2017 IL App (1st) 153119-U

No. 1-15-3119

Order filed December 8, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	
v.	)	No. 13 CR 17319
	)	
VONGIA WEATHERS,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** The summary dismissal of defendant's postconviction petition was erroneous, as he stated an arguably meritorious benefit-of-the-bargain claim for presentencing detention credit.

¶ 2 Pursuant to a 2014 negotiated guilty plea, defendant Vongia Weathers was convicted of escape and aggravated battery and sentenced to two concurrent prison terms of six years each, to run consecutive to his sentence in another case. He appeals from the summary dismissal of his 2015 postconviction petition, contending that it stated an arguably meritorious claim that the

benefit of his plea bargain entitles him to 216 days of presentencing detention credit. For the reasons stated below, we agree that he has stated an arguably meritorious claim and remand for further postconviction proceedings.

¶ 3 Defendant was charged with escape for intentionally escaping the custody of the sheriff on or about August 16, 2013, while he was charged in case 13 CR 7742 with the felony of driving with a suspended or revoked license. Defendant was also charged with aggravated battery for knowingly striking sheriff's deputy Lori Hernandez about the body on the same date knowing her to be a peace officer performing her duties.

¶ 4 In case 13 CR 7742, following an October 2013 bench trial, defendant was convicted of driving on a suspended or revoked license and was sentenced on December 18, 2013, to three years' imprisonment with 132 days of presentencing detention credit.

¶ 5 On March 12, 2014, the court continued the escape and aggravated battery cases at trial counsel's behest to allow him to confer with the State regarding a possible plea deal. On March 14, trial counsel mentioned a potential or tentative plea deal, with no mention of any possible terms, and the case was continued to March 19 for trial or other disposition.

¶ 6 On March 19, 2014, trial counsel, with defendant's approval after the court's due admonishments, requested a plea conference. After the conference was held off the record, trial counsel told the court that defendant "would take the six today." The State objected that the recommendation in the conference was 11 years, an offer of "six years was not accepted" before the conference, and the State sought at least eight years in the conference. The court then said that its "recommendation *** for now is six years." Trial counsel told the court that defendant would accept the recommendation and "has 269 days." The court then held a guilty plea hearing on the escape and aggravated battery charges, finding defendant guilty and sentencing him to six

years' imprisonment. In pronouncing sentence, the court stated that it would be consecutive to his sentence in case 13 CR 7742, with "[c]redit for 216 days time considered served, time actually served." The half sheet also states: "+CREDIT 216 DAYS." The mittimus provides for 216 days' credit and states that the prison sentences for the two escape-related offenses are concurrent to each other and consecutive to the sentence in case 13 CR 7742.

¶ 7 In September 2014, defendant filed a *pro se* motion to withdraw his guilty plea and vacate his sentence. His motion did not mention presentencing detention credit but raised challenges to the voluntariness of his plea. In October 2014, the court denied the motion as untimely. During the hearing, defendant told the court that his 216 days' credit was not being reflected in calculations of his prison term. The court noted that his sentence was consecutive to his sentence in case 13 CR 7742, "[w]hich would mean that you would be getting aggregate credit, and that may be why you may not be getting all the credit you think you should get." When defendant replied that he received no credit at all for this case, the court told him that it would send a copy of the mittimus to the prison, which would calculate his prison term appropriately.

¶ 8 In November 2014, defendant sent a letter to the court claiming that his "out date is not right" and the prison was not correcting it. He noted that the mittimus in case 13 CR 7742 shows a three-year prison sentence with 50 percent good-conduct credit and 132 days' presentencing credit, for an "out date" of February 6, 2015, and the mittimus in the escape and aggravated battery cases shows a consecutive six-year prison sentence with 50 percent good-conduct credit and 216 days' presentencing credit. He argued that his "out date" should not be February 6, 2018, because of the 216 days' credit.

¶ 9 In February 2015, defendant filed a *pro se* postconviction petition. He reiterated the claims in his letter, adding that "the State breached the plea agreement which induced my plea," and that he did not receive the benefit of his plea bargain. He claimed that his "out date" should not be February 6, 2018, or three years more than the "out date" in case 13 CR 7742 before he pled guilty and was sentenced herein, but "in June or July of 2017." He averred in the attached affidavit that he did not receive the 216 days' credit "that was part of my plea agreement." He averred that trial counsel told him that "I would not have to do the [whole] 3 years off the 6 years at 50% sentence, because I already have 216 days in on the 3 years I had to do" and that "my out date would be in June or July of 2017."

¶ 10 On May 22, 2015, the circuit court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. On appeal, defendant contends that his postconviction petition stated an arguable claim that the benefit of his plea bargain entitles him to 216 days of presentencing detention credit.

¶ 11 A postconviction petition may be summarily dismissed within 90 days of its filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a) (West 2014). A petition may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation, or it is substantially incomplete because it does not include objective or independent corroboration of its allegations. *People v. Allen*, 2015 IL 113135 ¶¶ 24-26. At the first stage, documented factual allegations are construed liberally and accepted as true unless affirmatively refuted by the record. *Id.* ¶¶ 25-26. We review the summary dismissal of a postconviction petition *de novo*. *Id.* ¶ 19.

¶ 12 In *People v. Lenoir*, 2013 IL App (1st) 113615, a plea agreement included as one of its terms that the defendant would receive 309 days' credit against a seven-year prison sentence,

which would be consecutive to his sentence in another case where he received the same 309 days' credit, "which results in defendant receiving double credit for time served, which is impermissible." *Id.* ¶ 12 (citing *People v. Latona*, 184 Ill. 2d 260, 271 (1998) (a defendant with consecutive sentences who was in presentencing custody on more than one offense simultaneously receives credit only once for each day in custody)). The *Lenoir* court found that the issue before it was whether the defendant could demand the benefit of his bargain without withdrawing his plea. *Id.* ¶ 13. We noted that our supreme court has held that a defendant may demand the benefit of his guilty-plea bargain and that due process requires that " '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.' " *Id.* (quoting *People v. Whitfield*, 217 Ill. 2d 177, 185 (2005)). The *Lenoir* court held that the defendant was entitled to the benefit of his bargain and that the appropriate remedy was to reduce his sentence by 309 days. *Id.* ¶¶ 13, 21.

¶ 13 In *People v. Clark*, 2011 IL App (2d) 091116, this court again relied upon *Whitfield* in reducing a defendant's prison sentence to reflect the presentencing credit in his plea agreement despite the fact that it would constitute double credit under *Latona*. The State described the plea agreement during the plea hearing: the defendant would receive consecutive eight-year prison terms on two charges with credit of 339 days in one case and 311 days in the other. *Id.* ¶ 5. Neither the State nor the court stated that the credits would run concurrently, though the prison terms were consecutive. *Id.* ¶¶ 5-6. Thus, the defendant was entitled to the benefit of his bargain with the State for 339 and 311 days' credit. The *Clark* court found that the appropriate remedy was to reduce the prison sentence for the offense with 311 days' credit by 622 days to account for the additional good-conduct credit arising from the additional presentencing credit. *Id.* ¶ 11.

¶ 14 In *People v. McDermott*, 2014 IL App (4th) 120655, this court followed *Lenoir* and *Clark* and granted relief where a defendant's plea agreements in two cases expressly stated that he would receive credits of 222 and 233 days. *Id.* ¶¶ 10-12, 16-18. The *McDermott* court noted that *Whitfield* grants relief upon claims " 'that defendant did not receive the benefit of the bargain he made with the State when he pled guilty' " and described the holding in *Lenoir* and *Clark* as "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." *Id.* ¶¶ 26-27 (quoting *Whitfield*, 217 Ill. 2d at 183-84). The *McDermott* court applied the *Clark* remedy rather than the *Lenoir* remedy. *Id.* ¶ 32.

¶ 15 This court distinguished *Lenoir*, *Clark*, and *McDermott* in *People v. Reeves*, 2015 IL App (4th) 130707. *Reeves* appealed the circuit court's dismissal of a defendant's motion to amend the mittimus in two cases with consecutive sentences to reflect a specific number of days of credit for simultaneous presentencing custody on separate charges. *Id.* ¶ 1. The *Reeves* court found that the plea agreement did not include double credit where the record did not indicate that the State and defense agreed to double credit, the plea hearing contained no reference to credit, and at the sentencing hearing only the State and court – that is, not defendant or his counsel – mentioned credit. *Id.* ¶¶ 13-14. Unlike *McDermott*, the *Reeves* record did not "*clearly* show[] the terms of the parties' agreements included specified amounts of sentence credit' or the double sentence credit days were essential, bargained-for terms of defendant's plea agreements." (Emphasis in the original; internal quotation marks removed.) *Id.* ¶ 14.

¶ 16 Here, trial counsel mentioned credit in conveying defendant's acceptance of the court's plea recommendation, and the court stated in pronouncing sentence that defendant would receive 216 days' credit and the instant sentence would run consecutively to another case. However, it

was not spread of record that presentencing credit was addressed in either the earlier plea offer or the plea conference just held. That said, this case is before us on the summary dismissal of a postconviction petition, when a petition with an arguably meritorious claim based on well-pled and documented factual allegations must advance to further proceedings unless the record affirmatively refutes the claim. This case is thus distinguishable from *Reeves*, where the defendant had to establish on the record that his plea agreement included credit.

¶ 17 Defendant's petition claims the benefit of his plea bargain for his 216 days' credit. His claim is of at least arguable legal merit under *Lenoir*, *Clark*, and *McDermott*, which create a benefit-of-the-bargain exception to the *Latona* rule against double credit for plea agreements that include a particular amount of credit. Factually, defendant's petition is supported by his affidavit that the credit was part of his plea deal and that counsel told him that he would not have to serve an additional full three years in prison (his six-year sentence with 50 percent good conduct) due to the 216 days' credit. While noting that defendant does not aver when counsel made this statement, we find that the affidavit liberally construed as a whole supports his petition. We conclude that defendant has an arguably meritorious claim not affirmatively refuted by the record, so that the petition must be remanded for further postconviction proceedings.

¶ 18 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further proceedings under sections 122-4 through 122-6 of the Code of Criminal Procedure. 725 ILCS 5/122-4 to 122-6 (West 2014).

¶ 19 Vacated and remanded.