COURT OF APPEALS
DECISION
DATED AND FILED

September 25, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2191-CR **Cir. Ct. No. 2010CF492**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

AUGUSTUS E. DILLON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Waukesha County: MARK D. GUNDRUM, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. Augustus E. Dillon appeals *pro se* from a judgment of conviction entered upon his no-contest plea to delivering not more than one gram of cocaine. He also appeals from an order denying his *pro se* motion for postconviction relief. He claims that his trial counsel was ineffective, the circuit

court erroneously exercised its sentencing discretion, and he had a viable defense to the charge. Additionally, Dillon alleges that the circuit court deprived him of his right to counsel on direct appeal by refusing to appoint successor postconviction and appellate counsel to replace the lawyer who believed that his case lacked any arguably meritorious appellate issues. Because Dillon's substantive claims for relief are meritless and because he waived his right to postconviction and appellate counsel, we affirm.

BACKGROUND

¶2 According to the criminal complaint, Dillon twice sold cocaine to an informant. Pursuant to a plea bargain, he agreed to plead no contest to one count of delivering not more than one gram of cocaine. In exchange, the State abandoned an allegation that he was a repeat offender, moved to dismiss and read in a second count of delivering cocaine, and recommended a concurrent six-year term of imprisonment, bifurcated as three years each of initial confinement and extended supervision. At the combined plea and sentencing hearing, the parties also filed a form entitled "Pretrial Incarceration Credit." The form, signed by Dillon, his trial counsel, and the State, reflected that Dillon was "entitled to 188 days of credit for pretrial incarceration" between his arrest and his sentencing.

¶3 The circuit court imposed a ten-year term of imprisonment, comprised of five years each of initial confinement and extended supervision, and the circuit court ordered Dillon to serve the sentence consecutively to any other sentence. The circuit court also ordered that Dillon receive 188 days of pretrial incarceration credit against his sentence.

¶4 Several months after the sentencing proceeding, a Department of Corrections staff member wrote a letter to the circuit court questioning the award of sentence credit in this case. The letter explained that Dillon had received credit for the same days in custody against both the sentence in this case and a sentence imposed earlier in another matter. Dillon's trial counsel and the State responded in writing, and both agreed that awarding sentence credit here improperly duplicated credit previously awarded. The circuit court then entered an amended judgment of conviction vacating the sentence credit in this case.

¶5 Dillon gave notice of his intent to pursue postconviction relief, and the state public defender appointed counsel to represent him in postconviction and appellate proceedings. Counsel, however, moved to withdraw. At the hearing to address the motion, counsel explained that Dillon did not agree with her conclusion that the case presented no arguably meritorious issues for appeal. A letter filed by a representative of the state public defender's office advised the parties that the state public defender would not appoint successor counsel. The letter further explained that Dillon's choices were to hire his own lawyer, proceed with an appeal *pro se*, or continue with appointed counsel and opt for a no-merit report.[1]

¶6 Dillon told the circuit court that he wanted successor counsel. The circuit court, however, refused to appoint counsel for him and cautioned him that

[1] *See* WIS. STAT. RULE 809.32 (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the state public defender also would not appoint new counsel. Dillon told the circuit court that he would prefer proceeding *pro se* to continuing with his current lawyer. After examining Dillon to determine his competency and to ensure that he understood the ramifications of proceeding *pro se*, the circuit court allowed appointed counsel to withdraw.

¶7 Dillon next filed a *pro se* motion seeking substantive postconviction relief from the amended judgment of conviction. He also alleged that he was "[d]enied the assistance of counsel in connection with [his] direct appeal." The circuit court rejected his claims without a hearing, and this appeal followed.

DISCUSSION

¶8 A defendant seeking postconviction relief may not rely on conclusory allegations to support his or her claims. ***State v. Allen***, 2004 WI 106, ¶15, 274 Wis. 2d 568, 682 N.W.2d 433. A postconviction motion must include sufficient facts to "allow the reviewing court to meaningfully assess" a defendant's claims. ***State v. Bentley***, 201 Wis. 2d 303, 314, 548 N.W.2d 50 (1996). If a motion does not raise sufficient facts to warrant relief, if the allegations are merely conclusory, or if the record conclusively shows that the defendant is not entitled to relief, the circuit court may deny relief without conducting a hearing. ***Id.*** at 309-10.

¶9 Here, Dillon rests several of his substantive claims for relief on allegations that he received ineffective assistance from his trial counsel. A defendant alleging counsel's ineffectiveness must prove both that counsel's performance was deficient and that the deficiency was prejudicial. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To prove deficiency, Dillon "must show that 'counsel made errors so serious that counsel was not functioning as the

'counsel' guaranteed the defendant by the Sixth Amendment.'" *See* ***State v. Pote***, 2003 WI App 31, ¶15, 260 Wis. 2d 426, 659 N.W.2d 82 (citation omitted). To prove prejudice, Dillon "must show that trial counsel's errors had an actual, adverse effect on the defense." *See* ***id.***, ¶16. If Dillon fails to make an adequate showing as to one component of the analysis, we need not address the other. *See* ***id.***, ¶14.

¶10 We first address Dillon's complaint that his trial counsel was ineffective by failing to explain that he would not receive pretrial incarceration credit against his sentence unless the circuit court imposed a concurrent sentence. The claim fails because Dillon does not demonstrate any prejudice.

¶11 Pursuant to WIS. STAT. § 973.155(1)(a), "[a] convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." ***Id.*** A defendant, however, may receive credit for days in custody against only one of multiple consecutive sentences. ***State v. Boettcher***, 144 Wis. 2d 86, 101, 423 N.W.2d 533 (1988). "The core idea of ***Boettcher*** is that 'dual credit is not permitted' where a defendant has already received credit against a sentence which has been, or will be, separately served." ***State v. Jackson***, 2000 WI App 41, ¶19, 233 Wis. 2d 231, 607 N.W.2d 338 (citation omitted).

¶12 Dillon does not dispute that he received credit for his days in custody at issue here against an earlier-imposed sentence. Therefore, Dillon could not receive credit for the same days in custody against his consecutive sentence in this case. *See* ***id.*** Dillon thus demonstrates no prejudice from his trial counsel's alleged failure to explain to him the mechanics of sentence credit. *See* ***State v. Giebel***, 198 Wis. 2d 207, 219, 541 N.W.2d 815 (Ct. App. 1995) (defendant

challenging counsel's effectiveness at sentencing does not show prejudice when sentence would have been the same had trial counsel performed in the manner suggested by defendant).

¶13 We next examine the contention that Dillon's trial counsel was ineffective because counsel "allowed [the] State to breach [the] plea agreement" by "misleading [him] to believe ... that [he] would receive [] 188 days of pretrial incarceration credit." To show that trial counsel was ineffective by failing to object to a breach of the plea bargain, Dillon first must show that the State's actions constituted a breach. *See* ***State v. Naydihor***, 2004 WI 43, ¶9, 270 Wis. 2d 585, 678 N.W.2d 220. Dillon has not made that showing here.

¶14 Dillon rests his contention that the State breached the plea bargain on his claim that "the 188 days was part of the plea agreement." This is merely a conclusory assertion. Dillon does not demonstrate that the parties' mechanical calculation of the time that he spent in custody before disposition of the charges was part of the inducement for him to give up his rights and plead no contest. *See* ***State v. Wills***, 187 Wis. 2d 529, 537, 523 N.W.2d 569 (Ct. App. 1994) (defining plea bargain). Indeed, the record belies his contention.

¶15 The terms of the plea bargain were handwritten on a guilty plea questionnaire and waiver of rights form signed by Dillon and his trial counsel. Additionally, the circuit court, as required, reviewed the terms of the plea bargain on the record at the time of Dillon's guilty plea. *See* ***State v. Frey***, 2012 WI 99, ¶¶100-01, __ Wis. 2d __, 817 N.W.2d 436. Neither the guilty plea questionnaire nor the description of the plea bargain placed on the record includes any reference to pretrial incarceration credit:

> THE COURT: The plea questionnaire and waiver of rights form indicates the Defendant would plead to Count 1 with the repeater portion stricken. The District Attorney's office would read in Count 2, dismiss and read in, and recommend three years of confinement plus three years of extended supervision concurrent to his present sentence.
>
> [DEFENSE COUNSEL]: And one thing I failed to mention but I discussed with my client, there's $200 of restitution the State will be seeking.
>
> THE COURT: Okay. Of buy money?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: Okay. With that addition, is that all correct, [counsel]?
>
> [DEFENSE COUNSEL]: Yes.
>
> THE COURT: And, [State's counsel], is that all correct?
>
> [THE STATE]: Yes, your honor.
>
> THE COURT: Okay. Mr. Dillon, did you understand all of that?
>
> THE DEFENDANT: Yes, Your Honor.

The record thus conclusively demonstrates that sentence credit was not a component of the parties' plea bargain. Accordingly, Dillon's trial counsel had no basis for claiming that the State's actions in regard to sentence credit breached the plea bargain. An attorney is not ineffective by foregoing a meritless argument. *See* ***State v. Toliver***, 187 Wis. 2d 346, 360, 523 N.W.2d 113 (Ct. App. 1994).[2]

[2] We note Dillon's contention that the circuit court erred in some way by vacating the sentence credit awarded. Dillon is wrong. He was not entitled to the credit. The proper remedy for correcting a sentence that includes an erroneous award of sentence credit is to modify the sentence by bringing it into conformity with WIS. STAT. § 973.155. *See* ***State v. Walker***, 117 Wis. 2d 579, 584, 345 N.W.2d 413 (1984). The circuit court applied that remedy here.

¶16 Dillon next complains that his trial counsel was ineffective in investigating the charges because trial counsel "allowed [him] to accept [a] plea agreement without v[ie]wing discovery requested at hearing." The record shows that trial counsel filed a motion to disclose the identity of a confidential informant, but counsel subsequently notified the State and the court that Dillon wished to withdraw the motion and accept a plea bargain.[3]

¶17 A defendant who complains that trial counsel was ineffective by failing to investigate must state with specificity how the information would have affected the outcome of the proceeding. ***State v. Flynn***, 190 Wis. 2d 31, 48, 527 N.W.2d 343 (Ct. App. 1994). Dillon does not satisfy that obligation. We acknowledge his assertion that he "did not really remember much of [the] details of [the] offense that took place and that's why [he] entered a no contest plea." This contention, however, does not demonstrate that the information he sought from the State, if disclosed, would have led him to resolve the case differently. Moreover, Dillon does not show that the circuit court would have granted the motion he filed had he pursued it. *Cf.* ***State v. Jackson***, 229 Wis. 2d 328, 344, 600 N.W.2d 39 (Ct. App. 1999) (defendant who alleges that counsel was ineffective by withdrawing a suppression motion must demonstrate that the motion would have

[3] We note that Dillon filed a *pro se* motion for discovery and inspection approximately ten days before his trial counsel filed the motion to disclose the identity of the informant. The circuit court had no obligation to consider the *pro se* motion because Dillon filed it while he was represented by counsel. *See* ***State v. Wanta***, 224 Wis. 2d 679, 699, 592 N.W.2d 645 (Ct. App. 1999) (circuit court did not erroneously exercise discretion by declining to address defendant's *pro se* proposition when defendant had counsel).

succeeded). Accordingly, Dillon fails to show that his trial counsel was ineffective in regard to investigation and discovery matters.

¶18 Next, Dillon asserts: "detective was aware of defendant['s] drug addiction from previous cases and defendant was targeted because of defendant['s] weak[n]ess and addiction to drugs." We understand Dillon to argue that he had an entrapment defense to the charges against him. This argument does not state a basis for relief. Dillon gave up his defenses by pleading no contest. "The general rule is that a guilty or no contest plea waives all nonjurisdictional defects and defenses, including alleged constitutional violations occurring prior to the plea." ***State v. Lasky***, 2002 WI App 126, ¶11, 254 Wis. 2d 789, 646 N.W.2d 53. Dillon does not show that his alleged entrapment defense is an exception to the rule.

¶19 Dillon also complains that his sentence was unduly harsh. A sentence is unduly harsh "'only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" *See* ***State v. Grindemann***, 2002 WI App 106, ¶31, 255 Wis. 2d 632, 648 N.W.2d 507 (citation omitted). Dillon faced a ten-year term of imprisonment and a $25,000 fine upon conviction for delivering one gram or less of cocaine. *See* WIS. STAT. §§ 961.41(1)(cm)1g, 939.50(3)(g). Moreover, by agreeing as part of his plea bargain that a second charge of delivering cocaine would be read in for sentencing purposes, he "expos[ed] himself to the likelihood of a higher sentence within the sentencing range." *See* ***Frey***, 2012 WI 99, ¶73, __Wis. 2d __, 817 N.W.2d 436. The circuit court imposed a ten-year term of

imprisonment and no fine. A sentence within the statutory maximum is presumptively neither unduly harsh nor excessive. ***Grindemann***, 255 Wis. 2d 632, ¶31. Dillon offers nothing to overcome the presumption.

¶20 Rather, the record shows that the circuit court selected Dillon's sentence only after considering the primary sentencing factors of "the gravity of the offense, the character of the defendant, and the need to protect the public." *See* ***State v. Ziegler***, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The circuit court explained that it had seen many lives destroyed "because of a person just like Augustus Dillon ... the guy who's giving them the cocaine." The circuit court discussed Dillon's "lengthy record of violating the law and being revoked." *See* ***State v. Fisher***, 2005 WI App 175, ¶26, 285 Wis. 2d 433, 702 N.W.2d 56 (substantial criminal record is evidence of character). As to the need to protect the public, the circuit court observed that Dillon "was dealing cocaine within the community here and contributing to the ruin of other lives."

¶21 The circuit court identified protection of the community as the primary goal of Dillon's sentence. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197 (requiring the circuit court to "specify the objectives of the sentence on the record"). The circuit court determined that Dillon must receive a maximum sentence and serve it consecutively to any other sentence because "the Court [was] very concerned that [Dillon] will be back to [his] old ways as soon as the opportunity presents itself, and again, that contributes to the destruction of other lives here in Waukesha County."

¶22 The record reflects that the circuit court considered proper sentencing factors and selected an appropriate sentencing objective. Dillon complains, however, because the circuit court did not permit him to participate in the earned release program and did not order him to serve a risk reduction sentence. His complaints do not support a claim for relief.

¶23 The earned release program and risk reduction sentences are mechanisms that permit an inmate to serve less than his or her full term of initial confinement. *See* WIS. STAT. § 302.05 (describing the earned release program); WIS. STAT. §§ 302.042, 973.031 (describing risk reduction sentences).[4] Here, however, the circuit court explained its view that the protection of the public necessitated confining Dillon for the maximum period allowed by law. Although the circuit court did not state a separate reason for excluding Dillon from each available avenue for hastening his return to the community, the circuit court is not required to articulate an independent rationale for every aspect of a sentencing decision. ***State v. Matke***, 2005 WI App 4, ¶19, 278 Wis. 2d 403, 692 N.W.2d 265. The circuit court believed that Dillon was a danger to the public. Therefore, the circuit court imposed a consecutive sentence and did not impose a risk reduction sentence or permit him to participate in the earned release program. The circuit court's conclusions are neither shocking nor unconscionable.

[4] Effective August 3, 2011, the legislature repealed the law permitting circuit courts to impose risk reduction sentences. 2011 Wis. Act 38 §§ 13, 92.

¶24 Finally, Dillon complains that the circuit court denied him his right to postconviction and appellate counsel and forced him to proceed *pro se*. We disagree.[5]

¶25 An indigent defendant is constitutionally entitled to representation by counsel at public expense in a direct appeal from a conviction. ***State v. Thornton***, 2002 WI App 294, ¶12, 259 Wis. 2d 157, 656 N.W.2d 45. That right extends to any postconviction proceedings that must precede the presentation of issues to this court. *See* ***id.***, ¶13; *see also* ***State v. Evans***, 2004 WI 84, ¶¶28-30, 273 Wis. 2d 192, 682 N.W.2d 784, *abrogated on other grounds by* ***State ex rel. Coleman v. McCaughtry***, 2006 WI 49, ¶29, 290 Wis. 2d 352, 714 N.W.2d 900.

[5] Although we reject the claim that Dillon was wrongly denied the right to counsel in this case, we do not rely on the State's argument to reach our conclusion. The State frames Dillon's complaint as an allegation that Dillon was denied due process, and the State then argues: "[t]he Wisconsin Supreme Court has stated that one does not have a due process right to appointed counsel to pursue claims in postconviction proceedings." In support, the State cites ***State ex rel. Warren v. Schwarz***, 219 Wis. 2d 615, 650, 579 N.W.2d 698 (1998). ***Warren*** is inapplicable here. In that case, our supreme court rejected the contention that defendants are entitled to appointed counsel when mounting collateral attacks on criminal convictions under WIS. STAT. § 974.06. *See* ***Warren***, 219 Wis. 2d at 647-50. Dillon, however, is not pursuing a collateral attack on his conviction. Rather, he is pursuing postconviction relief as a matter of right under WIS. STAT. RULE 809.30 and WIS. STAT. § 974.02. As we recently observed, the supreme court requires the circuit court to advise a convicted person of the right to seek postconviction relief in both the circuit court and this court, and to advise the person of the related right to request the appointment of counsel for those purposes. *See* ***State v. Peterson***, 2008 WI App 140, ¶11, 314 Wis. 2d 192, 757 N.W.2d 834. We added:

> Wisconsin affords a convicted person the right to postconviction counsel. It would be absurd to suggest that a person has a right to counsel at trial and a right to counsel on appeal, but no right to the assistance of counsel at a postconviction proceeding in the circuit court, which is often the precursor to and augments the record for an appeal.

Id. Accordingly, we do not rely on the State's argument on this issue.

An indigent defendant does not, however, have the right to counsel of choice or the right to insist that counsel raise particular issues. *See* ***Evans***, 273 Wis. 2d 192, ¶30. Further, a convicted defendant may waive the right to postconviction and appellate counsel. *See* ***Thornton***, 259 Wis. 2d 157, ¶¶1, 21. Dillon did so.

> ¶26 Before a court may conclude that a criminal defendant has knowingly and voluntarily waived his or her right to counsel on direct appeal, it must satisfy itself that the defendant is aware: (1) of the ... rights to an appeal, to the assistance of counsel for the appeal, and to opt for a no-merit report; (2) of the dangers and disadvantages of proceedings pro se; and (3) of the possibility that if appointed counsel is permitted to withdraw, successor counsel may not be appointed to represent the defendant in the appeal.

Id., ¶21 (footnote and one set of parentheses omitted). The colloquy may be conducted in writing. ***Id.***, ¶22. In this case, the circuit court conducted the necessary colloquy with Dillon on the record when he appeared by telephone at the hearing held to address postconviction counsel's motion to withdraw.[6]

¶27 During the motion hearing, postconviction counsel described telling Dillon that the public defender's office "will not appoint successor counsel," and counsel described Dillon's options to insist on a no-merit report or, alternatively, to proceed *pro se*. Dillon confirmed on the record that he understood his counsel's explanation of the rights and options available to him. He told the circuit court that he wanted replacement counsel to pursue the issues that he thought had merit,

[6] In his statement of facts, Dillon reminds us that he complained to the circuit court that "it was a violation of inmate due process for attorney not to sen[d] court transcript of [the] hearing from [the] circuit court ... motion [to] ... withdraw." On appeal, however, Dillon does not renew the claim that he was denied a transcript of the hearing held to address postconviction and appellate counsel's motion to withdraw. Further, docket entries reflect that the circuit court in fact did order that Dillon receive a copy of the motion hearing transcript for purposes of his appeal. Therefore, we do not address Dillon's suggestion that he was wrongly denied a transcript.

including, but not limited to, his loss of 188 days of pretrial incarceration credit and his contentions that trial counsel was ineffective. The circuit court explained that it would not appoint successor postconviction counsel for him. The circuit court further emphasized: "it's pretty clear that the public defenders are not going to be appointing successor counsel here." Dillon said that he then chose to proceed *pro se*.

¶28 A court should not deny a defendant of average ability and intelligence the opportunity for self-representation and should accept a proper waiver of the right to counsel unless '"a specific problem or disability can be identified.'" ***Id.***, ¶23 (citation and one set of quotation marks omitted). Here, the circuit court questioned Dillon to ensure that no such problems or disabilities prevented a valid waiver. Dillon demonstrated his competency to proceed *pro se*, telling the circuit court that he had a high school equivalency degree and that he could read, write, and understand English. He told the circuit court that no one had pressured him to discharge his postconviction counsel or promised him anything to induce him to give up his right to counsel. He acknowledged that his appointed counsel probably had a better understanding of the law and court procedures than did he. The record reflects that Dillon validly waived his right to postconviction and appellate counsel.

¶29 Dillon believes that he did not waive his right to counsel because he asked the circuit court to appoint a new attorney in place of the postconviction counsel appointed by the state public defender. Dillon's request does not affect the analysis, however, because he had no right to a lawyer appointed directly by the circuit court. In Wisconsin, an indigent defendant is afforded postconviction counsel through the Office of the State Public Defender. *See* ***State v. Kennedy***, 2008 WI App 186, ¶10, 315 Wis. 2d 507, 762 N.W.2d 412. Although the circuit

court has inherent authority to appoint postconviction counsel, that authority "is not intended to replace the SPD appointments. Rather, it is intended to cover those circumstances where a defendant does not satisfy the legislatively created SPD criteria for appointment, but still demonstrates indigency." ***Id.***, ¶28. Here, Dillon qualified for state public defender representation, but he was dissatisfied with the lawyer assigned to his case. This does not give rise to any circuit court obligation to appoint successor counsel. *See* ***id.***

¶30 Although Dillon wanted a lawyer who would pursue issues that he had identified, he had no right to that relief. *See* ***Evans***, 273 Wis. 2d 192, ¶30. The circuit court reviewed on the record the options available to him, and he elected to proceed *pro se* rather than continue with the appointed lawyer who saw no arguable merit in an appeal and who therefore planned to file a no-merit report. Such an election is a valid waiver of the right to counsel. *See* ***Oimen v. McCaughtry***, 130 F.3d 809, 812 (7th Cir. 1997). No error is shown.

By the Court.—Judgment and order affirmed.

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