2018 IL App (1st) 161124-U

No. 1-16-1124

Order filed June 22, 2018

Fifth 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. 10 CR 15487
	)	
FLAVIO JIMENEZ,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 *HELD*: Pursuant to defendant's negotiated plea agreement, he would be entitled to the benefit of his promised sentencing credit; however, the credit cannot be applied to the sentence as negotiated because his sentence was the minimum allowed by statute. Defendant's postconviction petition presented the gist of meritorious claims that the sentencing credit was an essential term of the original plea agreement and for renegotiating the plea agreement.

¶ 2 Defendant, Flavio Jimenez, appeals the trial court's summary dismissal of his petition for relief from judgment pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)). Defendant contends the trial court erred in increasing his sentence in violation of his negotiated plea agreement. Defendant additionally contends the trial court impermissibly entered a *nunc pro tunc* order to modify his sentencing credit. Based on the following, we reverse and remand for further proceedings.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with one count of possession of 900 or more grams of cocaine, one count of possession of a controlled substance with the intent to deliver 900 or more grams of cocaine, and delivery of 900 or more grams of cocaine. While awaiting trial, defendant completed a drug treatment program and two parenting programs, and earned his General Educational Development (GED) certificate.

¶ 5 On December 11, 2014, defendant waived his right to a trial and requested a conference pursuant to Supreme Court Rule 402 (eff. July 1, 1997). Following the conference, defendant agreed to plead guilty to delivery of 900 or more grams of cocaine and the State agreed to dismiss the additional charges. The State additionally agreed to the imposition of the minimum 15-year sentence, which would be served at 75% of the sentence, along with 3 years of mandatory supervised release. Defendant also would receive sentencing credit for completing the drug treatment program and earning his GED. The following exchange took place at the plea hearing:

> "THE COURT: Mr. Jimenez, we had this 402 conference. I know your attorney has had a long time to talk to you. It's my understanding, do you understand, that I had

recommended on Count 1 the minimum which is 15 years. It's 15 to 60. It's a Super Class X [felony]. The State would dismiss the other two counts. I have indicated if you would enter a plea of guilty that I would go along with that disposition. You are entitled to—again, that is served at 75 percent, and you are entitled to the time you spent in custody. And since you qualify—having completed the Westcare Impact Incarceration Program, you would be entitled to 1.5 times the days you spent in custody. All right [*sic*]?

THE DEFENDANT: Yes.

THE COURT: So you are entitled to that by law. Now, *** did you get your GED while in Westcare?

THE DEFENDANT: Yes. I have a copy of my certificate.

***

THE COURT: ***

All right [*sic*]. Here's the statute. It's 730 ILCS 5/3-6-3, rules and regulations for early release. And at Subsection 4, what they talk about is that you are entitled to credit in the Illinois Department of Corrections at 1.5 percent for the program you've completed, and that only applies if you have never been to an adult facility in the penitentiary before, if you've never had this conduct, and you've never been convicted of any other previous felonies where you did time. It appears you qualify for that.

Under section 4.1 there is a regulation that allows for additional 60 days credit awarded to anyone who passes the high school equivalence General Education Development test. So by law it says this paragraph under this sentence shall show a sentence credit awarded here in addition to and shall not affect the award of any other

> sentence credit given under this section, okay, but shall also be pursuant to the guidelines set forth, which is basically for the Illinois Department of Corrections. Quite frankly, you would be entitled to another 60 days."

After a discussion between the parties ascertaining the accurate number of days that defendant had been in custody, the court agreed defendant was entitled to 2,455 days of credit "by law."

¶ 6 The parties stipulated to the factual basis of defendant's plea. In relevant part, the parties agreed, if called, Cook County Sheriff's Police Officer Aguirre[1] would testify that, while undercover, he met with defendant and two confidential informants. The group discussed the delivery and sale of five kilograms of cocaine for the negotiated price of $148,750. On July 29, 2010, defendant drove to a parking lot in Forest Park, Illinois, and parked next to Officer Aguirre's undercover vehicle. Defendant entered Officer Aguirre's vehicle and the pair discussed transferring the cocaine. Defendant requested to view the money, so Officer Aguirre placed a phone call and a second undercover officer arrived at the location. Defendant and Officer Aguirre entered that vehicle to count $100,000 of the agreed purchase price. Officer Aguirre assured defendant that the remaining money was in a third vehicle. Defendant then proceeded to his vehicle with Officer Aguirre. Once inside, defendant unzipped a rear seat cushion and revealed five rectangular packages of purported cocaine. Officer Aguirre requested to inspect one of the packages and defendant complied. After cutting into one of the packages, Officer Aguirre believed the substance was cocaine. Defendant was arrested. Subsequent testing by the Illinois State Police Crime Lab verified that the five rectangular packages contained 998.5 grams of cocaine.

[1] Officer Aguirre's first name does not appear in the record.

¶ 7 The trial court found defendant freely and voluntarily entered his guilty plea and that there was a factual basis for the plea. A finding of guilt was entered for delivery of a controlled substance "on a Super Class X at 75 percent." The trial court entered judgment on that finding. The remaining counts were dismissed.

¶ 8 In sentencing defendant, the trial court stated:

> "All right [*sic*]. Very well. I will go along with what the agreement is and I will sentence the defendant to 15 years [in the] Illinois Department of Corrections on the Super Class X. It is a term of 75 percent. The defendant will be given credit for 2[,]455 days. ***. There will be a three year mandatory supervised release.
>
> The credit that defendant has is 1[,]597 days at 1.5 times that. The defendant is given an additional 60 days because he has completed a GED by statute and by law. So he totals 2[,]455 days. It comes out to six years seven months, 270 days credit."

A mittimus entered on December 11, 2014, provided "[t]his is a 75% sentence. Days credit is as follows: 1.5 x 1597 for completion of drug program, (2395) plus additional 60 days for G.E.D.—totaling 2455 days credit. Three years MSR."

¶ 9 Then, on March 16, 2015, the Assistant State's Attorney presented a letter to the trial court from the Illinois Department of Corrections (IDOC). The letter stated that, pursuant to section 3-6-2(A),[2] defendant was entitled only to three years and nine months of sentencing credit because the statute excludes Class X offenders from the 1.5 times pretrial credit for participating in a drug treatment program, as well as excludes Class X offenders from the 60 days credit for completion of a GED. As a result, the trial court found that defendant was entitled

[2] This subsection does not exist in the cited statute. The correct subsection is 3-6-3(A) (730 ILCS 5/3-6-3(A) (West 2010)).

only to 1,597 days of pretrial credit and ordered that the mittimus be corrected *nunc pro tunc*. The new mittimus provided that defendant was sentenced to 15 years' imprisonment to be served at 75% with credit for time actually served in custody of 1,597 days and three years of mandatory supervised release.

¶ 10 On October 27, 2015, defendant filed a *pro se* postconviction petition alleging his due process rights were violated and he was denied the benefit of his plea bargain where the *nunc pro tunc* procedure deprived him of the sentencing credit he was promised. Defendant additionally argued his counsel was ineffective for failing to advise him that he was not entitled to the 1.5 times substance abuse program credit or the 60-day GED completion credit. Defendant stated that he did not wish to withdraw his plea, but instead requested that his sentence be altered to adhere to the terms of his plea agreement. To his *pro se* petition, defendant attached a memorandum of law, his December 11, 2014, mittimus, an IDOC sentence calculation worksheet dated December 26, 2014, a copy of the March 6, 2015, IDOC letter to the Assistant State's Attorney requesting clarification of defendant's sentencing credit, a March 16, 2015, document and half sheet stating a special order was entered "Corr Mitt nunc pro tunc 12-11-14. Credit is 1597. 15 years IDOC at 75%," the March 16, 2015, mittimus, an IDOC sentence calculation worksheet dated March 30, 2015, petitioner's affidavit, and a transcript from the plea proceedings.

¶ 11 On November 6, 2015, the trial court summarily dismissed defendant's postconviction petition. In so doing, the trial court stated:

"[Defendant's] post conviction [petition] appears to request credits for obtaining a GED and 1.5 times the credit because of the time he did and the programs he completed. And this is up for the first time.

I would note that he was given, when I had him plead, 15 years IDOC on a super Class X of 75 percent.

He was given credit for 2,455 days as follows: Six years, seven months, 270 days as the credit for 1.5 for a drug program he completed.

He was given an additional 60 days credit for completing a GED. ***.

Subsequent to that, it was brought to this Court's attention that the defendant is not eligible because of the charge being a Class X felony that he pled guilty to.

We were informed of that by IDOC. We also had the statute available. And now, he's petitioning to get that back; but apparently, under the law, he's not eligible because of the type of charge he had, and that was given to him in error.

* * *

The Defendant had a Class X offense. Therefore, per the IDOC and per correction of the statute, even though the Defendant was erroneously given that time credit, he is not eligible and, therefore, his petition will be dismissed, and, therefore, I find it is frivolous and patently without merit.

I ask the court reporter to type it and the clerk to notify the Defendant within 10 days."

¶ 12 According to defendant, he was not informed of the summary dismissal of his postconviction petition until April 11, 2016. This court granted defendant's late notice of appeal.

¶ 13 ANALYSIS

¶ 14 Defendant contends the trial court erred in summarily dismissing his postconviction petition where his due process rights were violated when he was induced to plead guilty based on the promise of 2,455 days of sentencing credit without receiving the benefit of his bargain. Defendant maintains this court should modify his mittimus to provide him with the bargained-for sentencing credit. In the alternative, defendant contends he presented the gist of a meritorious claim under the Act and, therefore, his petition should proceed to second-stage review.

¶ 15 The Act provides a statutory method by which a defendant may challenge his conviction or sentence for substantial violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is a collateral attack on a final judgment. *Id*. There are three potential stages of postconviction review. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. Section 122-2 of the Act requires a postconviction petitioner to "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010). In the first stage of review, the defendant need only present a limited amount of detail in the petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). That said, section 122-2 also provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). At the first stage, the trial court, taking the allegations as true, reviews the petition to ascertain whether it is frivolous or patently without merit, *i.e.*, whether it presented "the gist of a constitutional claim." *Lofton*, 2011 IL App (1st) 100118, ¶ 27. A petition is frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an

indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 15. If the trial court finds the petition is frivolous or patently without merit, it must be dismissed. *Lofton*, 2011 IL App (1st) 100118, ¶ 27. We review the dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 16 "A plea agreement has often been compared to an enforceable contract, and this court has applied contract law principles in appropriate circumstances." *People v. Donelson*, 2013 IL 113603 ¶ 18. When a defendant shows 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). Moreover, when a specified amount of sentence credit is included within the terms of a plea agreement, the defendant is entitled to the amount of the sentence credit as promised. *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27; *People v. Lenoir*, 2013 IL App (1st) 113615, ¶ 13; *People v. Clark*, 2011 IL App (2d) 091116, ¶ 1. 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. 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)).

¶ 17 The statute applicable here is section 3-6-3 of the Unified Code of Corrections (Code). Section 3-6-3 of the Code provides, in relevant part:

"(a)(1) The Department of Corrections shall prescribe rules and regulations for the early release on account of good conduct of persons committed to the Department ***.

***

(2.1) *** the rules and regulations shall provide that a prisoner who is serving a term of imprisonment shall receive one day of good conduct credit for each day of his or her sentence of imprisonment ***. Each day of good conduct credit shall reduce by one day the inmate's period of imprisonment ***.

***

(4) The rules and regulations shall also provide that the good conduct credit accumulated and retained under paragraph (2.1) of subsection (a) of this Section by any inmate during specific periods of time in which such inmate engaged full-time in substance abuse programs, correctional industry assignments, or educational programs provided by the Department under this paragraph (4) and satisfactorily completes the assigned program as determined by the standards of the Department, shall be multiplied by a factor of *** 1.50 for program participation on or after that date. However, no inmate shall be eligible for the additional good conduct credit under this paragraph (4) or (4.1) of this subsection (a) *** if convicted of *** a Class X felony.

***

(4.1) The rules and regulations shall also provide that an additional 60 days of good conduct credit shall be awarded to any prisoner who passes the high school level Test of General Educational Development (GED) while the prison is incarcerated. The good conduct credit awarded under this paragraph (4.1) shall be in addition to, and shall

> not affect, the award of good conduct under any other paragraph of this Section, but shall also be pursuant to the guidelines and restrictions set forth in paragraph (4) of subsection (a) of this Section." 730 ILCS 3-6-3 (West 2010).

¶ 18 The parties agree that the trial court originally provided defendant with 2,455 days of sentencing credit as negotiated by the parties and that the credit was not authorized by statute because defendant committed a Class X offense. See 730 ILCS 5/3-6-3(a)(4) (West 2010); 720 ILCS 570/401(a)(2)(d) (West 2010) (a person found guilty of delivery of 900 grams or more of cocaine is guilty of a Class X felony and shall be sentenced to a term of imprisonment of not less than 15 years and not more than 60 years). Notwithstanding, defendant argues his due process rights were violated where he was denied the benefit of his plea agreement and he should be awarded the negotiated sentencing credit. Defendant alternatively maintains that, if this court is unable to provide specific performance of the agreement, his postconviction petition sufficiently presented the gist of a meritorious claim of a constitutional violation and should proceed to second-stage review. The State counters that defendant cannot receive his requested sentencing credit because doing so would impermissibly reduce his sentence below the statutory minimum of 15 years' imprisonment. The State adds that, because defendant has rejected the only remedy available, *i.e.*, withdrawal of his guilty plea, his postconviction petition was properly dismissed as remand would be futile.

¶ 19 In reviewing the first-stage summary dismissal of defendant's *pro se* postconviction petition, we find defendant sufficiently presented the gist of a meritorious claim that his due process rights were violated because he did not receive the benefit of his bargained for 2,455 days of sentencing credit. As stated, there is no dispute by the parties that the plea agreement

included a 2,455 sentencing credit in exchange for defendant's guilty plea for delivery of 900 or more grams of cocaine. The record supports as much. Accordingly, based on *Whitfield*, *McDermott*, and *Clark*, defendant was entitled to the benefit of his bargain despite the fact that, as a Class X offender, he was ineligible for the additional sentencing credits of 1.5 days for his completed drug treatment program and 60 days for earning a GED.

¶ 20 That said, unlike the defendants in *Whitfield*, *McDermott*, *and Clark*, the instant defendant was sentenced to the statutory minimum of 15 years' imprisonment. See 720 ILCS 570/401(a)(2)(d) (West 2010); see also *Whitfield*, 217 Ill. 2d at 179 (25-year sentence imposed for a guilty plea for felony murder with a concurrent sentence of six years' imprisonment for a guilty plea for armed robbery); *McDermott*, 2014 IL App (4th) 120655, ¶ 3 (5 years' imprisonment in exchange for the defendant's guilty plea for unlawful altering of a title document, which is a Class 2 felony carrying a sentencing range of 2-5 years' imprisonment); *Clark*, 2011 IL App (2d) 091116, ¶ 2 (8 years' imprisonment for a guilty plea for attempted armed robbery, which is a Class 1 felony punishable by 4-15 years' imprisonment). Therefore, in order to provide defendant with his bargained-for sentencing credit, his sentence would be reduced below the statutory 15-year minimum prison term. However, neither this court, nor the trial court, may reduce defendant's sentence below the statutory minimum. See *People v. White*, 2011 IL 109616, ¶ 20 ("[a] court does not have authority to impose a sentence that does not conform with statutory guidelines [citations] and a court exceeds its authority when it orders a lesser or greater sentence than that which the statute mandates").

¶ 21 We recognize that post-*People v. Castleberry*, 2015 IL 116916, the void-sentence rule no longer applies and, therefore, a sentence below the statutory minimum would no longer be void.

Id. ¶ 19 (finding only the most fundamental defects, such as lack of personal or subject-matter jurisdiction render a judgment void; therefore, the failure to comply with a statutory requirement does not negate the circuit court's subject matter jurisdiction and merely renders a nonconforming sentence voidable). *Castleberry*, however, does not provide courts with the ability to render "specific performance" of a nonconforming sentence. Instead, the supreme court has clarified that "[a]fter *Castleberry*, a reviewing court may no longer, *sua sponte*, correct a statutorily nonconforming sentence [citation], the State may no longer seek to correct such a sentence on direct review but must seek a writ of *mandamus* to do so [citation], and a defendant may no longer rely on the void sentence rule to overcome forfeiture of a claimed sentencing error or to challenge a statutorily nonconforming sentence in perpetuity [citation]." *People v. Price*, 2016 IL 118613, ¶ 17. Accordingly, *Castleberry* did not grant this court the authority to impose a sentence below the statutory minimum.

¶ 22 Although we cannot grant defendant's requested specific performance, we still review whether summary dismissal of defendant's *pro se* postconviction petition was warranted. In other words, did defendant's *pro se* postconviction petition present the gist of a meritorious claim entitling him to further consideration under the second stage of the Act where he did not receive his bargained-for sentencing credit?

¶ 23 Contract law requires consideration from both parties; therefore, when an essential term of a contract is deemed unenforceable, the entire agreement is rendered unenforceable. *Id*. at 610 (citing Restatement (Second) of Contracts § 184(1) (1981)). As a result, when a sentence that is an essential part of a plea agreement is later modified because the sentence does not conform to the statutory requirements, the plea agreement becomes unenforceable and the defendant must be

given an opportunity to withdraw his plea. *People v. White*, 2011 IL 109616, ¶ 31; *People v. Hare*, 315 Ill. App. 3d 606, 610 (2000). The key, therefore, in determining whether a modified sentence renders a plea agreement unenforceable is whether the challenged portion of the sentence was an essential element of the plea agreement.

¶ 24 In *Hare*, the defendant agreed to plead guilty to residential burglary in exchange for the State recommending a minimum four-year sentence. *Hare*, 315 Ill. App. 3d at 607-08. The trial court accepted the negotiated plea agreement and sentenced the defendant to four years' imprisonment. A few days later, the court *sua sponte* entered an order vacating the judgment because the defendant was subject to Class X sentencing, which required a minimum of six years' imprisonment. The defendant filed a motion demanding "specific performance" of the plea agreement, such that he still would be sentenced to the minimum sentence; however, that sentence would be the minimum 6-year term required as a Class X offender. The defendant's motion was denied where the trial court found the parties' negotiated plea agreement included a specific term of four years' imprisonment. On appeal, the Second District affirmed the lower court, finding the plea agreement could not be enforced because the four-year sentence, not a minimum sentence, was "a major element of the consideration for [the] defendant's guilty plea." *Id*. at 609.

¶ 25 Here, the question is whether defendant's sentencing credit was an essential element of his plea agreement. We find defendant's *pro se* petition and accompanying records make an arguably meritorious claim that the 2,455 days of sentencing credit were essential to his plea agreement. Keeping in mind that plea agreements are governed by principles of contract law subject to considerations of constitutional due process, defendant, therefore, would be entitled to

withdraw his plea. See *White*, 2011 IL 109616, ¶ 31; *Hare*, 315 Ill. App. 3d at 610. We recognize defendant's *pro se* petition stated that he did not wish to withdraw his plea, but asked that his mittimus be corrected to reflect the agreed days of sentencing credit or, in the alternative, that his petition proceed to second-stage review. We do not find that his requests should foreclose the petition from proceeding to second-stage review. Unlike in *People v. Porm*, 365 Ill. App. 3d 791, 795 (2006), where the defendant expressed both in his postconviction petition and in his appeal from the second-stage dismissal of his petition that he was not interested in withdrawing his plea, defendant in this appeal from the first-stage dismissal of his petition has expressed an interest in renegotiating a plea agreement if afforded the opportunity. We, therefore, find the trial court erred in summarily dismissing defendant's postconviction petition following only first-stage proceedings.

¶ 26 Because we have determined defendant's petition should proceed to second-stage review, we need not address the propriety of the trial court's *nunc pro tunc* order.

¶ 27 CONCLUSION

¶ 28 We reverse the first-stage summary dismissal of defendant's *pro se* postconviction petition. We remand for second-stage proceedings pursuant to the Act.

¶ 29 Reversed; remanded.