**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 5, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP2009-CR** **Cir. Ct. No. 2014CM2949**

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

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JAVA I. ORR,**

**DEFENDANT -APPELLANT.**

APPEAL from a judgment and order of the circuit court for Milwaukee County: REBECCA F. DALLET and JANET C. PROTASIEWICZ, Judges. *Affirmed*.

¶1 DUGAN, J.[1] Java I. Orr appeals the judgment of conviction entered after he pled guilty to two counts of battery and one count of disorderly

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

conduct. He also appeals the order denying his postconviction motion.[2]

¶2 At sentencing in this case, the trial court gave Orr accrued sentence credit, although the trial court was aware that Orr faced revocation proceedings in two cases (the "revocation cases"). The Wisconsin Department of Corrections (DOC) subsequently informed the trial court that it applied most of that sentence credit in Orr's revocation cases. As a result, the postconviction court reduced Orr's sentence credit to eliminate the duplication. By a postconviction motion, Orr raised various issues pertaining to the sentence credit reduction. After holding an evidentiary hearing, the motion was denied.

¶3 On appeal, Orr contends that: (1) he should have been permitted to withdraw his guilty pleas on the ground that trial counsel provided incorrect information regarding sentence credit that induced Orr to plead guilty and thereby rendered ineffective assistance; (2) the amount of sentencing credit applied in the revocation cases is a new factor justifying modification of his sentence; and (3) he was sentenced based on inaccurate information regarding the amount of sentence credit and should have been resentenced. We disagree and, therefore, affirm the judgment and the denial of Orr's postconviction motion.

## BACKGROUND

¶4 The court begins by providing some background facts. Additional facts are provided in the discussion portion of this opinion.

[2] The Honorable Rebecca Dallet presided over the criminal case. As the successor to Judge Dallet's misdemeanor calendar, the Honorable Janet Protasiewicz entered the amended judgment and presided over the postconviction motion proceedings including entering the order denying the postconviction motion. For clarity, the court refers to Judge Dallet as the trial court and Judge Protasiewicz as the postconviction court.

## The Charges

¶5 In a July 28, 2014 complaint, Orr was charged in Milwaukee County case number 2014CM2949 (the "2014 case") with battery (count one) and disorderly conduct (count two). He was also charged in a complaint dated January 26, 2015, in Milwaukee County case number 2015CF431 (the "2015 case") with intimidation of a witness in furtherance of a conspiracy (count one) and intimidation of a witness (counts two and three).

## Trial Proceedings

¶6 The morning of the scheduled jury trial of the 2014 and 2015 cases, the State advised the trial court that it intended to proceed in the 2014 case on both the battery (count one) and disorderly conduct (count two) charges and on the 2015 case only proceed on the intimidation of a witness (count two) charge.[3] The parties also advised the trial court that the State had offered to resolve the case if Orr pled guilty to one count of disorderly conduct, a class B misdemeanor. The trial court asked whether that offer would result in a time-served disposition. Trial counsel explained that "[Orr] faces revocation for about three and a half years, two and a half with the time he spent in. So that's what the issue is." The jury was then selected, and after opening statements, the jury was excused until the next morning.

[3] Count three in the 2015 case had previously been dismissed.

**Plea and Sentencing**

¶7 The following morning, prior to the jury's return to the courtroom, the State advised the trial court that Orr had been calling the victim and witnesses from the jail. The State had located sixty-three calls that Orr made from the jail to the victim and others, including his daughters. Trial counsel stated that he had just learned about the calls. The trial court recessed to give the parties time to talk.

¶8 After the recess, the parties submitted a plea questionnaire to resolve the case and the trial court returned on the record. The State summarized the negotiations as follows:

> In [the 2014 case], [the State] would move the [c]ourt to amend the [c]riminal [c]omplaint, adding one additional count for misdemeanor battery …. [Orr] will enter guilty pleas to all of the three charged offenses as amended in [the 2014 case]. The sole count remaining in [the 2015 case] will be dismissed.
>
> As discussed earlier on the record, there are a number of jail phone calls that we learned of late yesterday afternoon, and [the State had] agreed to treat those calls as uncharged read-ins.
>
> . . . .
>
> The State at sentencing will also recommend House of Correction, length to the [c]ourt.

¶9 The trial court then summarized the plea negotiations and asked Orr if that was his understanding:

> That is your understanding, [Orr], that you're going to enter pleas of guilty to [c]ounts [one], [two], and [three] as amended in [the 2014 case]. The [2015] case is being dismissed, that the State is agreeing not to charge calls made by you from the jail from July 19, 2014, to July 14, 2015, and that the State is recommending House of Correction, time up to the [c]ourt, with the defense free to argue.

Orr responded saying that was his understanding. The trial court took Orr's guilty pleas based upon the negotiations and continued to sentencing.

¶10 During sentencing, trial counsel told the trial court that Orr accepted responsibility in light of the new information that was discovered after the trial commenced. Trial counsel also advised the trial court that Orr had 352 days of sentence credit for the time he had been held in custody for this case. Additionally, trial counsel told the trial court that "there's a high probability now that [Orr's] going to get revoked. He has three years and six months potentially that he could get revoked for." Further, trial counsel stated that Orr's "number one goal" was the welfare of his daughters and that "[o]ne of the very big reasons that we did not proceed with the trial [was] that we did not want to have … to go through putting them through this."

¶11 Trial counsel concluded his sentencing arguments by stating that Orr had spent a lot of time in custody for this case "and the more serious effects of this are going to be what comes from the revocation, in my opinion."

¶12 In his sentencing remarks, Orr stated that "[a]s far as *my number one reason for not even going through with this process is* because I didn't want to put *my children*—my children mean everything to me[.]" (Emphasis added).

¶13 During the sentencing hearing, the trial court wanted to clarify the status and effect of the revocation Orr was facing. The trial court confirmed on the record with trial counsel that if Orr was revoked in the revocation cases, Orr was facing three and a half years, but he had credit for one.

¶14 Then, the trial court wanted to hear from Orr's DOC agent about the status and effect of the revocation Orr was facing. The agent explained that "[s]o

for the felony case from Washington County, [Orr's] looking at three years, six months, and six days; and on the 2012 CM case from Milwaukee County, it's three months, seven days." Addressing the issue of sentence credit the trial court then asked, "[a]nd if I give him credit for this, then it would be separate time? Or do they run those concurrent over—the revocations?" The agent responded, "I think it depends on if you say it's concurrent or consecutive."

¶15 After stating its reasons for sentencing on the record, the trial court sentenced Orr as follows:

> [O]n [c]ount [one], I'm going to impose nine months in the House of Correction. I'll give you credit for nine months. On [c]ount [two], I'm imposing [ninety] days. I'll give you credit for [ninety] days. And for [c]ount [three], I'm imposing six months; and I'll give you whatever—I don't think there's anything left.

The trial court then adjusted the sentence stating:

> All right. So 270 days credit on [c]ount [one]. That leaves [eighty-two] days—right—on the rest? So [eighty-two] days towards the [ninety] on [c]ount [two] and six months on [c]ount [three]. *They're all consecutive*.

(Emphasis added). The judgment of conviction was entered on July 15, 2015.

**Revocation**

¶16 Orr was subsequently revoked in the revocation cases and DOC applied 348 of the 352 days of sentence credit toward the revocation cases.[4]

¶17 In March 2016, the DOC sent a letter to the trial court explaining that because the sentence in this case was made consecutive to the sentences in the

[4] Only 348 days of the 352 days sentence credit constituted duplicate credit.

revocation cases, granting credit in this case would duplicate the credit granted in the revocation cases which is not permitted pursuant to ***State v. Boettcher***, 144 Wis. 2d 86, 423 N.W.2d 533 (1988).

## Postconviction Proceedings

¶18 In response to DOC's letter, the postconviction court issued an order amending the judgment of conviction by reducing the sentence credit in this case to four days on count one and zero days on counts two and three.

¶19 Orr filed a postconviction motion. After holding an evidentiary hearing at which trial counsel and Orr testified, the postconviction court rendered an oral decision denying Orr's postconviction motion. This appeal followed.

## DISCUSSION

### I. Orr has not Established a Basis to Withdraw his Plea: Trial Counsel did not give Orr Incorrect Information that Induced Orr to Enter his Pleas.

#### A. Standards for Plea Withdrawal and for Ineffective Assistance of Counsel Claims.

¶20 In ***State v. Shata***, the Supreme Court summarized the standards to be applied for a plea withdrawal:

> In general a circuit court should freely allow a defendant to withdraw his plea *prior to sentencing* for any fair and just reason, unless the prosecution [would] be substantially prejudiced. In contrast, the general rule [is] that a defendant seeking to withdraw a guilty or no contest plea *after sentencing* must prove manifest injustice by clear and convincing evidence.

***Id.***, 2015 WI 74, ¶29, 364 Wis. 2d 63, 868 N.W.2d 93 (emphasis in original; citations and internal quotes omitted). "Ineffective assistance of counsel is one type of manifest injustice." ***Id.*** (citation omitted).

¶21 "Both the United States Constitution and the Wisconsin Constitution guarantee criminal defendants the right to counsel." ***State v. Carter***, 2010 WI 40, ¶20, 324 Wis. 2d 640, 782 N.W.2d 695 (citing U.S. CONST. amend. VI; WIS. CONST. art. I, §7). "The United States Supreme Court has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" ***Carter***, 324 Wis. 2d 640, ¶20 (quoting ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)) (one set of quotation marks omitted).

¶22 "Whether a convicted defendant received ineffective assistance of counsel is a two-part inquiry. First, the defendant must prove that counsel's performance was deficient. Second, if counsel's performance was deficient, the defendant must prove that the deficiency prejudiced the defense." ***Carter***, 324 Wis. 2d 640, ¶21 (internal citations omitted). To succeed on a claim of ineffective assistance of counsel, a defendant must prove both deficient performance and prejudice. ***Id.*** If a defendant fails to prove deficient performance, a reviewing court need not consider whether the defendant was prejudiced. ***Id.***, ¶36; ***State v. Franklin***, 2001 WI 104, ¶13, 245 Wis. 2d 582, 629 N.W.2d 289.

¶23 In ***Shata***, the court explained that:

> A claim of ineffective assistance of counsel is a mixed question of fact and law. We will uphold the circuit court's findings of fact unless they are clearly erroneous. Findings of fact include the circumstances of the case and the counsel's conduct and strategy. Moreover, this court will not exclude the circuit court's articulated assessments of credibility and demeanor, unless they are clearly erroneous. However, the ultimate determination of whether counsel's

> assistance was ineffective is a question of law, which we review *de novo*.

***Id.***, 364 Wis. 2d 63, ¶31 (citations and internal quotes omitted; italics added).

### B. Postconviction Motion Evidentiary Hearing and Decision.

¶24 At the postconviction hearing, trial counsel testified that he and Orr discussed the fact that he had 352 days of sentence credit. Trial counsel explained why he submitted the sentence credit in this case:

> The reason that I submitted the form for 352 days was that, at the time he also had a pending revocation. That revocation hearing was set for, I believe, the month after the jury trial date, and he had not yet been revoked. Therefore, the credit that was applied for and granted by the [c]ourt would go towards this case *in the event that* [*Orr*] *was not revoked.*
>
> *He was made aware that if he were to be revoked … I made it clear … that he would not be given du*[*a*]*l credit. He would not receive credit for the 352 days both for the pending case and for the revocation. He would receive the 352 days credit towards one of them.*
>
> At the time he had not yet been revoked. Therefore, we applied for the 352 days credit towards this case in the event that [Orr] would not have been revoked, those 352 days would apply to this case.

(Emphasis added). Trial counsel also stated that he did not tell Orr that Orr had a choice of which case the credit would be applied. He specifically told Orr that the sentence credit would be applied to this case, "[*u*]*nless he was revoked*." (Emphasis added).

¶25 In response to the State's question, "[s]o it's your testimony that you absolutely told [Orr] he had a revocation pending and that, depending upon outcome of that revocation, he would either receive credit on this case or on that case?," trial counsel answered, "[y]es." Trial counsel also testified that Orr was

not adamant about receiving the sentence credit in this case although Orr "was adamant about getting his 352 days credit, which he still has received."

¶26 In response to postconviction counsel's question, trial counsel explained that the sentence credit had no effect on Orr's decision to enter pleas:

> *But the reason why* [*Orr*] *decided to change his plea was because of* [*sixty-three*] *potential counts against him, not because of the sentence credit.*
>
> In the motion filed, it states that one of his main reasons for changing his plea was because he had the credit. That is incorrect. That is never one of the reasons he mentioned as far as changing his plea. In the sentence transcript, he tells [the trial court] that his main reason for changing his plea was that he did not want his daughters to testify at trial.
>
> Then in my discussions with him … we began a trial … He wanted to proceed to trial; we did. We selected a jury, we had opening statements. At that time he still had one day less of credit time, 351 days. That in no way altered his opinion about changing his plea and going to trial.
>
> *What altered his opinion and had him enter the plea was that the witnesses showed up in court, that they said that he had been calling them on a regular basis for the past week.* [*The State*] *approached me on that second day of trial and notified me of these calls and stated that* [*the State*] *would investigate them and would, at least on that date, add* [*ten counts*] *if we were to remain in trial posture.*

(Emphasis added). Trial counsel emphasized that the reason Orr changed his mind and decided to enter his pleas was because of the sixty-three potential counts against him and "because he didn't want his daughters to testify." Moreover, trial counsel stated that "[i]n the motion, [Orr's] main reason was the credit. *I think that's* [*Orr*] *trying to talk his way out of something again*. The reason he told me, and I think it's very clear, is that he didn't want to face, potentially, [sixty-three] more counts. That's the main reason." (Emphasis added).

¶27 Orr also testified at the postconviction hearing. Orr stated that trial counsel told him that he would get his sentence credit in this case. He explained that there was no reason to discuss the sentence credit only applying in this case, if he was not revoked, because trial counsel had already told him that if he was convicted in this case he would be revoked in the revocation cases. Orr testified:

> I was adamant about going to trial, because any conviction would have ultimately resulted in my revocation … I knew and [trial counsel] knew that a judgment of conviction was going to result in my revocation … So I did ultimately take the plea, thinking that I was going to receive my sentence credit on this case.

¶28 On cross-examination, Orr admitted that his primary reason for entering his pleas was that he did not want to put his children through the process of a trial, but added, "not my only reason." Although Orr admitted that he never told the trial court that a big reason for entering his pleas was that he would get the sentence credit applied to this case, he stated he did not need to tell the trial court because trial counsel had told him that he would get the sentence credit in this case.

¶29 Orr also stated that he was aware that the State would proceed with additional charges if he proceeded to trial, but he denied that he was told there were sixty-three phone calls involved. However, when the State read from the transcript from the day the pleas were entered, Orr admitted knowing that there were sixty-three calls.

¶30 After trial counsel and Orr had testified, the postconviction court denied Orr's postconviction motion in an oral decision. The postconviction court stated that it found that trial counsel's testimony was very credible. It found that trial counsel told Orr that he was likely going to be revoked and with respect to the

sentence credit that trial counsel told Orr, "and if you are, [the sentence credit is] going to go to the other case." The postconviction court went on to find:

> And [trial counsel] states that he made clear you were not getting du[a]l credit. You are getting credit on either the revocation or you are getting credit on this case that you plead guilty to. He told you there's no choice in regard to this … Credit will only count—credit will only count if these [sentences] are concurrent.

¶31 The postconviction court found that Orr's testimony that he was adamant about going to trial was credible. However, it found that Orr's testimony about the sentence credit was not credible: "But the part I don't find credible, under the totality of the circumstances, is your testimony that you were not aware, that you were not going to get the credit for 352 days." Additionally, the postconviction court noted that once the information regarding the sixty-three phone calls was discovered Orr had "serious exposure problems." The postconviction court stated that even if the State only issued ten misdemeanor intimidation of a witness charges that Orr would be facing ninety more months. The postconviction court found that it only made sense for Orr to take the plea deal that was being offered.

¶32 Lastly, the postconviction court found that the trial court was aware when it imposed the sentences, that by making them consecutive, Orr would not get credit on both this case and the revocation cases. Orr would only get sentence credit in this case, if the trial court made the sentences in this case concurrent with the revocation cases.

### C. Trial Counsel Was Not Ineffective Because Trial Counsel Provided Orr Correct Information.

¶33 While asserting that he should have been allowed to withdraw his guilty plea because trial counsel provided inaccurate information, Orr correctly

states that the postconviction court was presented with diametrically opposed versions of whether trial counsel fully explained the issue of sentence credit to Orr and whether Orr understood the issue. However, the postconviction court heard the testimony of both trial counsel and Orr. The postconviction court made credibility determinations and specifically found that trial counsel's testimony was very credible and Orr's testimony about sentence credit in this case was not credible. It found that trial counsel had informed Orr that he was likely going to be revoked and that if he was revoked, the sentence credit would go to the revocation cases. This finding is supported by trial counsel's unequivocal testimony that because of the pending revocation proceedings were not resolved, he submitted the sentence credit form for 352 days "*in the event that* [*Orr*] *was not revoked*" and that he informed Orr that "if he were to be revoked … *he would* not be given du[a]l credit. He would not receive credit for the 352 days both for *the pending case and for the revocation.*" (Emphasis added). Trial counsel specifically told Orr that the sentence credit would be applied to this case "*unless he was revoked.*" (Emphasis added).

¶34 Although Orr acknowledges that this court will uphold the postconviction court's findings of fact so long as they are not clearly erroneous and that credibility determinations are within the exclusive province of the trier of fact, he argues that the postconviction court's findings are against the great weight and clear preponderance of the evidence. However, Orr merely quotes his testimony that he took the plea believing that he was going to receive the sentence credit in this case. Other than simply quoting this conclusory statement, Orr does not develop the argument as to why the postconviction court's credibility determination regarding this portion of his testimony is clearly erroneous. *See* ***Shata***, 364 Wis. 2d 63, ¶31. Orr has done no more than to state the proposition

without any elaboration. He has not developed or presented an argument telling us why we should overturn the trial court's specific credibility determination as to this portion of Orr's testimony. We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶35 The postconviction court's findings are not contrary to the great weight and clear preponderance of the evidence. Therefore, we uphold the postconviction court's findings that Orr knew at the time of his plea and sentencing that he would only get credit in this case if the trial court made the sentences in this case concurrent with the sentences in the revocation cases. Trial counsel gave Orr correct information about the sentence credit and was, therefore, not ineffective. Consequently, we conclude that Orr has failed to prove manifest injustice by clear and convincing evidence.

## II. The Amount of Sentence Credit Applied to the Revocation Cases is not a New Factor.

¶36 Deciding a motion for sentence modification based on a new factor involves a two-step inquiry. ***State v. Harbor***, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. First, a defendant must demonstrate by clear and convincing evidence the existence of a new factor. ***Id.*** Whether a new factor exists is a question of law subject to *de novo* review. *See* ***id.*** A new factor is "a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial [court] at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties." ***Rosado v. State***, 70 Wis. 2d 280, 288, 234 N.W.2d 69 (1975). If the defendant establishes a new factor, the second step requires the court to exercise its discretion to determine whether the new factor justifies modification of the sentence. ***Harbor***, 333 Wis. 2d 53, ¶37.

¶37 Orr argues that a new factor is the fact that 348 of the 352 days of sentence credit was applied to the revocation cases and not in this case. He argues that the postconviction court's finding that "the 352 days was going to be consecutive and used in either one manner or the other, either on the revocation or on the case[] that [the trial court] sentenced him to; clearly not to both" is not an accurate view of the original sentencing. Orr asserts that the trial court would not have granted him the sentence credit if the trial court believed he was not entitled to it. However, Orr does not argue and could not argue that he is entitled to dual sentence credit in the revocation cases and this case where the sentence in this case is consecutive. *See* ***Boettcher***, 144 Wis. 2d at 87.

¶38 Orr argues that the amount of the sentence credit was highly relevant to the trial court's imposition of sentence and to have that credit "swept away" some months later is a new factor that justifies sentence modification. However, once again, Orr merely relies on this general statement and does not develop the argument. In short, Orr has done no more than to state the proposition without any elaboration. He has not developed or presented an argument telling us why we should accept his conclusory statement. We need not address undeveloped arguments. *See* ***Pettit***, 171 Wis. 2d at 646-47.

¶39 Moreover, the record reflects that the trial court understood that Orr could not get sentence credit on both the revocation cases and this case unless the sentence in this case was concurrent with the revocation cases. The trial court specifically asked the agent who testified how DOC would treat the sentence credit: "And if I give him credit for this, then it would be separate time?," meaning that if the trial court made the sentences in this case consecutive to the revocation cases the time would be separate, not concurrent. The trial court then asked, "[o]r do they [DOC] run those concurrent over—the revocations?,"

meaning that if the sentences are consecutive does DOC still give sentence credit on both this case and the revocation cases. The agent stated, "I think it depends if you say it's concurrent or consecutive." The trial court was trying to determine how DOC would treat the sentence credit if the trial court made the sentences consecutive.

¶40 The postconviction court also rejected Orr's argument that the trial court would not have given Orr the credit if the trial court did not believe he was entitled to it. The postconviction court stated that the trial court "renders the sentence, giving the credit. And of course, giving the credit because nobody knew for absolute certain that [Orr] was going to be revoked." This finding is consistent with trial counsel's testimony that he submitted the sentence credit form to the trial court because Orr had not yet been revoked on the revocation cases.

¶41 This court finds that the trial court knew that Orr could not get dual sentence credit on both the revocation cases and this case when it made Orr's sentence in this case consecutive. Because Orr had not yet been revoked in the revocation cases, the trial court granted him the sentence credit at the time of sentencing in this case. However, when he was revoked and DOC applied the appropriate sentence credit to the revocation cases, the amount of sentence credit granted in this case had to be reduced and the judgment of conviction was properly amended to reflect the appropriate reduction of the sentence credit to four days. Orr received the benefit of the 352 days sentence credit, just not all in this case. Therefore, we conclude that the amount of sentence credit applied to the revocation cases is not a new factor.

## III. The Trial Court Relied on Accurate Sentence Credit Information.

¶42 Orr argues that the amount of sentence credit represented to the trial court was clearly significantly in error and violated his due process right to be sentenced upon accurate information, citing ***State v. Tiepelman***, 2006 WI 66, ¶31, 291 Wis. 2d 179, 717 N.W.2d 1.

¶43 To prevail on such a claim, a defendant must establish that: (1) there was information before the sentencing court that was inaccurate; and (2) the sentencing court actually relied on the inaccurate information. ***Id.*** If the defendant satisfies the burden of showing that the sentencing court actually relied on inaccurate information, the burden then shifts to the State to establish that the error was harmless. ***Id.*** Having considered this constitutional issue *de novo*, we conclude that Orr has not met his burden that the sentence credit information was inaccurate. *See* ***id.***, ¶9.

¶44 As explained above, the trial court was aware that: (1) Orr was entitled to a sentence credit in the amount of 352 days; (2) Orr had a pending revocation in the revocation cases, but a decision on revocation had not yet been made; (3) if Orr's sentence in this case was consecutive to the revocation cases he would only be entitled to the sentence credit in one case; and (4) if Orr was revoked in the revocation cases, the DOC would first apply the sentence credit in those cases. Because Orr had not yet been revoked, the trial court granted the sentence credit in this case at the time of sentencing. The trial court did not sentence Orr based on inaccurate information.

## CONCLUSION

¶45 For the reasons stated above we affirm the judgment and order denying Orr's postconviction motion.

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. § 809.23(1)(b)4.