2018 IL App (1st) 151742-U

No. 1-15-1742

Order filed March 22, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 10 CR 17867
	)	12 CR 10671
	)	12 CR 10678
	)	
CHARLES McCOY,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to defendant's plea agreement, he would be entitled to 513 days of credit for time he spent in custody. However, such credit cannot be applied to the minimum terms imposed in the cases involved in the plea agreement or to his consecutive 11-year sentence in a separate case.

¶ 2 Defendant Charles McCoy appeals the circuit court's grant of the State's motion to dismiss his amended petition brought under the Post-Conviction Hearing Act (the Act) (725

ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends that under his negotiated plea agreement, he should receive credit for 513 days spent in custody prior to sentencing on two driving offenses. Defendant asserts that to afford him the benefit of that plea agreement, this court should apply that credit to his two one-year prison terms for those offenses or, in the alternative, to the 11-year prison term for drug possession he is serving consecutive to his two other sentences.

¶ 3 In October 2010, defendant was charged in case 10 CR 17867 with possessing between 15 and 100 grams of heroin with intent to deliver (720 ILCS 570/401(a)(1)(A) (West 2010)). While defendant was out on bond prior to his trial in that case, he committed several felonies that resulted in the revocation of his bond.

¶ 4 In November 2012, defendant was convicted in case 10 CR 17867 after a bench trial. On December 6, 2012, the trial court sentenced defendant to 11 years in prison. The mittimus awarded defendant 407 days of credit toward his sentence for time spent in custody.

¶ 5 On January 31, 2013, the trial court denied defendant's motion to reconsider the sentence in case 10 CR 17867. Immediately thereafter, the parties presented to the court a negotiated guilty plea as to the felonies committed by defendant while on bond. In case 12 CR 10671, defendant agreed to plead guilty to driving with a suspended license (625 ILCS 5/6-303(a) (West 2010)). In case 12 CR 10678, defendant agreed to plead guilty to driving with a suspended license (625 ILCS 5/6-303(a) (West 2010)) and aggravated fleeing (625 ILCS 5/11-204.1(a)(4) (West 2010)).

¶ 6 The following colloquy then occurred:

> "ASSISTANT PUBLIC DEFENDER: Judge, at this time we have a plea subject to your approval on the other two matters.

THE COURT: All right.

ASSISTANT PUBLIC DEFENDER: As to the case ending 671, he would be sentenced to one year Illinois Department of Corrections with credit for 257 days.

THE COURT: All right. On Count 1?

ASSISTANT PUBLIC DEFENDER: I believe so. And as for the case ending 10678, he would be sentenced to one year Illinois Department of Corrections with 256 days. Those would run consecutive to each other and to the 2010 case.

THE COURT: This is bond on bond on bond.

ASSISTANT PUBLIC DEFENDER: Right. They are all consecutive to each other."

¶ 7 After defendant indicated he understood the charges against him and a factual basis was read for each case, the court stated as follows:

"In both of these cases, the sentence in the 678 case, Counts 1 and 2 to merge. The defendant will be sentenced to one year in the Illinois Department of Corrections plus one year mandatory supervised release, formerly known as parole, to be served after a period of incarceration. *** Credit for 257 days, timed [*sic*] considered served, time actually served in the 671 case. Credit for 256 days, time considered served, time actually served in the 678 case.

These sentences are consecutive to each other and consecutive to the sentence entered *** in Case No. 10 CR 17867-01."

¶ 8 Defendant filed an appeal in case 10 CR 17867, challenging the sufficiency of the evidence to establish his guilt and seeking correction of the mittimus to reflect the proper

offense. This court affirmed defendant's conviction and corrected the mittimus. *People v. McCoy*, 2014 IL App (1st) 130864-U.

¶ 9 Defendant did not move to withdraw his guilty pleas in case 12 CR 10671 and case 12 CR 10678 or directly appeal those cases. In May 2013, during the pendency of defendant's appeal in case 10 CR 17867, defendant filed a *pro se* postconviction petition in which he mentioned all three of his convictions and sentences and asserted he had "not received my correct amount of time credit as was presented to me on 1-31-13 for entering a plea of guilty." Defendant argued he should receive an additional 513 days of credit toward his sentences.

¶ 10 On September 6, 2013, postconviction counsel was appointed for defendant. Counsel filed an amended petition, arguing defendant did not receive the benefit of the bargain as to his negotiated guilty plea. The amended petition asserted that defendant's plea in his 2012 cases was entered with the understanding he would receive 257 days of presentence credit in case 12 CR 10671 and 256 days of credit in case 12 CR 10678. The petition cited *People v. Lenoir*, 2013 IL App (1st) 113615, ¶ 13, in which this court reduced a defendant's sentence on appeal to reflect 309 days of presentence credit to afford the defendant the benefit of his plea agreement.

¶ 11 The amended petition refers to a calculation worksheet from the Illinois Department of Corrections stating defendant's "projected release and mandatory out date" and states that document is attached as an exhibit to the petition. However, no such worksheet is included with the amended petition in the record on appeal.

¶ 12 The State moved to dismiss the petition, asserting that defendant's request for a reduction of his sentence could only apply to his one-year terms in case 12 CR 10671 and case 12 CR 10678. The State also argued those terms could not be reduced because they represented the minimum term for each offense, which was not the case in *Lenoir*. In addition, the State noted

defendant's 11-year sentence in case 10 CR 17867 was imposed following a trial and was not part of the plea agreement in the 2012 cases.

¶ 13 In a written order on May 22, 2015, the circuit court granted the State's motion to dismiss defendant's petition. Defendant now appeals that ruling.

¶ 14 On appeal, defendant contends the absence of 513 days of presentence credit violates his due process rights by denying him the benefit of his plea agreement. He asserts this court should reduce his one-year sentence in case 12 CR 10671 by 257 days and also should reduce his one-year term in case 12 CR 10678 by 256 days. In the alternative, he argues the 11-year sentence imposed in his earlier case could be reduced by 513 days to approximate the terms of his plea agreement.

¶ 15 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights in his original trial or sentencing and sets out three stages of postconviction relief. *People v. Allen*, 2015 IL 113135, ¶¶ 20-21. Where, as here, a petition is not dismissed within 90 days of its filing, the petition advances to the second stage, where counsel may be appointed to represent the defendant and the State must move to dismiss the petition or file an answer. 725 ILCS 5/122-5 (West 2012). At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Allen*, 2015 IL 113135, ¶ 21. If that burden is met, the circuit court advances the petition to the third stage and conducts an evidentiary hearing on the defendant's claims. 725 ILCS 5/122-6 (West 2012). The dismissal of a postconviction petition at the second stage, *i.e.*, without an evidentiary hearing, is reviewed *de novo*. *People v. Cotto*, 2016 IL 119006, ¶ 24.

¶ 16 Defendant was required to serve consecutive terms in the three cases discussed here. As the trial court noted during the plea discussions, the cases were "bond on bond on bond,"

meaning that defendant committed the latter two offenses while on bond from each previous offense. See 730 ILCS 5/5-8-4(d)(8) (West 2010); *People v. Karmatzis*, 373 Ill. App. 3d 714, 717-18 (2007) (consecutive sentences are mandated when a defendant commits another offense while on pretrial release for the first offense).

¶ 17 An offender "shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed[.]" 730 ILCS 5/5-4.5-100(b) (West 2010). This statutory right to receive credit for time served is mandatory. *People v. Evans*, 391 Ill. App. 3d 470, 472 (2009); *People v. Dieu*, 298 Ill. App. 3d 245, 249 (1998) (noting the purpose of presentence custody credit is "to ensure defendants are never subject to more jail time for a particular offense than they could have received for the offense in the first instance").

¶ 18 When a defendant demonstrates that his guilty plea was entered in reliance on a plea agreement, he has a due process right to enforce the terms of that agreement. *People v. Whitfield*, 217 Ill. 2d 177, 189 (2005). When a specified amount of sentence credit is included within the terms of a plea agreement, the defendant is entitled to the amount of sentence credit that was promised. *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27; *Lenoir*, 2013 IL App (1st) 113615, ¶ 13; *People v. Clark*, 2011 IL App (2d) 091116, ¶ 1. Such credit is to be awarded "even if applying the credit toward the defendant's sentence would violate the rule set forth in *People v. Latona*, 184 Ill. 2d 260, 271 (1998), that a defendant may not earn two sentence credits for a single day spent in custody." *McDermott*, 2014 IL App (4th) 120655, ¶ 27; *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12-13; *Clark*, 2011 IL App (2d) 091116, ¶¶ 1-2.

¶ 19 Defendant acknowledges that under *Latona*, he would not be able to receive an additional 513 days of credit; likewise, the State acknowledges the exception to *Latona* for fully negotiated

plea agreements. However, the State asserts the parties in this case did not agree that defendant would receive multiple days of credit for each single day in custody. The State cites the circuit court's conclusion that the plea hearing rebuts defendant's allegation that the parties intended he receive multiple days of credit. However, our review is *de novo*, meaning that this court pays no deference to the circuit court's determination. See *Cotto*, 2016 IL 119006, ¶ 24.

¶ 20 The terms of a plea agreement are fixed by the parties' statement of that agreement during the plea hearing. *Clark*, 2011 IL App (2d) 091116, ¶ 10. Our review of the record establishes it was represented at the plea hearing that defendant would receive multiple days of credit.

¶ 21 In presenting the plea agreement to the court, the assistant public defender stated defendant's sentences for the two 2012 offenses "would run consecutive to each other and to the 2010 case." The assistant public defender stated that defendant would receive credit for 257 days in case 12 CR 10671 and receive credit for 256 days in case 12 CR 10678.

¶ 22 When the court then summarized the plea agreement, the court also indicated defendant would receive separate and consecutive periods of credit for time spent in custody. After stating defendant would be sentenced to one year in each of the 2012 cases, the court stated: "Credit for 257 days, time[] considered served, time actually served in the 671 case. Credit for 256 days, time considered served, time actually served in the 678 case." The court then stated those sentences would be served consecutive to each other and consecutive to defendant's sentence in case 10 CR 17867, in which he had received an 11-year sentence that was handed down in the month prior to this guilty plea. From those statements at the plea hearing, defendant reasonably could conclude all of his sentences would be served consecutively and that he would receive 257 days of credit in addition to 256 days of credit for time served in custody for those two cases.

¶ 23 The facts here are comparable to those in *Clark*. There, the prosecutor stated the defendant would be sentenced to consecutive eight-year sentences for two offenses and then listed the amount of credit the defendant had for time served on each offense (339 days and 311 days). *Clark*, 2011 IL App (2d) 091116, ¶ 5. In finding the defendant's plea bargain should include all of that credit, this court reasoned that because the defendant's sentences were consecutive, "the most natural interpretation of the prosecutor's description of the agreement is that [the] defendant would serve a prison term of 8 years, less 339 days, for residential burglary, followed by a prison term of 8 years, less 311 days, for attempted armed robbery." *Clark*, 2011 IL App (2d) 091116, ¶ 5 (noting the State did not specify the sentencing credit would be concurrent). This court reduced the defendant's sentence to award the additional credit. *Clark*, 2011 IL App (2d) 091116, ¶ 11-12.

¶ 24 In *Lenoir*, this court also reduced a defendant's sentence to replicate the terms of his plea agreement. There, the defendant was on bond on a separate charge when arrested and charged with two weapons offenses, and his plea bargain in those cases led the defendant to understand he would receive 309 days of credit applied to a seven-year sentence. *Lenoir*, 2013 IL App (1st) 113615, ¶ 3. This court concluded the defendant should receive credit for his time served in the weapons cases and reduced the defendant's sentence to 6 years and 56 days in prison. *Lenoir*, 2013 IL App (1st) 113615, ¶ 27.

¶ 25 In *McDermott*, the defendant entered guilty pleas for offenses in Champaign and McLean counties and filed a postconviction petition seeking the sentencing credit specified in his plea agreements in those cases. *McDermott*, 2014 IL App (4th) 120655, ¶ 19. The State conceded that the defendant's sentences in those cases should be reduced to reflect the agreed amounts of credit to effectuate the terms of his plea bargain. *McDermott*, 2014 IL App (4th) 120655, ¶¶ 22, 32.

This court remanded with directions to impose specific sentences that reflected the credits. *McDermott*, 2014 IL App (4th) 120655, ¶ 36.

¶ 26 To summarize, defendant can receive two sentence credits for a single day spent in custody, even though that is contrary to *Latona*, if that was part of his plea agreement. See *McDermott*, 2014 IL App (4th) 120655, ¶ 27; *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12-13; *Clark*, 2011 IL App (2d) 091116, ¶¶ 1-2. The failure to award defendant that credit constituted a substantial violation of his due process rights. See *Whitfield*, 217 Ill. 2d at 189. Because the record of defendant's plea hearing shows he could have reasonably understood that 257 and 256 days of credit were part of his plea agreement, he would have to receive credit for the 513 days spent in custody on his 2012 cases to afford him the benefit of his bargain.

¶ 27 We next consider whether defendant can be provided with such relief. Where a defendant has not received the benefit of his plea agreement, "either the 'promise must be fulfilled' or [the] defendant must be given the opportunity to withdraw his plea." *Whitfield*, 217 Ill. 2d at 202 (quoting *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). Defendant's postconviction counsel indicated to the circuit court that defendant did not wish to withdraw his plea.

¶ 28 The State asserts, and we agree, that specific performance of defendant's plea agreement is not possible because his one-year sentences in case 12 CR 10671 and case 12 CR 10678 are the minimum possible prison terms. The State notes that in *McDermott*, *Lenoir* and *Clark*, the application of sentencing credit to the defendants' sentences pursuant to the terms of the plea bargains did not reduce the sentences below the minimum statutory terms. The State contends the application of sentencing credit in a case where a minimum sentence was imposed renders the sentence invalid. Furthermore, the State asserts this court cannot reduce defendant's 11-year sentence in case 10 CR 17867 because that case was not part of his negotiated plea agreement.

¶ 29 We agree that neither of those forms of relief can be provided to defendant. First, defendant's convictions in case 12 CR 10671 and case 12 CR 10678 were for Class 4 felonies subject to a sentencing range of one to three years in prison. See 730 ILCS 5/5-4.5-45(a) (West 2010); 625 ILCS 5/6-303(d-2, d-3) (West 2010) (driving with a suspended or revoked license); 625 ILCS 5/11-204.1(b) (West 2010) (aggravated fleeing). A sentence that is modified to effectuate a plea agreement must conform to the applicable statutes. See *People v. Donelson*, 2013 IL 113603, ¶¶ 27, 29. Moreover, a plea agreement is unenforceable if the parties agree to a sentence that is less than the minimum term authorized by law. *People v. Hare*, 315 Ill. App. 3d 606, 609 (2000). Defendant's one-year terms in those cases represented the statutory minimum sentences. Therefore, this court cannot reduce defendant's terms in those cases below the minimum one-year terms.

¶ 30 Defendant alternatively requests that his plea bargain be effectuated by reducing his 11-year sentence in case 10 CR 17867 by 513 days because his one-year sentences in the 2012 cases were ordered to be served consecutively to his sentence in case 10 CR 17867. Noting that consecutive sentences "are to be treated as a single term of imprisonment" (*Latona*, 184 Ill. 2d at 271), defendant asserts the credit he is owed can be subtracted from his 11-year sentence. However, as the State points out, defendant's 11-year term in case 10 CR 17867 was not part of defendant's subsequent plea bargain in his 2012 cases. The cases relied upon by defendant, including *McDermott*, do not involve the application of credit to a sentence that was not part of a plea agreement. We will not grant defendant the relief he seeks in the absence of any case law or statute providing authority to modify a sentence that is not part of a plea agreement.

¶ 31 In conclusion, for the reasons set out above, even though we find that defendant is entitled to the benefit of his plea bargain, this court cannot reduce defendant's one-year

sentences in case 12 CR 10671 or case 12 CR 10678 below the minimum term. Moreover, the 513 days of credit cannot be subtracted from defendant's 11-year sentence in case No. 10 CR 17867 because that sentence was imposed by the trial court following a trial and was not part of defendant's plea agreement.

¶ 32 As an alternative to sentencing relief, defendant asks this court to reverse the dismissal of his petition and remand for new second-stage postconviction proceedings with a new attorney appointed to represent him. He contends he was denied the reasonable assistance of his postconviction counsel for failing to request that his 11-year sentence be reduced by 513 days to effectuate his plea agreement. See *People v. Hardin*, 217 Ill. 2d 289, 299 (2005) (under Supreme Court Rule 651(c), a postconviction petitioner should receive the reasonable assistance of appointed counsel).

¶ 33 As we concluded above, defendant has identified no authority allowing a court to modify a sentence that was not part of a plea agreement. Because there is no legal basis for such a request, we cannot conclude that postconviction counsel was unreasonable for failing to seek that relief. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (postconviction counsel is not required to amend a petition to include nonmeritorious claims).

¶ 34 Accordingly, the circuit court's grant of the State's motion to dismiss defendant's postconviction petition is affirmed.

¶ 35 Affirmed.