COURT OF APPEALS
DECISION
DATED AND FILED

December 19, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP718-CR **Cir. Ct. No. 2012CF5231**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANELLE TAMIKA LOVELL,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County: JEFFREY A. WAGNER and JEFFREY A. CONEN, Judges. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Janelle Tamika Lovell appeals *pro se* after the circuit court denied a series of postconviction motions, filed in 2016, in which she challenged the sentence imposed in March 2014, requested sentence credit, and sought relief from a mandatory DNA surcharge. We affirm.

BACKGROUND

¶2 In July 2012, Lovell made a purchase with a stolen credit card. The State charged her with felonious unauthorized use of personal identifying information or documents as a repeat offender. *See* WIS. STAT. §§ 943.201(2)(a), 939.62(1)(b) (2011-12).[1] She pled guilty, and the matter proceeded to a sentencing hearing on March 19, 2014.[2] Lovell, by counsel, asked the circuit court to impose a maximum sentence, stay it, and place her on probation. The circuit court followed Lovell's sentencing recommendation. The circuit court imposed and stayed a maximum, evenly bifurcated six-year term of imprisonment and ordered Lovell to serve a two-year term of probation. The circuit court also ordered her to pay a $250 DNA surcharge. The circuit court entered the judgment of conviction on March 20, 2014.

¶3 Lovell filed a timely notice of intent to pursue postconviction relief and requested representation by the public defender. The record reflects that pretrial, plea, and sentencing transcripts were filed and served on appointed postconviction counsel, but counsel did not file a postconviction motion or notice

[1] All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable Jeffrey A. Wagner imposed sentence and presided over the March 2016 and April 2016 postconviction proceedings discussed in this opinion.

of appeal on Lovell's behalf. Lovell did not seek any postconviction remedies in this matter until January 2016, when she filed a *pro se* motion to vacate the DNA surcharge. By order dated February 18, 2016, the circuit court denied the requested relief without a hearing.[3]

¶4 In March 2016, Lovell filed a document entitled "*pro se* sentence modification per Wisconsin statute [§] 973.19." In the motion, Lovell asserted she was imprisoned because, effective January 6, 2016, the Division of Hearings and Appeals had upheld the revocation of her probation. She went on to allege that the circuit court had erroneously exercised discretion when it imposed her sentence and that new factors involving her physical and mental health warranted sentence modification. By order dated March 14, 2016, the circuit court denied the motion without a hearing.

¶5 Soon after the circuit court resolved the motion for sentence modification, Lovell filed a postconviction motion under WIS. STAT. § 973.155, seeking 319 days of credit against her sentence for time she spent at home subject to global positioning system (GPS) monitoring before she was convicted and sentenced in this matter. She also sought thirty-two days of credit for the period of June 1, 2015, until July 2, 2015, which, she alleged, she spent in a halfway house after sentencing as an alternative to probation revocation. By order dated April 6, 2016, the circuit court granted her three days of credit for time she was incarcerated in the Milwaukee County Jail before her sentencing date and otherwise denied the motion without a hearing.

[3] The Honorable Jeffrey A. Conen entered the February 2016 postconviction order.

¶6 Lovell filed a notice of appeal on April 20, 2016. The document stated that Lovell appealed "from the whole final judgment and/or order." Lovell described the date of entry of the final order as March 19, 2014, the date on which the circuit court pronounced sentence.

¶7 While the appeal was pending, Lovell sought an extension of unspecified deadlines. We construed the motion as seeking an extension of the deadline to file a statement on transcript. We then observed that "no hearings were held in conjunction with the judgment(s) and/or order(s) from which this appeal is taken," and we therefore waived Lovell's obligation to file a statement on transcript. The matter proceeded to briefing and is now before the court.

DISCUSSION

¶8 The State argues that we lack jurisdiction in this matter because, says the State, Lovell appeals solely from the March 2014 judgment of conviction, and the deadline for filing such an appeal expired long ago. We have a duty to inquire into our jurisdiction, *see* ***Carla B. v. Timothy N.***, 228 Wis. 2d 695, 698, 598 N.W.2d 924 (Ct. App. 1999), so we begin with that inquiry.

¶9 WISCONSIN STAT. RULE 809.30 and WIS. STAT. § 974.02 are the primary mechanisms available to a person pursuing a direct challenge to a judgment of conviction. *See* ***State v. Henley***, 2010 WI 97, ¶¶45-49, 328 Wis. 2d 544, 787 N.W.2d 350. As relevant here, RULE 809.30 provides that when a person has timely filed a notice of intent to pursue postconviction relief and has requested appointment of counsel by the public defender, the clerk of the circuit court must "send[] a copy of the notice to [the public defender's] office, which may then appoint counsel and order transcripts and the court record.... Within sixty days after the later of service of the transcript or record, the defendant may file either a

postconviction motion or notice of appeal." *See* ***State v. Quackenbush***, 2005 WI App 2, ¶2, 278 Wis. 2d 611, 692 N.W.2d 340 (discussing RULE 809.30(2)).

¶10 The circuit court record reflects that a court reporter filed the final transcript in this matter on July 3, 2014, and mailed copies to Lovell's appointed counsel. Although no subsequent action by appointed counsel is reflected in the circuit court record, we may take judicial notice of our own records in this matter. *See* ***Johnson v. Mielke***, 49 Wis. 2d 60, 75, 181 N.W.2d 503 (1970). Our records reflect that, in September 2014, we granted a motion filed by Lovell's appointed counsel and allowed Lovell until October 1, 2014, to file a postconviction motion or notice of appeal. Lovell took no action by that deadline. Her right under WIS. STAT. RULE 809.30 to pursue a direct appeal from the judgment of conviction therefore expired as of October 2, 2014. *See* ***State ex rel. Van Hout v. Endicott***, 2006 WI App 196, ¶35, 296 Wis. 2d 580, 724 N.W.2d 692 (right to direct appeal expired when defendant did not exercise appellate rights within time limits established by this court).

¶11 When a defendant seeks only sentence modification, WIS. STAT. § 973.19(1)(a) offers an "expeditious alternative" to a proceeding under WIS. STAT. RULE 809.30(2). *See* Judicial Council Note, 1984, § 973.19. The alternative is only available, however, when the defendant has not ordered transcripts under RULE 809.30. *See* § 973.19(1)(a). Moreover, the deadline for seeking relief under § 973.19(1)(a) expires ninety days after entry of the sentence. Here, Lovell requested preparation of transcripts under RULE 809.30 and, in addition, the ninety-day deadline imposed under § 973.19(1)(a) expired on June 18, 2014, long before Lovell filed a postconviction motion in January 2016.

¶12 In light of the foregoing, the April 20, 2016 notice of appeal was filed too late under both WIS. STAT. RULE 809.30, and WIS. STAT. § 973.19, to permit Lovell to challenge the March 20, 2014 judgment of conviction. We therefore lack jurisdiction to review that judgment. *See* WIS. STAT. RULE 809.10(1)(e) (timely notice of appeal required for this court to obtain jurisdiction of an appeal).

¶13 The April 20, 2016 notice of appeal was sufficient, however, to confer jurisdiction over an appeal from the postconviction orders that the circuit court entered on February 18, 2016, March 14, 2016, and April 6, 2016. The State contends otherwise, emphasizing that the notice of appeal does not specify any postconviction orders that Lovell intends to challenge. In the State's view, that omission is fatal. In support, the State points to our decision in ***State v. Baldwin***, 2010 WI App 162, 330 Wis. 2d 500, 794 N.W.2d 769. The State misconstrues ***Baldwin***.

¶14 In ***Baldwin***, the defendant's appellate counsel filed a notice of appeal explicitly challenging the defendant's judgment of conviction. *See* ***id.***, ¶60. The defendant thereafter filed a *pro se* postconviction motion, which the circuit court denied. *See* ***id.*** We held that the notice of appeal filed by counsel did not confer jurisdiction over the postconviction order denying the defendant's *pro se* motion. *See* ***id.***, ¶61. We explained that a notice of appeal must sufficiently identify the order the defendant seeks to challenge. *See* ***id.*** We then explained that, because the defendant's counsel filed the notice of appeal before the defendant filed a *pro se* motion, the notice of appeal did not and indeed could not refer to the postconviction order resolving that motion. *See* ***id.***

¶15 Here, by contrast, Lovell litigated several postconviction motions *before* she filed a notice of appeal on April 20, 2016. To obtain review of the final orders denying those motions, she was required to file a notice of appeal within ninety days after the date the circuit court entered those orders.[4] *See* WIS. STAT. § 808.04(1); *see also* WIS. STAT. RULE § 809.10(1)(e). Lovell's notice of appeal complied with that deadline as to the orders entered on February 18, 2016, March 14, 2016, and April 6, 2016.

¶16 The notice of appeal in this case stated that Lovell intended to appeal "the whole final judgment and/or order." She included the date of the March 19, 2014 sentencing, but we understood from her statement that she had identified the subject of her appeal as including the final postconviction orders entered in February 2016, March 2016, and April 2016. *Cf.* ***Baldwin***, 330 Wis. 2d 500, ¶61. Indeed, we expressly noted in our order waiving the obligation to file a statement on transcript that Lovell was pursuing an appeal from orders that did not involve any hearings. We thus recognized that Lovell sought to challenge the postconviction orders, each of which was entered without a hearing. Accordingly, we apply the long-settled rule that a notice of appeal identifying a nonappealable order as the object of the appeal nonetheless is sufficient to confer jurisdiction on

[4] For the sake of completeness we note that, pursuant to WIS. STAT. § 973.155(6), "[a] defendant aggrieved by a determination [of sentence credit] by a court under [§ 973.155] may appeal in accordance with [WIS. STAT. RULE] 809.30." The option to use RULE 809.30 as the mechanism for appealing a sentence credit determination is not exclusive. *Cf.* ***State v. Hemp***, 2014 WI 129, ¶27, 359 Wis. 2d 320, 856 N.W.2d 811 (stating that the word "may" in a statute is permissive, not mandatory). Here, Lovell did not file a notice of intent to pursue postdisposition relief after the circuit court denied her motion for sentence credit, and thus she did not elect to proceed under RULE 809.30 in regard to her sentence credit challenge. *See* ***State v. Quackenbush***, 2005 WI App 2, ¶¶2, 12, 278 Wis. 2d 611, 692 N.W.2d 340 (mandatory first step in an appeal under RULE 809.30 is a timely notice of intent). Accordingly, her deadlines are established under WIS. STAT. § 808.04(1).

this court when the notice reflects an intent to appeal from an existing appealable order and the notice of appeal was timely filed with respect to that appealable order. *See* ***Culbert v. Young***, 140 Wis. 2d 821, 824-25, 412 N.W.2d 551 (Ct. App. 1987).

¶17 Upon application of ***Culbert***, Lovell's notice of appeal successfully invokes our jurisdiction to review the orders entered on February 18, 2016, March 14, 2016, and April 6, 2016. We turn to that review.

¶18 Lovell alleges that she is entitled to additional credit against her sentence. Pursuant to WIS. STAT. § 973.155, a person is entitled to sentence credit for days that the person was in custody in connection with the course of conduct for which the sentence was imposed. *See* ***State v. Lange***, 2003 WI App 2, ¶41, 259 Wis. 2d 774, 656 N.W.2d 480. "[A]n offender's status constitutes custody for sentence credit purposes when the offender is subject to an escape charge for leaving that status." ***State v. Magnuson***, 2000 WI 19, ¶47, 233 Wis. 2d 40, 606 N.W.2d 536.

¶19 Lovell contends that she spent hundreds of days in presentence custody after she posted bail because, she says, she was "confined within [her] home" and required to comply with many rules and regulations in conjunction with the electronic monitoring imposed as a condition of her bond.[5] Pursuant to

[5] In her circuit court motion for sentence credit, Lovell sought 319 days of presentence credit for the period from "November 2012 until removed from the GPS bracelet to regular monitoring in September of 2013." In her appellate brief, she states she seeks "467 days of pretrial sentencing credit," representing the period from November 2, 2012, through March 19, 2014, the date of sentencing. She acknowledges that she did not move the circuit court to give her credit for time she allegedly served from September 2013 through March 19, 2014. Accordingly, we limit our consideration of her claim to the 319 days at issue in the circuit court. *See* ***Shadley v. Lloyds of London***, 2009 WI App 165, ¶25, 322 Wis. 2d 189, 776 N.W.2d 838 (we do not consider issues raised for the first time on appeal).

Magnuson, however, Lovell must show that she faced the risk of an escape charge while she was subject to electronic monitoring in order to receive the credit she seeks. *See* ***id.***, ¶32.

¶20 Lovell asserts that the escape statute, WIS. STAT. § 946.42, would have been the basis for an escape charge in the event that she failed to comply with the rules governing electronic monitoring. She is wrong. A person must be in either actual or constructive custody under one of the situations listed in § 946.42 before the person can be charged with escape under its provisions. *See* ***Magnuson***, 233 Wis. 2d 40, ¶40. Home confinement is not actual custody under the escape statute. *See* ***id.*** Home confinement is also not constructive custody absent a requirement to return to jail after completing a specified furlough, task, or treatment. *See* ***id.***, ¶¶41-43. Here, Lovell fails to show that the circuit court directed her to return to jail following temporary release for a specified purpose. Accordingly, she was not subject to an escape charge under § 946.42. *See* ***Magnuson***, 233 Wis. 2d 40, ¶43.

¶21 Lovell next asserts that she was subject to an escape charge under WIS. STAT. § 302.425. Pursuant to § 302.425(6), a person in a home detention program may be charged with escape, but the provision applies only "to 'prisoners' who have been placed in a home detention program by the DOC, a sheriff, or a superintendent." ***State ex rel. Simpson v. Schwarz***, 2002 WI App 7, ¶34, 250 Wis. 2d 214, 640 N.W.2d 527. Lovell was in home detention pursuant to a court order. A person placed in home detention by the circuit court is not subject to an escape charge under § 302.425(6). *See* ***Simpson***, 250 Wis. 2d 214, ¶34.

¶22 Lovell next asserts that she was subject to an escape charge under WIS. STAT. § 301.48(2g). That statute governs GPS tracking for certain sex offenders. Lovell fails to demonstrate that the statute has any applicability to her.

¶23 Lovell does not identify an applicable statute under which the State could have charged her with escape while she was subject to GPS monitoring. The circuit court therefore correctly denied her claim for credit against her sentence for time she spent subject to such monitoring. *See* ***Magnuson***, 233 Wis. 2d 40, ¶¶1, 4-6, 40, 48.

¶24 Lovell also seeks postsentence credit for the period from June 1, 2015, through July 2, 2015, which she says she spent in a halfway house as an alternative to probation revocation. We reject the claim. First, Lovell failed to include any supporting document with her postconviction motion to show that she was in a halfway house or that any such stay encompassed the thirty-two day period at issue. As the supreme court has repeatedly emphasized, "a postconviction motion requires more than conclusory allegations." *See* ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433.

¶25 Second, we agree with the circuit court that, given Lovell's disclosure that her probation has been revoked, Lovell must pursue credit for postsentence custody as a component of the revocation process. Pursuant to WIS. STAT. § 973.155(2), an order revoking probation must include a sentence credit determination. If Lovell is dissatisfied with the credit awarded in the revocation order, her remedy is to seek review pursuant to a writ of *certiorari*. *See* ***Simpson***, 250 Wis. 2d 214, ¶¶1, 9; *see also* ***State ex rel. Reddin v. Galster***, 215 Wis. 2d 179,

183, 572 N.W.2d 505 (Ct. App. 1997) (review of probation revocation decisions is by *certiorari*).[6]

¶26 Lovell next asserts that the circuit court erroneously denied her claim that new factors warrant sentence modification. A circuit court has inherent authority to modify a defendant's sentence upon a showing of a new factor. ***State v. Harbor***, 2011 WI 28, ¶35, 333 Wis. 2d 53, 797 N.W.2d 828. To prevail, the defendant must satisfy a two-prong test. First, the defendant must demonstrate by clear and convincing evidence that a new factor exists. *See* ***id.***, ¶36. Second, the defendant must show that the new factor justifies sentence modification. *See* ***id.***, ¶¶37-38. If a defendant fails to satisfy one prong of the new-factor test, a court need not address the other. *See* ***id.***, ¶38.

¶27 A new factor is '"a fact or set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of original sentencing, either because it was not then in existence or because ... it was unknowingly overlooked by all of the parties.'" ***Id.***, ¶40 (citation omitted). Whether a fact or set of facts constitutes a new factor is a question of law that this court decides independently. *See* ***id.***, ¶33. Whether a new factor warrants sentence modification is a discretionary determination for the circuit court. *See* ***id.***

¶28 Lovell first alleges that a new factor exists because, she says, the circuit court was unaware of the nature and extent of the physical and mental

[6] While briefing in this matter was underway, Lovell filed documents in this court to support her request for release on bond pending appeal. One of those documents is a copy of a revocation order issued by the Division of Hearings and Appeals reflecting revocation of Lovell's probation on January 6, 2016. We observe with interest that the order reflects an award of jail credit that includes days in June 2015, as well as days in early July 2015.

health problems afflicting her before and at the time of sentencing. These allegations are insufficient to earn relief. Lovell knew about her past diagnoses and the state of her mental and physical health at the time of her sentencing. Therefore, those matters cannot serve as new factors warranting sentence modification, even if they were unknown to the circuit court. *See* ***State v. Crockett***, 2001 WI App 235, ¶14, 248 Wis. 2d 120, 635 N.W.2d 673 (information known to the defendant at the time of sentencing is not a new factor).

¶29 As a second new factor, Lovell alleges that she developed additional health problems after sentencing. The circuit court rejected the claim, concluding as a discretionary matter that, even assuming Lovell's alleged worsening health is "new," it does not justify sentence modification. The circuit court first found that the "[p]rison system has medical services available to prisoners, and although [Lovell] claims that services are inadequate, it appears she has been fully diagnosed and has been receiving medications." Second, the circuit court observed that Lovell had "an opportunity to conform her conduct and remain out of prison when she was given probation." In the circuit court's view, the revocation of her probation "underlines her need for the type of punishment the court imposed," regardless of her health. Because the circuit court properly exercised its discretion when denying Lovell's claim for sentencing modification based on alleged new factors, we must uphold the postconviction order denying relief. *See* ***Harbor***, 333 Wis. 2d 53, ¶¶65-66.

¶30 Lovell next complains that the circuit court erroneously exercised its discretion at sentencing, and she is therefore entitled to sentence modification. Lovell cannot pursue this claim.

¶31 To seek sentence modification based on an erroneous exercise of sentencing discretion, Lovell had two options. *See* ***State v. Nickel***, 2010 WI App 161, ¶¶5, 7, 330 Wis. 2d 750, 794 N.W.2d 765. She could have pursued postconviction relief under the procedures set forth in WIS. STAT. RULE 809.30, or she could have challenged the sentence under WIS. STAT. § 973.19. *See* ***Nickel***, 330 Wis. 2d 750, ¶5. As we have already explained, her deadlines under both of those statutes lapsed when she did not take necessary action within the applicable deadlines. Accordingly, her challenge to the circuit court's sentencing discretion was untimely and was properly denied.

¶32 Lovell suggests that the circuit court has inherent power to modify a sentence that is unduly harsh, *see* ***State v. Ralph***, 156 Wis. 2d 433, 438-39, 456 N.W.2d 657 (Ct. App. 1990), and she asserts that her sentence is sufficiently harsh to warrant the exercise of such power. Lovell fails to understand that a circuit court exercises its inherent authority within the confines of various restraints. *See* ***Harbor***, 333 Wis. 2d 53, ¶35; *see also* ***State v. Crochiere***, 2004 WI 78, ¶12, 273 Wis. 2d 57, 681 N.W.2d 524, *abrogated on other grounds by* ***Harbor***, 333 Wis. 2d 53, ¶47 & n.11, ¶52. In this case, one such applicable restraint is the requirement that a defendant pursue a request for sentence modification within statutory deadlines. *See* ***State v. Macemon***, 113 Wis. 2d 662, 668 n.3, 335 N.W.2d 402 (1983). The other applicable restraint is the familiar rule that a defendant cannot challenge on appeal a sentence the defendant affirmatively approved. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 518, 451 N.W.2d 759 (Ct. App. 1989). Lovell asked the circuit court to impose the sentence that she received. Accordingly, she cannot challenge it.

¶33 Last, we address the claim that Lovell is entitled to relief from the $250 DNA surcharge imposed in this matter. She asserts she previously paid a

surcharge in connection with a 2002 conviction, and the circuit court therefore should not have required her to pay a surcharge here.

¶34 In the circuit court, Lovell claimed that the sentencing court erroneously exercised discretion by imposing the DNA surcharge. This argument constituted a claim for sentence modification, *see* ***Nickel***, 330 Wis. 2d 750, ¶5, and, as we have explained, such a claim was untimely. The circuit court therefore properly denied relief.

¶35 In this court, Lovell adds a claim that, because she previously paid a surcharge in connection with an earlier case, the DNA surcharge in this case violates the *ex post facto* clauses of the Wisconsin and United States Constitutions. We normally do not consider arguments raised for the first time on appeal, *see* ***Tatera v. FMC Corp.***, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810, and there is particularly good reason to enforce that rule here. Specifically, Lovell's argument depends on a predicate fact that the record does not establish, namely, that Lovell previously paid a DNA surcharge.[7] Accordingly, we reject her arguments in *toto*.

By the Court.—Orders affirmed.

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

[7] In resolving the motion for relief from the DNA surcharge in this case, the circuit court noted that electronic docket entries did not show that Lovell was assessed a DNA surcharge in a prior case. The circuit court assumed for the purposes of the motion only that Lovell had previously paid a surcharge but did not make a finding to that effect.