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DISTRICT II/IV

March 1, 2013

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

2012AP1113-CR State of Wisconsin v. Shawn K. Tucker (L.C. #2008CF108)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Shawn Tucker appeals a judgment of conviction and an order denying his postconviction relief. After reviewing the briefs and record at conference, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We affirm.

In February 2008, Tucker was charged with possession of a firearm by a felon and carrying a concealed weapon as a repeater. Tucker was placed in custody based on those charges

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and a probation hold in a 2003 case. Tucker's probation in the 2003 case was revoked, and Tucker was resentenced. In December 2009, Tucker was released from custody and posted bond in the 2008 case. In April 2010, Tucker was arrested on a charge of receiving stolen property and was placed in custody. Approximately five months later, in October 2010, counsel, who did not represent Tucker in the receiving stolen property case, filed a motion for a refund of Tucker's bond. Following Tucker's release from custody in November 2010, counsel withdrew the motion, and Tucker pled no contest to the felon in possession of a firearm charge. The court sentenced Tucker to two years of initial confinement followed by two years of extended supervision, consecutive to the 2003 case. The court denied Tucker sentence credit for the time he spent in custody between April and November 2010.

Tucker, through appellate counsel, filed a postconviction motion. In relevant part, Tucker contended that trial counsel was deficient in waiting approximately five months to file a motion to void Tucker's bond and that this prejudiced him by preventing him from receiving sentence credit for the time spent in custody related to this case. Following a ***Machner***[2] hearing, the court determined that counsel was not ineffective on that basis. Tucker appeals.

It is well established that an offender may be given sentence credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." WIS. STAT. § 973.155(1)(a). Tucker contends, and the State does not dispute, that Tucker could receive sentence credit only for the time he spent in custody in the instant case had counsel moved to void his bond because, otherwise, he was not in custody "in connection with" the sentence imposed for the felon in possession of a firearm offense.

[2] ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979).

As both parties recognize, our decision is guided by ***State v. Johnson***, 2008 WI App 34, 307 Wis. 2d 735, 746 N.W.2d 581, *aff'd*, 2009 WI 57, 318 Wis. 2d 21, 767 N.W.2d 207. In ***Johnson***, we addressed whether the "in connection with" requirement under the sentence credit statute applies individually to each sentence, even when concurrent sentences are imposed at the same time. ***Id.***, 307 Wis. 2d 735, ¶1. Johnson was arrested in 2004 for a drug offense, pled guilty, posted bond, and was released pending sentencing. ***Id.***, ¶2. In 2005, while Johnson was awaiting sentencing in the 2004 drug offense, he was arrested for a new drug offense and spent fifty days in custody because he was unable to post bond. ***Id.***, ¶3. At a joint sentencing hearing, Johnson received concurrent sentences, with fifty days' sentence credit applied only against the sentence imposed in the 2005 case. ***Id.***, ¶¶4-5. The court denied Johnson's postconviction motion seeking credit for fifty days in the 2004 case. ***Id.***, ¶6. We concluded that Johnson was not entitled to fifty days' sentence credit in the 2004 case because he was "free" on bail in the 2004 case during the time spent in custody, and, therefore, the time spent in custody was not "in connection with" the sentence imposed in the 2004 case. ***Id.***, ¶¶11-12, 33.

In a dissent, Judge Dykman suggested that counsel may have been ineffective in failing to take steps to void the bond so that the fifty days spent in custody would be "in connection with" the 2004 case and that Tucker was entitled to an evidentiary hearing to determine whether counsel was ineffective. ***Id.***, ¶¶35-36.

On review, the supreme court affirmed. ***State v. Johnson***, 2009 WI 57, ¶¶3-4, 318 Wis. 2d 21, 767 N.W.2d 207. In response to Judge Dykman's dissent, the court stated that asking defense counsel to file a motion to void Johnson's bond would have been "asking more than the court can reasonably expect from trial counsel." ***Id.***, ¶75. The court noted that Johnson wanted presentence release and that "[h]is presentence release may have benefitted him at

sentencing." ***Id.*** The court concluded that, under the facts of the case, "[s]econd-guessing counsel's performance … would be speculative, at best." ***Id.***

The supreme court's discussion in ***Johnson*** strongly indicates that, while the inquiry is fact driven, counsel is generally not considered to be deficient for failing to file a motion to void a bond in order to make custody "in connection with" a particular case. This is based on the acknowledgement that it can be difficult for counsel to readily identify the advantages and disadvantages of voiding a bond and to determine whether voiding a bond will work to a defendant's advantage for sentencing purposes. Tucker does not demonstrate how the facts in this case are such that it would have been easier for counsel to identify potential advantages of seeking to void a bond than it was for counsel in ***Johnson***. Here, following the logic stated in ***Johnson***, asking counsel to move to void the bond on the basis that it might prove advantageous later on for sentence credit purposes would be asking more than could be reasonably expected from counsel under the circumstances, especially given that counsel did not represent Tucker in the receiving stolen property case. Counsel was required to balance the potential advantages and disadvantages of seeking to void Tucker's bond, and, based on the facts of this case, we will not second-guess counsel's performance.

Therefore,

IT IS ORDERED that the judgment and order is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals