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DISTRICT II

July 28, 2021

To:

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Circuit Court Judge
Electronic Notice

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

2020AP727

State of Wisconsin v. David D. Austin (L.C. #2006CF503)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

David D. Austin, pro se, appeals from an order denying his WIS. STAT. § 974.06 (2019-20)¹ postconviction motion. Austin challenges the circuit court's failure to remedy the Department of Correction's (DOC) alleged error in "unconstitutionally convert[ing] Austin's determinate sentence into an indeterminate sentence and extend[ing] Austin's sentence from 20 years to over 22 years." Based upon our review of the briefs and record, we conclude at

¹ All references to the Wisconsin Statutes are to the 2019-20 version.

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. For the reasons that follow, we affirm.

In 2007, Austin was convicted of first-degree sexual assault of a child and sentenced to twenty years, consisting of ten years' initial confinement and ten years' extended supervision. After serving the initial confinement portion of his sentence, Austin was released to extended supervision in June 2016. In 2018, Austin violated the terms of his extended supervision, was taken into custody² pending a revocation hearing, and his extended supervision was revoked. He was ordered reconfined for three years and two days. As a result, the DOC adjusted his maximum release date from June 14, 2026, to June 30, 2028.

In February 2020, Austin filed his WIS. STAT. § 974.06 postconviction motion, arguing that that “DOC has wrongly exercised judicial power when it extended Austin’s maximum discharge date” from June 2026 to June 2028 and that his “sentence extension violates” several constitutional provisions. The circuit court denied Austin’s motion without a hearing. Austin appeals.

Austin renews his arguments that the DOC improperly extended his sentence on appeal and also faults the circuit court for failing to hold an evidentiary hearing on his postconviction motion. We conclude that the DOC did not improperly extend Austin’s sentence, as it complied with the statutory requirements when recalculating his discharge date due to the revocation of his

² The State notes that “[t]he record does not reflect when Austin was taken into custody” but explains that Austin contends it was June 28, 2018. The State does not dispute that Austin was likely taken into custody around this time.

extended supervision. Accordingly, as he is not entitled to relief, the circuit court did not err in denying Austin's postconviction motion without a hearing.

A defendant is not automatically entitled to an evidentiary hearing on his or her WIS. STAT. § 976.04 postconviction motion. See *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996). An evidentiary hearing is required only when the defendant alleges "sufficient material facts that, if true, would entitle the defendant to relief," which is a question of law reviewed de novo. *State v. Allen*, 2004 WI 106, ¶¶9, 14, 274 Wis. 2d 568, 682 N.W.2d 433. If that is the case, "the circuit court has no discretion and must hold an evidentiary hearing." *Bentley*, 201 Wis. 2d at 310. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion to grant or deny a hearing." *Allen*, 274 Wis. 2d 568, ¶9. Our review of the circuit court's decision to deny an evidentiary hearing is for an erroneous exercise of discretion. *Id.*

Under WIS. STAT. § 973.01, where an individual is sentenced for a felony committed on or after December 31, 1999, "the court shall impose a bifurcated sentence," which is comprised of "a term of confinement in prison followed by a term of extended supervision under [WIS. STAT. §] 302.113" and "equals the length of the term of confinement in prison plus the length of the term of extended supervision." Sec. 973.01(1)-(2). An individual is released to extended supervision after serving the confinement portion of his or her sentences, and if the individual "violates a condition of extended supervision, the reviewing authority may revoke the extended supervision" of the individual. Sec. 302.113(2), (9)(am).

If the extended supervision of the person is revoked, the reviewing authority shall order the person to be returned to prison for any

specified period of time that does not exceed the time remaining on the bifurcated sentence. The time remaining on the bifurcated sentence is the total length of the bifurcated sentence, less time served by the person in confinement under the sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the sentence. The order returning a person to prison under this paragraph shall provide the person whose extended supervision was revoked with credit in accordance with [WIS. STAT. §§] 304.072 and 973.155.

Sec. 302.113(9)(am). Where an individual is “subsequently released to extended supervision after” revocation,

[t]he remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence, less the time served by the person in confinement under the bifurcated sentence before release to extended supervision under sub. (2) and less all time served in confinement for previous revocations of extended supervision under the bifurcated sentence.

Sec. 302.113(9)(c).

The DOC properly applied the statutory requirements of WIS. STAT. § 302.113(9)(c) when it recalculated Austin’s maximum discharge date. The statute expressly provides in pertinent part that “[t]he remaining extended supervision portion of the bifurcated sentence is the total length of the bifurcated sentence, less the time served by the person *in confinement* under the bifurcated sentence before release to extended supervision under sub. (2).”

Sec. 302.113(9)(c) (emphasis added). As addressed above, the bifurcated sentence includes the confinement portion and the extended supervision portion. The statute is clear that Austin is to receive credit for the time served *in confinement* toward his revocation sentence, but it says nothing about including time served on extended supervision in the calculation. This is consistent with WIS. ADMIN. CODE § DOC 302.29(3), which provides that “[a]n inmate’s maximum discharge date shall be recalculated by adding the remainder of the sentence to the

date of custody after violation and subtracting credit received. The remainder of the sentence is the entire sentence *less time served in custody prior to release to community supervision.*” (Emphasis added.)

Austin claims that “[n]o part of [WIS. STAT.] § 302.113 expressly states that the time served on extended supervision can or will be forfeited if a prisoner is revoked based on a technical rule violation.” Austin, citing to § 302.113(8m)(a)³, equates “in custody” with being “in the custody of the DOC” under extended supervision. “Given the fact that Austin has always remained in the custody of the DOC,” he argues, “there is no basis to deny him credit for time served on extended supervision.” We disagree.

It is clear from the language of the statute and the administrative code that “in custody” refers to the “confinement” portion of his sentence and sentence after revocation “before release to extended supervision.” *See* WIS. STAT. § 302.113(9)(c); WIS. ADMIN. CODE § DOC 302.29(3) (“in custody prior to release to community supervision”). DOC’s recalculation properly provided Austin with credit for the time served in confinement but not the time he was on

³ WISCONSIN STAT. § 302.113(8m)(a) provides: “Every person released to extended supervision under this section remains in the legal custody of the department. If the department alleges that any condition or rule of extended supervision has been violated by the person, the department may take physical custody of the person for the investigation of the alleged violation.”

extended supervision. Accordingly, Austin is not entitled to the relief he seeks, and the circuit court appropriately denied his postconviction motion without a hearing.⁴

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

⁴ Austin also argues, citing *Smith v. State*, 60 Wis. 2d 373, 210 N.W.2d 678 (1973), that where the circuit court dismisses a WIS. STAT. § 974.06 postconviction motion without a hearing, it must do so by written opinion supporting its decision explaining “‘how’ Austin failed to meet the threshold requirement to have a hearing.” The circuit court’s order stated, “WHEREAS, the court reviewed said Motion as well as the Defendant’s file and; IT IS HEREBY ORDERED that the Defendant’s Motion is summarily denied.” We will uphold the circuit court’s discretionary decision to not hold a hearing on Austin’s motion if we can independently conclude that the facts and the law support the circuit court’s decision. See *State v. Clark*, 179 Wis. 2d 484, 490, 507 N.W.2d 172 (Ct. App. 1993) (“Where the trial court fails to adequately explain the reasons for its decision, we will independently review the record to determine whether it provides a reasonable basis for the trial court’s discretionary ruling.”). Given our conclusion that the record conclusively demonstrates that Austin is not entitled to relief, we will not reverse the circuit court’s decision for its failure to be more explicit in its order as to the reasons for its denial.

Finally, Austin claims “that he was not given reasonable notice at the time of sentencing” that his maximum discharge date could be extended. Upon review of the record, we conclude that Austin was provided with sufficient notice. At sentencing, the circuit court informed Austin of the terms of the statute, explaining that

[w]hile you are on extended supervision, you may be subject to certain conditions. If you violate any of these conditions, you may be returned to prison to serve not more than the time remaining on your sentence. The time remaining on your sentence is the total length of your sentence less any time served in custody.

After sentencing, Austin also received the Written Explanation of Determinate Sentence form, which reiterated the same information. Simply because Austin’s understanding of the term “custody” differed from what was contained in the statute does not mean that notice was not provided.

