2018 IL App (1st) 160335-U

No. 1-16-0335

Order filed May 17, 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.	)	No. 14 CR 4766
	)	
JOSE REYES,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is affirmed where the petition did not state a constitutional claim cognizable under the Post-Conviction Hearing Act. The order imposing fees and costs for filing a frivolous petition is affirmed.

¶ 2 Defendant Jose Reyes appeals from summary dismissal of his *pro se* petition for postconviction relief. On appeal, defendant contends that he is statutorily entitled to 505 days of additional presentence custody credit where the trial court calculated his credit from the date of

his indictment, rather than the date of his arrest. He further contends that the trial court erred in imposing fees and costs for the filing of a frivolous petition.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant was arrested and placed in custody on October 30, 2012. At some point in 2012, he was charged in case No. 12 CR 21370 with delivering a controlled substance within 1000 feet of a school on February 8, 2012. Then, on March 19, 2014, defendant was charged by indictment in the instant case, No. 14 CR 4766, with delivering a controlled substance within 1000 feet of a school on February 21, 2012.

¶ 5 On August 11, 2014, defendant pled guilty to both charges in exchange for concurrent eight-year sentences. After the trial court accepted the plea and imposed sentence, it confirmed with the prosecutor that defendant had been in continual custody since October 30, 2012. The court thereafter found that defendant would be credited with 650 days in custody on case No. 12 CR 21370 and 145 days in custody on the instant case, No. 14 CR 4766. The mittimus for the instant case, which lists an arrest date of October 30, 2012, reflects a presentence custody credit of 145 days.

¶ 6 Defendant did not move to withdraw his plea, file a direct appeal, or in any way move to show his objection.

¶ 7 On November 12, 2015, defendant filed the *pro se* petition at issue in this appeal, titled "*Pro Se* Post-Conviction Petition." The petition cited the Post-Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2014), and indicated that it was filed in relation to case No. 14 CR 4766. Defendant's sole assertion in the petition was as follows:

> "This sentence was ordered concurrent to 12 CR 2137001, but the preindictment delay on this sentence caused the outdates to be staggered by 17 months. This unnecessary delay in the second indictment had no rational basis other than to cause the defendant to do more actual time. Petitioner had not known that the sentences would be calculated this way until he had received a calculation sheet in IDOC otherwise he would have objected sooner. This unnecessary delay was a violation of due process."

¶ 8 The trial court dismissed the petition as frivolous and patently without merit on December 16, 2015. In a separate order, the trial court imposed $105 in fees and costs for filing a frivolous petition. Defendant filed a timely notice of appeal.

¶ 9 On appeal, defendant contends that he is statutorily entitled to an additional 505 days of presentence custody credit in case No. 14 CR 4766 because the trial court calculated his credit based on the date of indictment, rather than arrest. He argues that where he was in custody for the instant offense beginning on October 30, 2012, the delay in his indictment until March 19, 2014, had no bearing on his entitlement to presentence custody credit, and he should have been credited with the full 650 days he was in custody. He asserts that he may raise this issue for the first time on appeal from the dismissal of his postconviction petition, or, in the alternative, that "liberally construed, his postconviction petition was actually a claim for credit." Defendant asks this court to order a correction of his mittimus to reflect a total of 650 days of credit. With regard to this requested relief, defendant argues that we may "order the award of additional credit from any of several possible sources of authority." Specifically, he suggests that: we could construe the postconviction petition as a request to amend the mittimus and then reach its merits in the

interests of an orderly administration of justice; we could exercise our inherent authority to modify what amounts to a clerical error; or we could exercise our inherent authority to enter any judgment and make any order that ought to have been given or made.

¶ 10 As an initial jurisdictional matter, we note that defendant argues for the first time in his reply brief that "he is set to be released from custody for his term of Mandatory Supervised Release [(MSR)] on March 16, 2018," and that his "claim for sentence credit becomes moot" if it is not resolved before that date, citing *In re J.T.*, 221 Ill. 2d 338, 351 (2006), and *In re L.L.*, 243 Ill. App. 3d 1010, 1011-12 (1993). However, both of these cases involve a minor's claim for custody credit where the minor has already completed his or her term of probation. In this case, although defendant was released from prison on March 16, 2018, he is currently serving a term of MSR. An appeal becomes moot where the occurrence of events since the filing of the appeal makes it impossible for the reviewing court to provide effective relief. *People v. Jackson*, 199 Ill. 2d 286, 294 (2002). "Where a defendant has been released from prison but remains on MSR, a reduction in his prison sentence would affect how long he could be reincarcerated for a violation of his MSR." *People v. Montalvo*, 2016 IL App (2d) 140905, ¶ 14. As a result, this appeal is not moot since defendant challenges the length of his prison term before he has completed his MSR. See *Montalvo*, 2016 IL App (2d) 140905, ¶ 14; *In re Jabari C.*, 2011 IL App (4th) 100295, ¶ 19.

¶ 11 We next address defendant's alternative arguments that he either (1) is raising his claim for presentence custody credit for the first time in this appeal, or (2) liberally construed, his *pro se* petition stated a claim for presentence custody credit. To resolve this quandary, we look to the petition itself. Defendant alleged in his petition that a delay between the date of his arrest and the date of his indictment in case No. 14 CR 4766 caused his "outdates to be staggered by 17

months" and resulted in him "do[ing] more actual time." Construing these allegations liberally, which we must (*People v. Allen*, 2015 IL 113135, ¶ 25), we find that the petition presented a claim for additional presentence custody credit.

¶ 12 However, a claim for presentence custody credit is not cognizable in postconviction proceedings. This is because a claim for presentence custody credit is wholly based on a statutory provision, *i.e.*, section 5-4.5-100(b) of the Unified Code of Corrections (Code), which provides that an "offender shall be given credit *** for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014) (formerly section 5-8-7(b) of the Code (730 ILCS 5/5-8-7(b) (West 2008))). The Act permits a prisoner to file a postconviction petition to establish "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2014). Statutes do not confer constitutional rights; therefore, an allegation of a deprivation of a statutory right is not a proper claim under the Act. *People v. Mitchell*, 189 Ill. 2d 312, 329 (2000). Postconviction petitioners are barred from seeking additional sentencing credit–a statutory claim not of constitutional magnitude–under the Act. *People v. Nelson*, 2016 IL App (4th) 140168, ¶¶ 28-29, 32-38, 39 (citing *People v. Reed*, 335 Ill. App. 3d 1038, 1040 (2003); *People v. Uran*, 196 Ill. App. 3d 293, 294 (1990); *People v. Bates*, 179 Ill. App. 3d 705, 709 (1989)). Accordingly, summary dismissal of defendant's *pro se* postconviction petition was proper.

¶ 13 Defendant's second contention on appeal is that the trial court erred in imposing $105 in frivolous filing costs and fees under section 22-105 of the Code of Civil Procedure. 735 ILCS 5/22-105 (West 2014). He argues that he "raised a non-frivolous argument as a matter of both

fact and law," that is, a claim for additional presentence custody credit. Therefore, according to defendant, this court should vacate the assessment.

¶ 14 Section 22-105 authorizes trial courts to order payment of fees and costs when a defendant has, *inter alia*, filed a postconviction petition that lacks an arguable basis in law or in fact. 735 ILCS 5/22-105(a), (b)(1) (West 2014). Whether assessments pursuant to section 22-105 were properly imposed is a question subject to *de novo* review. See *People v. Alcozer*, 241 Ill. 2d 248, 254 (2011).

¶ 15 As discussed above, defendant's claim for presentencing custody credit is not cognizable under the Act. Therefore, we agree with the trial court that defendant's petition lacked an arguable basis in law, and affirm its imposition of frivolous filing costs and fees.

¶ 16 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 17 Affirmed.