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2012 IL App (3d) 100697-UB

Summary Order filed December 13, 2011.
Modified upon denial of rehearing February 17, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

| | | |
|--------------------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the Circuit Court |
| |) | of the 21st Judicial Circuit, |
| |) | Kankakee County, Illinois, |
| Plaintiff-Appellee, |) | |
| |) | Appeal No. 3-10-0697 |
| v. |) | Circuit No. 06-CF-486 |
| |) | |
| BRYAN J. MITCHELL, |) | Honorable |
| |) | Clark E. Erickson, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE McDADE delivered the judgment of the court.
Justices Holdridge and Carter concurred in the judgment.

ORDER

- ¶ 1 *Held:* The defendant was entitled to presentence custody credit against his sentence of imprisonment that resulted from the grant of a second petition for revocation of probation, where defendant had been in custody awaiting a hearing on the initial revocation of his probation that was dismissed following a hearing.
- ¶ 2 Defendant, Bryan J. Mitchell, filed an appeal requesting additional sentencing credit for time he served in jail either from: (1) October 1, 2007, to June 30, 2008, in case No. 07-CF-603 on unrelated charges; or (2) October 31, 2007, to June 30, 2008, during the pendency of a

petition to revoke (PTR) probation filed in this case. We grant defendant an additional 244 days of sentencing credit and otherwise affirm.

¶ 3

FACTS

¶ 4 On August 8, 2006, defendant was arrested in this case (No. 06-CF-486) on a charge of robbery (720 ILCS 5/18-1(a) (West 2006)). On March 5, 2007, defendant entered a negotiated plea of guilty to the robbery charge and was sentenced to 48 months of probation.

¶ 5 On October 1, 2007, defendant was arrested in another case (No. 07-CF-603) on a charge of unlawful possession of a controlled substance with intent to deliver while within 1,000 feet of a school. 720 ILCS 570/407(b) (West 2006). On October 31, 2007, in this case (No. 06-CF-486), the State filed a PTR based upon the drug offense charged in case No. 07-CF-603.

Defendant remained in continuous custody until his trial on the drug charge and hearing on the PTR, both of which took place on June 30, 2008.

¶ 6 Following a bench trial on the drug charge in case No. 07-CF-603, the trial court granted defendant's motion for directed verdict and acquitted defendant. The State's Attorney indicated that the State was requesting "parallel dispositions" on the probation case unless the court wanted to find defendant guilty on a lesser standard of proof for the PTR. The State's Attorney also indicated that he did not want defendant "to be in custody any longer than he ha[d] to be, given the Court's ruling." The trial court acknowledged that both cases were set for hearing that day and that a hearing was held on the PTR. The trial court denied the State's PTR in this case, and ordered that defendant be released from custody "on these cases."

¶ 7 On June 10, 2009, the State filed a second PTR in this case based on defendant's misdemeanor convictions for aggravated assault and unlawful use of a weapon in Cook County

and the fact that he possessed a gun in violation of the terms of his probation. On November 18, 2009, defendant was taken into custody for the second PTR. On June 10, 2010, the trial court found that defendant had violated his probation in this case, revoked his probation, and imposed a six-year term of imprisonment on the original robbery conviction. The trial court awarded defendant sentencing credit for time defendant initially served in jail prior to entering his guilty plea for the robbery in this case (August 8, 2006, to March 5, 2007) and for time he served in jail awaiting hearing on the second PTR (November 18, 2009, to June 10, 2010). No sentencing credit was awarded for time served from October 1, 2007, to June 30, 2008, for time defendant served in case No. 07-CF-603, or from October 31, 2007, to June 30, 2008, while the first PTR was pending.

¶ 8 In his motion for summary order, defendant contended that he should receive sentencing credit dating from October 1, 2007, which was the date he was taken into custody on the unrelated charge in case No. 07-CF-603, until June 30, 2008. In response, the State argued that defendant was not entitled to the additional 30 days of credit for the period from October 1 to October 31, 2007, for the time served on the unrelated charge in case No. 07-CF-603 and prior to the time the PTR was filed. In his reply to the State's response, defendant limited his request for sentencing credit to the period of October 31, 2007, through June 30, 2008, based upon the time the PTR was pending in this case. Defendant indicated that even without the additional 30 days' credit for time served preceding the filing of the PTR, he would be entitled to an immediate release from prison, based on his projected release date of April 12, 2012, and good time served, if he were granted sentencing credit from October 31, 2007, to June 30, 2008. Defendant stated that "[i]n the interest of avoiding any delay in obtaining his release, defendant ha[d] no objection

to this Court's not awarding defendant credit from October 1, 2007, through October 30, 2007." Therefore, we will not address defendant's initial request for sentencing credit based on his time served for the 30 days prior to the PTR being filed.

¶ 9

ANALYSIS

¶ 10 The issue before us on appeal is whether defendant is entitled to sentencing credit for the time that he served in jail during the pendency of the PTR, from October 31, 2007, until June 30, 2008. In support of his claim that he is entitled to the sentencing credit, defendant cites section 5-8-7(b) of the Unified Code of Corrections (the Code), which provides that an offender "shall be given credit *** for time spent in custody as a result of the offense for which the sentence was imposed[.]" 730 ILCS 5/5-8-7(b) (West 2008).¹ We review the scope and application of a statute *de novo*. *People v. White*, 357 Ill. App. 3d 1070 (2005).

¶ 11 The supreme court has stated that the language of section 5-8-7(b) of the Code "*requires* that credit be given for all time spent in custody for the same offense." (Emphasis in original.) *People v. Scheib*, 76 Ill. 2d 244, 250 (1979); see also *People v. Whitmore*, 313 Ill. App. 3d 117 (2000). The general legislative intent of section 5-8-7(b) of the Code is to prevent the State from depriving a defendant of credit for jail time through technical evasion. *People v. Kane*, 136 Ill. App. 3d 1030 (1985).

¶ 12 Specific to the State seeking revocation of probation, an offender is entitled to credit against his sentence of imprisonment for time served awaiting the hearing on the revocation of his probation. *People v. Clem*, 72 Ill. App. 3d 163 (1979); *People v. Townsend*, 209 Ill. App. 3d 987 (1991). Also, our supreme court has determined that section 5-8-7(b) of the Code entitles a

¹ Now codified at 730 ILCS 5/5-4.5-100(b) (West 2010).

defendant to sentencing credit for both offenses when he is simultaneously in presentence custody on two unrelated charges. *People v. Robinson*, 172 Ill. 2d 452 (1996); see also *People v. White*, 357 Ill. App. 3d 1070 (2005).

¶ 13 In this case, defendant was entitled to sentencing credit for time he served in jail from October 31, 2007, when the petition to revoke was filed, until June 30, 2008, when the petition was denied and defendant was released from custody. At that time, defendant was in simultaneous custody in both cases and was entitled to sentencing credit for both offenses.

¶ 14 The State argues that defendant was not in simultaneous custody for the PTR in this case and the new offense in case No. 07-CF-603 because the trial court did not set bail for the PTR. However, under section 5-6-4(b) of the Code, bail was not required to be set for the PTR because the PTR alleged the commission of a criminal offense. See 730 ILCS 5/5-6-4(b) (West 2006) (providing that a court "shall admit the offender to bail pending the [PTR] hearing unless the alleged violation is itself a criminal offense").

¶ 15 Furthermore, after the State filed the PTR, both the State and the trial court treated defendant as though he were in custody for the PTR. Defendant was required to appear in this case for continued hearings on the PTR. The case was continued multiple times for defendant's plea and eventually set for a hearing on the PTR the same day as the bench trial on the drug charge.

¶ 16 After the trial court acquitted defendant on the drug charge in the unrelated case, the State requested that the trial court rule on the PTR so that defendant need not "be in custody any longer than he ha[d] to be." The trial court denied the PTR and ordered that defendant be released from custody "on these cases." The docket sheet in this case indicated that the separate hearing was

held and the PTR was denied, and "defendant [was] released from custody" the same day. From the record, the State and the trial court both treated defendant as if he were in custody on the PTR despite the fact that no bail had been set. It appears from the record that even if defendant's unrelated drug charges had been dropped, he still would have remained in custody pending the hearing on the PTR.

¶ 17 Therefore, based on this record, defendant had been in custody on the PTR from the time the PTR was filed on October 31, 2007, until the PTR was denied and defendant was released from custody on June 30, 2008. Accordingly, we order the trial court to modify defendant's sentencing order to reflect an additional 244 days of sentencing credit for the time defendant spent in custody from October 31, 2007, to June 30, 2008.

¶ 18 **CONCLUSION**

¶ 19 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed as modified.

¶ 20 Affirmed as modified.