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DISTRICT II

May 10, 2023

To:

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Circuit Court Judge
Electronic Notice

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Clerk of Circuit Court
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Michael E. Thompson
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You are hereby notified that the Court has entered the following opinion and order:

2021AP195-CRNM State of Wisconsin v. Michael E. Thompson (L.C. #2003CF1003)

Before Gundrum, P.J., Neubauer and Lazar, 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).

Michael E. Thompson appeals from an order granting his motion for additional sentence credit but denying his motion for sentence modification. His appellate counsel filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2021-22)¹ and *Anders v. California*, 386 U.S. 738 (1967). Thompson received a copy of the report, was advised of his right to file a response, and has filed two responses. Upon consideration of the report, Thompson's responses, and an

¹ All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

independent review of the record, we conclude that the order may be summarily affirmed because there are no issues with arguable merit for appeal. *See* WIS. STAT. RULE 809.21.

The underlying issue in this case involves the amount of sentence credit Thompson received following his revocation from extended supervision and his administrative reconfinement. As relevant to this appeal, in 2004, following a jury trial, Thompson was convicted of possession with intent to deliver heroin as a second or subsequent offense with the repeater enhancer. On that count, Thompson was sentenced to eight years' initial confinement and five years' extended supervision.²

While incarcerated, Thompson successfully completed the Earned Release Program and was released to extended supervision on October 15, 2007. The Wisconsin Department of Corrections (DOC) permitted Thompson to transfer his extended supervision to Georgia.

In October 2008, while in Georgia, Thompson was arrested for armed robbery, aggravated assault, and false imprisonment. The Wisconsin DOC put a hold on Thompson, and he waived extradition. Ultimately, Thompson remained in Georgia, where he was sentenced to ten years' prison and five years' supervision. When he was released from prison in Georgia in 2018, Thompson was returned to Wisconsin.

In November 2018, the Wisconsin DOC completed its revocation summary. In March 2019, Thompson, by counsel, appeared at a contested revocation hearing. Following the

² Thompson was also convicted of obstructing an officer as a repeater, felony bail jumping as a repeater, possession of cocaine as a second or subsequent offense as a repeater, and possession of THC as a second or subsequent offense as a repeater. On these counts, sentence was withheld in favor of three years' probation consecutive to his sentence on the possession of heroin count.

hearing, the administrative law judge (ALJ) issued a written decision whereby she revoked Thompson from extended supervision based on the criminal conduct in Georgia. Of the eight years, eleven months, and eleven days available for reconfinement, the ALJ reconfined Thompson to prison for five years, four months, and twelve days. The ALJ gave Thompson sentence credit from December 12, 2008, (the day Wisconsin put a hold on him in Georgia) to May 11, 2010, (the day he was sentenced in Georgia) and from October 22, 2018, (the day he was released from prison in Georgia) until his receipt at the Wisconsin institution. The decision indicated it “may be appealed to the Administrator of the Division of Hearings and Appeals as provided in WIS. ADMIN. CODE § HA 2.05(8).” It does not appear from the record that an appeal was pursued.

In July 2019, Thompson, pro se, moved the circuit court for additional sentence credit under WIS. STAT. § 973.155. Thompson argued he should receive credit for the entire time he was in Georgia’s custody. The State objected, and the court denied the motion.

Thompson, pro se, filed a notice of intent to appeal. *See* WIS. STAT. § 973.155(6) (“A defendant aggrieved by a determination by a court under this section may appeal in accordance with [WIS. STAT. RULE] 809.30.”). The State Public Defender’s Office appointed counsel for Thompson for the sentence credit issue. *See* RULE 809.30(2)(e).

Appointed counsel, in turn, filed a motion for sentence credit and sentence modification. As for the sentence credit issue, counsel argued Thompson was entitled to additional sentence credit for the time period from October 22, 2008, (the day he was arrested in Georgia) to December 12, 2008, (the day Wisconsin put a hold on him), which totaled fifty-one days. The

State conceded Thompson was entitled to an additional fifty-one days' sentence credit, and the circuit court ordered the additional credit.

Counsel also moved for sentence modification on the basis that both Thompson's original sentence and his reconfinement sentence were unconscionable and unduly harsh and based on the fact that the COVID-19 health pandemic was a new factor that warranted resentencing. The State objected, and the circuit court denied Thompson's request for sentence modification.

Counsel filed a no-merit notice of appeal. Counsel's no-merit report discusses seven issues, including: (1) whether there is any arguable merit to challenge the circuit court's determination that Thompson's original sentence and reconfinement sentence were not unconscionable or unduly harsh; (2) whether the court erred by determining that the COVID-19 health pandemic was not a factor warranting resentencing; (3) whether Thompson was entitled to sentence credit for the entire time he spent incarcerated in Georgia; (4) whether Thompson was entitled to sentence credit for the time he was incarcerated in Georgia after he was purportedly eligible for early release but not released because of the Wisconsin detainer; (5) whether the Wisconsin DOC lost jurisdiction to revoke Thompson from extended supervision; (6) whether Thompson's constitutional rights were violated when the Wisconsin DOC did not have a revocation hearing while he was incarcerated in Georgia; and (7) whether his due process rights were violated when, after his return to Wisconsin, his final revocation hearing was not held within fifty days.

Thompson responds that there is an issue of arguable merit as to whether the Wisconsin DOC lost jurisdiction over him because it waited over ten years to revoke him from his extended supervision. Thompson asserts he completed his term of extended supervision while he was

incarcerated in Georgia. Alternatively, Thompson argues he should receive credit for the entire time he was in custody in Georgia.

At the outset, we observe that, in this case, the scope of this court's WIS. STAT. RULE 809.32 no-merit review is limited to a review of the circuit court's order that addressed sentence credit and sentence modification. *See* WIS. STAT. § 973.155(6). Thompson's direct appeal rights under WIS. STAT. RULE 809.30 (unrelated to sentence credit) have expired. The Wisconsin DOC's revocation of Thompson's extended supervision and its administrative reconfinement of Thompson are also not before this court. *See State ex rel. Flowers v. DHSS*, 81 Wis. 2d 376, 384, 260 N.W.2d 727 (1978) (revocation is independent from underlying criminal action); *see also State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 550, 185 N.W.2d 306 (1971) (judicial review of revocation is by petition for certiorari in circuit court). Although it is not clear whether the sentence modification portion of the circuit court's order is properly before this court in its sentence-credit no-merit review, we will nevertheless address sentence modification in addition to sentence credit.

We first agree with counsel that there is no arguable merit to assert Thompson is entitled to any sentence credit other than what has been already awarded. Thompson has received credit from October 22, 2008 (the day he was arrested in Georgia) until May 11, 2010 (the day he was sentenced in Georgia). He then received credit from October 22, 2018 (the day he was released from prison in Georgia) until he was received at the Wisconsin institution. “[U]nless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges.” *State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382, 387 (1985). Here, Thompson's conviction and sentence for his crime of possessing heroin with intent to deliver is not related to the crimes he committed

while in Georgia. It does not matter that Wisconsin may or may not have had a detainer on him while he was serving his Georgia sentence for armed robbery, aggravated assault, and false imprisonment. *See* WIS JI—CRIMINAL SM-34A at 11 (Jan. 2023) (“the filing of a detainer against someone already in custody on other charges does not result in ‘custody’ on the charges covered by the detainer”). In this case, there is no arguable merit to allege Thompson is entitled to sentence credit from the date his Georgia sentence was imposed to the date of his release in Georgia.

We also agree with counsel there is no arguable merit to assert Thompson is entitled to sentence modification on the basis that his sentence was unduly harsh or that the COVID-19 health pandemic is a new factor that warrants resentencing. Our review of the record confirms that the sentencing court appropriately considered the relevant sentencing objectives and factors. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695; *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The resulting sentence was within the maximum authorized by law. *See State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449. The sentence was not so excessive so as to shock the public’s sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We also agree that there is no arguable merit to argue the COVID-19 health pandemic, without more, constitutes a new factor that entitles a defendant to sentence modification. *See State v. Harbor*, 2011 WI 28, ¶38, 333 Wis. 2d 53, 797 N.W.2d 828 (explaining that to prevail on a sentence modification claim, a defendant must demonstrate both the existence of a new factor and that the new factor justifies sentence modification).

Our independent review of the record does not disclose any potentially meritorious issues for appeal related to sentence credit. Because we conclude that there would be no arguable merit

to any issue that could be raised on appeal, we accept the no-merit report and relieve Attorney John P. Mueller of further representation in this matter.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that Attorney John P. Mueller is relieved of further representation of Michael E. Thompson in this matter. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals