

**COURT OF APPEALS
DECISION
DATED AND FILED**

APRIL 1, 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.

**Nos. 97-2890-CR
97-2891-CR**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ANDRES GODINA,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

ANDERSON, J. Andres Godina appeals from an amended judgment of conviction for resisting an officer, disorderly conduct, battery and bail jumping and an order denying his postconviction motion for relief. Godina argues that the trial court erred by using the amount of sentence credit to which Godina was entitled as a factor in determining the length of sentences to impose. Godina also argues that the trial court violated his due process rights when it based its

sentence on false assumptions about the probation agent's recommendation. We reject these contentions and affirm the judgment and the order.

In January 1996, Godina pled no contest to four separate misdemeanor counts: disorderly conduct, resisting an officer, simple battery and bail jumping in violation of §§ 946.41(1), 947.01, 940.19(1) and 946.49(1)(a), STATS.; five additional counts were dismissed and read in for sentencing.¹ The trial court withheld sentence, placed Godina on probation for two years and ordered him to serve ninety days in jail, less thirty-seven days' credit, with work release privileges.

After repeated probation violations, Godina's probation was revoked. Godina's agent recommended eighteen months' jail time. At the sentencing after revocation hearing, the assistant district attorney immediately brought up the issue of Godina's sentence credit: "The agent recommends 18 months. I would note that is the maximum that is left ... since he's already served 90 days and there is a maximum of 27 months that would have been pending." The assistant district attorney recommended that the court follow the agent's recommendation and "impose the consecutive time which totals 18 months in the county jail." In his sentencing argument, defense counsel recommended a nine-month sentence with Huber privileges for the resisting charge and maximum concurrent sentences on the remaining charges with 217 days' credit.

¹ Godina's no contest plea consolidated two separate complaints. In 1991, Walworth County case no. 91-CR-48, Godina was charged with two counts of disorderly conduct, one battery count, one count of negligent handling of materials and three bail-jumping charges for failing to appear three times; Godina disappeared for almost four years on the last nonappearance. While back in Wisconsin in December 1995, Godina was charged with resisting an officer and disorderly conduct stemming from a domestic dispute, Walworth County case no. 95-CM-614. Godina filed a separate appeal for each complaint. Because the cases were handled together in the trial court, this court consolidated the two appeals.

After Godina's allocution, the court noted that:

The maximum sentence that this court sees is 27 months plus 90 days....

I believe the agent in saying that the penalty is 18 months is taking into consideration the dead time credit. Eighteen months would leave—with a dead time credit, I'm not so certain it would be any sentence....

....

[B]ecause if I sentence [Godina] to 18 months as recommended by the agent and give him credit for 217 days of dead time ... there would be no sentence.

At this point, defense counsel objected: "It is improper ... for the court to consider jail credit first and to try to fashion a sentence that results in so many days in jail after he's got his credit ... [and] I would certainly ask that the court not impute to [the probation agent's] calculations, which she did not explicitly say she was making" The court responded that it would be impossible to calculate sentence credit and then forget it when sentencing.

The trial court then sentenced Godina to nine months in jail for resisting an officer, nine months consecutive for the battery, nine months consecutive for the bail jumping and ninety days consecutive for the disorderly conduct with 180 days' sentence credit based on Godina's character, the seriousness of the underlying charges and the need to protect the public. Godina filed a postconviction motion seeking a new sentence which was denied. Godina appeals.

On appeal, Godina argues that the trial court erred by (1) determining the amount of sentence credit to which he was entitled and then deciding the sentence with that credit in mind and (2) relying on erroneous assumptions about the probation agent's sentencing recommendation. We will address each contention separately.

First, we must determine whether the trial court erroneously exercised its discretion by imposing a sentence too closely linked to the sentence credit. *See State v. Thompson*, 146 Wis.2d 554, 564-65, 431 N.W.2d 716, 720 (Ct. App. 1988). We start with the presumption that the court acted reasonably and with the requirement that the defendant must show some unreasonable basis for the sentence. *See id.* at 565, 431 N.W.2d at 720.

Under § 973.155, STATS., the trial court must impose the sentence, enter a specific finding of the number of days of sentence credit, and then include that finding in the judgment. If the sentence achieves the purpose of § 973.155, strict compliance with its procedural requirements is unnecessary. *See State v. Walker*, 117 Wis.2d 579, 584, 345 N.W.2d 413, 416 (1984). Sentencing should not be a game where a court's harmless procedural error results in a windfall to the defendant. *See id.* at 585 n.3, 345 N.W.2d at 416.

Godina submits that the trial court first considered the amount of credit and then determined how much more time Godina should have to serve. Even though the court awarded Godina all of the credit to which he was entitled, Godina insists it did so only after taking that credit into consideration when determining the length of sentence to impose. Because it is unclear what sentence the court would have imposed had it not improperly considered the sentence credit, Godina requests resentencing.

We disagree. The trial court gave consideration to the recognized primary factors and other appropriate sentencing considerations. *See State v. Iglesias*, 185 Wis.2d 117, 128, 517 N.W.2d 175, 178 (1994). One of the recognized factors is the length of pretrial detention. *See id.* Here, the State specifically sought the maximum on all counts based on Godina's habitual

noncompliance and because after counting time served, it calculated the maximum sentence to be eighteen months. Godina acknowledged the seriousness of the resisting charge, but characterized the remaining charges as “nuisance behavior.” Godina also recognized that probation was not an option based upon his prior failure; however, he argued for a nine-month consecutive sentence with Huber privileges so that he could live with his father and accept a position at a Chrysler plant in Illinois.

The trial court began with an inquiry on the amount of sentence credit to which Godina was entitled. Not only had it been invited to consider this factor by the arguments before it, but it did so in the context of trying to determine the appropriate punishment for Godina. The court concluded that it could not “place [Godina] on probation again, a fine is inappropriate. [Godina] has demonstrated [a] complete inability to function in society without a great deal of supervision.” As explained at the postconviction motion hearing, the court believed the maximum sentence to be appropriate “considering the character of the offender, the seriousness of the underlining charges, and the right to protect the public.”

Walker precludes the trial court from imposing a harsher sentence to effectively deprive a defendant of sentence credit to which he or she is entitled. *See Walker*, 117 Wis.2d at 586, 345 N.W.2d at 416. Godina concedes that the sentence was not structured so as to deny Godina his sentence credit—he takes issue with the order in which sentence credit and the length of sentence were discussed. However, there is nothing in this record to persuade us that a routine inquiry into the amount of sentence credit prior to the imposition of sentence was improper, strictly because the inquiry preceded the imposition of sentence. Moreover, Godina has not shown any unreasonable basis for the sentence. Despite

the unartful manner in which the trial court enunciated its sentence, we cannot conclude that the sentence was an erroneous exercise of discretion.

Next, Godina argues that the trial court violated his right to due process when it based its sentencing decision on false assumptions about the probation agent's recommendation. To establish a due process violation in the sentencing process, a defendant has the burden of proving by clear and convincing evidence both the inaccuracy of information relied upon by the sentencing court and that the reliance was prejudicial. *See State v. Littrup*, 164 Wis.2d 120, 132, 473 N.W.2d 164, 168 (Ct. App. 1991). Whether a defendant has met his or her burden of proof is also a question of law which is reviewed de novo. *See id.* at 126, 473 N.W.2d at 166; *State v. Windom*, 169 Wis.2d 341, 349, 485 N.W.2d 832, 835 (Ct. App. 1992).

The bases for this claim of error are the trial court's comments that the probation agent recommended eighteen months in addition to time already served and that an eighteen-month sentence with credit for time served would not be a sentence. We conclude that Godina has failed to establish that the trial court relied on inaccurate information at sentencing. Although the trial court misinterpreted the probation agent's recommendation, the record reveals that at the sentencing the trial court did not state that it was considering the recommendation. Before imposing the maximum sentence, the trial court commented on Godina's long history of behavioral problems; his inability to abide by the rules of society or probation; the attempts at intervention, including probation, jail, alcohol and drug treatment and sex offender treatment, all to no avail; and his complete inability to function in society without a great deal of supervision. We cannot presume that the trial court considered the agent's recommendation where there was no such statement in the record. *Cf. Brozovich*

v. State, 69 Wis.2d 653, 660-61, 230 N.W.2d 639, 644 (1975). However, based upon the court's comments relating to the serious nature of the crimes and the fact that previous interventions by the system had not deterred Godina from further criminality, we may presume the court intended Godina to be subject to further incarceration. *Cf. Walker*, 117 Wis.2d at 585, 345 N.W.2d at 416. We conclude that Godina's claim fails. This court affirms the sentencing of the trial court.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

