

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 9, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-0238-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

ROBERT J. FERGUSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MICHAEL B. TORPHY, JR., Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

PER CURIAM. Robert J. Ferguson appeals his sentence for conspiracy to commit theft by fraud. He claims that the trial court exceeded its authority when it ordered his sentence consecutive to two prior-imposed sentences, and that the court erroneously failed to give him credit for a number of periods of presentence incarceration. He also argues that the evidence presented

against him at trial was illegally obtained and that the evidence was insufficient to support the alleged amount of merchandise involved in the conspiracy. We do not address the latter arguments because they are not properly before this court on appeal, and we reject Ferguson's sentence claims. Accordingly, we affirm.

On September 11, 1992, Ferguson was convicted of one count of conspiracy to commit theft by fraud (contrary to §§ 939.31 and 943.20(1)(d) and (3)(c), STATS.), and two counts of fraudulent writings (contrary to § 943.39(2), STATS.), based upon his role in a scheme to shoplift items from department stores and then return them for cash or credit. The trial court ordered Ferguson to pay \$30,000 in fines and costs, and sentenced him to concurrent fifty-four month prison terms on the fraudulent writings counts, but withheld sentence on the conspiracy count subject to a concurrent twelve-year probation period.

Due to a variety of problems with a series of defense counsels, we gave Ferguson until July 12, 1995, to file a timely postconviction motion or a notice of appeal regarding the three judgments of conviction.¹ The extension expired without further action from Ferguson while he was out of prison on parole. The original convictions, therefore, are not properly before this court. RULE 809.10(1)(b), STATS.

¹ Trial counsel filed a § 809.30, STATS., notice of intent to pursue postconviction relief on November 19, 1992. However, after counsel failed to pursue postconviction relief for nearly two years, this court granted Ferguson an extension to order transcripts and take appellate action, by orders dated September 22 and 29, 1994. With new counsel from the public defender's office, Ferguson finally filed a postconviction motion in the trial court on February 1, 1995. The motion was denied by the trial court on June 26, 1995, but was never appealed. Meanwhile, on April 12, 1995, this court granted Ferguson an additional ninety days to file a new postconviction motion or notice of appeal by private counsel after Ferguson's parole on the fraudulent writing counts rendered him ineligible for continued public defender representation.

Ferguson was arrested on August 23, 1995, on an allegation of sexual assault, which was never charged. Based on that incident, the Department of Corrections revoked Ferguson's probation and parole on November 16, 1995, and on December 18, 1995, the trial court sentenced him to an eight-year prison term on the conspiracy theft count, to be served consecutively to the two earlier imposed sentences. On January 11, 1996, Ferguson filed a notice of intent to pursue postconviction relief, which this court deemed timely. On August 11, 1996, Ferguson filed a *pro se* motion for postconviction relief under § 809.30, STATS., which was denied by the trial court on October 14, 1996, as untimely and facially defective.

On January 17, 1997, Ferguson filed a notice of appeal from the sentence entered on December 18, 1995, which we deemed timely.² Meanwhile Ferguson also filed a *pro se* postconviction motion under § 974.06, STATS., which was denied by written order of February 6, 1997, after an evidentiary hearing. By a motion filed June 10, 1997, Ferguson attempted to amend his notice of appeal to include the February 6 order. However, we denied the motion as untimely. Therefore, the only issue on appeal is Ferguson's sentence on the conspiracy theft. RULE 809.10(1)(b), STATS.

Ferguson claims that the trial court improperly changed his sentence from concurrent to consecutive, three years after the fact. The record, however, does not support his contention. On September 11, 1992, the trial court sentenced Ferguson to probation on the conspiracy theft count concurrent to prison terms on

² On April 1, 1997, we found good cause for delay based on Ferguson's explanation that he had at first improperly captioned his postconviction motion, and that his mail had been misdirected after he was transferred to a new correctional institution.

the fraudulent writing counts, as the court was authorized to do under § 973.09(1)(a), STATS. That concurrent probation was revoked on November 16, 1995, and a consecutive prison term was imposed pursuant to § 973.15(2)(a), STATS. That Ferguson's probation on the conspiracy charge was to be concurrent to his other sentences does not mean that his withheld sentence also needed to be concurrent.

Ferguson also claims that he is entitled to credit for the seven days of prebail detention he served from May 4 to May 11, 1992; the fifty-seven days of presentence detention he served from September 11 to November 6, 1992; the twenty-five months of prison incarceration he served from November 12, 1992 to December 12, 1994; and the 111 days of probation hold detention he served from August 23 to December 15, 1995. We disagree. First, as discussed above, the conspiracy theft sentence was properly imposed consecutive to the fraudulent writings sentences. Therefore, the twenty-five months Ferguson spent in prison were "in connection with" the fraudulent writing counts rather than the conspiracy theft count. Section 973.115(1), STATS. While the prebail, presentence and probation hold detentions could all fairly be said to be connected to the conspiracy theft count as well as the fraudulent writing counts, the supreme court has held that "where consecutive sentences are imposed, credit for time spent in custody can be awarded but once." *State v. Boettcher*, 144 Wis.2d 86, 89-90, 423 N.W.2d 533, 535 (1988). Ferguson, therefore, is not entitled to dual credit for time which was already calculated in his fraudulent writing sentences.

Ferguson cites language from his parole and probation revocation hearing that suggests that he may not have received credit for his probation hold

on the fraudulent writings sentences.³ The State assumes otherwise in its brief, and the record fails to resolve the issue. Because Ferguson does not provide us with the DOC records or documentation necessary to evaluate his claim, we do not consider it further. *State v. Michels*, 141 Wis.2d 81, 90 n.3, 414 N.W.2d 311, 314 (Ct. App. 1987) (it is the appellant’s responsibility to ensure that the appellate record is complete). If Ferguson never received credit for the parole/probation hold time on either sentence, he can petition the DOC for relief under § 973.155(5), STATS.

By the Court.—Judgment affirmed.

This opinion will not be published in the official reports. *See* RULE 809.23(1)(b)5, STATS.

³ Ferguson quotes the administrative law judge as having said that he was “entitled to recommended jail time credit on case no. 92-CF-666A (conspiracy) from August 23, 1995, until his return to court,” but the ALJ decision is not in the appellate record, and was apparently not provided to the trial court.

