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DISTRICT II

March 2, 2022

To:

Hon. Barbara H. Key
Circuit Court Judge
Electronic Notice

Melissa M. Pingel
Clerk of Circuit Court
Winnebago County
Electronic Notice

Nicholas DeSantis
Electronic Notice

Christian A. Gossett
Electronic Notice

Benjamin M. Withrow, #534142
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

2020AP1703-CR State of Wisconsin v. Benjamin M. Withrow (L.C. #2017CF443)

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).

Benjamin M. Withrow appeals pro se from a judgment convicting him of aggravated battery (intending great bodily harm) and from circuit court orders denying his motion to reconsider and his request for 171 days of additional sentence credit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary

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disposition. *See* WIS. STAT. RULE 809.21 (2019-20).[1] We agree that Withrow is not entitled to an additional 171 days of sentence credit. The circuit court is affirmed.

Withrow seeks an additional 171 days of sentence credit in the battery case currently before this court. At the time he committed the battery, Withrow was on probation for misdemeanors in which sentencing had been withheld.[2] After he committed the battery, Withrow was taken into custody on a probation hold for these misdemeanors, and he was placed on bond for the battery. Withrow was sentenced on the misdemeanors before he was sentenced on the battery. At the time he was sentenced on the misdemeanors, Withrow received 171 days of credit for time spent in custody prior to sentencing on the misdemeanors (the time from his July 17, 2017 arrest for the battery and his probation hold on the misdemeanors to his January 4, 2018 sentencing for the misdemeanors). The misdemeanor sentences concluded on April 27, 2018, but Withrow remained in custody for the battery. Withrow pled guilty to and was sentenced for the battery on February 1, 2019. He received sentence credit on the battery conviction for time served between his July 17, 2017 arrest and the February 1, 2019 sentencing, minus the time he served in connection with the misdemeanor cases.

Post-sentencing in the battery case, Withrow asked the circuit court to grant the 171 days of sentence credit he received on the misdemeanor sentences to his battery sentence. The circuit court denied Withrow's request because double sentence credit cannot be applied to sentences that are not concurrent. Withrow appeals.

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[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

[2] The misdemeanor convictions occurred in Outagamie County circuit court case nos. 2014CF143, 2015CF692 and 2016CM1165.

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Whether a defendant is entitled to WIS. STAT. § 973.155 sentence credit presents a question of law we decide independently: ***State v. Davis***, 2017 WI App 55, ¶7, 377 Wis. 2d 678 901 N.W.2d 488. The facts relevant to the sentence credit issue before this court are not in dispute.

As a threshold matter, we observe that at the time Withrow was sentenced in the battery case, Withrow conceded that he was not then serving any other sentence. Withrow makes the same concession in this court. The battery sentence was neither consecutive nor concurrent to any other sentence.[3]

We conclude that Withrow's 171-day sentence credit request is governed by ***State v. Jackson***, 2000 WI App 41, 233 Wis. 2d 231, 607 N.W.2d 338. The facts of ***Jackson*** and this case cannot be meaningfully distinguished. While on probation for old Dodge County offenses, Jackson committed new offenses in Fond du Lac County. ***Id.***, ¶3. He was arrested on the new Fond du Lac offenses and detained on a probation hold for the old Dodge offenses. ***Id.*** At the time he was sentenced on his old Dodge offenses, Jackson received seventy days of sentence credit for the time he was detained on the probation hold. ***Id.*** At the time he was sentenced for the new Fond du Lac offenses, Jackson had finished serving the sentences in his old Dodge probation-hold offenses. ***Id.***, ¶19. Nevertheless, Jackson asked the circuit court to give him the same seventy days of sentence credit on his new Fond du Lac offenses as he received on his old

[3] The circuit court's reference during sentencing and in the judgment of conviction to the battery sentence being consecutive to any other imposed sentence does not change our sentence credit analysis. It is undisputed that Withrow was not subject to any other sentence at the time he was sentenced for the battery and, despite some of its comments, the circuit court elsewhere conceded as much. The battery sentence was neither consecutive nor concurrent to any other sentence. To the extent Withrow relies upon sentence credit cases in which the defendant received concurrent sentences, that reliance is misplaced.

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Dodge offenses. ***Id.***, ¶¶7, 12. This court concluded that Jackson was not entitled to another seventy days of sentence credit because "'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." ***Id.***, ¶19.

We apply ***Jackson*** and conclude that Withrow is not entitled to an additional 171 days of sentence credit. Withrow received 171 days of credit against his misdemeanor sentences, which were completed before he was sentenced for the battery. Because Withrow received 171 days of sentence credit on sentences that were separately served, he cannot receive dual credit on the battery sentence. ***Id.***, ¶19.[4]

Upon the foregoing reasons,

IT IS ORDERED that the judgment and 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.

Sheila T. Reiff
Clerk of Court of Appeals

[4] We have considered all of the arguments in the briefs. To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").

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OFFICE OF THE CLERK

Supreme Court of Wisconsin

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May 18, 2022

To:

Hon. Barbara H. Key
Circuit Court Judge
Winnebago County Courthouse
P.O. Box 2808
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Tara Berry
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Benjamin M. Withrow 534142
Fox Lake Correctional Inst.
P.O. Box 200
Fox Lake, WI 53933-0200

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

No. 2020AP1703-CR State v. Withrow, L.C. #2017CF443

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Benjamin M. Withrow, pro se, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Sheila T. Reiff
Clerk of Supreme Court

Pet.-App. B

Bemjamin M. Withrow, #534142
Fox Lake Corr. Institution
W10237 Lake Emily Road
Post Office Box 200
Fox Lake, WI 53933-0200

June 3, 2022

Office of Clerk
U.S. Supreme Court
One First Street, N.E.
Washington, DC 20543-0001

RE: Benjamin M. Withrow vs. State of Wisconsin,
Wisconsin Court of Appeals Case No. 2020AP1703-CR
U.S. Case No. (to be assigned)

Dear Clerk:

Enclosed for filing please find the original of the **Petitioners' Petition for Writ of Certiorari.** Opposing counsel identified below has been served a copy of the same:

Attorney General Joshua Kaul
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857

If you have any questions or concerns please feel free to contact me at the address listed above.

Thank you for your time and attention to this matter.

Very truly yours,

Benjamin M. Withrow