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No. 3--09--0677

Order filed January 19, 2011

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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 21st Judicial Circuit,
	)	Iroquois County, Illinois,
Plaintiff-Appellee,	)	
	)	No. 05--CF--26
v.	)	
	)	
JAYSON L. FELTON,	)	Honorable
	)	Gordon L. Lustfeldt,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices McDade and O'Brien concurred in the judgment.

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**ORDER**

*Held:* Where the plea agreement involves defendant receiving presentencing credit against his sentence and the credit is not received, the reviewing court may exercise its authority under Supreme Court Rule 615(b)(4) and modify the sentence to reflect the intent of the parties.

Defendant pled guilty to unlawful delivery of a controlled substance (720 ILCS 570/401(c)(2) (West 2004)) and, pursuant to a negotiated plea agreement, was sentenced to 8 years in prison with

credit for 328 days served. The trial court denied defendant's subsequent motion to withdraw his plea based on the Department of Corrections' failure to award the appropriate credit. We modify the sentencing order and otherwise affirm.

On February 26, 2005, defendant was arrested and later charged by indictment with unlawful delivery of a controlled substance. He posted bond on March 4, 2005.

At a pretrial hearing in March of 2006, the trial court was informed that defendant was in custody on other charges in Kankakee County. Defense counsel moved to exonerate bond in this case, noting that defendant wished to receive credit as he served time. The trial court granted the motion and set the matter for trial.

Defendant's Kankakee County cases were resolved by guilty plea in August of 2006. Defendant began serving his sentences on those charges on August 24, 2006.

On December 23, 2006, this case proceeded to a bench trial. The trial court heard the State's witnesses and then granted a recess. When proceedings resumed, the parties informed the court that they had reached a plea agreement. Under the terms of the agreement, defendant would plead guilty in exchange for an 8-year sentence and 328 days of credit for time served.

At the guilty plea hearing, the trial court explained to defendant that the sentence imposed in this case would be a consecutive sentence to the prior sentences he was already serving

in Kankakee County. The court noted that the eight-year sentence would be added "on top of" the previous terms. The court also informed defendant that his credit for 328 days of presentencing custody would be added to the credit he had in Kankakee County. Specifically, the trial court stated:

"But you get day for day credit. Now, the way this works if a sentence is consecutive is [sic] they take all the sentence credit that you have in both counties and add it together because they are going to take the sentences and add them together. So I don't know how much time you got coming in Kankakee, but the 328 days will get added to that. Okay?"

Defendant responded: "Yes, sir." The trial court then accepted defendant's negotiated guilty plea and imposed the agreed-upon sentence of 8 years, again noting the 328-day credit.

"The Court: Now the way I understand it the agreement is 8 years on top of Kankakee, but it's going to be day for day credit and you got 328 days credit from us; is that right?"

The Defendant: Yes."

In defendant's sentencing order, the trial court provided: "The Court further finds that the defendant is entitled to receive credit for time actually served in custody of 328 days as of the date of this order." The court sentenced defendant to eight years

in prison to be served consecutive to the Kankakee County offenses.

Within 30 days, defendant sent the trial court a letter stating that he only received 8 days credit against his Iroquois County sentence. Upon review, the trial court sent a letter to the Department of Corrections, seeking clarification of the assigned credit. On March 14, 2007, the trial court responded to defendant's letter and informed defendant that he could not get double credit for time served in consecutive sentences. Thus, according to custody records, defendant had eight days of credit for time served in the Iroquois County case and he was receiving credit against his consecutive sentences for all the time he had served. Thereafter, defendant moved to withdraw his plea. At the hearing, defendant testified that he would not have pled guilty and accepted the 8-year agreement if it had not been for the assumption that he would receive 328 days of credit against his Iroquois County sentence.

In reaching its decision, the trial court noted that there was a recurring issue regarding credit, but informed defendant that he could not award him double credit for the days he served in presentencing custody. The court emphasized that even if it granted the motion to withdraw, defendant would not get double credit for the days he was in custody. Before the court entered its ruling, defendant offered additional testimony, focusing again on the importance of the credit calculation to the plea agreement.

The trial court denied his motion to withdraw the plea.

#### ANALYSIS

Defendant urges us to remand the matter to the trial court so that the court may consider the possible "equitable solution" of a sentence reduction since the parties' expectations in the plea agreement were frustrated by the statute and case law.

The circumstances of this appeal are unique; our research revealed one case that provides guidance as to its resolution. In *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552 (2002), the defendant pled guilty to a sex offense and was sentenced, based on a negotiated plea agreement, to a term of eight years in prison. Both parties and the sentencing judge contemplated that the defendant would receive day-for-day credit in prison rather than 4.5 days per month as required under the truth-in-sentencing statute. See 730 ILCS 5/3--6--3(a)(2)(ii) (West 2000). The trial judge even noted in the defendant's sentencing order that the sentence was not subject to the statute. The State later sought to eliminate the sentencing order provision and to enforce the reduced credit under the truth-in-sentencing statute. The supreme court agreed with the State that the statute required 85% service and that the agreed sentence violated the law. As a result, the court ordered the trial court to issue an amended sentencing order to remove the "not subject to" language.

In reaching its decision, however, the supreme court

recognized that neither party contemplated the application of the truth-in-sentencing statute when negotiating toward a guilty plea. Consequently, the court reduced defendant's sentence to a six-year sentence, resulting in actual service closer to the four years to which he had agreed, in the exercise of its supervisory authority under Supreme Court Rule 615(b)(4) (Ill S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999)). *Roe*, 201 Ill. 2d at 556-58.

The facts in this case are strikingly similar. Both parties and the trial court believed that defendant agreed to serve a term of 8 years and that he would receive 328 days of credit against that sentence. The parties knew that the sentence would be served consecutive to the sentences imposed in the Kankakee County cases, but the parties also contemplated that 328 days of credit would be added to any credit defendant received in those cases. As in *Roe*, however, the parties' agreement was not realized. Under statutory guidelines, the Department of Corrections cannot award defendant 328 days of credit against his Iroquois County sentence. See 730 ILCS 5/5--8--4(e)(4) (West 2004); *People v. Leeper*, 317 Ill. App. 3d 475 (2000). Thus, defendant received an 8-year prison sentence with only 8 additional days of credit instead of the 8-year sentence and 328 days of credit to which he agreed.

Given the mutual mistake of the parties during plea negotiations, we choose to follow the court's disposition in *Roe*. Under Supreme Court Rule 615(b)(4) and the supervisory authority

granted therein, we reduce defendant's sentence by 320 days. Ill. S. Ct. R. 615(b)(4) (eff. Aug. 1999); see also *Roe*, 201 Ill. 2d at 558.

#### CONCLUSION

We modify the sentencing order and reduce defendant's sentence to seven years and forty-five days. The judgment of the circuit court of Iroquois County is otherwise affirmed.

Affirmed as modified.