FIFTH DIVISION
November 13, 2015

No. 1-13-2038

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.	)	Nos. 95 CR 23229
	)	96 CR 7032
	)	
ANTHONY COLEMAN,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant not entitled to correction of mittimus regarding pre-sentencing detention credit upon negotiated guilty plea, where record does not support contention that the plea agreement encompassed such credit.

¶ 2 Pursuant to a negotiated guilty plea, defendant Anthony Coleman (also known as Anthony Walker) was convicted in 2000 of possession of a controlled substance with intent to deliver and possession of a controlled substance and sentenced to consecutive prison terms of four and one years, to be served consecutively to an existing 55-year prison sentence. Defendant

now appeals from the denial of his 2013 *pro se* motion for a *nunc pro tunc* order to correct his pre-sentencing detention credit. He contends on appeal that the motion was erroneously denied because his plea agreement included 1,306 and 364 days' credit in these two cases. For the reasons stated below, we affirm the denial of the motion.

¶ 3 Defendant was arrested on January 16, 1996, on an initial charge of possession of a controlled substance, and bail was set on January 18th at $5,000. A bond forfeiture warrant was issued on April 23, 1996, and executed on the 30th. The State applied for a bail increase, alleging that he was on bail in another case when he committed the alleged offense of January 16, 1996. On May 2, 1996, the court vacated the bond forfeiture warrant and increased bail to $10,000. Another bond forfeiture warrant was issued on May 24, 1996, and a motion to vacate said warrant was entered on June 27, 1996, and continued thereafter until the court denied vacatur on July 12, 1996. The record reflects that defendant was in custody thereafter and does not indicate any subsequent change to the court's no-bail order.

¶ 4 On July 13, 2000, defendant pled guilty in case 96 CR 7032 to possession of a controlled substance (one gram or more, but less than 15 grams, of cocaine) with intent to deliver allegedly committed on January 16, 1996, and in case 95 CR 23229 to possession of a controlled substance (less than 15 grams of cocaine) allegedly committed on July 6, 1995. Defense counsel told the court that the "agreement is four years consecutive to one year, which is also consecutive to" an already-sentenced case, with no mention of any other terms. Defendant was admonished of his sentencing ranges, including that his sentences were extendible due to a prior conviction and must be served consecutively because he was on bond for one offense when he committed another. The court admonished defendant upon, and defendant waived, his right to trial and

particularly to a jury trial. The parties stipulated to the factual basis for the pleas: the summarized testimony of the police officers and forensic chemists in the two cases. The court ascertained defendant's plea to be voluntary and knowing, accepted the plea in both cases, and proceeded to sentencing. The State and defense counsel rested on the agreement, defendant declined to address the court, and the court sentenced him to prison terms of four and one years, to run consecutively to each other and an existing sentence in case 96 CR 18490. The court admonished defendant of his appeal rights. Defense counsel then informed the court that there was 1,671 days credit "on both cases" and that the bonds were exonerated in both cases. The court stated that "as long as the bonds weren't revoked when he was in custody *** he should receive credit" of 364 days in one case and 1,306 days in the other. The court reiterated that "if there's a problem, it will come back." The mittimus in case 95 CR 23229 reflects 364 days' credit and the mittimus in case 96 CR 7032 reflects 1,306 days' credit, with each mittimus stating that defendant's sentence is consecutive to the sentences in the other case and case 96 CR 18490.

¶ 5 Defendant filed his *pro se* motion for a *nunc pro tunc* order in April 2013. He alleged that on "June 25, 1996, while on bail, defendant was arrested for an unrelated charge and [the circuit court] ordered the bail be returned." He claimed that he was told by his counsel on July 23, 2000, that on a plea to both controlled-substance cases he would receive credit of 1,306 days and 364 days "as reflected by the mittimus" but the Department of Corrections (Department) "refuses to credit defendant with the above days, since, according to the [D]epartment he is also serving a 55 year consecutive sentence." He argued that "the promise of the sentencing credit was an essential part of the bargain" and he would have demanded trial without both the 1,306 and 364 days of credit. Attached to the motion were copies of the aforesaid mittimuses and a Department

sentence calculation worksheet computing his aggregate prison sentence of 60 years from a custody date of June 17, 1996.

¶ 6 The court heard the motion on May 10, 2013. The State informed the court that defendant's consecutive prior conviction was for "murder" with a 55-year sentence and argued that defendant received credit on the aggregate 60-year sentence and is entitled only "to get one actual day for one actual day that he spent in custody." The court denied the "motion for additional credit," finding that defendant received a prison sentence of an aggregate 60 years in the aforementioned three cases and "received credit for all time spent in custody on that aggregate sentence." Defendant's timely notice of appeal lists cases 95 CR 23229 and 96 CR 7032 and mentions sentences of 1 and 4 years.

¶ 7 Defendant contends on appeal that the denial of his motion for a *nunc pro tunc* order was erroneous because, by the terms of his plea agreement, he is entitled to an additional 1,670 days[1] of pre-sentencing detention credit. The State responds that defendant's understanding of the 2000 plea agreement is not the proper subject of *nunc pro tunc* relief intended to correct clerical errors and that neither the record nor the law support's defendant's interpretation of the agreement. Defendant replies that the plea hearing record supports his interpretation and he is merely seeking to correct the mittimus to reflect the plea agreement.

¶ 8 Before proceeding to the merits of this appeal, we note that the record on appeal does not include the common-law record in case 95 CR 23229, though that case was pled and sentenced along with case 96 CR 7032 and both cases were listed in the notice of appeal. The record also

[1] Though defense counsel mentioned 1,671 days at the 2000 plea hearing, defendant's brief notes that 1,306 and 364 adds up to 1,670 days.

does not contain any of the proceedings or the mittimus in case 96 CR 18490. We therefore do not know and cannot on this record discern when defendant was in custody on either case. This is highlighted by the credits defendant is now seeking: 364 days in 95 CR 23229 and 1,306 days in 96 CR 7032. From the plea and sentencing hearing of July 13, 2000, this would (by computation only) reflect custody dates in mid-July 1999 and mid-December 1996 respectively, neither of which corresponds to the arrest date in either case. By comparison, the June 17, 1996, custody date on the Department worksheet (which also does not correspond to the arrest dates) computes to 1,488 days' of pre-sentencing custody. Defendant seeks to cut through the confusion created by this incomplete record by contending that, regardless of how many days he was actually in custody upon these two cases or consecutively-sentenced case 96 CR 18490, his plea agreement included as an essential term the credits of 1,306 and 364 days in addition to whatever credit he received in 96 CR 18490.

¶ 9 For this contention, defendant relies upon *People v. Lenoir*, 2013 IL App (1st) 113615, and *People v. Clark*, 2011 IL App (2d) 091116. In *Lenoir*:

> "there [wa]s no dispute that the State and defendant agreed that, as a term of the plea agreement in this case, defendant would receive 309 days' credit for time served against the 7-year sentence imposed in this case and that this sentence would run consecutive to the 7-year sentence he received in No. 08-C6-60762. The parties are also in agreement that defendant was credited with the same 309 days in No. 08-C6-60762, which results in defendant receiving double credit for time served, which is impermissible. [Citation.] The sentencing judge, Judge Stephenson, clearly was not advised that defendant had already been credited with

> the 309 days in the earlier case. We are confident that had Judge Stephenson been accurately informed, defendant would have been advised he could not receive double credit for his time served in custody prior to his plea. In any event, the parties disagree, however, on how to correct this error." *Lenoir*, 2013 IL App (1st) 113615, ¶ 12, citing *People v. Latona*, 184 Ill. 2d 260, 271 (1998)(a defendant with consecutive sentences who was in pre-sentencing custody on more than one offense simultaneously receives credit only once for each day in custody).

The *Lenoir* court found that the issue before it was whether the defendant could demand the benefit of his bargain without withdrawing his plea. *Lenoir*, 2013 IL App (1st) 113615, ¶ 13. Noting our supreme court's holding in *People v. Whitfield*, 217 Ill. 2d 177, 185 (2005), that a defendant may demand the benefit of the bargain from his guilty plea and that due process requires that " 'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled,' " the *Lenoir* court held that defendant was entitled to the benefit of his bargain and that the appropriate remedy was to reduce his sentence by 309 days. *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 13, 21.

¶ 10 In *Clark*, the Second District of this court relied upon *Whitfield* in reducing a defendant's prison sentence to reflect the pre-sentencing credit in his plea agreement despite the fact that it would constitute double credit under *Latona*. The State had described the *Clark* plea agreement during the plea hearing: the defendant would receive consecutive eight-year prison terms on two charges with credit of 339 days in one case and 311 days in the other. *Clark*, 2011 IL App (2d) 091116, ¶ 5. Neither the State nor the court stated that the credits would run concurrently though

the prison terms were consecutive. *Clark*, 2011 IL App (2d) 091116, ¶¶ 5-6. Thus, defendant was entitled to the benefit of his bargain with the State for 339 and 311 days of credit. The *Clark* court determined that the appropriate remedy was to reduce the prison sentence for the offense with the 311-day credit by 622 days to account for the additional good-conduct credit arising from the additional pre-sentencing detention credit. *Clark*, 2011 IL App (2d) 091116, ¶ 11, citing 730 ILCS 5/3-6-3 (West 2004).

¶ 11 In *People v. McDermott*, 2014 IL App (4th) 120655, the Fourth District of this court followed *Lenoir* and *Clark* and granted relief where a defendant's March 2012 plea agreements in two cases expressly stated that he would receive the credits specified of 222 and 233 days. *McDermott*, 2014 IL App (4th) 120655, ¶¶ 10-12, 16-18. The *McDermott* court noted that *Whitfield* grants relief upon claims " 'that defendant did not receive the benefit of the bargain he made with the State when he pled guilty' " and described the holding in *Lenoir* and *Clark* as "when a specified amount of sentence credit is included within the terms of a defendant's plea agreement with the State, the defendant is entitled to the amount of sentence credit promised." *McDermott*, 2014 IL App (4th) 120655, ¶¶ 26-27, quoting *Whitfield*, 217 Ill. 2d at 183-84, and citing *Lenoir*, 2013 IL App (1st) 113615, ¶¶ 12-13, and *Clark*, 2011 IL App (2d) 091116, ¶ 1. The *McDermott* court applied the *Clark* remedy rather than the *Lenoir* remedy. *McDermott*, 2014 IL App (4th) 120655, ¶ 32.

¶ 12 The Fourth District has distinguished *McDermott*, *Lenoir*, and *Clark* in *People v. Reeves*, 2015 IL App (4th) 130707, and *People v. Grant*, 2015 IL App (4th) 140971. The *Reeves* court found that a plea agreement did not include double credit where the record did not indicate that the State and defense agreed to double credit, the plea agreement hearing contained no reference

to credit, and at the separate sentencing hearing only the State and court – that is, not defendant or his counsel – mentioned credit. *Reeves*, 2015 IL App (4th) 130707, ¶¶ 13-14. Unlike *McDermott*, the *Reeves* "record does not '*clearly* show[ ] the terms of the parties' agreements included specified amounts of sentence credit' or the double sentence credit days were 'essential, bargained-for terms of defendant's plea agreements.' " (Emphasis added by *Reeves*.) *Reeves,* 2015 IL App (4th) 130707, ¶ 14, quoting *McDermott*, 2014 IL App (4th) 120655, ¶ 30. The *Reeves* court also noted that defendant's plea and sentencing occurred years after *Latona* clarified that a defendant is not entitled to double credit. *Reeves*, 2015 IL App (4th) 130707, ¶ 15. The *Grant* court distinguished the case before it on the basis that, unlike *McDermott, Lenoir*, and *Clark* where "the defendants were never advised their sentence credit would not be applied as they anticipated," the *Grant* defendant was admonished and acknowledged at the plea hearing that he would not receive double credit but only be credited for the time actually in custody on the consecutively-sentenced cases. *Grant*, 2015 IL App (4th) 140971, ¶¶ 26-27.

¶ 13 Here, defense counsel stated at the 2000 plea and sentencing hearing that defendant would receive 1,306 and 364 days' credit in two cases, for a total of 1,671 days. On one hand, after defense counsel did so, the State made no objection and the court ordered that defendant would receive credit of 1,306 and 364 days. That distinguishes this case from *Grant* insofar as nothing was said on the record to dispel any perception that defendant would receive the stated credits. On the other hand, counsel described the credits after defendant's plea was entered and accepted and he was sentenced to the agreed prison terms of one and four and years, and unlike *Clark* and *McDermott* neither party stated at the plea hearing that the plea agreement encompassed credit. The *McDermott* court noted that the key consideration under *Whitfield* is the

agreement of the parties. "As the State points out, this particular case does not turn on the circuit courts' admonishments with respect to sentence credit, or lack thereof, but on the terms of the plea agreements defendant entered into with the State." *McDermott*, 2014 IL App (4th) 120655, ¶ 30. However, there is no indication on this record that the State agreed to double credit as part of the plea agreement; the State's alleged "agreement" by failure to object to defense counsel's assertion of credits occurred after the plea agreement was described by counsel, adopted by defendant, and approved by the court. Unlike *Lenoir*, it *is* disputed here that the plea agreement encompassed credit. Under such circumstances, we conclude that the circuit court did not err in denying defendant's motion for a *nunc pro tunc* order where the record does not establish that his plea agreement entitles him to relief. If defendant is nonetheless entitled to further credit under the usual *Latona* rule of one day's credit against his aggregate prison term for each day actually in pre-sentencing custody on the three cases in question, he may reapply for it in the circuit court where the court and parties have access to the full records in all three cases as we do not.

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

¶ 15 Affirmed.