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DISTRICT II

July 10, 2013

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

2012AP2577-CR

State of Wisconsin v. Brenda L. Mantsch (L.C. #2010CF1071)

Before Brown, C.J., Neubauer, P.J., and Gundrum, J.

Brenda L. Mantsch appeals from a judgment of conviction and an order denying her postconviction motion. Mantsch argues that the postconviction court should have: (1) modified the length of her conditional jail time based on her declining health (2) amended the judgment to reflect that her sentence credit should be applied to her conditional jail time, and (3) amended the judgment to reflect that her probation supervision may be transferred to Florida after she serves her conditional jail time. 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

(2011-12).¹ We affirm the trial court's order denying Mantsch's new-factor sentence modification motion. However, because there remains an unresolved issue concerning the proper application of Mantsch's seventeen days of presentence credit, we reverse and remand for further proceedings.

Mantsch pled no contest to one count of transferring encumbered property, as a party to the crime. The sentencing court imposed and stayed a six-year bifurcated sentence, and ordered a ten-year term of probation, with six months of conditional jail time. The trial court provided that Mantsch's probation could be transferred to Florida and that counsel should advise the court of any pretrial incarceration credit within ten days. The court's intent concerning the application of any forthcoming sentence credit was ambiguous. At first, the court stated that any sentence credit would ultimately apply to the imposed and stayed sentence because the court intended that Mantsch serve "six months on a straight time basis." However, in the next breath, the sentencing court stated "Let me do this."

Depending upon the amount of time [Mantsch and her co-defendant] are entitled to, I will then modify or amend the judgment of conviction downward minus the number of days of credit. For example in [the co-defendant's] case, she'll be required to serve 365 days. If she spent 22 days in custody, she will then have to serve 343 days as a condition of her period of probation.

Several weeks later, the sentencing court entered an amended judgment "grant[ing] 17 days of pretrial incarceration credit." The judgment did not specify how the credit should apply.

After serving almost four months of her jail time, Mantsch filed a pro se motion for release pending appeal. At a hearing in December 2011, the trial court granted the motion and

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

stayed the balance of Mantsch's conditional jail time, but not her probation supervision. The trial court's written order granting release required Mantsch to reside in Wisconsin and provided that she could not transfer her probation to Florida while her appeal was pending. The trial court also amended the judgment to state that Mantsch's probation could not be transferred to Florida because it wanted her "to remain here in the state of Wisconsin while this appeal is being proceeded on."² The trial court was again asked to clarify whether the seventeen days of sentence credit should be subtracted from Mantsch's remaining conditional jail time. Noting that the balance was stayed pending appeal, the trial court stated that any "dispute as to how it's supposed to be applied and as it related to [her] condition time, that can be taken up at a later point in time."

Thereafter, Mantsch, by counsel, filed a postconviction motion requesting that the trial court either modify her sentence by reducing the conditional jail time to 117 days (the time served prior to Mantsch's release pending appeal), or that it amend the judgment to clarify that the seventeen days of credit should be applied to her remaining condition time. Mantsch also asked the court to modify the amended judgment to allow the transfer of her probation to Florida.³

² The second amended judgment entered on December 27, 2011, provided: "THE DEFENDANT'S PROBATION MAY NOT BE TRANSFERRED TO THE STATE OF FLORIDA." This language was redundant given its simultaneous inclusion in the written order specifying the conditions of Mantsch's release pending appeal. The amendment of the formal judgment was unduly confusing and, left in its present form, requires further litigation after the completion of Mantsch's appeal if she still wants to attempt the transfer of her supervision to Florida.

³ Postconviction counsel explained he was concerned that once Mantsch's appeal ended, Mantsch would be unrepresented and nobody would assist her in modifying the judgment to reinstate her ability to transfer probation to Florida.

At a postconviction hearing, the trial court concluded that it did not have jurisdiction to decide Mantsch's motion because she had filed a notice of intent to pursue postconviction relief and was released on bail pending appeal.⁴ The postconviction court stated "[s]he can't appeal the case and ask for modification of sentence contemporaneously to see if that sentence suits her better." The court suggested that Mantsch could move for sentence modification upon the termination of her appeal, and opined that it did not have jurisdiction to modify the sentence and also that the claim was "without merit."

We conclude that the trial court properly denied Mantsch's new-factor sentence modification motion as "without merit."⁵ A trial court may modify a sentence based on the existence of a new factor. *State v. Harbor*, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is a set of facts highly relevant to the imposition of sentence but not known to the trial judge at the time of the original sentencing. *Id.*, ¶40. Whether a new factor exists presents a question of law we review de novo. *Id.*, ¶36. Here, as a matter of law, Mantsch's health does not constitute a new factor because the trial court was aware of her medical concerns at the time of sentencing. The sentencing court expressly considered Mantsch's "medical situation" in determining that she should receive only six months of conditional jail time, rather than the one-year term ordered in her co-defendant's case.

⁴ Due to circuit court rotation, a new judge presided at Mantsch's postconviction hearing.

⁵ We recognize that the trial court's decision relied primarily on its perceived lack of jurisdiction, but conclude that it reached the correct result in denying the new-factor motion. See *State v. Sharp*, 180 Wis. 2d 640, 650, 511 N.W.2d 316 (Ct. App. 1993) (when a trial court's holding is correct, this court may affirm on other grounds).

Contrary to its stated belief, the trial court had jurisdiction to entertain all of Mantsch's postconviction claims, including her request to have the sentence credit applied to her conditional jail time. *See* WIS. STAT. RULE 809.30(2)(h) and (i). That Mantsch had been granted release pending appeal did not preclude her from pursuing postconviction relief. The issue of whether Mantsch's pretrial incarceration credit should apply to her conditional jail time has not been satisfactorily resolved. The sentencing court's inconsistent remarks failed to decisively address whether the credit should be applied to Mantsch's conditional jail time or to her imposed and stayed prison sentence upon revocation.⁶ Though the first amended judgment did not specify that the seventeen days of credit should apply toward Mantsch's conditional jail time, the sentencing court's subsequent remarks at the December 2011 hearing demonstrate that it considered the matter unresolved and intended to defer resolution until a later date. On remand, the trial court should decide whether to apply the seventeen days of credit up front, to Mantsch's conditional jail time, or upon revocation, to her imposed and stayed prison sentence. Remand will also allow the trial court to consider amending the judgment to remove the provision prohibiting the transfer of Mantsch's probation to Florida, or to otherwise clarify that her probation may be transferred after she completes her conditional jail time or her appeal.

Upon the foregoing reasons,

⁶ We also note that at sentencing, the court suggested that given her prior history, Mantsch would probably "successfully complete the lengthy period of probation" and expressed doubt that "a prison term ever will go into effect." Though not dispositive, this arguably supports an inference that the sentencing court intended any credit to be applied to Mantsch's conditional jail time.

IT IS ORDERED that, pursuant to WIS. STAT. RULE 809.21, the judgment is summarily affirmed, and the order of the trial court is summarily affirmed in part, reversed in part, and cause remanded.

Diane M. Fremgen
Clerk of Court of Appeals