

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 12, 2001

Cornelia G. Clark
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.

No. 01-0736-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY MALKMUS,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
ROBERT A. HAWLEY, Judge. *Affirmed.*

¶1 BROWN, J.¹ Gary Malkmus appeals from an order denying his motion for postconviction relief. He also appeals from an order denying his motion for sentence credit. We affirm the orders of the trial court for the reasons stated below.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version.

¶2 On May 6, 1996, Malkmus was convicted of violating WIS. STAT. §§ 110.05(3) and 110.02(10) of the Agricultural Trade and Consumer Protection Act. The trial court sentenced him to one year in prison on each offense, to be served consecutively with each other and to any other sentence pending. At the time this action commenced, Malkmus had been released on bond pending resolution of his appeal on another criminal matter in Fond du Lac county. In the Fond du Lac case, he was sentenced to seven years' imprisonment following revocation of probation for a similar agricultural code violation. During the period of this appeal, Malkmus's appeal in the Fond du Lac case was denied and he was incarcerated. His appeal in this case was also denied and on August 10, 1999, the trial court lifted the stay and ordered Malkmus to serve the sentence imposed on May 22, 1996, consecutive to the first imposed Fond du Lac sentence.

¶3 On August 1, 2000, Malkmus filed pro se a motion for postconviction relief, arguing that the trial court misused its discretion in imposing a consecutive sentence rather than a concurrent sentence. The trial court denied his motion and he appeals.

¶4 The thrust of Malkmus's argument is that under WIS. STAT. § 973.15(1), the trial court has no authority to impose a consecutive sentence if, at the time of sentencing, the defendant is released on bond pending an appeal in another jurisdiction. Stated differently, he argues that a trial court can only impose a consecutive sentence if the defendant is actually in prison at the time the second or additional sentence is imposed. There is no scintilla of legal authority to support Malkmus's argument and the statute that he cites does not support his proposition.

¶5 WISCONSIN STAT. § 973.15(2)(a) gives the trial court absolute discretion to impose as many sentences as there are convictions and provides that “any such sentence [may] be concurrent with or consecutive to any other sentence imposed at the same time or previously.” There is no requirement in the statute that the defendant actually be incarcerated at the time the consecutive sentence is imposed. Furthermore, the lapse of time from the stay of sentencing to the resolution of the appeal is irrelevant to the court’s authority to order Malkmus to serve his sentence after the appeal process ended.

¶6 We also affirm the trial court’s order denying sentence credit to Malkmus. In his brief, Malkmus asks the court for 100 days credit on the grounds that “the time the defendant is requesting, the defendant was detained in another county jail and the new arrest kept the defendant in the county jail till [sic] his first appearance, thus by law the defendant is entitled to the 100 days spent in connection of the present sentence.” The record clarifies that the period of incarceration for which Malkmus seeks credit was not spent in connection with the course of conduct for which sentence was imposed in this matter, but was connected to the offense in Fond du Lac county. Therefore, no sentence credit is due in this case for those 100 days. *See* WIS. STAT. § 973.155(1)(a).

By the Court.—Orders affirmed.

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

