

2017 IL App (2d) 140961-U
No. 2-14-0961
Order filed February 10, 2017

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 12-CF-3437
)	
JACK M. CLARK,)	Honorable
)	Randy Wilt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Birkett and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* On the State's confession of error, defendant's extended-term sentence is vacated and the cause is remanded for resentencing.

¶ 2 Defendant, Jack M. Clark, entered a partially negotiated guilty plea to the offense of aggravated battery. As part of the plea, the State asserted, and Clark agreed, that based on Clark's prior criminal history he was eligible for an extended-term sentence. After a hearing, the trial court sentenced Clark to an extended term of imprisonment. Clark appeals from that sentence. He contends that there is insufficient proof in the record of his eligibility for an

extended-term sentence. The State agrees with Clark and “confesses error.” We accept the State’s concession, albeit, as we will explain, with some reservation.

¶ 3 Section 5-5-3.2(b)(1) of the Corrections Code (730 ILCS 5/5-5-3.2(b)(1) (West 2012)) furnished the basis for enhancing Clark’s sentence. Section 5-5-3.2(b)(1) enables a trial court to impose a discretionary extended-term sentence:

“(1) When a defendant is convicted of any felony, after having been previously convicted *** of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody ***.” 730 ILCS 5/5-5-3.2(b)(1).

¶ 4 The question presented in this appeal is whether Clark’s present felony conviction occurred “within 10 years after [his] previous conviction, *excluding time spent in custody.*” (Emphasis added.) *Id.* The presentence investigation report (PSI report) in this case shows that Clark was previously convicted of robbery, a class 2 felony, in case number 02-CF-2806 and sentenced on April 11, 2003 to four years’ imprisonment. The report does not indicate when Clark was released from the Illinois Department of Corrections (IDOC).

¶ 5 In the present case, Clark was charged by indictment on November 28, 2012, with several offenses including aggravated battery (strangulation), a class 3 felony (see 720 ILCS 5/12-3.05(a)(5), (h) (West 2012)) for choking his girlfriend, Samantha. Clark was arrested that same day (he remained in the county jail throughout the proceedings in the trial court). On December 12, 2012, Clark was re-charged with the same offenses in a superseding indictment. Each charge in the superseding indictment noted that Clark was “extended term eligible.” Although the charges did not indicate the basis for Clark’s eligibility for an extended-term sentence, at his

arraignment, Clark's attorney stated that Clark was eligible for an extended-term "due to a prior class two conviction" and Clark was admonished accordingly.

¶ 6 Subsequently, at the hearing on the entry of his guilty plea, the court again admonished Clark that he was eligible for an extended-term sentence as follows:

"THE COURT: As pled, th[is] is a class 3 felony. A class 3 felony is a type of offense for which you could be sent to prison or placed on probation. If you were sent to prison, the sentencing range available in this one is 2 to 10 years. It is normally 2 to 5 years, but based upon your prior record, convictions, you are eligible for what's referred to as extended term, which means double the maximum sentence. So you could face anywhere from 2 to 10 years in prison. As a part of any prison sentence there would be 1 year of mandatory supervised release, maximum fine of \$25,000. As I said, it's also probationable, which means you could be placed on probation, and as part of probation you could be ordered to serve up to 180 days in the county jail or anything less than that. Because this is a felony, however, I cannot merely impose a fine. There has to be some sort of punishment aspect over and above a fine.

Do you understand the sentencing range available to the court on this charge?

[CLARK]: Yes, I do, Your Honor.

THE COURT: All right. *** "

After a sentencing hearing on January 24, 2014, the trial court handed down an extended-term sentence of six years' imprisonment. The court later denied Clark's post-sentencing motion and he has appealed his sentence.

¶ 7 On appeal, Clark notes that the PSI report contains no information concerning when he was released from IDOC custody on his robbery sentence in case number 02-CF-2806.

Therefore, he asserts, his sentence must be vacated and this case remanded so that his eligibility for an extended-term sentence can be determined based on the date he was released by corrections officials on his earlier robbery sentence. According to Clark, “it cannot be assumed” that he served his prior robbery sentence within 10 years of the date of the date he was *sentenced* in this case—*i.e.*, January 24, 2014. Clark notes that our supreme court has stated the following: “A court should not presume confinement or the date of a release from confinement” (*People v. Yost*, 78 Ill. 2d 292, 297 (1980)); however, that general statement was made in the context of determining the admissibility of prior convictions for impeachment purposes under *People v. Montgomery*, 47 Ill. 2d 510 (1971), and has no direct application to section 5-5-3.2(b)(1) of the Corrections Code. We note that the use of prior convictions for at-trial impeachment is a more rigorous factual inquiry (see *Montgomery*, 47 Ill. 2d at 521) than the comparatively looser standards of proof that obtain at sentencing hearings. See, *e.g.*, *People v. Williams*, 149 Ill. 2d 467, 493 (1992) (“we find that the use of certified copies of conviction in place of presentence reports to be a useless requirement and a needless waste of time where, as here, defendants never once claimed at sentencing that their criminal record did not make them eligible for a sentence under the Class X provision”).

¶ 8 In any case, as noted the State has chosen to confess error. We accept the State’s confession. That said, unlike Clark and the State, we think it is an open question as to what may be excluded from the 10-year interval as “time spent in custody” under section 5-5-3.2(b)(1) of the Code, and thus it is an open question as to whether the trial court erred in this case at all. In interpreting section 5-5-3.2(b)(1), some authority suggests that “the 10-year period runs from conviction to conviction” (*People v. Lewis*, 211 Ill. App. 3d 276, 281 (1991)); in other words, from the date the defendant was sentenced on the first case to the date defendant was sentenced

on the second case, minus time spent in custody. In *Lewis*, however, it was unnecessary for the court to consider whether “time spent in custody” had any broader meaning because both of the defendant’s sentencing dates were within section 5-5-3.2(b)(1)’s 10-year timeframe, so the exclusion never came up as an issue. See *id.* at 280-82.

¶ 9 By contrast, here, the sentencing date from the first offense was within 10 years of the date Clark was charged. Therefore this case arguably presents a different question altogether: Whether the time Clark spent in custody *after* he was charged may be excluded from 10-year calculation as “time spent in custody” under section 5-5-3.2(b)(1). Were that the question both parties had briefed, it is conceivable that we would determine there was no sentencing error. Clark was sentenced in his prior case on April 11, 2003. Even if no assumption were made about when Clark was released from IDOC for his robbery sentence (see *Yost*, 78 Ill. 2d at 297), he was indicted in this case on November 28, 2012, and re-indicted on December 12, 2012—*i.e.*, at least four full months within section 5-5-3.2(b)(1)’s 10-year timeframe.

¶ 10 We note that nothing forecloses the interpretation of “time spent in custody” that we have just posited. Section 5-5-3.2(b)(1) merely provides that “time spent in custody” should be excluded. It does not place any limitation on the type of “custody”—*e.g.*, presentence custody, or time spent on bond, or imprisonment upon conviction—that should not be counted. And our interpretation of “time spent in custody” as including time spent in pretrial custody finds support in several other statutes such as the provision for calculating a defendant’s good-time prison credit (730 ILCS 5/5-4.5-100(b) (West 2014); see, *e.g.*, *People v. Latona*, 184 Ill. 2d 260, 271, (1998); *People v. Daily*, 2016 IL App (4th) 150588, ¶ 20)), the provision for sentencing habitual criminals (730 ILCS 5/5-4.5-95 (West 2014); see, *e.g.*, *People v. Abdullah*, 336 Ill. App. 3d 940, 953 (2002)), the provision crediting a defendant for time spent in a mental institution (725 ILCS

5/104-24 (West 2014); see, e.g., *People v. Williams*, 23 Ill. App. 3d 127, 130 (1974)), and the provision granting a \$5-per-day monetary credit against fines (725 ILCS 5/110-14 (West 2014); see, e.g., *People v. Caballero*, 228 Ill. 2d 79, 87 (2008)).

¶ 11 Although it is arguable that the trial court committed no error in this case, and we have the discretion to refuse the State's confession of error (see *People v. Martin*, 67 Ill. 2d 462, 465 (1977)), the more prudent course of action is to simply accept it. The consequence of not doing so would require us to raise and decide an issue *sua sponte* in what appears to be a matter of first impression. Our supreme court has cautioned us against such adventurism (see, e.g., *People v. Givens*, 237 Ill. 2d 311, 324 (2010)), and we decline to embark on such a course here.

¶ 12 For the reasons stated, we accept the State's confession of error. The judgment of the circuit court of Winnebago County is hereby vacated and we remand this case to the trial court for resentencing.

¶ 13 Vacated and remanded.