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DISTRICT III

May 16, 2023

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

2020AP1587-CRNM State of Wisconsin v. Dean Alan Curley
2020AP1588-CRNM (L. C. Nos. 2019CF26, 2019CF65)

Before Stark, P.J., Hruz and Gill, 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).

Counsel for Dean Curley filed a no-merit report concluding that no grounds exist to challenge Curley's convictions for attempting to flee an officer, as a repeater, and possession

with intent to deliver more than three but not more than ten grams of methamphetamine.[1] Curley filed a response challenging his pleas and sentences, and counsel filed a supplemental no-merit report. Upon consideration of the reports and response, and our independent review of the records as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that any challenge to Curley's pleas or the circuit court's sentencing discretion would lack arguable merit; however, we cannot say that it would be frivolous to pursue additional sentence credit. Therefore, for the reasons discussed below, we will dismiss the appeal and extend the time for counsel to file a postconviction motion for sentence credit. In the event that a second no-merit appeal is filed after a decision on a postconviction motion, the no-merit review will be limited to issues raised by the postconviction motion.[2] *Cf.* ***State v. Scaccio***, 2000 WI App 265, ¶8, 240 Wis. 2d 95, 622 N.W.2d 449 (the logic behind the rule that a post-revocation appellant cannot challenge the original conviction is that the appellant already had an opportunity to raise any issues relating to the conviction in a first direct appeal).

[1] We note that although the record shows Curley was charged and convicted upon his guilty plea of possession with intent to deliver more than three but not more than ten grams of "methamphetamine," contrary to WIS. STAT. § 961.41(1m)(e)2. (2021-22), the judgment of conviction identifies the drug as "amphetamine." Because both drugs are among those listed under § 961.41(1m)(e)2., this appears to be a clerical error. Therefore, upon remittitur, the circuit court shall enter an amended judgment of conviction correctly describing Curley's conviction for possession with intent to deliver more than three but not more than ten grams of methamphetamine.

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

[2] We recognize that we are conducting a partial no-merit review. Although an appellant is not entitled to a partial no-merit review, this court conducts partial no-merit reviews in some cases. ***State ex rel. Ford v. Holm***, 2006 WI App 176, ¶¶6, 9-12, 296 Wis. 2d 119, 722 N.W.2d 609. A partial no-merit review is appropriate in this case because the court reviewed the records and Curley's lengthy response before determining that it would not be frivolous to pursue additional sentence credit. A partial no-merit review in this circumstance promotes judicial economy.

The State charged Curley with the following offenses: (1) attempting to flee an officer; (2) possession with intent to deliver more than fifteen but not more than forty grams of cocaine; (3) possession with intent to deliver more than three but not more than ten grams of methamphetamine; and (4) possession of drug paraphernalia—all four counts as a repeater. The charges, filed in St. Croix County case Nos. 2019CF26 and 2019CF65, arose from a highway-speed pursuit that originated in Minnesota, when Curley refused to comply with law enforcement's attempt to initiate a stop of his vehicle. The pursuit continued into Wisconsin, where Hudson police officers took over and witnessed the driver, later identified as Curley, throwing items out of the driver side window. Curley was ultimately apprehended with the help of stop sticks on the roadway. In a bag that had been thrown from the vehicle, law enforcement discovered a metal cylinder and three plastic bags containing cocaine, one plastic bag containing 4.15 grams of methamphetamine, and drug paraphernalia.

In exchange for Curley's guilty pleas to attempting to flee an officer, as a repeater, and possession with intent to deliver more than three but not more than ten grams of methamphetamine, without the repeater enhancer, the State agreed to recommend that the remaining charges in these cases be dismissed outright, and that a disorderly conduct charge in a third case be dismissed and read in. The State also agreed to cap its sentencing recommendation at five years of initial confinement, with "[n]o agreement on anything else." Out of maximum possible sentences totaling twenty-two and one-half years, the circuit court imposed concurrent sentences resulting in an eleven-year term, consisting of six years of initial confinement followed by five years of extended supervision. The court ordered these sentences to be served concurrent with Curley's sentence following the revocation of his probation in St. Croix County case

No. 2017CF98. The court also determined that Curley was entitled to twenty-two days of sentence credit.

Curley filed a pro se postconviction motion for an additional 166 days of sentence credit Because appellate counsel was appointed during the pendency of that motion, the circuit court denied the motion noting: "While it does not appear that any errors were made regarding sentence credit, the [c]ourt trusts that [appellate counsel] will be able to pinpoint any putative errors with sufficient accuracy now that he is … involved in the case."

The no-merit report addresses whether Curley knowingly, intelligently and voluntarily entered his guilty pleas; whether the circuit court properly exercised its sentencing discretion; and whether there are any grounds to challenge the effectiveness of Curley's trial counsel. Upon reviewing the records, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit.

In his response to the no-merit report, Curley intimates that his pleas were unknowing because he was unaware that the circuit court could depart from the parties' sentence recommendations. The record belies his claim. After outlining the maximum possible sentences for each crime, the following exchange occurred between Curley and the court:

> [Court]: Now, Mr. Curley, please keep in mind, as you've appeared in my courtroom before, that I don't have to go along with the recommendation, what the PSI recommends, or what your attorney recommends. I'm free to sentence you within the confines of a sentencing based on seriousness of the offense, your character, the need to protect the public, need to punish, as well as consideration of rehabilitation, which could include maximums. Do you understand that?
>
> [Curley]: Yes, I do, your Honor.

Any claim that the court's departure from the sentence recommendations rendered Curley's pleas unknowing would lack arguable merit.

Curley also asserts that the State breached the plea agreement and his trial counsel was ineffective by failing to object to the breach. Before addressing Curley's ineffective assistance claim, however, we must first determine whether there was, in fact, a material and substantial breach of the plea agreement. *See* ***State v. Naydihor***, 2004 WI 43, ¶¶9-10, 270 Wis. 2d 585, 678 N.W.2d 220. If no such breach existed, then Curley's trial attorney did not perform deficiently by failing to object. *See* ***id.*** Whether the State's conduct constituted a material and substantial breach of the plea agreement is a question of law that we review independently. ***State v. Williams***, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. A breach of a plea agreement is material and substantial when it "violates the terms of the agreement and deprives the defendant of a material and substantial benefit for which he or she bargained." ***State v. Bowers***, 2005 WI App 72, ¶9, 280 Wis. 2d 534, 696 N.W.2d 255.

Here, Curley acknowledges that the State recommended concurrent sentences that did not exceed five years of initial confinement, consistent with the plea agreement. Curley nevertheless argues that the State breached the agreement by recommending that these concurrent sentences should run consecutive to Curley's sentence in St. Croix County case No. 2017CF98. The parties, however, made no agreement regarding how the sentences in the present matters would relate to any other sentence. The State did exactly what it agreed to do—it recommended no more than five years of initial confinement for both of these cases. Any challenge to the plea, or derivative challenge to the effectiveness of trial counsel, based on this alleged breach would therefore lack arguable merit.

Curley also claims that he received ineffective assistance of appellate counsel, claiming that counsel did not fully investigate his case and that he was "always rude and negative." We will not review a claim of ineffective appellate counsel on direct appeal. *See* ***State v. Knight***, 168 Wis. 2d 509, 512-13, 484 N.W.2d 540 (1992). Such a claim must be pursued by a petition for a writ of habeas corpus in this court. ***Id.*** at 522.

Finally, Curley argues that he is entitled to 166 additional days of sentence credit. The circuit court's electronic docket reflects that in St. Croix County case No. 2017CF98, Curley pled guilty to possession of methamphetamine as a second or subsequent drug offense. The court imposed and stayed one and one-half years of initial confinement followed by two years of extended supervision, and it placed Curley on probation for three years. Following his arrest in the underlying cases, Curley's probation in the 2017 case was revoked on or around February 6, 2019. However, it appears that he remained in the St. Croix County jail during the pendency of the underlying cases. He was sentenced in those cases on July 22, 2019, and he was transferred to prison thereafter.

Although Curley was credited for the twenty-two days representing the time from his January 16, 2019 arrest in the new cases to the February 6, 2019 revocation of Curley's probation in the older case, he argues that he is entitled to an additional 166 days of sentence credit, for the time he spent in jail from the date of his probation revocation until his July 22, 2019 sentencing in the new cases. 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). In deciding whether an offender is entitled to a particular amount of credit under the statute, a court must determine: (1) whether the defendant was "in custody" during the

relevant time period; and (2) whether that custody was "in connection with the course of conduct for which sentence was imposed." ***State v. Johnson***, 2009 WI 57, ¶27, 318 Wis. 2d 21, 767 N.W.2d 207 (citation omitted).

Here, it appears that Curley was in custody during the period for which he seeks sentence credit. Further, the revocation of Curley's probation appears to have been triggered by the charges in the cases underlying this appeal, thus arguably providing the necessary connection between his custody and the course of conduct for which his sentences in the present cases were imposed. *See* WIS. STAT. § 973.155(1)(b) (stating that the custody for which an offender is entitled to credit includes custody "which is in whole or in part the result of a probation, extended supervision or parole hold ... placed upon the person for the same course of conduct as that resulting in the new conviction").

As counsel's supplemental no-merit report recognized, our supreme court has held that the connection between a defendant's presentence custody and the course of conduct for which sentence is imposed is severed when the defendant begins serving a sentence in a different case. ***State v. Beets***, 124 Wis. 2d 372, 379, 383, 369 N.W.2d 382 (1985). Curley's imposed-and-stayed sentence in the 2017 case, however, did not begin to run until he was received in prison. *See* WIS. STAT. § 973.10(2)(b); *see also* ***State v. Slater***, 2021 WI App 88, ¶14, 400 Wis. 2d 93, 968 N.W.2d 740. Because it does not appear that Curley's probation revocation in the 2017 case severed the connection between his presentence custody and the course of conduct for which his sentences on his subsequent offenses were imposed, we cannot conclude that further postconviction proceedings would be without merit. Therefore, we will accept the no-merit

report in part, reject the no-merit report conclusion in part, dismiss this appeal, deny counsel's motion to withdraw, and extend the time to file a postconviction motion.[3] Although we will not conduct a second and subsequent no-merit review of plea and sentencing issues discussed in the no-merit report and this opinion, appointed counsel is not precluded from raising any other issue in the postconviction motion that counsel may conclude has arguable merit.

Upon the foregoing reasons,

IT IS ORDERED that the WIS. STAT. RULE 809.32 no-merit report is accepted in part and rejected in part, appointed counsel's motion to withdraw is denied, and this appeal is dismissed.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender for the possible appointment of new counsel. If the SPD determines that it should appoint new counsel, any such appointment is to be made within twenty days of the date of this order.

IT IS FURTHER ORDERED that the WIS. STAT. RULE 809.30 deadline for filing a postconviction motion is reinstated and extended to forty-five days after remittitur.

[3] Counsel's conclusion that there is no arguable merit to pursuing additional sentence credit *may* conflict with the advocacy to which Curley is entitled. Appointment of new counsel, therefore, may be appropriate.

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

Sheila T. Reiff
Clerk of Court of Appeals