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2012 IL App (3d) 100959-U

Order filed July 31, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Tazewell County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal Nos. 3-10-0959 and 3-11-0643
v.	)	Circuit No. 08-CF-483
	)	
	)	Honorable
HERBERT BENHAM,	)	Timothy M. Lucas, Richard Grawey, and
	)	Stuart P. Borden,
Defendant-Appellant.	)	Judges, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* We dismiss appeal No. 3-10-0959 for want of jurisdiction, and we award defendant $370 of $5-per-day credit in appeal No. 3-11-0643.

¶ 2 Defendant, Herbert Benham, appealed the dismissal of his motion to withdraw his guilty plea in appeal No. 3-10-0959. He also appealed the denial of his postconviction petition in appeal No. 3-11-0643. This court consolidated both cases under appeal No. 3-10-0959[1]. We

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[1]Throughout the rest of this order, any reference to appeal No. 3-10-0959 is only to the

dismiss appeal No. 3-10-0959 for want of jurisdiction. Defendant's sole argument on appeal is that he should receive a $5-per-day credit towards his $5,000 fine. We find a jurisdictional basis for that argument in defendant's timely appeal of his postconviction petition, and we affirm appeal No. 3-11-0643 as modified.

¶ 3 FACTS

¶ 4 Defendant was arrested on August 12, 2008, on charges of unlawful possession of methamphetamine precursor (720 ILCS 646/20(a)(1) (West 2008)). On August 27, 2008, defendant was released on bail. After posting bail, defendant was arrested in Tennessee. On June 10, 2009, defendant signed a waiver of extradition. In July 2009, defendant was returned to the Tazewell County jail where he posted bail on August 6, 2009.

¶ 5 On October 19, 2009, defendant appeared for a negotiated plea. Defendant pled guilty to unlawful possession of methamphetamine precursor and was sentenced to pay a $5,000 fine and to serve six years in prison. The State informed the court that defendant was entitled to 261 days of sentencing credit. The trial court stayed execution of defendant's sentence until January 11, 2010. Defendant's surrender date was extended several times; however, his bond was ordered forfeited and an arrest warrant was issued on February 19, 2010. On July 23, 2010, defendant was remanded to the Department of Corrections (DOC).

¶ 6 On August 19, 2010, defendant filed a motion to withdraw his guilty plea. The State filed a motion to strike defendant's motion as untimely. The trial court granted the State's motion, and defendant filed a timely notice of appeal. We docketed this appeal as appeal No. 3-10-0959.

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appeal of defendant's motion to withdraw his guilty plea, while reference to appeal No. 3-11-0643 is to defendant's appeal of the dismissal of his postconviction petition.

¶ 7 On January 19, 2011, defendant filed a postconviction petition. After counsel was appointed, the State filed a motion to dismiss defendant's petition. On September 8, 2011, the trial court granted the State's motion to dismiss, and defendant filed a notice of appeal. This appeal was docketed as appeal No. 3-11-0643 and was consolidated with defendant's earlier appeal.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant argues that under section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) he is entitled to a $5-per-day credit against his fine for the time he spent in custody prior to being remanded to the DOC. 725 ILCS 5/110-14(a) (West 2008).

¶ 10 The State argues that we do not have jurisdiction over this case for two reasons. First, it argues that we lack jurisdiction because defendant's motion to withdraw his guilty plea was untimely. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). Second, although the State concedes that defendant timely appealed the final order dismissing his postconviction petition, it argues that defendant failed to provide an independent jurisdictional basis for his monetary credit argument because he did not raise this claim in the trial court and he does not make an argument concerning his postconviction petition in this appeal. See *People v. Permanian*, 381 Ill. App. 3d 869 (2008). Alternatively, the State contends that if this court finds that it has jurisdiction to address defendant's monetary credit argument, then it should reduce his credit against his term of incarceration, as the trial court miscalculated the number of days.

¶ 11 I. Appeal No. 3-10-0959

¶ 12 We agree with the State that we do not have jurisdiction to address the trial court's order that struck defendant's motion to withdraw his guilty plea in appeal No. 3-10-0959. Illinois

Supreme Court Rule 604(d) states in part:

> "No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

The date on which the sentence is imposed under Rule 604(d) is the date that the judgment and sentence were filed. *People v. Wright*, 337 Ill. App. 3d 759 (2003).

¶ 13 Defendant filed his motion to withdraw his guilty plea on August 19, 2010. This filing was nine months after his 30-day filing period had ended. The lapse of more than 30 days from sentencing divested the trial court of jurisdiction to entertain the motion. *People v. Tlatenchi*, 391 Ill. App. 3d 705 (2009). As a result, we have no jurisdiction to do anything but dimiss this appeal. *People v. Haldorson*, 395 Ill. App. 3d 980 (2009). Therefore, we dismiss appeal No. 3-10-0959 for want of jurisdiction.

¶ 14 II. Appeal No. 3-11-0643

¶ 15 Contrary to the State's second argument, we find that we have jurisdiction over defendant's postconviction petition appeal. Defendant's notice of appeal was filed within 30 days after the entry of the trial court's order dismissing the petition. See Ill. S. Ct. Rs. 651 (eff. April 26, 2012), 606(b) (eff. Mar. 20, 2009). This was the jurisdictional act. Although defendant waived review of his postconviction petition by failing to raise any issue concerning it, we decline to apply the *Permanian* rationale that would require him to make a postconviction argument, providing an independent jurisdictional basis, before we could address his monetary credit request. It is well settled that we may address a defendant's statutory claim for credit at

any time and at any stage of court proceedings. *People v. Caballero*, 228 Ill. 2d 79 (2008). In *Caballero*, our supreme court reasoned that granting the $5-per-day credit is a simple ministerial act that promotes judicial economy by ending any further proceedings. *Id*. Therefore, we elect to address defendant's monetary credit argument.

¶ 16 Section 110-14 of the Code allows a "person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense *** a credit of $5 for each day so incarcerated." 725 ILCS 5/110-14(a) (West 2008).

¶ 17 From our review of the record, we find that defendant is entitled to 74 days of monetary credit. Defendant spent 16 days in jail on a bailable offense between his arrest date on August 12, 2008, until he was released on bail on August 27, 2008. After his release, defendant was arrested in Tennessee and waived extradition on June 10, 2009. Defendant was returned to Illinois, where he posted bail on August 6, 2009. During this period, defendant was entitled to 58 days of monetary credit from the date he waived extradition until he posted bail in Illinois. See *People v. Rhoden*, 299 Ill. App. 3d 951 (1998).

¶ 18 We further find that defendant is not entitled to monetary credit for the time he spent in custody after his sentence was entered, but before he was transferred to the DOC. See *People v. Mitchell*, 403 Ill. App. 3d 707 (2010). The plain language of section 110-14 of the Code permits defendant to receive the credit for the days he spent in custody until the "fine is levied on conviction." 725 ILCS 5/110-14(a) (West 2008). Therefore, we modify the mittimus to reflect a $370 credit against defendant's $5,000 fine.

¶ 19 III. Incarceration Credit0

¶ 20 Finally, the State argues that defendant should have received only 41 days of credit

against his term of incarceration, instead of the 261 days he was awarded. We find that the State cannot raise this issue on appeal. At defendant's guilty plea proceedings, the State took the position that defendant would receive 261 days of credit against his negotiated term of imprisonment. Therefore, the State is estopped from arguing on appeal that defendant's sentence credit was erroneous. See *People v. Carey*, 386 Ill. App. 3d 254 (2008).

¶ 21 Alternatively, this argument puts the State in the position of an appellant, and challenging the calculation for time served is not among the list of limited issues for a State's appeal. Ill. S. Ct. R. 604(a)(1) (eff. July 1, 2006); see also *People v. Goodwin*, 381 Ill. App. 3d 927 (2008).

¶ 22 CONCLUSION

¶ 23 For the foregoing reasons, appeal No. 3-10-0959 is dismissed for want of jurisdiction. The judgment of the circuit court of Tazewell County in appeal No. 3-11-0643 is affirmed as modified.

¶ 24 No. 3-10-0959 dismissed.

¶ 25 No. 3-11-0643 affirmed as modified.