FIFTH DIVISION
FEBRUARY 17, 2017

No. 1-14-3028

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 10738
	)	
DARNELL JONES,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Reyes concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant relied on the trial court's pronouncement that he would receive 1,618 days of presentencing custody credit, he is entitled to the benefit of the pronouncement of his plea agreement and we order a correction of the mittimus to reflect that credit.

¶ 2 Defendant Darnell Jones, who pled guilty to first degree murder committed during the course of an aggravated kidnapping and was sentenced to 40 years in prison, appeals from the denial of his *pro se* "Motion for a *Nunc Pro Tunc* Order to Correct the Mittimus." On appeal, defendant argues that he was denied the benefit of his plea bargain because, pursuant to his fully

negotiated plea agreement, he should have received 1,618 days of presentence custody credit but the mittimus provided that he would only receive 809 days.

¶ 3 For the reasons explained below, we reverse the denial of defendant's motion, reduce his sentence by 809 days so as to best approximate the terms of his plea agreement, and order modification of the mittimus.

¶ 4 On June 21, 2001, defendant participated in a plea hearing during which, in exchange for the trial court's recommendation of 40 years in prison, he agreed to plead guilty to one count of first degree murder for an offense that occurred in 1996, when defendant was 18 years old. At the plea hearing, prior to the admonishments and to defendant entering into the plea of guilty, the trial court and defense counsel discussed the plea agreement and defendant's sentence as follows:

> "THE COURT: Okay. Are we proceeding on any particular count, all the counts, how did you want me to admonish the defendant? Give me an idea. Are we proceeding with murder as the mandatory 20 to 60?
>
> [ASSISTANT STATE'S ATTORNEY]: Yes, Judge.
>
> THE COURT: Or are there–other than the aggravating facts in the case themselves somewhere between 40 and 60, and the Court indicated to him after a conference in this matter that I thought 40 years would be appropriate in exchange for a plea of guilty. Is that what I'm hearing?
>
> [DEFENSE COUNSEL]: Yes, it is. Mr. Jones also–I spoke to the State about this–he has been in custody, and I believe the State has now given day-for-day credit.

THE COURT: I think he is entitled to it. He always has a right to proceed under whatever statute is available. He is entitled to choose the statute that says day-for-day good time, if that was what he ultimately wanted to plead guilty, I will certainly mark the mittimus and underline it that he receive day-for-day good time in the amount of–

[DEFENSE COUNSEL]: 809 days.

THE COURT: 809 days time considered served having actually been served, and he is entitled to god [*sic*] day for everyday he is in custody. He is entitled to it by statute and likely to proceed on the statute that was in effect at the time of the crime."

¶ 5 The trial court then discussed the 40-year sentence and presentence custody credit with defendant as follows:

"THE COURT: I heard you're being–I indicated that after hearing the facts, that I would sentence you to 40 years in the Illinois Department of Corrections and give you day-for-day time credit for all the time spent in custody, and you will be allowed to elect under the statute that was in effect at the time of this crime which allows you day-for-day good time.

Is that your understanding and is that what you want me to do?

THE DEFENDANT: Mr. Himel, I have a question.

THE COURT: Sure.

THE DEFENDANT: He said I have been here 800 and how many days?

[DEFENSE COUNSEL]: 809 days.

THE COURT: 809 days. If you have no problems, you are entitled to that day-for-day credit. You get one day for every good day you spend in custody.

THE DEFENDANT: Okay.

THE COURT: This is under the statute that would require by statute that you be given day-for-day credit. You have any other questions?

THE DEFENDANT: No."

¶ 6 The trial court then explained to defendant the rights he was giving up by pleading guilty. During the trial court's explanation, the trial court and defendant engaged in the following exchange:

"THE COURT: You are entering this plea freely and voluntarily, no one has forced you into entering this plea other than you yourself want to accept 40 years Illinois Department of Corrections, which would include 809 days, or double that, 1,618 days time credit.

THE DEFENDANT: Yes.

THE COURT: And, again, you are doing this freely and voluntarily. You have talked about the facts. You talked about this with your attorneys. You talked about trial strategies. You talked about guilt or innocence; and based on all discussions, it's your final decision that you want to withdraw this plea and accept 40 years Illinois Department of Corrections in exchange for this plea of guilty.

THE DEFENDANT: Yes.

THE COURT: The Court finds that the defendant knowingly and intelligently understands the consequences of his plea of guilty. The plea of guilty will, therefore, be accepted."

¶ 7 Thereafter, the State informed the trial court of the factual basis for the plea. In brief, Chicago police officers Downes and Kronkowski would have testified that on August 17, 1996, they found the victim, Shawn McKenzie, lying in a large pool of blood with multiple gunshot wounds. The victim's ankles were bound together with a telephone cord, and a sock was tied around his neck. The State explained that codefendant Nicole Burns gave a statement regarding the incident. Her statement indicated that prior to the incident, she, defendant, and the three other codefendants had planned to rob the victim of his narcotics and money. The parties stipulated to a statement given and signed by defendant, and the State asked him questions about it at the plea hearing. During this questioning, defendant testified that the victim would not tell him or the other codefendants where the money or drugs were, that he bound up and then cut the victim, that another codefendant poured acid or another type of painful liquid bleach on the victim, and that when the victim tried to get away, he shot the victim.

¶ 8 The trial court found a factual basis for defendant's guilty plea, found him guilty, and sentenced him to 40 years in prison. When the trial court imposed the sentence, it stated as follows:

> "THE COURT: Sentence of this Court, after hearing aggravation-mitigation, defendant is sentenced to 40 years Illinois Department of Corrections. Defendant to receive day-for-day credit for 809 days.
>
> The mittimus should indicate that the plea is taken under the statute which would indicate that he is entitled to day-to-day time on the plea. I want the mittimus to show that. I want that fully understood.
>
> * * *

> First and foremost, if anything should arise and you not get day-for-day credit, that is a basis for letting your attorney know or for letting me know so we can bring your case back and make sure that the paperwork is done."

¶ 9 The record contains a preprinted "Notification of Motion" form indicating that a *pro se* "Motion for Correct Mitt for Credit" was received on November 20, 2002. The form indicates the motion was scheduled to be heard on December 4, 2002. The record also contains a handwritten letter from defendant, specifically addressed to the trial judge who presided over the plea hearing proceeding. The letter, which was stamped as received by the Clerk of the Circuit Court on November 20, 2002, stated, among other things, as follows:

> "I Darnell Jones are [*sic*] writing concerning my time that I were [*sic*] sentence, and it seems as if there has been an error made with my out date, thats [*sic*] why I am writing you, so that this error can be correct [*sic*]. Judge Himel I were [*sic*] inform [*sic*] by you that I would receive (1618 days) on my sentence and I have not gotten it yet, so this is why I'm sending you my calculation sheet so that you may be more aware on whats [*sic*] going on with my situation, it seem [*sic*] as if there has been some type of misunderstanding with I.D.O.C about my sentence."

The record does not contain any documents reflecting whether the trial court heard or issued a ruling on this "Motion for Correct Mitt for Credit."

¶ 10 On June 20, 2014, defendant filed a *pro se* "Motion for a *Nunc Pro Tunc* Order to Correct the Mittimus," arguing that he did not receive the benefit of the bargain of his plea agreement because he pled guilty in exchange for a specific sentence of 40 years and credit for 1,618 days, but was only credited for 809 days. A hearing on the motion was held on August 1, 2014.

Defendant was not present at the hearing on this motion, and the trial judge was not the same trial judge who presided over the plea hearing proceeding. At the hearing, the assistant public defender stated as follows:

> "Your Honor, I looked at the motion. There is certain, let's say, allegations. I think we might have to order the transcript from the sentencing date. Just looking at the file though, it looks like the credits are correct, the 809 that he was given. In one paragraph he states that he was promised a credit of 1,618 days."

The trial court examined the date of defendant's arrest and the date he was sentenced, and noted that he would have been in presentence custody for 806 days. The trial court found that defendant received all credit due and stated that he "is now asking to double that credit for 1,618. That is not what 'day for day' means." The trial court denied defendant's motion, noting that "The IDOC will credit him the appropriate day-for-day credit in custody based on the actual number of days."

¶ 11 This appeal followed.

¶ 12 As an initial matter, we find that defendant's "Motion for a *Nunc Pro Tunc* Order to Correct the Mittimus" is a proper procedure for defendant's requested relief, namely, that he is entitled to 1,816 days' credit, or a reduced sentence of 809 days, pursuant to his plea agreement, which he entered on June 21, 2001. Even after a trial court's jurisdiction over an underlying criminal case lapses, the trial court retains jurisdiction to enforce the judgment or to correct clerical errors (*People v. Flowers*, 208 Ill. 2d 291, 306-07 (2003)) or "to conform the record to the judgment actually entered" (*People v. Corredor*, 399 Ill. App. 3d 804, 808 (2010)). A motion for an order *nunc pro tunc* and a motion to correct the mittimus are methods used to request these

corrections. *Corredor*, 399 Ill. App. 3d at 808. With respect to *nunc pro tunc* orders, "[t]he purpose of a *nunc pro tunc* order is to make the present record correspond with what the court actually decided in the past." *People v. White*, 357 Ill. App. 3d 1070, 1072 (2005). A *nunc pro tunc* order reflects only what the trial court actually did, and therefore, "it must be based on some note, memorandum, or other memorial in the court record." *People v. Jones*, 2016 IL App (1st) 142582, ¶ 11. "The evidence in the record 'must clearly show' that the order being modified failed to conform to the decree actually made by the trial court." *Jones*, 2016 IL App (1st) 142582, ¶ 12.

¶ 13 For the reasons that follow, we find that the evidence in the record shows that the mittimus does not conform to the terms of the plea agreement, and therefore, conclude that defendant's "Motion for a *Nunc Pro Tunc* Order to Correct the Mittimus" was the proper procedure for the requested relief. See *Corredor*, 399 Ill. App. 3d at 808 (noting that the trial court retained jurisdiction to review defendant's "Motion for Order Nunc Pro Tunc" and stating that "[b]y entitling his filing a 'Motion for Order Nunc pro Tunc' and by referring to an alleged discrepancy between the court's expressed intentions and the result, defendant plainly invoked this limited continuing jurisdiction").

¶ 14 With respect to the merits, defendant argues on appeal that he is entitled to the benefit of his fully negotiated plea agreement, which included 1,618 days' credit. Defendant argues that the trial judge assured him on the record that he would receive 1,618 days of presentence custody credit but that the mittimus provided that he would only receive 809 days. Defendant contends that the 1,618 days of credit was consideration for him to enter into the guilty plea and that we should follow the holding in *People v. Lenoir*, 2014 IL App (1st) 113615. In *Lenoir*, we found

that even though the 309-day credit included in the plea agreement was impermissible double credit, the defendant was entitled to that credit because it was consideration for the plea of guilty, and he was entitled to the benefit of the bargain. *Lenoir*, 2014 IL App (1st) 113615, ¶¶ 12, 13. Defendant further argues that when the trial court ruled on his motion, the trial court did not have the transcript of the guilty plea proceeding, and therefore, it did not have knowledge that the judge presiding over the guilty plea proceeding promised him 1,618 days of credit. Defendant argues that the trial court only considered whether his credit was correctly calculated and not whether he was denied the benefit of the bargain or whether he was promised 1,618 days of credit. Defendant requests that we reduce his sentence by 809 days to best approximate the terms of his plea agreement.

¶ 15 In response, the State argues that the record is “abundantly clear” that the parties' agreement included that defendant would receive 809 days of presentence custody credit and that defendant's argument is “directly rebutted” by the record. The State contends that the trial court repeatedly admonished, and defense counsel represented, that defendant would receive 809 days' credit and that the trial court misspoke when it stated that defendant would receive 1,618 days of presentence custody credit. The State further argues that defendant's understanding of the terms of the plea agreement are unreasonable because the "good conduct credit cannot be part of a plea agreement.” Additionally, the State argues that this case is distinguishable from *Lenoir* because here, defendant did not file a direct appeal pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006), and therefore, he has forfeited his right to withdraw his guilty plea as well as his right to appeal claims about his sentencing.

¶ 16 Before considering the merits, we first address the State's arguments that defendant forfeited his right to withdraw his guilty plea and to appeal claims about his sentencing, which the State argues distinguishes this case from *Lenoir*. First, we note that defendant is not seeking to withdraw his guilty plea, but is only requesting that we amend the mittimus to reflect the terms of his plea agreement. Therefore, whether defendant has forfeited his right to withdraw his guilty plea is not an issue. As for the State's argument that defendant forfeited his right to appeal claims regarding his sentence, we disagree. While a trial court generally loses jurisdiction over a criminal case after the postjudgment filing period expires (*Hollister*, 394 Ill. App. 3d at 381), as discussed above, the trial court "retains jurisdiction to conform the record to the judgment actually entered" (*Corredor*, 399 Ill. App. 3d at 808). Moreover, the trial court "retains jurisdiction to correct insubstantial matters, such as amending the mittimus." *Hollister*, 394 Ill. App. 3d at 381. Here, defendant requested to amend the mittimus to reflect the terms of his plea agreement. Accordingly, the trial court retained jurisdiction to hear defendant's "Motion for a *Nunc Pro Tunc* Order to Correct the Mittimus," and we find that defendant has not forfeited this issue. See *People v. Reeves*, 2015 IL App (4th) 130707, ¶¶ 5-8 (the reviewing court addressed the merits of the defendant's "motion to amend the written sentencing judgment" even though the defendant filed this motion with the trial court after his postconviction petition was summarily dismissed); *White*, 357 Ill. App. 3d at 1072-73 (where the State argued that the reviewing court did not have jurisdiction because the defendant did not file a postplea motion under Rule 604(d), the reviewing court addressed the merits of the defendant's "*nunc pro tunc* motion," which requested additional credit for presentence custody).

¶ 17 Plea agreements are considered contracts between the State and the defendant and are governed by contract law. *Lenoir*, 2013 IL App (1st) 113615, ¶13. Further, "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. N.Y.*, 404 U.S. 257, 262 (1971). "A defendant's due process may be violated when a defendant does not receive the 'benefit of the bargain' of his plea agreement" (*People v. Lee*, 385 Ill. App. 3d 1109, 1110 (2008)) or when "a court admonishes a defendant that he will receive a shorter sentence than he actually receives" (*People v. Day*, 311 Ill. App. 3d 271, 274 (2000)). A defendant may have a due process right to enforce the terms of a plea agreement if he or she can show that his plea of guilty was entered in reliance on a plea agreement. *People v. Whitfield*, 217 Ill. 2d 177, 189 (2005). The issues of whether an order meets the legal criteria for a *nunc pro tunc* order and whether a mittimus should be amended are subject to *de novo* review. *Jones*, 2016 IL App (1st) 142582, ¶ 12; *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 86.

¶ 18 We find that the record demonstrates that the mittimus does not conform to the pronouncement of the trial court that defendant would receive "809 days, or double that, 1,618 days time credit." Once the trial court made that pronouncement and defendant relied on it, it became part of the plea agreement. Therefore, we conclude that he is entitled to the benefit of his plea bargain and a correction to the mittimus to reflect a presentence custody credit of 1,618 days. The trial court made the statement regarding 1,618 days' credit prior to defendant acknowledging that it was his final decision to accept the plea agreement, and prior to the trial court accepting it. See *People v. Reeves*, 2015 IL App (4th) 130707, ¶14 (noting that "the terms of a plea agreement are set at the plea hearing, not at sentencing"). Furthermore, the trial court's

statement was the final statement made to defendant concerning his presentencing credit before he formally accepted the plea agreement, and the State did not object or take issue with the trial court's pronouncement. Defendant's handwritten letter to the trial judge in November 2002 further demonstrates that he relied on the trial court's statement that he would get 1,618 days of credit. Given these circumstances, we find that defendant relied on the statement that he would receive 1,618 days' credit and must be accorded the benefit of the court's pronouncement.

¶ 19 We disagree with the State's position that the record directly rebuts a conclusion that defendant relied on the trial court's statement. While the record indicates that the trial court repeatedly referenced the 809 days defendant had actually served in custody and defendant and his attorney agreed with it, these statements occurred in conjunction with explanations of good conduct credit that defendant may be entitled to and with references to "day-for-day credit" and "day-for-day good time." We note that under the statute that governs good conduct credit after a defendant begins a prison sentence with the Illinois Department of Corrections, "day-for-day" credit is a term used to describe "good conduct credit." *People v. Lindsey*, 199 Ill. 2d 460, 477-78 (2002) ("'Day-for-day' credit is a phrase used to describe the system of mandatory 'good conduct credit' contained in section 3–6–3 of the Unified Code of Corrections. *** Under the day-for-day system, a felon may earn credit for good behavior once he or she begins to serve the prison sentence."). The record does not indicate that either party explained to defendant that, while he may be entitled to good conduct credit, it would not apply to the days he had already served or the time the trial court gave him as credit for time considered served. See *People v. Clark*, 2011 IL App (2d) 091116, ¶¶ 1, 5, 11 (finding that the defendant did not receive the benefit of the bargain of his negotiated plea agreement and noting that "[t]he prosecutor never

indicated that, although defendant's sentences were to run consecutively, the sentencing credits would, in effect, apply concurrently"). Given the foregoing, and after reviewing the plea hearing as a whole, we do not find that the record is "abundantly clear," or that defendant was repeatedly admonished, that the plea agreement only included 809 days' credit for time spent in presentence custody. Instead, we find that it was reasonable for defendant to interpret the trial court's pronouncement of 1,618 days of presentence custody credit as part of the plea agreement. See *Clark*, 2011 IL App (2d) 091116, ¶ 5 (noting that the defendant's interpretation of the plea agreement was "the most natural interpretation" of the prosecutor's description).

¶ 20 Finally, the State argues that defendant's interpretation of the agreement is unsupported and unreasonable because good conduct credit cannot be part of a plea agreement. We do not find the State's argument persuasive. To support its argument, the State cites *People v. Davis*, 405 Ill. App. 3d 585, 603 (2010), which stated, "[T]he trial court has no control over the manner in which a defendant's good-conduct credit is earned or lost and it is within the Department of Correction's discretion to calculate what credit, if any, he will receive." While we do not dispute this proposition, we note that *Davis* did not involve a plea agreement, and that in *Lenoir*, 2013 IL App (1st) 113615, which did involve a plea agreement, we found that even though on appeal the parties had agreed that the requested 309 days' credit was impermissible "double credit" under *People v. Latona*, 184 Ill. 2d 260, 271 (1998), the defendant was entitled to 309 days' credit because it "was consideration for the plea of guilty such that defendant is entitled to the benefit of the bargain." *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 11-13. Similarly, in this case, even though the trial court could not award defendant good-conduct credit, as that credit is contingent upon behavior in prison (*Davis*, 405 Ill. App. 3d at 603), we find that the 1,618 days of credit was part

of defendant's plea because the trial court made it a part by its pronouncement and reliance by defendant. Accordingly, defendant is entitled to the benefit of the pronouncement of his plea agreement, which included the promise of 1,618 days' credit for time spent in presentence custody. See *Lenoir*, 2013 IL App (1st) 113615, ¶ 13; *Clark*, 2011 IL App (2d) 091116, ¶¶ 1, 11; *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27 ("the First and Second Appellate Districts have held that, when a specified amount of sentence credit is included within the terms of a defendant's plea agreement with the State, the defendant is entitled to the amount of sentence credit promised").

¶ 21 For the reasons explained above, we reverse the trial court's denial of defendant's motion and, pursuant to Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), reduce his sentence by 809 days so as to best approximate the terms of his plea agreement. We order the clerk of the circuit court to modify the mittimus to reflect a presentence custody credit of 1,618 days. See *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 21, 27 (reducing sentence to enforce benefit of the bargain and modifying mittimus accordingly); *Clark*, 2011 IL App (2d) 091116, ¶¶ 11, 12 (same).

¶ 22 Reversed; mittimus modified.