COURT OF APPEALS
DECISION
DATED AND FILED

March 30, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1498-CR **Cir. Ct. No. 2007CF5300**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN E. BROWN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DENNIS P. MORONEY and RICHARD J. SANKOVITZ, Judges. *Affirmed and remanded with directions.*

Before Fine, Kessler and Brennan, JJ.

¶1 KESSLER, J. John E. Brown appeals from a judgment of conviction for one count of misappropriation of personal identifying documents, contrary to WIS. STAT. § 943.201(2)(a) (2007-08),[1] and from an order denying the majority of the relief Brown sought in his postconviction motion.[2] Brown, who was placed on probation and ordered to serve time in jail with work-release privileges as a condition of probation, challenges the trial court's subsequent decision to cancel his work-release privileges, arguing: (1) the trial court lacked authority to impose conditional jail time without work-release privileges; (2) permitting a trial court to cancel work-release privileges usurps the sheriff's authority to restrict work-release privileges for up to five days as a method of discipline; and (3) cancellation of Brown's work-release privileges violates the double jeopardy clauses of the United States and Wisconsin Constitutions, and his sentence should therefore be converted to time served. In the alternative, Brown argues that he is entitled to a hearing on the other issues raised in his motion for postconviction relief, including allegations that the trial court erroneously exercised its sentencing discretion and that trial counsel was ineffective. We reject Brown's arguments and affirm the judgment and order.[3]

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The Honorable Dennis P. Moroney found Brown guilty and imposed sentence. The Honorable Richard J. Sankovitz denied Brown's postconviction motion. As explained *infra*, the trial court granted Brown's motion for postconviction relief concerning the imposition of a three-hundred-dollar fine.

[3] We do, however, agree with the parties that the amended judgment of conviction should not list a ten-dollar fine, because the trial court's postconviction order vacated the entire fine. We remand this matter to the trial court for correction. *See* ***State v. Prihoda***, 2000 WI 123, ¶5, 239 Wis. 2d 244, 618 N.W.2d 857 (stating that the trial court must correct a clerical error in the sentence portion of a written judgment or direct the clerk's office to make the correction).

BACKGROUND

¶2 Brown pled guilty to one count of misappropriation of personal identifying information. According to the facts in the criminal complaint, upon which the trial court relied to find a factual basis for the crime, Brown tried to purchase six one-hundred-dollar gift cards from a Pick 'n Save store using two credit cards that did not belong to him.

¶3 The trial court imposed a five-year prison sentence, consisting of two-and-one-half years of initial confinement and two-and-one-half years of extended supervision. The trial court stayed that sentence and placed Brown on probation for three years, with six months in jail as a condition of probation. The trial court ordered that Brown be released during the day "not for good time but for programming and for work." Brown was also ordered to pay a three-hundred-dollar fine, as well as costs and surcharges, including those associated with providing a DNA sample.

¶4 Nearly three weeks after he began serving his conditional jail time, Brown provided a urine sample that tested positive for cocaine. A Milwaukee County House of Correction hearing officer found Brown guilty of using illegal drugs and restricted his work-release privileges.[4]

[4] Beginning with the first restriction of Brown's release privileges, the record refers to the restriction of work-release privileges. Brown has never offered a separate argument concerning release for programming, even though all forms of release were cancelled when the trial court amended the judgment of conviction to provide for straight jail time as a condition of probation. In this opinion, we refer to the cancellation of work-release privileges, which is what Brown explicitly challenges.

¶5 An administrative hearing was conducted to determine whether to recommend that the trial court cancel Brown's work-release privileges. At the hearing, Brown stated, "I did something I had no business doing. I'm about to lose everything. My home is being foreclosed on. My employer is still holding my job for me." The work-release board recommended that Brown's case be returned to the trial court to seek cancellation of Brown's work-release privileges.

¶6 On August 20, 2008, the trial court signed an order cancelling Brown's work-release privileges and ordering that the remainder of the jail time imposed as a condition of probation be served without work-release privileges.[5] Brown filed a postconviction motion seeking sentence modification, alleging that the trial court had erroneously exercised its discretion when it originally imposed his sentence and when it subsequently cancelled the work-release privileges associated with his conditional jail time. Brown also alleged that he was deprived of the effective assistance of trial counsel based on trial counsel's handling of an alternative sentence recommendation by the State.

¶7 The trial court denied Brown's postconviction motion without a hearing, except it agreed with Brown that the three-hundred-dollar fine was improperly imposed, and it therefore vacated both the fine and penalties for non-payment of the fine. This appeal follows.

[5] The Honorable Paul R. Van Grunsven issued the order cancelling Brown's work-release privileges.

DISCUSSION

¶8 Brown presents two arguments on appeal: (1) the order cancelling his work-release privileges exceeds the trial court's authority and violates his constitutional rights;[6] and (2) "the trial court failed to provide rulings on all of the issues in Brown's postconviction motion and therefore erred in denying the motion without a hearing." (Capitalization and bolding omitted.) We examine each issue in turn.

I. Cancellation of Brown's work-release privileges.

¶9 Brown challenges the cancellation of his work-release privileges on several legal grounds, all of which require us to apply the Wisconsin Statutes, the Wisconsin Constitution and the United States Constitution to undisputed facts. Therefore, we are presented with issues of law that we consider *de novo*. *See* ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶26, 313 Wis. 2d 542, 753 N.W.2d 496 ("Statutory interpretation is a question of law that we review de novo."); ***Coulee Catholic Schools v. LIRC***, 2009 WI 88, ¶47 n.22, 320 Wis. 2d 275, 768 N.W.2d 868 (constitutional interpretation is *de novo*). Applying those standards, we reject Brown's challenges to the cancellation of his work-release privileges.

¶10 First, Brown argues that work release during conditional confinement is mandatory, and that the trial court therefore erred when it cancelled his work-release privileges. He relies on ***State v. Gloudemans***, 73 Wis. 2d 514,

[6] Brown does not allege that the trial court erroneously exercised its discretion when it decided that cancellation of Brown's work-release privileges was appropriate in light of his drug use. Rather, he argues that as a matter of law, work-release privileges are required and cannot be cancelled.

243 N.W.2d 220 (1976), which interpreted WIS. STAT. § 973.09(4) (1973-74) and held that a trial court could not order confinement in the county jail as a condition of probation without work-release privileges. *See* ***Gloudemans***, 73 Wis. 2d at 518. Brown's reliance on ***Gloudemans*** is misplaced because the statutory language that dictated the result in that case has been amended to give trial courts the discretion to order straight jail time as a condition of probation.

¶11 ***Gloudemans*** interpreted WIS. STAT. § 973.09(4) (1973-74), which provided: "The court may also require as a condition of probation that the probationer be confined in the county jail between the hours or periods of his employment during such portion of his term of probation as the court specifies, but not to exceed one year." Applying the plain meaning of this statute, ***Gloudemans*** held that a trial court could order confinement in the county jail as a condition of probation "'between the hours or periods of his employment.'" ***Id.*** at 518 (quoting § 973.09(4) (1973-74)).

¶12 WISCONSIN STAT. § 973.09(4) was subsequently amended and now provides in relevant part:

> (a) The court may also require as a condition of probation that the probationer be confined during such period of the term of probation as the court prescribes, but not to exceed one year. The court may grant the privilege of leaving the county jail, Huber facility, work camp, or tribal jail during the hours or periods of employment or other activity under s. 303.08 (1) while confined under this subsection.

Applying the plain language of § 973.09(4)(a), it is clear that straight confinement time may be imposed as a condition of probation, and that although the trial court "may grant" work-release privileges, it is not required to do so. *See* ***id.*** Consistent with this interpretation, our supreme court has recognized that a trial court has "tremendous discretion in determining the conditions of probation" and "may"

choose to grant a probationer leave time for numerous situations outlined in WIS. STAT. § 303.08(1)(c).[7] *See* ***State v. Ogden***, 199 Wis. 2d 566, 569-570, 573, 544

[7] WISCONSIN STAT. § 303.08(1) applies to probationers serving conditional jail time by virtue of WIS. STAT. § 973.09(4)(c) ("While subject to this subsection, the probationer is subject to s. 303.08 (1), (3) to (6), (8) to (12), and (14)."). Section 303.08, also known as the "Huber Law," provides in relevant part:

> **(1)** Any person sentenced to a county jail ... may be granted the privilege of leaving the jail during necessary and reasonable hours for any of the following purposes:
>
> (a) Seeking employment or engaging in employment training.
>
> (b) Working at employment.
>
> (bn) Performing community service work under s. 973.03.
>
> (c) Conducting any self-employed occupation including housekeeping and attending the needs of the person's family.
>
> (cn) Attending court proceedings to which the person is a party or for which the person has been subpoenaed as a witness.
>
> (d) Attendance at an educational institution.
>
> (e) Medical treatment.
>
> (f) Obtaining counseling or therapy from an approved public treatment facility, as defined in s. 51.45 (2) (c), an approved private treatment facility, as defined in s. 51.45 (2) (b), a psychiatrist, a psychologist, a licensed clinical social worker, a professional counselor licensed under ch. 457, or a certified independent or advanced practice social worker who is authorized to practice psychotherapy under ch. 457.
>
> (g) Attending an assessment for the purpose of determining the person's need for counseling or therapy under par. (f).
>
> (h) Attending a parenting education program.
>
> (i) Meeting with the person's probation, extended supervision, or parole officer.

N.W.2d 574 (1996) (concluding that trial court erroneously exercised its discretion when it decided before the probationer even made her request that it would not order that her conditional jail time include family leave privileges). Likewise, we have affirmed the imposition of conditional jail time without work-release privileges. *See* ***State v. Hays***, 173 Wis. 2d 439, 441-43, 496 N.W.2d 645 (Ct. App. 1992) (affirming trial court order modifying defendant's probation to include nine months' confinement in the county jail as a condition of probation, with the first six months to be served without release for work or child care).[8]

¶13 Based on the plain language of the current version of WIS. STAT. § 973.09(4), as well as case law applying that statute, we reject Brown's argument that a trial court is required to grant work-release privileges to probationers who are confined in jail as a condition of probation.

¶14 Next, Brown argues that cancelling his work-release privileges ursurped the power of the sheriff to impose discipline for rule violations. He contends that allowing a trial court to cancel work-release privileges would render superfluous the statutory provision giving the sheriff authority to enforce rule violations by cancelling work-release privileges for up to five days. *See* WIS. STAT. § 303.08(10). We are not convinced.

¶15 When probation is ordered pursuant to WIS. STAT. § 973.09(4), probationers are subject to WIS. STAT. § 303.08(10), which provides: "The sheriff

[8] At issue in ***State v. Hays***, 173 Wis. 2d 439, 496 N.W.2d 645 (Ct. App. 1992), was the adequacy of the hearing on the motion to modify the defendant's conditions of probation to include, for the first time, confinement in jail. *See* ***id.*** at 441. In contrast, Brown has not raised a due process challenge to the process by which his probation was modified. Instead, he argues that the modification made—cancellation of his work-release privileges—was impermissible because work-release privileges must be afforded to those confined as a condition of probation.

may refuse to permit the prisoner to exercise the prisoner's privilege to leave the jail as provided in sub. (1) for not to exceed 5 days for any breach of discipline or other violation of jail regulations." *See* § 973.09(4). In other words, § 303.08(10) allows the sheriff to impose discipline on those probationers *for whom the trial court has approved leave*. At the same time, § 973.09(3)(a) explicitly authorizes the trial court to modify the terms and conditions of probation at any time prior to the expiration of the probationary period, and that can include *cancelling the probationer's right to leave*. We fail to see how the trial court's decision to cancel Brown's work-release privileges ursurped the sheriff's authority. Indeed, the request to cancel the privileges was made at the recommendation of the Milwaukee County House of Correction, which apparently decided that the discipline available was not sufficient. For these reasons, we reject Brown's argument.

¶16 Brown's third argument is that the cancellation of his work-release privileges "converted his conditional confinement to a sentence and therefore the probation as well as the imposed and stayed sentence are contrary to law and in violation of Brown's constitutional rights to be protected from double jeopardy." (Bolding omitted.) We disagree.

¶17 Wisconsin courts "have long held that confinement as a condition of probation is not considered a 'sentence.'" ***State v. Avila***, 192 Wis. 2d 870, 885, 532 N.W.2d 423 (1995), *overruled on other grounds*, ***State v. Gordon***, 2003 WI 69, 262 Wis. 2d 380, 663 N.W.2d 765. However, we have also recognized that probation is a form of punishment that can trigger double jeopardy analysis. *See* ***State v. Meddaugh***, 148 Wis. 2d 204, 212, 435 N.W.2d 269 (Ct. App. 1988) (superceded by statute as stated in ***State v. Eckola***, 2001 WI App 295, ¶10, 249 Wis. 2d 276, 638 N.W.2d 903). ***Meddaugh*** cited ***State v. Dean***, 111 Wis. 2d 361,

330 N.W.2d 630 (Ct. App. 1983), which held that where one condition of a defendant's probation was overturned on appeal, the trial court on remand could not impose a prison sentence rather than probation. *See* ***id.*** at 365-66. ***Dean*** stated: "[T]he reimposition of a sentence after a defendant has been placed on probation, absent a violation of a condition of probation, is a violation of both the United States and Wisconsin Constitutions' double jeopardy clauses." ***Id.*** at 365.

¶18 Contrary to Brown's assertion, ***Dean*** does not support his claim for relief. Brown was not "resentenced." The trial court has the authority to modify the terms of probation, *see* WIS. STAT. § 973.09(3)(a), and that is exactly what it did in this case. Brown's probation continues, and that probation includes confinement time without work-release privileges as a condition of that probation. This does not offend either the Wisconsin Statutes or the United States and Wisconsin Constitutions. We reject Brown's argument that the cancellation of his work-release privileges violated his constitutional rights and, therefore, we do not consider his final argument that we should convert his sentence to time served as a remedy for that alleged constitutional violation.

II. Denial of Brown's postconviction motion on other grounds.

¶19 Brown argues that the trial court erroneously exercised its discretion when it "failed to provide rulings on all of the issues in Brown's postconviction motion and therefore erred in denying the motion without a hearing." (Capitalization and bolding omitted.) In ***State v. Allen***, 2004 WI 106, 274 Wis. 2d 568, 682 N.W.2d 433, our supreme court summarized the applicable standard of review of an order denying a postconviction motion order without a hearing:

> Whether a defendant's postconviction motion alleges sufficient facts to entitle the defendant to a hearing for the relief requested is a mixed standard of review. First,

> we determine whether the motion on its face alleges sufficient material facts that, if true, would entitle the defendant to relief. This is a question of law that we review de novo. If the motion raises such facts, the [trial] court must hold an evidentiary hearing. However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, or if the record conclusively demonstrates that the defendant is not entitled to relief, the [trial] court has the discretion to grant or deny a hearing. We require the [trial] court "to form its independent judgment after a review of the record and pleadings and to support its decision by written opinion." We review a [trial] court's discretionary decisions under the deferential erroneous exercise of discretion standard.

Id., ¶9 (citations omitted). Applying these standards, we conclude that the trial court did not erroneously exercise its discretion when it denied Brown's claims.

¶20 At the outset, we address Brown's general assertion that the trial court's written decision denying Brown's postconviction motion was inadequate. The trial court issued a ten-page written decision in which it attempted to address what it termed the "multitude of claims" that Brown asserted in his postconviction motion and which "boil[ed] down essentially to six" claims. Although the trial court did not address every single issue using the terminology Brown used, we are confident, having reviewed the decision, that the trial court fully considered the critical issues when making its decision. To the extent the written decision did not address any particular sub-issue, we affirm because we conclude, as a matter of law, that the motion does not raise facts sufficient to entitle Brown to relief, the motion presents only conclusory allegations, and/or the record conclusively demonstrates that Brown is not entitled to relief. *See* ***id.***

¶21 We now briefly consider specific concerns Brown raises in his appellate brief. First, he complains that the trial court did not specifically rule on his double jeopardy issue. We have considered that issue on its merits and have

concluded, as a matter of law, that cancelling Brown's work-release privileges did not place him in double jeopardy. He was not, and is not, entitled to postconviction relief on that issue.

¶22 Second, Brown addresses the issues of fines, costs and surcharges. Brown's postconviction motion argued that the fine was erroneously imposed and that the judgment should not have established penalties for non-payment. The trial court agreed and vacated both the fine and the non-payment penalty. Brown asserts that the trial court should have done more. He argues that the trial court should have made specific findings regarding the costs and surcharges that were assessed, implying that some of the costs and surcharges were discretionary. However, Brown's postconviction motion did not identify which specific costs and surcharges he contested, nor did he offer any authority to support his assertion that he should not have to pay any particular cost or surcharge. To the extent Brown was attempting to challenge the DNA surcharge, the mandatory victim/witness surcharge and other costs and surcharges, we conclude the motion insufficiently raised those issues and, therefore, Brown was not entitled to additional relief. *See* ***id.*** Further, he has not adequately briefed those issues on appeal, so we decline to address them further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (court will not address issues on appeal that are inadequately briefed).

¶23 Third, Brown argues that the trial court did not make sufficient rulings on the length or alleged undue harshness of his sentence. While the order denying Brown's postconviction motion did not address every one of Brown's challenges to his sentence, it rejected two specific challenges, implicitly concluding that the trial court that sentenced Brown had properly exercised its sentencing discretion. On appeal, Brown simply suggests, without providing

specific argument, that his sentence was harsh, excessive or unconscionable, and that it was based on improper factors and inaccurate information. We decline to develop his argument for him and do not consider it further.[9] *See* ***Kristi L.M. v. Dennis E.M.***, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 ("undeveloped arguments need not be addressed").

¶24 Finally, Brown contends that the trial court failed to address his ineffective assistance of counsel argument. In his postconviction motion, Brown argued that his sentence should be modified because "the State breached the plea agreement and [Brown] received ineffective assistance of counsel." (Some capitalization omitted.) Brown asserted that his trial counsel should have performed differently when there was confusion prior to sentencing about whether the State would be recommending one year in jail, as it told the trial court at the plea hearing, or whether it would recommend probation with conditional jail time, which was a suggestion Brown's original trial counsel communicated to the State after the plea hearing.[10] In its written decision, the trial court found, based on its review of the transcripts, that the State had not breached the plea agreement. It also noted that Brown had ultimately received probation, which is what both he and his attorney had asked the trial court to order. The trial court did not explicitly address Brown's related ineffective assistance argument, but it implicitly rejected

[9] We do note, however, that it is hard to envision how Brown could effectively argue his sentence was unduly harsh and unconscionable when he explicitly asked for, and received, probation.

[10] Ultimately, Brown was allowed to choose which recommendation the State would make. He chose to have the State recommend one year in jail, with the final six months including work-release privileges, which was the recommendation originally discussed at the plea hearing. Brown, however, asked the trial court to impose probation "with imposed and stayed time" that did not include conditional jail time.

that claim based on the lack of prejudice: Brown asked for probation and received it.

¶25 On appeal, Brown presents no argument concerning trial counsel's alleged deficiency or the prejudice Brown allegedly suffered from his trial counsel's performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984) (To establish an ineffective assistance of counsel claim, a defendant must show both that counsel's performance was deficient and that he was prejudiced by the deficient performance.). This issue is inadequately developed and we decline to develop it for him. *See* ***Kristi L.M.***, 302 Wis. 2d 185, ¶20 n.7.

¶26 For the foregoing reasons, we reject Brown's challenges to the denial of his postconviction motion. We affirm the judgment and the order.

By the Court.—Judgment and order affirmed and cause remanded with directions.

Not recommended for publication in the official reports.