2017 IL App (3d) 140630-U

Order filed February 15, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-14-0630, 3-14-0631,
	)	3-14-0632, 3-14-0633 and 3-14-0634
v.	)	
	)	Circuit Nos. 13-CF-259, 13-CF-265,
	)	13-CF-266, 13-CF-397 and 13-CF-409
SCOTT R. SIMMONS,	)	
	)	Honorable
	)	Michael E. Brandt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Presiding Justice Holdridge and Justice Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Further proceedings are required to determine if the trial court should issue an amended mittimus.

¶ 2 Defendant, Scott R. Simmons, appeals the denial of his motion to amend the mittimus. Specifically, he asks that we amend the mittimus to show that he is entitled to 124 days' presentence custody credit. We remand for further proceedings.

¶ 3 FACTS

¶ 4 On September 19, 2013, defendant entered into a plea agreement that disposed of five different criminal cases pending against him. Pursuant to the plea agreement, defendant pled guilty to two counts of burglary (720 ILCS 5/19-1(a) (West 2012)) in one case and was sentenced to 4½ years' imprisonment. Defendant also pled guilty to another count of burglary (*id.*) charged in a separate case and was sentenced to 4½ years' imprisonment, to run concurrently with his sentence in the first burglary case. Defendant was awarded 54 days of presentence custody credit in each of the two burglary cases.

¶ 5 Defendant also pled guilty to unlawful possession of a converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2012)), forgery (720 ILCS 5/17-3(a)(2) (West 2012)), and unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2012)). Defendant was sentenced to 3 years' imprisonment and was awarded 70 days of presentence custody credit on each of the three preceding charges. These sentences were ordered to run concurrently with one another but consecutively to defendant's burglary sentences. Defendant was represented by the public defender during the plea proceedings.

¶ 6 On June 9, 2014, defendant filed a *pro se* motion for amended mittimus alleging that the Department of Corrections (DOC) was not giving defendant the full 124 days (70 + 54) of presentence custody credit the trial court awarded him. Specifically, the motion claimed that the DOC was only giving defendant 70 days of presentence custody credit and not the additional 54 days of credit that were to run consecutively with the 70 days. The motion alleged the prison records office required that the trial court issue an amended mittimus that included: the word "amended"; the original sentencing date; and that " 'Aggregated Pretrial Jail Credit' " was awarded to defendant, with the actual dates served in custody for the 54 and 70 days of credit

awarded to defendant. The motion explained that the records office required the actual dates "to ensure the defendant is not receiving double jail credit."

¶ 7 The trial court entered a written order reappointing the public defender and docketing the matter for the limited purpose of determining whether a *nunc pro tunc* order amending the mittimus was appropriate. The prosecutor and the assistant public defender that represented defendant during the plea proceedings appeared before the court regarding defendant's motion. Defendant was not present. The prosecutor stated that he and the assistant public defender had reviewed the file and discussed the matter. The prosecutor advised the trial court: "[T]he credits for the respective actual days served on each of the numbered cases is and was correct at the time of the entry of the sentencing order, Judge, and that's by agreement of the parties." The assistant public defender replied: "That's correct." The trial court entered an order denying defendant's motion. Defendant filed a *pro se* notice of appeal.

¶ 8 On appeal, defendant argued that he did not receive the benefit of his bargain with the State because he did not receive the full amount of presentence custody credit stated in the agreement. Defendant contended that we should modify the mittimus to reduce his sentence by 108 days.

¶ 9 The State acknowledged defendant was entitled to 124 days of presentence credit pursuant to the plea agreement, but argued the doctrine of invited error applied and thus defendant was barred from challenging the propriety of the sentencing order. The State also argued that the sentencing orders accurately reflected the presentence credit and it was the DOC that was interpreting the sentencing orders incorrectly. The State therefore concluded that defendant needed to take up the issue with the DOC.

¶ 10 We entered a summary order affirming the trial court's order. We reasoned that defendant was precluded from advancing the above argument by the doctrine of invited error.

¶ 11 Defendant filed a petition for rehearing, arguing that we "improperly found that [defendant] was not entitled to an additional 54 days of pre-sentence credit, despite the fact that the State conceded on appeal that it was part of his guilty plea agreement." We granted the petition. We also ordered supplemental briefing on the following issues: (1) whether we had jurisdiction to grant the relief requested—namely, a reduced sentence—on appeal from the denial of a motion to amend the mittimus, (2) whether the record showed the actual number of days defendant spent in presentence custody and whether the actual number of days served affected the appropriate remedy in this case, and (3) which points of defendant's argument had the State conceded and which points were still in contention.

¶ 12 ANALYSIS

¶ 13 The issue on appeal remains whether the trial court erred in denying defendant's motion to amend the mittimus. Because it is unclear from the record whether defendant actually spent 124 days in presentence custody, we remand the matter for further proceedings.

¶ 14 Upon consideration of the points raised in defendant's petition for rehearing, we have reconsidered our initial holding that the doctrine of invited error precludes defendant's argument on appeal. Although the trial court denied defendant's motion for amended mittimus based on the parties' agreement that the sentencing orders were correct, the position defendant takes on appeal is not inconsistent with the position taken in the trial court. That is, defendant is not arguing that his sentencing order is incorrect. Rather, defendant argues that his sentencing order correctly states the number of days' credit that was awarded to him, but the order is not in the proper form to be correctly interpreted by the DOC. Because defendant's position on appeal is

not inconsistent with his position in the trial court, the concerns of fair play and duplicity underlying the doctrine of invited error are inapplicable in this case. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004) ("To permit a defendant to use the exact ruling or action procured in the trial court as a vehicle for reversal on appeal 'would offend all notions of fair play' [citation], and 'encourage defendants to become duplicitous' [citation].") (quoting *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001) and *People v. Sparks*, 314 Ill. App. 3d 268, 272 (2000)).

¶ 15 Having found that invited error does not preclude defendant's argument on appeal, we now address defendant's claim that the trial court erred in denying his motion to amend the mittimus. Initially, we note that the parties are in agreement that defendant is entitled to 124 days' presentence custody credit under his plea agreement. The parties also agree that the record is *unclear* as to how many days defendant actually spent in presentence custody.

¶ 16 We find that, if defendant actually spent 124 days in presentence custody, the trial court should enter an amended mittimus in the manner requested in defendant's *pro se* motion. Stated another way, if defendant actually spent 124 days in presentence custody, the trial court should amend the mittimus to set forth the actual dates defendant spent in custody so that the DOC gives defendant all the credit awarded.

¶ 17 If defendant actually spent less than 124 days in presentence custody—that is, if some of the presentence credit he was awarded represents time that he was simultaneously in custody for multiple cases—the remedy is less clear. Our supreme court has held that, under section 5-8-4(e)(4) of the Unified Code of Corrections (730 ILCS 5/5-8-4(e)(4) (West 1994)), "to the extent that an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served." *People v. Latona*, 184 Ill. 2d 260, 271 (1998).

¶ 18 The holding in *Latona* has been applied to bar the awarding of double credit for simultaneous presentence custody even when double credit was promised as part of a negotiated plea agreement. See *People v. Clark*, 2011 IL App (2d) 091116, ¶ 11; *People v. Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12, 21; *People v. McDermott*, 2014 IL App (4th) 120655, ¶¶ 27, 31. In those cases, the courts instead reduced the defendants' sentences by the amount of presentence custody credit awarded in excess of the amount of time the defendants actually spent in presentence custody so that the defendants would receive the benefit of their bargain. *Clark*, 2011 IL App (2d) 091116, ¶ 11; *Lenoir*, 2013 IL App (1st) 113615, ¶ 21; *McDermott*, 2014 IL App (4th) 120655, ¶ 31.

¶ 19 As in the above cases, if defendant actually spent less than 124 days in presentence custody, he may have a valid due process claim that his sentence should be reduced so that he receives the benefit of his bargain. While such a claim may be properly raised in a postconviction petition, it is not clear that a claim for a reduced sentence would be proper in a proceeding to amend the mittimus, as in the instant case. This is because "[a] trial court's act of correcting a mittimus *** is a ministerial act and does not change the underlying sentence." *People v. Wright*, 337 Ill. App. 3d 759, 762 (2003).[1] In any event, any determination as to whether we have authority to reduce defendant's sentence in this appeal would be premature, as it is unclear whether the 124 days' presentence custody credit awarded to defendant exceeded the days defendant actually spent in presentence custody.[2]

---

[1]We recognize that the *Lenoir* court reduced the defendant's sentence on appeal from a motion to amend the mittimus. See *Lenoir*, 2013 IL App (1st) 113615, ¶ 21. However, the *Lenoir* court did not expressly consider the issue of whether it had jurisdiction to reduce the defendant's sentence given that (1) amendment of the mittimus is commonly considered a ministerial act, and (2) the defendant had not invoked the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)).

[2]While defendant requested in his initial brief and petition for rehearing that we reduce his sentence so that he receives the benefit of his bargain from the State, he seems to have abandoned that position in his supplemental briefing. Specifically, when we asked the parties to brief the issue of whether

¶ 20 We acknowledge that the parties agreed in supplemental briefing that the actual number of days that defendant spent in presentence custody does not affect the appropriate remedy in this case. However, for the reasons stated above, we do not accept the parties' concession. While the actual number of days defendant spent in custody may not affect whether he is entitled to 124 days' credit or its equivalent to receive the benefit of his plea bargain, it is highly relevant to the proper remedy in this case. If defendant actually spent 124 days in presentence custody, the appropriate remedy is to amend the mittimus so defendant receives the full amount of presentence custody credit awarded. If defendant spent less than 124 days in custody, the holding in *Latona* may preclude defendant from receiving double credit for simultaneous custody. See *Latona*, 184 Ill. 2d at 271. In that situation, defendant may need to bring a due process claim to have his sentenced reduced, as in *Clark* and *McDermott*. *Clark*, 2011 IL App (2d) 091116, ¶ 11; *McDermott*, 2014 IL App (4th) 120655, ¶¶ 27, 31.

¶ 21 Finally, we note that although defendant requested that we directly amend the mittimus, we find that the matter must be remanded for the trial court to determine the actual number of days defendant spent in presentence custody. Based on the allegations in defendant's *pro se* motion to amend the mittimus, it is unlikely that the DOC would apply the full 124 days' credit without an order containing the actual dates defendant spent in presentence custody. Contrary to defendant's argument, we believe the DOC is not merely "confused" by this "atypical" situation such that it will not give 124 days of credit unless this court orders it to do so. Rather, the DOC likely believes, based on the holding in *Latona*, that double sentencing credit is always impermissible even if it is part of a plea agreement. See *Latona*, 184 Ill. 2d at 271. Indeed, such an interpretation is supported by the holdings in *Clark*, *Lenoir*, and *McDermott*, where the courts

---

we had jurisdiction to reduce a criminal sentence on appeal from denial of a motion to amend the mittimus, defendant argued only generically that we have jurisdiction to amend the mittimus.

reduced the sentences of the defendants rather than awarding double credit. See *Clark*, 2011 IL App (2d) 091116, ¶ 11; *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12, 21; *McDermott*, 2014 IL App (4th) 120655, ¶¶ 27, 31.

¶ 22 CONCLUSION

¶ 23 We remand the matter for a hearing to determine the number of days defendant actually spent in presentence custody. If the trial court determines that defendant actually spent 124 days in presentence custody, the trial court should issue an amended mittimus that includes: the word "amended"; the original sentencing date; and that " 'Aggregated Pretrial Jail Credit' " was awarded to defendant, with the actual dates served in custody for the 54 and 70 days of credit awarded to defendant. On order of this court, the clerk of this court is directed to issue the mandate forthwith.

¶ 24 As defendant's parole date is quickly approaching, we encourage the trial court to expedite this proceeding to ensure that defendant receives all the presentence credit agreed to under the plea agreement.

¶ 25 Remanded with directions.