2018 IL App (1st) 161648-U

No. 1-16-1648

Order filed December 20, 2018

Fourth Division

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).

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. 09 CR 16795
	)	
EARL HILL,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: Defendant's claims that he is owed additional days of presentence custody credit and certain assessed fees are fines subject to offset by his presentence custody credit are raised for the first time on appeal from the denial of his section 2-1401 petition and are not properly before this court. The trial court's denial of defendant's section 2-1401 petition is affirmed.

¶ 2 Defendant Earl Hill appeals from the trial court's denial of his *pro se* petition for relief from judgment (735 ILCS 5/2-1401) (West 2014)). For the first time on appeal, defendant

contends that he is owed additional days of presentence custody credit and certain assessed fees are actually fines subject to offset by his presentence custody credit. We affirm.

¶ 3 Following a 2011 bench trial, defendant was found guilty of armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2008)), two counts of unlawful use a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2008)), and six counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1)/(3)(a), (c), (f) (West 2008)). The trial court sentenced defendant to eight years in prison for AHC and seven years in prison on each of the remaining counts, to be served concurrently. We affirmed defendant's conviction for AHC and for UUWF based on possession of ammunition, vacated his remaining convictions for AUUW and UUWF under the one-act, one crime doctrine, and ordered the clerk of the circuit court to correct the fines and fees order. *People v. Hill,* 2013 IL App (1st) 113610-U. We set out a full recitation of the trial evidence in that decision. For resolution of this appeal, we need only provide a brief summary of the subsequent procedural posture.

¶ 4 In September 2015, defendant filed a *pro se* petition for relief from judgment under section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)). Defendant alleged his six convictions for AUUW were void under *People v. Aguilar*, 2013 IL 112116. He requested the trial court vacate his AUUW "conviction" and resentence him on the remaining counts without the influence of the unconstitutional AUUW "conviction." The court granted the State's motion to dismiss the petition and "denied" defendant's petition, finding defendant "forfeited his current relief" and failed to allege any appropriate claim under section 2-1401.

¶ 5 Defendant does not challenge the denial of the petition. Instead, he contends for the first time on appeal that he is owed additional days of presentence custody credit. Defendant asserts that he only received 50 days of presentence custody credit but that, under section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(a), (b) (West 2016)), he is entitled to between 81 and 92 days. Defendant also contends for the first time on appeal that certain fees assessed against him are actually fines that he is entitled to offset with his *per diem* monetary presentencing custody credit. He requests that we remand for the trial court to determine the proper number of days for which he is entitled to credit and order the trial court to offset the challenged fees by his presentence custody credit.

¶ 6 In response, the State does not address the merits of either argument. Instead, it argues that, because defendant is currently serving his three-year mandatory supervised release term, his claim that he is owed additional days of presentence custody credit is moot, as he is no longer in the custody of the Illinois Department of Corrections. It argues that we should therefore dismiss this issue as moot. The State also argues we need not address the merits of defendant's claim that certain assessed fees are actually fines subject to offset by his presentence custody credit. It contends defendant's section 2-1401 petition was untimely because it was filed more than two years after entry of the final judgment at issue and its denial should therefore be affirmed.

¶ 7 Defendant acknowledges his petition was untimely and that the trial court properly dismissed it. He argues however that the two-year limitations period is not jurisdictional and the trial court had jurisdiction over his untimely petition. He contends that, therefore, because he filed a timely notice of appeal from the trial court's dismissal of that petition, we have

jurisdiction over his claims and may correct his time-served credit and mandatory presentence custody credit even though he raises these arguments for the first time on appeal.

¶ 8 We must determine whether we have jurisdiction to consider defendant's claims, which he raises for the first time on appeal from the denial of his untimely section 2-1401 petition. See *People v. Brown*, 2017 IL App (1st) 150203, ¶ 42 (where the defendant raised challenges to the assessed fines and fees for the first time on appeal from the dismissal of his postconviction petition and the State conceded certain errors, this court reviewed its jurisdiction, noting that it should not overlook our lack of appellate jurisdiction). To resolve this issue, we must first determine whether the trial court had jurisdiction over defendant's section 2-1401 petition, even though it was untimely filed. See *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 10 (explaining a three-step analysis to determine whether this court had jurisdiction to consider the merits of the defendant's challenge to fines and fees, raised for the first time on appeal from the denial of his motion to correct the mittimus). If the trial court had jurisdiction, we must determine whether defendant's appeal from the denial of his petition is properly before this court. *Id.* If it is, then we must decide whether defendant can raise his credit and fines and fees claims in this court, even though he did not raise them in the trial court. *Id.*

¶ 9 Generally, a trial court loses jurisdiction to alter a sentence after 30 days. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Under section 2-1401, a defendant may challenge a final order and judgment more than 30 days after their entry. *People v. Pinkonsly*, 207 Ill. 2d 555, 562 (2003). A section 2-1401 petition filed more than two years after the challenged judgment cannot be considered, unless the defendant makes a clear showing that he or she was under a legal disability or duress or the grounds for relief were fraudulently concealed. *Id.*

¶ 10 However, the two-year limitations period for filing a section 2-1401 petition may be waived by the opposing party. *People v. Harvey*, 196 Ill. 2d 444, 447 (2001). It is not a jurisdictional issue. *People v. Glowacki*, 404 Ill. App. 3d 169, 172 (2010) (rejecting the State's argument that the trial court lacked jurisdiction to grant the defendant's untimely filed section 2-1401 petition); *People v. Malloy*, 374 Ill. App. 3d 820, 824 (2007) (two-year limitations period in section 2-1401 is not a jurisdictional prerequisite); *People v. Ross,* 191 Ill. App. 3d 1046, 1053 (1989) (holding the two-year limitations period is procedural rather than jurisdictional and therefore may be waived). Because the two-year limitations period is not jurisdictional, the trial court had jurisdiction to consider defendant's untimely petition.[1] *Glowacki*, 404 Ill. App. 3d at 171-72.

¶ 11 The trial court denied defendant's petition on January 22, 2016. On June 22, 2016, we granted defendant leave to file a late notice of appeal. See Ill. S. Ct. R. 606(c) (eff. Dec. 11, 2014) (the reviewing court may grant leave to appeal if the appellant files a motion within six months of the expiration of the time for filing the notice of appeal). Accordingly, the trial court had jurisdiction over defendant's petition, and we have jurisdiction over defendant's timely appeal from the denial of that petition. See *People v. Young,* 2018 IL 122598, ¶ 14 (the appellate court obtained jurisdiction to consider the dismissal of the defendant's successive postconviction petition when he filed a timely notice of appeal); *People v. Grigorov*, 2017 IL App (1st) 143274, ¶¶ 1, 5-6 (where the trial court had jurisdiction over the defendant's freestanding collateral action, the appellate court had jurisdiction over his timely appeal from the denial of that petition).

[1] We note that the trial court denied defendant's petition on the merits, not because it was untimely filed more than two years after judgment was entered.

¶ 12 We lastly must determine whether we can consider defendant's claims that he is owed additional days of presentence custody credit and that certain assessed fees are actually fines subject to offset by monetary presentence custody credit, claims he did not raise in his section 2-1401 petition.

¶ 13 We first address defendant's claim that he is owed additional days of presentence custody credit. Defendant asserts that, even though he is raising this challenge for the first time on appeal, we may review his claim under Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) and as a "mittimus amendment" motion, which can be made at any time. We disagree.

¶ 14 Under Rule 615(b)(1), a reviewing court may "modify the judgment or order from which the appeal is taken." Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967). However, this authority to modify a circuit court's judgment is limited to the judgment "from which the appeal is taken." Ill. S. Ct. R. 615(b)(1) (eff. Jan. 1, 1967); *Young,* 2018 IL 122598, ¶ 28. The judgment from which defendant is taking his appeal is not the sentencing order entered by the trial court in November 2011, in which the court awarded the days of presentence custody credit. Rather, defendant is appealing the trial court's subsequent denial of his section 2-1401 petition, which did not assert any claims based on the incorrect calculation of his sentencing credit. Thus, we do not have authority under Rule 615(b) to grant his claim for additional sentencing credit. See *Young,* 2018 IL 122598, ¶ 28 (the supreme court concluded that Rule 615(b) did not give the appellate court authority to grant the defendant's claim for presentence custody credit presented for the first time on appeal from postconviction proceedings); *People v. Morrison*, 2016 IL App (4th) 140712, ¶ 17.

¶ 15 We also do not have authority to grant defendant's claim for presentence custody credit by ordering correction of the mittimus. A circuit court may not modify a judgment after it lost jurisdiction over a case, but may correct the mittimus to accurately reflect the trial court's judgment that was entered. *Young,* 2018 IL 122598, ¶ 29 (citing *People v. Latona*, 184 Ill. 2d 260, 278 (1998)). Under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), this authority extends to the appellate court. *Id.* However, we are authorized to order correction of a mittimus only when it is inconsistent with the judgment entered by the circuit court. *Id.* The mittimus here is not inconsistent with the court's judgment.

¶ 16 At sentencing, the trial court orally granted defendant 50 days of presentence custody credit. The mittimus states that defendant received 50 days of credit. Thus, the mittimus and the trial court's judgment are consistent and we do not have authority to order correction of the mittimus. See *Young,* 2018 IL 122598, ¶¶ 29-31 (where the defendant requested an amendment to the trial court's sentencing judgment to correct the calculation of presentence custody credit but the mittimus reflected the court's judgment accurately, the supreme court concluded that the appellate court was not authorized to make such amendment on appeal from the dismissal of a successive postconviction petition that did not raise the claim). Accordingly, we cannot grant defendant relief on his claim for additional presentence custody credit.

¶ 17 We also cannot grant defendant relief on his second claim. Defendant contends for the first time on appeal that the $50 court system, $15 document storage, $15 automation, and $190 felony complaint filing fees assessed against him are actually fines subject to offset by his monetary presentence custody credit. Under section 110-14(a) of the Code of Criminal Procedure of 1963, "upon application of the defendant," he is entitled to a $5 credit against his

fines for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2016); *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Presentence credit applies only to fines imposed after a conviction and does not apply to other assessed costs or fees. *Tolliver,* 363 Ill. App. 3d at 96.

¶ 18 Citing *People v. Caballero*, 228 Ill. 2d 79, 87 (2008), defendant argues that, under section 110-14, he may request, and we may grant him, *per diem* credit for the first time on appeal from his untimely section 2-1401 petition.[2]

¶ 19 As section 110-14 permits this court to award a defendant monetary presentence custody credit on "application of the defendant" (725 ILCS 5/110-14 (West 2016)), claims for statutory credit under section 110-14 " 'may be raised at any time and at any stage of court proceedings, even on appeal in a postconviction petition.' " *Brown*, 2017 IL App (1st) 150203, ¶ 36 (quoting *Caballero*, 228 Ill. 2d at 88). "Granting credit is a simple ministerial act that promotes judicial economy by ending any further proceedings over the matter." *Id.* ¶ 36.

¶ 20 However, although section 110-14 and *Caballero* allow defendant to raise claims for *per diem* credit in this proceeding, they do not allow him to raise substantive issues regarding whether certain fees are properly categorized as fines subject to offset by that credit. *Id.* ¶ 40. Here, defendant is not arguing that the trial court made a mathematical error in calculating the fines and fees owed. See *Id.* ¶ 35. Rather, he is raising substantive questions regarding whether the assessed $50 court system, $15 document storage, $15 automation storage, and $190 felony complaint filing fees are actually fines despite their labels as fees. Thus, because defendant

[2] On direct appeal, defendant challenged various other assessed fines for which he did not receive presentence custody credit. *People v. Hill,* 2013 IL App (1st) 113610-U, ¶ 53. Applying the void sentence rule, we considered defendant's challenge, even though he raised it for the first time on appeal. *Hill,* 2013 IL App (1st) 113610-U, ¶¶ 49, 53. The void sentence rule has since been abolished by *People v. Castleberry*, 2015 IL 116916, ¶ 19. *People v. Price*, 2016 IL 118613, ¶ 17.

raised these substantive questions for the first time on appeal from the denial of his section 2-1401 petition, we do not have independent subject matter jurisdiction over these claims and will not address them. See *Id.* ¶¶ 40-41.

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

¶ 22 Affirmed.