

NOTICE
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2014 IL App (5th) 120254-U

NO. 5-12-0254

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 07-CF-1335
)	
NATHANIEL FLEMING,)	Honorable
)	James Hackett,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Spomer concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant was not entitled to day-for-day credit against the 25 years added to his murder sentence pursuant to a mandatory sentence enhancement provision because the 25 years were part of the murder sentence.
- ¶ 2 The defendant, Nathaniel Fleming, is serving a 45-year sentence for murder. His sentence includes a 25-year sentence enhancement for using a firearm in the commission of the offense (see 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006)). In this appeal, the defendant argues that the *mittimus* should be amended to state that he is eligible for day-for-day good conduct credit for that portion of his sentence. He acknowledges that he is not eligible for credit against the base sentence for murder (see 730 ILCS 5/3-6-3(a)(2)(i)

(West 2006)). He argues, however, that the 25-year enhancement for using a firearm during the commission of the offense is a separate and distinct sentence that does not fall within any of the exceptions to the general rule that a prisoner is eligible for day-for-day credit (see 730 ILCS 5/3-6-3(a)(2.1) (West 2006)). We affirm.

¶ 3 In June 2007, the defendant was charged by information with one count of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)). The charges stemmed from a drive-by shooting in a parking lot during which the defendant shot two men, injuring one and killing the other. The defendant was subsequently tried and convicted on both charges and sentenced to consecutive terms of 45 years for murder and 10 years for aggravated battery with a firearm. The 45-year murder sentence includes a mandatory sentence enhancement of 25 years because he used a firearm in committing the murder. It is this enhancement that is at issue in this appeal.

¶ 4 The defendant unsuccessfully appealed his conviction, arguing that he received ineffective assistance of counsel at trial. He later filed a postconviction petition, raising additional claims of ineffective assistance of trial and appellate counsel. In May 2012, the trial court dismissed the defendant's petition at the second stage of postconviction proceedings. He then filed the instant appeal.

¶ 5 The defendant does not challenge any of the court's substantive rulings with respect to his postconviction petition. Instead, as previously mentioned, he argues that the *mittimus* must be amended to reflect his eligibility for day-for-day good conduct credit against the 25-year sentence enhancement. For the reasons that follow, we

disagree.

¶ 6 Before addressing the merits of the defendant's appeal, we must first consider the State's contention that the defendant has forfeited our consideration of his claim. The State points out that the defendant raises the issue of the sentence credit for the first time in this appeal; he did not raise this question in his postconviction petition. Ordinarily, issues not raised in the trial court are forfeited on appeal. *People v. Cruz*, 2013 IL 113399, ¶ 20, 985 N.E.2d 1014 (citing *People v. Thompson*, 238 Ill. 2d 598, 611-12, 939 N.E.2d 403, 412 (2010)). However, courts have granted relief to defendants raising the issue of sentence credit for the first time at any point in the proceedings, including on appeal from postconviction proceedings. See *People v. Caballero*, 228 Ill. 2d 79, 88, 885 N.E.2d 1044, 1049 (2008); *People v. Purcell*, 2013 IL App (2d) 110810, ¶ 8, 987 N.E.2d 813. We will therefore consider the merits of the defendant's appeal.

¶ 7 The defendant argues that he is entitled to have the *mittimus* amended to reflect day-for-day good conduct credit against the 25-year mandatory add-on for using a firearm in committing the murder. We disagree.

¶ 8 The defendant's argument revolves around his interpretation of two statutes in the Unified Code of Corrections and the interplay between their provisions. It is thus a question of statutory interpretation. Our goal in interpreting statutes is to ascertain and give effect to the intent of the legislature. *People v. Roberts*, 214 Ill. 2d 106, 116, 824 N.E.2d 250, 256 (2005). The most reliable indication of legislative intent is the language of the statute itself, which should be given its plain and ordinary meaning. *People v. Alvarado*, 2013 IL App (3d) 120467, ¶ 19, 993 N.E.2d 1122. Ambiguities in penal

statutes must be resolved in favor of criminal defendants. *People v. Lee*, 397 Ill. App. 3d 1067, 1069, 926 N.E.2d 402, 404 (2010). However, where the statutory meaning is clear, we will apply the statute as written. Statutory construction is a question of law, which we review *de novo*. *Roberts*, 214 Ill. 2d at 116, 824 N.E.2d at 256.

¶ 9 The statutes at issue are section 3-6-3 of the Unified Code of Corrections (730 ILCS 5/3-6-3 (West 2006)), which governs sentence credit, and section 5-8-1(a)(1) (730 ILCS 5/5-8-1(a)(1) (West 2006)), which contains provisions related to sentencing of defendants convicted of murder. In relevant part, the latter section provides that if a defendant is convicted of first-degree murder and "during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006).

¶ 10 The statute governing sentence credit provides that "a prisoner who is serving a term of imprisonment for first degree murder *** shall receive no good conduct credit and shall serve the entire sentence imposed by the court." 730 ILCS 5/3-6-3(a)(2)(i) (West 2006). In addition, the statute enumerates several specific offenses and prescribes methods of calculating good conduct credit against time served for each of those offenses. 730 ILCS 5/3-6-3(a)(2)(ii)-(iv) (West 2006). The statute further provides, "For all offenses, other than those enumerated ***, a prisoner who is serving a term of imprisonment shall receive one day of good conduct credit for each day of his or her sentence ***". 730 ILCS 5/3-6-3(a)(2.1) (West 2006).

¶ 11 The defendant focuses on the phrase "imposed by the court," which appears in both statutes. See 730 ILCS 5/3-6-3(a)(2)(i) (West 2006); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). He argues that the "sentence imposed by the court" refers only to the base sentence for murder without taking into account the mandatory add-on. He argues that, by the plain terms of the statute, the mandatory sentence enhancement is not part of the "sentence imposed by the court," but is "added to" such sentence by operation of law.

¶ 12 Here, according to the defendant, the sentence imposed by the court for murder was 20 years. He acknowledges that, pursuant to section 3-6-3(a)(2)(i), he is not eligible for sentence credit against the 20-year sentence imposed by the court. He contends, however, that section 3-6-3(a)(2)(i) does *not* apply to the 25 years that were added to the 20-year sentence. Instead, he contends, credit against the 25-year add-on is governed by section 3-6-3(a)(2.1). As previously mentioned, that section provides that an inmate serving a sentence for any offense not enumerated in the statute is eligible for day-for-day good conduct credit. 730 ILCS 5/3-6-3(a)(2.1) (West 2006).

¶ 13 This argument has two components. First, the defendant contends that the 25-year enhancement was a sentence for the separate offense of using a firearm during the commission of a crime. In support of this contention, the defendant points out that the Criminal Code of 1961 defines "offense" as "a violation of any penal statute of this State." 720 ILCS 5/2-12 (West 2006). He further notes that statutes in the Unified Code of Corrections are penal in nature. See *People v. McCarty*, 94 Ill. 2d 28, 31-35, 445 N.E.2d 298, 302 (1983) (noting that ambiguities in penal statutes must be resolved in favor of defendants, including sentence enhancement provisions). Second, the defendant

argues that because this "offense" is not enumerated elsewhere in the statute governing sentence credit, section 3-6-3(a)(2.1) is applicable, making him eligible for day-for-day credit. We do not find these arguments persuasive.

¶ 14 As the defendant acknowledges, the only Illinois court to squarely address the question before us reached the opposite conclusion from the one he asks us to reach today. In *People v. Alvarado*, as here, the defendant argued that the 25-year enhancement was separate from his sentence for murder. He argued, as the defendant does here, that this portion of his sentence was therefore not subject to the provisions of section 3-6-3(a)(2.1). *Alvarado*, 2013 IL App (3d) 120467, ¶ 18, 993 N.E.2d 1122. The Third District rejected this argument, noting that "the plain and ordinary meaning" of the statute indicates that the enhancements mandated "are to be considered part of the sentence." *Alvarado*, 2013 IL App (3d) 120467, ¶ 21, 993 N.E.2d 1122. The court emphasized that the statute requires that 25 years to a term of natural life be "added" to the sentence. The court then explained that "the word 'add' means 'to unite or join so as to increase the *** size.' " *Alvarado*, 2013 IL App (3d) 120467, ¶ 21, 993 N.E.2d 1122 (quoting The Random House Dictionary of the English Language 22 (2d ed. 1987)).

¶ 15 We find the Third District's rationale persuasive. We find additional support for this interpretation in the structure and the title of the statute mandating the enhancement. As noted earlier, section 5-8-1(a) contains provisions related to sentencing certain defendants convicted of first-degree murder. Section 5-8-1(a)(1)(b) provides that a court may impose a sentence of natural life if the jury finds beyond a reasonable doubt that the murder "was accompanied by exceptionally brutal or heinous behavior." 730 ILCS 5/5-

8-1(a)(1)(b) (West 2006). Section 5-8-1(a)(1)(c) provides that the court must impose a natural-life sentence under certain conditions. 730 ILCS 5/5-8-1(a)(1)(c) (West 2006). Section 5-8-1(a)(1)(d) provides three different periods of time that the court must add to the defendant's sentence if the offense is committed with a firearm. Additional circumstances determine which of these enhancement provisions is applicable. 730 ILCS 5/5-8-1(a)(1)(d)(i)-(iii) (West 2006). The placement of the add-ons in a paragraph governing extended sentences for murder indicates that the legislature considered the add-ons to be enhancements, not separate sentences.

¶ 16 Moreover, although the supreme court has not addressed the precise issue before us, it has considered a closely related argument in a different context. In *People v. White*, a defendant pled guilty to first-degree murder and was sentenced to 28 years in prison in accordance with a negotiated plea agreement. *People v. White*, 2011 IL 109616, ¶ 7, 953 N.E.2d 398. He subsequently filed a motion to vacate his guilty plea. He argued that he was not properly admonished about the sentence range because he was not told about the applicable enhancement provision, which required a 15-year addition to his murder sentence. *White*, 2011 IL 109616, ¶ 9, 953 N.E.2d 398 (citing 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2004)). He further argued that his plea had to be vacated because his sentence—which did not include the add-on—was void. *White*, 2011 IL 109616, ¶ 9, 953 N.E.2d 401.

¶ 17 On appeal, the supreme court agreed. *White*, 2011 IL 109616, ¶ 21, 953 N.E.2d 398. The State argued, however, that its authority to offer a negotiated plea agreement included the authority to offer an "unenhanced" murder sentence in exchange for a plea.

The Stated likened such a plea agreement to an agreement in which a defendant charged with armed robbery pleads guilty to a lesser charge of simple robbery pursuant to a plea agreement. *White*, 2011 IL 109616, ¶ 24, 953 N.E.2d 398.

¶ 18 In rejecting this argument, the court explained, "Unlike robbery and armed robbery, which are separate and distinct offenses, first degree murder is a single offense—there is no separate offense of 'armed murder' or 'enhanced murder.'" *White*, 2011 IL 109616, ¶ 26, 953 N.E.2d 398. Thus, our supreme court has explicitly rejected the idea that the use of a firearm during the commission of an offense constitutes a separate and distinct offense, which further undermines the defendant's contention that the mandatory enhancement for the use of a firearm should be treated differently from the remainder of his murder sentence.

¶ 19 For all of these reasons, we conclude that the 25-year sentence enhancement is part of the defendant's sentence for murder. As such, section 3-6-3(a)(2)(i) is applicable, and the defendant is ineligible for any good conduct sentence credit.

¶ 20 For the foregoing reasons, we affirm the judgment of the trial court without amendment to the *mittimus*.

¶ 21 Affirmed.