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No. 3--08--0675

Order filed January 13, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 9th Judicial Circuit,
)	Knox County, Illinois,
Plaintiff-Appellee,)	
)	
v.)	No. 91--CF--225
)	
DOUGLAS E. BAILEY,)	
a/k/a/ DOUGLASS BAILEY,)	Honorable
)	James B. Stewart,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Presiding Justice Carter concurred in the judgment.
Justice Schmidt concurred in part and dissented in part.

ORDER

Held: Because the record on appeal does not clearly support the defendant's request for an additional 151 days of presentence credit, the defendant shall not receive any presentence credit beyond the 32 days conceded by the State, and the cause is remanded to the trial court to determine whether the defendant has earned additional presentence credit.

On December 12, 1991, the defendant, Douglas Bailey, pled guilty to aggravated assault (Ill. Rev. Stat. 1991, ch. 38, par.

12--2(a)(13)). The court sentenced him to a 2-year term of probation and a 60-day jail term. After the defendant made a number of unsuccessful attempts to complete his term of probation, the court revoked it. At a hearing on October 19, 1995, the court sentenced the defendant to a three-year prison term for the aggravated assault conviction, and awarded him credit for five days of presentence incarceration. On September 13, 2007, the defendant filed a motion for *nunc pro tunc* requesting additional presentence credit. The trial court denied it. The defendant appeals, arguing that this court should award him an additional 151 days of credit, or remand the cause to determine the quantity of credit owed to him. We grant the defendant an additional 32 days of presentence credit and remand the cause for the trial court to determine what amount of additional credit, if any, the defendant should receive.

FACTS

The record shows that on November 14, 1991, the State filed an information charging the defendant with the instant offense of aggravated assault, and the defendant was taken into custody that same day. Thereafter, the defendant filed a motion to reduce bond. Before the court ruled on it, on December 12, 1991, the defendant entered a negotiated plea of guilty to aggravated assault. The court sentenced him to a 60-day jail term, with credit for time served, and a 2-year term of probation.

On April 21, 1992, the State filed a petition to revoke the defendant's probation, and the defendant was arrested and posted bond that same day. The defendant did not appear at an August 13, 1992, hearing, so the court issued a warrant for his arrest. Police executed the warrant on September 9, 1992, and the defendant posted bond that day. The court conducted a hearing on the State's petition on October 22, 1992, and it found that the defendant had violated his probation.

The defendant's probation officer filed a presentence investigation (PSI) report on November 30, 1992. It indicated that the defendant "[was] presently in custody on pending charges in Knox County on 92--CF--154, and 92--CF--155, having been arrested [September 14, 1992]." It also indicated that the defendant reported to his probation officer on January 3 and 9, 1992, but after those dates he was either late or missed numerous appointments.

On December 10, 1992, the court conducted a resentencing hearing on the State's petition to revoke the defendant's probation. The court resentenced the defendant to a 30-month term of probation and a 6-month jail term, with credit for time served.

The State filed a petition to revoke the defendant's probation on October 26, 1994, alleging that the defendant had failed to report to his probation officer. The court issued an

arrest warrant for the defendant on October 27, 1994. Police arrested the defendant on October 28, 1994, and he posted bond that day. On March 31, 1995, the court resentenced the defendant to a two-year term of conditional discharge and a one-day jail term with credit for time served.

The State subsequently filed a petition to revoke the defendant's conditional discharge on May 23, 1995. The court issued an arrest warrant for the defendant, and police arrested the defendant on June 7, 1995. The defendant posted bond on June 10, 1995. Thereafter, the defendant failed to appear at a July 6, 1995, hearing, and the court issued a warrant for his arrest. Police arrested the defendant on July 13, 1995, and he posted bond that day. The PSI filed for the defendant's resentencing hearing on the petition to revoke his probation revealed that the defendant was in custody on an unrelated pending attempted murder charge. It also disclosed that the defendant had been sentenced to a four-year term of imprisonment in May 1993 for a drug conviction, but his probation was not revoked as a result of that offense. The defendant was released from custody on the drug offense in June 1994.

The court conducted the resentencing hearing on October 19, 1995. It resentenced the defendant to a three-year term of imprisonment. The court orally granted the defendant credit for five days of presentence incarceration, specifically for June 7

through 10 and July 13 of 1995. The written sentencing order indicated that the defendant had earned credit for "5 days only" (emphasis in original) but next to this notation was written "60 days served on original sentence." At this hearing, the court noted that "[t]he time that [the defendant had] been spending in the County Jail now [was] for [his] new attempt [*sic*] murder case." The record shows that the defendant was subsequently convicted of attempted murder, and the court imposed a 30-year term of imprisonment for that offense, which was to be consecutively served with the instant three-year term of imprisonment for aggravated assault.

The defendant filed the instant motion for *nunc pro tunc* on September 13, 2007. The court denied it, finding "insufficient evidence" that the defendant was owed additional presentence credit. The defendant appealed.

ANALYSIS

On appeal, the defendant argues that this court should award him an additional 151 days of credit, or remand the cause to determine the quantity of credit owed to him.

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 the sentence is imposed. 730 ILCS 5/5--8--7(b) (West 2004). A defendant may receive section 5--8--7(b) credit for

time spent in custody on a pending petition to revoke his probation. See *People v. Morrison*, 298 Ill. App. 3d 241 (1998). Further, a defendant is entitled to section 5--8--7(b) credit for the time spent in jail prior to his resentencing on the original offense after his term of probation is revoked. See *People v. Scheib*, 76 Ill. 2d 244 (1979). A defendant may be in simultaneous custody on more than one offense, and is entitled to presentence credit on each offense. *People v. Robinson*, 172 Ill. 2d 452 (1996).

A defendant may ask the trial court to amend the mittimus at any time to reflect presentence credit earned by the defendant. See *People v. White*, 357 Ill. App. 3d 1070 (2005). In that regard, an appellate court has authority to issue a direct order to the clerk of the circuit court to make necessary corrections to the mittimus. *People v. Hernandez*, 345 Ill. App. 3d 163 (2004).

In general, an appellate court will correct the mittimus when the requisite correction is clearly reflected by the record. See *Hernandez*, 345 Ill. App. 3d 163. The appellant bears the burden to provide a sufficiently complete record to support his claims. *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). Any doubt arising from the incompleteness of the record will be resolved against the appellant. *Foutch*, 99 Ill. 2d 389.

In this case, the record shows that the defendant was

initially arrested on the underlying aggravated assault charge on November 14, 1991, and that he appeared in court in custody at his guilty plea hearing on December 12, 1991, at which time the court imposed a 60-day jail term with credit for time served. The State concedes that the defendant is owed 29 days of presentence credit, from November 14 to December 12, 1991, which we now award.

However, our review of the record does not indicate when the defendant was released following the imposition of this jail term. We cannot presume that the defendant served all 60 days of this jail term. Furthermore, the record indicates that the defendant reported to his probation officer on January 3 and 9, 1992. Thus, the record does not clearly show that the defendant spent 60 days in jail. As such, we may not grant the defendant any credit above what the State has conceded. Instead, we must remand the cause to the trial court for it to determine what additional credit, if any, the defendant has earned.

Likewise, the record does not clearly reflect how much time the defendant spent in jail pursuant to the six-month jail sentence imposed after his resentencing on December 10, 1992, on the State's initial petition to revoke his probation. The State concedes that the defendant spent two days in jail prior to his resentencing on April 21 and September 9, 1992. We now award the defendant credit for these two days.

However, we may not award the defendant the additional 88 days of presentence credit that he requests for the period from his arrest on September 14, 1992, until his resentencing on December 10, 1992. Specifically, the record indicates that the defendant was arrested on unrelated charges on September 14, 1992. He was being held in jail on these charges at the time the court found he violated his probation in the instant case on October 22, 1992, and until the time of his resentencing on December 10, 1992. Thus, it is necessary to remand the cause to determine if the defendant was in simultaneous custody subsequent to his September 14, 1992, arrest and the October 22, 1992, finding that he had violated his probation. If so, the court should determine how many days the defendant spent in jail awaiting resentencing on the instant aggravated assault offense.

The State further concedes that the defendant has earned one day of presentence credit on the State's second petition to revoke his probation because he was arrested on October 28, 1994, and he posted bond that day. We will grant the defendant this day of credit.

Thus, of the 151 days of presentence credit requested by the defendant, the State concedes that he is owed 32 of them. However, the record on appeal does not clearly support the defendant's request for the remaining days of presentence credit. Therefore, we will grant the 32 days of credit conceded by the

State, and remand the cause for the trial court to determine what quantity of credit, if any, the defendant has earned.

CONCLUSION

The judgment of the circuit court of Knox County is modified, and the cause is remanded for further proceedings consistent with this order.

Order modified; remanded with directions.

JUSTICE SCHMIDT, concurring in part, dissenting in part:

I concur in the judgment to the extent it grants defendant an additional 32 days credit for presentence incarceration. I respectfully dissent from the majority's decision to remand for further proceedings in the trial court. The majority concedes that the record before us supports only an additional 32 days. It also concedes it is defendant's burden to supply us with an adequate record to support his claim for additional credit. It is not the trial court's burden to create a record for defendant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984). The majority now places the burden on the trial court to search the record to determine whether or not defendant is entitled to additional credit against his sentence. This holding flies in the face of the law cited by the majority.