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**DISTRICT III**

July 6, 2023

To:

Hon. Yadira Rein  
Circuit Court Judge  
Electronic Notice

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Electronic Notice

Barb Bocik  
Clerk of Circuit Court  
Outagamie County Courthouse  
Electronic Notice

Pedro T. Winfrey  
512 N. Cambridge Drive  
Appleton, WI 54915

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

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2022AP222-CR

State of Wisconsin v. Pedro T. Winfrey  
(L. C. No. 2007CF136)

Before Stark, P.J., Hruz and Blanchard, 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).**

Pedro Winfrey, pro se, appeals an order denying his postconviction motion for 407 additional days of sentence credit. Based on 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).<sup>1</sup> We summarily affirm the circuit court's order.

On October 12, 2009, Winfrey entered no-contest pleas in Outagamie County case No. 2007CF136 to two counts of manufacture or delivery of cocaine and one count of manufacture or delivery of designer drugs, each as a second and subsequent offense. On

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

December 1, 2009, the circuit court withheld sentence and placed Winfrey on probation for five years.

Winfrey's probation was revoked in July 2014, and his sentencing after revocation hearing took place on September 25, 2014. The circuit court imposed concurrent seven-year sentences, consisting of three years' initial confinement and four years' extended supervision. The court awarded Winfrey 549 days of sentence credit.

On March 16, 2015, Winfrey filed a motion asking the circuit court to award him 407 additional days of sentence credit for time that he spent in custody in Michigan on both an arrest warrant in the instant case and separate Michigan charges. The court denied that motion on March 25, 2015, stating that "[t]he issue of sentence credit was addressed at the sentencing hearing" and "[t]he Court is not persuaded by the new argument for additional time." Winfrey did not appeal the court's denial of his motion for additional sentence credit.

Winfrey filed a second motion seeking the same 407 days of sentence credit on July 13, 2020. The circuit court did not take any action on Winfrey's motion. Winfrey then filed a third motion seeking the same 407 days of credit on September 16, 2020. The court denied that motion on September 24, 2020. The court reasoned:

Mr. Winfrey was given credit [for] the 407 days at issue in the Michigan case, referenced in his motion. The Michigan case appears to have been discharged by the time that Mr. Winfrey was revoked [from probation] in the instant case. As such, there was no overlap and dual credit was not available. Because the days at issue had been used, for credit purposes, they were not available for credit consideration in this case.

Winfrey did not appeal the court's September 24, 2020 order.

On January 19, 2022, Winfrey filed the postconviction motion underlying this appeal, which again sought the same 407 days of sentence credit. The circuit court entered an order denying the motion on February 1, 2022, stating that Winfrey’s claim for additional sentence credit “was previously requested and denied.”

Winfrey now appeals, arguing that the circuit court erred by denying his most recent motion for 407 days of additional sentence credit. We conclude that the court properly denied Winfrey’s motion because the issue raised in the motion had already been litigated and decided in Winfrey’s prior postconviction motions. It is well established that “[a] matter once litigated may not be relitigated in a subsequent postconviction proceeding no matter how artfully the defendant may rephrase the issue.” *State v. Witkowski*, 163 Wis. 2d 985, 990, 473 N.W.2d 512 (Ct. App. 1991). Winfrey’s most recent postconviction motion sought credit for the same 407 days of presentence custody as he sought in his three prior postconviction motions. The circuit court concluded, in two prior orders, that Winfrey was not entitled to credit for those 407 days. Under *Witkowski*, Winfrey cannot continue filing postconviction motions seeking the same sentence credit that the circuit court has already denied.<sup>2</sup>

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<sup>2</sup> The State argues that the circuit court lacked competency to consider Winfrey’s postconviction motion for additional sentence credit because WIS. STAT. § 973.155(5) required Winfrey to petition the Department of Corrections for additional credit before requesting that relief from the circuit court. We reject this argument, for the reasons explained in *State v. Liedke*, No. 2020AP33-CR, unpublished slip op. ¶¶15-16 (WI App Dec. 29, 2021). See WIS. STAT. RULE 809.23(3)(b) (an authored, unpublished opinion issued on or after July 1, 2009, may be cited for its persuasive value).

(continued)

In his reply brief, Winfrey argues for the first time that he is also entitled to “an additional 88 days of presentence credit,” beyond the 407 days that he requested in his postconviction motion. We need not address this argument because it is raised for the first time on appeal, *see Tatera v. FMC Corp.*, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810, and for the first time in a reply brief, *see A.O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998).

Upon the foregoing,

IT IS ORDERED that the order is summarily affirmed. WIS. STAT. RULE 809.21.

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

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*Samuel A. Christensen*  
*Clerk of Court of Appeals*

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Specifically, we note that by its plain language, WIS. STAT. § 973.155(5) applies where § 973.155—the sentence credit statute—“has not been applied at sentencing.” Here, it is undisputed that the circuit court applied the sentence credit statute at Winfrey’s sentencing after revocation hearing. Like the defendant in *Liedke*, Winfrey “argues that there was an error in the circuit court’s credit determination, not that the sentencing credit statute had not been applied to [his] case.” *See Liedke*, No. 2020AP33-CR, ¶16. Under these circumstances, § 973.155(5) is inapplicable, and Winfrey was not required to petition the Department of Corrections before asking the court to award him additional sentence credit.