2019 IL App (2d) 151104-U
No. 2-15-1104
Order filed May 23, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 13-CF-804
	)	
KURT B. NASH,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Daniel B. Shanes,
	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Zenoff concurred in the judgment.
Presiding Justice Birkett dissented.

ORDER

¶ 1 *Held*: Because defense counsel was ineffective for failing to move to withdraw bond while defendant simultaneously served his prison sentence in this case and an unrelated case, we amend the mittimus to reflect 193 days of credit. Affirmed as modified.

¶ 2 Defendant, Kurt B. Nash, pled guilty to attempt armed violence (720 ILCS 5/8-4, 5/33A-2(a) (West 2012)). The trial court sentenced him to 10 years' imprisonment to be served concurrently with his sentence for his conviction in an unrelated case. The trial court gave defendant 408 days credit for time served. The defendant appeals, arguing that defense counsel

was ineffective for failing to move to withdraw bond in this case while he simultaneously served a prison sentence in the unrelated case. We agree and award defendant an additional 193 days of credit.

¶ 3 I. BACKGROUND

¶ 4 On March 26, 2013, Lake County sheriff's deputy Steven Campobasso was on patrol in Waukegan, Illinois, and observed defendant driving a 2003 Impala at 51 miles per hour in a 35-miles-per-hour zone. Campobasso initiated a traffic stop. According to Campobasso, as defendant got out of the car, defendant dropped a plastic bag containing a white "rock-like" substance, which Campobasso suspected was cocaine. Campobasso arrested defendant, took his keys and tried to open the car, but none of the keys unlocked the vehicle's doors. The car was towed. Defendant posted bond the same day and was released.

¶ 5 After a search warrant was issued, police found a 9-millimeter handgun in the car's console. On April 29, 2013, the State charged defendant with unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2012)).

¶ 6 On May 7, 2013, defendant was arrested and charged in a separate case (13 CF 2932) with unlawful possession of a controlled substance.

¶ 7 On July 17, 2013, the indictment in this case was amended to include three counts, including armed violence (720 ILCS 5/33A-2(a) (West 2012)). In August 2013 defense counsel filed a motion to quash arrest and suppress evidence discovered as a result of the search of himself and the car he was driving. In October 2013 the trial court partially granted defendant's motion to quash and suppress. The State filed a notice of impairment and a notice of appeal.

¶ 8 On April 22, 2014, the trial court placed defendant on a $100,000 recognizance bond in this case, which was still pending on appeal. On the same date, a jury found defendant guilty in case no. 13 CF 2932. The trial court sentenced defendant to three years' imprisonment followed

by one year of mandatory supervised release (MSR) and gave defendant 352 days credit against the three-year sentence. On October 31, 2014, defendant was released from prison and was permitted to reside with his mother in Wisconsin. The following day, he began serving MSR, home confinement and wearing an electronic ankle bracelet; MSR had been transferred to Wisconsin.

¶ 9 Regarding the State's appeal in this case, on November 19, 2014, this court issued its order that reversed the trial court's partial grant of defendant's motion to quash and suppress and remanded the case for further proceedings. *People v. Nash*, 2014 IL App (2d) 131298-U. Our mandate in *Nash* was filed with the clerk of the trial court on February 3, 2015.

¶ 10 On February 19, 2015, defendant appeared with defense counsel before the trial court on this case. Defense counsel asked the court to let defendant "continue on his bond, since he's under the custody of the Department of Corrections [and] he's on a GPS ankle bracelet." The State asked "for a high cash bond [because] the community is in danger [and defendant] carries a high risk to reoffend." The trial court placed defendant on a $50,000 bond, partly because defendant had been "appearing in court, apparently, for the most part, been out of trouble, been supervised, but *** [before the motion to suppress being granted and the appeal being filed, Judge Shanes] had [defendant] in custody and placed him on a recognizance bond." The trial court, Judge George Strickland presiding, remanded defendant to custody, and a bond review was set for a few days later pending a pretrial bond services report.

¶ 11 On February 23, 2015, defendant appeared before the trial court, Judge Shanes, presiding. The State argued that defendant's "bond should be raised substantially to reflect the serious offense." The trial court set bond at $30,000, ordering defendant to remain in his house in Milwaukee on a "twenty-four-hour curfew monitored by GPS."

¶ 12 On July 15, 2015, defendant pled guilty to a charge of attempt armed violence in this case. In exchange, the State *nolle prossed* the remaining counts and agreed to a 15-year sentencing cap. Defendant was taken into custody on July 20, 2015. On September 3, 2015, the trial court sentenced defendant to 10 years' imprisonment to be followed by two years of MSR, to be served concurrently with the sentence in case no. 13 CF 2932. The trial court gave defendant 408 days credit for time served. The mittimus reflected that the sentence in this case was to be served concurrent with the sentence imposed in case No. 13-CF-2932.

¶ 13 On October 1, 2015, defendant filed a motion to withdraw his plea, or, alternatively, to reconsider his sentence. However, on November 3, 2015, defense counsel stated that, after conferring with defendant, he was amending his motion; he no longer wanted to withdraw his plea. Defendant sought only to move to reconsider his sentence to receive 193 days credit for the time he spent in prison from April 22, to October 31, 2014. Defense counsel argued that defendant should receive credit for these days because this case was on appeal on the State's certificate of impairment. Thus, according to defense counsel, the trial court had no jurisdiction to place defendant on a recognizance bond in this case on April 22, 2014, and "in doing so, we violated the cardinal intent of Section 5-8-7 [of the Unified Code of Corrections], which is not to allow the State the ability through technical means to stop a defendant from obtaining his lawful credits on concurrent sentencing." Defense counsel argued that, pursuant to *People v. Robinson*, 172 Ill. 2d 452 (1996), defendant's bond in this case was effectively revoked when he was in prison on the other concurrent case. The trial court denied defendant's motion.

¶ 14 Defendant filed his notice of appeal on November 3, 2015, and an amended notice of appeal on November 16, 2015.

¶ 1 II. ANALYSIS

¶ 15 Defendant argues that he should be granted an additional 193 days of sentencing credit because his attorney rendered ineffective assistance by failing to move to withdraw bond on this case while defendant simultaneously served a sentence in another case.

¶ 16 To establish a valid claim of ineffective assistance of counsel a defendant must show that: (1) his attorney's conduct fell below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Cherry*, 2016 IL 118728, ¶ 24. Inquiries of counsel's effectiveness may not extend into areas of trial strategy or tactics. *People v. Centeno*, 394 Ill. App.3d 710, 713 (2009). However, counsel may be held to be ineffective where he or she fails to withdraw bond in one case while the defendant is in custody on an unrelated case. *Id*. at 713-714.

¶ 17 A defendant who is in simultaneous custody on two unrelated charges is entitled to credit for time served with regard to both sets of charges. *People v. Robinson*, 172 Ill. 2d 452, 459 (1996). A defendant who is out on bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge until his bond is withdrawn or exonerated. *People v. Nesbit*, 2016 IL App (3d) 140591, ¶ 44 (citing *People v. Arnhold*, 115 Ill. 2d 379, 383 (1987)). Once a defendant withdraws or exonerates his bond, he is considered in custody on both charges and earns credit for each day in presentencing custody. *Id*. (citing *Robinson*, 172 Ill. 2d at 459-63).

¶ 18 Here, on April 22, 2014, during the sentencing hearing in case no. 13-CF-2932, defense counsel requested and the trial court agreed to place defendant on a "hundred thousand recognizance bond" in this case. The trial court then sentenced defendant in case no. 13-CF-2932 and defendant was in custody from April 22, 2014, to October 31, 2014, or 193 days. Had defense counsel moved to withdraw defendant's bond in this case, defendant would have earned credit for those 193 days. Because defense counsel was aware that defendant was in custody on

the offense in case no. 13-CF-2932, "[i]t behooved defense counsel to move to withdraw the bond posted in the instant case in order to allow the defendant to earn credit against his eventual sentence in the [instant] case." *People v. DuPree*, 353 Ill. App. 3d 1037, 1049 (2004).

¶ 19 The State argues that defense counsel's failure to move to withdraw defendant's bond was a "reasonable strategic choice." The State contends that, had defense counsel moved to withdraw defendant's bond, defendant "could not have demonstrated his potential for rehabilitation and reform. The State contends that the goodwill defendant accumulated during his time "out of custody" earned him more time off of his sentence than the 193 days of credit he would have received had bond been withdrawn. However, this is mere speculation, without support in the record.

¶ 20 We note, that pursuant to Illinois Supreme Court Rule 604(a)(3), defendant should not have been held to bond while the State's appeal was pending. Ill. S. Ct. R. 604(a)(3) (eff. July 1, 2017)) ("A defendant shall not be held in jail or to bail during the pendency of an appeal by the State, *** unless there are compelling reasons for his or her continued detention or being held to bail"). Further, defense counsel never raised this issue in the trial court.

¶ 21 In addition, the State fails to understand that nothing prevented defense counsel from moving to withdraw bond while defendant was in prison on the unrelated offense and then requesting bond when defendant was released on October 31, 2014. If defense counsel had done that, defendant would have received his proper credit *and*, as the State speculates, defendant would have accumulated goodwill.

¶ 22 The State also argues that this case should be determined in a postconviction proceeding. Defendant's release date on MSR is July 26, 2019. Thus, by the time this matter is determined through postconviction proceedings, defendant would likely be finished serving his prison term and would not be able to obtain the relief he now seeks.

¶ 23 Had defendant received effective assistance, counsel would not have requested bond in this case during defendant's sentencing hearing in case no. 13-CF-2932 or would have moved to withdraw said bond after the trial court sentenced defendant. See *Centeno*, 394 Ill. App. 3d at 714. Further, had defense counsel moved to withdraw bond on April 22, 2014, defendant would have been in simultaneous custody on both charges and he would have received in-custody credit for both offenses. Accordingly, we hold that the defendant is entitled to 193 days of additional credit because he did not receive effective assistance of counsel.

¶ 24 This court has authority to issue a direct order to the clerk of the circuit court to make necessary corrections. *Id*. at 715. Accordingly, we direct the clerk to amend the mittimus to reflect 193 days of presentence credit.

¶ 25 III. CONCLUSION

¶ 26 For the reasons stated, the judgment is affirmed as modified.

¶ 27 Affirmed as modified.

¶ 28 PRESIDING JUSTICE BIRKETT, dissenting:

¶ 29 I disagree with my colleagues that defendant established that trial counsel provided ineffective assistance by not moving to withdraw defendant's bond in this case when defendant was sentenced in case number 13-CF-2932. There are several reasons why the majority's analysis and conclusions are flawed. First, defendant has not demonstrated that counsel's decision was not the result of strategy. Second, the record is silent as to any discussions defense counsel had with defendant and defendant's family regarding the request for a recognizance bond. Third, as a matter of law defendant was required to be released and discharged from bail during the pendency of the State appeal in this case. S. Ct. R. 604(a)(3) (eff. July 1, 2017) ("A defendant shall not be held in jail or to bail during the pendency of an appeal by the State, or of a petition or appeal by the State under Rule 315(a), unless there are compelling reasons for his or

her continued detention or being held to bail.") Fourth, defendant's argument that he would have been required to serve less time had counsel moved to withdraw bond is mere speculation. Fifth, even if defendant's bond in this case had been withdrawn, he would not be entitled to receive credit for both cases where the law required that the sentence be consecutive. *People v. Latona*, 184 Ill. 2d 260, 271 (1988).

¶ 30 I. BACKGROUND

¶ 31 In considering defendant's argument a more complete review of the record and sequence of events is necessary. This is especially true in this case because when examining a claim of ineffective assistance of counsel, the issue "is always to be determined from the totality of counsel's conduct." *People v. Mitchell*, 105 Ill. 2d 1, 15 (1984). By the time defendant was arrested in this case on March 26, 2013, he had amassed a substantial criminal record. Defendant had been adjudicated delinquent for aggravated battery in 2003. The presentence report in this case also shows that by 2013, defendant had been convicted of four separate felonies and multiple misdemeanors and traffic offenses. He was sentenced to probation and short jail sentences on several occasions. He was a member of the Satan Disciples street gang. Defendant had been expelled from high school and been disciplined for threatening and intimidating a teacher.

¶ 32 On March 26, 2013, at 12:39 a.m., defendant was arrested for possession of a controlled substance after being stopped for speeding. Defendant tried to escape and the in-squad recording device captured defendant's voice confessing. He appeared in bond court that same day and the public defender was appointed. Defendant posted $1,000 cash and was released. The clerk's docket sheet for March 26, 2013, lists charges of possession of a controlled substance, armed violence (category 1), possession of a firearm by a gang member and unlawful use of weapons

by a felon. However, the only charging document filed on that day is a non-traffic complaint and notice to appear.

¶ 33 On April 3, 2013, private counsel, Mr. James Schwarzbach, filed his appearance and the public defender was granted leave to withdraw. While defendant was out on bail in this case he continued to engage in serious criminal behavior. My colleagues fail to even mention that in addition to case number 13-CF-2932, defendant was charged with two separate sets of felonies involving gang related shootings. Mrs. Schwarzbach represented defendant in all of the cases.

¶ 34 On May 9, 2013, defendant appeared before Judge Shanes. Defense counsel informed the court that defendant had been arrested on two new cases. Defense counsel stated that he would not be filing appearances in those cases until he spoke to his client and his client's family.

¶ 35 On June 19, 2013, defendant appeared for status in this case and for arraignment in case numbers 13-CF-1191 and 13-CF-1502. In case 13-CF-1191 defendant was charged with aggravated discharge of a firearm, unlawful use of a weapon by a street gang member, reckless discharge of a firearm and aggravated unlawful use of a weapon by a felon. The charges alleged that defendant shot a firearm in the direction of an occupied vehicle. The trial court advised defendant that in case 13-CF-1502 he was charged, along with co-defendant John Wegleiz, with aggravated battery with a firearm, aggravated discharge of a firearm, reckless discharge, and "unlawful use of a weapon by a felon in three different ways."[1] The charges alleged that defendant or his co-defendant caused injury to two people who were shot. Defendant was also arraigned on his indictment in this case for possession of a controlled substance. The cases were all continued by agreement to August 19, 2013, for trial. Judge Shanes then advised defendant

[1] The indictments in 13-CF-1191 and 13-CF-1502 are not included in the record on appeal.

that he knew defendant's father as well as his aunt, who are both police officers for the city of North Chicago. Defense counsel said he would speak to defendant and make a determination. Judge Shanes stated that it would make no difference but he wanted to let defendant know that he knew defendant's family. Counsel noted that defendant still had time for an automatic substitution of judge.

¶ 36 On June 25, 2013, defense counsel stated that defendant wished his cause to remain in front of Judge Shanes. The trial court noted "as a matter of housekeeping" that the clerk said there were separate bonds in each of defendant's cases and asked counsel if he wanted to "umbrella them" and defense counsel said yes. The clerk was then ordered to "umbrella them."[2] The docket sheet reflects that an "umbrella cash bond" of $500,000 was set in 13-CF-804, 13-CF-1191 and 13-CF-1502.

¶ 37 On July 17, 2013, defense counsel demanded a speedy trial. Counsel notified the court that defendant's co-defendant in 13-CF-1502 had identified defendant. Counsel filed motions for supplemental discovery in both shooting cases. The motions involved "known video and photo arrays" that had not been disclosed. The assistant state's attorney said that the State was not ready to elect which case would proceed first.

¶ 38 On August 6, 2013, defendant was arraigned on a supplemental indictment in case number 13-CF-804 returned by the grand jury on July 17, 2013. Defendant was charged with armed violence, possession of a firearm by a street gang member, and unlawful use of a weapon by a felon. Defense counsel answered ready on 13-CF-1191 and -1502, but said he would be

[2] There is no provision either Article 110 Bail (725 ILCS 5/110 *et seq.* (West 2012) or in the Supreme Court Rules for an "umbrella bond."

filing a motion to suppress in case number 13-CF-804. The State answered that it was electing to proceed on 13-CF-804 first.

¶ 39 On August 16, 2013, the State tendered more discovery in this case as well as surveillance video on case number 13-CF-1191. Counsel stated that in addition to the motion to suppress, he now had a motion to suppress defendant's confession recorded inside the squad car on March 27, 2013. Counsel indicated that defendant's girlfriend is "all over the audio" portion of the recording. Counsel requested a recess to speak to defendant. After the recess, counsel said he was requesting a continuance and that the speedy trial term would be tolled on all cases. Defendant agreed and confirmed that he had discussed the issue with counsel.

¶ 40 The motion to suppress evidence and motion to suppress defendant's confession were heard by Judge Levitt because of scheduling issues. Following a full hearing and arguments to counsel, Judge Levitt granted the motion to suppress evidence in part and denied the motion to suppress defendant's confession. Judge Levitt ruled that the recording of defendant's voice "inside the squad" could not be imputed to the police to establish probable cause for seizing a lawfully parked car. Judge Levitt denied the motion to suppress defendant's statements "as he sat" in the squad car. The State requested a continuance to decide whether to appeal the ruling.

¶ 41 On October 31, 2013, all three cases were back before Judge Shanes. The State had not yet decided whether to appeal. The parties were involved in plea discussions. The State was not willing to dismiss all the other charges in exchange for an "open plea" to the possession of controlled substances charge in 13-CF-804.

¶ 42 On October 23, 2013, defendant was arraigned on a new charge of possession of controlled substance in case number 13-CF-2932 stemming from the May 7, 2013 arrest on the shooting cases in 13-CF-1191 and 13-CF-1502. Defense counsel noted the prejudice to defendant in that he had answered ready for trial on case number 13-CF-804. The assistant

state's attorney, Mr. Hoffert, said that the State had tendered a new offer after the motion to suppress ruling but that offer had been rejected. Hence, the State opted to file a certificate of impairment and appeal Judge Levitt's ruling. The State tendered more discovery in the shooting cases. The State acknowledged that it had originally elected to proceed on case number 13-CF-804, but now was electing to proceed on 13-CF-1191. The trial court asked defense counsel if he could be ready for trial the following Monday. Defense counsel stated that he would need to review the supplemental discovery. The court noted that there were outstanding motions in 13-CF-1191. Following a recess the State acknowledged that it was providing additional discovery on 13-CF-1191 that defense counsel had requested. Defense counsel informed the court that he learned that a police officer "threw away" the five photo arrays that had been shown to the State's eyewitnesses in 13-CF-1191. Defense counsel noted that three arrays contained photos of known Satan Disciples and that the witness made no identification, even though defendant was a known Satan Disciple. Defense counsel pointed out that there were no 911 calls about the shooting even though it occurred in a populated area.

¶ 43 The trial court stated that it would not hold defense counsel to "four days" to prepare for a jury trial. Counsel then indicated that defendant was electing to waive his right to a jury trial. Counsel announced that defendant would request a substitution of judge from Judge Levitt if the case was sent to him for a bench trial. Defendant acknowledged that he understood his rights and that he had discussed his options with defense counsel. The case was continued for scheduling.

¶ 44 On October 28, 2013, the State filed its certificate of impairment in case number 13 CF 804. Defense counsel stated that he understood that the State had a right to appeal but that he was "going to reserve a request for bond at this time until we see what happens, obviously, with our bench trial, but then I would be motioning for bond." Neither the State nor the trial court

commented regarding defendant's right to be discharged from custody and bail pending a State appeal absent a finding of compelling reasons for "continued detention or being held to bail." S. Ct. R. 604(a)(3) (eff. July 1, 2017). Defense counsel filed a motion to bar identification and a motion to dismiss in case number 13-CF-1191.

¶ 45 On November 1, 2013, case number 13 CF 1191 was called for trial before Judge Stride because of scheduling issues. Prior to trial the court conducted a hearing on defendant's motion to dismiss or for sanctions regarding identification as well as the State's motion *in limine* to admit gang evidence. Testimony from Waukegan Police Detective Amaro established that the eyewitness description of the shooter was that he was five foot eight inches and weighed 140 to 160 pounds. Defendant is actually five foot eleven inches and weighs 180 pounds. Defendant was not in the photo arrays that were shown to the eyewitnesses. Amaro explained that the five photo arrays shown to the eyewitnesses, which were lost or discarded, did not contain a photo of defendant. The Waukegan Police Department had only a 2005 photograph of defendant. Amaro obtained a current mug shot of defendant from the March 26, 2013, arrest by the Lake County Sheriff's Department and included in the photograph array from which the eyewitnesses identified defendant. Amaro believed he "threw out" the other five photographic arrays. On cross-examination Amaro testified that the shooter yelled "SD" meaning Satan Disciples, at the time of the shooting. The intended victim, the eyewitnesses' brother, was a member of the Latin Kings, rivals of the Satan Disciples. Defendant is one of only 10 African American members of the Satan Disciples. The eyewitness told Amaro that before the shooting she had been at Lewis Produce Store on Grand Avenue and that she saw the shooter in the store. Amaro obtained surveillance video from Lewis Produce and identified defendant as being in the store shortly before the shooting. The eyewitness was also identified on the video as well as Juan Chapa, a

member of the Satan Disciples. On the photo array containing defendant's photograph, the eyewitness circled defendant' photo and wrote, "[t]his is the guy that shot me?"

¶ 46 Defense counsel argued that defendant was prejudiced by the destruction of the five photo arrays as well as the failure to document or memorialize who those persons in the arrays were. Counsel argued that the evidence was exculpatory and there was no valid reason for throwing the evidence away. The State argued that defendant had not demonstrated prejudice and that "[t]he absence of evidence is not evidence of absence."

¶ 47 The trial court ordered the State to produce the photos of five known Satan Disciples that were included in the five photo arrays. Following disclosure of the photographs the hearing continued. Amaro was recalled and again acknowledged that he had thrown out the five photo arrays. The trial court characterized the failure to save photo arrays as "reprehensible" but that the dismissal of the case would be "draconian." The trial court indicated that all of the circumstances would be fair game on cross-examination of the eye witnesses. The court said, "I'm, frankly, going to draw a bit of a negative inference" based on the failure to preserve "those things." The court denied defendant's motion.

¶ 48 Following a recess, the State announced that the parties had reached a plea agreement in 13 C 1191. The trial court concurred in the agreement. The State amended the aggravated unlawful use of weapons (count IV) to possession of a firearm without a firearm owner's identification card, a Class 4 felony. In exchange for defendant's guilty plea to the amended charge he was sentenced to six months in jail (time served) and one day of conditional discharge, terminating upon his release from custody on the other charges. During the court's admonishments defendant acknowledged that he had discussed his options, possible defenses, reviewed the discovery materials with defense counsel. Defendant said he listened to defense counsel and was pleading guilty because it was in his best interest to do so. At the conclusion of

the plea proceedings, defense counsel requested a bond hearing. Latonia Benjamin testified that she was defendant's girlfriend and defendant was the father of two of her children, ages ten and seven. During argument, defense counsel mentioned the March arrest and said, "[t]hat case is over." Counsel noted that defendant was facing "15 to 30" years on the armed violence charge but the case was on appeal and the court should take "notice of the possibility of the State never being able to proceed on that." Counsel noted that the other shooting case from April 30, 2013 was "not an extremely strong case" for the State. Counsel argued that the fourth case was a simple possession of a small amount of controlled substance. Counsel argued that the $500,000 bond was excessive and requested a reduction to $50,000 with "stringent conditions." The State objected to the bond reduction request and noted that the in-squad recording in 13-CF-804 captured defendant's "attempting to arrange an escape."

¶ 49 The trial court referred to defendant's string of felony arrests as "mayhem that you're alleged to be involved in at this point." The court reduced defendant's bond to $400,000.

¶ 50 On January 21, 2014, case numbers 13-CF-1502 and 13-CF-2932 were back before Judge Shanes. Defendant had filed a motion to dismiss the indictment in 13-CF-1502 based upon perjured testimony before the grand jury. The trial court denied the motion, finding that there was "no showing of prejudice to the defendant." The State filed a motion *in limine* to admit gang evidence in 13-CF-1502. Defense counsel made reference to rulings on motions that had been made a week earlier. (That transcript is not contained in the record on appeal.) Defense counsel stated that the only issue at trial would be whether defendant was accountable for the shootings committed by Wegleiz. The rest of the evidence, including the victims' medicals, could be entered by stipulation.

¶ 51 On February 10, 2014, case number 13-CF-1502 was called for trial. Following lengthy arguments the trial court granted the State's motion *in limine* to introduce gang evidence. The

court noted that it had severed count VII, unlawful use of a weapon by a felon, from the other counts and asked defense counsel if he wanted count VIII, unlawful use of a weapon by a gang member, severed as well and counsel responded, "yes." Defendant acknowledged that he agreed with defense counsel's "tactic." The court overruled the State's objection to severing count VIII for trial. Next, the court heard the parties' arguments on their respective motion regarding admissibility of defendant's prior convictions for purposes of impeachment. The trial court ruled that defendant's conviction in case number 13-CF-1191 would be admissible. The court entertained remaining motions and recessed for lunch.

¶ 52 Following the recess assistant state's attorney Hoffert informed the court that the parties had reached a plea agreement in case number 13-CF-1502. Defendant would be pleading guilty to count III, aggravated discharge of a firearm, a class 1 felony. Defendant would be sentenced to "six months conditional discharge and six months in the Lake County jail with credit for time served." The State noted that defendant still had "the possession charge in 13-CF-2932 and the 804 remains on appeal before the Second District." The trial court noted that there was a traffic ticket along with the March 26th offense. The State dismissed the traffic ticket. After questioning the parties regarding defendant's record, the trial court concurred in the agreement and accepted defendant's plea. During the court's admonishments defendant acknowledged that he had reviewed the case with defense counsel and realized that there would be no appeal regarding the numerous rulings made by the court. Case number 13-CF-2932 was continued for trial.

¶ 53 On February 24, 2014, defense counsel moved for a bond reduction. Counsel noted that there had been an "umbrella bond" of $400,000 and argued that the bond was excessive.

¶ 54 Counsel argued that if the State thought defendant was a danger to society they would not have reduced the charges in the other cases. It could have insisted on sending him to prison

instead of "time served." The State objected, citing the "crime spree" defendant went on in 2013. The trial court noted that "[w]e are almost at the end of a long journey of all these cases" and that a trial was coming up on the last case. The court noted that the bond was high but let it stand.

¶ 55 On March 5, 2014, case number 13-CF-2932 was called for pre-trial. Defense counsel noted that this charge stemmed from defendant's May 7, 2013, arrest in 13-CF-1191 and 13-CF-1502. The alleged controlled substance was found in the band of defendant's hat in the booking room at the police department. The State acknowledged that they did not have "the booking room video." During discussions with counsel the trial court noted that the clerk has been "bugging him" about 13-CF-804, "the one before the appellate court." The trial court asked if it could give that case "a six month status date?" Defense counsel stated that defendant was indigent and requested appointment of the appellate defender in 13-CF-804. Defense counsel noted that Judge Levitt ruled on the motion to suppress and there was never an opportunity to request the appointment of the Appellate Defender's Office. Defense counsel said he did not do appellate work. The court found that defendant was indigent only in the appeal "in 13-CF-804." The Appellate Defender's Office was appointed in that case only.

¶ 56 Defendant was convicted by a jury of unlawful possession of a controlled substance in case number 13-CF-2932. The record does not contain the trial transcript. Defense counsel filed a post-trial motion and argued that the evidence was insufficient to convict. On April 24, 2014, defense counsel argued that the State failed to prove knowledge and that the credibility of the police officers was impeached.

¶ 57 The trial court noted defense counsel's "excellent cross-examination" of the police officers. The trial court also noted the "absence of any booking room video" and the "thin" reports regarding the case. The court ruled that the case was a "quintessential question of

credibility" and denied the motion. The court asked the parties whether they had any corrections to the presentence report. Defense counsel argued that the report did not properly indicate time in custody. Counsel argued that defendant was entitled to credit for time served since his arrest on May 7, 2013, on unrelated charges even though he was not served with the warrant in 13 CF 2932 until October 12, 2013. Defense counsel argued that the State only charged defendant in this case because the "State received an adverse ruling, to be quite honest, on a prior case—." The State objected and argued that defendant was only entitled to credit for "custody on this case." The trial court stated that it "was not sure what the law is." Over the State's objection the trial court awarded defendant back to May 7, 2013, which amounted to 352 days credit for time served. Neither the State nor defense counsel noted that defendant had already been given credit for time served since May 7, 2013, in both cases 13-CF-1191 and 13-CF-1502.

¶ 58 Defense counsel called three witnesses in mitigation. Latonia Benjamin testified that defendant was "a great father" and that his absence has been a hardship. On cross examination the State elicited testimony that defendant was driving Benjamin's car the night of March 26, 2013, when he was arrested in case 13-CF-804 and that she had no knowledge "about a handgun being in that car."

¶ 59 Defendant's sister Brianna Oglesby testified that she had arranged for defendant to be employed in her company if he were to be released and placed in "some structured environment." Oglesby testified that defendant had undergone a change since being locked up and wanted to be a "productive citizen."

¶ 60 Defendant's father, Kurt Nash, a lieutenant for the North Chicago Police Department, testified that he had seen a change in defendant's maturity. He said that defendant acknowledged that he should have listened to his father and that he "would leave the gang alone." Nash testified that he believed his son's desire to change was sincere.

¶ 61 Defendant made a statement in allocution. He acknowledged that he had made bad choices but that he was a good father to his four daughters. Defendant claimed to be a changed person and asked for a sentence of "probation with structure." He wanted to dedicate his life to his "kids, family and God." Defendant apologized to the court, saying "you have been patient and fair and I thank you for that. I thank my lawyer too."

¶ 62 The State argued that defendant's extensive criminal history was the result of choices that he had made. It noted that since the age of 15 defendant had been under almost constant supervision by the court and had been involved in criminal activity his entire life. The State argued that the court should impose an extended term sentence (four to six years' imprisonment).

¶ 63 Defense counsel argued that defendant had "tremendously strong family support" and that the evidence in mitigation showed defendant had changed over the past 11 months. Counsel stated that he has seen a "very highly credible in resolve and change in character" in defendant. Counsel requested a sentence of probation with work release so that "we can give him the assistance right now of a structured environment." Counsel argued that if the court decided that a prison sentence was necessary, that it be the "primary" one (one to three years' imprisonment).

¶ 64 Prior to imposing sentence in 13-CF-2392 the following exchange occurred:

> "THE COURT: Thank you. You had asked on previous dates regarding the other case, 13 CF 804, the one that's on appeal regarding bond.
>
> MR. SCHWARZBACH [DEFENSE COUNSEL]: Yes.
>
> THE COURT: This case is going to conclude today for all intent and purposes.
>
> MR. SCHWARZBACH: Correct.
>
> THE COURT: I believe technically it's an umbrella bond, this bond with the other one. So I'm inclined to grant your request and impose short of a rule of recognizance bond on the case that's on appeal on the State's certificate of impairment.

MR. SCHWARZBACH: Your Honor, thank you. I would ask that that be reflected. Shall I draft an order to that extent, or will the Court's order adequately reflect that?

THE COURT: Why don't you do a quick order. It's 13-CF-804. The defendant's placed on a hundred thousand dollar recognizance bond. The standard conditions on that case. Bond's going to end in this case too because we're going to go to sentencing.

¶ 65 During its remarks prior to imposing sentence the court commented on defendant's extensive criminal history and on factors in mitigation. The court commented that defendant's extensive criminal history and on factors in mitigation. The court commented that defendant's family is "[a] bonus for you." The court remarked that people who get out of prison and do not have support often end up back in the system. The court said, "[b]ut with this strong support structure that you have, the odds of you succeeding go way up." The court expressed its appreciation for hearing from the family members as their perspective "maybe otherwise wouldn't come through the paperwork." The court then imposed a sentence of three years in the Illinois Department of Corrections with credit for 352 days served in the Lake County jail, plus court costs. The court remarked that it would be up to defendant to show whether he was a "man of [his] word" when he got out of prison. Otherwise, the court said, he would be "doing life on the installment plan." The court admonished defendant regarding his right to appeal. Following an off the record conversation, defense counsel said he did not expect any post-sentencing motion and said he thought the sentence was fair so no status date was necessary. The court noted that case 13 CF 804 had a status date of October 2, 2014. Defense counsel said he'd put it in his calendar and "see where his client [was.]"

¶ 66 On October 2, 2014, case 13 CF 804 was continued for status to March 19, 2015. The State noticed 13-CF-804 on the call for February 5, 2015, because this court had reversed Judge Levitt's order suppressing evidence. *People v. Nash*, 2014 IL App (2d) 131298-U. Defense counsel, Mr. Schwarzbach, stated that he had been in contact with defendant, who was on parole. Counsel asked the court for a date to have defendant appear. Judge Strickland continued the case to February 19, 2015, for defendant's appearance and for "a hearing on the State's motion to set bond."

¶ 67 On February 19, 2015, Judge Strickland heard the State's motion to set bond on 13 CF 804, "class X armed violence." Defense counsel stated that defendant had been on parole for five or six months on electronic monitoring and he had no violations. Counsel asked that defendant be allowed to continue on a recognizance bond since he was still "under the custody of the Department of Corrections." Defendant said that his parole had been transferred to Milwaukee, Wisconsin, where he was living. The State argued that, given the history of the several cases charged in 2013, defendant was still at "high risk" to reoffend and asked for a "high cash bond." Defense counsel argued that Judge Shanes had conducted a full sentencing hearing and was aware of all the circumstances involved in the prior offenses but imposed only a three year sentence. Defense counsel argued that defendant was no longer living in the area, that he had been in perfect compliance with parole and was on a "GPS bracelet." Counsel argued that defendant's past history was not consistent with his "present conduct." Judge Strickland set bond at $50,000 and ordered a pretrial bond services report for review on February 23, 2015. Defendant was remanded to custody in the Lake County jail.

¶ 68 On February 23, 2015, the case was back in front of Judge Shanes for bond review. Judge Shanes noted that defendant's MSR had been transferred to Wisconsin. Defense counsel indicated that that was the case. Arrangements had been made for defendant to be "released to

his mother's home in October" and that for five months he had been in compliance with parole while on a GPS ankle monitor. Counsel noted that defendant had been working and supporting his four children while living with his mother.

¶ 69 Judge Shanes recalled the trial and sentencing hearing in 13-CF-2932 and noted that defendant did not appeal. Defense counsel argued that the State's argument that defendant was dangerous was inconsistent with the State's agreement to give defendant "credit for time served on another couple cases." The court asked counsel, "[w]hat was his bond on this before the case went up on the State's appeal?" Counsel responded that "[t]here wasn't a bond. He was given a recog I believe by the appellate court because it was the State's certification." The State noted that when the case was appealed there were three other pending felonies.

¶ 70 Judge Shanes indicated that his normal practice was to "reinstate the bond that existed at the time that the cause went back up on appeal" but that here things were complicated with "a number of different charges." The court noted that defendant had serve his sentence on 13 CF 2932, was on parole and said, "[t]hat's good." The court asked defendant what he had been doing in Wisconsin. Defendant said that he was working with his mother in a home improvement business. The trial court set bond at $30,000, stating that that was as low as it could go and said, "that's as low as it's going but you've been out and you've been doing good so I'll give you credit for that too." Defendant was allowed to continue living and working in Wisconsin. The case was continued to March 11, 2015, for status. Bond was posted ($3000 cash) for defendant on February 28, 2015, and he was released. The bond receipt indicates that the cash was posted by Juan Chapa.

¶ 71 Defense counsel filed several more pre-trial motions, including: a motion to reconsider the motion to suppress an audio eavesdropping; a motion to compel disclosure related to fingerprint analysis; a motion to dismiss or alternatively for sanctions; a motion to bar evidence

of the audio recording; a motion to bar the State's experts; a motion to suppress products of the search of defendant's cell phone; and a motion to sever the counts.

¶ 72 Judge Levitt heard and denied defendant's motion to reconsider the ruling on the motion to suppress the audio recording. The remaining motions were heard by Judge Shanes. Judge Shanes denied defendant's motion to bar admissibility of the in-squad recording but granted defendant's motion to redact portions of the recording. During an April 30, 2015, hearing regarding the motion to compel discovery related to fingerprint analysis, defense counsel established that the Northern Illinois Police Crime Laboratory tested the alleged controlled substance in case 13-CF-804 but did not conduct any fingerprint testing on the baggie that contained the purported cocaine. The trial court granted defendant's motion to compel production of the evidence for testing by a defense expert.

¶ 73 On May 11, 2015, defense counsel submitted his proposed redactions from the in-squad audio recording of defendant. The State had not prepared its proposed redactions.

¶ 74 On June15, 2015, defense counsel reported that an independent expert fingerprint examination of the baggie yielded no fingerprints. Defense counsel then requested a conference pursuant to Supreme Court Rule 402 (eff. July 1, 2012) "and a firm trial date." The State then said, "[w]e hadn't discussed a 402 Conference before." The court wanted to know whether the case was going to trial or whether the parties were going to continue negotiating before setting a firm trial date. The case was continued to June 17, 2015 to see if there would be a trial.

¶ 75 On June 17, 2015, defense counsel informed the court that the parties were close to an agreement and that the State now was agreeing to a 402 conference. The State agreed and the trial court admonished defendant pursuant to Rule 402. Defendant said that he agreed to the 402 conference and that he had discussed it with defense counsel. Following the 402 conference the

case was continued to June 23, 2015, to determine whether defendant would accept the State's offer or make a counter-offer.

¶ 76 On June 23, 2015, defense counsel reported that the parties were very close, "within arm's length" and requested a "continued 402 conference." Counsel stated that defendant had "family influence assisting him in making an extremely important decision." Counsel said that he had additional evidence received from defendant's father to present "in a brief 402 conference." In response to the court's question counsel said he thought the court's involvement would be helpful and "the court was gracious in giving us very strong direction at the 402 conference. Assistant State's Attorney Hoffert said, "I anticipate a trial on this, judge." The case was continued for trial to July 20, 2015.

¶ 77 On July 6, 2015, defense counsel informed the court that there would not be a "negotiated disposition." The court admonished defendant that he was facing between 15 and 30 years' in prison. Hoffert said the offer had been to an amended armed violence charge with a range of 6 to 30 years at 50 percent. Defense counsel said there had been discussion of a "cap of 25" on a plea to a "6 to 30 offense." Defendant said he understood what a "cap" was, that the court would impose a sentence "within that range." Defendant said he understood that if he went to trial and was convicted of armed violence the court would be required to sentence him to "no less than 15 years up to 30." The case was continued to July 7, 2015, for a hearing on pretrial motions.

¶ 78 On July 7, 2015, the trial court denied the defense motion to suppress evidence that alleged a different theory than the motion rule on by Judge Levitt. Defendant testified during the hearing on the motion to suppress evidence (photographs) seized from his cell phone that the State intended to introduce to prove defendant's membership in a street gang. Defendant identified the photographs and said they were taken from his cell phone when he was arrested on May 7, 2013. The police did not have a warrant to search defendant's cell phone when he was

arrested. The State called Waukegan Detective Eliza Agalianos, who testified that she obtained the photograph "off of Facebook." Two of the four photos were from a friend of defendant. On cross-examination it was established that several of the photographs were not printed until just days before the hearing and others were printed in 2014. The defense argued that it could be inferred that the police seized the photos from defendant's phone and there was no documentary proof that the photos were taken from defendant's Facebook account. Defense counsel noted that Detective Agalianos testified that the police "did search the phone" and that there was no consent.

¶ 79 Prior to ruling on the motion to suppress the photos, the trial court granted defendant's motion to sever over the State's objection. The State argued that it intended to introduce other crimes evidence and gang expert testimony the trial on the armed violence count. The trial court rejected the State's argument and severed the counts. The State elected to proceed on the armed violence counts and unlawful possession of a controlled substances counts first. Defendant acknowledged that he agreed with the defense strategy. The trial court postponed ruling on the motion to suppress the photographs. Defense counsel requested another "very short 402" conference. The court directed counsel to speak with Mr. Hoffert.

¶ 80 On July 13, 2015, the hearing on defendant's motions was continued. The parties went through the audio and video recording with the trial court. The State took the position that everything should come in, including "the officer's exchange with dispatch." The trial court agreed with defense counsel, stating "you have a really good hearsay argument if the officer is not engaged with the defendant." The court ruled that the officer's body microphone recording would not be admissible and gave direction to the State as to what portions of the in-squad audio recording should be redacted.

¶ 81 On July 15, 2015, the State informed the trial court that the parties had reached a partial negotiation. The State first announced that count II (armed violence) would be amended to a category III weapon and the sentencing range would be 6 to 30 years' imprisonment instead of a minimum of 15 years'. The State would agree to a cap of "no more than 20 years' in the Illinois Department of Corrections." Defense counsel asked that the case be passed so he could speak to defendant. Following further discussion the State announced that it would amend count II to attempt armed violence, a class 1 felony (4 to 15 years' imprisonment), and that the parties agreed that defendant would be sentenced to no less than 6 years' imprisonment. Counsel commented that he and defendant saw "a tremendous benefit" to defendant. Defendant confirmed that he has been engaged in the plea discussions all along and he wished to enter the proposed agreement.

¶ 82 The trial court commented that there had been a "tremendous amount of litigation" in this case, which was fine, but now he wanted to know whether the defendant was telling him that he wished to plead guilty "under this negotiation; is that correct?" Defendant said "yes." The trial court said he could understand the "benefit" defendant was getting but he wanted to confirm that defendant understood his different options. Defendant confirmed that he had discussed the "strengths and weaknesses" with defense counsel. Following admonishments defendant entered a plea of guilty to the amended count of armed violence. The parties agreed that defendant's sentence would be concurrent with the sentence in 13-CF-804. The court ordered a presentence investigation report and set the case for August 27, 2015, for sentencing. The trial court noted that defendant wanted to be out (on bond) because of his "responsibilities as a father" but that he had to appear on July 20, 2015, to be remanded. Defendant appeared on that date and was remanded to custody.

¶ 83 On August 27, 2013, the case proceeded to sentencing. The State offered a transcript of John Wegleiz's plea and testimony in 13-CF-1332, where he was a co-defendant in the April 30, 2013, shooting. Defense counsel objected on various grounds, including confrontation. Counsel noted that the State could have gone to trial on 13-CF-1502 where his client faced a minimum of 21 years, but instead offered "conditional discharge with a six month sentence" so counsel never got to confront Wegleiz. Counsel argued that Wegleiz's testimony was a series of leading questions by the State while Weigleiz's attorney stood by. The State argued the transcript was clearly relevant to defendant's leadership in the Satan Disciples street gang. The court overruled defense counsel's objection.

¶ 84 Defense counsel presented both documentary and testimonial evidence at sentencing. A letter from the mother of defendant's two youngest children described his relationship with the children. The first character witness Casuel Pitts, the owner of a business who met defendant while he was on bond living in Wisconsin. Mr. Pitts met defendant through defendant's sister, Briann. Mr. Pitts learned about defendant's record from defendant. Mr. Pitts testified that he had his own "trials and tribulations" before becoming a business owner. Defendant was "interested and intrigued" by what Mr. Pitts had accomplished. He felt that defendant was not a threat to society, that he has a great "mindset" and that he had an opportunity waiting for defendant.

¶ 85 Defendant's sister, Brianna Oglesby, testified that defendant had changed his life after release from prison. His attitude changed, "it was all about family" and "making a better life for him, us and his children." Defendant told her that he had "placed his loyalties in the wrong direction." Defendant's children were his life. She said that defendant's relationship with his father had also improved since his prison sentence. Defendant had changed and he had "the support needed to become a better citizen."

¶ 86 Defendant's father testified that he had seen a change in defendant since his release from prison. Mr. Nash described defendant as a more caring father and a hard worker, and a person of which he could proud. Since his release from prison defendant's attitude about his responsibilities as a good citizen have changed. Regarding his past friends, defendant told his father that he was "done with that."

¶ 87 One of defendant's daughters testified as to his qualities as a father. He helped her with her homework, was always there for her. She said she loved him very much, and asked that he not be sent away "for a long time."

¶ 88 Defendant's aunt, Valiza Nash, testified that she was a police officer for the city of North Chicago. She testified that she had also seen changes in defendant since his release from prison. Ms. Nash testified that defendant had a positive attitude and "has been rehabilitated and that he [could] be a productive person."

¶ 89 Defendant gave a lengthy statement in allocution. He said he had learned a valuable lesson while "locked up" and that he came home with a new mindset "to follow God, raise my kids, be a productive citizen." He insisted that he was "done with the Satan Disciples" and asked for a lighter sentence, if possible.

¶ 90 Prior to imposing sentence the trial court questioned the attorneys about how much "credit for time served" to which defendant was entitled. Defense counsel took the position that defendant was entitled to 842 days. He argued that defendant was in continuous custody since May 7, 2013. The trial court commented that defendant was "out October to July" in 2015. Counsel argued that defendant was still in the custody of the Department of Corrections because defendant was on "what's called the ankle bracelet." The trial court recalled that it had given defendant a recognizance bond when defendant was sentenced in 13-CF-2932. The court said it wanted to make sure the credit was "right and proper under the law." Assistant State's Attorney

Hoffert argued that the sentence in 13-CF-2932 and this case were required to be consecutive "because he was on bond for the felony" when he was arrested on 13-CF-2932.

¶ 91 Following an off-the-record discussion the trial court noted that section 5-8-4(d)(8) of the Unified Code of Corrections (Code) required consecutive sentencing for a person charged with a felony who commits a separate felony while on pretrial release. 730 ILCS 5/5-8-4(d)(8) (West 2014). The court noted that the statute is "susceptible" to "multiple reasonable interpretations." Because defendant was not charged with armed violence until after his arrest on 13-CF-2932, the court gave defendant the benefit of a "loophole" that may not have been intended by the legislature. The court went on to note that defendant was on bond on this case while he was serving the sentence on 13-CF-2932 so he does not get credit. Defense counsel asked what good was the ruling on concurrent sentences if defendant was not given the credit for time served. The court responded that it want the "math" to be legally appropriate. Counsel insisted that defendant should be given the credit due to "the highly unusual circumstances in which the sequence of events have played out." The court postponed the imposition of sentence to give the parties an opportunity to research the credit issue, the issue of concurrent versus consecutive sentences, and to consider the testimony it heard that day.

¶ 92 One week later the parties presented their arguments regarding credit and concurrent versus consecutive sentences. The State argued that pursuant to *People v. Karmatzis*, 373 Ill. App. 3d 714 (2007), *People v. Williams*, 184 Ill. App. 3d 1094 (1989), *People v. Dowthard*, 197 Ill. App. 3d 668 (1990) and *People v. Clark*, 183 Ill. 2d 261 (1998), the sentences are required to be consecutive "regardless of the order in which the judgments of conviction are entered." The State contended that the term "felonies" in the statute did not refer to a specific charge. The court asked how the State's argument would affect defendant's "out date" since it was the State's position that defendant was "not in custody on this case." The State responded that there was a

time when defendant was "in custody on both, and he would only get credit for that time against the aggregate of the sentence, so it would affect his out date as far as that goes." The State noted that it would be "hundreds of days" the bulk of the time defendant was in custody before being sentenced in 13 CF 2932.

¶ 93 The State argued that defendant had proven to be a serious threat to the safety of the community. It acknowledged that while on bond after his release from prison defendant "was on his best behavior." That had to be balanced against defendant's criminal history and his leadership role in the gang. The State argued that defendant had "indoctrinated others, like John Wegleiz, into the gang." Defense counsel's objection was overruled. The State said defendant threatened Wegliez's life and ordered Wegliez to "shoot a rival gang member, which Mr. Wegliez did." It reminded the court that defendant tried to entice someone into assisting in his escape after his arrest in this case. The State argued that it remained to be seen whether defendant will become a "law abiding and good family member." The State recommended a sentence at the top of the sentencing range.

¶ 94 Defense counsel argued that defendant's sentences should run concurrently. Counsel argued that the penal statutes should be construed in favor of defendants. Counsel noted that section 5-8-4(d)(8) of the Code indicates mandatory consecutive sentencing "if a person charged with a felony commits a separate felony while on pretrial release." Counsel argued that since defendant was not charged with armed violence until after his arrest on May 7, 2013, in 13 CF 2932, he should not receive consecutive sentences. Counsel distinguished the cases cited by the State. In those cases the defendants were on bond for the original offense.

¶ 95 Counsel urged the court to look not just at defendant's life before being sentenced to prison, but to also consider the rehabilitative potential demonstrated since his release. He reminded the court that defendant was "not being sentenced for any conduct since he went to

prison." Counsel noted that the State could not point to "one single aggravating circumstances" since the last time defendant was sentenced. Counsel argued that there had been "tremendous changes in defendant. The parole agent reported that defendant's performance had been "exemplary." Counsel noted that it did not occur to defendant that he would face sentencing on this case until February 2015. He argued that defendant's change was genuine and not because "he's afraid" as the State argued. Counsel stressed defendant's family support and his relationship with his children and requested that the sentence be near the minimum of six years.

¶ 96 The court first dealt with the "technical stuff." He recalled that when he gave defendant a recognizance bond on this case he was "thinking of the impact it might have should we ever reach this day. It was not an accident. It was not something that just slipped by. It was a request, an agreement and a decision." The court rejected the defense counsel's argument that defendant should receive credit while on parole. Wearing an ankle bracelet does not "constitute being in custody." Regarding consecutive versus concurrent sentences the court noted that "Mr. Hoffert has an interesting point about how DOC might do the arithmetic." The court, however, concluded that consecutive sentencing was not required.

¶ 97 In sentencing defendant the court commented on defendant's attempt to escape from the squad car; the "the audaciousness of it, staggering." The court noted the danger inherent in that situation and that "it was bold and it was bad." The court recalled defendant's sentencing hearing on 13 CF 2932 and commented that the mitigation in the way of family support had "doubled" since that time. The court commented on the choices defendant had made in the past and that now he had decided to make different choices. The court expressed hope that defendant would continue to make good choices "for our community's sake." The court sentenced defendant to ten years in the Illinois Department of Corrections with 408 days credit for time served plus costs. Defense counsel made another request for 191 days; the time defendant was in

prison on 13-CF-2932. At defendant's request the mittimus was stayed until September 10, 2015.

¶ 98 Defendant filed a motion to withdraw his plea or in the alternative for a new sentencing hearing. Counsel filed a certificate of compliance with Supreme Court Rule 604(d) (eff. December 11, 2014). Counsel stated that defendant did not wish to withdraw his plea and that the motion should be treated as a motion to reconsider sentence. The motion addressed the credit for time served. With respect to the status of this case, at the time defendant was sentenced on 13-CF-2932 counsel agreed that "we were under the impediment that the case in fact [*sic*] before the Second District Appellate Court." Counsel said that by placing defendant on a recognizance bond "we violated the cardinal intent of section 5-8-7, which is not to allow the State the ability through technical means to stop a defendant from obtaining his lawful credits on concurrent sentencing." Counsel said that the court "effectively revoked his bond when [it] put him in jail on the concurrent case."

¶ 99 The State noted that when the court released defendant on a recognizance bond on this case, defendant was "already held on the other cases." The State also pointed out that when defendant was paroled "he wasn't paroled back to the Lake County jail to await disposition of 804. He was released to the community on parole." He was living in Wisconsin until he was "noticed back here."

¶ 100 The court said that it could not find a case directly on point. The court distinguished *People v. Robinson*, 172 Ill. 2d 452 (1996) (simultaneous presentence custody credit applicable to concurrent sentences for separate offenses), noting that defendant's "time in DOC" was not "as a result of the offenses for which the sentence was ultimately imposed, in other words, in this case." The court denied the motion and defendant timely appealed.

¶ 101 II. ANALYSIS

¶ 102 Our review of counsel's performance must be highly deferential and we must "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable assistance; that is, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (quoting *Michel v. Louisiana*, 350 U.S. 91, 102 (1955). As we have been frequently reminded by our supreme court, we are to "evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007). We must also remember that the reasonableness of an attorney's actions or inactions "may be determined by a defendant's own statements or actions. *Strickland*, 466 U.S. at 691. "Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) 'that counsel's representation falls below an objective standard of reasonableness' and (2) that any such deficiency was 'prejudicial to the defense.' " *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). In certain contexts prejudice is presumed. *Id.* Failure by defense counsel to move to revoke bond in order to obtain credit for time served is not among those situations.

¶ 103 Defendant *must prove* that counsel's decision to accept the trial court's invitation to place defendant on a recognizance bond rather than requesting that defendant's bond be revoked was not objectively reasonable. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. The issue of ineffective assistance of counsel is not to be determined from isolated incidents, but from the totality of counsel's conduct. *People v. Mitchell*, 105 Ill. 2dd 1, 15 (1984). Evaluations of counsel's conduct "cannot property extend into areas of judgment, discretion, or trial tactics." *Id.* at 12. While there may be some instances where an isolated error can support an ineffective assistance claim if it is "sufficiently egregious and prejudicial *** it is

difficult to establish ineffective assistance when counsel's *overall performance* indicates active and capable advocacy." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).

¶ 104 In assessing prejudice under *Strickland* a defendant must show that "the likelihood of a different result must be substantial and not just conceivable." *Id.* at 112. "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135-6 (2008).

¶ 105 We use a bifurcated standard of review in evaluating a claim of ineffective assistance of counsel. We defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but review *de novo* the ultimate legal issue of whether counsel's actions or inactions support an ineffective assistance claim. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 106 A. Performance

¶ 107 Applying the above-stated principles to the facts of this case it is clear that defendant has failed to prove either deficient performance or prejudice. First, my colleagues reject the State's argument that counsel's decision to not move to revoke bond was a "reasonable, strategic choice", stating, "this is mere speculation without support in the record." *Supra*, ¶ 19. The majority forgets that the State has no burden here. Defendant must prove deficient performance. The State's argument is that defense counsel was thinking of the future, knowing that if defendant had to face sentencing on this case his release on bond would give him the opportunity to demonstrate his rehabilitative potential. That is exactly what the record shows.

¶ 108 At oral argument, counsel for defendant conceded that the trial court considered defendant's good behavior while on bond in reducing his bail from $50,000 to $30,000. Defense counsel also conceded that the trial court considered defendant's behavior while on bond in mitigation. In defendant's reply brief he argues that the State is "speculating that the goodwill

Nash accumulated during his out-of-custody rehabilitation earned him more time off his sentence than the 193 days of credit he would have received had bond been withdrawn." Defendant's brief fails to acknowledge that the trial court found that counsel's decision was strategy. At oral argument defense counsel conceded that the trial court made this finding but argued that defendant still would have been able to post a cash bond and develop the same mitigation evidence.

¶ 109 Defendant and the majority forget that we are not to evaluate counsel's decisions in hindsight, but rather from his perspective at the time. Defendant's statements in allocution at sentencing in 13-CF-2932 make clear that he wanted "structure" and to be with his children. The record shows that defense counsel regularly conferred with defendant regarding matters of trial strategy, *i.e.*, waiving speedy trial and motions to sever. It is reasonable to infer from defendant's statements that he conferred with counsel about his options upon release from prison. The American Bar Association's "Criminal Justice Standards for Defense Function" standard 4-3.2 (release; custody; less restrictive conditions) states, "[c]ounsel should investigate community and family resources that might be available to assist in implementing such alternatives." Here, the record makes clear that counsel remained in contact with both defendant and his family throughout the pendency of this case, as well as the other felonies that were disposed of. Counsel knew, as the trial court commented when he sentenced defendant on 13-CF-2932, that if defendant lived in a stable environment with support, his chances of success would go way up. Defendant realized this as well.

¶ 110 The presentence report in this case reflects that "while sitting in custody prior to his last case [defendant] said he finally realized that the people he has associated with are not a good influence and nothing good has come of these associations." Defendant told the probation officer who prepared the report that he wanted to make changes and "[wanted] to be available to

his daughters." These are the same sentiments defendant expressed before being sentenced in 13-CF-2932. He told the probation officer that he wanted to work and to be available to his daughters, which is precisely what occurred when he was released from prison. Defendant was in debt to his father, who was "helping to pay his attorney." Defendant had no assets and had approximately $12,000 in unpaid medical bills. The presentence report in this case stated that when defendant was released from prison he parole had been transferred to Milwaukee, where defendant was allowed to live and work with his mother. As the State argues, these facts make it clear that it "was a reasonable strategic choice not to have defendant's bond withdrawn."

¶ 111 Defendant has the burden of rebutting the presumption that counsel action was a reasonable, strategic choice. In fact, it appears that counsel's action was largely determined "by defendant's own statements." *Strickland*, 466 U.S. at 691. The trial court's finding that counsel's decision was one of strategy is not against the manifest weight of the evidence.

¶ 112 Defendant and the majority forget that in evaluating a claim of ineffective assistance of counsel we look at counsel's overall performance. At oral argument defense counsel conceded that trial counsel's overall performance was "good." Counsel also acknowledged that defendant's brief omitted the fact that defendant's sentence was the result of aggressive and lengthy plea negotiations. Counsel acknowledged that this fact was relevant to our consideration of defendant's claim. Counsel should not have to be reminded that a statement of facts "shall contain the necessary facts of the case, stated accurately and fairly." Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013). Defendant's brief also omits any reference to the shooting cases in 13-CF-1191 and 13-CF-1502, which defense counsel negotiated to reduced charges and time served. The State opted to give away the store in the shooting cases and go to trial on the possession of controlled substance charge in case 13-CF-2932. Defense counsel's overall performance was not just good, it was outstanding. Defendant was facing 15 to 30 years in prison. Defense counsel

convinced the State to reduce count II of the indictment to a class 1 felony (otherwise probationable) with a minimum of 6 years and a maximum of 15 years. Defendant was sentenced to 10 years at 50 percent concurrent with 13-CF-2932. As the record reflects, the plea agreement was the result of vigorous litigation, lengthy plea negotiations and several 402 conferences.

¶ 113 Even if the record in this case did not contain the above facts, we could not resolve defendant's claim of ineffective assistance of trial counsel because the record does not show what advice was given to defendant regarding his options when counsel requested a recognizance bond. *People v. Blair*, 2015 IL App (4th) 130307, ¶ 47. The majority cites *People v. Nesbit*, 2016 IL App (3d) 140591 (*Nesbit II*), for the proposition that if defendant's bond had been exonerated he could have been considered "in custody on both charges and earned credit for each day in presentence custody on both charges and earned credit for each day in presentence custody." *Supra*, ¶ 17. *Nesbit II* was a postconviction case. In *Nesbit I*, 389 Ill. App. 3d 200 (2010), the Third District declined to address defendant's ineffective assistance claim based on trial counsel's failure to exonerate bond. The appellate court stated that "[t]he record is also silent as to whether appointed or private counsel discussed surrendering the bond with defendant." *Id.* at 215. In *Nesbit II*, the defendant supported his postconviction claim that counsel was ineffective for failing to surrender bond with an affidavit claiming that trial counsel "did not discuss the potential surrender of bond on sentencing credit" and that "had he been informed that he could receive credit for time served by surrendering his bond, he would have done so." *Nesbit II*, 2016 IL App (3d) 140591, ¶ 49.

¶ 114 My colleagues ignore the well established rule that we should not address claims of ineffective assistance of counsel involving matters outside the record on direct appeal. *People v. Ligon*, 365 Ill. App. 3d 109, 122 (2006). Ineffective assistance of counsel claims is better suited

to collateral proceedings when "the record is incomplete or inadequate for resolving the claim." *People v. Veach*, 2017 IL 120649. My colleagues say that "by the time this matter is determined through postconviction proceedings, defendant would likely be finished serving his erroneously lengthy prison term and would not be able to obtain the relief he now seeks." This is no excuse for refusing to follow settled precedent. The contention that defendant is serving an "erroneously lengthy prison term" ignores the facts. Defendant is actually serving a relatively lenient sentence as a direct result of counsel's aggressive motion practice and effective plea negotiations. The majority also ignores the fact that nothing prevented defendant from filing a postconviction petition while this appeal is pending. "There is no provision in the Act barring a postconviction case from proceeding at the same time as a direct appeal." *People v. Harris*, 224 Ill. 2d 115, 126 (2007). Our supreme court has held that "postconviction proceedings and direct appeals may proceed at the same time." *Id.* at 127.

¶ 115 In *People v. Campbell*, 2011 IL App (2d) 100015-U, the majority's author concurred that we should not address the issue of an ineffective assistance claim based on a failure to exonerate bond where "the record does not show whether the defendant was appropriately advised regarding the possible exoneration of his bond." *Id.* ¶ 13. Defense counsel may have reasonably believed that defendant's sentence in this case would be consecutive to the sentence in 13-CF-2932 pursuant to section 5-8-4(d)(8) of the Code, in which case he would not be eligible for double credit. 730 ILCS 5/5-8-4(d)(8) (West 2014)); *People v. Latona*, 184 Ill. 2d 260, 271-72 (1998).

¶ 116 Again, it is not the State's burden to prove that counsel's performance was objectively reasonable. Defendant must prove deficient performance, which he had failed to do. Defendant should not have been held to bail when this case was on appeal. Illinois Supreme Court Rule 604(a)(3) provides, "[a] defendant *shall not be held in jail or to bail* during the pendency of an

appeal by the State, or a petition or appeal by the State under 315(a), unless there are compelling reasons for his or her continued detention or being held to bail." Ill. S. Ct. R. 604(a)(3) (eff. Dec. 11, 2014). Neither defendant nor the State discussed Rule 604 in their briefs. We directed the parties to be prepared to address the issue at oral argument. At oral argument defense counsel disagreed that defendant should have been discharged from bail in this case because "defendant had three pending felonies" and there was "no way he was going to be released." Counsel acknowledged that the State never argued that there was compelling reasons to hold defendant to bail, but argued that Rule 604(a)(3) is not automatic. Contrary to counsel's argument that three were three other pending felonies when defendant was sentenced on 13-CF-2932, there was only one and it was on appeal. Defendant had benefitted from trial counsel's litigation and negotiation skills in obtaining unbelievably lenient sentences on the shooting cases. Also, although neither the trial court nor the attorneys were apparently aware of 604(a)(3)'s requirements, the rule is mandatory and is to be carried out immediately.

¶ 117 An adverse ruling resulting in an appeal by the State not only weakens its case, it delays trial and "warrants the *immediate* restoration of complete freedom, absent more compelling reasons than those that support imposition of bail conditions" upon being charged. *People v. Beaty*, 351 Ill. App. 3d 717, 719 (2004). "When the State seeks an interlocutory appeal of an adverse order, the *State must restore* the defendant's freedom unless it can establish compelling reasons to override the rule's mandate." (Emphasis added.) *People v. Baltimore*, 381 Ill. App. 3d 115, 125 (2008) (citing *People v. Wells*, 279 Ill. App. 3d 564, 567 (1996) ("[g]enerally, it is anticipated that defendants will enjoy complete freedom during a delay occasioned by interlocutory appeal.")). Since defendant should not have been held to bail at all, he cannot establish deficient performance due to counsel's failure to revoke bail. Counsel cannot be held to be ineffective for failing to make a motion that had no merit in the first place. See *People v.*

Wise, 2019 IL App (2d) 160611, ¶ 53. Defendant now seeks to benefit from a mistake made by the trial court. The majority acknowledges the mandate of Illinois Supreme Court Rule 604(a)(3) but ignores it, saying "[f]urther, defense counsel never raised this issue in the trial court." *Supra*, ¶ 20. It then claims that "nothing prevented defense counsel from moving to withdraw bond" while defendant went to prison in 13-CF-2932 and "then requesting bond" when defendant was released. *Supra*, ¶ 21**.** The majority ignores the fact that the trial court had *no authority* to enter an order revoking bail unless the State first presenting compelling reasons to do so. Even people accused of murder are entitled to be released from bail pending a State appeal. *People v. Wells* 279 Ill. App. 3d 564, 567 (1996). Trial counsel was unaware of Rule 604(a)(3), otherwise, instead of requesting a recognizance bond, he would have invoked Rule 604(a)(3). What would the majority be saying if counsel simply requested defendant's discharge from bail pending appeal? As the State argues and defendant concedes, defense counsel's strategy was to make sure that when defendant was released from prison he would live in a stable environment in the event that he would someday face sentencing in this case.

¶ 118 The majority cites *People v. Centeno*, 394 Ill. App. 3d 710 (2009), for the proposition that "counsel may be held to be ineffective where he or she fails to withdraw bond." *Centeno* did not involve a plea agreement or an interlocutory appeal by the State. In *Centeno*, the defendant was in custody in Cook County while he had pending petitions to revoke probation in Will County. When Centeno was sentenced to prison on the petition to revoke probation, his attorney requested credit for time served. The trial court stated that defendant had "never been in custody on the petition to revoke here." *Id.* at 713. Also, in that case there was nothing in the record to suggest that defense counsel's failure to revoke bond was a result of trial strategy. Justice Schmidt dissented, saying:

> "Defendant's contention is simply unsupported by the record. To establish that counsel was ineffective, the defendant must overcome the strong presumption that the challenged inaction may have been the product of competent strategy. *People v.Richardson*, 189 Ill. 2d 401, 411 (2000). Here, the record is silent as to defendant's or counsel's position whether or not to push exoneration." *Centeno*, 394 Ill. App. 3d at 715.

¶ 119 As noted above, the Third District and other districts have adopted the dissent's position in *Centeno*. See *People v. Nesbit*, 398 Ill. App. 3d 200, 215 (2010); *People v. Blair*, 2015 IL App (4th) 130307, ¶ 47; *People v. Miller*, 2011 IL App (5th) 090679, ¶ 15.

¶ 120 In *People v. Campbell*, 2011 IL App (2d) 100015-U, the defendant argued on appeal that defense counsel was ineffective and deprived him of an opportunity to earn additional credit for time served by failing to "move to withdraw the bond" where counsel knew defendant was in custody in another case. This court declined to rule on the defendant's argument that "he was not made to understand the significance of his choice to surrender in exoneration of his bond might have on his sentence." We said that because "this argument pertains to matters outside the record, however, we cannot consider it on direct appeal." *Id*. ¶ 13. The majority's author in this case was on the panel and concurred in *Campbell*. Like this case, the defendant was present when "defense counsel informed the trial court that he wanted the defendant to remain on bond. The defendant did not object to defense counsel's comments." *Id*. ¶ 11.

¶ 121 The majority fails to even mention the cases cited by the State for their argument that the record is insufficient for our review. See *People v. Blair*, 2015 IL App (4th) 130307. Likewise, the majority makes no mention of the strong presumption in favor of finding that counsel's advocacy was effective or the principle that "we make every effort to evaluate counsel's performance from his perspective at the time rather than through the lens of hindsight. *People v. Perry*, 224 Ill. 2d 312, 344 (200). Even in unpublished decisions pursuant to Supreme Court

Rule 23 we have an obligation to discuss "relevant case law pertaining to the issues in a given case." *Seigel v. Levy Organization Development Company, Inc.*, 153 Ill. 2d 534, 544 (1992). We should not ignore relevant authority in order to reach a particular result.

¶ 122 Of course, in this case we do not have a silent record. The trial court found and defendant concedes that counsel's decision was the result of trial strategy. Recalling the day the defendant was sentenced on 13 CF 2932, the trial court stated:

> "And on that same day I released you on a recognizance bond on this case when I sent you to prison on that case. Not only does the record show that, I remember it because I remember at the time thinking about the impact it might have should we ever reach this day. It was not an accident. It was not something that just slipped by. It was a request, an agreement and a decision."

¶ 123 The majority's conclusion that the State's argument "is mere speculation, without support in the record" (*supra* ¶ 19) could not be more wrong. Not only has the majority improperly shifted the burden to the State, they have cherry picked the record and failed to pay deference to the trial court's findings. As the Supreme Court stated in *Strickland*, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of professional assistance." *Strickland*, 466 U.S. at 689.

¶ 124 B. Prejudice

¶ 125 Even if by some remote stretch I could agree that defense counsel's performance was deficient for failing to move to revoke bond, defendant has failed to establish prejudice. As the State notes in its brief, both the issue of credit for time served as well as the issue of whether the sentence in this case was required to be consecutive to 13-CF-2932 were contested. As to consecutive sentencing, the State argued that defendant was on bond for "the felony" class IV possession of a controlled substance in this case when he was arrested on "a warrant for the

shooting cases." Citing to *People v. Karmatzis*, 373 Ill. App. 3d 714 (2007)[3], the State argued the sentence was required to be consecutive and defendant would not be eligible for double credit for time served. The trial court agreed with defendant's argument that defendant "pleaded guilty to the attempt arm [*sic*] violence, not the offense in which he was on bond." Characterizing section 5-8-4(d)(8) of the Code as being susceptible to "multiple reasonable interpretations" the trial court commented that the defendant might get the benefit of "a loophole not intended by the legislature." 730 ILCS 5/5-8-4(d)(8) (West 2014).

¶ 126 Section 5-8-4(d)(8) of the Code provides that "[i]f a person charged with a felony commits a separate felony while on pretrial release or in pretrial detention in a county jail facility or county detention facility, 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." 730 ILCS 5/5-8-4(d)(8) (West 2014). There is no question that defendant was on bond in this case when he committed the possession of controlled substance offense in 13-CF-2932. Defense counsel argued that defendant pled to attempt armed violence and that since that charge was filed after defendant's arrest in 13-CF-2932 he was not on pretrial release for that "felony." In fact, defendant was on bond for the "felony" that gave rise to the armed violence, unlawful possession of a controlled substance, as alleged in the amended charge to which defendant pled guilty. As the supreme court stated in *Latona*, consecutive sentences are treated as a single term of imprisonment and defendants "so sentenced should receive but one credit for each day

[3] The statute at issue in *Karmatzis* was 730 ILCS 5/5-8-4(h) (West 2004), but like the version of the statute that was effective in this case, 730 ILCS 5/5-8-4(d)(8) (West 2014), both provisions mandated consecutive sentences if a defendant was charged with a felony and committed another felony while on pretrial release.

actually spent in custody as a result of the offense or offense for which they are ultimately sentenced." *Latona*, 184 Ill. 2d 260, 271 (1998). Since defendant's sentences should have been ordered to be served consecutively, defendant cannot demonstrate prejudice due to counsel's failure to move to revoke bail.

¶ 127 Defendant's claim that he suffered prejudice is pure speculation. "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *Bew*, 228 Ill. 2d 122, 134 (2008). "Pure speculation falls short of the demonstration of actual prejudice required." *Id.* (quoting *People v. Olinger*, 176 Ill. 2d 326, 363 (1997)). As noted previously, defendant's conviction of a reduced charge and sentence were the result of vigorous litigation, extensive plea negotiations and 402 conferences with the trial court. The issue of credit for time served was also vigorously litigated. According to the provisions of the Code, in sentencing a defendant to prison a trial court must determine approximately how much time the defendant will serve in custody. 730 ILCS 5/5-4-1(c-2) (West 2014). Even if defendant's bond had been revoked the trial court likely would have increased defendant's sentence to make up for the additional credit. The trial court specially commented that he wanted the "math" to be correct. Therefore, defendant's claim that his "out date" would have been different is pure speculation. Also, we have no way of knowing what effect revoking defendant's bail would have had on the State's willingness to plea bargain. There is no doubt that defendant's good behavior while on bail was factored into the State's decision to offer what defense counsel characterized as a "tremendous benefit" to defendant. Given these facts, defendant cannot make a substantial showing that he was prejudiced. See *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 14 (nothing was in the record to show that the State would not have increased its offer upon recognition of an error in percentage of time defendant would serve; *People v. Powers*, 2011 IL App (2d) 090292, ¶ 7 (defendant's argument that the State would have stood by its offer was speculative); *People v.*

Farrell, 2018 IL App (2d) 170790-U, ¶ 21 (defendant's claim that his "out date" would have been different was mere speculation).

¶ 128 III. CONCLUSION

¶ 129 In sum, defense attorneys are not expected to work miracles. Failure to secure 193 days of credit for time served in this case does not justify branding defense counsel as incompetent when, in fact, but for counsel's tireless advocacy defendant's "out date" would be in the far distant future.