this argument because Harden does not demonstrate any reason why an evidentiary hearing was necessary.

Therefore,

IT IS ORDERED that the circuit court's order is summarily affirmed pursuant to WIS. STAT. RULE 809.21(1).

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

Sheila T. Reiff
Clerk of Court of Appeals