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

**February 21, 2018**

**Sheila T. Reiff**
**Clerk of Court of Appeals**



**Appeal Nos. 2017AP677-CR**
**2017AP678-CR**

**Cir. Ct. Nos. 2012CM411**
**2012CM412**

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

---

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LANCE P. HOWARD,**

**DEFENDANT-APPELLANT.**

---

APPEALS from judgments and orders of the circuit court for Sheboygan County: TERENCE T. BOURKE and REBECCA L. PERSICK, Judges. *Affirmed*.

¶1 GUNDRUM, J.[1] In these consolidated appeals, Lance P. Howard appeals from judgments and orders denying his motions for a new sentencing hearing. He contends the circuit court erred in modifying his sentence credit to reflect consecutive sentences because the sentencing court intended concurrent sentences.[2] For the following reasons, we affirm.

## *Background*

¶2 On June 7, 2012, Howard pled to misdemeanor theft as a repeater (Sheboygan County case No. 2012CM411) and misdemeanor battery and bail jumping both as a repeater (No. 2012CM412). The circuit court withheld sentence in both cases and placed Howard on concurrent terms of probation.

¶3 Howard's probation was revoked, and on November 6, 2012, he was sentenced to one year of initial confinement followed by one year of extended supervision on each of the three counts. The sentences on the two counts in No. 2012CM412 were made concurrent to each other but consecutive to the sentence on the theft count in No. 2012CM411. Howard was given 139 days of sentence credit in No. 2012CM412 and thirty-three days of credit in No. 2012CM411.

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

[2] Although Howard indicates on page one of his brief-in-chief that the issue on appeal is whether the circuit court violated his "due process" rights "by taking away sentence credit that was clearly a consideration at the time of sentencing," he develops no due process argument at all. In fact, "due process" is not referenced anywhere else in his brief.

¶4 In 2014, Howard moved for resentencing, which motions were granted on May 5, 2014. The circuit court again sentenced Howard to one year of initial confinement and one year of extended supervision on each of the three counts, with the sentences on the two counts in No. 2012CM412 concurrent with each other but consecutive to the theft sentence in No. 2012CM411. The court granted Howard 572 days of sentence credit in No. 2012CM411 and 678 days of credit in No. 2012CM412.

¶5 Following correspondence from the department of corrections questioning the amount of sentence credit granted Howard, the circuit court modified the judgments of conviction on May 14 and 16, 2016, and granted Howard 365 days of sentence credit in No. 2012CM411 and 317 days of credit in No. 2012CM412.[3]

¶6 Howard moved for a new sentencing hearing, arguing that the circuit court's modification/reduction of the amount of sentence credit without a hearing at which Howard was present deprived him of due process. A hearing was held on the motions on December 13, 2016, at which a successor judge presided.[4] The court determined that the judgments of conviction had been modified to what the correct sentence credit calculation should have been when the sentences were originally ordered. The court denied Howard's motions for resentencing,

[3] The court subsequently modified the judgment of conviction in No. 2012CM411 to remove the DNA test requirement.

[4] The Honorable Terence T. Bourke presided over the sentencing-after-revocation and resentencing hearings and entered the judgments of conviction. The Honorable Rebecca L. Persick presided over the December 13, 2016 hearing on Howard's motions for a new sentencing hearing and entered the orders denying those motions.

concluding there was no due process violation because the May 2016 changes in the amount of sentence credit "may have been an increase in what he perceived his time should be, but the sentence didn't change. The sentence has always been the same." There was "no change in the actual sentence" because it was simply correcting an erroneous "double count[ing]" the court had originally made. Howard appeals.[5]

## *Discussion*

¶7 Howard's "argument" is difficult to understand and insufficiently developed. We could reject it on that basis alone. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) ("We may decline to review issues inadequately briefed."). The best we can determine is that Howard is claiming that when the circuit court resentenced him on May 5, 2014, it had intended to make the sentences in No. 2012CM412 concurrent to the sentence in No. 2012CM411, but when the court reduced the amount of sentence credit in May 2016, it erroneously made the No. 2012CM412 sentences consecutive to the No. 2012CM411 sentence. The State similarly interprets Howard's position on appeal.

[5] We note that the State inappropriately includes documents in its appendix that are not part of the record, and in doing so presents us with new substantive facts presumably not presented to the circuit court. An appellate court's review is confined to those parts of the record made available to it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992); *see also* ***Reznichek v. Grall***, 150 Wis. 2d 752, 754 n.1, 442 N.W.2d 545 (Ct. App. 1989) ("The appendix may not be used to supplement the record."). Additionally, the State fails to develop an argument supported by legal authority for a contention it makes that Howard "forfeited or abandoned his appeal" because of "absconding." *See* ***W.H. Pugh Coal Co. v. State***, 157 Wis. 2d 620, 634, 460 N.W.2d 787 (Ct. App. 1990) (we do not consider arguments unsupported by legal authority). Finally, the State fails to adequately support its background facts with citations to the record as required by WIS. STAT. RULE 809.19(1)(d). We would appreciate all future briefs contain "appropriate references to the record," *see* ***id.***, and not include matters outside the record.

¶8 We agree with the State that the record is clear that at the resentencing hearing, the circuit court intended to make the No. 2012CM412 sentences consecutive to the No. 2012CM411 sentence. At Howard's November 6, 2012 sentencing after revocation hearing, the circuit court stated:

> I'll sentence him on [No. 2012CM411] to one year of initial confinement followed by one year of extended supervision.
>
> On [No. 2012CM412] on Count 1 I'll sentence him to one year of initial confinement followed by one year of extended supervision and one year of initial confinement on Count 3 followed by one year of extended supervision. The two counts on [No. 2012CM412] will run concurrently but consecutively to that in [No. 2012CM411].

Then at the resentencing hearing on May 5, 2014, the court stated:

> [A]s I look at the original sentence and the reasons why I did it, again, because of your failure on probation, because of your repeated criminal activity, I thought going to prison was about the only option I had.
>
> And *I'll make the same sentence* knowing you're going to get out in … a month.…
>
> [O]n Count Number 1 of [No. 2012CM412], which is the battery, I'll sentence you to one year of initial confinement followed by one year of extended supervision.
>
> And on Count 3, which is the bail jumping, I will sentence you to one year of initial confinement followed by one year of extended supervision. Those will run concurrent with each other *but consecutive to that in [No. 2012CM411]*. (Emphasis added.)

The State points all of this out in its response brief and Howard has chosen not to file a reply brief with any counterpoints. Because the record compellingly shows that the circuit court has at all times ordered that Howard's sentences in the No. 2012CM412 counts be consecutive to his sentence in the No. 2012CM411

theft count, he has failed to demonstrate that the court erred in modifying the sentence credit as it did and we decline his invitation to modify the sentences in No. 2012CM412 to make them concurrent with his sentence in No. 2012CM411.

¶9 For the foregoing reasons, we affirm the judgments of conviction and orders.

*By the Court*.—Judgments and orders affirmed.

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