

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 4, 2017

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 Nos. 2016AP1088-CR
2016AP1089-CR
2016AP1090-CR
2016AP1091-CR**

**Cir. Ct. Nos. 2014CF97
2014CF109
2014CF137
2014CF139**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JUSTIN A. HILL,

DEFENDANT-APPELLANT.

APPEALS from judgments and an order of the circuit court for Jefferson County: JENNIFER L. WESTON, Judge. *Affirmed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. Justin Hill seeks resentencing because, as he argues, the circuit court erroneously exercised its discretion in determining the sentences in these Jefferson County cases by improperly relying on the amount of

sentence credit to which Hill was entitled. More specifically, Hill argues that case law allows the consideration of sentence credit due as a reason to impose a more lengthy sentence only for a rehabilitative purpose, and that the circuit court acted contrary to that case law because it considered the sentence credit due solely with a “punitive purpose” in mind. Hill’s argument fails because he does not demonstrate that the court relied on the amount of sentence credit due at all.¹ Accordingly, we affirm.

BACKGROUND

¶2 In March and April 2014, Hill was charged in separate cases with several drug-related crimes committed in Jefferson County. The State and Hill entered into a plea agreement to resolve the cases, which was offered to the court at a joint plea and sentencing hearing in November 2014. At that hearing, Hill pled no contest to misdemeanor battery, disorderly conduct, felony bail jumping, possession of an illegally obtained prescription, and possession of a narcotic drug. The circuit court accepted Hill’s pleas, withheld sentencing, and ordered that Hill serve concurrent terms of probation of between one and three years.

¶3 Hill was subsequently charged with new drug-related crimes committed in Dane County, and his probation in the Jefferson County cases was revoked. In November 2015, the Jefferson County circuit court held a sentencing after revocation hearing in the Jefferson County cases. The court ordered that Hill

¹ Because our conclusion that the circuit court did not rely on sentence credit in determining Hill’s sentences is dispositive, we do not reach Hill’s argument involving sentence credit as an improper factor. See *Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (if a decision on one issue disposes of an appeal, we will not generally decide the other issues raised).

serve two years of initial confinement and three years of extended supervision on the felony bail jumping charge, and lesser terms on each of the other four charges, to be served concurrent to the sentence on the felony bail jumping charge. The court also granted Hill 201 days of sentence credit.

¶4 In December 2015, Hill was sentenced in the Dane County case, on the charges that formed the basis for the revocation of his probation in the Jefferson County cases, to four years of initial confinement and two years and five months of extended supervision.

¶5 Hill filed a postconviction motion for sentence modification in the Jefferson County circuit court. In that motion he argued that the sentence Hill subsequently received in the Dane County case was a new factor warranting reduction of Hill's sentence on the Jefferson County felony charge from two years to one year of incarceration. Hill argued that the Jefferson County circuit court had imposed two years of initial confinement on that felony charge, rather than one year in jail as recommended by the Department of Corrections, to ensure that Hill was in prison long enough to receive institutional substance abuse treatment, but the two-year sentence was no longer necessary for that purpose in light of the Dane County sentence.

¶6 The Jefferson County circuit court issued a written decision and order denying Hill's motion for sentence modification. The court explained that its reasons for denying the motion included that: (1) it was "well aware" of the pending sentencing in Dane County at the time of the sentencing after revocation hearing in the Jefferson County cases, but "made a specific point of sentencing only on the cases before it"; and (2) while its primary objective at the initial

sentencing in ordering probation had been rehabilitation, its clearly stated primary sentencing objective after revocation of probation was protection of the Jefferson County community, based in large part on the seriousness of the underlying Jefferson County offenses and of the conduct resulting in the revocation.

¶7 We relate additional facts, including the details of the post-revocation sentencing hearing, in the discussion that follows.

DISCUSSION

¶8 On appeal, Hill does not challenge the circuit court's denial of his postconviction motion seeking resentencing on the bail jumping felony charge based on a *new* factor. Rather Hill argues that the circuit court's rationale for denying his postconviction motion reveals that the court had relied on an *improper* factor in determining all of the sentences after revocation. More specifically, Hill argues that the circuit court erroneously exercised its discretion in determining the sentences in these Jefferson County cases by improperly relying on the amount of sentence credit to which Hill was entitled for purposes other than rehabilitation.

¶9 We first review the law governing Hill's improper sentencing factor argument, then lay out the relevant facts, and finally explain why we conclude that Hill's argument fails because he does not demonstrate that the circuit court relied on the amount of sentence credit due at all.

I. Consideration of Sentence Credit in Determining Sentences

¶10 This court will uphold a sentence imposed by the sentencing court unless the sentence reflects an erroneous exercise of discretion. *State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197. In exercising its discretion,

the sentencing court must specify the objectives of the sentence on the record. *Id.*, ¶40. The principle objectives include, but are not limited to, “protection of the community, punishment of the defendant, rehabilitation of the defendant, and deterrence to others.” *Id.* The sentencing court “should indicate the general objectives of greatest importance and explain how, under the facts of the particular case, the sentence selected advances those objectives.” *State v. Klubertanz*, 2006 WI App 71, ¶17, 291 Wis. 2d 751, 713 N.W.2d 116 (citing *Gallion*, 270 Wis. 2d 535, ¶¶41-42).

¶11 “Besides the objectives of the sentence, the sentencing court must also identify the factors that the court considered in arriving at the sentence and must indicate how those factors fit the objectives and influenced the sentencing decision.” *Klubertanz*, 291 Wis. 2d 751, ¶17 (citing *Gallion*, 270 Wis. 2d 535, ¶43). The primary factors that the court must consider are the gravity of the offense, the character of the defendant, and the need to protect the public. *Klubertanz*, 291 Wis. 2d 751, ¶18 (citing *Harris v. State*, 75 Wis. 2d 513, 519, 250 N.W.2d 7 (1977) and *McCleary v. State*, 49 Wis. 2d 263, 274-76, 182 N.W.2d 512 (1971)).

¶12 The sentencing court may also consider other relevant factors, including, but not limited to: the defendant’s record; the defendant’s history of undesirable behavior; the defendant’s personality, character, and social traits; the presentence investigation report; the aggravated nature of the crime; the degree of the defendant’s culpability; the defendant’s demeanor in court; the defendant’s age, educational background, and employment record; the defendant’s remorse, repentance, and cooperativeness; the defendant’s need for close rehabilitative control; the rights of the public; and the length of pretrial detention. *Gallion*, 270

Wis. 2d 535, ¶43 n.11. The sentencing court need discuss only the factors relevant to the particular case. *Id.* The weight to be given to each factor is within the sentencing court’s discretion. *Harris*, 75 Wis. 2d at 520.

¶13 “When discretion is exercised on the basis of clearly irrelevant or improper factors, there is an erroneous exercise of discretion.” *Gallion*, 270 Wis. 2d 535, ¶17. The defendant has the burden of showing that the sentence was based on a clearly improper factor. *Id.*, ¶72.

¶14 The improper factor that Hill argues the circuit court relied on here was the amount of sentence credit to which Hill was entitled. A sentencing court may consider “the length of pretrial detention” as a factor in determining the sentence, *Gallion*, 270 Wis. 2d 535, ¶43 n.11, but it may not “do so with the purpose of enlarging the sentence to deprive the defendant of his or her right to receive sentence credit.” *State v. Armstrong*, 2014 WI App 59, ¶¶16-17, 30-32, 354 Wis. 2d 111, 847 N.W.2d 860 (holding that the sentencing court properly exercised its discretion in imposing a sentence of four years of initial confinement where the defendant had a large amount of sentence credit to ensure that the defendant served “some confinement time” that would not be longer than it needed to be in order to serve the objectives identified by the court). *See also Struzik v. State*, 90 Wis. 2d 357, 367, 279 N.W.2d 922 (1979) (holding that the sentencing court improperly “added to the appropriate sentence the time already served, so that the sentence after the application of the credit would still constitute the sentence originally determined,” where the court imposed a sentence of five years and fourteen days after determining that the defendant was entitled to fourteen days of sentence credit); *State v. Coles*, 208 Wis. 2d 328, 336, 559 N.W.2d 599 (Ct. App. 1997) (clarifying that “the sentencing tactic which *Struzik* condemns is

the grant of the required sentence credit in one judicial breath and the enhancement of the sentence by the same amount in the next”); *State v. Fenz*, 2002 WI App 244, ¶10, 258 Wis. 2d 281, 653 N.W.2d 280 (affirming the sentence imposed after considering sentence credit to ensure that the defendant would be incarcerated for a sufficient time to complete the institutional sex offender treatment program, because the court “articulated a specific time-related incarceration goal [which] required the court to consider the presentence credit due” to the defendant).

II. Hill’s Sentencing Following Revocation of Probation

¶15 As stated, after Hill’s probation was revoked, he returned to the Jefferson County circuit court for sentencing on five drug-related offenses. The Department of Corrections recommended twelve months of jail on all five offenses, all to run concurrently. The prosecutor, after noting that Hill was entitled to 201 days of sentence credit, urged the court to reject that recommendation because “[i]t’s not going to address any treatment needs.” The prosecutor proposed a total sentence of two years’ initial confinement and three years’ extended supervision, based on concurrent sentences on all five offenses.

¶16 The prosecutor reviewed the conduct underlying the five offenses, as well as the new offenses Hill committed in Waukesha and Dane Counties while he was on probation for the Jefferson County cases. The new offenses included the Dane County offense of armed robbery that resulted in the revocation of his Jefferson County probation. The prosecutor also reviewed Hill’s history of assaultive behavior and substance abuse, and his series of unsuccessful treatment attempts. The prosecutor told the Jefferson County circuit court that she based her

recommendation on “the nature of the violations that resulted in revocation and the attempts at treatment in the community,” with the goal of placing Hill “in a confined setting where hopefully he can get treatment that he hasn’t gotten out in the community.”

¶17 The circuit court determined Hill’s sentence as follows:

The initial sentence objective was very clearly rehabilitation for Mr. Hill and that objective has failed. And all one needs to do is read the “Adjustment Under Supervision” paragraph on Page 2 of the revocation summary to see how terribly that objective failed.

I don’t intend to sentence Mr. Hill for the things that he’s done in other counties. That’s not my job. I’ve got the cases in front of me. The first is a battery and a DC conviction, but the underlying offense is violent. You have a 17-year-old brother who frankly is just trying to save your [*i.e.*, Hill’s] life and you lash out at him and hit him in the face 10 or 15 times and he doesn’t do anything in response. He’s a good brother. That’s what he’s trying to do. And he gets beaten up pretty badly.

Then the other three cases—I concede that those flow very quickly after the battery and disorderly conduct. Everything is drug-related. But despite all the counseling opportunities that have been presented to you, you just can’t get to them. You ... did the Herrington one

....

... And then they got you into NewStart, but couldn’t really get that going, I don’t think, because of an arrest. And everything just went downhill from there.

The agent notes that you need treatment and then the agent recommends jail time. And I ... can’t get you treatment in jail.... It’s minimal treatment that you’re going to get in jail.

And the most concerning component now is this violence. The incident at the Luke House where you grabbed this woman’s purse. That’s violent behavior. And then pulled

the knife on the other gentleman who was trying to stop you.

At this point in time, my sentencing objective is truly protection of the public. It's nothing beyond that. I hope rehabilitation comes with it, but I've got an obligation to the members of my community and Dane County has an obligation to the members of its community and Waukesha to the members of its community. And you are dangerous. You have demonstrated that your need for heroin is so significant that you will go to every extreme to get money to get heroin so you can use it....

....

And if you continue to violate the law while we're trying to give you treatment, we run out of ideas. And your violations of the law are well beyond other people's violations of the law. You're not breaking into someone's car and taking their CDs and selling them so you can get some money to buy heroin. You're grabbing a woman's purse right out of her arms. She's standing there and you grab her purse and ...you've got a knife. Just dangerous.

... [T]here are certain times when prison is necessary and appropriate. And at this point, it really is a means of protecting the public and also possibly providing you with some well-needed, focused treatment that you haven't been able to get while you're on probation.

The gravity of the original offense, the battery to your brother, was severe. The gravity of the other offenses, not so, but I don't have much information. I noted that in one of the criminal complaints, you did admit to using heroin multiple times a day and getting rides to Milwaukee daily to buy heroin, so I have to believe that there may have been other things going on because I don't know how you got the money to get to Milwaukee to buy your heroin on a daily basis.... You need some serious help.

You've always been pleasant in court. I know your mother and your brother even indicated after the battery that they didn't want you to spend any time behind bars and ... I took that into consideration at that time. They're not here today. And I think what they want right now is for you to stay alive and, I think, really probably even beyond that, they want other people to stay alive and not have you responsible for their deaths, and I respect that.

The sentence I'm going to give you is not particularly long. I think that [the prosecutor's] recommendation is really quite a well-thought-out plan here, and that's what I'm going to adopt.

¶18 The circuit court then imposed a sentence of two years' initial confinement and three years' extended supervision on the felony bail jumping offense, and concurrent sentences of lesser duration on the other four offenses. Finally, the court determined that Hill was entitled to 201 days of sentence credit.

III. The Validity of Hill's Sentence

¶19 Hill bases his argument that the circuit court relied on sentence credit due in determining his sentences on two sets of statements at the sentencing hearing: (1) the prosecutor's reference, after recounting Hill's history of misconduct while on probation and 201 days of sentence credit, to the twelve months' jail sentence recommended by Department of Corrections as a "nonsentence" that would not address Hill's treatment needs, and the prosecutor's one additional reference to Hill's 201 days of sentence credit at the end of her remarks; and (2) the court's reference, at the conclusion of its remarks, to the sentencing package recommended by the prosecutor as "really quite a well-thought-out plan here, and that's what I'm going to adopt." However, Hill ignores the court's extensive remarks in between those two sets of statements.

¶20 The circuit court's sentencing remarks make it clear that the court did not rely on the amount of sentence credit due Hill in making its sentencing determination. Rather, the court's total sentence of two years' initial confinement and three years' extended supervision was based on the court's primary objective to protect the public, considering the gravity of Hill's offenses in the cases before the court; his increasingly violent and frequent conduct, driven by his addiction to

heroin, which made him a danger to the Jefferson County community; his failed treatment efforts while on probation; his need to be confined long enough for him “to stay alive and ... [for] other people to stay alive”; and his potential for rehabilitation thereafter. While the prosecutor may have stressed the need for treatment in a confined setting as a basis for her sentence recommendation, the court expressly rejected that focus, stating, “At this point in time, my sentencing objective is truly protection of the public. It’s nothing beyond that. I hope rehabilitation comes with it, but I’ve got an obligation to the members of my community and Dane County has an obligation to the members of its community and Waukesha to the members of its community. And you are dangerous.” The sentence of two years of initial confinement imposed on Hill for the bail jumping felony charge was consistent with the court’s articulation of its primary sentencing objective.

¶21 We do not read the circuit court’s reference to the prosecutor’s “well-thought-out plan” as narrowly as does Hill. From the court’s extensive remarks leading up to that reference, it is clear that the court viewed the “plan” as a reasonable package of individual sentences on the five offenses, which would result in the terms of confinement and extended supervision that the court deemed necessary to fulfill its primary objective, protection of the community, based on Hill’s increasingly dangerous conduct. Hill’s argument that the court, nevertheless, relied on the amount of sentence credit due Hill in adopting that plan, appears to be based on Hill’s own reliance on the prosecutor’s focus on the need for rehabilitation, a focus that, as explained above, the circuit court did not adopt.

¶22 Finally, the circuit court made no reference, explicit or implicit, to the amount of sentence credit due Hill in her sentencing remarks. Only after rendering the sentences on the five offenses did the court then make a specific finding of the number of days for which sentence credit was to be granted.

¶23 In sum, Hill fails to demonstrate that the circuit court relied on the amount of sentence credit to which he was entitled in determining the sentences that were warranted by the court's primary objective and consideration of the relevant factors.

CONCLUSION

¶24 For the reasons stated above, we affirm.

By the Court.—Judgments and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2015-16). This opinion may not be cited under RULE 809.23(3)(b).

