



were to be served concurrently with one another and consecutively to a prior sentence imposed against the plaintiff in Nevada.

¶ 5 Subsequently, in case No. 00-CF-78, the circuit court entered a supplement to the judgment and sentence ordering that the plaintiff be given credit for time served from September 27, 2000, to September 17, 2001, for a total of 356 days.

¶ 6 The plaintiff completed his sentence in the Nevada case on August 25, 2008, and began to serve his time in the Illinois cases. On July 7, 2010, the plaintiff filed a complaint for *mandamus* relief and a "Motion for Order *Nunc Pro Tunc*" arguing that in case No. 00- CF-78, he was not given credit for his time served as ordered by the court. The plaintiff's complaint and motion were accompanied by, *inter alia*, a copy of a grievance report. The report stated, "Offender grieves that he is not receiving 356 days credit that the Johnson County circuit court ordered May 15, 2007." The report shows that the grievance was denied, and the chief administrative officer concurred in the denial. The report also reveals that the plaintiff's signature was affixed to the bottom of the report stating that he was appealing the denial to the Director.

¶ 7 In response to the plaintiff's *mandamus* complaint, the defendant filed a motion for summary judgment, arguing that there were no genuine issues of material fact and that the calculation of the plaintiff's sentence was correct.

¶ 8 The circuit court granted the defendant's motion for summary judgment and dismissed the plaintiff's *mandamus* complaint with prejudice. The plaintiff filed this timely appeal.

¶ 9 ANALYSIS

¶ 10 We review the circuit court's grant of summary judgment *de novo*. *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274, 280 (2007). On appeal, the plaintiff argues that

the defendant should have credited him with the 356 days of time served against his combined sentence. In response, the defendant argues that the plaintiff failed to demonstrate that he had exhausted all his administrative remedies. In the alternative, the defendant argues that the plaintiff's sentence was calculated correctly and that his release date was not affected because he is also serving a concurrent 52-year sentence.

¶ 11 We first note that the defendant's argument regarding the exhaustion of administrative remedies was not raised in the circuit court. "Failure to exhaust administrative remedies is an affirmative defense that is waived if not raised in the trial court." *Hawthorne v. Village of Olympia Fields*, 204 Ill. 2d 243, 254 (2003). Although the defendant raises failure to exhaust administrative remedies for the first time on appeal, the Illinois Supreme Court has held, "It is quite established that 'the appellee may urge any point in support of the judgment on appeal, even though not directly ruled on by the trial court, so long as the factual basis for such point was before the trial court.'" *Beahringer v. Page*, 204 Ill. 2d 363, 370 (2003) (quoting *Shaw v. Lorenz*, 42 Ill. 2d 246, 248 (1969)).

¶ 12 Here, the defendant did not raise the argument of failure to exhaust administrative remedies in the circuit court, and the record on appeal does not provide us with a complete picture that would allow us to review this argument on appeal. The plaintiff did attach a copy of his grievance report to his *mandamus* complaint. However, this report shows that he appealed the decision to the Director, but there is no record that the Director ever rendered a decision on the appeal. Thus, without a complete factual basis in the record, we cannot consider this argument, and we deem it waived. We will now address the merits of the plaintiff's petition for *mandamus*.

¶ 13 In his *mandamus* petition, the plaintiff argues that the presentence credit of

356 days ordered by the circuit court on May 15, 2007, should be applied to his combined sentence of 52 years, which would include both his 20-year sentence from case No. 00-CF-78 and his 52-year sentence from case No. 00-CF-91. He requests that the defendant be ordered to give him 356 days against his sentence as ordered by the circuit court.

¶ 14           However, the problem with this argument is that the circuit court only ordered that the 356 days of credit be given in case No. 00-CF-78, which is the plaintiff's 20-year sentence. *Mandamus* is an extraordinary remedy by which an inmate can compel a public official to perform a mandatory duty that does not involve an exercise of discretion. *Turner-El v. West*, 349 Ill. App. 3d 475, 480 (2004). An order of *mandamus* will only be granted if a plaintiff can establish all of the following conditions: (1) a clear affirmative right to relief, (2) a clear duty of the public officer to act, and (3) clear authority on behalf of the public officer to comply with a *mandamus* order. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 434 (2007). The burden lies on the plaintiff to demonstrate material facts to prove the conditions. *Id.*

¶ 15           Here, the plaintiff does not demonstrate any of the required conditions for the court to grant *mandamus*. The circuit court ordered that the plaintiff receive credit for time served in presentence custody in case No. 00-CF-78. However, this credit did not affect the plaintiff's release date because he is also concurrently serving a 52-year sentence. The plaintiff requests that the credit be applied to his combined sentence so that his release date would be affected. The crediting of time for presentence custody that was not ordered by the circuit court is not a mandatory duty of the defendant, and thus, the defendant cannot be compelled to perform this by an order of *mandamus*.

¶ 16 Nevertheless, we note that it appears that the plaintiff might have been in presentence custody simultaneously on different charges. The Illinois Supreme Court has "determined that defendant should receive sentence credit on both offenses for each day he spent in simultaneous custody." *People v. Latona*, 184 Ill. 2d 260, 270 (1998) (citing *People v. Robinson*, 172 Ill. 2d 452 (1996)). However, whether the plaintiff was held in simultaneous custody is not completely clear from the record on appeal, and whether the circuit court should have granted presentence custody for case No. 00-CF-91 is not before the court at this time. Therefore, we find that the circuit court's order of 356 days of presentence custody to be applied to case No. 00-CF-78 was properly credited to the plaintiff, and the circuit court's grant of summary judgment is affirmed.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the circuit court's order granting the defendant's motion for summary judgment of the plaintiff's *mandamus* complaint is affirmed.

¶ 19 Affirmed.