

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 22, 2015

Diane M. Fremgen
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1671-CR

Cir. Ct. No. 2001CF1820

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAZ L. MOSEBY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
WILLIAM W. BRASH, Judge. *Affirmed and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Chaz Moseby, pro se, appeals an order denying his request for additional sentence credit. Moseby argues a previous order that reduced his sentence credit violated his right to be free from double jeopardy. Alternatively, he argues the reduction in sentence credit constituted a new factor

warranting sentence modification. We reject these arguments and affirm the order denying Moseby additional sentence credit.

¶2 The State contends that Moseby actually received too much sentence credit. The circuit court calculated Moseby's sentence credit based on an arrest date of October 26, 2000. However, because the record was ambiguous as to the date Moseby was arrested on the charges at issue in this case, earlier in this appeal we remanded to the circuit court for additional fact finding on that issue, as well as one additional topic. On remand, the court determined Moseby was arrested in the instant case on November 20, 2000. Based on the circuit court's findings, the State argues Moseby is entitled to only 1194 days of sentence credit, rather than the 1207 days previously awarded. The State urges us to use our inherent authority to amend Moseby's judgment of conviction to reflect the correct amount of credit. *See State v. Crochiere*, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524 (A court has the power to correct formal or clerical errors or an illegal or void sentence at any time.), *abrogated on other grounds by State v. Harbor*, 2011 WI 28, 333 Wis. 2d 53, 797 N.W.2d 828. Moseby, in turn, argues the circuit court erred on remand by failing to address his request for the appointment of counsel. Moseby asserts that, had he been represented by counsel in the fact-finding proceedings, his attorney likely would have been able to present evidence showing he was arrested on the charges at issue in this case on October 26.

¶3 We agree with Moseby that the circuit court erred by failing to address his request for the appointment of counsel. However, because Moseby's release date is fast approaching, we are mindful of the need to resolve these proceedings as expeditiously as possible. Pursuant to our inherent authority, we therefore remand with directions that the circuit court vacate the previous sentence credit orders and amend Moseby's judgment of conviction to grant him 1194 days

of sentence credit—the minimum amount to which he is entitled. Then, the court must exercise its discretion to determine whether to appoint counsel for Moseby with respect to the one outstanding issue—the date of Moseby’s arrest on the charges in the instant case. If the court decides to appoint counsel for Moseby, it must then engage in further fact finding regarding the date of arrest. If the court decides not to appoint counsel, or if, after further fact finding, it again finds that Moseby was arrested on November 20, 2000, in the instant case, the amended judgment of conviction awarding Moseby 1194 days of sentence credit shall stand.

BACKGROUND

¶4 Moseby was convicted of one count of armed robbery with threat of force, as a party to a crime, in Washington County case No. 2001CF31. He was convicted of two counts of armed robbery with threat of force, as a party to a crime, in the instant Milwaukee County case.

¶5 On December 18, 2001, Moseby was sentenced to twelve years’ initial confinement and thirteen years’ extended supervision in the Washington County case. On March 19, 2002, the Honorable Daniel L. Konkol sentenced Moseby to seventeen years’ initial confinement and eight years’ extended supervision on Count 1 in the instant case, and twelve years’ initial confinement and eight years’ extended supervision on Count 2. The sentences were concurrent to one another and to Moseby’s sentence in the Washington County case. Moseby was granted 509 days of sentence credit against his Milwaukee County sentences, calculated from October 26, 2000—which Judge Konkol believed to be the date of Moseby’s arrest on the Milwaukee County charges—until March 19, 2002—the date of sentencing.

¶6 On September 15, 2003, Moseby’s attorney filed a postconviction motion in the instant case, arguing Moseby’s cooperation in a federal prosecution constituted a new factor warranting sentence modification. On May 28, 2004, the Honorable Michael B. Brennan granted Moseby’s motion, vacated the previous sentence, and resentenced Moseby to fifteen years’ initial confinement and ten years’ extended supervision on Count 1, and ten years’ initial confinement and ten years’ extended supervision on Count 2. Again, these sentences were concurrent to each other and to Moseby’s Washington County sentence.¹ Judge Brennan granted Moseby 1286 days of sentence credit, calculated from November 20, 2000—which Judge Brennan believed to be the date of Moseby’s arrest on the Milwaukee County charges—until May 28, 2004—the date of resentencing.

¶7 Moseby’s counsel subsequently filed a no-merit report. Moseby responded, but did not raise any issue regarding sentence credit. Counsel then filed a supplemental no-merit report and affidavit. In an order dated May 19, 2005, we concluded there were no issues of arguable merit and affirmed the judgment of conviction. The supreme court denied Moseby’s pro se petition for review.

¶8 From 2008 to 2011, Moseby filed various pro se postconviction motions, none of which pertained to sentence credit, and all of which were denied. Then, on June 11, 2012, Moseby filed a pro se motion to “clarify” his sentence credit. He argued he was arrested on October 26, 2000, on both the Washington County charge and the Milwaukee County charges, rather than on November 20,

¹ Thus, Moseby received the same aggregate sentence as before, but Judge Brennan shifted two years of initial confinement time to extended supervision.

2000, on the Milwaukee County charges, as Judge Brennan believed.² Based on this discrepancy regarding the date of his arrest on the Milwaukee County charges, Moseby argued his release date should be October 26, 2015, rather than November 2, 2015.

¶9 On June 15, 2012, the Honorable Jean A. DiMotto issued an order denying Moseby's motion. Judge DiMotto agreed that Moseby's sentence credit should be calculated beginning on October 26, 2000. However, she concluded Moseby was not entitled to any credit after December 18, 2001, the date sentence was imposed in the Washington County case. See *State v. Gavigan*, 122 Wis. 2d 389, 393-94, 362 N.W.2d 162 (Ct. App. 1984) (If a defendant who is in custody on two pending, unrelated charges is sentenced on one charge and begins serving that sentence, the custody is no longer "in connection with" the other pending charge for purposes of sentence credit.). Judge DiMotto therefore concluded Moseby was entitled to a total of 418 days of sentence credit, for the period from October 26, 2000, until December 18, 2001. Moseby's judgment of conviction was amended to reflect this change.

¶10 Moseby subsequently filed a second pro se motion to clarify his sentence credit. In response, Judge DiMotto amended Moseby's judgment of conviction. Shortly thereafter, Moseby again asked the court to clarify his sentence credit, and the Department of Corrections (DOC) joined in his request.

¶11 On August 22, 2012, Judge DiMotto issued an order finding that Moseby was entitled to a total of 1207 days of sentence credit, comprised of:

² It is undisputed that Moseby was arrested on October 26, 2000, in the Washington County case.

- 418 days of presentence credit under WIS. STAT. § 973.155(1)(a),³ for the time period from Moseby's arrest on October 26, 2000, through the date of his sentencing in Washington County on December 18, 2001; and
- 789 days of postsentencing, time-served credit under WIS. STAT. § 973.04, for the time period from Moseby's original sentencing on March 19, 2002, to his resentencing on May 28, 2004.

Again, Judge DiMotto did not grant Moseby any credit for the ninety-one days between his sentencing in the Washington County case and his sentencing in the instant case. Moseby's judgment of conviction was amended to grant him 1207 total days of sentence credit.

¶12 On September 24, 2012, Moseby filed another pro se motion to modify his sentence credit, asking the court to "reinstate" ninety-one days of credit for the period between his Washington County and Milwaukee County sentencings. Moseby argued Judge DiMotto's determination that he was not eligible for this credit violated his right to be free from double jeopardy and also constituted a new factor warranting sentence modification.

¶13 Judge DiMotto denied Moseby's motion on September 25, 2012. Judge DiMotto explained that Moseby was "never ... legally entitled to the 91 days of credit he now seeks to reinstate" because he was serving his sentence in the Washington County case during that time. Judge DiMotto therefore rejected Moseby's double jeopardy argument, reasoning, "The court's sentence credit

³ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

decision in this case did not increase the defendant's May 28, 2004 sentence."

She also rejected Moseby's new factor argument, explaining:

The defendant posits that if Judge Brennan had known the effects of his sentence on sentence credit, he may have imposed a lighter sentence. A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." *Rosado v. State*, 70 Wis. 2d 280, 288[, 234 N.W.2d 69] (1975). Judge Brennan granted 1,286 days of credit from the date of arrest. The sentence credit order has been modified to 1,207 days, which is 79 days less. There is no reason to believe that Judge Brennan would have imposed any different sentence if he had known that under *Gavigan* the defendant was entitled to 79 days[?] less credit because of the Washington County sentence.

¶14 Moseby did not appeal Judge DiMotto's September 25, 2012 order. Instead, over one year later, he filed another pro se motion for additional sentence credit. Specifically, Moseby asked the court to "reinstate" the 1286 days of sentence credit granted by Judge Brennan at the time of resentencing, plus six additional days, in order to reflect an arrest date of October 26, 2000.

¶15 The Honorable William W. Brash denied Moseby's motion on May 23, 2014. Judge Brash explained:

The court has reviewed the various credit orders in the file and finds there is nothing to correct. If the defendant believed the court was in error with respect to the credit, he could have appealed Judge DiMotto's findings. He did not. The defendant has set forth nothing which alters the findings made by Judge DiMotto with respect to sentence credit.

¶16 On June 26, 2014, Moseby filed a pro se motion for reconsideration of Judge Brash's decision. Judge Brash denied Moseby's motion on July 8, 2014. Moseby then appealed.

¶17 On July 15, 2015, we remanded this case to the circuit court for additional fact finding on two issues, pursuant to WIS. STAT. § 808.075(6). First, we asked the circuit court to determine whether Moseby was arrested on the Milwaukee County charges on October 26, 2000, or November 20, 2000. Second, we asked the court to determine the amount of credit to which Moseby was entitled for the period from his original sentencing on March 19, 2002, until his resentencing on May 28, 2004. We observed that Moseby claimed this period spanned 802 days, while the State, the circuit court, and the DOC asserted it spanned 789 days. Finally, we stated, “In light of the questions at issue, we observe that the circuit court may wish to refer this matter to the State Public Defender for the possible appointment of counsel to assist Moseby in these proceedings.”

¶18 On remand, Moseby moved the circuit court to refer his case to the State Public Defender. The court did not address Moseby’s request. Instead, after reviewing written submissions from both parties, Judge Brash issued an “Order Entering Findings of Fact” on September 8, 2015. Based on a Milwaukee Police Department Arrest-Detention Report submitted by the State, Judge Brash found that Moseby was arrested on the Milwaukee County charges on November 20, 2000. Judge Brash then found that the time period between Moseby’s original sentencing and his resentencing was 801 days.⁴ Judge Brash observed the DOC had calculated the sentence credit for this period to be 789 days based on a fictitious 360-day-per-year calendar. However, pursuant to *State v. Boettcher*,

⁴ Judge Brash did not count the sentencing date, May 28, 2004, because a sentence is deemed to commence on the date it is imposed. *See* WIS. STAT. § 973.15(1).

144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988), sentence credit under WIS. STAT. § 973.155 is given on a day-for-day basis.

¶19 Thereafter, Moseby filed a statement of objections to the circuit court's findings in this court, and the State filed a statement in support of the court's findings. Having retained jurisdiction over Moseby's appeal, we now address the parties' arguments.

DISCUSSION

¶20 Moseby raises two primary arguments on appeal. First, he contends that, by reducing his total sentence credit to 1207 days, Judge DiMotto violated his right to be free from double jeopardy. Second, Moseby argues Judge DiMotto's reduction of his sentence credit constitutes a new factor warranting sentence modification because, had Judge Brennan been aware that Moseby was entitled to only 1207 days of sentence credit, he likely would have imposed shorter sentences.

¶21 Moseby raised both of these arguments in his September 24, 2012 postconviction motion. Judge DiMotto rejected both arguments and denied Moseby's motion in an order dated September 25, 2012. Moseby did not appeal the September 25 order.⁵ "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

⁵ In his motion for reconsideration of Judge Brash's May 23, 2014 order, Moseby asserted he did not appeal Judge DiMotto's September 25, 2012 order because he never received a copy of it and he was not aware until 2014 that his judgment of conviction had been amended to grant 1207 days of sentence credit. However, the record contains no evidence to support Moseby's claim that he did not receive the September 25 order.

(Ct. App. 1991). Accordingly, we decline to address the merits of Moseby's double jeopardy and new factor arguments.

¶22 Moseby may also intend to argue that Judge DiMotto erred by determining he was not entitled to credit for the ninety-one-day period between his sentencing in the Washington County case and his original sentencing in the instant case. However, Judge DiMotto rejected that argument in orders dated June 15, 2012, July 9, 2012, and September 25, 2012, which Moseby did not appeal. He is therefore barred from relitigating the issue in the instant proceedings. *See id.*⁶

¶23 We now turn to the question of calculating the proper amount of sentence credit. Moseby's judgment of conviction currently states he is entitled to 1207 days of sentence credit. Based on the circuit court's factual findings on remand, the State argues Moseby is entitled to only 1194 days of credit, consisting of:

- 393 days of presentence credit under WIS. STAT. § 973.155(1)(a), for the time period between Moseby's arrest in this case on November 20, 2000, and his sentencing in the Washington County case on December 18, 2001; and
- 801 days of postsentencing, time-served credit under WIS. STAT. § 973.04, for the time period between Moseby's original sentencing on March 19, 2002, and his resentencing on May 28, 2004.

⁶ To the extent Moseby raises other arguments not identified in this opinion, we deem them undeveloped and decline to address them. *See State v. Flynn*, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address undeveloped arguments).

The State asks us to vacate Moseby's previous sentence credit orders and amend the judgment of conviction to grant him a total of 1194 days of sentence credit.

¶24 Moseby does not dispute the circuit court's finding that he is entitled to 801 days of sentence credit for the period from March 19, 2002, until May 28, 2004. However, he contends Judge Brash erroneously determined that he was arrested on November 20, 2000, on the Milwaukee County charges. He also argues Judge Brash violated his right to due process by failing to act on this court's suggestion to refer him to the State Public Defender for the appointment of counsel. Had he been represented by counsel during the fact-finding proceedings on remand, Moseby contends his attorney likely would have been able to obtain evidence showing that he was arrested on the Milwaukee County charges on October 26, 2000.

¶25 The circuit court did not violate Moseby's right to due process by failing to refer him to the State Public Defender or appoint counsel. An indigent defendant has a constitutional right to appointed counsel on his or her first direct appeal of right from a criminal conviction. *State ex rel. Warren v. Schwarz*, 219 Wis. 2d 615, 648, 579 N.W.2d 698 (1998). "The due process clause, however, does not require appointment of counsel for discretionary appeals." *Id.* "Thus, as the United States Supreme Court has stated, 'the right to appointed counsel extends to the first appeal of right, and no further.'" *Id.* (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Here, Moseby's direct appeal was resolved via a no-merit report in 2005. Moseby subsequently filed five pro se postconviction motions dealing with issues other than sentence credit. Moseby appealed the denial of one of those motions, and we affirmed the circuit court. Thus, Moseby does not have a due process right to the appointment of counsel in the instant proceedings.

¶26 Although he phrases his argument in terms of due process, Moseby may mean to argue that the circuit court erroneously exercised its discretion by declining to refer him to the State Public Defender or appoint counsel. Independent of the constitutional right to counsel, a circuit court has authority to appoint counsel for an indigent defendant whenever it deems such action necessary in the exercise of its discretion. *State v. Lehman*, 137 Wis. 2d 65, 76, 403 N.W.2d 438 (1987). A court may exercise its discretion to appoint counsel both in the interest of fairness to the litigant and in the interest of the court itself. *See Roberta Jo W. v. Leroy W.*, 218 Wis. 2d 225, 240, 578 N.W.2d 185 (1998).

¶27 We will uphold a circuit court's discretionary decision as long as the court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion. *State v. Campbell*, 2006 WI 99, ¶27, 294 Wis. 2d 100, 718 N.W.2d 649. The proper exercise of discretion contemplates that the circuit court explain its reasoning. *Randall v. Randall*, 2000 WI App 98, ¶7, 235 Wis. 2d 1, 612 N.W.2d 737. Unfortunately, on remand from this court, Judge Brash failed to address Moseby's request for the appointment of counsel. When a circuit court fails to explain its reasoning for a discretionary decision, we may search the record to determine if it supports the court's exercise of discretion. *Id.* However, the record in this case does not permit us to determine whether the court properly exercised its discretion by denying Moseby's request for counsel. As a result, we must remand for the circuit court to address Moseby's request.

¶28 We are mindful of the fact that Moseby's release date is fast approaching. In light of that fact, we direct the circuit court on remand to vacate the previous sentence credit orders and amend Moseby's judgment of conviction to grant him 1194 days of sentence credit—the minimum amount of credit to

which Moseby is entitled. The circuit court must then address Moseby's request for the appointment of counsel. If the court grants that request, further fact finding will be necessary regarding the date of Moseby's arrest on the Milwaukee County charges. If the court denies Moseby's request, or if, after further fact finding, it again finds that Moseby was arrested on the Milwaukee County charges on November 20, 2000, the amended judgment of conviction awarding Moseby 1194 days of sentence credit shall stand.

By the Court.—Order affirmed and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

