COURT OF APPEALS
DECISION
DATED AND FILED

March 24, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal Nos. **04-1687-CR**
04-1688-CR
04-1689-CR
04-1690-CR
04-1691-CR
04-1692-CR

Cir. Ct. Nos. **01CM004872,**
02CF002515,
02CM004110,
02CM004281,
02CM004360,
03CF000547

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ERIC T. SCOTT,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Dane County: ANGELA B. BARTELL, Judge. *Affirmed.*

¶1 LUNDSTEN, J.[1] In this consolidated appeal, Eric Scott proceeds *pro se*. He challenges the circuit court order denying him postconviction relief in each circuit court case underlying the appeal. With respect to each case for which he was sentenced, Scott argues that he is entitled to additional sentence credit. He also argues that counsel was ineffective for failing to pursue the sentence credit issue. We conclude that Scott waived his sentence credit argument and that he has failed to sufficiently allege ineffective assistance of counsel. We affirm the circuit court's orders.

Background

¶2 Scott was apprehended for retail theft on November 30, 2001. The State charged Scott with the theft and, while that charge was pending, charged him with numerous other offenses he committed in October 2002 and February and March 2003. Together, these charges form the basis for the six cases underlying Scott's appeal.

¶3 Scott entered into a plea bargain covering all six cases. The charge for the November 30, 2001 retail theft was dismissed and read in at sentencing. Scott received a total of 200 days of sentence credit. We refer to additional relevant facts as needed below.

Discussion

¶4 Scott argues that he is entitled to additional sentence credit under WIS. STAT. § 973.155, the sentence credit statute, as interpreted in ***State v. Floyd***,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

2000 WI 14, 232 Wis. 2d 767, 606 N.W.2d 155, for time he spent on a probation hold that was at least partially due to the retail theft charge which was read in at sentencing on the convictions underlying this appeal. We conclude that Scott has waived his right to appellate review of this sentence credit argument.

¶5 Scott filed postconviction motions to modify his sentence in the circuit court, arguing, in part, that he was entitled to additional sentence credit. However, the court's orders denying Scott's postconviction motions state that Scott's counsel withdrew Scott's motion for recalculation of sentence credit in each case underlying this appeal. The orders refer to a March 29, 2004 hearing on Scott's motions, but we do not find a transcript of that hearing in the record. Scott does not supply us with any reason why his withdrawal of the sentence credit motions in the circuit court should not constitute waiver of his sentence credit arguments on appeal.[2]

¶6 Scott also asserts ineffective assistance of counsel, apparently based on counsel's failure to pursue the sentence credit issue. We apply the two-part test from ***Strickland v. Washington***, 466 U.S. 668, 687 (1984), when analyzing

[2] Scott has filed numerous *pro se* motions and other papers in both this court and the circuit court. His filings have been, at times, repetitive and difficult to understand, prompting us to issue several orders in an attempt to assist him in successfully navigating the waters of postconviction and appellate procedure. Our September 29, 2004 order, responding to one of Scott's motions, is consistent with our conclusion today regarding waiver. In that order, we explained:

> At this point, we are not certain whether the sentence credit issues presented in the motion Scott sent to this court are properly before us, because they may have been withdrawn and not decided in circuit court. Therefore, we will not accept the motion … as Scott's brief. Scott must file a single brief that is limited to issues that can properly be considered in this appeal.

ineffective-assistance-of-counsel claims. ***State v. Allen***, 2004 WI 106, ¶26, 274 Wis. 2d 568, 682 N.W.2d 433. A defendant must prove both that his or her attorney's performance was deficient and that the deficient performance caused prejudice. ***Id.***

¶7 A defendant must first allege ineffective assistance of counsel in the circuit court. *See* ***State v. Machner***, 92 Wis. 2d 797, 804, 285 N.W.2d 905 (Ct. App. 1979). Here, our review of the record shows that Scott never plainly alleged ineffective assistance before the circuit court. Scott's numerous *pro se* circuit court filings, including several postconviction filings, at most make an occasional passing reference to Scott's belief that counsel was ineffective. We could reject Scott's appeal on this basis alone. But even assuming that one of Scott's postconviction filings in the circuit court alleged ineffective assistance of counsel, Scott fails to persuade us that his ineffective-assistance-of-counsel claim was improperly rejected without a hearing.

¶8 A defendant is not entitled to an evidentiary hearing on a postconviction motion unless his motion alleges facts which, if proved true, would entitle him to relief. *See* ***State v. Bentley***, 201 Wis. 2d 303, 309-11, 548 N.W.2d 50 (1996); ***Nelson v. State***, 54 Wis. 2d 489, 497-98, 195 N.W.2d 629 (1972). A circuit court may summarily deny a postconviction motion for any of the following reasons: the motion fails to allege sufficient facts to raise a question of fact; the motion presents only conclusory allegations; or the record conclusively demonstrates that the defendant is not entitled to relief. *See* ***Bentley***, 201 Wis. 2d at 309-11; ***Nelson***, 54 Wis. 2d at 497-98. A defendant must allege facts that allow a reviewing court to meaningfully assess his claim. ***Bentley***, 201 Wis. 2d at 314.

¶9 Scott's appellate brief may come closer to alleging sufficient facts warranting relief than do any of his filings below. But even his appellate brief falls short. His claim of ineffective assistance of counsel depends on the merits of his sentence credit argument. More specifically, Scott argues he suffered prejudice because he did not receive additional sentence credit to which he is entitled under ***Floyd***. Thus, Scott needed to allege facts that would entitle him to additional credit under ***Floyd***. He has failed to do so.

¶10 We will assume, without deciding, that Scott's interpretation of ***Floyd*** is correct. That is, we will assume that a defendant is entitled to sentence credit for time spent in confinement on a probation hold at least partially due to a charge that is dismissed but read in at sentencing. Even so, Scott fails to sufficiently allege that he did not receive all the sentence credit he was entitled to in this case. For example, Scott does not allege facts showing that the credit he seeks is not already included in the 200 days of sentence credit he received. Likewise, Scott has not alleged facts showing that the probation custody at issue here was not applied to a sentence following his revocation of probation, long before the sentences in this case were imposed.

¶11 Scott was previously sentenced, and portions of the record suggest that he may have received credit for the custody time at issue here on a prior sentence. An exhibit purporting to show Scott's sentence credit history, though somewhat cryptic, seems to show that Scott had a total of 393 days of credit as of June 19, 2002, but that 270 days of that credit were used toward a sentence of time served for circuit court case no. 00-CF-55, along with what appears to be a concurrent sentence in circuit court case no. 01-CM-390. Consistent with this exhibit, the State made comments at sentencing on the convictions here,

suggesting that Scott received credit in the form of time-served sentences for what appear to be the same cases referenced in the exhibit. Specifically, the State explained:

> Those [cases] were going at the same time he was revoked on probation, and both of those, the sentence on both of those, was in June, I think, I believe June 26, 2002, or thereabouts on those cases.
>
> By that point in time he had served a substantial amount of time on a probation hold, and the State at that time argued for prison, and that was in front of [a different circuit court branch] … [that] gave him time served. I believe he had been in jail for over a year by that point in time on his various credits and holds.

Thus, at least some portions of the record suggest that the credit Scott seeks here may already have been applied to a separate sentence. If other portions of the record suggest otherwise, Scott has not drawn our attention to them.

¶12 In sum, Scott puts forth a legal theory supporting the conclusion that he might be entitled to sentence credit for time he spent on a probation hold relating to behavior that was the subject of a read-in charge in this case. Under ***Floyd***, such time is arguably available for sentence credit in this case. But Scott has failed to allege facts showing that the custody time at issue has not already been applied to a previously imposed sentence. If this time was applied as sentence credit to a previously imposed sentence, Scott is not entitled to credit for that time in this case. *See* ***State v. Boettcher***, 144 Wis. 2d 86, 87, 423 N.W.2d 533 (1988).

¶13 Scott appears to be making other arguments, including that his sentence violated his constitutional rights, that a new factor justifies modification of his sentence, and that he was illegally incarcerated for several periods of time.

But these arguments all seem to be based on the sentencing credit issue, which he has waived. To the extent these arguments are based on some other circumstance, they are so undeveloped that we cannot address them any further. We are cognizant that Scott is before us as a *pro se* prisoner and, accordingly, we have afforded him some leniency when construing his briefs. *See* ***State ex rel. Terry v. Traeger***, 60 Wis. 2d 490, 496, 211 N.W.2d 4 (1973). That said, this court cannot construct a house from broken bricks.

By the Court.—Orders affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.