

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).

2013 IL App (4th) 110752-U

NO. 4-11-0752

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

February 20, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
WILLIAM J. MILLER,)	No. 07CF98
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Steigmann and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment as modified but remanded with directions to (1) grant defendant an additional day of credit for time served, and (2) reduce the amount of total accrued probation fees from \$1,200 to \$1,100; the court rejected defendant's claim for *per diem* credit satisfying a \$200 noncreditable sexual assault fine.

¶ 2 In May 2007, defendant, William J. Miller, entered a blind plea to aggravated criminal sexual abuse. In July 2007, the trial court sentenced defendant to four years of probation, including as a condition 180 days in jail and requiring defendant to pay, among other things, a \$200 sexual assault fine and \$25 a month in probation supervision fees.

¶ 3 In August and September 2009, the trial court issued three arrest warrants when defendant failed to appear in court. Police executed the third warrant on September 23, 2009. Defendant posted bond and was released that day.

¶ 4 In March 2011, the State filed its third petition to revoke defendant's probation, alleging defendant failed to complete sex offender treatment as required by the court. Defendant admitted he failed to complete the treatment, and in June 2011, the trial court resentenced defendant to three years in prison. The court credited defendant with 93 days for time spent in custody from April 22, 2007 through July 23, 2007. The court specified "all outstanding fines, costs and assessments" as set forth in the court's July 23, 2007, sentencing order remained in effect.

¶ 5 Defendant appeals, arguing (1) he is entitled to an additional day of sentencing credit, (2) he should be credited \$200 in \$5 *per diem* credit against his \$200 sexual assault fine for time previously served, and (3) the trial court erroneously calculated the probation fees defendant owed. We affirm as modified and remand with directions.

¶ 6 I. BACKGROUND

¶ 7 In April 2007, the State charged defendant with aggravated criminal sexual abuse based on defendant, who was over 17, touching the vagina of T.M.J., a 14-year-old. In May 2007, defendant entered a blind guilty plea to the charges. In July 2007, the trial court sentenced defendant to four years of probation, including as a condition 180 days in jail. The court credited defendant with 93 days for time previously served. The court also entered an order requiring defendant to register as a sexual predator pursuant to the Sex Offender Registration Act (730 ILCS 150/1 to 12 (West 2006)). With respect to monetary assessments, the court stated as follows:

"And there are some court costs to pay, crime victims fund. I am ordering you to pay \$25.00 a month probation supervision fees.

All of that will start on 11-1-07. You are going to pay that at the rate of \$35.00 a month beginning 11-1-07."

¶ 8 The trial court's July 2007 written sentencing order required defendant to pay, among other assessments, a \$25 crime victim's fund charge and a \$200 sexual assault fine. The order reiterated defendant would start paying \$35 per month on "11-1-07" but listed defendant's \$25 probation services fee as due beginning "10-1-07." The docket entry from that date states defendant was convicted of aggravated criminal sexual abuse and placed on probation but does not mention any of defendant's assessments. Defendant took no direct appeal.

¶ 9 In November 2007, the State filed a petition to revoke defendant's probation, alleging defendant violated his probation by failing to register as a sex offender in Edgar County, Illinois. In December 2007, defendant admitted having violated the terms of his probation by failing to timely register. In February 2008, the trial court resentenced defendant to four years' probation, ordering defendant to complete the additional requirements of (1) obtaining his general equivalency diploma (GED) or a high school diploma by February 4, 2009, and (2) completing sex offender treatment as directed by the court services department.

¶ 10 In September 2008, the State filed a second petition to revoke probation, again alleging defendant failed to register as a sex offender in Edgar County. The following month, the State withdrew the petition because the circuit court in Edgar County found defendant had complied with his registration obligation.

¶ 11 The trial court issued an arrest warrant after defendant failed to appear in court for a payment review. Police arrested defendant on September 23, 2009, and subsequently released him that day after he posted a \$300 bond.

¶ 12 In March 2011, the State filed a third petition to revoke probation, alleging defendant failed to complete sex offender treatment and to pay court costs and probation fees. At an April 2011 hearing, defendant admitted failing to complete sex offender treatment but denied the State's contentions with respect to the costs and fees. Thereafter, the State withdrew the allegation defendant willfully failed to pay the assessments.

¶ 13 In June 2011, the trial court resentenced defendant to three years in prison, crediting defendant with 93 days for time defendant spent in custody from April 22, 2007, through July 23, 2007. The court specified "all outstanding fines, costs and assessments" set forth in the July 23, 2007, order remained in effect and were due within 12 months of defendant's release from prison.

¶ 14 That month, defendant filed a motion to reconsider sentence, which the trial court denied following an August 2011 hearing.

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant contends (1) he is entitled to an additional day of sentencing credit, (2) he should be credited \$200 in \$5 *per diem* credit for time served against his \$200 sexual assault fine, and (3) the trial court erroneously calculated the probation fees he owes. We address defendant's contentions in turn.

¶ 18 A. Additional Day of Sentencing Credit

¶ 19 Defendant first argues he is entitled to an additional day of sentencing credit for September 23, 2009. The State concedes this issue. We accept the State's concession.

¶ 20 Pursuant to section 5-4.5-100(b) of the Unified Code of Corrections (Unified

Code), a defendant "shall be given credit" for time the defendant "spent in custody as a result of the offense for which the sentence was imposed[.]" 730 ILCS 5/5-4.5-100(b) (West 2008). As defendant points out, prior to July 1, 2009, section 5-8-7 of the Unified Code governed sentencing credit. 730 ILCS 5/5-8-7 (West 2008). On July 1, 2009, Public Act 95-1052 renumbered section 5-8-7 as section 5-4.5-100 without substantively changing the statute. Pub. Act 95-1052, § 5 (eff. July 1, 2009) (2008 Ill. Laws 4204, 4223) Defendant spent time in custody both before and after July 1, 2009; however, under either version of the statute, defendant is entitled to credit for the time he spent in custody as a result of his criminal sexual abuse charge. This issue is not subject to default. *People v. Dieu*, 298 Ill. App. 3d 245, 249-50, 698 N.E.2d 663, 665-66 (1998).

¶ 21 Here, the trial court credited defendant for the 93 days he spent in jail from April 22, 2007, through July 23, 2007. However, the record reflects defendant was also in custody on September 23, 2009, when police executed an arrest warrant for defendant's failure to appear "on Criminal Sexual Abuse." Because the offense underlying defendant's arrest warrant was criminal sexual abuse, defendant is entitled to one day of credit for his September 23, 2009, custody. See *People v. Hernandez*, 345 Ill. App. 3d 163, 170, 803 N.E.2d 577, 582 (2004) (crediting the defendant, who was indicted for aggravated criminal sexual abuse, for the time he spent in custody after police executed a warrant for his failure to appear because "[t]he offense underlying the issuance of the bench warrant to arrest was aggravated criminal sexual abuse.").

Accordingly, defendant's sentencing order should be modified to reflect one additional day of credit.

¶ 22 B. \$200 Credit

¶ 23 Defendant next asserts he is entitled to \$200 of monetary credit against his \$200 sex assault fine. The issue is not subject to forfeiture. *People v. Watson*, 318 Ill. App. 3d 140, 143, 743 N.E.2d 147, 149 (2000) (citing *People v. Woodard*, 175 Ill. 2d 435, 457, 677 N.E.2d 935, 945-46 (1997)). Although the State concedes defendant is entitled to credit against his sex assault fine, our review of the Code of Criminal Procedure of 1963 (Procedure Code) reveals the \$5-a-day credit set forth in section 110-14 of the Procedure Code (725 ILCS 5/110-14(a) (West 2006)) is clearly not available to defendant. The State's concession was ill-advised and incorrect.

¶ 24 Subsection (a) of section 110-14 of the Procedure Code (725 ILCS 5/110-14(a) (West 2006)) entitles a defendant to \$5 of credit against fines for each day of time the defendant serves on a bailable offense, with the total amount of credit not to exceed the amount of the defendant's fines. However, subsection (b) states "[s]ubsection (a) does not apply to a person incarcerated for sexual assault" as defined in section 5-9-1.7(a)(1) of the Unified Code. 725 ILCS 5/110-14(b) (West 2006). Section 5-9-1.7(a)(1) defines "[s]exual assault" as including aggravated criminal sexual abuse. 730 ILCS 5/5-9-1.7(a)(1) (West 2006).

¶ 25 Because defendant was convicted of aggravated criminal sexual assault, defendant is not entitled to a *per diem* credit against his \$200 sex assault fine.

¶ 26 C. The Probation Fees

¶ 27 Defendant also claims the trial court erred by calculating his probation supervision fees. Actually, the court set the fees at \$25 per month and the circuit clerk's record sheet reflects a total of \$1,200 in probation fees. Specifically, defendant posits the fees totaled \$1,100, not \$1,200. The State concedes defendant's probation fees should be reduced. We accept the State's concession and agree.

¶ 28 Pursuant to section 5-6-3(i) of the Unified Code (730 ILCS 5/5-6-3(i) (West 2006)), a probation supervision fee "shall be imposed only upon an offender who is actively supervised by the probation and court services department."

¶ 29 Here, the trial court imposed a sentence of probation on July 23, 2007, at which time the court stated as follows:

"[T]here are some court costs to pay, crime victims fund. I am ordering you to pay \$25.00 a month probation supervision fees.

All of that will start on 11-1-07. You are going to pay that at the rate of \$35.00 a month beginning 11-1-07."

¶ 30 The trial court's written sentencing order required defendant to pay a \$25 crime victim's fund charge, a \$200 sex assault fine, a \$200 deoxyribonucleic acid (DNA) fee, human immunodeficiency virus (HIV) test costs, and a probation supervision fee of \$25 a month "beginning 10-1-07." The order reiterated "[t]he above amounts" should be paid to the clerk in monthly amounts of \$35 a month "beginning 11-1-07." The docket entry from defendant's July 23, 2007, sentencing hearing does not mention any of defendant's assessments. However, the trial court later ordered defendant to appear in court on July 11, 2008, to review his payment records. A docket entry from July 11, 2008, states, "when [defendant] was sentenced on 7-23-07 he was ordered to pay \$35.00 a [month] commencing 11-1-07."

¶ 31 "Although the common law record imports verity and is presumed correct, where the common law record is contradicted by matters in the report of proceedings, a reviewing court must look at the record as a whole to resolve the inconsistencies." *People v. Durr*, 215 Ill. 2d 283, 306, 830 N.E.2d 527, 540 (2005). Where the sentence indicated in the common-law record

conflicts with the sentence imposed by the judge as indicated in the report of proceedings, the report of proceedings will prevail. *People v. Peebles*, 155 Ill. 2d 422, 496, 616 N.E.2d 294, 329 (1993). Given the trial court's comments during sentencing and the fact all other payments in this case began on November 1, 2007, we conclude the commencement date for defendant's \$25 monthly probation fee was November 1, 2007.

¶ 32 On June 6, 2011, the trial court resentenced defendant to four years in prison following the revocation of defendant's probation. At that point, defendant was no longer being "actively supervised by the probation and court services department." 730 ILCS 5/5-6-3(i) (West 2008). Thus, defendant's obligation to pay \$25 per month in probation fees spanned from November 1, 2007, through and including June 1, 2011—a period of 44 months. Defendant's probation fees in this case therefore totaled \$1,100. Defendant's payment status sheet currently reflects defendant owes \$1,200 in probation fees and should therefore be corrected to reflect as due \$1,100 in probation fees.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment as modified but remand with directions to (1) grant defendant an additional day of credit for time served, and (2) reduce the amount of total accrued probation fees from \$1,200 to \$1,100.

¶ 35 Affirmed as modified and cause remanded with directions.