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DISTRICT III

May 31, 2023

To:

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Circuit Court Judge
Electronic Notice

Susan Schaffer
Clerk of Circuit Court
Eau Claire County Courthouse
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Xue Vang 626196
Chippewa Valley Correctional Treatment Facility
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Chippewa Falls, WI 54729

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

2021AP941-CR State of Wisconsin v. Xue Vang (L.C. No. 2020CF39)

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).

Xue Vang, pro se, appeals an order denying his postconviction motion seeking 321 additional days of sentence credit. 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 (2021-22).[1] We affirm.

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

On December 26, 2019, Vang was arrested in Eau Claire County. The State later charged Vang on January 6, 2020, with possession with intent to deliver methamphetamine (more than ten but not more than fifty grams) as a repeater, second or subsequent offense. The probable cause portion of the complaint alleged that law enforcement found methamphetamine in Vang's possession after he was placed in custody on December 26, 2019. As the basis for the repeater enhancer, the State relied on Vang's convictions in Chippewa County case No. 2014CF386 and Minnesota Ramsey County case No. 62-CR-13-6527, both of which involved drug-related activity.

Vang obtained a signature bond the same day. The record suggests, however, that he remained in custody due to an extended supervision hold in the Chippewa County case. At some point in March 2020, Vang's extended supervision was revoked in the Chippewa County case, and he was thereafter incarcerated due to that revocation. The reasons for the revocation and the actual date of his return to prison on that revocation are unclear from the record, but Vang's postconviction motion suggests his return date to prison was July 8, 2020.

According to the judgment of conviction in this case, Vang pled no contest to the charged crime, and he was sentenced to four years of initial confinement followed by six years of extended supervision, to be served concurrently with the sentence in the Chippewa County case. The judgment of conviction also included ninety-six days of sentence credit.[2]

[2] The State does not dispute that Vang is entitled to ninety-six days of sentence credit in this case. However, neither in the parties' briefing nor in the record is there any information regarding how those days were computed.

(continued)

Vang later filed related postconviction motions requesting 321 additional days of credit.[3] Vang contended that he was taken into custody on December 26, 2019, for both this case and the extended supervision hold in the Chippewa County case, and that his extended supervision was revoked due to the charges in this case. Vang further alleged that because he was not sentenced in this case until February 15, 2021, he "spent a total of 417 days in custody waiting for the resolution of this matter," and, after applying the ninety-six days credited, "321 days [are] outstanding."

The State opposed Vang's postconviction motion for sentence credit. It noted that the Department of Corrections (DOC) revoked Vang's supervision in the Chippewa County case "on or about March 31, 2020," and Vang was reconfined on that revocation while this case remained pending. The State then relied on the rule pronounced in ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), to argue that where a defendant on supervision receives new charges, and

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Although this appeal ultimately does not require us to determine how the circuit court calculated the original ninety-six days of sentence credit, there appear to be at least two possibilities. First, consistent with the State's argument to the court, the ninety-six days might have been awarded for Vang's custody between December 26, 2019, and March 31, 2020. The State suggested that Vang's extended supervision was revoked "on or about March 31, 2020" and that his revocation sentence began on that day as well. Alternatively, the ninety-six days might have been awarded for a time period in which Vang was in custody *after* his extended supervision was revoked but before he returned to prison. Although the record contains insufficient facts to determine the precise dates for when these two events occurred, it does appear—based on the limited information in the record—that Vang's extended supervision was revoked sometime at the end of March 2020 and that he returned to prison sometime in the beginning of July 2020. The time between these two events is close to the ninety-six days that were eventually awarded.

[3] Vang filed a "Motion for Custody Time Credit" on April 26, 2021, to which the State filed a letter brief in response the same day. Eleven days later, Vang filed a document denominated "Notice of a 'Pro Se' Motion for Sentence Credit" under WIS. STAT. § 973.155, with an additional argument for him to receive the requested 321 days' sentence credit. The circuit court, on separate dates, placed a denial stamp on a copy of each of Vang's two filings. Whether Vang's May 7, 2021 filing is deemed a second motion for sentence credit or a reply to the State's response to his initial motion is immaterial to our disposition of this appeal.

has his or her supervision revoked prior to resolving the new charges, the defendant's credit stops accruing on the new charges once the defendant begins serving the revocation sentence. Based on this rule and its application in subsequent cases, the State argued that Vang was entitled to credit only from his time of arrest until when his extended supervision in the Chippewa County case was revoked in March of 2020—i.e., the ninety-six days of credit he received.

The circuit court summarily denied Vang's motions for sentence credit. Vang now appeals that order.

WISCONSIN STAT. § 973.155(1)(a) governs sentence credit in Wisconsin, and it 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." This presentence credit generally includes time spent in custody while "awaiting trial," while "being tried," and while "awaiting imposition of sentence." Sec. 973.155(1)(a)1.-3.

"[A]pplication of the sentence credit statute, WIS. STAT. § 973.155, to a particular set of facts presents a question of law that we review independently." ***State v. Kontny***, 2020 WI App 30, ¶6, 392 Wis. 2d 311, 943 N.W.2d 923. In so doing, we uphold factual findings by the circuit court unless they are clearly erroneous. ***Id.*** The defendant bears the burden of demonstrating both "custody" and its connection with the course of conduct for which the sentence was imposed. ***State v. Carter***, 2010 WI 77, ¶11, 327 Wis. 2d 1, 785 N.W.2d 516.

Vang has not met his burden of demonstrating that he is entitled to any additional sentence credit. As an initial matter, and as the State notes, the record in this case is devoid of many material documents or information normally required for an appeal regarding sentence

credit. For example, the record does not contain the sentencing hearing transcript, which might explain why the circuit court ordered the original ninety-six days of sentence credit. Although Vang submitted some documents that appear to be part of the DOC's revocation proceedings, those documents are incomplete and none of them establish that Vang's extended supervision hold was for his conduct in this case, nor do they establish when precisely Vang's extended supervision was revoked. Given that it was Vang's burden to show an entitlement to additional sentence credit, *see* ***id.***, this deficiency is fatal to Vang's claim, *see* ***State v. Lange***, 2003 WI App 2, ¶46, 259 Wis. 2d 774, 656 N.W.2d 480 (2002). That said, even based on the limited information in the record, it appears Vang's argument fails.

First, Wisconsin law does not permit sentence credit in a new case unless the time spent in 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). The presentence custody's "connection with" the sentence imposed must be factual; a mere procedural connection will not suffice. ***Id.***, ¶33; *see also* ***Beets***, 124 Wis. 2d at 379.

On the record before us, it is by no means clear that Vang's custody beginning on December 26, 2019, was in connection with the charges in this case. At most, Vang's postconviction motion contained an arrest report indicating that Vang was arrested for an extended supervision hold on the Chippewa County case that day. Vang's postconviction motion also contained a DOC document stating that Vang "stopped reporting in November and a warrant was issued" on November 21, 2019—which was over one month before the underlying conduct that led to Vang's conviction in this case. Further, the complaint in this case alleged that on December 26, 2019, "Vang was advised that he was under arrest for an active [DOC] warrant." In the end, many of the alleged connections to which Vang points between his supervision hold

and this case are merely procedural and thus do not establish a connection with the course of conduct for which sentence was imposed in this case.

Second, generally, any "course of conduct" connection between a defendant's presentence custody for both an extended supervision hold on an earlier offense and for a new offense is severed once the defendant begins serving his or her sentence in that different, earlier case. ***Beets***, 124 Wis. 2d at 379. For extended supervision cases, as here, the connection is severed when a defendant is received at a correctional institution to begin serving his or her revocation sentence. WIS. STAT. §§ 304.072(4), 973.10(2)(b); *see also* ***State v. Slater***, 2021 WI App 88, ¶14, 400 Wis. 2d 93, 968 N.W.2d 740.

Because Vang has failed to prove (at least on the record before us) the date he began serving the custody portion of his sentence after revocation, and because there is no showing of a circuit court finding in that regard, he is not entitled to any relief in this appeal.[4] At most, accepting Vang's argument on its face, he might be entitled to credit from December 26, 2019, until he returned to a correctional institution to begin serving the revocation sentence on the Chippewa County case. He has already received ninety-six days of sentence credit for a portion of that time. Vang is not entitled to any credit from the time he returned to a correctional institution on his revocation in the Chippewa County case until February 15, 2021, the date of sentencing in this case.

[4] Vang's postconviction motion includes documentation from the DOC indicating that he returned to prison on the revocation on July 8, 2020. Again, even accepting that date, Vang would be entitled only to sentence credit that he earned up until July 8, the date that he seems to have returned to prison.

Moreover, we stress that our decision today is based largely upon the lack of support in the record for Vang's position under the applicable case law.

Vang presents no cogent argument disputing the foregoing law or its application to his case.[5] His appellate argument, in both his initial and reply briefs, focuses on a misreading of ***State v. Hintz***, 2007 WI App 113, 300 Wis. 2d 583, 731 N.W.2d 646. In ***Hintz***, we concluded that an extended supervision hold was placed, in part, due to the conduct that gave rise to new burglary charges and, accordingly, Hintz was entitled to sentence credit in his current case for his time in custody on the extended supervision hold. ***Id.***, ¶¶9-12. However, we allowed sentence credit only for the time Hintz was in custody on the extended supervision hold. ***Id.***, ¶12. Indeed, in accordance with Hintz's concession, we referenced ***Beets*** for the proposition that after revocation, any connection between a defendant's custody on an extended supervision hold and a new crime was "severed." ***Hintz***, 300 Wis. 2d 583, ¶7 n.3.

Vang claims that he satisfied the "two-prong test" stated in ***Hintz*** merely because he was in custody since his arrest on December 26, 2019, until his sentencing in this case, and his "arrest warr[a]nt is in direct or part of his probation violation which resulted in the [n]ew [c]onviction." All that satisfaction of this test would establish is that Vang was entitled to any sentence credit for the time that he was in custody for both this case and prior to him beginning to serve his revocation sentence. It does nothing to alter the applicable law that, once Vang began serving

[5] In his briefs, Vang summarily refers to notions of double jeopardy, due process, and ineffective assistance of counsel. No such claims were raised below, nor does Vang present them in any developed way as adequate, independent bases for reversing the circuit court. Moreover, to the extent Vang intends to advance such arguments, they are entirely premised on his misunderstanding of Wisconsin law regarding sentence credit and, therefore, must fail.

time in a correctional institution after his revocation, he was not entitled to any further credit toward his sentence in this case. Indeed, Vang advances no argument contrary to this authority.[6]

Therefore,

IT IS ORDERED that the order is 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

[6] Indeed, Vang's only attempt to address ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), and related cases, as well as the State's argument relying on them, is to declare that "[t]he State's argu[]ment … that Wisconsin law does not permit sentencing credit after a defendant is return[ed] to prison on extended supervision rev[o]cation is moot."

Also, because we affirm the order denying Vang additional sentence credit for the reasons stated herein, we do not address the State's alternative bases for affirming. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716.