

NOTICE
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2011 IL App (4th) 100441-U

Filed 11/30/11

NO. 4-10-0441

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ALAXSTAIR REED,)	No. 09CF358
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Any error from the waiver of defendant's right to a preliminary hearing was harmless.
- (2) Defendant is entitled to 24 additional days' sentence credit for the time he spent in custody prior to sentencing.
- ¶ 2 In June 2009, a jury convicted defendant, Alaxstair Reed, of unlawful delivery of a controlled substance (cocaine) (720 ILCS 570/401(d)(i) (West 2008)). In November 2009, the trial court sentenced defendant to 14 years in prison, with 224 days' sentence credit for time served.
- ¶ 3 Defendant appeals, arguing he is entitled to (1) a new trial because his public defender waived his right to a preliminary hearing and (2) 24 days' additional sentence credit.
- We affirm as modified and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 On March 2, 2009, the State charged defendant by information with unlawful delivery of a controlled substance (cocaine).

¶ 6 During defendant's March 4, 2009, arraignment, the following colloquy took place:

"[THE COURT:] In [Champaign County case No.] 09-CF-358, sir, the State alleges that on November 17th of last year, you committed the offense of the unlawful delivery of a controlled substance, a Class II felony. A fine not to exceed \$200,000.00. Non-probational, extended sentence; which means, a mandatory prison sentence of between three and fourteen years in the Department of Corrections. The State alleges you knowingly and unlawfully delivered, less than one gram of a substance containing cocaine, a controlled substance, other than as authorized by statute.

* * *

Mr. Reed, do you want to hire your own attorney, or do you want me to consider appointing the Public Defender to represent you?

THE DEFENDANT: Public Defender (unintelligible).

(DEFENDANT SWORN AS TO FINANCIAL AFFIDAVIT)

THE COURT: Sir, I'm going to appoint the Public Defender to represent you on all three of these cases. Ms. Kierny, as to the two -CF-'s, prelim or pretrial?

MS. KIERNY [(Defendant's Counsel)]: Pretrial, your

Honor."

Thereafter, the trial court reset Champaign County case No. 09-CF-358 for felony pretrial.

¶ 7 On May 19, 2009, defendant informed the trial court his preliminary hearing was waived without his consent. Defendant maintained he told his appointed counsel he wanted a preliminary hearing. On June 9, 2009, the trial court responded as follows:

"It is a matter of determination for counsel whether or not to waive a preliminary hearing. That is a strategic determination and not one of the fundamental rights that is reserved only to the defendant only.

That is to elect to go to trial, to plead guilty, a lesser charge, those are all matters that the defendant must make. But whether or not to waive a preliminary hearing or grand jury indictment is not reserved only to the defendant. That was a determination made on his behalf by represented counsel. That is certainly not a basis for a claim of ineffective assistance of counsel."

¶ 8 On June 17, 2009, a jury convicted defendant of unlawful delivery of a controlled substance.

¶ 9 On November 10, 2009, the trial court sentenced defendant as stated.

¶ 10 On November 24, 2009, defendant *pro se* filed a motion to reconsider sentence, which the trial court denied.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues he is entitled to a new trial where his trial counsel was

ineffective by improperly waiving his right to a preliminary hearing without consulting him because only he may waive his right to the hearing. In the alternative, defendant argues he is entitled to 24 days' additional sentence credit for time spent in presentence detention.

¶ 14 A. Preliminary Hearing

¶ 15 Article 1, section 7 of the Constitution of the State of Illinois provides, "No person shall be held to answer for a crime punishable *** by imprisonment in the penitentiary unless either the initial charge has been brought by indictment of a grand jury or *the person has been given a prompt preliminary hearing to establish probable cause.*" (Emphasis added.) Illinois Const. Art. I, § 7 (1970). Further, section 109-3.1(b) of the Code of Criminal Procedure of 1963 provides, "Every person in custody in this State for the alleged commission of a felony shall receive either a preliminary examination as provided in Section 109-3 or an indictment by Grand Jury ***." 725 ILCS 5/109-3.1(b) (West 2008). Pursuant to section 109-3(a) the trial court "shall hold the defendant to answer to the court having jurisdiction of the offense if from the evidence it appears there is probable cause to believe an offense has been committed by the defendant." 725 ILCS 5/109-3(a) (West 2008).

¶ 16 In *People v. Ramey*, 152 Ill. 2d 41, 604 N.E.2d 275 (1992), the supreme court found the decisions left ultimately to the defendant in a criminal case are: (1) what plea to enter, (2) whether to waive a jury trial, (3) whether to testify on his own behalf, and (4) whether to appeal. See *Ramey*, 152 Ill. 2d at 54, 604 N.E.2d at 281 (citing *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Since *Ramey*, the supreme court has held there is a fifth decision ultimately belonging to a defendant. In *People v. Brocksmith*, 162 Ill. 2d 224, 229, 642 N.E.2d 1230, 1232 (1994), the supreme court "established a defendant has the exclusive right to decide whether to

submit an instruction on a lesser-included offense at the conclusion of the evidence, finding this analogous to the decision of what plea to enter." *People v. Clendenin*, 238 Ill. 2d 302, 318, 939 N.E.2d 310, 319 (2010) (citing *People v. Campbell*, 208 Ill. 2d 203, 210, 802 N.E.2d 1205, 1209 (2003)). Aside from those five decisions ultimately belonging to a defendant, however, a defendant's "trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consultation with the client." *Clendenin*, 238 Ill. 2d at 320, 939 N.E.2d at 321 (citing *People v. Philips*, 217 Ill. 2d 270, 281, 840 N.E.2d 1194, 1201 (2005)).

¶ 17 Notwithstanding the foregoing, it is unnecessary in this case to determine whether the preliminary hearing was properly waived because any error was harmless as the evidence against defendant was overwhelming. See *People v. Patterson*, 217 Ill. 2d 407, 428, 841 N.E.2d 889, 902 (2005) (even constitutional error is harmless if evidence presented overwhelmingly supports a defendant's conviction). Further, to demonstrate ineffective assistance of trial counsel, the defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *People v. Ross*, 229 Ill. 2d 255, 260, 891 N.E.2d 865, 869 (2008). To show prejudice the defendant must show the reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have differed. *People v. Caffey*, 205 Ill. 2d 52, 123, 792 N.E.2d 1163, 1207 (2001). The record reveals defendant cannot establish prejudice because the evidence against defendant was overwhelming. See *Patterson*, 217 Ill. 2d at 428, 841 N.E.2d at 902; *People v. Tapscott*, 386 Ill. App. 3d 1064, 1078-79, 899 N.E.2d 597, 610 (2008) (examining only prejudice prong to deny ineffective-assistance claim).

¶ 18 In this case, the State presented evidence from an informant who identified

defendant and testified he bought drugs from him during a controlled buy organized by the police. The State also presented a video, which was taken by a hidden camera worn by the informant during the controlled buy. The video showed defendant taking money from the informant and in return giving the informant crack cocaine. Further, the State presented corroborating testimony from two officers involved with the controlled buy. Thus, even if a preliminary hearing was held to determine whether probable cause to proceed existed, ample evidence would have been presented to prevent dismissal at that stage. As a result, defendant suffered no prejudice when counsel declined a preliminary hearing.

¶ 19 We note defendant was present in court with his appointed attorney when the trial court asked whether he wanted to proceed with a preliminary hearing or pretrial. While defendant stood silent and made no objection indicating he wanted a preliminary hearing instead of a pretrial hearing, we believe it preferable for the trial court to address the defendant to ascertain whether he understands he has a right to a preliminary hearing and to obtain an express waiver of that right from the defendant. Such a procedure would eliminate this issue as a ground for appeal.

¶ 20 B. Defendant's Sentence Credit

¶ 21 Defendant argues he is entitled to additional sentence credit for the time he spent in custody prior to sentencing. The State concedes defendant is entitled to 24 days' credit, and we agree.

¶ 22 It is statutorily mandated a trial court give credit to a defendant for his presentence incarceration. *People v. Beachem*, 229 Ill. 2d 237, 244, 890 N.E.2d 515, 519 (2008). Section 5-8-7(b) of the Unified Code of Corrections provides a criminal defendant shall be given credit on

his sentence "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). A " 'defendant is entitled to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing, including the day he was taken into custody.' " *People v. Hill*, 409 Ill. App. 3d 451, 456, 949 N.E.2d 1180, 1185 (2011) (quoting *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001)).

¶ 23 In this case, the parties agree defendant has been in custody since March 4, 2009, and did not post bond. The parties also agree the Department of Corrections incorrectly shows defendant's date of custody as March 28, 2009. See http://www.idoc.state.il.us/subsections/search/inms_print.asp?idoc=K88474 (last visited October 28, 2011). The State concedes the sentencing judgment should be amended to reflect defendant has been in continuous custody since March 4, 2009, entitling defendant to 24 additional days' sentence credit. We accept the State's concession and agree.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we remand with directions to modify the sentencing judgment to reflect 24 additional days' sentence credit against defendant's sentence for unlawful delivery of a controlled substance. We otherwise affirm the trial court's judgment. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 26 Affirmed as modified; cause remanded with directions.