

NOTICE  
Decision filed 12/07/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2011 IL App (5th) 100411-U  
NO. 5-10-0411  
IN THE  
APPELLATE COURT OF ILLINOIS  
FIFTH DISTRICT

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).

|                                      |   |                    |
|--------------------------------------|---|--------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the    |
|                                      | ) | Circuit Court of   |
| Plaintiff-Appellee,                  | ) | St. Clair County.  |
|                                      | ) |                    |
| v.                                   | ) | No. 97-CF-632      |
|                                      | ) |                    |
| GARY D. JOHNSON,                     | ) | Honorable          |
|                                      | ) | Annette A. Eckert, |
| Defendant-Appellant.                 | ) | Judge, presiding.  |

JUSTICE SPOMER delivered the judgment of the court.  
Presiding Justice Donovan and Justice Stewart concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the record reveals discrepancies on the custody date of the defendant, the cause is remanded to determine the correct custody date and how many days of presentence custody the defendant should have received.
- ¶ 2 The defendant, Gary D. Johnson, appeals the circuit court's dismissal of his postconviction petition. The only issue raised on appeal is whether the defendant is entitled to three additional days of presentencing credit. For the following reasons, we remand the cause to the circuit court to determine the number of days of presentencing credit to which the defendant is entitled.

**BACKGROUND**

- ¶ 3
- ¶ 4 On May 23, 2000, the defendant pled guilty to first-degree murder (720 ILCS 5/9-1(a)(2) (West 1992)) in exchange for the State recommending no more than a 40-year term of imprisonment. The court accepted the defendant's plea. On July 10,

2000, the court sentenced him to 40 years of imprisonment with credit for time served in presentence custody.

¶ 5 On July 12, 2007, the defendant filed a *pro se* petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)). In the petition, the defendant alleged that his due process rights were violated due to the circuit court's failure to admonish him of his mandatory-supervised-release term. The circuit court ordered the defendant's petition be recharacterized as a postconviction petition and found that the defendant had alleged the gist of a constitutional claim. The defendant was then appointed counsel.

¶ 6 Defense counsel amended the defendant's petition. The State filed a motion to dismiss arguing that the rule announced in *People v. Whitfield*, 217 Ill. 2d 177 (2005), was not retroactive. On August 11, 2010, the circuit court granted the State's motion to dismiss. The defendant filed this timely appeal.

¶ 7 ANALYSIS

¶ 8 On appeal, the sole issue raised is whether the defendant is entitled to additional days of presentencing credit. We note that no other issues from the defendant's postconviction petition were raised here. The defendant argues that a reviewing court may correct a mittimus at any time, even when the issue was not brought in the defendant's postconviction petition. The defendant argues that the record on appeal, specifically the presentence investigation report, reflects that the defendant was arrested on June 16, 1997, and that the defendant was sentenced on July 10, 2000. The defendant also argues that this court should take judicial notice of the Illinois Department of Corrections website, which indicates that the defendant's custody date was June 19, 1997. Thus, the defendant argues that there is an error in his presentence credit award and that he is entitled to an additional three days of

presentencing credit.

¶ 9 In response, the State agrees that a reviewing court may amend a mittimus to reflect additional sentencing credit, even if the issue was not raised in the postconviction petition. However, the State argues that the instant case contains discrepancies in the record regarding the defendant's arrest date. In particular, the State argues that the presentence investigation report reveals an arrest date of June 16, 1997, while the arrest warrant was not issued until June 18, 1997. Therefore, the State requests that the cause be remanded to the circuit court to determine the correct date of arrest and days of presentencing credit. It further contends that police reports which were not contained in the record on appeal could be helpful in solving the discrepancies on remand.

¶ 10 When a defendant is sentenced, he or she shall be entitled to credit for time spent in presentencing custody as a consequence of that offense. 730 ILCS 5/5-8-7(b) (West 1998) (now see 730 ILCS 5/5-4.5-100(b) (West 2008)). "A defendant held in custody for any part of the day should be given credit against his sentence for that day." *People v. Johnson*, 396 Ill. App. 3d 1028, 1033 (2009). Furthermore, "the statutory right to sentence credit is mandatory and can be raised for the first time on appeal." *People v. Cook*, 392 Ill. App. 3d 147, 149 (2009).

¶ 11 We agree that a reviewing court can amend a mittimus to reflect additional presentence credit, even where the issue was not raised in the defendant's postconviction petition. However, the record must be clear for us to make a determination of how much credit should have been received. The record on appeal reflects discrepancies that must be resolved on remand. Specifically, we note that the record reveals that the arrest warrant was issued on June 18, 1997, while the presentence investigation report states that the defendant was arrested on June 16,

1997. These conflicting documents alone create a discrepancy that prevents us from being able to accurately determine the correct amount of presentence credit the defendant should have received. Therefore, we remand the cause for the determination of how many days of presentence credit to which the defendant is entitled.

¶ 12

#### CONCLUSION

¶ 13

For the foregoing reasons, we remand the cause to the circuit court for the determination of when the defendant was taken into custody and the number of days of presentence custody credit the defendant should have received.

¶ 14

Remanded with directions.