

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 15, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**Nos. 98-3053-CR, 98-3054-CR,
99-0414-CR and 99-0415-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEROY J. DEAN, JR.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for La Crosse County:
JOHN J. PERLICH, Judge. *Affirmed.*

ROGGENSACK, J.¹ LeRoy Dean appeals an order of the circuit court denying his postconviction motion requesting withdrawal of an amended judgment which eliminated duplicative sentence credit. Dean also argues that amending the judgment *sua sponte* and without notice and hearing violated his due

¹ This appeal is decided by one judge pursuant to § 752.31(2)(f), STATS.

process and double jeopardy rights. We conclude that the court properly amended the judgment of conviction consistent with its intent to impose consecutive sentences while removing duplicative sentence credit to which Dean was not entitled. We further conclude that Dean's constitutional rights were not violated. Therefore, we affirm.

BACKGROUND

Dean was convicted of forgery in case number 96-CF-58, bail-jumping in case number 96-CM-101, and disorderly conduct and unlawful use of the telephone in case number 95-CM-2006. Dean was sentenced to the Department of Intensive Sanctions for four years, with eighteen months confinement in 96-CF-58. In 96-CM-101, the circuit court withheld sentence and placed Dean on probation for three years, concurrent to his sentence in 96-CF-58. And, in 95-CM-2006, the circuit court also withheld sentence and placed him on probation for three years concurrent to his sentences in 96-CF-58 and 96-CM-101.

Later, Dean's probation in 96-CM-101 and 95-CM-2006, and his parole on a prior burglary conviction, were revoked. At the subsequent sentencing, Dean requested 213 days credit for time previously served, which included 117 days served from April 4, 1996 to July 29, 1996. When the court asked whether Dean had already been given credit for all of the 213 days on the sentence for the burglary, defense counsel stated "[h]e is getting some credit on a parole revocation. He is getting, yeah, all the credit right now, because that's why I'm asking for concurrent time on the last part especially."

The court sentenced Dean to four months incarceration in 96-CM-101 with credit for time served from April 4, 1996 to July 29, 1996. In 95-CM-

2006, the court sentenced Dean to thirty days incarceration consecutive to 96-CM-101. Both sentences were consecutive to Dean's sentence for the prior burglary.

On June 30, 1998, the Wisconsin Department of Corrections (DOC) informed the circuit court that Dean had already received credit for the time served from April 4, 1996 to July 29, 1996, on his prior burglary sentence, and because the sentence in 96-CM-101 was consecutive to the burglary sentence, the judgment of conviction resulted in duplicative credit, in violation of *State v. Boettcher*, 144 Wis.2d 86, 423 N.W.2d 533 (1988). Thereafter, the court, *sua sponte* and without notice and hearing, amended the judgment of conviction to eliminate the credit erroneously applied to 96-CM-101.

On September 28, 1998, the circuit court held a postconviction motion hearing. Dean requested withdrawal of the amended judgment which removed the second sentence credit because, he argued, the court, in sentencing him after revocation, intended to give him a compromise between a consecutive and a concurrent sentence by duplicating the credit for time served from April 4, 1996 to July 29, 1996.² The court stated that at the earlier sentencing, it interpreted defense counsel's answer to the court's question concerning sentence credit to mean that Dean had not received credit for time served from April 4, 1996 to July 29, 1996 and that the court intended to give Dean credit for the 117 days to which it thought he was entitled. Therefore, the circuit court denied Dean's postconviction motion, and this appeal followed.

² Dean did not argue that the sentence credit had not been applied to his prior burglary sentence.

DISCUSSION

Standard of Review.

We review allegations of due process and double jeopardy violations *de novo*. See *State v. Evans*, 187 Wis.2d 66, 82, 522 N.W.2d 554, 560 (Ct. App. 1994) (due process); *State v. Saucedo*, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992) (double jeopardy).

Amended Judgment.

Following Dean's original sentencing after revocation, DOC informed the circuit court that sentence credit for time served from April 4, 1996 to July 29, 1996 had already been applied to Dean's sentence for burglary. Dean does not dispute this. Pursuant to *Boettcher*, 144 Wis.2d at 100, 423 N.W.2d at 539, sentence credit applied to his burglary sentence could not also be applied to his sentences in 96-CM-101 and 95-CM-2006, which were consecutive to the burglary sentence. Additionally, when it is clear what a circuit court intended to do when it imposed an otherwise improper sentence, the appropriate remedy is to modify the sentence to carry out the intent of the circuit court while bringing the sentence into accord with the applicable law. *State v. Walker*, 117 Wis.2d 579, 584, 345 N.W.2d 413, 415-16 (1984).

The circuit court stated that it interpreted defense counsel's answer to the court's question concerning sentence credit to mean that Dean had not received credit for time served from April 4, 1996 to July 29, 1996 and that the court intended to give Dean credit for the 117 days to which it thought he was entitled. The court never intended to give Dean a compromise between a consecutive and a concurrent sentence. Therefore, once the circuit court was

informed of its mistake in calculating sentence credit, it properly modified Dean's sentence consistent with its intent.

Due Process.

Dean also argues that the circuit court violated his procedural due process rights in modifying his sentence *sua sponte*, and without notice and hearing. We do not reach the merits of his contention, however, because Dean did receive an opportunity to be heard "at a meaningful time and in a meaningful manner." *State v. Amos*, 153 Wis.2d 257, 281, 450 N.W.2d 503, 512 (Ct. App. 1989) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)). At the postconviction motion hearing, Dean's arguments about removal of the sentence credit were detailed on the record before the circuit court. If Dean had been entitled to reinstatement of 117 days of sentence credit, as he contended, the circuit court could have reinstated it at the conclusion of that hearing before he began to serve the consecutive sentences. *See id.* Therefore, Dean was not denied procedural due process.

Double Jeopardy.

Dean also contends that the *sua sponte* elimination of 117 days of sentence credit constituted double jeopardy. Under the double jeopardy clause, no punishment can be increased once a defendant has commenced serving his sentence for that crime for which credit was given. *Id.* at 281-82, 450 N.W.2d at 512 (citing *United States v. Benz*, 282 U.S. 304, 307 (1931)). "Modification to correct sentencing flaws runs afoul of the double jeopardy provisions when the amending court seeks to increase sentences already being served." *Id.* (citing *State v. North*, 91 Wis.2d 507, 509-10, 283 N.W.2d 457, 458-59 (Ct. App. 1979)). In this case, the circuit court's sentence modification eliminating the duplicative

117 days of sentence credit occurred before Dean had begun serving his sentences in 96-CM-101 and 95-CM-2006. Therefore, his double jeopardy argument has no merit. *See id.*

CONCLUSION

Because Dean's sentence credit for time served from April 4, 1996 to July 29, 1996 had already been applied to a prior sentence, it was properly eliminated in the amended judgment of conviction. Also, any alleged due process violation in modifying Dean's sentence *sua sponte* was corrected by the postconviction motion hearing. Finally, the amended judgment which eliminated the duplicative sentence credits does not violate double jeopardy. Therefore, we conclude the circuit court properly denied Dean's postconviction motion to withdraw the amended judgment of conviction.

By the Court.—Order affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)4., STATS.

