

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 6, 2012

Diane M. Fremgen
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.

Appeal No. 2011AP2775-CR

Cir. Ct. No. 1999CF3941

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MELVIN D. TORAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County:
CLARE L. FIORENZA, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Melvin D. Toran, *pro se*, appeals an order of the circuit court that denied his motion for sentence credit or sentence adjustment. Because Toran's motion was incorrectly premised on his belief that he had been given a bifurcated sentence under the truth-in-sentencing rules, and because

recalculation of his maximum discharge date does not violate the separation of powers doctrine, we affirm the order.

BACKGROUND

¶2 On July 23, 1999, Toran was charged with two unclassified felonies: manufacture or delivery of cocaine and possession with intent to deliver between ten and fifty grams of cocaine, both with the use of a dangerous weapon and both as party to a crime. Toran pled guilty to both charges and on January 21, 2000, was given indeterminate sentences totaling fourteen years' imprisonment. Toran's original maximum discharge date was calculated by the Department of Corrections to be January 19, 2014.

¶3 Toran was granted parole and released around February 1, 2005. In February 2008, an Illinois court imposed a seven-year sentence that included three years' imprisonment. When Illinois released Toran in February 2011, he was returned to Wisconsin on a violation of parole hold. Toran's parole was subsequently revoked. On July 29, 2011, he was ordered reincarcerated for two years. His maximum discharge date was then recalculated as February 6, 2020.

¶4 Toran moved the circuit court for relief, citing WIS. STAT. §§ 302.113, 973.01, 973.155, and 973.195 (2009-10).¹ He claimed that he "was 'Illegally' and 'Unlawfully' re-sentenced back to incarceration with 'extra prison

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted. WISCONSIN STAT. § 302.113 is entitled, "Release to extended supervision for felony offenders not serving life sentences." WISCONSIN STAT. § 973.01 is entitled, "Bifurcated sentence of imprisonment and extended supervision." WISCONSIN STAT. § 973.155 deals with "sentence credit," and WIS. STAT. § 973.195 deals with "sentence adjustment."

time’ that the sentencing court did not impose.” He sought credit for the “street time” he had spent on release and asked to have his 2014 discharge date reinstated.

¶5 The circuit court denied Toran’s motion without a hearing. It explained that Toran was serving an indeterminate sentence, not a bifurcated one. Therefore, he was not entitled to seek sentence adjustment under WIS. STAT. § 973.195. The circuit court also explained that, based on the language of WIS. STAT. § 302.11(7)(am), sentence credit under WIS. STAT. § 973.155 was not available for Toran’s “street time.” Toran now appeals.

DISCUSSION

¶6 As an initial matter, we note that Toran’s motion sought relief primarily based on statutes related to extended supervision. However, extended supervision is a component of a bifurcated sentence. *See* WIS. STAT. § 973.01(2). A bifurcated sentence is only available when the circuit court sentences a person for a felony committed on or after December 31, 1999. *See* WIS. STAT. § 973.01(1); *State v. Gallion*, 2004 WI 42, ¶7 n.3, 270 Wis. 2d 535, 678 N.W.2d 197. Toran’s offenses were committed in July 1999. Thus, he was not eligible for, and was not given, a bifurcated sentence.

¶7 As the circuit court noted, in order to petition for sentence adjustment under WIS. STAT. § 973.195, Toran had to be serving a bifurcated sentence imposed under WIS. STAT. § 973.01. He was not. Accordingly, the circuit court did not err in denying Toran’s request for sentence adjustment: such relief is simply not available to him.

¶8 Toran also requested sentence credit for “street time,” the time he spent out on parole. *See* 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.”). However, parole itself is not custody. *See State ex rel. Ludtke v. Dep’t. of Corrections*, 215 Wis. 2d 1, 13, 572 N.W.2d 864 (Ct. App. 1997). A parole violator like Toran is only entitled to credit against his sentence “from the beginning date of the sentence to the date of release to field supervision” and “for all periods during which the parolee was in custody following the date of release.” WIS. ADMIN. CODE § DOC 302.25(3)-(4). The circuit court properly denied the request for sentence credit for the time Toran was on parole.

¶9 Related to the credit issue, Toran additionally complained about having his maximum discharge date reset. However, “[t]he possibility that the maximum discharge date will be extended is part of the parole ... system to which a prisoner’s sentence is subject.” *State ex rel. Bieser v. Percy*, 97 Wis. 2d 702, 709, 295 N.W.2d 179 (Ct. App. 1980). A parole violator’s maximum discharge date “shall be reestablished by counting the number of days equal to the remainder of the sentence beginning from the date of custody after violation of parole.” WIS. ADMIN. CODE § DOC 302.25(6). The “remainder of the sentence” is calculated as “the entire sentence, less time served in custody prior to parole.” WIS. STAT. §§ 302.11(7)(a) (1999-2000) & 302.11(7)(am) (2009-10). Thus, the circuit court properly denied the request to reinstate the 2014 discharge date. *Cf. Bieser*, 97 Wis. 2d at 710 n.4.

¶10 Finally, Toran’s appellate argument is that in resetting his maximum discharge date, the Department of Corrections has unconstitutionally usurped a judicial function and improperly added to his sentence.² This argument fails.

¶11 “[S]entencing in Wisconsin is an area of shared powers.” *State v. Horn*, 226 Wis. 2d 637, 645, 594 N.W.2d 772 (1999). Though the advent of truth-in-sentencing has diminished the executive branch’s role, *see Gallion*, 270 Wis. 2d 535, ¶28, the new rules do not undermine the executive branch’s role in administering those sentences still subject to parole provisions, *see Bieser*, 97 Wis. 2d at 711. When Toran was sentenced in 2000, the judicial branch’s role terminated and the administrative process vested in the executive branch was substituted in its place. *Horn*, 226 Wis. 2d at 650. Thus, resetting the maximum discharge date for a parole violator does not usurp the judiciary or otherwise violate the separation of powers doctrine.

By the Court.—Order affirmed.

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

² On appeal, Toran does not address the substance of the circuit court’s rulings regarding his requests for sentence adjustment or sentence credit; rather, he focuses only on the separation of powers question. We choose to discuss the other issues because the State did so in its brief, though Toran also does not refute the State’s arguments in his reply brief. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (arguments not refuted deemed admitted). The sections in Toran’s briefs on the interests of justice and harmless error are undeveloped and will not be addressed further. *See State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).

