2014 IL App (2d) 140923-U
No. 2-14-0923
Order filed March 17, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-483
DANIEL S. GRAHAM,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices McLaren and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not entitled to credit for time served in prison pursuant to a vacated sentence against a subsequent sentence of probation; additionally, trial court has authority to impose a sentence of periodic imprisonment as a condition of probation, so that portion of the sentence was not void.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Daniel S. Graham, appeals the sentence imposed by the trial court on remand after we vacated an earlier sentence of imprisonment in an earlier appeal (see *People v. Graham*, 2014 IL App (2d) 120841-U (unpublished order in accordance with Illinois Supreme Court Rule 23 (eff. July 1, 2011))). He raises two issues. First, he contends that he is entitled to credit for

time he served in prison pursuant to an earlier sentence that we vacated in the first appeal against his current sentence of probation, which was re-imposed on remand. Second, he asserts that the portion of his current sentence requiring him to serve a term of periodic imprisonment is void, as the trial judge unilaterally modified the plea agreement. For the reasons that follow, we affirm.

¶ 4 Before turning to the merits of defendant's arguments, we note that the State's brief is largely unresponsive to the issues raised by defendant. It also contains substantial irrelevant material that appears calculated to play to this court's sympathy. Filing such a brief is little better than filing no brief at all. Although we ultimately decline to do so, we considered striking the State's brief and deciding this case in accordance with the principles set forth in *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

¶ 5 The relevant facts are brief. The parties engaged in plea negotiations, which resulted in an agreement that was accepted by the trial court. After an evaluation by the probation department, electronic home monitoring was recommended. Defendant could not afford the costs of such monitoring, and he did not have a permanent residence, which is also a requirement of the monitoring program. As defendant could not comply with the terms of the probation, he moved to vacate the plea. The trial court granted the motion, and, following a jury trial, defendant was convicted of one count of violating an order of protection. Defendant then moved to reinstate the terms of the plea agreement. The trial court denied the motion and sentenced defendant to 30 months' imprisonment. Defendant then appealed to this court, arguing that trial counsel was ineffective in moving to vacate the initial plea agreement. He sought to have the terms of the agreement reinstated. We agreed that counsel was ineffective; however, rather than reinstate the plea, we vacated his sentence, and remanded for further proceedings. We stated that our intent was to place the parties in the position they were at prior to counsel's error, and we

explained that the parties could proceed in whatever manner they could have at that time and that nothing in our earlier decision was intended to constrain the trial court's discretion.

¶ 6 On remand, the trial court imposed a sentence of 24 months' probation, it modified the agreement to include a period of 18 months' periodic imprisonment, and it refused to credit defendant for any of the time he spent in prison pursuant to his earlier sentence. This appeal followed.

¶ 7 II. CREDIT FOR TIME SERVED

¶ 8 Defendant argues that he is entitled to credit against his sentence of probation for time spent in prison in accordance with his earlier, vacated sentence. Whether a defendant is entitled to such a credit presents a pure question of law, so review is *de novo*. *People v. Jones*, 223 Ill. 2d 569, 596 (2006). As we explain below, we hold that defendant is not entitled to such a credit.

¶ 9 Defendant begins his argument by invoking the words of the United States Supreme Court: "[T]he constitutional guarantee against multiple punishments for the same offense absolutely requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969). The guarantee against double jeopardy (U.S. Const. amend. V) is offended "whenever punishment already endured is not fully subtracted from any new sentence imposed." *Id*. at 718. Whether a prison sentence and a period of probation are fungible, however, is not a question addressed by the Supreme Court in that case.

¶ 10 Defendant contends that, "[a]s it is undeniably true that imprisonment is a stricter confinement of liberty than probation, there is no reason not to credit time served in prison against the re-imposed term of probation." Initially, we note that at this stage of the proceedings, it is defendant's burden, as the appellant, to set forth reasons why he is entitled to receive such

credit. See *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). Therefore, it is not enough to simply state that there is no reason not to do what defendant would like us to do. Moreover, defendant provides no legal authority—direct or otherwise—in support of this point. In order to carry his burden on appeal, defendant was required to provide legal reasons, supported by legal authority, in furtherance of his position. While we acknowledge that no case *directly* addresses the question before us, *indirect* authority sheds some light on the proposition defendant advocates.

¶ 11 Notably, in *People v. Miles*, 53 Ill. App. 3d 137, 143 (1977), the court held that a probationer was not entitled to a credit against his sentence for time spent in preconviction custody. In *Miles*, the defendant asserted an equal-protection violation based on the fact that a defendant who is ultimately imprisoned receives a credit for time spent in pretrial custody while a defendant sentenced to probation does not. The court found no violation existed, as the two groups were not similarly situated. *Id*. at 142. The court noted, *inter alia*, that the legislature could have rationally concluded serving a full sentence of probation was necessary to allow probation to serve its rehabilitative function such that a reduction for prior time served in jail was inappropriate. *Id*. at 144; see also *People v. McClendon*, 130 Ill. App. 3d 852, 855 (1970) ("Probation is *** an affirmative correctional tool used because it offers the most future protection to the public."). It also could have concluded that since probation is an inherently milder form of punishment, such a reduction is unnecessary. *Id*. In short, the court identified several reasons why a defendant's previous time spent in custody should not reduce a sentence of probation. See also *People v. Kolzow*, 319 Ill. App. 3d 673, 680 (2001) ("[A] felon sentenced to a term of confinement with a condition of probation is different from a felon sentenced to imprisonment."); *cf. People v. Jarrett*, 372 Ill. App. 3d 344, 351 ("Years of [mandatory

supervised release] and years in prison are not interchangeable."). Thus, the clear implication of *Miles* is that time spent in prison and time spent on probation are not fungible.

¶ 12 Defendant acknowledges the existence of *Miles*, but attempts to distinguish it by stating, "It is important to note the difference between time served in prison *after* a jury conviction and time spent in jail *before* resolution of the case." (Emphasis in original.) Defendant makes no attempt to explain why this difference is significant, cite authority to establish that it is, or discuss the policies underlying the court's decision in *Miles*. In any event, the significance of the distinction defendant seeks to draw is not apparent to us, and we find *Miles* to provide sound guidance here.

¶ 13 Accordingly, we hold that a defendant is not entitled to credit against a sentence of probation for time previously spent in custody for the same offense.

¶ 14 III. PERIODIC IMPRISONMENT

¶ 15 Defendant next contends that the trial court erred in imposing an 18-month term of periodic imprisonment. We note that he frames this argument in terms of voidness rather than directly attacking the sentence, for example, through a claim of judicial vindictiveness (see, *e.g.*, *Pearce*, 395 U.S. at 725) or an abuse of discretion in sentencing (see *People v. Flores*, 404 Ill. App. 3d 155, 157-58 (2010)). Thus, defendant challenges the trial court's authority to impose that sentence as a condition of probation. As a general proposition, defendant is correct that, once the trial court concurs in the plea agreement, it may not unilaterally alter it. See *People v. Lambrechts*, 69 Ill. 2d 544, 556 (1977) ("Absent a plea agreement concurred in by the court, a defendant has no right, constitutional or otherwise, to know in advance the specific sentence which will be imposed upon him. [Citation.] Nor is there any obligation upon a judge to follow the recommendations embodied in a plea agreement in which he has not concurred.").

¶ 16 Nevertheless, it is axiomatic that plea agreements are governed by contract law (at least to the extent that due process concerns are absent). *People v. Young*, 2013 IL App (1st) 111733, ¶ 37. Citing contract law principles, our supreme court has held that in the event of a mutual mistake of fact, a court has the authority to reform a plea agreement to conform to the intent of the parties. *People v. Donelson*, 2013 IL 113603, ¶ 20. This is what the trial court did in the instant case. The plea agreement contained, in pertinent part, the following provisions: 24 months' probation and monitoring by GPS. However, defendant could not afford the fees associated with home monitoring and did not have a permanent place of residence, which is necessary to make such monitoring effective. To effectuate the parties' intent, the trial court waived the fees, and, to address defendant's lack of a residence, the trial court imposed a period of periodic imprisonment. It explained:

> "The other issue that remains is he does not have a stable residence ***. So, with reformation principles in mind[,] here's what I'm doing.
>
> ***
>
> I am modifying the probation to include 18 months of periodic imprisonment. The defendant [is] to be released to seek employment, to work, to obtain treatment as ordered and perform probation obligations. He will stay at a community based corrections center. He will be released. He may find housing and work and needs to do everything he needs to do on probation. Once he's got his feet on the ground and he has a residence to which he can be released, I will stay or vacate the rest of the periodic imprisonment sentence because I believe that fulfills the intent of the parties."

Essentially, the court fulfilled the intent of the parties regarding GPS monitoring in the only way possible under the circumstances—by providing defendant a residence. We take particular note

of the fact that this portion of the probation order will remain in effect only so long as necessary to effectuate GPS monitoring (that is, until defendant obtains a stable residence and moves to vacate that portion of the sentence). In short, defendant's contention that the trial court lacked the authority to modify probation is not well taken. Quite simply, to the extent the modification was simply a reformation of the terms of the agreement to reflect the parties' intent, the trial court absolutely did have that authority. See *People v. Douglas*, 2014 IL App (4th) 120617, ¶¶ 41-45.

¶ 17 Moreover, while it is true that defendant is entitled to the benefit of the agreement he bargained for, the State is similarly so entitled: "Though rarely emphasized in this court's jurisprudence, the other half of the contractual equation is the benefit of the bargain accruing to the State." *Donelson*, 2013 IL 113603, ¶ 19. For the State, the benefit of the bargain was probation in accordance with terms determined by the probation department, which, prior to the first appeal in this case, had been determined to include GPS monitoring. If we were to vacate the trial court's order of periodic imprisonment, such monitoring would not be possible (at least until defendant established a residence). In other words, vacating that sentence would result in a situation that did not reflect the parties' intent, as it denied the State its consideration. The alternative would be to rescind the agreement. See *Schafer v. Union Bank/Central*, 2012 IL App (3d) 110008, ¶ 39. The end result would be that defendant would be sentenced to prison (or MSR as he apparently served his entire term of imprisonment). The trial court expressly asked defendant if he preferred that option, and defendant declined. As such, the trial court reformed the agreement.

¶ 18 Finally, without citation to authority, defendant contends he is entitled to time served in prison against the term of periodic imprisonment. Given the term of periodic imprisonment was

imposed to facilitate probation, it is not apparent to us how such credit would be appropriate.

¶ 19 To conclude, the trial court had the authority to impose a sentence of periodic imprisonment, so that portion of the sentence is not void.

¶ 20 IV. CONCLUSION

¶ 21 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed.

¶ 22 Affirmed.