

No. 1-13-0557

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 16238
)	
PIERRE JOHNSON,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held:* Where the defendant is currently serving a term of probation, this court need not order that the mittimus be amended at this stage to reflect the days spent in pre-sentencing custody that would be applied toward any potential prison sentence imposed upon a probation revocation.

¶ 2 Following a bench trial, defendant Pierre Johnson was convicted of aggravated fleeing or attempting to elude a police officer pursuant to section 11-204.1 of the Illinois Vehicle Code (625 ILCS 5/11-204.1 (West 2010)). After defendant's trial, the court ordered that he be placed on electronic monitoring until his sentencing hearing. On appeal, defendant contends the

sentencing order in his case should be corrected to reflect 33 days of credit for the time he spent on electronic monitoring. Because such an amendment would have no effect at this time, we reject defendant's contention and affirm the judgment of the trial court.

¶ 3 Defendant was arrested on February 5, 2011, for continuing to drive for two miles and disobeying seven stop signs after police attempted to stop his vehicle. The trial court completed a bench trial and found defendant guilty on December 12, 2012. The court ordered that defendant be placed on electronic home monitoring until his sentencing hearing in lieu of posting bail. On January 14, 2013, the court sentenced defendant to two years of felony probation and ordered defendant to complete 15 days of the Sheriffs Work Alternative Program (SWAP) and pay \$650 in various fines and fees, including a \$200 DNA analysis fee.

¶ 4 The following exchange then occurred:

"THE COURT [to defense counsel]: How many days has your client been in physical custody on this case? It appears bail was made February 6, 2011.

MS. PRUSAK [defense counsel]: Yes, and – February 6, 2011.

THE COURT: Yes.

MS. PRUSAK: So it was one day, but he has it since the day of electronic monitoring, so it would be 33 days in total.

THE COURT: No, I will just give the one day [of credit]. If your client was going to the penitentiary, I would give him credit for the electronic monitoring, but since he isn't I am not. Sir, I will give you credit for one day that you have been in custody for fines only."

¶ 5 The State Appellate Defender was appointed to represent defendant on appeal and filed a timely notice of appeal.

¶ 6 On April 25, 2014, the State Appellate Defender filed a motion for summary disposition, asserting that the \$200 DNA fee imposed against defendant should be vacated because, due to his prior convictions, it was to be "presumed" that he had already provided a DNA sample. The motion also asked that the sentencing order in defendant's case be amended to reflect credit for the time defendant was on electronic monitoring. The State filed a written response agreeing the DNA fee should be vacated; however, the State objected to a summary disposition on the sentencing credit issue.

¶ 7 On May 21, 2014, this court ordered the clerk of the circuit court to amend the fines and fees order to assess a total judgment of \$445, to reflect the vacating of the \$200 DNA fee and an award of \$5 in credit toward his total fines. This court's order further stated that "the motion is otherwise denied" and that "[t]his appeal shall continue as to the issue of appellant's credit for electronic monitoring."

¶ 8 On appeal, defendant again contends his sentencing order should be corrected to reflect credit for the 33 days he spent on electronic monitoring between his trial and his sentencing hearing. Defendant acknowledges the credit for time spent on electronic monitoring would not reduce the time he spends on probation; however, he maintains he will be entitled to that credit to offset any prison sentence imposed upon a violation of his probation. Defendant argues the current sentencing order is incorrect because it awards him credit for one day of custody (February 6, 2011, which was the day after his arrest), and he asserts the amendment he seeks is necessary for an "accurate sentencing order."

¶ 9 A defendant shall receive a day of credit toward a sentence of imprisonment for each day spent in custody as a result of the offense for which the sentence was imposed. 730 ILCS 5/5-4.5-100(b) (West 2012). That sentencing credit can be awarded for time spent in electronic home detention, with certain exceptions not relevant here. *Id.*; see also 730 ILCS 5/5-8A-3 (West 2012).

¶ 10 Defendant correctly observes that version of the statute, which took effect June 22, 2012, can be applied to his case because he is entitled to be sentenced under either the law that was in effective at the time of the offense or the law in effect at the time of the sentencing, citing *People v. Calhoun*, 377 Ill. App. 3d 662, 664 (2007). The prior version of the statute left to the discretion of the trial court the awarding of presentence custody credit for time spent on electronic home monitoring. 730 ILCS 5/5-4.5-100(b) (West 2010); see also *People v. Smith*, 2014 IL App (3d) 130548, ¶¶ 10-14 (explaining differences between 2010 and 2012 versions of statute). The State does not dispute that defendant is to receive credit for the time spent on electronic monitoring but contends the sentencing order does not need to be amended at this time.

¶ 11 We agree with the State that defendant's mittimus does not need to be corrected. Defendant is not entitled to credit for his time on electronic monitoring to offset either his term of probation (*People v. Speight*, 72 Ill. App. 3d 203, 211-13 (1979)), or the fines or fees that he was assessed as part of his sentence. *People v. Riley*, 2013 IL App (1st) 112472, ¶ 13 (citing *People v. Beachem*, 229 Ill. 2d 237, 243 (2008)). Only if the State seeks to revoke defendant's probation, and he is incarcerated as a result, will he be entitled to offset his prison sentence with the time he spent on electronic monitoring. 730 ILCS 5/5-4.5-100(b) (West 2012). At that point,

at the hearing on the hypothetical revocation of defendant's probation, defendant may bring his claim that he is entitled to 33 days' credit. See 730 ILCS 5/5-6-4(e) (West 2012) (upon finding that the defendant has violated a condition of his probation, the trial court may continue the term of probation or sentence the defendant to a term of incarceration). However, the amendment of defendant's sentencing order at this stage would serve no practical purpose because defendant is not currently serving a sentence to which such credit can be applied.

¶ 12 The authority on which defendant relies does not convince us that an amended sentencing order is necessary. *People v. Scheib*, 76 Ill. 2d 244 (1979), stands for the unchallenged proposition that a defendant who is sentenced following the revocation of his probation must be credited for all time spent in custody for that offense. Similarly, *People v. Morrison*, 298 Ill. App. 3d 241, 243-44 (1998), involved a probation revocation proceeding in which this court calculated the sentencing credit that the defendant should receive and remanded for the correction of the mittimus to reflect the appropriate number of days of credit. Here, neither *Scheib* nor *Morrison* applies because defendant's probation has not been revoked. Consequently, he is not yet entitled to have his time spent electronic home monitoring applied to his sentence.

¶ 13 Moreover, the State offers a valid reason that the sentencing order in this case should not be amended now. As noted above, defendant is not entitled to reduce his fines and fees with a \$5-per-day monetary credit for each day he spent on electronic monitoring. See *Riley*, 2013 IL App (1st) 112472, ¶ 13. By maintaining the original sentencing order reflecting the time defendant spent in actual custody, we will ensure that defendant receives the correct amount of *per diem* credit can be awarded against his fines and fees. Awarding defendant additional credit

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may engender confusion as to whether he should receive the \$5-per-day offset, and it will not be of any benefit to him at this point, as it cannot reduce his term of probation.

¶ 14 Accordingly, the judgment of the trial court is affirmed.

¶ 15 Affirmed.