2017 IL App (1st) 14-3706-U

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THIRD DIVISION
March 29, 2017

No. 1-14-3706

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 04 CR 11883
JOSE BARRERA,	)	
	)	The Honorable
Petitioner-Appellant.	)	Nicholas Ford,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Cobbs concurred in the judgment.

ORDER

Held: Where the petitioner relied on the trial court's pronouncement that he would receive 303 days of presentencing 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.

¶ 1 The petitioner, Jose Barrera, who pleaded guilty to having violated his bail bond and was sentenced to two years' imprisonment, appeals from the circuit court's *sua sponte* dismissal of his *pro se* section 2-1401 petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)) and denial of his *pro se* motion for a *nunc pro tunc* order to correct his mittimus. On appeal, the petitioner argues that he was denied the benefit of his plea bargain because, pursuant to his fully

negotiated plea agreement, he should have received 303 days of presentence custody credit in the aggregate and not overlapping with his prior sentencing credit for a separate conviction, which he was serving at the time he pleaded guilty. For the reasons that follow, we agree and modify the mittimus by reducing the petitioner's prison term to reflect 303 days of sentencing credit.

¶ 2 I. BACKGROUND

¶ 3 On March 6, 2009, the petitioner was convicted of reckless homicide (720 ILCS 5/9-3(A)(C)(2) (West 2002)), obstruction of justice (720 ILCS 5/31-4(A) (West 2002)), and aggravated driving under the influence (DUI) (625 ILCS 5/11-503(C) (West 2002)) in case No. 02 CR 259361, and sentenced to concurrent sentences of 14 years' three years' and three years' imprisonment, respectively, with a total credit of 90 days for presentence custody. Several months later, while serving that sentence, on October 16, 2009, the petitioner pleaded guilty to a violation of bail bond (720 ILCS 5/32-10 (West 2009)), a Class 3 offense.

¶ 4 As part of a negotiated guilty plea, in return for his plea of guilty, the petitioner was to receive a consecutive sentence of two years in prison with credit for 303 days spent in presentence custody. At the plea hearing held on October 16, 2009, defense counsel informed the court that the petitioner had 303 days of sentencing credit on his offense. Defense counsel explained that the State offered the petitioner a sentence of two years' incarceration at 50%, to be served consecutive to the 14-year sentence he was already serving on his prior conviction. The court asked the petitioner if he wanted to plead guilty and he indicated in the affirmative.

¶ 5 The court then explained to the petitioner what he was giving up by pleading guilty, and the petitioner stated that he understood his rights and wanted to plead guilty. The trial court informed the petitioner of the potential penalties and his rights to have a presentence investigation report prepared prior to sentencing. The petitioner stated that he understood and

that he wanted to waive his rights to a presentence investigation. The parties stipulated that the facts in the arrest reports and complaints were sufficient to prove the petitioner was guilty of violating his bail bond as charged. The trial court found that the plea was freely and voluntarily made and that a factual basis existed.

¶ 6 The parties rested on the negotiated plea agreement and the State reiterated that the petitioner's two-year sentence would run consecutive to his sentence in the reckless homicide case. The court then pronounced sentence in the following manner:

> "Today's sentence will be two years Illinois Department of Corrections. 303 days' credit. This sentence will be served consecutive to case 02 CR 25936. Fees, fines and costs with that. As I said 303 days' credit."

The petitioner did not file a motion to withdraw his plea or an appeal.

¶ 7 On July 27, 2012, the petitioner filed a *pro se* petition for mandamus relief pursuant to section 14-101 of the Code of Civil Procedure (Code) (735 ILCS 5/14-101 (West 2010)), asserting that he was not receiving the 303 days of time credited towards his sentence. In that petition, he asserted that upon his incarceration at Western Illinois Correctional Center he was provided with a sentence calculation sheet and learned that his 303 days of credit were not being applied toward his two-year sentence. In support of his mandamus petition, the petitioner attached, *inter alia*: (1) two grievances that he filed with the Illinois Department of Corrections (IDOC) (on January 19, 2010, and subsequently April 15, 2010) explaining that because his two year sentence was to run consecutively to his 14 year sentence in the reckless homicide case, his 303 days of credit should be applied consecutively against his two-year sentence, and should not "overlap" with his reckless homicide sentence; (2) the orders of commitment and sentence in both the reckless homicide and bond violation convictions; (3) a certified statement of conviction

in the bond violation case; and (4) IDOC's calculation sheets. Accordingly, the petitioner asked the court to compel Western Illinois Correctional Center to give him the credit he was entitled to.

¶ 8 On September 28, 2012, the trial court dismissed the petitioner's *pro se* petition for mandamus relief, finding that the IDOC had properly factored the petitioner's 303 days of credit into his sentence.[1]

¶ 9 On September 8, 2014, the petitioner filed a *pro se* petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), a *pro se* motion for *nunc pro tunc* order to correct his mittimus, and motions for appointment of counsel as an indigent person. The section 2-1401 petition alleged that the petitioner had not received "the benefit of his plea bargain" because he pleaded guilty in exchange for a sentence of "one year and 62 days" (or two years in prison, minus the 303 days that he spent in presentence custody), but the IDOC's "projected out date" did not reflect these 303 days of credit. The petitioner's motion for a *nunc pro tunc* order asked the court to issue a new mittimus specifying that the sentencing credits on his consecutive sentences be "r[u]n in the 'aggregate' so that [he] c[ould] properly receive the 303 days of credit for time served on the two-year sentence." In support of these motions, the petitioner attached numerous exhibits, including, *inter alia*: the orders of commitment and sentence in both the reckless homicide and bond violation convictions; a sentence calculation worksheet, and the "Response to Offender Request" dated May 13, 2012, that he had received from his correctional facility stating that "the only way jail credits on consecutive sentences c[ould] be aggregated [wa]s if it he court

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[1] In its subsequent written order *sua sponte* dismissing the petitioner’s section 2-1401 petition and *nunc pro tunc* motion to correct the mittimus, the circuit court noted that on December 13, 2013, it denied the petitioner's notice of appeal of the mandamus petition due to late filing.

order call[ed] for it, which [his] d[id] not. Otherwise in your case, you receive the jail credits which benefit[] you the most."

¶ 10 On October 10, 2014, the circuit court *sua sponte* dismissed the petitioner's section 2-1401 petition, and *nunc pro tunc* motion, and denied his request for appointment of counsel. In a written order, the court noted that the petitioner had previously filed a petition for writ of mandamus asserting the same claim as that of the instant petition, but that upon consideration of the petitioner's claims the court had already determined that the 303 days of actual time served had been factored into his sentence and that the petitioner had failed to advance any meritorious arguments to the contrary. The court therefore concluded that the petitioner had presented the court with no evidence that he was entitled to a modification of his mittimus. In addition, the court held that the petitioner failed to assert any claim that would entitle him to relief pursuant to section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2012)). As the court explained: "His claim is not proper in this pleading. He has filed his petition well outside the two-year period prescribed by statute and does not assert that his sentence or conviction is void."

¶ 11 The petitioner now appeals the trial court's *sua sponte* dismissal of his petition for relief from judgment and his *nunc pro tunc* motion for a correction of the mittimus.

¶ 12 II. ANALYSIS

¶ 13 On appeal, he contends that we must restructure his sentence to give him the benefit of the bargain of his fully negotiated guilty plea, as demonstrated by the transcript of his plea hearing. Alternatively, the petitioner contends that the trial court's *sua sponte* dismissal of his petition for relief from judgment and his motion for *nunc pro tunc* order to correct the mittimus should be reversed because he stated a meritorious claim that he was denied the benefit of his bargain and that his mittimus should be corrected. For the reasons that follow, we agree.

¶ 14 Before addressing the merits, we begin by noting that contrary to the State's position, the petitioner was not required to proceed with his claim by way of a postconviction petition, rather than a *nunc pro tunc* order to correct the mittimus. Our supreme court has made clear that a *nunc pro tunc* order to correct the mittimus is a proper procedure for a petitioner's requested relief that he is eligible to receive additional days of presentencing credit pursuant to his fully negotiated plea agreement. See *People v. Coleman*, 60 N.E. 3d 868 (2016) (By way of supervisory order vacating the judgment of the appellate court and ordering the trial court to grant the defendant's motion for a *nunc pro tunc* order requesting that his sentencing credit be corrected because he was denied the benefit of the bargain by not receiving double presentencing credit when he pleaded guilty to consecutive sentences); see also *People v. Jones*, 2016 IL App (1st) 142582, ¶ 12 (The purpose of a *nunc pro tunc* order is to make the present record correspond with what the court actually decided in the past and 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); *People v. Denn*y, 238 Ill. App. 3d 819, 822-23 (1992) (noting that the purpose of a *nunc pro tunc* order is to correct the record of judgment based upon "definite and precise evidence in the record," such as a "note, memorandum or memorial paper remaining in the files or *upon the records of the court*."); see also *Harreld v. Butler*, 2014 IL App (2d) 131065, ¶ 13 (" 'A *nunc pro tunc* order is an entry now for something previously done, made to make the record speak now for what was actually done then.' [Citation.]") Where, as here, the petitioner asserts that his mittimuses must be corrected to reflect the benefit of his bargain as revealed by the transcript of his negotiated guilty plea hearing, a motion for a *nunc pro tunc* order to change the mittimus is appropriate.

¶ 15 Turning to the merits, on appeal, the petitioner contends that because the 303 days of

presentence custody credit on his consecutive sentence was consideration for his guilty plea, we must restructure his sentence to give him the benefit of the bargain. In support of his claims, the petitioner cites to our appellate court decisions in *People v. Lenoir*, 2013 IL App (1st) 113615, *People v. Clark*, 2011 IL App (2d) 09116, and *People v. McDermott*, 2014 IL App (4th) 120655.

¶ 16 For the reasons that follow, we find those cases to be controlling and require our reduction of the defendant's sentence by 303 days of credit so as to enforce the benefit of the bargain.

¶ 17 In *Clark*, the defendant pleaded guilty to two felonies in return for two consecutive eight-year prison sentences with credit against each sentence for time served in presentence custody. *Clark*, 2011 IL App (2d) 09116, ¶ 2. During the guilty plea proceedings, the State explained that the defendant was entitled to 339 days of credit toward one of the sentences, and 311 days' credit toward the other. *Clark*, 2011 IL App (2d) 09116, ¶ 5. The State, however, never explained that although the defendant's sentences were to run consecutively, under the law, the credits would have to run concurrently, such that the 311 day-credit would merge into the 339 day-credit. *Clark*, 2011 IL App (2d) 09116, ¶ 5.

¶ 18 After learning that the sentencing credits would not run consecutively, the defendant moved to withdraw his guilty plea, arguing that he had been denied the benefit of the bargain of his negotiated guilty plea. *Clark*, 2011 IL App (2d) 09116, ¶ 5. The trial court denied the defendant's motion, and he appealed. *Clark*, 2011 IL App (2d) 09116, ¶ 5.

¶ 19 The appellate court reversed the trial court's order, holding that even though under our supreme court's decision in *People v. Latona*, 184 Ill. 2d 260, 271 (1998), a defendant was not entitled to receive double credit for time served in simultaneous custody on consecutive sentences the defendant was nevertheless entitled to the benefit of his bargain with the State. *Clark*, 2011 IL App (2d) 09116, ¶ 11.

¶ 20 In reducing the defendant's sentence, the court in *Clark* reasoned:

"Because the sentences were consecutive, the most natural interpretation of the prosecutor's description of the agreement is that defendant would serve a prison term of 8 years, less 339 days, for residential burglary, followed by a prison term of 8 years, less 311 days, for attempted armed robbery. The prosecutor never indicated that, although defendant's sentences were to run consecutively, the sentencing credits would, in effect, apply concurrently, such that the 311–day credit would essentially merge into the 339–day credit.

The trial court ratified the agreement as stated by the prosecutor, never clarifying that defendant would, in fact, receive a total credit of only 339 days—not 650—toward his aggregate sentence." *Clark*, 2011 IL App (2d) 09116, ¶ 5-6.

¶ 21 The court in *Clark* further noted that had the defendant actually received the 311 days credit toward his sentence, he would have also earned an additional 311 days of good-conduct credit. As such, the court reduced the defendant's sentence by 622 days. *Clark*, 2011 IL App (2d) 09116, ¶ 11-12.

¶ 22 Similarly, in *Lenoir*, 2013 IL App (1st) 113615, this appellate court reduced a defendant's prison sentence to enforce the benefit of his bargain where the defendant was admonished pursuant to a negotiated guilty plea that he would receive more presentence custody credit than what was permitted by law. Specifically, in *Lenoir*, the trial judge informed the defendant that he would be sentenced to 7 years imprisonment and would receive 309 days of presentence custody credit. *Lenoir*, 2013 IL App (1st) 113615, ¶ 4. At the proceeding, the defendant stated that this was his understanding of the agreement and the court sentenced him in accordance with that agreement. *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 4, 7.

¶ 23 Sometime after he began serving his prison term, the defendant was informed by the IDOC

that he was not going to receive the agreed-upon 309 day's credit because he was already receiving his credit against another sentence he was serving on an unrelated conviction. *Lenoir*, 2013 IL App (1st) 113615, ¶ 8. Not knowing the proper procedure, the defendant filed a motion to withdraw his guilty plea and a motion to correct his mittimus alleging that he did not receive the credit for the 309 days which was agreed to in his case. *Lenoir*, 2013 IL App (1st) 113615, ¶ 8. The trial court found that the defendant was not entitled to the double credit but corrected the defendant's mittimus to reflect an additional 24 days of credit only. *Lenoir*, 2013 IL App (1st) 113615, ¶ 9. The defendant withdrew his motion to withdraw his guilty plea and appealed. *Lenoir*, 2013 IL App (1st) 113615, ¶ 9.

¶ 24 On appeal, the defendant argued that he was entitled to the benefit of his bargain and that the appellate court should reduce his prison sentence by 309 days. *Lenoir*, 2013 IL App (1st) 113615, ¶ 9. In reducing the defendant's sentence, we acknowledged that under our supreme court's decision in *Latona*, 184 Ill. 2d 260, 271 (1998), sentencing credits could not be served consecutively. *Lenoir*, 2013 IL App (1st) 113615, ¶ 12. Nonetheless, we held that the 309-day credit "was consideration for the plea of guilty" such that the defendant was entitled to the benefit of the bargain." *Lenoir*, 2013 IL App (1st) 113615, ¶ 12. In doing so, we initially noted that our supreme court has long recognized that plea agreements, and especially negotiated plea agreements, where the parties agree on the appropriate sentence, are contracts between the State and the defendant, which are governed by contract law. *Lenoir*, 2013 IL App (1st) 113615, ¶ 13. As such, we explained that under our supreme court's holding in *People v. Whitfield*, 217 Ill. 2d 177, 185 (2005), a defendant may demand the benefit of the bargain from his guilty plea and that due process requires that " 'when a plea rests in any significant degree on a promise or agreement

of the prosecutors, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.' " *Lenoir*, 2013 IL App (1st) 113615, ¶ 13.

¶ 25 Accordingly, in that case, despite the State's objection, pursuant to its authority under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) we reduced the defendant's sentence by 309 days, so as to best approximate his plea agreement. See *Lenoir*, 2013 IL App (1st) 113615, ¶ 21 ("Supreme Court Rule 615(b)(4) provides authorization for us to exercise our authority to modify defendant's sentence, and enforce the benefit of the bargain by reducing defendant's sentence by 309 days").

¶ 26 Subsequently, in *McDermott*, 2014 IL App (4th) 120655, ¶¶ 10-12, 16-18, the appellate court followed *Lenoir* and *Clark* and granted relief where a defendant's plea agreements in two cases expressly stated that he would receive the credits specified of 222 and 233 days. The court in *McDermott* also cited to *Whitfield*, holding that relief must be granted where a " 'defendant did not receive the benefit of the bargain he made with the State when he pled guilty.' " *McDermott*, 2014 IL App (4th) 120655, ¶ 32. Accordingly, the *McDermott* court remanded the cause to the circuit court with instructions to reduce the defendant's consecutive sentences by the amount of sentencing credit promised to him as to each sentence, so as to approximate the terms of the plea agreement. *McDermott*, 2014 IL App (4th) 120655, ¶ 32.

¶ 27 In the present case, just as in *Clark*, *Lenoir*, and *McDermott*, the record before us demonstrates that the mittimus does not correctly reflect the bargained for sentence negotiated by the petitioner and the State and ratified by the court on October 16, 2009. The transcript from the guilty plea hearing reveals that the State informed the court that in exchange for the guilty plea the defendant's 2 year sentence for violation of bail bond would be served consecutively to his 14 year sentence for reckless homicide, and that in pronouncing this sentence, the trial court

reiterated that the petitioner would be credited for 303 days of presentencing credit. The record does not indicate that either party explained to the defendant that while the two-year sentence was to be served consecutive with his prior 14-year sentence, the 303-day presentence credit that he received for the negotiated sentence could or would not be served consecutively with the already earned 90-day presentence credit on his prior conviction. The trial court's ratification of the plea agreement and reiterated pronouncement of the 303 days presentencing credit as it related to the violation of bail bond conviction further befuddled the petitioner's understanding of how presentencing credit would work. Accordingly, "the most natural interpretation" of the plea agreement as pronounced by the trial court, was that it requiring the petitioner to serve 14 years in prison, less 90 days for reckless homicide, followed by two years in prison, less 303 days for violation of bail bond. 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). As such, we conclude that in the present case, under the holdings of *Clark*, *Lenoir* and *McDermott*, the petitioner has been denied the benefit of the bargain of his negotiated plea agreement, and that due process requires that he be given the benefit of that bargain. See *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."); *Lenoir*, 2013 IL App (1st) 113615, ¶ 21; *McDermott*, 2014 IL App (4th) 120655, ¶ 32.

¶ 28 In coming to this decision, we have reviewed the decisions in *People v. Reeves*, 2015 IL App (4th) 12070 and *People v. Grant*, 2015 IL App (4th) 140971, cited to by the State and find them inapposite. Unlike the petitioner here, in *Reeves*, the defendant never "claim[ed] his plea bargain

promised the double sentencing credit." *Reeves*, 2015 IL App (4th) 12070, ¶ 14. Rather, on appeal the defendant in *Reeves*, only argued that the rule in *Latona* against double credit was inapplicable to his case because it was not in effect at the time of his offense. *Reeves*, 2015 IL App (4th) 12070, ¶ 14. Moreover, unlike in the present case, in *Reeves* the record refuted the notion that the sentencing credit was even an element of the plea agreement, since "no one addressed sentencing credit *at any time*" during the plea hearing. *Reeves*, 2015 IL App (4th) 12070, ¶ 5.

¶ 29 *Grant* is similarly distinguishable. In that case, the defendant was explicitly admonished and acknowledged at the plea hearing that "consecutive sentencing would mean he would *not* receive double credit," but would only be allowed "one credit," and nonetheless ultimately acquiesced to consecutive sentencing and persisted in his plea." *Grant*, 2015 IL App (4th) 140971, ¶¶ 8, 23. Unlike in *Grant*, in the present case the petitioner was never advised that his sentence credit would not be applied as he had anticipated. In fact, as already explained above, the trial court's pronouncement regarding the 303 days of presentencing credit would have led a reasonable person to conclude that the 303 days would be applied to the consecutively imposed violation of bail bond sentence.

¶ 30 We further reject the State's contention that the petitioner's request that his mittimus be changed to reflect the bargained for plea agreement is barred by *res judicata* since the circuit court has previously reviewed and denied his *pro se* writ of mandamus, raising this same issue. *Res judicata* is an equitable doctrine and may be relaxed when fundamental fairness so requires. *People v. Flores*, 153 Ill. 2d 264, 273-74 (1992). "[T]he question is not solely whether the doctrine of *res judicata* applies; we must also ask whether it should be applied." *People v. Kines*, 2015 IL App (2d) 120518, ¶ 21. In the present case, under the holdings in *Lenoir*, *Clark* and

McDermott, it would be fundamentally unfair to hold the circuit court's ruling on the petition for writ of mandamus—that the petitioner's sentencing credit claim lacked merit—against the petitioner. In denying the petition for writ of mandamus, the circuit court made no mention of *Clark*, and did not have the benefit of *Lenoir* or *McDermott*, since those cases were decided after the denial of the petitioner's writ of mandamus. What is more, until this appeal, the petitioner's challenge to his mittimus, has been made *pro se*, and therefore without the benefit of appointed counsel. Accordingly, under this record, we reject the State's invitation to apply *res judicata* to avoid addressing the petitioner's claim.

¶ 31 Accordingly, for all of the aforementioned reasons, we conclude that under the holdings in *Clark*, *Lenoir* and *McDermott*, the petitioner has been denied the benefit of the bargain of his negotiated plea agreement, and that due process requires that he be given the benefit of that bargain. Accordingly, pursuant to the authority vested in us by Illinois Supreme Court Rule 615(b)(4) (eff. August 27, 1999) we will reduce his sentence to most closely approximate his agreement with the State. See *Clark*, 2011 IL App (2d) 091116, ¶ 11; see also *Lenoir*, 2013 IL App (1st) 113615, ¶ 21 ("Supreme Court Rule 615(b)(4) provides authorization for us to exercise our authority to modify [the petitioner's] sentence, and enforce the benefit of the bargain by reducing his sentence.").

¶ 32 Contrary to the State's position we cannot achieve this by merely crediting the petitioner with an additional 213 days of presentencing credit (303 minus 90 days in presentence custody on the original reckless homicide conviction). See *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12-13, 21 (rejecting this same argument). Rather, we must restructure the petitioner's sentence to give him the 303 days he bargained for. Because the petitioner's two-year violation of bail bond sentence is the minimum Class 3 sentence possible for that offense, we cannot reduce the sentence by 303

days. See 730 ILCS 5/5-4.5-40 (a) (West 2009). However, we may reduce his 14-year sentence for reckless homicide by those same 303 days.

¶ 33 III. CONCLUSION

¶ 34 Accordingly, for all of the aforementioned reasons, we reverse the trial court's denial of the petitioner's motion for *nunc pro tunc* order to correct the mittimus and pursuant to Illinois Supreme Court Rule 615(b)(4) modify the petitioner's mittimus to reflect an additional 303 days of credit on his reckless homicide conviction.

¶ 35 Reversed; mittimus corrected.