COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2013

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. 2013AP27-CR **Cir. Ct. No. 2010CF2743**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LARRY L. JACKSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: REBECCA F. DALLET and JONATHAN D. WATTS, Judges. *Affirmed in part and reversed in part and cause remanded with directions.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 PER CURIAM. Larry L. Jackson appeals a judgment entered upon his guilty plea to possessing a firearm while a felon. He also appeals a

postconviction order that denied his motion for plea withdrawal and denied, in part, his motion for sentence credit.[1] We reverse those portions of the judgment and postconviction order that denied him credit for twenty-one days of presentence incarceration and otherwise affirm.

I.

¶2 On May 30, 2010, Jackson was serving a term of extended supervision for armed robbery when police stopped the car he was driving, searched it, and arrested him after finding a gun in the glove compartment. The hearings and appeals division of the department of administration revoked Jackson's extended supervision on November 19, 2010, and he returned to prison on December 10, 2010, to serve a term of reconfinement for the armed robbery. Additionally, the State charged him in the instant case with possessing a firearm while a felon as a repeat offender. In March 2011, Jackson pled guilty to an amended charge of possessing a firearm while a felon, and the circuit court ordered him to serve a term of imprisonment concurrently with the previously imposed reconfinement term.

¶3 Jackson moved for postconviction relief. As relevant here, he sought to withdraw his guilty plea to the charge of possessing a firearm while a felon, because, he claimed, his trial lawyer was constitutionally ineffective for advising him that he could be found guilty of the crime even if he was unaware that the car he was driving contained a gun. Jackson also sought credit for the 194

[1] The Honorable Rebecca F. Dallet presided over Jackson's guilty plea and sentencing and entered the judgment of conviction. The Honorable Jonathan D. Watts presided over the postconviction proceedings and entered the order partially denying postconviction relief.

days that he spent in custody from the date of his arrest for possessing a firearm while a felon until the day he returned to prison to serve his reconfinement term for armed robbery.

¶4 The circuit court resolved Jackson's claims in a written order entered without a hearing.[2] The circuit court denied the claim for plea withdrawal on the ground that the Record defeated Jackson's allegations. As to the claim for presentence incarceration credit, the circuit court granted Jackson credit towards his sentence for the period from May 30, 2010, through November 19, 2010, but the circuit court denied him credit for the twenty-one days he spent in custody after revocation of his extended supervision before returning to prison on December 10, 2010, to serve his reconfinement term. He appeals.

II.

¶5 We begin by examining Jackson's claim for plea withdrawal. Because Jackson first sought that relief after sentencing, he must establish by clear and convincing evidence that plea withdrawal is necessary to correct a manifest injustice. *See* ***State v. Brown***, 2006 WI 100, ¶18, 293 Wis. 2d 594, 611, 716 N.W.2d 906, 914. "Ineffective assistance of counsel can constitute a 'manifest injustice.'" ***State v. Berggren***, 2009 WI App 82, ¶10, 320 Wis. 2d 209, 222, 769 N.W.2d 110, 116 (citation omitted).

¶6 A defendant who claims that his trial lawyer was ineffective must prove both that the lawyer's performance was deficient and that the deficiency

[2] The circuit court granted Jackson a postconviction hearing to address issues that he does not pursue on appeal.

prejudiced the defense. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Whether the lawyer's performance was deficient and whether the deficiency was prejudicial are questions of law that we review *de novo*. ***State v. Johnson***, 153 Wis. 2d 121, 128, 449 N.W.2d 845, 848 (1990). If a defendant fails to satisfy one component of the analysis, a reviewing court need not address the other. ***Strickland***, 466 U.S. at 697.

¶7 To demonstrate deficient performance, the defendant must identify specific acts or omissions of the lawyer that are "outside the wide range of professionally competent assistance." *See* ***id.*** at 690. To prove prejudice, a defendant must demonstrate that the lawyer's errors were so serious that the outcome of the proceeding is unreliable. *See* ***id.*** at 687. In the context of a guilty plea, a defendant must demonstrate prejudice by showing that, but for the trial lawyer's errors, the defendant would not have pled guilty but would have insisted on a trial. ***State v. Bentley***, 201 Wis. 2d 303, 312, 548 N.W.2d 50, 54 (1996).

¶8 Jackson contends that the circuit court should have afforded him a hearing to pursue the claim that his trial lawyer's alleged ineffectiveness warrants plea withdrawal. A circuit court is required to grant a postconviction hearing if the defendant's postconviction motion contains allegations of material fact that, if true, would entitle the defendant to relief. ***State v. Allen***, 2004 WI 106, ¶9, 274 Wis. 2d 568, 576, 682 N.W.2d 433, 437. This presents an additional question of law for our independent review. *See* ***ibid.*** If, however, the petitioner does not allege sufficient material facts, if the allegations are merely conclusory, or if the Record conclusively shows that the petitioner is not entitled to relief, the circuit court has discretion to deny a postconviction motion without a hearing. ***Ibid.*** Moreover, '"an evidentiary hearing is not mandatory if the [R]ecord as a whole conclusively demonstrates that defendant is not entitled to relief, even if the

motion alleges sufficient nonconclusory facts.'" ***State v. Balliette***, 2011 WI 79, ¶50, 336 Wis. 2d 358, 380, 805 N.W.2d 334, 344 (citation omitted). We review a circuit court's discretionary decisions with deference. ***Allen***, 2004 WI 106, ¶9, 274 Wis. 2d at 577, 682 N.W.2d at 437.

¶9 In this case, Jackson alleges that his trial lawyer erroneously advised him that he could be found guilty of possessing a firearm while a felon even if he did not know that the car he was driving contained a gun. He points out that, in fact, a felon can be guilty of possessing a firearm only if he or she '"knowingly had actual physical control of a firearm."' *See* ***State v. Black***, 2001 WI 31, ¶19, 242 Wis. 2d 126, 142, 624 N.W.2d 363, 371 (citation omitted). Therefore, he argues, his trial lawyer's performance was deficient. Jackson also argues that he was prejudiced by his lawyer's alleged deficiency. He contends that, but for the misinformation he claims he received, he would have insisted on going to trial because, he says, he did not know that the car he was driving contained a gun. To support his claim, he offers a statement from his sister that she bought the gun and placed it in the car without his knowledge. We reject his contentions, because the Record conclusively demonstrates that Jackson is not entitled to relief.

¶10 The criminal complaint states that, after police found a gun in Jackson's car, Jackson told the officers that he "ha[d] the gun for protection, because [he] was jumped over on 44th and North," and that he was "not doing any licks, it's just for protection."[3] Jackson dismisses these components of the Record as "merely allegations in the State's own charging document." He instead directs

[3] The complaint includes an explanation that "doing licks" means "committing robberies."

our attention to his postconviction affidavit, in which he flatly denies making the statements attributed to him in the criminal complaint. When Jackson entered his guilty plea, however, he told the circuit court that he had read the criminal complaint and that he understood it. The circuit court asked him if he agreed that the facts in the criminal complaint are true. Jackson replied, "yes, your honor."

¶11 Moreover, at sentencing, Jackson's trial lawyer explained to the circuit court that Jackson "told [the lawyer] the gun wasn't used in the process of a crime, he didn't threaten anyone with the gun, he just had the gun, he knew it was in the car and that it was wrong for him to do that." The Record reflects no protest from Jackson in response to these remarks. *See* ***State v. Cain***, 2012 WI 68, ¶35, 342 Wis. 2d 1, 22, 816 N.W.2d 177, 188 (trial lawyer's unchallenged sentencing remarks properly considered when assessing claim for plea withdrawal).

¶12 In light of the foregoing, Jackson's self-serving and conclusory statements denying the truth of the criminal complaint are insufficient to establish ineffective assistance of counsel or the need for an evidentiary hearing. *See* ***State v. Winters***, 2009 WI App 48, ¶31, 317 Wis. 2d 401, 419, 766 N.W.2d 754, 763. Rather, the Record conclusively demonstrates that, regardless of who purchased the gun and placed it in the glove box of Jackson's car, Jackson knew he possessed the gun at the time that the police stopped him. Therefore, assuming that his trial lawyer wrongly advised him that he could be found guilty even if he was unaware of the gun in his car, the erroneous advice did not lead to an unreliable outcome because the advice was not relevant to a viable defense. No reasonable probability exists that Jackson would have insisted on going to trial to present a defense that lacked factual support. Accordingly, he shows no prejudice. *See* ***Bentley***, 201 Wis. 2d at 312, 548 N.W.2d at 54.

III.

¶13 We turn to the claim that the circuit court erroneously denied Jackson sufficient credit for his presentence incarceration. He received credit against his sentence in this case for a portion of his presentence custody, specifically, the 174 days from his arrest through the date that the division of hearings and appeals revoked his extended supervision for armed robbery and required him to serve a term of reconfinement for that offense. He asserts that, pursuant to WIS. STAT. § 973.155, he is also entitled to twenty-one days of credit for the period he spent in custody following revocation of his extended supervision awaiting transfer to a correctional institution to serve the reconfinement term. The State concedes error.

¶14 Whether an offender is entitled to sentence credit pursuant to WIS. STAT. § 973.155 is a question of law that we review *de novo*. ***State v. Carter***, 2010 WI 77, ¶¶11–12, 327 Wis. 2d 1, 7, 785 N.W.2d 516, 519. We are not required to accept a respondent's concession of law. *See* ***id.***, 2010 WI 77, ¶50, 327 Wis. 2d at 21, 785 N.W.2d at 526. For the reasons that follow, however, we agree that Jackson is entitled to the credit he seeks.

¶15 Pursuant to WIS. STAT. § 973.155(1)(a), "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Thus, "two conditions must be met in order for a defendant to receive sentence credit: (1) the defendant must have been 'in custody' for the period in question; and (2) the period 'in custody' must have been 'in connection with the course of conduct for which the sentence was imposed.'" ***State ex rel. Thorson v. Schwarz***, 2004 WI 96, ¶15, 274 Wis. 2d 1, 8, 681 N.W.2d 914, 918 (citing

§ 973.155(1)(a)). Here, Jackson was continuously in custody after his arrest on May 30, 2010. Because he received concurrent terms, he is entitled to credit for presentence incarceration served in connection with both his sentence in the instant matter and his period of reconfinement. *See* ***State v. Ward***, 153 Wis. 2d 743, 746–747, 452 N.W.2d 158, 160 (Ct. App. 1989). Our task is to determine the event, if any, that severs the connection between the presentence custody and the conduct for which the circuit court sentenced Jackson in this case.

¶16 Although Wisconsin appellate courts have developed a body of case law applying WIS. STAT. § 973.155 in various circumstances, no published case addresses a constellation of facts precisely the same as that presented here. We agree with the State that the guiding principles are found in ***State v. Beets***, 124 Wis. 2d 372, 369 N.W.2d 382 (1985), and ***State v. Presley***, 2006 WI App 82, 292 Wis. 2d 734, 715 N.W.2d 713. We briefly review the pertinent facts and holdings of those cases.

¶17 In ***Beets***, an offender on probation was arrested for a new crime and, a few days later, the offender "was also in custody on a probation hold resulting from the alleged violation of his probation on the earlier" offenses. ***Id.***, 124 Wis. 2d at 374–375, 369 N.W.2d at 383. The offender eventually received concurrent sentences for the older offenses and the new crime. ***Id.***, 124 Wis. 2d at 375, 369 N.W.2d at 383. The circuit court allowed the offender credit against the sentence for the new crime for all days in custody from the date of his arrest through the date of his probation revocation and up to the date that the circuit court sentenced him after revocation for the older offenses. *See* ***id.***, 124 Wis. 2d at 374–376, 369 N.W.2d at 383–384. The circuit court denied the offender credit against his sentence for the new crime, however, for the period from sentencing after revocation for the older offenses through sentencing for the new crime. ***Id.*** at

375–376, 369 N.W.2d at 383. The supreme court affirmed, holding that, when an offender on probation commits a new crime and receives concurrent sentences, "any connection which might have existed between custody for the [old offenses] and the [new crime] was severed when the custody resulting from the probation hold was converted into a revocation and sentence." ***Id.***, 124 Wis. 2d at 379, 369 N.W.2d at 385. The supreme court explained that, "[f]rom that time on, [the offender] was in prison serving an imposed and unchallenged sentence." ***Ibid.***

¶18 In ***Presley***, we applied ***Beets*** and WIS. STAT. § 973.155(1)(a) to a circumstance where an offender serving a term of extended supervision committed a new crime, leading to revocation of the offender's extended supervision. *See* ***Presley***, 2006 WI App 82, ¶¶2–3, 292 Wis. 2d at 737–738, 715 N.W.2d at 715–716. The offender then pled guilty to the new crime. ***Id.***, 2006 WI App 82, ¶2, 292 Wis. 2d at 737, 715 N.W.2d at 715. Some weeks after the guilty plea, the circuit court conducted a reconfinement hearing for the older offense and a sentencing hearing for the new crime, and the circuit court imposed concurrent terms. ***Ibid.*** In determining the amount of presentence incarceration credit due to the offender, we recognized that, under ***Beets***, "the lynchpin to the uncoupling of the connection between the new and old charges was the act of sentencing, not the revocation determination." ***Presley***, 2006 WI App 82, ¶9, 292 Wis. 2d at 742, 715 N.W.2d at 718. We therefore held that "an offender who has had his or her extended supervision revoked is entitled to sentence credit on any new charges until the [circuit] court 'resentences' him or her from the available remaining term of extended supervision." ***Id.***, 2006 WI App 82, ¶13, 292 Wis. 2d at 745, 715 N.W.2d at 719.

¶19 In the instant case, the circuit court denied Jackson credit towards his sentence for possessing a firearm while a felon for the entirety of the time he

spent in custody before sentencing for that crime but after revocation of his extended supervision for armed robbery. ***Beets*** and ***Presley*** teach, however, that revocation of community supervision alone is insufficient to uncouple the connection between custody for old and new offenses. As the State explains, "in both ***Beets*** and ***Presley***, it was the sentencing after revocation that severed the connection between the old and new offenses, not the revocation itself." The State goes on to observe that "[t]he problem in the present case is that there was no circuit court sentencing or reconfinement hearing related to the revocation." This factual distinction arises because, after we decided ***Presley***, the legislature shifted authority for reconfinement determinations from the circuit court to an administrative agency. *See* 2009 Wis. Act 28, §§ 2726, 9311(4q), 9411(2u); WIS. STAT. §§ 302.113(9)(ag)–(am). We therefore cannot refer to the date of a circuit court reconfinement hearing to determine the end of the connection between Jackson's presentence custody and his new crime.

¶20 The parties propose that the key to determining Jackson's entitlement to sentence credit under the circumstances here is found in WIS. STAT. § 304.072(4). We agree. The statute provides, in pertinent part, that "[t]he sentence of a revoked ... person on extended supervision resumes running on the day he or she is received at a correctional institution."[4] Thus, only upon arrival at a correctional institution was Jackson "in prison serving an imposed and unchallenged sentence" for his older armed robbery conviction. *See* ***Beets***, 124

[4] The Record contains an inmate classification report reflecting that, on December 10, 2010, Jackson arrived at Kettle Moraine Correctional Institution, but the circuit court made a finding that Jackson arrived at Dodge Correctional Institution on that date. The seeming discrepancy is irrelevant, because both prisons are statutorily defined as state correctional institutions. *See* WIS. STAT. §§ 301.01(4), 302.01(1)(a), (3) & (9).

Wis. 2d at 379, 369 N.W.2d at 385. Accordingly, at that point, custody for the older offense was divorced from custody for the new crime. *See* ***id.*** Any conclusion that severance instead occurred upon revocation of community supervision would be inconsistent with the analysis in ***Beets*** and ***Presley***.

¶21 Therefore, we affirm the judgment and postconviction order in part, but we reverse that portion of the judgment and postconviction order denying Jackson credit for the twenty-one days he spent in custody after revocation of his extended supervision on November 19, 2010, before he returned to prison on December 20, 2010, to serve his reconfinement term. We remand this matter with directions that the circuit court enter an amended judgment of conviction granting Jackson sentence credit for those twenty-one days.

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

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