



OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS

110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

DISTRICT II

June 21, 2023

To:

Hon. Todd K. Martens
Circuit Court Judge
Electronic Notice

Sarah Adjemian
Clerk of Circuit Court
Washington County Courthouse
Electronic Notice

Mark Bensen
Electronic Notice

Jacob J. Wittwer
Electronic Notice

Marquece L. Hart, #552949
Racine Correctional Inst.
P.O. Box 900
Sturtevant, WI 53177-0900

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

2021AP356-CR State of Wisconsin v. Marquece L. Hart (L.C. #2018CF513)

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

Marquece L. Hart appeals, pro se, from an order denying his postconviction motion for sentence credit and sentence modification. He also appeals from an order denying his reconsideration motion. Hart claims that he is entitled to additional days of sentence credit and that the circuit court erroneously exercised its discretion when it imposed a consecutive sentence without a specific reason. 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.

In May 2013, Hart was convicted in two Milwaukee County cases, one for possession of marijuana as a second offense (No. 2013CF162) and the other for felony bail jumping (No. 2013CF975). In July 2013, the circuit court² sentenced Hart. On the drug possession conviction, it imposed a three-and-one-half-year sentence but imposed and stayed the sentence and put Hart on three years' probation. On the bail-jumping conviction, it sentenced Hart to a concurrent four-year sentence but imposed and stayed that sentence and put Hart on three years' probation.

In September 2016, Hart's probation for both the drug possession and bail-jumping convictions was revoked, and he was incarcerated. In January 2017, Hart was released to extended supervision on both No. 2013CF162 and No. 2013CF975. While on that extended supervision, Hart committed the crime underlying this appeal. Specifically, in October 2018, in Washington County, on multiple dates, Hart sold heroin and cocaine to an undercover police officer. When police attempted to arrest Hart, he smashed his car into their cars and fled. He was eventually arrested on November 15, 2018, and taken into custody. Thus, starting on that date, Hart was in custody for the 2018 crimes and the two 2013 crimes. Hart was subsequently charged for the 2018 crimes. Specifically, in case No. 2018CF513, the State charged Hart with six counts of manufacturing/delivering heroin and cocaine and two counts of criminal damage to

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

² The 2013 cases occurred in Milwaukee County where the Honorable Clare L. Fiorenza imposed the sentences.

property. Hart accepted a plea bargain where he pled guilty to one of the drug charges, and the rest of the charges were dismissed and read in.

On July 24, 2019, the Washington County Circuit Court held a sentencing hearing for the 2018 case. The State recommended a thirteen-year sentence consecutive to any other sentence, primarily based on Hart's "significant criminal record," the fact he was on extended supervision for the 2013 crimes as well as a federal ammunition charge at the time he was arrested in this case, and because Hart admitted he sold drugs for financial reasons. The State also informed the sentencing court that Hart had waived his revocation hearing in the two 2013 Milwaukee cases and was awaiting a reconfinement hearing. The State told the sentencing court that Hart faced a reconfinement period of two years on the 2013 drug possession conviction and over a year on the 2013 felony bail-jumping conviction. The State further explained that if the sentencing court imposed a consecutive sentence in the 2018 case, Hart "would not be entitled to any credit [in No. 2018CF513], because the time he has been sitting on this case is going to be credited towards" the 2013 sentences.

Hart's lawyer asked the sentencing court to impose an eleven-year sentence and run it concurrent to the two years Hart would likely receive in the 2013 drug case. After considering the relevant sentencing factors, the sentencing court noted the seriousness of the dismissed and read-in charges, that the quantity of drugs Hart sold was "substantial[.]" and described Hart as a "mid-level heroin dealer[.]" The court found it significant that Hart was not selling drugs to support his own drug habit but was selling to make a profit, which required a longer sentence to protect the public. The court also had concerns about Hart's criminal history, including the fact that Hart was on supervision for multiple cases when he committed the current crime—and that Hart had been revoked more than once on the 2013 cases. The court imposed a twelve-year

sentence that consisted of seven years' initial confinement and five years' extended supervision, consecutive to the 2013 cases. As a result of the consecutive sentence, the court told Hart that he was not entitled to any days of sentence credit on the 2018 sentence.

Two days after the 2019 sentencing hearing, on July 26, 2019, Hart was ordered to be reconfined in both of the 2013 cases. In the No. 2013CF162 (possession of marijuana) case, he was ordered to be reconfined for two years, and in the No. 2013CF975 (felony bail jumping) case, he was ordered to be reconfined for one year, eleven months and one day, concurrent. Hart was awarded sentence credit on the 2013 sentences for the time he spent in custody following his arrest on the 2018 case.³

In December 2020, Hart filed a pro se postconviction motion. He claimed that the sentencing court erred when it failed to award him sentence credit on the 2018 case. He also claimed that the sentencing court erred when it made the 2018 sentence consecutive to the 2013 sentences.⁴ The circuit court denied the motion and explained that Hart had “received [sentence] credit for that time on cases [No. 20]13CF162 and [No. 20]13CF975. To award duplicate credit for that time on this case would frustrate the Court’s intention in sentencing Defendant to consecutive time.” The court also denied Hart’s motion for reconsideration of its decision. Hart appeals.

³ Hart claims the sentence credit amounts to 260 days. It appears this is the number used during the postconviction proceedings, including by the circuit court. In its appellate brief, however, the State presented the actual calculation from the relevant time period to be 252 days. Hart failed to file a Reply brief or refute this calculation, and therefore he has conceded that the State’s calculation is correct. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (stating that unrefuted arguments are deemed conceded).

⁴ Hart also requested sentence modification based on the “interest of justice[.]” but he does not assert this claim on appeal.

First, Hart contends that he should have been awarded the sentence credit on the 2018 case, not the 2013 cases. Hart argues that because the 2018 sentence preceded the 2013 re-confinement hearing, the 2018 case was the first sentence, and therefore, under *State v. Boettcher*, 144 Wis. 2d 86, 423 N.W.2d 533 (1988), the sentence credit must be applied to the 2018 case. *Boettcher* does in fact hold that “where consecutive sentences are imposed,” “custody credits ... should be credited on a day-for-day basis against the total days imposed in the consecutive sentences” and that “[f]or ease in calculation and clarity ... the credits should be applied to the sentence that is first imposed.” *Id.* at 100.

The State, however, refutes Hart’s claim that he was sentenced *first* on the 2018 case.

The State explains:

In September 2016, Hart’s probation for both 2013CF162 and 2013CF975 was revoked and, as a result, Hart began serving the previously imposed but stayed sentences pursuant to WIS. STAT. § 973.10(2)(b). In January 2017, Hart was released to extended supervision. While Hart was on extended supervision for 2013CF162 and 2013CF975, he committed the crimes underlying the instant appeal (2018CF513). Thus, while Hart’s re-confinement decision in 2013CF162 and 2013CF975 was issued on July 26, 2019, he was not sentenced, for purposes of *Boettcher*, on that day. And, because Hart had already waived his right to a revocation hearing by the time he was sentenced on 2018CF513, the court properly ordered no sentence credit on 2018CF513 because, pursuant to *Boettcher*, the credit is properly applied to his re-confinement terms in 2013CF162 and 2013CF975 since those were the first sentences imposed. *Boettcher*, 144 Wis. 2d at 100.

(Record citations omitted). Hart failed to file a Reply brief refuting the State’s position, and accordingly, he has conceded that the State’s position is correct. See *State v. Chu*, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 (“[Appellant] offers no response to the [Respondent’s] argument[;] [u]nrefuted arguments are deemed admitted[;] [a]ccordingly, we reject his argument without further discussion.”).

Next, Hart contends that the circuit court erroneously exercised its discretion because it imposed a consecutive sentence without giving a specific reason. The State responds that the sentencing transcript refutes Hart's claim. Specifically, the State points to the sentencing transcript itself and to the sentencing court's comments about Hart's extensive criminal history, the fact that Hart committed the 2018 drug crime while he was out on extended supervision for other crimes, that Hart was selling heroin and cocaine for profit, and that his plea bargain resulted in the dismissal of seven other counts—including five felonies. The State directs us to the sentencing court's comments about the need to protect the public from Hart and the need for a lengthy sentence to serve both as a punishment to Hart and as a deterrent. Again, Hart did not file a Reply brief refuting the State's position, and therefore he has conceded the point. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

Therefore,

IT IS ORDERED that the orders of the circuit court are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

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

Samuel A. Christensen
Clerk of Court of Appeals