

2014 IL App (2d) 130397-U
No. 2-13-0397
Order filed October 16, 2014

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CF-1714
)	
CLARENCE E. PERRY,)	Honorable
)	George Bridges,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Presiding Justice Burke and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court properly denied defendant’s motion to dismiss for improper venue, as he did not make a *prima facie* showing that his allegedly fraudulent online orders were not processed at the victim’s headquarters in Lake County; (2) defendant was entitled to an additional day of presentencing credit, though he was not entitled to credit for time in custody in Ohio for an offense committed there.

¶ 2 Defendant, Clarence E. Perry, was charged in Lake County with two counts of Internet theft by deception. 720 ILCS 5/16-40(b) (West 2012). A defendant charged with this offense may be prosecuted “in any county where any one or more elements of the offense took place.” 720 ILCS 5/1-6(s) (West 2012). Defendant moved to dismiss the indictment on the ground of

improper venue. The trial court denied the motion and, following a bench trial, found defendant guilty on both counts. Defendant appeals, contending that the trial court erred in denying his motion to dismiss and that he is entitled to additional sentencing credit. We affirm as modified.

¶ 3 An information alleged that defendant ordered merchandise online from W. W. Grainger, Inc., using an account that he was not authorized to use. Defendant, acting *pro se*, moved to dismiss the information, alleging that venue in Lake County was improper. At the hearing on his motion, defendant asserted that he ordered the merchandise while in Cook County and had it delivered to another location in Cook County. Thus, he concluded, there was no basis to conclude that venue was proper in Lake County. The State responded that the victim, Grainger, had its corporate headquarters in Lake County. Its loss-prevention officer, call center for complaints about online orders, and server were all in Lake County. Defendant replied that the State had previously stated that the server was in Niles, which is in Cook County.

¶ 4 The trial court denied the motion, holding that the State had established that the victim's headquarters, server, and call center were in Lake County, which was sufficient to establish venue there. At the next court date, the State clarified that Grainger's primary server is in Lake County, with a "back-up server" in Niles.

¶ 5 Following a bench trial, the court found defendant guilty and sentenced him to concurrent 12-year prison terms, with credit for 125 days' presentencing incarceration. Defendant timely appeals.

¶ 6 Defendant first contends that the trial court erred by denying his motion to dismiss the charges on the basis of improper venue. Defendant was charged with internet theft by deception. A person violates this section when he or she "uses the Internet to purchase or attempt to purchase property from a seller with a mode of payment that he or she knows is fictitious, stolen,

or lacking the consent of the valid account holder.” 720 ILCS 5/16-40(b) (West 2012). A defendant charged with this offense may be prosecuted “in any county where any one or more elements of the offense took place, regardless of whether the element of the offense was the result of acts by the accused, the victim or by another person, and regardless of whether the defendant was ever physically present within the boundaries of the county.” 720 ILCS 5/1-6(s) (West 2012).

¶ 7 At one time, venue was considered an element of the offense that the State had to prove at trial. *People v. Gallegos*, 293 Ill. App. 3d 873, 877 (1997). However, this is no longer the case. It is now the defendant’s burden to show that venue is improper. A defendant wishing to do so must file a motion pursuant to section 114-1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/114-1(a)(7) (West 2012). If the defendant makes a *prima facie* showing that venue is improper, the burden shifts to the State to prove by a preponderance of the evidence that the county is a proper place for trial. 725 ILCS 5/114-1(d-5) (West 2012).

¶ 8 The State asserts that defendant never made a *prima facie* case that venue was improper. Thus, the burden never shifted to the State to demonstrate proper venue. We agree. Defendant acknowledges that the State is no longer required to prove venue at trial. However, he contends that “there was simply no evidence that the order was received by Grainger in Lake County” and that “[t]here was no evidence which of these two servers processed the orders in question.” However, it was defendant’s burden to make a *prima facie* case of improper venue, and he failed to do so.

¶ 9 At the hearing on defendant’s motion, the State asserted that Grainger’s corporate headquarters, including its loss-prevention officer, call center for complaints about online orders, and server were all in Lake County. Defendant responded that the State had previously stated

that the server was in Cook County. At a later hearing, the State clarified that Grainger's primary server is in Lake County and that it has only a backup server in Cook County. Defendant argues that, even if Grainger processed his order through its Lake County server, venue would not be proper there because there was no evidence presented that the orders were processed or shipped from Lake County.

¶ 10 Defendant never presented any evidence that venue in Lake County was improper, *i.e.*, that the order was not processed by Grainger in Lake County or that the order was processed by its backup server in Niles rather than its primary server in Lake County. (The State argues that this would be impossible because, by definition, a backup server is used only to create backup files and thus the backup server could not have independently processed the order.) Thus, the burden never shifted to the State to prove proper venue. *People v. Digirolamo*, 179 Ill. 2d 24, 51-52 (1997), which defendant cites, is inapposite, as it was decided under the old rule that the State had to prove venue at trial. Thus, the trial court properly denied defendant's motion to dismiss for improper venue.

¶ 11 Defendant alternatively argues that he is entitled to an additional 22 days' credit against his sentence. Defendant notes that the offenses at issue were committed in April 2012. In June 2012, he was arrested in Ohio on a forgery charge that was later dismissed. Based on a violation of his mandatory supervised release, he was transferred to the Department of Corrections on July 12, 2012. Defendant contends that he is entitled to credit for the 21 days he spent in custody in Ohio. He further contends that the court miscalculated the time he spent in the Lake County jail and that he is entitled to one additional day for time spent there.

¶ 12 Credit for time served in presentencing custody is a question of law, which we review *de novo*. *People v. Robinson*, 172 Ill. 2d 452, 457 (1996). Section 5-4.5-100(c) of the Unified Code

of Corrections provides that “[a]n offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit *** for time spent in custody under the former charge not credited against another sentence.” 730 ILCS 5/5-4.5-100(c) (West 2012).

¶ 13 Citing *People ex rel. Bradley v. Davies*, 17 Ill. App. 3d 920, 921-22 (1974), defendant argues that the plain language of section 5-4.5-100(c) does not limit the credit to time spent in custody in Illinois. In *Davies*, however, it was clear that the defendant was arrested in Indiana for the Illinois crime of which she was ultimately convicted. *Id.* at 920. Conversely, Illinois courts have consistently stated that a defendant is not entitled to credit for time in custody in another state for a crime committed in that state. *People v. Evans*, 391 Ill. App. 3d 470, 472-73 (2009); *People v. Clinard*, 242 Ill. App. 3d 414, 417 (1993); *People v. Gardner*, 172 Ill. App. 3d 763, 768 (1988).

¶ 14 The predecessor to section 5-4.5-100(c) was enacted to “ ‘prevent the State from dropping an initial charge and recharging a defendant with another crime, with the intent of denying credit for time spent in jail on the first charge.’ ” *Robinson*, 172 Ill. 2d at 460-61 (quoting *People v. Townsend*, 209 Ill. App. 3d 987, 990 (1991)). That situation is clearly not present here. As far as the record shows, defendant was jailed in Ohio for a crime committed there. The legislature could not have intended to grant credit to a defendant who is fortuitously arrested but not convicted in another state for a crime having no connection to Illinois.

¶ 15 The State agrees, however, that defendant is entitled to an additional day of credit for time spent in the Lake County jail. Defendant was jailed for this offense on November 21, 2012, and remained there until he was sentenced on March 27, 2013, a period of 126 days. A defendant is entitled to credit for any part of a day spent in custody prior to being sentenced. 730

ILCS 5/5-4.5-100(b) (West 2012); *People v. Dominguez*, 255 Ill. App. 3d 995, 1005 (1994).

Thus, we amend the mittimus to show that defendant is entitled to 126 days of credit against his sentence.

¶ 16 The judgment of the circuit court of Lake County is affirmed as modified.

¶ 17 Affirmed as modified.