2018 IL App (5th) 170327-U

NO. 5-17-0327

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MICHAEL McMILLAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Christian County.
	)	
v.	)	No. 17-MR-43
	)	
GLEN JACKSON, Chief Records Officer; JANIS JOKISCH, Records Office Supervisor, Taylorville Correctional Center; KIMBERLY SMITH, Warden, Taylorville Correctional Center; SANDRA FUNK, Deputy Director Central Region, IDOC; JOHN BALDWIN, Director of IDOC; JOHN MILHISSER, State's Attorney, Seventh Judicial Circuit of Sangamon County; and HON. PETER C. CAVANAGH, Presiding Seventh Circuit Court Judge,	)	Honorable
	)	J. Marc Kelly,
Defendants-Appellees.	)	Judge, presiding.

PRESIDING JUSTICE OVERSTREET delivered the judgment of the court.
Justices Chapman and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the plaintiff's complaint for *mandamus*.

¶ 2 The plaintiff, Michael McMillan, appeals *pro se* the dismissal of his complaint for *mandamus* relief wherein he alleged that his presentence custody credit was incorrectly applied to his terms of imprisonment. The judgment of the circuit court is affirmed.

¶ 3 BACKGROUND

¶ 4 On April 15, 2016, plaintiff entered pleas of guilty to aggravated driving under the influence in Sangamon County case numbers 12-CF-782 (2012 Case) and 14-CF-361 (2014 Case). In his 2012 Case, plaintiff was sentenced to 6 years of imprisonment with credit of 962 days for time served in presentence custody on September 16, 2012; September 19, 2012; September 25, 2012, to May 9, 2013; and April 16, 2014, to April 15, 2016, along with any time served between sentencing and his receipt by the Department of Corrections (Department). In his 2014 case, he was sentenced to 6 years of imprisonment with credit of 733 days for time served in presentence custody from April 16, 2014, to April 15, 2016, along with any time served between sentencing and his receipt by the Department. Of particular note is the fact that he was in custody on both charges simultaneously from April 16, 2014, to April 15, 2016 (the 733 days *supra*). These sentences were ordered to be served consecutively.

¶ 5 Plaintiff filed a grievance with the Department alleging that his sentence credit was being incorrectly applied and that his release date should be in July 2017. This grievance was denied. In January 2017, he appeared for a hearing on his motion to correct or amend the mittimus. The court denied his motion.

¶ 6 In March 2017, plaintiff filed a complaint for *mandamus* relief seeking to compel the Department to credit his sentences with both 962 and 740 days, and to recalculate his

release date to July 2017. Alternatively, he sought to compel the court, in any manner of ways, to ensure his release date of July 2017, so that he would receive the "benefit of his plea bargain." Defendants filed a motion to dismiss, to which the plaintiff responded. On or about July 25, 2017, the court stated, "relief requested is not in possession of *** this court. Petitioner seeking relief based on sentence received from Sangamon County and as such petitioner should file in that county. Case dismissed." Plaintiff now brings this timely appeal.

¶ 7 ANALYSIS

¶ 8 On appeal, plaintiff argues that the trial court erred in dismissing his *mandamus* complaint where he sought either recalculation of his sentences, an order from the court requiring the Department to comply with said recalculation and to release him in July 2017, or the court's recalculation of his term of imprisonment based on "benefit of the bargain" principles so that he would be released in July 2017. We do not agree.

¶ 9 We begin by noting our standard of review. "The grant of a motion to dismiss for a failure to state a cause of action filed pursuant to section 2-615 or a motion for an involuntary dismissal based on defects or defenses in the pleadings pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2004)) is subject to *de novo* review." *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433, 876 N.E.2d 659, 663 (2007) (citing *White v. DaimlerChrysler Corp.*, 368 Ill. App. 3d 278, 282, 856 N.E.2d 542, 546 (2006)). "Where the dismissal was proper as a matter of law, we may affirm the circuit court's decision on any basis appearing in the record." *Id.*

(citing *MKL Pre-Press Electronics/MKL Computer Media Supplies, Inc. v. La Crosse Litho Supply, LLC*, 361 Ill. App. 3d 872, 877, 840 N.E.2d 687, 691 (2005)).

¶ 10 Additionally, "[*m*]*andamus* is an extraordinary civil remedy that will be granted to enforce, as a matter of right, the performance of official nondiscretionary duties by a public officer." *Id.* (citing *Lee v. Findley*, 359 Ill. App. 3d 1130, 1133, 835 N.E.2d 985, 987 (2005)). "*Mandamus* will issue only where the plaintiff has fulfilled his burden (see *Mason v. Snyder*, 332 Ill. App. 3d 834, 840, 774 N.E.2d 457, 461 (2002)) to set forth *every* material fact needed to demonstrate that (1) he has a clear right to the relief requested, (2) there is a clear duty on the part of the defendant to act, and (3) clear authority exists in the defendant to comply with an order granting *mandamus* relief." (Emphasis in original.) *Id.* at 433-34 (citing *Baldacchino v. Thompson*, 289 Ill. App. 3d 104, 109, 682 N.E.2d 182, 186 (1997)). "Because Illinois is a fact-pleading jurisdiction, a plaintiff is required to set forth a legally recognized claim and plead facts in support of each element that bring the claim within the cause of action alleged." *Id.* at 434 (citing *Beahringer v. Page*, 204 Ill. 2d 363, 369, 789 N.E.2d 1216, 1221 (2003)). "To survive a motion to dismiss ***, a complaint must be both legally and factually sufficient." *Id.* "A writ of *mandamus* is appropriate when used to compel compliance with mandatory legal standards but not when the act in question involves the exercise of a public officer's discretion." *McFatridge v. Madigan*, 2013 IL 113676, ¶ 17, 989 N.E.2d 165.

¶ 11 The gist of plaintiff's argument is that he should receive "double-credit" for the time served from April 16, 2014, to April 15, 2016: 733 days credit in his 2012 Case and 733 days credit in his 2014 Case.

¶ 12 Plaintiff is entitled to receive day-for-day credit during his term of imprisonment based upon his convictions (730 ILCS 5/3-6-3 (West 2016)), and his term of imprisonment began the date he was received by the Department (*id.* § 5-4.5-100(a)). As part of his plea bargain, he received credit for time spent in presentence custody. Plaintiff argues that section 5-4.5-100(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-100(b) (West 2010)) applies. Section 5-4.5-100(b) of the Code 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. *Id.* § 5-4.5-100(b). His reliance on this section is misplaced. Plaintiff was released on bond for his 2012 case when he was arrested for the 2014 charge. At the time he was arrested on the 2014 charge, he was then being held on both the 2014 Case *and* the 2012 Case. Therefore, section 5-4.5-100(c) of the Code applies, which provides that "[a]n offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit on the determinate sentence or maximum term and the minimum term of imprisonment for time spent in custody *under the former charge not credited against another sentence*." (Emphasis added.) *Id.* § 5-4.5-100(c).

¶ 13 As he was being held, during his last 733 days of his presentence custody, for both of his charges (2012 Case and 2014 Case simultaneously), section 5-4.5-100(c) of the Code *supra* is directly on point as to how he should receive his presentence credit when being held on two charges. He does not get credit against both charges for the same amount of time.

¶ 14 Plaintiff also argues that section 5-8-4(b) of the Code (730 ILCS 5/5-8-4(b) (West 2016)) is applicable to his case. That section provides that if a defendant serving a sentence for a misdemeanor is subsequently sentenced to prison for a felony then the misdemeanor sentence will be served concurrently with the felony sentence. Again, this section does not apply. Plaintiff is serving two felony sentences. Section 5-8-4(d) of the Code requires the court to "impose consecutive sentences in each of the following circumstances: *** (8) If a person charged with a felony commits a separate felony while on pretrial release ***, then the sentences imposed upon conviction of these felonies shall be served consecutively regardless of the order in which the judgments of conviction are entered." *Id.* § 5-8-4(d)(8). Because plaintiff was out on bond in his 2012 Case when he was arrested on his 2014 Case, his sentences must be consecutive. *Id.* § 5-8-4(b), (d).

¶ 15 Further, section 5-8-4(g) of the Code instructs the Department to treat "the defendant as though he or she had been committed for a single term" and provides "[t]he defendant shall be awarded credit against the aggregate maximum term and the aggregate minimum term of imprisonment for all time served in an institution since the commission of the offense or offenses and as a consequence thereof at the rate specified in Section 3-6-3 (730 ILCS 5/3-6-3)." *Id.* § 5-8-4(g)(4). Recall, *supra*, he gets credit under "*the former charge*[,] *not credited against another sentence*." (Emphasis added.) *Id.* § 5-4.5-100(c).

¶ 16 Also, the Illinois Supreme Court spoke directly on the double-credit subject in *People v. Latona*, 184 Ill. 2d 260, 271-72, 703 N.E.2d 901, 907 (1998). The court there found that allowing double credit for consecutive sentences would frustrate the

legislature's clearly expressed intent, stating that, "to allow an offender sentenced to consecutive sentences two credits—one for each sentence—not only contravenes the legislative directive that his sentence shall be treated as a 'single term' of imprisonment, but also, in effect, gives that offender a double credit, when the sentences are aggregated, for each day previously served in custody. That cannot be what the legislature intended." *Id.* at 271. The court held that "to the extent that an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served. *** Defendants must be given credit for all the days they actually served, but no more." *Id.* While plaintiff asserts that *Latona* has been "debunked," he cites no authority to support this assertion.

¶ 17 Finally, plaintiff asserts that the court should allow him double credit for him to receive the "benefit of the bargain" of his plea. He asked the court to attempt, in any number of ways, to craft an order giving him what he purports to be the benefit of his plea bargain. However, by asking the court to craft an order, he was asking the court to use its discretion, and *mandamus* can only be sought for ministerial, nondiscretionary duties. *Rodriguez*, 376 Ill. App. 3d 429; *McFatridge*, 2013 IL 113676, ¶ 17.

¶ 18 As plaintiff has not shown clear right to receive double credit for the days in simultaneous custody, nor that the court, in modifying his sentence, would be completing a ministerial, nondiscretionary task, his *mandamus* complaint was properly dismissed.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Christian County is affirmed.

¶ 21 Affirmed.