2015 IL App (2d) 140277
No. 2-14-0277
Order filed March 27, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-1788
ROBERT THEODORE,	)	Honorable Blanche Hill Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Zenoff and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly disallowed defendant's request for 511 days of sentencing credit due to time spent on in-home electronic monitoring because defendant was not on electronic home detention, but only on home supervision as a condition of his pretrial bail and, because the in-home electronic home monitoring was imposed by the trial court and not a supervising authority, defendant did not qualify for home detention.

¶ 2 Defendant, Robert Theodore, disputes the amount of sentencing credit he should receive as a result of spending 511 days on in-home electronic monitoring as a condition of his pretrial bond. He was granted two days of credit and argues that the time he spent on in-home electronic

monitoring as a condition of his pretrial bond must be credited against his sentence under section 5-4.5-100 of the Unified Code of Corrections (Code of Corrections) (730 ILCS 5/5-4.5-100 (West 2012)). We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 The pertinent facts of record reveal that, on September 11, 2012, defendant was arrested and charged with aggravated criminal sexual abuse (720 ILCS 5/11-1.60(f) (West 2012)). Bail was set at $250,000 (and defendant was required to post 10%). The next day, September 12, 2012, defendant made bail, posting the required $25,000. Defendant's bail included terms in addition to the monetary term: defendant had to submit to in-home electronic monitoring and was required to report to the Du Page County probation department to receive a GPS monitoring device. Defendant was required to remain in his residence 24 hours a day, and he was under the supervision of the Du Page County probation department.

¶ 5 On October 11, 2012, defendant was indicted with five counts of aggravated criminal sexual abuse. On October 15, 2012, by agreement of the parties, defendant's bail terms were modified to allow defendant to leave his residence and attend work from 8:45 a.m. to 5:15 p.m., and he was otherwise required to remain at his residence. The matter advanced and, on December 2, 2013, defendant pleaded guilty to a single count of aggravated criminal sexual abuse, with the other counts being *nol-prossed*. The matter advanced to a February 5, 2014, sentencing hearing at which extensive evidence was introduced about the count to which defendant pleaded guilty as well as evidence showing defendant's questionable interactions with other young men while he was working as a track coach and trainer. The trial court queried whether either the State or defendant had any corrections to make to the presentencing investigation report which indicated that defendant was to receive two days of sentencing credit.

Defendant indicated that he had no issues with the report. Defendant was sentenced to a four-year term of imprisonment. After the trial court pronounced sentence and admonished defendant about his rights to appeal, defendant presented a written motion seeking credit for the 511 days of pretrial in-home electronic monitoring.

¶ 6 On February 20, 2014, the trial court heard argument on defendant's motion for sentencing credit. Defendant argued that a recent amendment to section 5-4.5-100 made sentencing credit for pretrial electronic home monitoring mandatory. The State argued that defendant was not in custodial detention during the time he was in pretrial electronic home monitoring and was therefore not entitled to any sentencing credit for that time. The trial court accepted the State's argument and denied defendant's motion for sentencing credit.

¶ 7 On March 7, 2014, defendant filed a motion to reconsider, and, on March 17, 2014, the trial court heard the motion to reconsider. Defendant presented an evidentiary offer of proof in which Daniel Boivin, a supervisor in the Du Page County probation department, testified that defendant's electronic home monitoring was conducted under the auspices of the probation department. Boivin testified that defendant was required to contact the department every day that he went to work and arrived at home, and that the department kept tabs on defendant's movements via the electronic monitoring device. Boivin further testified that, if defendant violated any of the terms of the electronic home monitoring, Boivin was required to report the violations to the court. The record does not show that defendant violated the terms of his electronic home monitoring while he was subject to it. After the offer of proof and argument, the trial court denied defendant's motion to reconsider. Defendant timely appeals.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues that he is entitled to sentencing credit for the time he spent on in-home electronic monitoring before he was sentenced. According to defendant, the recent amendment of section 5-4.5-100 of the Code of Corrections (P.A. 97-697, eff. June 22, 2012) demonstrates the legislature's intent to make such credit mandatory, where previously (*e.g.*, 730 ILCS 5/5-4.5-100 (West 2010)), the determination to award sentencing credit to defendants on electronic home monitoring was discretionary with the trial court. The State argues that defendant misreads section 5-4.5-100, and that defendant is entitled to credit only for the days spent in custody under that section. The State reasons that, as defendant was not in custody, but was only subject to electronic monitoring, he is not entitled to the credit he seeks. The State further argues this case is on all fours with *People v. Beachem*, 229 Ill. 2d 237 (2008), which explored the difference between a defendant who is in a pretrial custodial detention and a defendant who is subject to bond while awaiting trial, notwithstanding the fact that the amendment to section 5-4.5-100 was enacted some four years after *Beachem* was decided (and, according to defendant, rendering it inapposite). The State also suggests that *People v. Ramos*, 138 Ill. 2d 152 (1990), is still good authority and, when section 5-4.5-100 is read with *Beachem* and *Ramos*, we must conclude that defendant is not entitled to any sentencing credit for his in-home electronic monitoring.

¶ 10 Based on the parties' initial arguments, this court, *sua sponte*, ordered the parties to provide supplemental briefing on the question of:

¶ 11 "whether section 5-4.5-100 of the Unified Code of Corrections (730 ILCS 5/5-4.5-100 (West 2014) [*sic*]) is ambiguous, especially in light of section 110-10 of the Code of Criminal Procedure (725 ILCS 5/110-10 (West 2014) [*sic*]) and section 5-8A-3 of the Unified Code of Corrections (730 ILCS 5/5-8A-3 (West 2014) [*sic*]) and how a

> determination of ambiguity (or its lack) in section 5-4.5-100 affects [each party's] argument on appeal."

The parties complied and provided supplemental briefs and responses to our question. Defendant argued, in response to our query, that section 5-4.5-100 was not ambiguous and he was entitled to credit for the time he spent on in-home electronic monitoring. Defendant also argued, alternatively, that if we determined section 5-4.5-100 to be ambiguous, then the rule of lenity should apply to our construction of the provision with the result that he should still be granted sentencing credit for the days he spent on bail under an in-home electronic monitoring program. For its part, the State essentially ignored our query and argued that section 5-4.5-100 was inapplicable because defendant was not in custody, but was on bail, for which no sentencing credit was available. The supplemental briefing, somewhat more than the original appellate briefing, also degenerated into pointless *ad hominem* attacks between the attorneys. We admonish both parties that such behavior is not professional and does not effectively advance the interests of the party the attorney is supposed to represent. We expect all attorneys to behave with professionalism, civility, and appropriate decorum in their interactions with opposing counsel as well as with the court.

¶ 12 Defendant also filed a motion to strike the State's supplemental response brief arguing it is both nonresponsive to defendants' arguments raised in his original supplemental brief and continues to be nonresponsive to the issue for which we requested supplemental briefing. Defendant further argues that the State's supplemental response also improperly raises new issues for the first time. The State justifies the content of its supplemental response by noting that it raised the issues that defendant purports to be wholly new in its original response on appeal and providing correct pinpoint citations demonstrating where the issue appeared in its

original response brief. The State also contends that it was proper to raise the mandatory supervised release (MSR) issue for the first time in its supplemental response brief because defendant's sentence contains a void term, and voidness may be raised at any time.[1] We ordered the motion to strike to be taken with the case, and, after duly considering its merits, we deny it.

¶ 13 The dispositive issue in this case revolves around "home detention" as provided in section 5-4.5-100(b) (730 ILCS 5/5-4.5-100(b) (West 2014)), and whether defendant was participating in such a home detention program. The answer to these issues requires only that we look at defendant's conditions of bail versus the statutorily defined term, "home detention."[2]

¶ 14 A. Bail and Pretrial Services Versus Home Detention

¶ 15 Defendant's bond included a financial term of $250,000 (with 10% required to be posted), and a number of other terms, including an order for GPS location tracking equipment. The order for GPS tracking equipment included the condition that defendant was required to remain in his residence for 24 hours a day (and this term was later modified to allow defendant to travel to and from his place of employment and work there). In turn, the bail and its conditions were authorized by section 110-1 *et seq.* of the Code of Criminal Procedure (725 ILCS 5/110-1 *et seq.* (West 2012)).

¶ 16 Specifically, section 110-10(b)(14) states that various conditions may be imposed on a defendant's bond, including, pertinently: that the defendant may "[b]e placed under direct

[1]To the extent necessary, we will address the State's mandatory-supervised-release issue below.

[2]The statutory underpinnings of "home supervision" are discussed below in paragraphs 14-15; likewise, the statutory basis of "home detention" is discussed below in paragraph 16.

supervision of the Pretrial Services Agency, Probation Department or Court Services Department in a pretrial bond home supervision capacity with or without the use of an approved electronic monitoring device subject to Article 8A of Chapter V of the Unified Code of Corrections [(730 ILCS 5/5-8A-1 *et seq.* (West 2012))]." Important to our consideration here is the designation, "home supervision." This term is not defined, so we give it its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, ¶ 15 (an undefined term in a statute is given its plain and ordinary meaning which is often ascertained from the dictionary definition). "Supervision" is defined as "the act, process, or occupation of supervising : direction, inspection, and critical evaluation." Webster's Third New International Dictionary Unabridged 2296 (1993). The meaning of home supervision then, is the inspecting, directing, and evaluating the defendant's compliance with the terms of his bond conditions.

¶ 17 The other piece of the interpretive puzzle is "home detention." Section 5-4.5-100(b) of the Uniform Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2012)) provides for crediting "home detention:"

> "CREDIT; TIME IN CUSTODY; SAME CHARGE. Except as set forth in subsection (e), the 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 [(West 2012)]). 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 was custodial."

"Home detention" is further defined as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." 730 ILCS 5/5-8A-2(C) (West 2012). For our purposes, an offender serving a valid "home detention" will receive sentencing credit; likewise, the offender will be given credit for time spent in "custody." 730 ILCS 5/5-4.5-100(b) (West 2012).

¶ 18 When we compare the terms, "home supervision," and "home detention," we end up with two separate and distinct concepts. For a defendant under home supervision, the agency tasked with the supervisory role will inspect, direct, and evaluate his performance in complying with the requirement he remain at his home. This may sound like "custody," meaning a duty to submit to legal authority. *People v. Riley*, 2013 IL App (1st) 112472, ¶ 12 ("custody" is an expansive concept referring to the duty to submit to legal authority; "incarceration," by contrast, refers to actual, physical confinement). We are, however, foreclosed from reaching such a conclusion by *Ramos*.

¶ 19 In *Ramos*, the defendant was released on bail, but a term of his bail required the defendant to stay in his residence unless he received the prior permission to leave from the court or the probation officer. *Ramos*, 138 Ill. 2d at 154. The defendant argued that his home confinement was the same as custody contemplated in section 5-4.5-100(b) (previously Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-7(b)). The supreme court held that home confinement was unlike incarceration because the offender was not subject to the regimentation of life in jail or prison and was unmonitored while at home, enjoying unrestricted freedom of activity, movement (within the home, of course), and association. *Id.* at 159. The court further held that "custody"

did not encompass any time that an offender was released on bond, "regardless of the restrictions that might be imposed on him during that time." *Id.* at 160. Thus, for purposes of sentencing credit, even though a defendant may be subject to the direction of the supervising authority and may have a duty to submit to the agency's authority, any time spent released on bond, even confined to his or her home, does not come under the scope of "custody" under section 5-4.5-100, because our supreme court in *Ramos* determined that such time would not be eligible for sentencing credit. *Id.*

¶ 20 Our supreme court reinforced its holding in *Ramos* that time on bond would not be deemed "home detention" in *Beachem*, 229 Ill. 2d 237. In *Beachem*, the defendant challenged his sentencing credit calculation, contending that the time he spent in Cook County's Sheriff's Day Reporting Center Program was "custody" under section 5-8-7 of the Code of Corrections (730 ILCS 5/5-8-7 (West 2004), now codified 730 ILCS 5/5-4.5-100 (West 2012)). *Beachem*, 229 Ill. 2d 238, 242. Significantly to our decision here, the court noted that a defendant on bond has significant due process rights, including "judicial procedures that not only protect him from arbitrary arrest, but also provide a means to modify or contest an aspect of denial of bond." *Id.* at 249-50. If the defendant does not comply with the terms of his or her bond, the trial court may issue a warrant for his or her arrest and he or she may still qualify for bail. *Id.* at 250. The defendant may ask to have the terms of bail modified and the defendant is entitled to notice if the State asks to modify the defendant's bail, and the defendant is entitled to certain process if the State has asked to modify the terms of his or her bail, including the right to a hearing, cross-examination of witnesses, and representation of counsel. *Id.*

¶ 21 In contrast, the court noted that the Sheriff's Day Program did not provide a defendant with any of the process that he or she was entitled to while under bond. *Id.* at 250-51. The

defendant cannot challenge the terms of the Program, whether he is selected to participate in the Program; if the defendant is charged with violating Program rules, he has no right to a hearing or to counsel. *Id.* at 251.

¶ 22 The court further addressed the confinement aspects of the Program, noting that it had aspects of confinement, albeit not 24 hours a day, but the defendant was required to report to a specific location for between three and nine hours a day, and he was subjected to a " 'strictly supervised environment.' " *Id.* at 253. The court emphasized that the defendant was not "free to come and go as he pleased. He was not free to structure his day as he saw fit. He was obligated to report at an established time to and participate in a state-run program." *Id.* If the defendant did not appear and report to the Program, he was subject to immediate arrest and reincarceration. *Id.* Based on these factors, the court held that, "unlike a defendant on a traditional bond, a defendant in the Program is not only under the 'constructive custody of the sheriff, he is also under the sheriff's physical custody for several hours a day." *Id.*

¶ 23 We further note, amplifying the *Beachem* court's recognition that, unlike bond, participation in the Program subjected a violator to arrest and reincarceration (*id.*), the Electronic Home Detention Law expressly spells out that a participant who violates the terms of his or her detention is subject to prosecution for escape in addition to immediate arrest and reincarceration. 730 ILCS 5/5-8A-4(H) (West 2012); 730 ILCS 5/5-8A-4.1 (West 2012). If convicted of escape arising from the violation of the terms of his or her pretrial electronic home detention, the defendant's sentence is mandatorily consecutive to the term imposed upon conviction of the charged offense. 730 ILCS 5/5-8-4(d)(8) (West 2012). These limitations on a defendant's liberty when he or she is participating in a home detention program pursuant to the Electronic Home Detention Law clearly distinguish the rights enjoyed by a defendant on bond from the

obligations of a defendant held in pretrial electronic home detention, and amplify the conclusion of the *Beachem* court.

¶ 24 These two cases (plus the limitations on a defendant's liberty discussed above) are illustrative of significant differences between bond, custody, and confinement. In *Ramos*, the court held that bond conditions would never qualify as "custody" or "confinement" under the current section 5-4.5-100(b) (*Ramos*, 138 Ill. 2d at 160), and in *Beachem*, the court specifically contrasted the features of bond and differentiated them from both "custody" and "confinement" (*Beachem*, 229 Ill. 2d at 250-53). Under *Ramos* and *Beachem*, then, we must conclude that home supervision *as a condition of bond*, as is the case here, does not constitute either confinement or custody as those terms are understood in section 5-4.5-100(b) of the Code of Corrections.

¶ 25 Further, we note that, pursuant to section 5-4.5-100 and other related provisions, home detention *is* defined as confinement, meaning actual physical confinement. 730 ILCS 5/5-8A-2(C) (West 2012). Home supervision, on the other hand, is by definition without the element of confinement necessary to make it equivalent to home detention. *Ramos*, 138 Ill. 2d at 160. As a result, we conclude that the difference in terminology between the bail provisions (725 ILCS 5/110-10(b)(14) (West 2012)), and the sentencing credit provisions (730 ILCS 5-4.5-100(b) (West 2012)), is intentional, self conscious, and significant.

¶ 26 If home detention is confinement, then *Ramos* and *Beachem* both hold that home monitoring as a condition of bond is not confinement. *Ramos*, 138 Ill. 2d at 160; *Beachem*, 229 Ill. 2d at 253-54. Put another way, home monitoring as a condition of bond lacks the element of confinement necessary to fall under "home detention" as defined in the statutes and case law. This conclusion is reinforced *People v. Smith*, 2014 IL App (3d) 1305048. *Smith* held that the

Unified Code of Corrections "does not anticipate [allowing] sentencing credit for time spent released on bond." *Id.* ¶ 43. In reaching this conclusion, the court relied on *Ramos* (*id.* ¶¶ 16-21) and *Beachem* (*id.* ¶¶ 23-29). Thus, if defendant's placement on home supervision was not custody, it also was not home detention, either condition being necessary as a prerequisite to receiving sentencing credit for time spent on pretrial release.

¶ 27 Likewise, this court, relying on *Smith*, held that a defendant who was released on bond under the condition of electronic monitoring was not entitled to sentencing credit for that time. *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 50. In that case, the defendant sought credit "for the time that he spent on electronic monitoring before trial." *Id.* ¶ 49. Relying on the passage in *Smith* holding "that 'home confinement pursuant to an appeal bond does not qualify as custody entitling one to credit against his sentence under the statute' " (*id.* ¶ 50 (quoting *Smith*, 2014 IL App (3d) 130548, ¶ 35), this court held that it agreed "with the reasoning in *Smith*," and it concluded that, "because [the] defendant was released on bond while being subject to electronic monitoring, the trial court did not err in refusing to give him a credit" (*id.*). With these principles in mind, we now consider what the difference between "home detention" and "home supervision" means for this case.

¶ 28 Here, defendant is seeking to obtain sentencing credit for the time he was out of jail on bond with a condition of home supervision, limiting his movements to his home and workplace. The statutory bail provision expressly states that, as a condition of bond, an offender may be placed into "a pretrial bond home supervision capacity with or without the use of an approved electronic monitoring device ***." 725 ILCS 5/110-10(b)(14) (West 2012). The fact that subsection (b)(14) also expressly references the Electronic Home Detention Law (730 ILCS 5/5-8A-1 *et seq.* (West 2012)) does not suffice to confer equivalency between home supervision and

home detention. The term, "home supervision" nowhere appears in the Home Detention Law. Instead, the Home Detention Law uses (and defines) the term, "home detention." The usage of two separate terms in the related statutes suggests that the legislature did not intend them to be synonymous. Rather, it suggests that the legislature intended that they mean different things. See *Village of Lake in the Hills v. Niklaus*, 2014 IL App (2d) 130654, ¶ 21 (the expression of one thing implies the exclusion of the other). In other words, the use of "home supervision" in the bail provisions means that the legislature did not intend that any time an offender was released on bond with a condition that he remain at his residence (or even his residence and workplace), he would not automatically be deemed to have been placed in a home detention program thereby making him eligible for sentencing credit. Instead, if he were placed in a home detention program, the trial court would have to expressly state that the offender was being confined in a home detention program, and the requirements of that program would have to be followed in order for the offender to later qualify for sentencing credit. In short, considering our foregoing examinations and analysis, we hold that the legislature consciously and thoughtfully intended "home supervision" pursuant to the bail provisions of the Code of Criminal Procedure and "home detention" pursuant to the Unified Code of Corrections to mean separate and discrete things.

¶ 29 B. The Parties' Argument

¶ 30 Defendant steadfastly argues that he was placed in electronic home detention and, under section 5-4.5-100 (730 ILCS 5/5-4.5-100 (West 2012)), he is entitled to sentencing credit for the time he spent on pretrial electronic home detention. We need not address this argument because defendant's starting supposition, that he was on electronic home detention, is erroneous. Because defendant was not on electronic home detention, section 5-4.5-100 is not applicable, and

this matter is fully resolved with the analysis in Section A above. All that remains is to discuss the effect of the difference between home supervision and home detention.

¶ 31 C. Applying Law to Facts

¶ 32 Defendant argues he is entitled to sentencing credit for the 511 days he spent "on electronic home monitoring prior to judgment." However, defendant's time spent on electronic home monitoring was actually home supervision under section 110-10(b)(14) of the Code of Criminal Procedure (725 ILCS 5/110-10(b)(14) (West 2012)) pursuant to the conditions of bail, and therefore ineligible for sentencing credit for the time spent in home supervision. *Ramos,* 138 Ill. 2d at 160.

¶ 33 Next, because defendant's in-home electronic monitoring did not equate to "home detention" as defined in the statutes, we consider whether defendant's restrictions due to in-home electronic monitoring qualify him to receive credit for that time. We hold it does not. In *Ramos,* the defendant was released on bail, but a term of the defendant's bail bond required him to stay in his residence unless he received the prior permission to leave from the court or the probation officer. *Id.* at 154. The defendant argued that his home confinement was the same as custody contemplated in section 5-4.5-100(b) (previously Ill. Rev. Stat. 1987, ch. 38, par. 1005-8-7(b)). The supreme court held that home confinement was unlike incarceration because the offender was not subject to the regimentation of life in jail or prison and was unmonitored while at home, enjoying unrestricted freedom of activity, movement (within the home, of course), and association. *Id.* at 159. The court further held that "custody" did not encompass any time that an offender was released on bond, "regardless of the restrictions that might be imposed on him during that time." *Id.* at 160. Likewise here. While defendant was confined to his residence and, later to his place of employment and his residence, the central fact was that these restrictions

were conditions of his bail, and *Ramos* held clearly that time spent on bail, regardless of the movement restrictions placed on a defendant, did not qualify to receive sentencing credit. *Id.* at 160, 162. We therefore hold, in accord with *Ramos*, that even if we deny defendant's contention that he was on "home detention," but accept that his in-home electronic monitoring was tantamount to custody, we cannot give him sentencing credit because he was on bond and *Ramos* prohibits the award of sentencing credit for time spent on bond no matter how restrictive the conditions. *Id.*; see also *Beachem*, 229 Ill. 2d at 250-53 (differentiating between conditions of bond and "custody" or "confinement").

¶ 34 Defendant argues strenuously that, because of the recent amendment, section 5-4.5-100 unambiguously entitles him to credit for the time spent on pretrial home electronic monitoring. Before June 22, 2012, section 5-4.5-100 stated, pertinently, that "the trial court may give credit to the defendant for time spent in home detention *** if the trial court finds that the detention *** was custodial." 730 ILCS 5/5-4.5-100(b) (West 2010). After June 22, 2012, the statute was amended to state, pertinently, that "the trial court shall give credit to the defendant for time spent in home detention ***." 730 ILCS 5/5-4.5-100(b) (West 2012). We agree with defendant that the change represents a requirement that a defendant is now required to receive sentencing credit for time spent in home detention. Defendant, however, did not consider the impact of his bail agreement and whether it was compatible with "home detention" under the statute. As we have noted, home supervision pursuant to a bail agreement is distinct from home detention under the Electronic Home Detention Law. Accordingly, even though defendant appears to be correct about the recent amendment to section 5-4.5-100, it is inapplicable because defendant was on home supervision and therefore not eligible to receive any benefit from the recent amendment to section 5-4.5-100.

¶ 35 D. Supervising Authority

¶ 36 We can take another tack in deciding the issue of whether defendant was in home detention. One of the lines of defendant's argument asserts that his pretrial electronic home monitoring was established and overseen by the Du Page County probation department, and that the probation department is an entity that may supervise persons serving time under electronic home detention. Defendant further notes that he was, in fact, supervised by the Du Page County probation department because the department provided an electronic monitor and he was required to contact the department daily, when he left for work and when he returned home. In addition to the restrictions on his liberty entailed by the electronic home monitoring, he was under the probation department's close supervision, thereby qualifying his pretrial electronic home monitoring to be deemed "electronic home detention" as the term is used in the pertinent statutes.

¶ 37 The Electronic Home Detention Law defines "home detention" as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." 730 ILCS 5/5-8A-2(C) (West 2012). For the sake of argument, we accept an equivalence between home supervision and home detention in order to illustrate this alternative analysis, even though, as we have demonstrated above, there is actually no equivalence between home supervision as a condition of a pretrial bond, and home detention. Returning to the alternative analysis, "supervising authority" is in turn defined as "the Department of Corrections, probation supervisory authority, sheriff, superintendent of municipal house of corrections or any other officer or agency charged with authorizing and supervising home detention." 730 ILCS 5/5-8A-2(E) (West 2012). Thus, not only must the offender be

confined to his or her residence, that confinement must be pursuant to the terms and conditions established by the supervising authority, which includes the probation department.

¶ 38 The *Smith* court included a second rationale in reaching its holding that the defendant there had not been on "home detention." *Smith*, 2014 IL App (3d) 130548, ¶¶ 35-43. In *Smith*, the trial court released the defendant on bond awaiting the resolution of his appeal. *Id.* ¶ 4. As a condition of his appeal bond, the defendant was required to wear a monitoring bracelet at all times, and defendant's release on bond was monitored by a private traffic school. *Id.* ¶ 5. Among the defendant's restrictions (and like defendant in this case) was a requirement to remain in his residence, but with permission to leave and attend his employment. *Id.*

¶ 39 The appellate court affirmed the denial of sentencing credit for the time that the defendant spent on in-home electronic monitoring. *Id.* ¶ 43. The appellate court rejected the defendant's argument that he was on "home detention" because he was " 'supervised by probation.' " *Id.* ¶ 42. The appellate court noted that the defendant's bond-release was supervised by a private traffic school and not by the probation department, notwithstanding the defendant's representation. *Id.* The court reasoned, pertinently, that, even if the defendant had been supervised by the probation department, he still would not have been on home detention (and qualified for sentencing credit), because the trial court, not the probation department, established the terms and conditions of the defendant's bond. *Id.* ¶ 43. The court further noted that the "[d]efendant possessed the same right as the probation department to request that the court change the conditions and terms of his release. *Id.*

¶ 40 Here, unlike *Smith*, defendant's in-home electronic monitoring was supervised by the Du Page County probation department and not by a nongovernmental private entity. Still, defendant was not on "home detention" under the statutes because it was the trial court, not the probation

department, that established the terms and conditions of defendant's bond, including the condition of in-home electronic home monitoring and occasional absences from home. Initially, the trial court allowed bond with the condition that defendant was required to stay within his residence 24 hours a day. Later, the trial court modified the condition, allowing defendant to attend his employment. The State and defendant both had the right to ask the court to modify the bond conditions; additionally, the court could also modify defendant's bond conditions *sua sponte*. 725 ILCS 5/110-6(a) (West 2012). The probation department could not change any conditions of defendant's bond: it could neither broaden nor lessen the parameters of defendant's release. In short, it was the court, not a "supervising authority" that established the terms and conditions of defendant's in-home electronic monitoring. Without being placed into a pretrial electronic home monitoring by a supervising authority, defendant cannot maintain that he was on "home detention" pursuant to the Electronic Home Detention Law. As a result, defendant is not entitled to sentencing credit under section 5-4.5-100(b) of the Code of Corrections.

¶ 41 There is yet another aspect of in-home electronic monitoring as a condition of bond and home detention, namely custody. There appear to be issues of custody associated with each condition. Defendant notes that, in amending section 5-4.5-100(b), the legislature struck the requirement that the trial court find the defendant's home detention to be custodial. See 730 ILCS 5/5-4.5-100(b) (West 2010) (previously providing that "the trial court may give credit to the defendant for time spent in home detention *** if the court finds that the detention *** was custodial"). On the other hand, the State argued that home detention is custodial (notwithstanding the amendment), but defendant was not in custody when he was released on bond, so he could not be in home detention. We need not resolve what role, if any, custody plays in home detention and the entitlement to sentencing credit because, by definition, defendant here

was not being held on home detention pursuant to the statutes as the terms and conditions of his monitoring were not established by a supervising authority.

¶ 42 With that said, it is apparent that the legislature intended for some defendants to receive sentencing credit for their time spent in pretrial home detention, but the characteristics of pretrial home detention are not clear. For instance, the Electronic Home Detention Law permits a defendant to leave his or her residence for work, just as defendant eventually was allowed to do in this case. See 730 ILCS 5/5-8A-4(A)(1) (West 2012). Thus, an approved absence from his or her residence does not itself serve to distinguish "home supervision" as a condition of a pretrial bond pursuant to section 110-10(b)(14) of the Code of Criminal Procedure from pretrial "home detention" under section 5-8A-3 of the Electronic Home Detention Law.

¶ 43 While we do not speculate about what might constitute a pretrial home detention, simply looking at the definitions provided by the relevant statutes suggests a "home detention" must be administered by a "supervising authority" that will set the terms and conditions of the defendant's confinement in his or her residence. *Smith*, 2014 IL App (3d) 130548, ¶ 43. In addition to setting the terms, the supervising authority would have to obtain the defendant's written consent to participate in home detention, and the defendant would have "to comply with the rules and regulations of the program as stipulated in subsections (A) through (I) of Section 5-8A-4." 730 ILCS 5/5-8A-5(A) (West 2012). Included in the rules and regulations are the requirements that the participant must "remain within the interior premises or within the property boundaries of his or her residence at all times during the hours designated by the supervising authority" and must "admit any person or agent designated by the supervising authority into his or her residence at any time for purposes of verifying the participant's compliance with the conditions of his or her detention." 730 ILCS 5/5-8A-4(A,B) (West 2012). Defendant here

made an offer of proof on the motion to reconsider that included Boivin's testimony that he informed defendant of "the rules" of the home monitoring and that defendant signed a form acknowledging that he would comply with those rules, but the record does not disclose what those rules were. We do not know if the rules were established by the probation department or if they followed the requirements of section 5-8A-4 of the Electronic Home Detention Law. In any event, no matter what form "the rules" took, the conditions defendant's restriction to his home and the hours he was released to attend his employment had been set by the trial court before defendant reported to the probation department to receive his electronic monitoring device. The probation department was only carrying out the trial court's directions. Thus, the probation department was not a "supervising authority" under the terms of the relevant statutes, and we are back to our original line of argument in this section.

¶ 44 E. Gamesmanship and MSR Term

¶ 45 We note that the State accuses defendant of gamesmanship in bringing the claim for sentencing credit. We have addressed above our disapproval of the increasing *ad hominem* attacks across the briefing in this matter. We further note that the State fails to develop its complaint into an actual argument that defendant's claim should be forfeited. We need not further address this point but to say that any "gamesmanship" is unobjectionable here; defendant timely raised his request for sentencing credit under a statutory amendment he believed was overlooked.

¶ 46 Turning to the supplemental briefs, the State raises the issue in its supplemental brief that defendant's MSR term was improperly calculated to be two years, when it should have been four in light of defendant's prior conviction of a felony child sex offense in Arizona. 730 ILCS 5/5-8-1(d)(5) (West 2012). Defendant objects to raising the issue in a supplemental brief (especially in

a manner nonresponsive to the question that was to be briefed), and further argues that the issue was never raised or considered before the trial court, which made no findings about defendant's Arizona offense. For its part, the State justifies raising the MSR term for the first time in a supplemental brief on appeal because defendant's sentence contains a void term, and voidness may be raised at any time.

¶ 47 It is well established that a sentence which does not conform to a statutory requirement is void and a void order may be attacked at any time. *People v. Thompson*, 209 Ill. 2d 19, 24-25 (2004). The State, however, has not demonstrated that the MSR term of defendant's sentence is invalid.

¶ 48 The State argues that defendant has twice been convicted of felony criminal sexual abuse: this case being the second, and the Arizona conviction being the first. The pertinent MSR provision states that, "if the victim is under 18 years of age, for a second or subsequent offense of aggravated criminal sexual abuse or felony criminal sexual abuse," the MSR term is four years. 730 ILCS 5/5-8-1(d)(5) (West 2012). The record, however, does not support the State's argument. The record reflects that defendant's 1986 Arizona conviction was for the crime of attempted child molestation, and that conviction was later set aside. Thus defendant has a conviction for aggravated criminal sexual abuse and a conviction (which was set aside) for an *attempted* child molestation. The State offers no authority to address whether a conviction for attempted child molestation qualifies as a prior conviction of aggravated criminal sexual abuse or felony criminal sexual abuse, to say nothing about the effect of setting aside the Arizona conviction on the status of the Arizona conviction. The failure to present pertinent authority in support of an argument operates to forfeit the argument on appeal (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)); likewise we will not optimize arguments and conduct supporting research where

the party itself has failed to do so (*People v. Olsson*, 2014 IL App (2d) 131217, ¶ 16). Accordingly, we reject the State's challenge to defendant's MSR term.

¶ 49 III. CONCLUSION

¶ 50 For the foregoing reasons, the judgment of the circuit court of Du Page County is affirmed.

¶ 51 Affirmed.