2015 IL App (2d) 130819-U
No. 2-13-0819
Order filed April 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ALEXANDER DOWTHARD, JR., Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Stephenson County. No. 08-CF-171 Honorable Michael P. Bald, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant received the benefit of his plea bargain, which, as stated at the plea hearing, envisioned only the standard, legally authorized credit and not "double" credit in violation of *Latona*.

¶ 2 Defendant, Alexander Dowthard, Jr., appeals after the trial court's denial of his motion to withdraw his plea of guilty to a count of aggravated fleeing or eluding a peace officer (second or subsequent offense, speed at least 21 miles per hour above the speed limit) (AFE) (625 ILCS 5/11-204.1(a)(1) (West 2008)). His challenge here is to the length of his sentence, which is consecutive to one imposed by the court in Winnebago County. He asserts that, despite the rule

in *People v. Latona*, 184 Ill. 2d 260, 271 (1998), the terms of his plea agreement required that he receive credit for certain days incarcerated against both of his consecutive sentences. He therefore asks that we reduce his sentence to make it conform as closely as possible to the terms of the agreement. We do not agree that the terms of the agreement included a requirement for such credit. We therefore conclude that defendant received the benefit of his bargain as to the effective length of his sentence, and we thus affirm his sentence.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information in Stephenson County with a single count of AFE. The date of the offense charged was July 27, 2008, and the preliminary hearing took place on July 31, 2008. The court held a Rule 402 conference (see Ill. S. Ct. R. 402 (eff. July 1, 1997)) on June 11, 2009. On January 6, 2010, defendant was unavailable to enter a plea because he was in the Winnebago County jail.

¶ 5 On October 22, 2010, the State announced that the parties had reached a "conditionally[-] concurring [Rule] 402 [agreement]," with all terms fixed. The parties agreed that, although defendant would enter his guilty plea that day, they would postpone the formal sentencing until after the disposition of the Winnebago County matter. The State described the terms as follows:

> "He'll plead guilty to this Class 3 felony. The State will be recommending two years Department of Corrections [(DOC)], one year MSR [mandatory supervised release] period, $3,000 fine, plus costs, payable out of bond. The two TR numbers we'll be dismissing."

The court responded by stating that it "assum[ed that] that's with credit for time served and $5 per day credit for the days he's in custody." The State agreed. The court then asked both parties if what the State had described set out all the terms of the agreement. Both parties agreed that it

did. The court admonished defendant of the rights he was waiving, defendant entered his plea, the State gave the factual basis for the charge, defendant waived his right to a presentence report, and the court set a date for sentencing.

¶ 6 The formal sentencing hearing occurred on July 12, 2012. At that point, defendant had entered a guilty plea on a charge of conspiracy to murder in the Winnebago County case and had received a sentence of five years' imprisonment for that conviction. At the sentencing hearing, defense counsel told the court that he had explained to defendant that the DOC would be responsible for calculating the application of sentence credit. The mittimus stated that defendant had spent 506 days in presentencing custody.

¶ 7 On August 13, 2012 (a Monday), defendant filed a motion to withdraw his guilty plea:

> "I did not receive the jail credit that I agreed to[.] I agreed to 2 years DOC 1 year MSR with credit for 7/27/08 to 8/1/2008[,] 2/4/2010-6/9/2010[,] 7/1/2011 to 7/12/2012[.]"

He claimed that his attorney had told him that he would receive credit for all those days against the sentence in this case, but that the DOC treated the consecutive sentences as effectively one sentence for the purposes of allocating credit, such that he had received only 131 days of credit against his sentence in this case. Defendant simultaneously filed a motion to reconsider his sentence, asking the court to reduce his sentence by a year to compensate for the "missing" 375 days of credit.

¶ 8 The court initially sent defendant a letter stating that his motions were untimely. Defendant filed a motion to reconsider, stating that he had mailed the motions within the time allotted and that the mailbox rule applied. He also said that he wanted to "go with" the motion to reconsider the sentence.

¶ 9 On February 28, 2013, defendant filed through appointed counsel an amended motion for reconsideration of his sentence. On March 18, 2013, counsel asked to withdraw that motion and to proceed on the motion to withdraw the guilty plea. Soon after, the court granted defendant leave to proceed *pro se*. Defendant then went forward on his motion to withdraw his guilty plea.

¶ 10 Defendant filed a notice of appeal on August 7, 2013. On August 8, the court ruled that defendant was entitled to one more day of credit only. Defendant filed an amended notice of appeal on August 19, 2013.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues that he is entitled to have the benefit of his bargain, which he asserts included 506 days of presentencing credit, and that we should modify his sentence accordingly. He argues that the agreement that the sentence would include "time served" should be understood to include 506 days. He asserts that the interpretation of a plea agreement, as it is set out in open court at the plea hearing, is a matter for *de novo* review. The State, by contrast, argues that the denial of a motion to withdraw a guilty plea is subject to review for an abuse of discretion.

¶ 13 Defendant's core claim here—the one on which he rests the whole of his argument—is that he did not receive the benefit of his plea-agreement bargain. Interpretation of plea agreements is governed primarily by contract-law principles (albeit tempered to protect defendants' due-process rights). *People v. Henderson*, 211 Ill. 2d 90, 103 (2004). The proper interpretation of a contract is an issue of law and thus subject to *de novo* review. *E.g.*, *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24. We thus review *de novo* the question of whether defendant received the benefit of his bargain. Because we conclude that he did, we conclude that the court did not err in denying relief.

¶ 14 Initially, the State, correctly, points out that defendant timely filed his original postsentencing motion. The court sentenced defendant on July 12, 2012. Defendant filed his original *pro se* motion to withdraw his guilty plea on August 13, 2012—a Monday—which was 32 days after the court sentenced him. Postsentencing motions must be filed no later than 30 days after the court imposes sentence (Ill. S. Ct. R. 605(a)(3)(B) (eff. Oct. 1, 2001)), but, because the actual 30th day was a Saturday, defendant had until the following Monday to file his motion (see 5 ILCS 70/1.11 (West 2012)). The court in fact received defendant's motion that Monday, making it timely.

¶ 15 Defendant argues that the terms of his plea agreement entitle him to 506 days of credit against his sentence. He argues that this is so even if that amount of credit implies counting certain days incarcerated against *both* of his consecutive sentences, in violation of the rule in *Latona*, which prohibits such double counting. We agree with defendant on the applicable rule of law, but disagree that, on the record here, it requires a modification of defendant's sentence to give him the benefit of his plea agreement's terms.

¶ 16 Our opinion in *People v. Clark*, 2011 IL App (2d) 091116, lays out the relevant principles. If specific credit for time served is part of a plea agreement, then the defendant is entitled to receive a sentence that gives him the benefit of the agreed-to credit. *Clark*, 2011 IL App (2d) 091116, ¶¶ 10-11. The terms of a plea agreement are fixed by the parties' statement of it during the plea hearing. *Clark*, 2011 IL App (2d) 091116, ¶ 10. Thus, in *Clark*, the defendant was entitled to the benefit implied by the State's assertion at the plea hearing that he would receive 311 days' credit against his sentence for one offense and 339 days' credit against his sentence for the other offense. See *Clark*, 2011 IL App (2d) 091116, ¶ 11. Similarly, in *People v. McDermott*, 2014 IL App (4th) 120655, ¶¶ 29-30, when the defendant was told at plea

hearings in separate cases that he would receive specific numbers of days of credit, he was entitled to a sentence that gave him the benefit of the promised credit. Applying the same principles, courts have also held that a defendant may be bound by an agreement to *forgo* time-served credits. *E.g.*, *People v. Williams*, 384 Ill. App. 3d 415, 417 (2008).

¶ 17 Given the delay in sentencing here, we emphasize *Clark*'s holding that the terms of the agreement are set when the parties state the agreement in open court and the defendant enters the agreed plea. Because of this, we are concerned with only the discussions surrounding defendant's entry of his plea, and not those that occurred in the run-up to the sentencing hearing or at it.

¶ 18 This case presents an issue different from those in *Clark* and related cases, in that, in contrast to those cases, the parties did not state a particular number of days of credit. Indeed, because the parties agreed to postpone the formal sentencing, the parties could not have agreed that defendant would receive a specific number of days of presentencing credit.

¶ 19 Further, in contrast to *Clark* and related cases, the only mention of time-served credit during the plea hearing came in a comment from the court after the State set out the basic terms. Specifically, the court commented that it "assum[ed that] that's with credit for time served and $5 per day credit for the days he's in custody." Defendant cannot claim that the agreement set out a particular number of days of credit. Instead, he must argue that the general discussion of "time served" led to an agreement for a nonstandard calculation of credit. As we now discuss, it is not possible to read such an agreement into the colloquy of the plea hearing.

¶ 20 Here, the entirety of the discussion of time-served credit was confined to the court's interjection that it "assum[ed that] that's with credit for time served" and the State's reply in the affirmative. That context makes clear that the court was asking whether sentencing credit would

be treated in the usual way and that the State agreed that that was its intent. Put another way, contrary to what defendant's argument requires, it is obvious that the court would not have been offhandedly proposing a nonstandard sentencing credit contrary to *Latona*. It is conceivable that defendant personally might have made assumptions that led him to understand the agreement as to credits differently. Such a misunderstanding would go to a claim that the plea agreement was involuntary, which is a claim defendant is not making.

¶ 21 Defendant argues that the "plea agreement was for two years in prison with credit for time served in presentence custody, which in this case amounted to 506 days." We note that, in making this argument, defendant saw the need to add the phrase "in presentence custody" to the language used by the court. That addition, made without any argument in its support, is question begging—it turns his argument's conclusion into one of his premises. The State could just as fairly assert that the agreement was for two years in prison with credit for *legally creditable* time served. We thus reject this argument of defendant's.

¶ 22 Defendant also argues that, "because [at the time of the plea hearing] neither the court [n]or the parties contemplated the possibility of consecutive sentencing, [he] reasonably understood that his plea agreement would include all 506 days." Because defendant cannot point to any language at the plea hearing that made that understanding part of the agreement, this argument is one that can go only to his comprehension of the agreement, and not to the terms of the agreement proper. Further, defendant has not elucidated his basis for asserting that he had an expectation that the Winnebago County matter would not affect the sentencing credit in this case. Certainly, nothing was said at the sentencing hearing that implied that the agreement required the credits to be unaffected by the other case. Thus, this argument also fails.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we hold that defendant received the benefit of his plea agreement as to time-served sentencing credit, and we therefore affirm his sentence. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 25 Affirmed.