

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP1-CR

Cir. Ct. No. 2013CF89

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

PETER BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Washington County: ANDREW T. GONRING, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

¶1 PER CURIAM. Peter Brown appeals from a judgment convicting him of being a felon in possession of a firearm and from orders denying his postconviction motion to vacate his conviction on double jeopardy grounds and for sentence credit. We affirm the circuit court in all respects.

¶2 Brown faced charges in two counties. In June 2012 in Milwaukee county, Brown was charged with felon in possession of a firearm as a repeat offender. On June 4, 2012, police officers observed Brown drop a firearm¹ as he ran from officers who were surveilling his Milwaukee county residence. Brown's residence was being surveilled because he was a suspect in a June 1, 2012 Washington county Taco Bell armed robbery. Brown was convicted of being a felon in possession in Milwaukee county in November 2012 after a jury trial. Brown received the maximum sentence in the Milwaukee county case.

¶3 In March 2013 in Washington county, Brown was charged in connection with the June 1 Taco Bell robbery, during which he allegedly brandished a firearm. The charges included possession of a firearm by a felon, substantial and misdemeanor battery, armed robbery, and second-degree recklessly endangering safety. In February 2014, Brown entered *Alford*² pleas to possession of a firearm by a felon and second-degree recklessly endangering safety as party to the crime. He received the maximum sentence on both counts and no sentence credit.

¶4 Postconviction, Brown moved the Washington county circuit court to vacate his felon in possession conviction on double jeopardy grounds because he was previously convicted of felon in possession in Milwaukee county for conduct that occurred three days after the Washington county Taco Bell robbery.

¹ The firearm Brown dropped on June 4, 2012 as he fled from police in Milwaukee county was allegedly the same weapon Brown possessed on June 1, 2012 when he participated in the Taco Bell robbery in Washington county.

² An *Alford* plea is a guilty plea in which the defendant maintains "his or her innocence of the charge while at the same time pleading guilty or no contest to it. *State v. Spears*, 147 Wis. 2d 429, 434-35, 433 N.W.2d 595 (Ct. App. 1988).

Brown alleged an unlawful second or successive prosecution in Washington county for the same offense.³ After undertaking the double jeopardy analysis, the circuit court concluded that the two felon in possession charges did not constitute the same act or the same offense. The acts occurred in different counties and in different settings; Brown committed two distinct violations of the prohibition on possessing a firearm. The circuit court declined to vacate Brown's conviction, and Brown appeals.

¶5 Even though the entry of an *Alford* plea can waive constitutional claims,⁴ *State v. Kelty*, 2006 WI 101, ¶18, 294 Wis. 2d 62, 716 N.W.2d 886, a court may nevertheless address a postconviction double jeopardy challenge based on the record created at the time the defendant entered the *Alford* pleas, *Kelty*, 294 Wis. 2d at ¶¶34, 38, 46.

¶6 Whether Brown's convictions and punishments in two counties for felon in possession of a firearm violated double jeopardy prohibitions presents a question of law that we review independently. *State v. Davison*, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

¶7 Double jeopardy protections bar successive prosecution for the same offense. *Davison*, 263 Wis. 2d 145, ¶19. "Same offenses" must be identical in law and fact. *Id.*, ¶33. Here, the facts supporting Brown's two convictions for

³ Double jeopardy challenges encompass "successive prosecutions and multiple punishments for the same offense." *State v. Kelty*, 2006 WI 101, ¶16, 294 Wis. 2d 62, 716 N.W.2d 886. Brown only argued successive prosecution in the circuit court.

⁴ Brown argues that the State raises for the first time on appeal its argument that he waived his right to raise a double jeopardy claim. The State may argue that the circuit court should be affirmed based on a theory not presented to the circuit court. *State v. Truax*, 151 Wis. 2d 354, 359, 444 N.W.2d 432 (Ct. App. 1989).

felon in possession of a firearm are not the same. In Milwaukee county, a jury convicted Brown of being in possession of a firearm he dropped while being pursued by the police on June 4, 2012. In Washington county, Brown entered *Alford* pleas to felon in possession of a firearm whose factual basis was the June 1, 2012 armed robbery of the Taco Bell. Brown possessed a firearm on two separate, distinct occasions; he remained in possession of a firearm in Milwaukee county three days after the Taco Bell robbery in Washington county. Because the record before the Washington county circuit court at the time Brown entered his *Alford* pleas does not support a double jeopardy claim, Brown waived his double jeopardy claim by entering *Alford* pleas. *Kelty*, 294 Wis. 2d 62, ¶46. The circuit court did not err in denying Brown’s postconviction double jeopardy claim.

¶8 We turn to Brown’s sentence credit claim. The Washington county court imposed ten years for the felon in possession conviction, to be served concurrently to the Milwaukee county felon in possession conviction,⁵ and a consecutive ten-year term for second-degree recklessly endangering safety. After revisiting the issue of sentence credit in February 2015, the circuit court found that Brown was not entitled to any sentence credit.

¶9 A defendant is entitled to sentence credit for “all days spent in custody in connection with the course of conduct for which [the Washington county felon in possession] sentence was imposed.” *State v. Johnson*, 2009 WI 57, ¶2, 318 Wis. 2d 21, 767 N.W.2d 207 (citation omitted). We independently review the application of the sentence credit statute to a set of facts. *State v.*

⁵ Milwaukee county circuit court case No. 2012CF2816 (the June 4, 2012 incident in which Brown dropped a firearm as he was fleeing police).

Abbott, 207 Wis. 2d 624, 628, 558 N.W.2d 927 (Ct. App. 1996). Brown is not entitled to sentence credit for three reasons.

¶10 First, on June 1, 2012, when he committed the Taco Bell robbery, Brown was on extended supervision in Milwaukee county circuit court case No. 2002CF3313 (the revocation case). Brown was on an extended supervision hold from June 4, 2012, his Milwaukee county arrest date, until his extended supervision was revoked and he was reconfined on October 1, 2012 at Dodge Correctional Institution. The department of corrections reported that Brown received sentence credit in his revocation case for the period from June 4 to October 1. When Brown began serving his revocation sentence on October 1, 2012, he severed any connection between the revocation case and the Washington county case. *State v. Beets*, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985). Therefore, Brown is not entitled to any additional credit in the Washington county case for time spent in custody after his October 1, 2012 return to custody in the revocation case.

¶11 Second, Brown is not entitled to dual credit, i.e., credit applied to more than one case. *State v. Jackson*, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338. Credit in relation to consecutive sentences is allowed only on one consecutive sentence.⁶ *State v. Boettcher*, 144 Wis. 2d 86, 100, 423 N.W.2d 533 (1988). Credit is applied to the first sentence imposed. *Id.* Here, credit for

⁶ As stated, Brown's Washington County felon in possession sentence was made concurrent to his Milwaukee County felon in possession sentence in circuit court case no. 2012CF2816. The sentence in 2012CF2816 was ordered to run consecutively to the sentence in the revocation case. Therefore, the practical effect of Brown's Washington County sentence is that it will be served consecutive to the revocation case.

June 4 to October 1, 2012, was applied to the revocation sentence imposed in October 2012. No additional sentence credit is due in this case.

¶12 Third, Brown cannot satisfy the “course of conduct” requirement for sentence credit. Brown was arrested in Milwaukee county on June 4, 2012 and charged with being a felon in possession for his conduct on June 4. There is an insufficient factual connection between the June 1 Taco Bell robbery firearm offense and the June 4 firearm offense to satisfy the “course of conduct” requirement. *Johnson*, 318 Wis. 2d 21, ¶¶32-33.

By the Court.—Judgment and orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2013-14).

