2017 IL App (2d) 150241-U
No. 2-15-0241
Order filed January 24, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-686
ERIK C. STRICKLAND,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices McLaren and Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: On defendant's motion to correct the mittimus, the trial court erred in denying defendant the benefit of his plea bargain, which, as recited in open court, provided that he would get credit against each of two consecutive sentences; as such credit was not statutorily authorized, we reduced defendant's present sentence so as to approximate his bargain.

¶ 2 At issue in this appeal is whether defendant, Erik C. Strickland, was denied the credit he was promised when he pleaded guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)), a Class 2 felony. For the reasons that follow, we determine that he was denied the credit he was due. Thus, we affirm the judgment as modified.

¶ 3 On February 28, 2010, defendant was arrested and charged in case number 10-CF-235 with unlawful delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2010)). Defendant remained in custody until April 15, 2010. On that date, he pleaded guilty to that offense in return for a six-year sentence with credit for the time he served in custody before sentencing.

¶ 4 On July 9, 2010, while defendant was serving his six-year sentence in case number 10-CF-235, he was charged in this case, number 10-CF-686, with committing a drug-induced homicide (720 ILCS 5/9-3.3(a) (West 2010)). Pursuant to an agreement, the State reduced the charge to unlawful delivery of a controlled substance. Defendant pleaded guilty to that charge on October 25, 2011, in return for a 12-year sentence.[1] The State advised the court that, as part of the agreement, defendant would get day-for-day credit, the 12-year sentence would be consecutive to the 6-year sentence imposed in case number 10-CF-235, and "[defendant would] be given credit for time served from July 9 of 2010 to today's date." Later, during those same proceedings, defendant asked about this credit, and the following discussion was had:

"THE DEFENDANT: I have one question, Your Honor.

THE COURT: Go ahead.

THE DEFENDANT: Because of the start date of 7/9 of 10 that would mean that that case the time started on that date, correct?

THE COURT: The time started on which case on that date?

[1] Because defendant had a prior conviction of a Class 2 felony within the past 10 years, he was eligible for an extended-term sentence between 7 and 14 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2010) (eligibility for extended-term sentencing); 730 ILCS 5/5-4.5-35(a) (West 2010) (extended-term sentencing range for Class 2 felonies is 7 to 14 years).

THE DEFENDANT: On this one.

THE COURT: Referring to the 10 CF 235 case?

THE DEFENDANT: No. The 10 CF 686.

THE COURT: You will be getting credit for time served on 10 CF 686 commencing on July 9th of 10. From that date—

THE DEFENDANT: From that date forward?

THE COURT: —to today's date, yes.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, I understand, Your Honor.

THE COURT: You have been in custody I assume since July 9th of 10.

MR. COMBS [Assistant State's Attorney]: Judge, he was. A warrant was issued and a hold was placed on him. So I'm agreeing that he gets credit for all that time.

THE COURT: Do you understand that, [defendant]?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Does that answer your question?

THE DEFENDANT: Yes, it does."

¶ 5 Thereafter, on June 24, 2013, defendant filed a *pro se* "Petition/Order" asking the court to issue a "decree/edict." Defendant claimed that he was not given credit for the time he served from July 9, 2010, and thus he asked the court to correct the mittimus.

¶ 6 Before the court ruled on defendant's petition, defendant filed two amended motions. In the first amended motion, defendant asked the court to order the Department of Corrections (DOC) to give him credit from July 9, 2010, to October 25, 2011. Attached to the motion were

three worksheets the DOC prepared. The last worksheet, which was prepared on June 11, 2013, listed defendant's projected release date as February 28, 2019.[2] In the second amended motion, defendant reiterated that he was denied credit from July 9, 2010, to October 25, 2011, in case number 10-CF-686.

¶ 7 The trial court denied defendant's motion. In doing so, the court found that it had no authority to act, that the DOC should have been named a party, and that defendant should have sought a writ of *mandamus*. This appeal, filed 29 days later, followed.

¶ 8 At issue in this appeal is whether defendant is entitled to credit from July 9, 2010, to October 25, 2011. Before addressing that issue, we consider the State's claims that we lack jurisdiction over this appeal and that the record on appeal is insufficient to address the issue raised. With regard to jurisdiction, the State appears to argue that the trial court did not have jurisdiction to correct the mittimus when defendant filed his motion, and thus we cannot exercise jurisdiction over his appeal. See *People v. Bailey*, 2014 IL 115459, ¶ 26 (noting "general rule that trial courts lose jurisdiction 30 days after entry of the judgment if a timely postjudgment motion is not filed"). However, several cases have held that a trial court retains jurisdiction to correct the mittimus. See, *e.g.*, *People v. Hollister*, 394 Ill. App. 3d 380, 381 (2009). Accordingly, because the trial court retained jurisdiction, we can exercise jurisdiction over defendant's timely filed appeal from the court's order refusing to correct the mittimus. See *People v. White*, 357 Ill. App. 3d 1070, 1073 (2005).

[2] This clearly reflects that defendant was given credit for the time he served in custody before sentencing in case number 10-CF-235 but that he was not given credit for the time he served before sentencing in case number 10-CF-686.

¶ 9 Concerning the State's claim that the record on appeal is incomplete, we note that "an appellant[, here, defendant,] has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Under *Foutch*, "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392. The State claims that missing in this case and necessary to resolve this appeal is the record in case number 10-CF-235 and evidence from the DOC concerning how it calculated the credit to which it believed defendant was entitled. We disagree. Because case number 10-CF-235 was resolved long before the charge in case number 10-CF-686 was even brought, we fail to see how anything that happened in case number 10-CF-235 would impact the agreement defendant entered into in case number 10-CF-686 concerning his credit from July 9, 2010, to October 25, 2011. Similarly, given that we have the DOC's worksheets, we fail to see what other evidence from the DOC would assist us in determining whether defendant was denied any credit that he was due.

¶ 10 Turning to the merits, defendant argues that he did not receive the benefit of his bargain in case number 10-CF-686 when he entered into the plea agreement. Resolving that issue starts with examining the terms of the plea agreement. The interpretation of a plea agreement is governed primarily by contract-law principles. *People v. Henderson*, 211 Ill. 2d 90, 103 (2004). The interpretation of a contract is an issue of law, which is subject to *de novo* review. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. Thus, we consider anew to what the parties agreed.

¶ 11 According to what transpired at the guilty plea proceedings in case number 10-CF-686, the State agreed that, if defendant pleaded guilty to a reduced charge of unlawful delivery of a

controlled substance, he would receive a 12-year sentence with credit for time served in custody on that charge before sentencing. After the terms of the plea agreement were explained, defendant specifically asked the court if, in fact, he was going to receive credit for the time he was in custody from July 9, 2010, to October 25, 2011. After clarifying that defendant was asking about credit in case number 10-CF-686, the court agreed, asserting that "[y]ou will be getting credit for time served on 10 CF 686 commencing on July 9th of 10" until "today's date[, *i.e.*, October 25, 2011]." The assistant State's Attorney confirmed that defendant was entitled to that credit in case number 10-CF-686, "agreeing that [defendant] gets credit for all that time." Given this exchange, it is clear that the parties agreed that defendant would get credit toward his 12-year sentence for all of the time he served in custody from July 9, 2010, to October 25, 2011. The question becomes whether defendant is entitled to the benefit of his bargain given that he was already serving a six-year sentence in case number 10-CF-235 when that agreement was made.

¶ 12 When a defendant enters a negotiated plea of guilty in exchange for specified benefits, both the State and the defendant are bound by the agreement's terms. *People v. Whitfield*, 217 Ill. 2d 177, 190 (2005). One of the terms to which the State and the defendant can agree is the amount of sentencing credit the defendant will receive. See *People v. Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12-13; *People v. Clark*, 2011 IL App (2d) 091116, ¶ 1. Although it is true that a defendant is not entitled to "double credit" when he is in custody on two separate charges and receives consecutive sentences after being convicted (*People v. Latona*, 184 Ill. 2d 260, 271 (1998)), a defendant may receive double credit if receiving double credit is part of the plea agreement the defendant entered into with the State (see *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27).

¶ 13 In *McDermott*, the defendant, who was serving sentences in other cases, agreed to plead guilty to aggravated battery in exchange for a 5-year sentence with credit for 222 days served in presentencing custody. *Id.* ¶¶ 2, 7. Because the defendant had been denied sentencing credit in the past, he asked the court to clarify that he would receive 222 days of sentencing credit. *Id.* ¶ 12. The court confirmed that the defendant would receive that credit. *Id.* Nine days later, the defendant agreed to plead guilty to unlawful altering of a title document in return for a consecutive sentence of 5 years' imprisonment and 233 days of sentencing credit. *Id.* ¶¶ 3, 17. Again, the defendant asked the court to clarify that he would receive 233 days of credit toward his five-year sentence in that case. *Id.* ¶ 18. The court confirmed that the defendant would receive that credit. *Id.* When the DOC did not give the defendant the credit to which he had agreed, the defendant moved the court to amend the mittimus to reflect the agreed-upon amount of credit. *Id.* ¶ 19. The court dismissed the motion, and the defendant appealed. *Id.* ¶¶ 19-20.

¶ 14 On appeal, the court determined that the defendant was denied the benefit of his bargain in both cases. *Id.* ¶ 29. The court observed:

> "Here, in [the] defendant's [aggravated battery] case, the State set forth the terms of the parties' plea agreement in open court and identified [the] defendant's receipt of 222 days' sentence credit as one of those terms. Upon inquiry by the circuit court, [the] defendant agreed the State's recitation accurately reflected the parties' agreement. In [the] defendant's [unlawful altering of a title document] case, the written plea agreement stated [the] defendant would receive '[c]redit for 233 days served.' The court recited the terms of the plea agreement in open court, including the requirement that [the] defendant would receive the specified amount of credit. Upon inquiry by the court, [the] defendant affirmed that it accurately recited the parties' agreement. Additionally, during the plea

> hearings in both cases, [the] defendant attempted to 'stress' or 'clarify' that his sentence credit was a 'part of the sentence' or 'part of the plea.' Both circuit courts confirmed that [the] defendant would receive the specified amount of credit." *Id.* ¶ 29.

Because the record before the court made clear that the defendant was denied the benefit of his bargain in both cases, the court reversed the judgements, vacated the sentences, and remanded the cases for the trial courts to impose sentences that approximated the terms of the agreements. *Id.* ¶ 32.

¶ 15 *McDermott* makes clear that a defendant may receive double credit when double credit is a term of the parties' plea agreement. Accordingly, here, because one of the terms of the agreement defendant entered into with the State was that he would receive credit toward his 12-year sentence for the time he was in custody from July 9, 2010, to October 25, 2011, we conclude that defendant is entitled to that credit even though he was already serving his 6-year sentence in case number 10-CF-235 when that agreement was made.

¶ 16 Citing *Owens v. Lane*, 196 Ill. App. 3d 358 (1990), the State claims that we should not address the merits of defendant's claim, because he did not file the proper action before the trial court. The State argues that, rather than filing a motion to correct the mittimus, defendant should have filed a *mandamus* action. However, as defendant notes, a *mandamus* action should be brought when the DOC does not follow statutory law. *Id.* at 361. That is not at issue here. Rather, as noted above, at issue is whether defendant was denied the benefit of his bargain under his plea agreement with the State. That issue, rather than involving compliance with a statute, involves interpreting to what the parties agreed when defendant pleaded guilty.

¶ 17 Having concluded that defendant failed to receive the benefit of his bargain, we next turn to the appropriate remedy. In *Whitfield*, our supreme court held that two remedies are available

to a defendant when he has been denied the benefit of his bargain. *Whitfield*, 217 Ill. 2d at 202. Specifically, "either the 'promise must be fulfilled' or [the] defendant must be given the opportunity to withdraw his plea." *Id.* (quoting *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). Here, defendant has repeatedly indicated that he does not wish to withdraw his fully negotiated guilty plea. Rather, he has repeatedly asserted that he wants the court to correct the mittimus to reflect to what he and the State agreed when he pleaded guilty to unlawful delivery of a controlled substance in case number 10-CF-686.

¶ 18 Citing *Clark*, defendant contends that, to best approximate the agreement the parties had, his 12-year sentence must be reduced by 946 days. This number represents the 473 days between July 9, 2010, and October 25, 2011, plus day-for-day credit for time served (see 730 ILCS 5/3-6-3(a)(2.1) (West 2010)). *Clark*, 2011 IL App (2d) 091116, ¶ 11. Accordingly, defendant claims that his 12-year sentence should be reduced to 9 years and 149 days, which is still within the applicable range for Class 2 felonies. See 730 ILCS 5/5-4.5-35(a) (West 2010) (extended-term sentencing range for Class 2 felonies is 7 to 14 years); see also *People v. Donelson*, 2013 IL 113603, ¶¶ 20, 26-28 (sentence imposed that does not approximate to what the parties agreed may be modified to fulfill the parties' agreement as long as the modified sentence falls within the proper sentencing range).

¶ 19 The State disagrees. The State claims that defendant's projected parole date should be moved up by 260 days. The State arrives at this amount by adding the total amount of credit granted in both cases (46 days in case number 10-CF-235 plus 473 days in case number 10-CF-686 for a total of 519 days); reducing the aggregate sentence of 18 years (6,570 days) by the 519 days of credit for a total of 16.57 years (6,051 days); and giving defendant day-for-day credit on that amount for a total of 8.28 years (3,025 days). Because defendant's projected release date of

February 28, 2019, is nine years after he was first placed in custody on February 28, 2019, the State claims that defendant's adjusted sentence of 8.28 years renders his projected release date only 260 days too late.

¶ 20 We disagree with the State's calculations, as they do not give defendant day-for-day credit for the time he served in custody before sentencing. Not only does the State cite no authority indicating that this is the correct way to compute a defendant's sentence, but this court, as well as many others, have already determined how a defendant's sentence must be modified to approximate what he and the State agreed to when the defendant pleaded guilty. See *Clark*, 2011 IL App (2d) 091116, ¶ 11; see also *McDermott*, 2014 IL App (4th) 120655, ¶ 32; *Lenoir*, 2013 IL App (1st) 113615, ¶ 21. Because defendant is entitled to day-for-day credit for the time he served in custody before sentencing in case number 10-CF-686 (see 730 ILCS 5/5-4.5-100(b), 3-6-3(a)(2.1) (West 2010)), he, in contrast to what the State proposes, must get day-for-day credit for the 473 days he served in presentencing custody, for a total of 946 days of credit. Accordingly, pursuant to the above-cited cases and our authority under Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967), we reduce defendant's 12-year sentence to 9 years and 149 days. *Lenoir*, 2013 IL App (1st) 113615, ¶ 21.

¶ 21 For the reasons noted above, we reduce defendant's 12-year sentence to 9 years and 149 days. In all other respects, the judgment of the circuit court of McHenry County is affirmed.

¶ 22 Affirmed as modified.