

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).

2011 IL App (3d) 100008-U

Order filed November 14, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

RICHARD HUBENY,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 21st Judicial Circuit,
) Iroquois County, Illinois,
)
) Appeal No. 3-10-0008
) Circuit No. 09-CF-87
)
) Honorable
) Gordon L. Lustfeldt,
) Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant was in custody for purposes of the presentence credit statute during the time he spent in a hospital after his arrest. The matter is remanded for the trial court to ascertain whether that time was spent on June 6 or June 7, 2009.

¶ 2 The defendant, Richard Hubeny, was convicted of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2008)) and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2008)). He was sentenced to 12 years' imprisonment for aggravated discharge of a firearm, along with a 1-year sentence for domestic battery, to run concurrently. On appeal, the defendant argues that

he is entitled to an additional day of presentence credit because he was actually in custody beginning on June 6, 2009, instead of June 7, 2009. We remand the matter to the Iroquois County Circuit Court for further proceedings consistent with this order. We otherwise affirm the trial court's judgment.

¶ 3

FACTS

¶ 4 The date of the offense that appeared on both the original information and the later indictment was June 7, 2009. The State confessed error as to the date at the beginning of the bench trial, but the pleadings were not amended to reflect the correct date. The trial proceeded and all of the evidence indicated that the offense occurred on June 6th and that the defendant was taken into custody on that same date.

¶ 5 More specifically, the evidence at trial established that on June 6, 2009, the defendant had a physical altercation with his wife in the parking lot of a bar. As a result, the police were called, and they began looking for the defendant. They suspected that the defendant had returned home, and they arrived at his house shortly before 9 p.m.

¶ 6 Four officers entered the defendant's home and found him sitting in an office holding a gun to his head. The officers and the defendant negotiated for about 30 minutes before one of the officers shot the defendant with a Taser. The officers and the defendant began to struggle, and during the struggle one of the officers was shot in the arm.

¶ 7 The officers eventually subdued the defendant, and he was handcuffed. Officer Brandon Legan transported the defendant to St. Mary's Hospital in a squad car, and he remained at the hospital while the defendant was being treated. Following the defendant's release from the hospital, he was booked into the Iroquois County jail, apparently during the early morning of

June 7, 2009. After a bench trial, he was convicted of the charged offenses and sentenced on December 28, 2009.

¶ 8

ANALYSIS

¶ 9 On appeal, the defendant argues that he is entitled to an additional day of presentence credit because he was taken into custody on June 6, 2009. The State responds that under *People v. Hollister*, 394 Ill. App. 3d 380 (2009), the defendant is not entitled to presentence credit for any time spent in a hospital receiving medical treatment. We review *de novo*. *People v. Robinson*, 172 Ill. 2d 452 (1996).

¶ 10 Pursuant to section 5-8-7(b) of the Unified Code of Corrections, a defendant is to receive credit against his sentence for time spent "in custody" as a result of the offense for which sentence is imposed. 730 ILCS 5/5-8-7(b) (West 2008). A defendant is entitled to one day of credit for each day, or portion thereof, spent in custody. *People v. Morrison*, 298 Ill. App. 3d 241 (1998).

¶ 11 The State relies on *Hollister* to argue that the defendant was not "in custody" when he was arrested and taken to the hospital. In *Hollister*, the defendant was admitted to the hospital immediately after an automobile collision, and on that day a police officer issued him two traffic citations for causing the accident. *Hollister*, 394 Ill. App. 3d 380. On the day the defendant was released from the hospital, an arrest warrant was issued, and he was taken into custody. *Id.* In addition, the record did not show that the defendant was under guard or being restrained by police personnel during his hospital stay. *Id.*

¶ 12 In contrast, the defendant in the instant case was arrested prior to being transported to the hospital by an officer and in a police vehicle. "Arrest" is defined as "the taking of a person into

custody." 725 ILCS 5/102-5 (West 2008). By definition, the defendant was in custody upon his arrest.

¶ 13 Moreover, as opposed to the defendant in *Hollister*, the defendant in this case was monitored by a police officer upon being admitted to the hospital. Although the testimony in this regard is not extensive, Officer Legan stated that he transported the defendant to St. Mary's and was present with the defendant while he was in the hospital. Accordingly, because we find *Hollister* to be distinguishable from the instant case, we conclude that while he was in the hospital, the defendant was in custody within the meaning of section 5-8-7(b). If, as appears to be the case, the date of his hospital treatment was, in fact, June 6, 2009, he was entitled to an additional day of presentence credit.

¶ 14 Because the charging instruments indicate that the offense took place on June 7, 2009, and they were never amended to reflect the prosecutor's representation that the correct date was June 6, 2009, and because the sentencing order reflects a June 7th occurrence; we, in an abundance of caution, remand this matter to the trial court with directions that the court ascertain the actual date of the offense. If it was June 6, 2009, the court is directed to award the defendant one additional day of presentence credit; if it was June 7, 2009, the sentence should remain the same.

¶ 15 **CONCLUSION**

¶ 16 For the foregoing reasons, we remand this matter to the circuit court for further proceedings consistent with this order. The judgment of the circuit court of Iroquois County is affirmed in all other respects.

¶ 17 Affirmed in part and remanded.