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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Ogle County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 12-CF-130
	)	
MICHAEL W. DOBYNS,	)	Honorable
	)	Kathleen O. Kauffmann,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* Defendant’s waiver of his right to appeal his sentence did not preclude his appeal of the denial of credit for postsentencing drug treatment; as the State did not contest defendant’s entitlement to such credit, except improperly in its surreply brief, we therefore remand for a hearing on that issue.

¶ 2 Pursuant to a plea agreement, defendant, Michael W. Dobyms, pleaded guilty to two counts of burglary (720 ILCS 5/19-1(a) (West 2012)), and he was ultimately sentenced to concurrent terms of 14 years’ imprisonment. As part of the agreement, defendant waived his right to appeal his sentence, and the sentence was stayed so that defendant could participate in drug court. Thereafter, defendant was kicked out of a drug-treatment facility and committed

home repair fraud (815 ILCS 515/3(a)(1) (West 2014)). The State moved to lift the stay on defendant's prison sentence, the trial court granted that motion, and defendant was given credit for the 395 days he served in jail. The 395 days of credit did not include the days defendant spent in inpatient treatment or various residential drug-treatment facilities. Defendant moved the court to grant him this credit, the court denied that request, and this timely appeal followed. On appeal, defendant argues that he is entitled to credit for the days he spent in drug treatment. In response, the State claims only that defendant waived his right to appeal. We determine that defendant has not waived his right to appeal, and that the State has not properly challenged defendant's right to credit.

¶ 3 On November 7, 2012, after the court imposed the prison sentence, the court advised defendant about drug court. In doing so, the court told defendant that, because he agreed to participate in drug court, he was waiving his right to appeal his sentence. Defendant advised the court that he understood, and he signed a form titled "Drug Court Written Waivers." That form provided, among other things, that "[d]efendant, having been advised of [his] right to file a Notice of Appeal, and/or to challenge any aspect of the sentence herein, do[es] hereby waive [his] right to file a Notice of Appeal, or any post-trial motion regarding the sentence imposed pursuant to the plea agreement, upon [his] entry into drug court."

¶ 4 On August 1, 2014, almost two years later, defendant left Oxford House, a treatment facility, without permission. Because of that, he was discharged from Oxford House, and the State asked the court to vacate the stay on the prison sentence previously imposed. Thereafter, the State filed a supplemental motion, advising the court that defendant committed home repair fraud on September 4, 2014, and pleaded guilty to that offense on February 10, 2015.

¶ 5 In June 2015, the court lifted the stay on defendant’s prison sentence and gave defendant credit for the 395 days he served in various jails. Although defendant and the State agreed that defendant was entitled to this credit, defendant claimed that he should receive additional credit for the time he was in drug treatment. The court denied defendant’s request for this additional credit.

¶ 6 On appeal, defendant claims that he is entitled to credit for the time he spent in inpatient treatment and in various drug-treatment facilities after completing inpatient treatment. The State argues only that defendant, by signing the “Drug Court Written Waivers,” waived his right to appeal this issue. Although the State attempted to address the merits in its surreply brief, we will not consider the merits, as a party who files a surreply brief is limited to responding to points raised in the reply brief. See Ill. S. Ct. R. 341(j) (eff. Jan. 1, 2016) (“The reply brief, if any, shall be confined strictly to replying to arguments presented in the brief of the appellee.”); *Plooy v. Paryani*, 275 Ill. App. 3d 1074, 1088 (1995) (“The requirements of supreme court rules apply to appellees and cross-appellees with equal strength.”). Accordingly, we consider only whether the “Drug Court Written Waivers” precluded defendant from appealing the trial court’s order denying him credit for the time he spent in drug treatment. We review this issue *de novo*. See *People v. Reid*, 2014 IL App (3d) 130296, ¶ 10.

¶ 7 It is well settled that a defendant has a constitutional right to appeal a criminal conviction. Ill. Const. 1970, art. VI, § 6. However, that right may be waived. *People v. McCaslin*, 2014 IL App (2d) 130571, ¶ 13. A defendant who executes an appeal waiver is bound by that waiver except when the defendant can establish that it suffers from some infirmity, such as that it was entered into involuntarily or unintelligently. *Id.*

¶ 8 That said, the scope of an appeal waiver is only as broad as the specific conditions of the waiver. See *United States v. Carruth*, 528 F.3d 845, 846 (11th Cir. 2008) (nothing in the defendant’s waiver of his right to appeal entered in original plea agreement indicated that he waived his right to appeal from a future order revoking his supervised release). Thus, if a defendant appeals from an order that is not covered by the appeal waiver, the reviewing court may consider the merits of the appeal. See *id.*

¶ 9 In determining the scope of an appeal waiver, we must examine the waiver to see what the parties reasonably expected when it was executed. *United States v. Vega*, 241 F.3d 910, 912 (7th Cir. 2001). Any ambiguity in the scope of the appeal waiver must be strictly construed against the State. See *United States v. Anderson*, 374 F.3d 955, 957 (10th Cir. 2004).

¶ 10 Here, the relevant portion of the appeal waiver provided that defendant waived his right to appeal “the sentence imposed pursuant to the plea agreement.” Although sentencing credit is considered part of a sentence in that this credit ensures that a defendant is not subjected to more time in confinement for a particular offense (see *People v. Scheib*, 76 Ill. 2d 244, 252 (1979)), we cannot conclude that the parties reasonably expected that defendant, by waiving his right to appeal, would waive his right to appeal the future denial of what was then an unknown amount of sentencing credit (see *People v. Weintraub*, 20 Ill. App. 3d 1090, 1094 (1974) (noting that a defendant who pleads guilty does not waive an unknown right by doing so)). Indeed, the language of the waiver indicated that defendant was giving up challenging the sentence that resulted from the plea agreement, not forgoing anything to do with what transpired in drug court.

¶ 11 Citing *McCaslin*, the State claims that the appeal waiver precludes us from addressing the merits. There, the defendant pleaded guilty with the understanding that, as part of the plea agreement, he would be accepted into the De Kalb County drug-court program. *McCaslin*, 2014

IL App (2d) 130571, ¶ 3. Moreover, the defendant agreed that his prison sentence was deferred until after he completed the drug-court program or was unsuccessfully discharged and that, if he committed a new felony while participating in the program, the State could immediately file a petition to discharge him. *Id.* ¶ 4. As a condition of entering drug court, the defendant executed an appeal waiver that provided that he “ ‘waive[d] any and all rights to appeal [he] may have in the event [he is] dismissed from the De Kalb County Drug Court, and understand[s] and consent[s] to the Court and De Kalb County Drug Court Team being the sole authority for determining such dismissal.’ ” *Id.* ¶ 5. Thereafter, the State petitioned to discharge the defendant from the program, alleging that defendant was charged with felony theft in another county. *Id.* ¶ 7. The court granted the petition, the court imposed the deferred sentence, and the defendant appealed, claiming that the State failed to prove that he committed a new felony in violation of the agreement. *Id.* ¶¶ 8-10, 12. In response, the State argued that the defendant waived his right to appeal, and we agreed. *Id.* ¶ 12.

¶ 12 Although the primary issue raised in *McCaslin* concerned whether a court must admonish a defendant about the specific appellate rights that are being waived as a condition of participating in drug court, *McCaslin* is nevertheless instructive. That is, in *McCaslin*, the defendant explicitly agreed that the court and drug-court team would provide the final word on whether the defendant should be discharged from the program and that he could not appeal from a dismissal from that program. *Id.* ¶ 5. In light of that waiver, the defendant certainly could not appeal from the dismissal from the program, arguing that the State failed to prove that he should be discharged, as such an issue was well within the scope of the waiver. *Id.*

¶ 13 That is not the case here. Here, unlike in *McCaslin*, defendant never agreed to waive his right to appeal any sentencing credit he may earn by participating in the drug-court program.

¶ 14 We also find unpersuasive the federal cases on appeal waivers that the State referred to in its surreply brief. The issues the defendants sought to raise on appeal in those cases clearly fell within the parameters of the appeal waivers. See, e.g., *People v. Carson*, 855 F.3d 828, 829-30 (7th Cir. 2017) (the defendant could not appeal finding that he was an armed career criminal, which subjected him to an increased sentence, because the appeal waiver the defendant signed provided that he waived “ ‘the right to contest any aspect of the conviction and sentence’ ” (emphasis omitted)); *People v. Worthen*, 842 F.3d 552, 554, 556 (7th Cir. 2016) (appeal waiver precluded the defendant from appealing conviction and sentence “ ‘on any and all grounds,’ ” and thus reviewing court could not consider whether crime the defendant committed was a “ ‘crime of violence’ ” for purposes of entering specific type of conviction); *People v. Smith*, 759 F.3d 702, 703-04 (7th Cir. 2014) (the defendant was precluded from appealing issue that his trial attorney was ineffective for failing to challenge the defendant’s classification as a career offender, because appeal waiver specifically provided that the defendant waived his right to appeal a claim that his counsel provided ineffective assistance for anything other than procuring the waiver or initiating postconviction proceedings).

¶ 15 Having found that the appeal waiver is of no effect here, we observe that, because the State has not properly addressed the merits of this appeal, it has forfeited any claim regarding defendant’s entitlement to the credit he seeks. See *People v. Olsson*, 2014 IL App (2d) 131217, ¶ 15 (noting that, pursuant to Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016), a party’s failure to argue a point in his brief results in forfeiture of the issue on appeal); see also Ill. S. Ct. R. 341(i) (eff. Jan. 1, 2016) (requiring an appellee’s brief to comply with Rule 341(h)(7)). Thus, we vacate the order denying defendant's request for credit and remand for a hearing on that issue.

See Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967) (“On appeal[,], the reviewing court may \*\*\* modify the judgment or order from which the appeal is taken.”).

¶ 16 Pursuant to section /5-4.5-100(b) of the Unified Code of Corrections, the trial court *may* give credit to the defendant for the number of days spent confined for substance abuse treatment prior to judgment, if the court finds that the confinement was custodial. 730 ILCS 5/5-4.5-100(b) (West 2016). The trial court may not abandon its obligation to exercise discretion in each case and instead implement a policy in which *all* drug court offenders are denied credit for the number of days spent confined in treatment. Rather, the statute requires the trial court to exercise its discretion and that discretion must be individualized as to the specific offender before the court. In other words, the court must evaluate each defendant independently and evaluate the particular circumstances of his or her substance abuse treatment to decide whether that confinement was custodial. If the court decides in the exercise of its discretion that a certain number of the days spent confined for substance abuse treatment were custodial, the trial court shall grant credit.

¶ 17 For these reasons, we affirm the concurrent 14-year terms of imprisonment imposed by the circuit court of Ogle County and remand the case for a hearing pursuant to section /5-4.5-100(b).

¶ 18 Affirmed and remanded.