

No. 1-09-0282

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FOURTH DIVISION
DATE May 5, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 27823
)	
DASMEN THOMAS,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in
the judgment.

O R D E R

HELD: Where defendant cannot establish plain error on issue of jury venire questioning, his conviction was affirmed; mittimus was corrected to reflect in-custody credit not counting day of sentencing, where mittimus was issued that day.

Following a jury trial, defendant Dasmens Thomas was convicted of first degree murder and residential burglary and was

sentenced to consecutive terms of 38 years and 6 years in prison. On appeal, defendant contends a new trial is warranted by the trial judge's failure to comply with Supreme Court Rule 431(b) (eff. May 1, 2007) during jury selection and also argues the mittimus should be corrected to award additional sentencing credit. We affirm and correct the mittimus.

Defendant's convictions arose from the fatal shooting of 72-year-old Earl Duke after defendant had entered Duke's home attempting to steal items on October 14, 2005. Defendant does not raise any issue regarding the evidence but, rather, contests the propriety of the trial court's admonitions to the potential jurors during jury selection in September 2008 under Rule 431(b).

Rule 431(b) requires the trial court to ask potential jurors if they understand and accept the following four principles: (1) the defendant is presumed innocent of the charges against him; (2) before a defendant is convicted, the State must prove his guilt beyond a reasonable doubt; (3) the defendant is not required to offer any evidence on his own behalf; and (4) the defendant's failure to testify cannot be held against him or her. The trial court is required to ask each potential juror, either individually or in a group, if they understand and accept each principle and provide an opportunity to respond to each concept. Ill. S. Ct. R. 431(b) (eff. May 1, 2007).

The record reveals that two groups of potential jurors were questioned in order to select the eventual 12-member jury and 2 alternate jurors. Initially, the court articulated all the factors to the entire jury pool. Before questioning each of the two groups of potential jurors, the court advised them to raise their hand if they would answer "yes" to any of the questions to follow. Regarding the first factor, the presumption of defendant's innocence, the court recited the principle and then asked the venire members if anyone had a "problem with that concept?" Likewise, regarding the second factor, the State's burden of proof, the court recited the principle and then asked whether anyone "had a problem with that concept?" The court did not recite the third principle that a defendant is not required to offer any evidence on his own behalf. As to the last principle, the court informed the venire members that the defendant does not have to testify and his decision not to testify must not be held against him. The court then asked, "Is there anyone who would hold the decision not to testify against the defendant regardless of what I've just said to you?" Defendant did not object to the court's presentation of the principles or raise it as an issue in his post-trial motion.

On appeal, defendant challenges both the completeness of the admonitions and the method of inquiry by the court. Defendant observes that the court failed to articulate the third principle

of Rule 431(b): that a defendant does not have to offer any evidence. Defendant also faults the court's inquiry as to the other three factors when the court asked the potential jurors whether they had a "problem with the concept" of the first and second principles, and whether they would "hold the decision not to testify against the defendant regardless of what [the court] just said" as to the last factor.

This case is controlled by the supreme court's decision in *People v. Thompson*, 238 Ill. 2d 598 (2010), which was issued during the pendency of this appeal, and considered in light of its progeny. In *Thompson*, as here, when setting out the principles of Rule 431(b), the trial court omitted the principle that the defendant did not have to offer any evidence, and the supreme court found the omission itself constituted noncompliance with Rule 431(b). *Thompson*, 238 Ill. 2d at 607. Accordingly, we must also find that the trial court in this case violated the rule by omitting that same principle. See also *People v. Stewart*, No. 1-08-3092, slip op. at 22 (Ill. App. Dec. 10, 2010) (error to omit a principle).

Regarding the content of the inquiry, *Thompson* found that Rule 431(b) "requires questioning on whether the potential jurors both understand and accept each of the enumerated principles." *Thompson*, 238 Ill. 2d at 607. Where the dual inquiries are not satisfied, the rule has been violated. Accordingly, the supreme

court concluded that the trial court had violated the rule because "while the trial court asked the prospective jurors if they understood the presumption of innocence, the court did not ask whether they accepted that principle." *Id.*; *People v. White*, No. 1-08-3090, slip op. at 9 (Ill. App. Jan. 7, 2011) (asking whether any potential jurors "couldn't follow the law" in regard to defendant's right not to testify and noting that no hands were raised did not ascertain whether they understood that right, and therefore, inquiry did not comply with Rule 431(b)).

In the present case, we are not persuaded that the court's questioning violated the dual requirement of the rule where the court recited two of the principles and separately asked whether anyone "had a problem with that concept" and, as to the other principle, asked whether anyone "would hold the decision not to testify against the defendant." See, e.g., *People v. Atherton*, No. 2-08-1169, slip op. at 15 (Ill. App. Dec. 16, 2010) (no error where court recited principles and asked whether the venire had any "difficulties" with the principles); *People v. Digby*, No. 1-09-0908, slip op. at 8-9 (Ill. App. Nov. 24, 2010) (no error under similar questioning); *People v. Davis*, No. 1-08-2895, slip op. at 4-5 (Ill. App. Nov. 12, 2010) (no error where trial court recited the principles and then asked venire whether anyone had a "problem" with them); but see *People v. Lampley*, No. 1-09-0661, slip op. at 13 (Ill. App. Nov. 10, 2010) (error where the trial

court recited the principles and then asked whether venire had "any problems with those concepts"). Nevertheless, in the instant case, we still must determine the effect of the court's noncompliance with the rule because the court omitted any reference to one of the four principles, which constituted error under *Thompson*.

Defendant acknowledges that he failed to preserve the issue for review but contends the forfeiture rule should be relaxed because the judge's conduct is at issue. The supreme court considered a comparable argument in *Thompson* and reasoned that the trial judge would have complied with Rule 431(b) had the judge been notified of the omission. *Thompson*, 238 Ill. 2d at 612 (forfeiture rule is relaxed where objection to judge about his or her own action or omission would have "fallen on deaf ears," quoting *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). Therefore, under *Thompson*, defendant's arguments are forfeited.

Defendant next argues the issue should be reviewed as plain error. Under the plain error doctrine, a forfeited error can be reviewed if: (1) the evidence in the case was so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of due process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

Defendant only argues the second prong of plain error, i.e., that the trial court's incomplete questioning and method of questioning implicated the fairness of his trial. The supreme court in *Thompson* held that incomplete questioning under Rule 431(b) does not satisfy the second prong of plain error so as to excuse the defendant's procedural default. *Thompson*, 238 Ill. 2d at 614 (inquiries under Rule 431(b) were "only one method of helping to ensure the selection of an impartial jury"). Here, as in *Thompson*, defendant has not shown that the trial court's questioning under Rule 431(b) affected the fairness of his trial and challenged the integrity of the judicial process.

Defendant's remaining contention is that the mittimus in this case should be corrected to reflect an additional 19 days spent in custody prior to sentencing. The State responds defendant should receive pre-sentencing detention credit for 18 days in custody and argues defendant should not be credited for the day on which he was sentenced.

The issue of whether the day of sentencing is included in the calculation of in-custody credit was recently decided by the Illinois Supreme Court in *People v. Williams*, No. 109361 (Ill. Jan. 21, 2011). The supreme court stated that a defendant's sentence begins upon the issuance of the mittimus, and because the day the mittimus is issued is a day of the defendant's

sentence, that day should not be counted as a day of pre-sentence custody. *Williams*, No. 109361, slip op. at 5.

In the instant case, the record indicates defendant was sentenced on December 22, 2008, and the mittimus was issued that day, which committed defendant to DOC custody. Therefore, defendant should not receive in-custody credit for that day, and defendant's mittimus should be corrected to reflect an additional 18 days of credit, not 19 days as defendant contends.

Accordingly, we direct the circuit court to correct the mittimus to indicate 1,135 days of in-custody credit toward defendant's sentence. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus). The judgment of the trial court is affirmed in all other respects.

Affirmed; mittimus corrected.