

**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).

No. 3–09–0680

Order filed February 9, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD JUDICIAL DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08–CF–737
	)	
SIMON ROSAS-HERNANDEZ,	)	Honorable
	)	H. Chris Ryan, Jr.
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Justice Holdridge concurred in the judgment.  
Justice Schmidt concurred in part and dissented in part in the judgment.

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**ORDER**

*Held:* Defendant’s conviction for the offense of aggravated discharge of a firearm as set forth in count II of the indictment must be vacated because the conviction was based upon the same act which supported the conviction on count I, and therefore, the judgment of conviction violates the one act, one crime principle. Further, defendant is entitled to one additional day of credit toward his sentence for time spent in custody from the date of his arrest until the day prior to sentencing. Pursuant to our authority under Supreme Court Rule 615(b)(1), we modify defendant’s sentencing order to reflect our decision herein.

Following a trial, a jury found defendant guilty of aggravated battery with a firearm,

aggravated discharge of a firearm and reckless discharge of a firearm. The trial court entered judgments on all three offenses, sentenced defendant on the offenses of aggravated battery with a firearm and reckless discharge, and reserved sentencing on the offense of aggravated discharge of a firearm. The trial court also granted defendant 248 days credit toward his sentence. We modify defendant's sentencing order.

### FACTS

Defendant, Simon Rosas-Hernandez, was arrested on November 16, 2008, and ultimately charged by indictment with one count of aggravated battery with a firearm (count I) and two counts of aggravated discharge of a firearm (counts II and III). Counts I and II related to an incident on November 16, 2008, during which defendant fired a shotgun in the direction of Fernando Rosas, striking Fernando Rosas in the leg. Count III related to an incident on November 16, 2008, during which defendant fired a shotgun in the direction of Alejandro Rosas.

Following a trial, a jury found defendant guilty of counts I and II and guilty of the lesser offense of reckless discharge of a firearm as to count III. The trial court entered judgment on all three verdicts. At the sentencing hearing on July 23, 2009, the trial court imposed sentences to the Illinois Department of Corrections on counts I and III. The trial court entered a written order adjudging defendant guilty of count II but reserved any sentence. Further, the trial court granted defendant credit for 248 days for time served in custody. Thereafter, defendant filed a timely notice of appeal.

### ANALYSIS

On appeal, defendant raises two claims of error. First, defendant argues that the conviction on count II must be vacated because the conviction was based upon the same act

which supported the conviction on count I, and therefore, the judgment of conviction violates the one act, one crime principle. Pursuant to Supreme Court Rule 651(b)(1), defendant requests this court to modify the trial court's sentencing order by vacating the conviction on count II. The State concedes that defendant's conviction on count II must be vacated as it violates the one act, one crime rule.

We agree with the parties. The allegations contained in counts I and II of the indictment relate to the same act. The one act, one crime doctrine prohibits a trial court from entering multiple convictions based upon the same act, even if the trial court does not impose a sentence. See *People v. Lilly*, 56 Ill. 2d 493 (1974); *People v. Bolar*, 229 Ill. App. 3d 563 (1992).

Defendant next argues that he is entitled to two additional days of credit for a total of 250 days because defendant was in custody from his arrest on November 16, 2008, until his sentencing on July 23, 2009. Pursuant to Supreme Court Rule 651(b)(1) (eff. December 1, 1984), defendant requests this court to modify the trial court's sentencing order by awarding defendant 250 days of credit toward his sentence for time spent in custody prior to sentencing. The State argues that defendant is only entitled to one additional day of credit as defendant is not entitled to credit for the date of sentencing.

A defendant is entitled to credit toward any sentence imposed for all or any part of a day during which he is held in custody. *People v. Beachem*, 374 Ill. App. 3d 145, 151 (2007); 730 ILCS 5/5-8-7(b) (West 2008). A sentence of imprisonment begins on the date defendant is received by the Department of Corrections. 730 ILCS 5/5-8-7(a) (West 2008). The trial court's sentencing order, entered on July 23, 2009, remanded defendant to the Department of Corrections and was effective immediately. Therefore, defendant's credit for time spent in custody does not

include the day of sentencing. See *People v. Allen*, 371 Ill. App. 3d 279 (2006); *People v. Foreman*, 361 Ill. App. 3d 136 (2005).

The parties agree that defendant was arrested on November 16, 2008, and remained in custody until his sentencing on July 23, 2009. Including the day of his arrest, defendant spent 46 days in custody during 2008. In 2009, defendant spent 203 days in custody representing the time period from January 1, 2009, through July 22, 2009, the day prior to sentencing. Therefore, we agree with the State that defendant is entitled to one additional day of credit toward his sentence for a total of 249 days.

Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. December 1, 1984), we modify the sentencing order to reflect that defendant's judgment and conviction on count II is vacated. Further the sentencing order is modified to reflect 249 days credit toward defendant's sentence for time spent in pre-sentencing custody. We direct the Department of Corrections to recalculate defendant's release date consistent with this order. In all other respects, we affirm the judgment of the circuit court of LaSalle County.

#### CONCLUSION

The sentencing order entered by the circuit court of LaSalle County is modified consistent with the terms of this order. All other terms of defendant's conviction and sentence are affirmed.

Affirmed as modified.

No. 3--09--0680, *People v. Simon Rosas-Hernandez*

JUSTICE SCHMIDT, concurring in part and dissenting in part:

I concur with the majority's ruling finding defendant to be entitled to one extra day of

credit for presentencing incarceration. I dissent from the majority's decision to vacate defendant's "conviction" for aggravated discharge of a firearm stemming from count II of the indictment.

I do not disagree that the finding of guilty entered by the jury regarding defendant's unlawful discharge of a firearm toward Fernando Rosas stems from the same act that served as the basis for his conviction for aggravated battery with a firearm toward the same victim. Nevertheless, the trial court never sentenced defendant for the crime of unlawful discharge of a firearm related to count II and, as such, I find we have nothing to review in regards to that conviction.

Citing to *People v. Lilly*, 56 Ill. 2d 493 (1974), the majority holds that we must vacate defendant's conviction. I find *Lilly* to not only be an anomaly but also at odds with *People v. Caballero*, 102 Ill. 2d 23 (1984). The *Lilly* court acknowledged the general proposition that the final judgment in a criminal case is a sentence and that "in the absence of the imposition of [a] sentence[,] an appeal cannot be entertained." *Lilly*, 56 Ill. 2d at 496. Nevertheless, since multiple issues were appealed in *Lilly*, our supreme court saw fit to "vacate the incomplete judgment" of the defendant. *Lilly*, 56 Ill. 2d at 496. (The *Lilly* jury returned guilty verdicts for rape and indecent liberties with the same victim. The court entered judgments on both verdicts but only sentenced defendant for the rape count. Despite the fact that defendant received no sentence on the indecent liberties count, our supreme court vacated the judgment associated with that count.)

In *Caballero*, however, 10 years after the *Lilly* decision, the court took a different approach. In *Caballero*, the court stated:

"Although three guilty verdicts were returned against the

defendant for the offense of armed violence, no sentences were imposed on those verdicts. The final judgment in a criminal case is the sentence, and, in the absence of the imposition of a sentence, an appeal cannot be entertained. [Citation.] \*\*\*

Although the notice of appeal in the record appeals from the three armed-violence convictions, the three unlawful-restraint convictions, as well as the three murder convictions and the death penalty, sentence was imposed only on the murder convictions. For this reason, the armed-violence convictions and the unlawful-restraint convictions are not before this court.

Appeals from the convictions of armed violence and unlawful restraint are therefore dismissed." *Caballero*, 102 Ill. 2d at 51.

Similarly to the *Caballero* court, I find that since the trial court entered no sentence against defendant for his unlawful discharge of a firearm toward Fernando Rosas, defendant's claim, that his "conviction" for that crime should be vacated, is not properly before this court and that part of defendant's appeal should be dismissed.