FIFTH DIVISION
May 8, 2015

No. 1-14-3691

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN THE INTEREST OF NELSON M., a minor,	)	Appeal from the
	)	Circuit Court of
(THE PEOPLE OF THE STATE OF ILLINOIS,	)	Cook County.
	)	
Petitioner-Appellee,	)	No. 11 JD 3093
	)	
v.	)	Honorable
	)	Stuart F. Lubin,
NELSON M., a minor,	)	Judge Presiding.
	)	
Respondent-Appellant.)	)	

JUSTICE REYES delivered the judgment of the court.
Justices McBride and Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Remanding case for hearing regarding whether respondent minor was entitled to sentencing credit.

¶ 2 In a decision entered in an earlier appeal (*In re Nelson M.*, 2014 IL App (1st) 123152-U), we directed the circuit court of Cook County to consider whether respondent minor Nelson M. "is entitled to mandatory credit for the time spent while attending" two residential treatment facilities, pursuant to section 5-4.5-100(b) of the Unified Code of Corrections. 730 ILCS 5/5-

4.5-100(b) (West 2012). On remand, the trial court denied respondent's request for such credit. In this second appeal, respondent contends that the trial court "failed to comply with this Court's mandate," and "trial counsel was ineffective for failing to litigate the issue presented by the mandate." Respondent requests that we order the trial court to issue an amended commitment order that includes the time he spent at the two facilities. Alternatively, respondent asks that we remand this matter to the trial court with instructions to "hold a hearing on whether [respondent] was in 'custody' during the time he spent in two residential treatment programs as a condition of probation, and, if so, to grant [respondent] 223 additional days of sentence credit." The State contends that the trial court complied with our mandate and that trial counsel "was not deficient for acknowledging the discretionary nature of the trial court's decision, nor exercising strategy in failing to provide evidence that defendant was 'in custody' where such evidence may not have existed."

¶ 3 For the reasons stated below, we remand this matter to the trial court with instructions to hold a hearing, as described further herein.

¶ 4 BACKGROUND

¶ 5 On July 18, 2011, the State filed a petition for adjudication of wardship, alleging respondent – then age 14 – committed various offenses on July 15, 2011.[1] Respondent pled guilty to criminal sexual abuse on November 1, 2011. 720 ILCS 5/11-5(a)(1) (West 2010). On November 22, 2011, respondent was sentenced to 36 months of probation with the following conditions:

> "30 days time considered served, having been served - he's been in custody way more than that - DNA is mandatory, fees are waived on that, probation fees are

[1] Additional details regarding this matter are set forth in our earlier decision. *In re Nelson M.*, 2014 IL App (1st) 123152-U. We discuss only those facts necessary for our decision herein.

> also waived, no contact with the witnesses, defendant commit[ed] to Department of Children & Family Services ***, defendant to cooperate with and successfully complete inpatient JSO[2] program, as well as any aftercare that's recommended."

The court then stated, "I'll release him to his parents. Continue this for a progress report and see when he can go to the facility."

¶ 6 On December 13, 2011, the State filed a petition for supplemental relief, alleging respondent violated his probation by leaving his residence without permission and not returning home. On that same day, the trial court ordered that respondent be held in custody for one week, until December 20, 2011.

¶ 7 Respondent was placed in a residential treatment facility, the Alternative Behavior Treatment Centers (ABTC), on December 21, 2011. On April 23, 2012, respondent was transferred to another residential treatment facility, Indian Oaks Academy (Indian Oaks), because of ABTC's closing.

¶ 8 On July 31, 2012, the State filed a petition for supplemental relief, alleging that respondent violated his probation conditions by (a) his "runaway/missing" status from Indian Oaks on six different dates; (b) "becoming verbally aggressive and making verbal threats" to Indian Oaks staff members; and (c) failing to follow the rules and regulations of Indian Oaks "by kicking and punching a van, property of Indian Oaks and causing extensive damage." The court placed respondent in custody on July 31, 2012. On September 25, 2012, the court vacated the guardianship of DCFS and committed respondent to the Department of Juvenile Justice, noting that the "maximum adult sentence would be three years in a penitentiary."[3] The court credited

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[2] We understand that "JSO" refers to "juvenile sex offender."

[3] The sentencing order provides, in part, "3 MAX. ADULT [SENTENCE] KEWANEE FACILITY." The Illinois Department of Juvenile Justice operates an Illinois Youth Center in

respondent with 163 days for time he was detained.

¶ 9 In appeal number 1-12-3152, respondent contended that he should receive credit for the time spent in ABTC and Indian Oaks as a condition of his probation, in addition to the time he spent in actual detention, for a total of 418 days. The State conceded that respondent was entitled to a credit of 195 days, but asserted that he was not entitled to any additional credit for time spent in a residential treatment program. In an unpublished order entered on June 20, 2014 (*In re Nelson M.*, 2014 IL App (1st) 123152-U), we agreed that respondent was entitled to a credit of 195 days credit for predisposition custody.[4]

¶ 10 We then considered respondent's request for 223 days of mandatory credit for the time spent at ABTC and Indian Oaks pursuant to section 5-4.5-100(b), which provides, in part, that "[an] offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days *spent in custody as a result of the offense for which the sentence was imposed*." (Emphasis added.) 730 ILCS 5/5-4.5-100(b) (West 2012). After reviewing case law regarding the meaning of the phrase "in custody" in section 5-4.5-100(b), we concluded that "[t]he record in the present cause *** does not contain a sufficient factual basis for us to determine whether respondent was 'in custody' while attending ABTC and Indian Oaks Academy. The record is devoid of facts regarding the type of treatment respondent received, whether there was any state involvement with the facilities, or the living conditions at the treatment facilities." We further noted that "[a]lthough the record does reflect that respondent's movement was not restricted (respondent was able to leave Indian Oaks

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Kewanee, Illinois. See https://www.illinois.gov/idjj/pages/kewanee_iyc.aspx (last visited May 7, 2015).

[4] The 195 day credit represents the following days respondent spent in detention: (a) from July 15, 2011 through November 22, 2011 (131 days); (b) from December 13, 2011 through December 20, 2011 (8 days); and (c) from July 31, 2012 until he was sentenced on September 25, 2012 (56 days).

Academy on multiple occasions as respondent admitted), there was no testimony adduced at the hearing regarding whether respondent was subjected to strip searches, solitary confinement, or other means of restricting his movement as discussed in *Christopher P.* See *Christopher P.*, 2012 IL App (4th) 100902, ¶ 45." The penultimate paragraph of our order provided as follows:

> "¶ 39 For the foregoing reasons, pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we remand the matter to the trial court to correct respondent's mittimus to reflect a sentence credit of 195 days for time spent in predisposition custody. We further remand the matter for the trial court to consider whether respondent is entitled to mandatory credit for the time spent while attending ABTC and Indian Oaks Academy pursuant to section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2012)). We otherwise affirm the trial court's judgment."

¶ 11 On remand, respondent's counsel filed a one-page "Motion for Resentencing," which provided as follows:

> "MINOR RESPONDENT, NELSON [M.], through his Attorney, ***, respectfully moves this Honorable Court to resentence him and in support of this Motion the Minor states:
>
> 1. On September 25, 2013 he was committed to the Illinois Department of Juvenile Justice (DJJ) for an indeterminate period of time.
> 2. The minor timely appealed and on June 26, 2014 the Appellate Court *** remanded this case for resentencing. A copy of the Appellate Court Order is attached and incorporated into this Motion as Exhibit 'A'.
> 3. Although given credit for 163 days of predisposition custody, NELSON [M.]

requested that he be given credit for an additional 30 days in Detention.

4. The people of the State of Illinois agree with the contention in paragraph 2 above (Appellate Court Order page 6 Paragraph 18)

5. An additional 223 days spent in treatment at ABTC and Indian Oaks Academy under Court Order may be considered by the Court in determining credit to be given, and the minor respectfully requests that this Court grant him credit for these days.

THEREFORE NELSON [M.] respectfully requests that this Honorable Court resentence him in accordance to the ruling in 2014 IL. App (1st) 1-12-3152."

¶ 12 During proceedings on September 26, 2014, the following exchange occurred:

"[DEFENSE COUNSEL]: Good morning, your Honor. *** There will be no parties.

As you know, Judge, this is a motion for reconsideration. I suspect the best thing to do would just be to set another date for reconsidering our probate sentencing [*sic*].

THE COURT: Why?

[DEFENSE COUNSEL]: Why? We could resentence him right now.

THE COURT: It is not resentencing, it is about getting him credit.

[DEFENSE COUNSEL]: Remanded, yeah, it is remanded for additional time. I don't know if the State wants to argue the 233 days of time at ABTC and Indian Oaks.

THE COURT: Well, I am not required.

[DEFENSE COUNSEL]: Exactly, you are not required, it is strictly

discretionary."

After establishing that respondent was "still in the Department of Juvenile Justice," the court asked the State's attorney if he had any comments. The State's attorney responded, "No, Judge. The opinion is you can consider the possibility, and I take it that your Honor has considered in its rule, in using your discretion, you are not giving him credit at this time." The trial court then stated, "Well, I'm doing what the Appellate Court told me to do. He gets the additional 30 days, but unless you have some evidence to provide me as to the discretionary part." Defense counsel responded:

> "No, Judge. My argument would simply be that he is on probation at ABTC and Indian Oaks, any violation there would bring it back here. I know it is not the same case as [*People v. Beachem*, 229 Ill. 2d 237 (2008)], but our position is that he is in custody at Indian Oaks and ABTC and should be given credit."

The court then stated, "Without anything further on that issue, the credit -- the discretionary credit is denied. I'm exercising my discretion, and I'm not giving him credit for the time he spent in the treatment center. It doesn't qualify under the case cited in this case."

¶ 13 After a discussion of our remand order, the trial court granted respondent an "additional 32 days, granted for time considered served, credit for time in custody per Appellate Court opinion for mandate." The 32-day credit, reflected in written orders entered on September 26, 2014, represented the difference between the 163 days previously credited by the trial court and the 195-day credit referenced in our decision in appeal number 1-12-3152.

¶ 14 On December 12, 2014, we allowed respondent's late notice of appeal.

¶ 15 ANALYSIS

¶ 16 On appeal, respondent contends, "Not only did the trial court fail in its duty to comply

with this Court's mandate, but Nelson was deprived of his right to effective assistance of counsel." The State responds that "[w]hile it is true that the hearing on the matter was brief, and that no new evidence was offered to suggest that respondent was 'in custody' while participating in his programs, that may have been because no such evidence existed." "Moreover," the State contends, "as opposed to the treatment program in both [*In re Christopher P.*, 2012 IL App (4th) 100902] and [*In re Darius L.*, 2012 IL App (4th) 120035], the treatment programs here appear to be for psychiatric and substance abuse purposes firmly establishing that any credit for participation in them was strictly discretionary."

¶ 17 Section 5-4.5-100(b) of the Unified Code of Corrections provides, in pertinent part:

> "[An] offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days *spent in custody as a result of the offense for which the sentence was imposed*. The Department shall calculate the credit at the rate specified in Section 3-6-3 (730 ILCS 5/3-6-3). Except when prohibited by subsection (d), the trial court shall give credit to the defendant for time spent in home detention on the same sentencing terms as incarceration as provided in Section 5-8A-3. The trial court may give credit to the defendant for the number of days spent confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial." (Emphasis added.) 730 ILCS 5/5-4.5-100(b) (West 2012).

¶ 18 In our decision in the first appeal, we noted that section 5-4.5-100(b) "provides for two types of sentencing credit, mandatory credit and discretionary credit." However, we now observe that, in our prior decision, we did not explicitly articulate the distinction between

mandatory and discretionary credit. Although not expressly stated in our prior decision, we view the first sentence of section 5-4.5-100(b) as providing for *mandatory* credit: respondent "*shall be given*" sentencing credit for the days respondent "spent *in custody*" as a result of the offense for which the sentence was imposed. (Emphasis added.) *Id.* Again, although not expressly stated in our prior decision, we view the final sentence of section 5-4.5-100(b) as providing for *discretionary* credit: "[t]he trial court *may give credit* *** for the number of days spent confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial." (Emphasis added). *Id.*

¶ 19 The State contends on appeal that "the treatment programs here appear to be for psychiatric and substance abuse purposes firmly establishing that any credit for participation in them was strictly discretionary." However, we did not direct the trial court to make any determinations regarding the "discretionary" portion of section 5-4.5-100(b). In respondent's first appeal, we concluded that the record did not contain a "sufficient factual basis for us to determine whether respondent was 'in custody' while attending ABTC and Indian Oaks Academy." Our use of the phrase "in custody" was purposeful: we were quoting the language from the first sentence of the section 5-4.5-100(b), which provides for mandatory credit. Because of the trial court's "failure to assess whether respondent should receive sentencing credit for the time spent while attending ABTC and Indian Oaks Academy pursuant to section 5-4.5-100(b) ***,"[5] we remanded the matter "for hearing on whether *mandatory* credit should be given to respondent for his time spent in residential treatment[.]" (Emphasis added.) Nothing in the record indicates that, on remand, the trial court made any determination – or that trial counsel presented any evidence – as to whether respondent had been "confined for psychiatric or

[5] As the trial court correctly observed during the proceedings on remand, "[r]espondent never asked for the time spent in the residential treatment facilities before the Trial Court."

substance abuse treatment prior to judgment." Such advocacy or analysis would have been beyond the scope of our mandate in respondent's first appeal.

¶ 20 Despite the foregoing, we observe that defense counsel, the State's attorney and the court each referred to the determination as "discretionary" or referred to the court's "discretion" during the September 26, 2014 proceedings.[6] We can conjecture regarding possible usages of the term "discretionary" that do not necessarily reflect a misapprehension of the law of sentencing credit or the scope of our mandate. For example, our mandate in the original appeal was twofold: the matter was remanded for the trial court to (a) correct the mittimus to reflect a sentence credit of 195 days for time spent in predisposition custody, and (b) consider whether respondent was entitled to mandatory credit for the time he spent at ABTC and Indian Oaks under section 5-4.5-100(b). The court and/or counsel may have characterized the 195-day mittimus correction as "mandatory" and the determination of the ABTC/Indian Oaks credit as "discretionary." Alternatively, the court and counsel may have been referring to the court's "discretion" to make a determination as to whether respondent was "in custody" during the time spent at ABTC and Indian Oaks.

¶ 21 Regardless of the reasons underlying the repeated references to the trial court's "discretion," we are concerned about the possibility that our original order was subject to misinterpretation. Our intent in the prior order was to compel the trial court to hear arguments and evaluate evidence regarding whether respondent was "in custody" during the time he spent at ABTC and Indian Oaks. Pursuant to section 5-4.5-100(b), if respondent was "in custody," he

[6] Furthermore, the "Motion for Resentencing" filed by defense counsel provided, in part, that "[a]n additional 223 days spent in treatment at ABTC and Indian Oaks Academy under Court Order *may* be considered by the Court in determining credit to be given[.]" (Emphasis added.) The use of the word "may" suggests that counsel believed that the court had discretion whether or not to award the sentencing credit.

was entitled to sentencing credit as provided by the statute. 730 ILCS 5/5-4.5-100(b) (West 2012). However, when the trial court asked counsel during the September 26, 2014 proceedings whether he "[had] some evidence to provide me as to the discretionary part," counsel responded:

> "No, Judge. My argument would simply be that he is on probation at ABTC and Indian Oaks, any violation there would bring it back here. I know it is not the same case as [*People v. Beachem*, 229 Ill. 2d 237 (2008)], but our position is that he is in custody at Indian Oaks and ABTC and should be given credit."

The court then stated that "[w]ithout anything further on that issue, *** the discretionary credit is denied."

¶ 22 The limited record on appeal regarding the proceedings on remand precludes us from a definitive determination of whether a lack of clarity in our original order — or a misunderstanding of the scope of our mandate or of the law of sentencing credit — may have deprived respondent of the hearing we intended regarding *mandatory* sentencing credit pursuant to section 5-4.5-100(b). On remand, defense counsel did not offer any evidence regarding factors such as the type of treatment respondent received, whether there was any state involvement with the facilities, or the living conditions at the treatment facilities, as we expressly contemplated in our earlier decision. Based on the appellate record, we cannot conclude with certainty whether counsel's failure to provide such evidence was a matter of strategy, as suggested by the State, or an issue of attorney ineffectiveness, as argued by respondent. We are certain, however, that respondent "deserves the hearing he was promised." *People v. Mitchell*, 2014 IL App (1st) 120080, ¶ 2.

¶ 23 We thus agree with respondent that this case should again be remanded. We do not agree with respondent's contention that record "is sufficient" for us to order the trial court to grant

respondent an additional 223 days of sentencing credit. As noted in our earlier ruling, the record in the first appeal "does not contain a sufficient factual basis for us to determine whether respondent was 'in custody' while attending ABTC and Indian Oaks Academy." Nothing was added to the record in the proceedings on remand that would enable us to make such a determination herein.[7]

¶ 24 CONCLUSION

¶ 25 In accordance with this order and our earlier order (2014 IL App (1st) 123152-U), we again remand this matter to the trial court to timely consider whether respondent is entitled to mandatory credit for the time spent while attending ABTC and Indian Oaks Academy pursuant to section 5-4.5-100(b) of the Unified Code of Corrections. 730 ILCS 5/5-4.5-100(b). If after investigation and analysis respondent's trial counsel concludes that insufficient evidence supports the proposition that respondent was "in custody" at ABTC and/or Indian Oaks Academy, counsel shall so inform the trial court. The State's request for fees and costs is denied.

¶ 26 Remanded with directions.

[7] In light of our decision to remand this matter, we need not address the State's arguments on appeal regarding the applicability of the doctrines of *res judicata* and "law of the case."