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November 22, 2022

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

2022AP347-CR State of Wisconsin v. Anthony Terrell Smith, Jr.
(L.C. # 2018CF2184)

Before Donald, P.J., Dugan and White, 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).

Anthony Terrell Smith, Jr., *pro se*, appeals a judgment of conviction entered after a bench trial at which the circuit court found him guilty of eight felonies. He also appeals an order denying postconviction relief. Smith claims that the circuit court should have recused itself, that his trial was unfair due to a discovery violation and evidentiary errors, and that he was wrongly denied 323 days of sentence credit. Based upon a review of the briefs and record, we conclude at conference

that this matter is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We reject Smith's claims and summarily affirm.

In Milwaukee County Circuit Court case No. 2018CF2184, which underlies this appeal, the State filed a complaint charging Smith with eight crimes: a set of three charges that arose at a West Greenfield Avenue property on September 12, 2016; and a set of five charges that arose at a West Washington Street property on December 20, 2017. Each set of charges included two counts of possessing with intent to deliver controlled substances and one count of maintaining a drug trafficking place, all as a habitual criminal and as a party to a crime. The 2017 charges also included two counts of being a felon in possession of a firearm as a solo actor and as a habitual criminal. The complaint additionally included three charges against Smith's girlfriend, Miketa B. Roberts, all arising at the West Washington Street property on December 20, 2017. The charges against Smith and Roberts were joined for trial.

Smith waived the right to counsel early in the proceedings, and he and Roberts both waived the right to a jury trial. The matters proceeded to a bench trial, but on the second day of that trial, Roberts decided to resolve her case with a plea agreement. The trial continued solely against Smith, and at its conclusion the circuit court found him guilty of the eight charges that he faced in this case.[2]

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] The bench trial included charges that the State brought against Smith in another case, Milwaukee County Circuit Court case No. 2018CF2184. The circuit court acquitted Smith of all charges in that matter. The judgment of acquittal is not before us in the instant appeal.

At sentencing, the circuit court imposed eight concurrent sentences amounting to an aggregate seventeen-year term of imprisonment bifurcated as ten years of initial confinement and seven years of extended supervision. The circuit court further ordered Smith to serve his eight sentences in this case consecutive to two previously imposed revocation sentences arising from his convictions in Milwaukee County Circuit Court case Nos. 2007CF3884 and 2007CF5832. The circuit court then addressed Smith's potential sentence credit. Smith asserted that he had spent 323 days in custody in connection with the charges in the instant case, but the circuit court was unable to determine whether Smith had already received credit against his revocation sentences for those same days. Ultimately, the circuit court granted Smith credit for the 323 days at issue, but the circuit court advised him that it could not say whether they would count towards service of the sentences in this case or towards his earlier-imposed revocation sentences. The circuit court further advised Smith that the Department of Corrections (DOC) would conduct an independent review of the sentence credit awarded.

Soon after Smith's sentencing, the DOC notified the circuit court that the sentence credit awarded to Smith in this case appeared to represent the same days in custody already credited to him in connection with the revocation sentences imposed for his convictions in case Nos. 2007CF3884 and 2007CF5832. In support, the DOC attached copies of the revocation orders and warrants reflecting the sentence credit in those earlier matters. The circuit court in response entered an order vacating the sentence credit granted in the instant case, explaining that Smith was not entitled to dual credit for consecutive sentences.

Smith thereafter filed several postconviction motions on his own behalf before postconviction counsel was appointed for him.[3] The circuit court denied some of those motions without prejudice, explaining that Smith should address them with his counsel after an appointment of counsel was made. As to Smith's motion to reinstate sentence credit, however, the circuit court denied relief on the merits, reiterating that dual credit for consecutive sentences is not permitted and reaffirming the reasoning set forth in the order vacating sentence credit.

In due course, postconviction counsel was appointed for Smith, but Smith successfully moved to discharge that attorney. Representing himself, Smith then filed a postconviction motion under WIS. STAT. RULE 809.30. As relevant here, he alleged that he did not have a fair trial because the State did not comply with its obligations to produce discovery material and because he did not want to continue with a bench trial after his co-defendant, Roberts, pled guilty. He further sought reinstatement of 323 days of sentence credit. The circuit court denied relief without a hearing, and Smith appeals.

The standard for evaluating a postconviction motion is familiar. A circuit court is not required to grant a hearing on a postconviction motion unless the motion contains sufficient allegations of material fact that, if true, would entitle the defendant to relief. *See* ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. This presents a question of law for our independent review. *See* ***id.*** If the postconviction motion does not include sufficient allegations of material fact that, if true, entitle the defendant to relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court has

[3] This court's records reflect that the State Public Defender sought and obtained a lengthy extension of the deadline for appointing postconviction and appellate counsel for Smith. The State Public Defender explained that it was unable to meet the deadline through no fault of Smith's.

discretion to deny a postconviction motion without a hearing. *See* ***id.*** We review discretionary decisions with deference. *See* ***id.***

To allege sufficient facts that, if true, would entitle a defendant to relief, "a defendant must allege 'sufficient material facts' that would allow a reviewing court 'to meaningfully assess a defendant's claim.'" *See* ***State v. Sulla***, 2016 WI 46, ¶26, 369 Wis. 2d 225, 880 N.W.2d 659 (citation omitted). Our inquiry is thus whether the defendant alleged, within the four corners of the postconviction motion, "the five 'w's' and one 'h'; that is, who, what, where, when, why, and how." *See* ***Allen***, 274 Wis. 2d 568, ¶¶23, 27.

On appeal, Smith first alleges that the circuit court should have recused itself after Roberts pled guilty because the knowledge of her plea prejudiced the court against Smith. Smith claims that his trial was therefore unfair. As the State points out, Smith arguably raised this claim for the first time on appeal; in his postconviction motion, he alleged that he did not want to proceed with a bench trial after Roberts pled guilty, but he did not know how to request a jury trial at that juncture. We normally do not consider claims raised for the first time on appeal. *See* ***State v. Van Camp***, 213 Wis. 2d 131, 144, 569 N.W.2d 577 (1997). Following careful review of Smith's postconviction submissions, however, we assume for the sake of argument that the allegation of improper failure to recuse that Smith has presented to us was included within his postconviction motion. Nonetheless, we conclude that Smith forfeited the claim.

The record shows that Smith did not move the circuit court to recuse itself at any point during the trial. A defendant forfeits a right by failing to object at the time that the right was violated. *See* ***State v. Coffee***, 2020 WI 1, ¶19, 389 Wis. 2d 627, 937 N.W.2d 579. Smith's failure to seek the circuit court's recusal during trial constituted a forfeiture of his claim that the circuit

court's continuing involvement with the trial rendered it unfair. Smith may not resurrect that claim in postconviction proceedings long after his trial ended.

As to the allegation in Smith's postconviction motion that the trial was unfair because Smith wanted to abort it, but did not know how to request a jury trial while the bench trial was underway, Smith abandoned that allegation by not renewing it in his appellate briefs. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998). Regardless, his assertion that he did not know how to request a jury trial does not provide a basis for further proceedings. A defendant who waives the right to counsel and proceeds *pro se* may not later claim that he is entitled to relief due to his own ineffective representation.[4] *See* ***Faretta v. California***, 422 U.S. 806, 834 n.46 (1975).

Smith next alleges that the State violated his right to exculpatory discovery materials because the State did not timely produce police body camera videos. In support, he relies on ***Brady v. Maryland***, 373 U.S. 83 (1963). Smith again forfeited his claim.

Under ***Brady***, the State is required to disclose evidence that is favorable to the defendant, but ***Brady*** does not impose a deadline for the disclosure, requiring instead that the State produce exculpatory evidence in time for the defendant to use it effectively. *See* ***State v. Harris***, 2004 WI 64, ¶¶12, 35, 272 Wis. 2d 80, 680 N.W.2d 737. Here, the State produced the body camera videos on the first day of trial, before testimony began. The State explained that a detective had searched

[4] For the sake of completeness, we observe that Smith did not raise a challenge in circuit court to the validity of either his jury waiver or his waiver of the right to counsel, nor does he offer a challenge to the validity of either waiver in this court. *See* ***State v. Anderson***, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301 (setting forth the process for waiving the right to a jury trial); ***State v. Klessig***, 211 Wis. 2d 194, 206, 564 N.W.2d 716 (1997) (setting forth the process for waiving the right to counsel).

for such videos previously but none were found until someone with superior access to the body camera system conducted a supplemental review. This review uncovered several body camera videos related to the execution of a search warrant in 2017 at the West Washington Street property. The circuit court recessed to allow Smith to watch the videos, and he subsequently confirmed that he had done so. Smith has not identified any place in the record where he claimed that the disclosure of the videos came too late for him to make effective use of them at trial. Accordingly, the claim is forfeited.[5] *See* ***Coffee***, 389 Wis. 2d 627, ¶19.

Moreover, Smith argues now that "had the prosecutor produced the videos in time," he would have been able to use them to impeach a witness who testified to being present at the West Greenfield Avenue property when police executed a search warrant there in 2016. As the State points out, however, the record refutes those allegations because it conclusively shows that the body camera footage was all recorded in 2017. Smith thus fails to offer material facts showing that the State's delayed production of the videos adversely affected his defense, and instead he presents only conclusory and unsupported allegations.[6] The circuit court therefore properly

[5] Smith's postconviction motion suggested that the State did not comply with the Wisconsin discovery statute, WIS. STAT. § 971.23, because the State did not provide Smith with "some discovery" that he asked for and because some materials were in an inaccessible format. Smith does not reassert his statutory claim in his appellate briefs, and we deem the claim abandoned. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491-92, 588 N.W.2d 285 (Ct. App. 1998). Moreover, as the State points out, Smith's postconviction motion failed to specify the discovery at issue or explain how its alleged nondisclosure prejudiced Smith's defense. The circuit court therefore properly rejected his conclusory assertions. *See* ***State v. Allen***, 2004 WI 106, ¶¶9, 23, 274 Wis. 2d 568, 682 N.W.2d 433.

[6] We recognize that Smith's reply brief includes allegations that body camera videos exist showing the execution of a search warrant in 2016. Smith, however, fails to support those allegations with anything in the record and instead offers only a bald assertion that he has such videos. This court will not consider that assertion. "We are bound by the record as it comes to us." ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993). Smith may not supplement the record with conclusory, unsupported, and self-serving allegations in his briefs.

rejected Smith's claim that a discovery violation warranted relief in this matter. *See* ***Allen***, 274 Wis. 2d 568, ¶9.

Smith next contends that the circuit court wrongly refused to reinstate the 323 days of sentence credit awarded at sentencing but subsequently vacated in postconviction proceedings.[7] We reject this claim. The circuit court ordered Smith to serve his sentences in the instant case consecutive to his sentences in case Nos. 2007CF3884 and 2007CF5832. Documents submitted by the DOC when it sought review of the sentence credit awarded here reflected that all of the days that Smith spent in custody following his arrest in this case were credited to the periods of reconfinement imposed in the 2007 cases. The applicable rule is well-settled: "Credit is to be given on a day-for-day basis, which is not to be duplicatively credited to more than one of the sentences imposed to run consecutively." *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d

[7] The State argues that Smith previously litigated his sentence credit claim because he unsuccessfully moved to reinstate sentence credit before challenging the loss of the credit in his WIS. STAT. RULE 809.30 postconviction motion. To the extent that the State suggests that Smith is barred from seeking appellate review of the sentence credit determination, we disagree. Smith filed a timely notice of intent to pursue postconviction relief following entry of the judgment of conviction. His notice of appeal advised that he was challenging, *inter alia*, the provision in the amended judgment of conviction stating that he was not entitled to any sentence credit. Under these circumstances, we conclude that the notice of appeal brings before us not only the judgment of conviction but also the order vacating sentence credit. *See* ***State v. Perry***, 215 Wis. 2d 696, 704, 573 N.W.2d 876 (Ct. App. 1997) (holding that a notice of appeal from a judgment of conviction brought before this court both the original judgment and a later order entered after a restitution hearing, where the later order was made part of the judgment).

533 (1988). The circuit court properly applied that rule and declined to reinstate the credit vacated following review of the documents that the DOC submitted.[8]

We turn to Smith's complaints that, at trial, the circuit court erred by permitting the State to lead one of its witnesses and by permitting the State to introduce four guns into evidence "just to make Smith look bad." Smith preserved these two claims for appeal by raising his objections during pretrial and trial proceedings. *See* WIS. STAT. § 974.02(2). Smith's appellate brief, however, includes only a single sentence in support of each of these claims. Because his arguments are undeveloped and offered without any supporting legal authority, we decline to consider them. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

Finally, Smith asserts that he is entitled to a new trial in the interest of justice. Pursuant to WIS. STAT. § 752.35, this court may grant a new trial in the interest of justice when the real controversy has not been fully tried or when it is probable that justice has miscarried. "[R]eversals under WIS. STAT. § 752.35 are rare and reserved for exceptional cases." ***State v. Kucharski***, 2015 WI 64, ¶41, 363 Wis. 2d 658, 866 N.W.2d 697. In support of a reversal here, Smith merely cites the standard for relief set forth in § 752.35 and echoed in several decisions of the Wisconsin appellate courts. Smith thus fails to develop any argument to show that this is the rare case

[8] We note that the 323 days of sentence credit that Smith sought at sentencing included the period from May 12, 2018, until May 14, 2018, and that the documents later submitted by the DOC show that Smith did not receive credit against his reconfinement sentences for that period. The record unambiguously shows, however, that Smith was not in custody during that period. The transcript of Smith's initial appearance on Monday, May 14, 2018, reflects that he "came on his own" to the courthouse to "clear the warrant" that was issued after the State filed the criminal complaint in this case on Friday, May 11, 2018. Indeed, Smith acknowledged in his postconviction motion that he "turned himself in at [the] courthouse" on May 14, 2018. Accordingly the circuit court properly declined to reinstate Smith's sentence credit for the period from May 12, 2018, until May 14, 2018. *See* ***State v. Cameron***, 2012 WI App 93, ¶28 n.6, 344 Wis. 2d 101, 820 N.W.2d 433 (explaining that this court will uphold a decision of the circuit court if it reached the correct result, even if we rely on different reasoning).

warranting relief under the statute. Accordingly, we reject the claim. *See* ***Pettit***, 171 Wis. 2d at 647. For all of the foregoing reasons, we affirm.

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed. *See* 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