

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).

FILED

June 28, 2017
Carla Bender
4th District Appellate
Court, IL

2017 IL App (4th) 150485-U

NO. 4-15-0485

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	DeWitt County
HERMAN A. BOYER,)	No. 14CF17
Defendant-Appellant.)	
)	Honorable
)	Hugh Finson,
)	Judge Presiding.

PRESIDING JUSTICE TURNER delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court vacated defendant’s sentence and remanded for resentencing and the award of additional sentence credit.

¶ 2 In August 2014, defendant, Herman A. Boyer, pleaded guilty to one count of domestic battery (subsequent offense), and the trial court sentenced him to probation. In April 2015, the State filed an amended petition to revoke defendant’s probation, and the court found in the State’s favor. In June 2015, the court resentenced defendant to an extended-term sentence of four years in prison.

¶ 3 On appeal, defendant argues (1) the trial court erred in resentencing him to an extended-term sentence after the revocation of his probation and (2) he is entitled to additional sentence credit. We vacate defendant’s sentence and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In May 2014, the State charged defendant by information with one count of domestic battery (subsequent offense) (720 ILCS 5/12-3.2(a)(2) (West 2014)), alleging he knowingly and without legal justification made physical contact of an insulting or provoking nature with the victim, a family or household member, by picking her up and dropping her on the floor. The information stated the offense was a Class 4 felony based on defendant's prior conviction. 720 ILCS 5/12-3.2(b) (West 2014).

¶ 6 In August 2014, defendant agreed to plead guilty in exchange for a period of incarceration of 101 days and 24 months' probation. In admonishing defendant, the trial court noted the offense was a Class 4 felony with a possible sentence of one to three years in prison. The court accepted defendant's guilty plea. Thereafter, the court sentenced him to 101 days in jail, with full credit for time spent in pretrial custody, and 24 months' probation.

¶ 7 In March 2015, the State filed a petition to revoke defendant's probation, alleging he violated his probation by committing the offenses of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)) and failure to register as a sex offender (730 ILCS 150/3 (West 2014)). In April 2015, the State filed an amended petition, stating defendant violated his probation by committing the additional offense of unlawful possession of drug paraphernalia (720 ILCS 600/3.5(a) (West 2014)).

¶ 8 Also in April 2015, the trial court conducted a hearing on the amended petition to revoke defendant's probation. Following the presentation of evidence, the court found defendant violated his probation by committing the offenses of domestic battery and failure to register as a sex offender. In June 2015, the court resentenced defendant to an extended term of four years in prison based on his prior felony convictions. This appeal followed.

¶ 9

II. ANALYSIS

¶ 10

A. Extended-Term Sentence

¶ 11 Defendant argues the trial court improperly imposed a four-year extended-term sentence when he was never admonished about the possibility of receiving an extended-term sentence. We agree.

¶ 12 Section 5-4.5-45(a) of the Unified Code of Corrections (Code) provides the sentencing range for a Class 4 felony is one to three years in prison. 730 ILCS 5/5-4.5-45(a) (West 2014). An extended term for a Class 4 felony has a range of three to six years in prison. 730 ILCS 5/5-4.5-45(a) (West 2014). Further, in regard to extended-term sentences and guilty pleas, section 5-8-2(b) of the Code (730 ILCS 5/5-8-2(b) (West 2014)) provides as follows:

“If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant’s knowledge that a sentence under this Section was a possibility. If it does not so appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.”

¶ 13 In this case, the trial court admonished defendant at the guilty plea hearing that he was subject to a prison term of one to three years in prison for the Class 4 felony of domestic battery. The court did not mention the possibility of an extended-term sentence. Thus, and as the State concedes, the court erred in resentencing defendant to a four-year extended-term sentence given the admonishments only noted a maximum term of three years. “[W]hen an extended-term sentence is imposed after the revocation of a lesser punishment such as probation, the proper remedy is to vacate the extended-term sentence so that a nonextended-term sentence may be imposed.” *People v. Taylor*, 368 Ill. App. 3d 703, 707, 859 N.E.2d 20, 25 (2006).

Accordingly, we vacate defendant's four-year extended-term sentence and remand for resentencing in accordance with the admonishments he received prior to pleading guilty.

¶ 14 B. Sentence Credit

¶ 15 Defendant argues he is entitled to an additional two days of presentence credit. We agree.

¶ 16 Section 5-4.5-100(b) of the Code (730 ILCS 5/5-4.5-100(b) (West 2014)) provides an offender shall be given credit on his sentence "for the number of days spent in custody as a result of the offense for which the sentence was imposed." A "defendant is entitled to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing, including the day he was taken into custody." *People v. Ligonis*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A claim of error in the calculation of mandatory sentence credit cannot be waived. *People v. Hill*, 2014 IL App (3d) 120472, ¶ 27, 6 N.E.3d 860 (citing *People v. Whitmore*, 313 Ill. App. 3d 117, 121, 728 N.E.2d 1267, 1270 (2000)).

¶ 17 In the case *sub judice*, defendant argues he spent 198 days in custody prior to his June 4, 2015, sentencing, but the sentencing judgment only reflects credit for 196 days. The State agrees defendant was in custody for 198 days and should be given credit for two additional days. Accordingly, we remand for the trial court to award 198 days of pretrial incarceration credit upon entering the new sentencing judgment.

¶ 18 III. CONCLUSION

¶ 19 For the reasons stated, we vacate defendant's sentence and remand for resentencing and the award of 198 days of sentence credit.

¶ 20 Vacated; cause remanded with directions.