

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).

2011 IL App (4th) 100006-U

Filed 7/25/11

NO. 4-10-0006

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

<p>THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LUIS CANO, Defendant-Appellant.</p>	<p>) Appeal from) Circuit Court of) Livingston County) No. 09CF74)) Honorable) Jennifer H. Bauknecht,) Judge Presiding.</p>
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JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Turner and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant not entitled to additional sentence credit from the date the information was filed where no warrant issued and bond was not set.

¶ 2 On September 21, 2009, a jury found defendant, Luis Cano, guilty of aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)). On November 16, 2009, the trial court sentenced him to four years in prison with sentence credit from May 4, 2009, the date his bond was set.

¶ 3 On appeal, defendant argues he is entitled to sentence credit from March 12, 2009, the date the information was filed. We affirm.

¶ 4 On March 12, 2009, the State charged defendant, an inmate at the Pontiac Correctional Center (Pontiac), with aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)). The information alleged that on or about November 1, 2008, defendant knowingly made physical contact of an insulting or provoking nature with Greg Foltyniewicz, knowing Foltyniewicz was a

correctional institution employee engaged in the execution of his official duties, by throwing a liquid substance (urine) on Foltyniewicz. On March 17, 2009, the trial court issued a writ of *habeas corpus ad prosequendum* directing defendant be transported to the Livingston County Courthouse on May 4, 2009.

¶ 5 On May 4, 2009, defendant made his first appearance, and the trial court appointed counsel for him. The court set a \$50,000 bond. Defendant was to be released from prison on the unrelated charge "sometime in August."

¶ 6 Defendant's presentence investigation and report showed defendant was released from the Illinois Department of Corrections on June 22, 2009, and returned to Livingston County, where he was unable to post bond.

¶ 7 On September 21, 2009, a jury found defendant guilty of aggravated battery. On November 16, 2009, the trial court sentenced him to four years in prison with sentence credit from May 4, 2009, the date his bond was set. This appeal followed.

¶ 8 Initially, we note defendant attached to the appendix of his brief a copy of an order entered by the First District Appellate Court dated April 30, 2009, reversing the trial court's judgment in an unrelated charge for which defendant was imprisoned at the time of the commission of the instant offense. Defendant does not identify a date when the appellate court issued its mandate.

¶ 9 Defendant argues he is entitled to sentence credit from March 12, 2009, the date the information was filed. We disagree.

¶ 10 It is statutorily mandated that a trial court give credit to a defendant for his presentence incarceration. 730 ILCS 5/5–8–7(b) (West 2008); *People v. Beachem*, 229 Ill. 2d

237, 244, 890 N.E.2d 515, 519 (2008). We review the scope and application of a statute *de novo*. *People v. Caballero*, 228 Ill. 2d 79, 82, 885 N.E.2d 1044, 1046 (2008).

¶ 11 Section 5–8–(b) of the Unified Code of Corrections (730 ILCS 5/5–8–(b) (West 2008)) provides an offender shall be given credit on his sentence "for time spent in custody as a result of the offense for which the sentence was imposed." 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. Lignons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). "[A] defendant will not be credited for the day of sentencing in which he is remanded to the Department of Corrections." *People v. Foreman*, 361 Ill. App. 3d 136, 157, 836 N.E.2d 750, 768 (2005).

¶ 12 In support of his argument that he should receive sentence credit from the date the information was filed, defendant cites to *People v. Robinson*, 172 Ill. 2d 452, 667 N.E.2d 1305 (1996). In *Robinson*, the supreme court applied section 5–8–7(b) of the Unified Code of Corrections (730 ILCS 5/5–8–7(b) (West 1992)) in the context of a defendant who had been simultaneously in custody to some extent while awaiting trial and sentencing on two unrelated charges. The court determined that the defendant should receive sentence credit on both offenses for each day he spent in simultaneous custody and additional credit against each sentence for time spent in custody on that offense only. *Robinson*, 172 Ill. 2d at 454-56, 463, 667 N.E.2d at 1305-1307, 1310. While out on bond awaiting trial on one charge, the Robinson defendant committed another offense and surrendered in exoneration of the first bond.

¶ 13 Defendant's attempt to extend *Robinson* to the case at bar is misplaced. In *Robinson*, the defendant awaited trial and sentencing on two unrelated charges. In this case,

defendant was committed to the Department of Corrections at the time of the commission of the instant offense. See 730 ILCS 5/5-8-4(f) (West Supp. 2007) ("A sentence of an offender committed to the Department of Corrections at the time of the commission of the offense shall be served consecutive to the sentence under which he is held by the Department of Corrections"). "By enacting provisions relating to consecutive sentencing, the legislature sought to punish the commission of certain offenses more harshly." *People v. Latona*, 184 Ill. 2d 260, 271, 703 N.E.2d 901, 907 (1998). Further, the *Robinson* defendant received sentence credit from the date he surrendered in exoneration of his previously posted bond until he was released on a new bond. The *Robinson* court did not identify the dates informations or indictments were filed.

¶ 14 Defendant next cites two appellate court cases (*People v. Johnson*, 401 Ill. App. 3d 678, 937 N.E.2d 190 (2010) and *People v. Chamberlain*, 354 Ill. App. 3d 1070, 822 N.E.2d 914 (2005)) that expanded *Robinson* to apply to a defendant who is in custody serving a sentence on one charge at the same time that he or she is in presentence custody on an unrelated charge. The cases cited are factually distinguishable. Neither *Chamberlain* or *Johnson* involve a defendant committed to the Department of Corrections at the time of the commission of the subsequent offense.

¶ 15 In *Chamberlain*, the defendant was serving time in a youth center on an unrelated charge and sought credit for the time between when he was charged in the case at bar and when he was transferred from the youth center to a county jail. *Chamberlain*, 354 Ill. App. 3d at 1074, 822 N.E.2d at 918. Applying *Robinson* and *People v. Spencer*, 347 Ill. App. 3d 483, 807 N.E.2d 1228 (2004), the Third District held that the defendant was in simultaneous custody during that time and extended the reasoning of those cases to circumstances that did not involve the

revocation or withdrawal of a bond. *Chamberlain*, 354 Ill. App. 3d at 1074–75, 822 N.E.2d at 918. The appellate court noted that the reasoning was the same as in cases involving bond revocation or withdrawal. Once the defendant was charged with the present offense, he was simultaneously serving his prior sentence and in presentence custody. Thus, the court held that the defendant was entitled to credit from the date he was charged. *Chamberlain*, 354 Ill. App. 3d at 1075, 822 N.E.2d at 918. In *Johnson*, the Second District found the defendant entitled to 53 days of credit on his sentence for time spent in custody from the date of the complaint rather than the date of a subsequent indictment, even though the indictment was the charge that defendant was prosecuted on; although the warrant on the complaint was quashed, it was superseded by the warrant on the subsequent indictment with no intervening time when a warrant was not outstanding. *Johnson*, 401 Ill. App. 3d at 684-85, 937 N.E.2d at 195.

¶ 16 In *Robinson*, the defendant was entitled to credit for time spent in simultaneous custody when his bond was withdrawn or revoked. In *Chamberlain*, where the defendant was already serving a sentence on an unrelated offense, he was entitled to credit for time spent in simultaneous custody when he was charged, because, at that time, the defendant was unable to be released because of the outstanding warrant and his or her failure to post bond on the new charge. Similarly, in *Johnson*, the defendant was entitled to credit from the date that he was charged, where a warrant issued that same day, and bond set. The holdings of *Robinson*, *Chamberlain*, and *Johnson* are dependent upon circumstances where (1) a defendant has been charged, (2) a warrant issued, and (3) bond has been set. Then, bond is withdrawn, revoked, or not posted by the defendant. In this case, the defendant was charged on March 12, 2009, but a warrant did not issue that same day, and no bond was set until May 4, 2009. Thus, this defendant was not in

custody for the instant offense on March 12, 2009, where there was no outstanding warrant and bond was not set until May 4, 2009. Because defendant was not in custody on March 12, 2009, as a result of the instant offense, he is not entitled to sentence credit from March 12, 2009, the date the information was filed.

¶ 17 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 18 Affirmed.