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2015 IL App (3d) 130470-U

Order filed March 3, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

|                                      |   |  |
|--------------------------------------|---|--|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois, |
| Plaintiff-Appellee,                  | ) |  |
| v.                                   | ) | Appeal No. 3-13-0470   |
|                                      | ) | Circuit No. 93-CF-51   |
| TYRONE B. WALKER,                    | ) | Honorable  |
| Defendant-Appellant.                 | ) | Michael J. Kick,<br>Judge, Presiding.  |

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice McDade and Justice Wright concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defendant's *nunc pro tunc* motion was in substance a motion to amend the mittimus to award defendant the proper sentencing credit; such a motion can be made at any time. The motion made a sufficient showing that defendant's sentencing credit did not conform to the statutory requirements. Cause remanded to determine the appropriate sentencing credit.
- ¶ 2 A jury convicted defendant, Tyrone B. Walker, of first degree murder (720 ILCS 5/9-1(a)(1) (West 1992)), and the court sentenced him to 40 years' incarceration. The court awarded defendant day-for-day sentencing credit for 376 days spent in presentence custody. More than

18 years later, defendant filed a *nunc pro tunc* motion alleging that he was denied the appropriate day-for-day credit. The trial court denied the motion, concluding that a *nunc pro tunc* motion is available to correct clerical errors but not to correct sentencing credit. Defendant appeals, arguing that his *nunc pro tunc* motion should be construed as a motion to amend the mittimus and, as such, was a proper vehicle to raise the issue of sentencing credit. We agree, and therefore reverse the trial court's decision and remand for further proceedings.

¶ 3

### FACTS

¶ 4

On January 25, 1993, defendant was charged by complaint with first degree murder (720 ILCS 5/9-1(a)(1) (West 1992)). On January 26, 1994, defendant first appeared in court on that charge. At that appearance, the State acknowledged that on December 2, 1993, it became aware that defendant was in custody in Cook County on a different charge. Defendant pled guilty to the Cook County charge on January 25, 1994.

¶ 5

Defendant's murder charge proceeded to trial, after which the jury found him guilty. On January 17, 1995, the court sentenced him to 40 years' incarceration. The court awarded defendant day-for-day sentencing credit for 376 days spent in presentence custody, under section 5-8-7(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-7(b) (West 1994)). The court did not specify the dates for which defendant was receiving credit.

¶ 6

The judgment was upheld on direct appeal. *People v. Walker*, No. 3-95-0058 (1996) (unpublished order under Supreme Court Rule 23). Defendant's petition for postconviction relief was summarily dismissed. We upheld that dismissal on appeal. *People v. Walker*, No. 4-97-0826 (1998) (unpublished order under Supreme Court Rule 23). In neither the direct appeal nor the postconviction petition did defendant raise an issue involving sentencing credit.

¶ 7 In 2013, defendant filed a motion for *nunc pro tunc* relief. In it, he argued that he was entitled to an additional 75 days' sentencing credit for time spent in simultaneous custody on the present charge and the Cook County charge. The motion alleged that defendant was in custody on the Cook County charge from January 25, 1993, until pleading guilty to the Cook County charge on January 25, 1994. The motion further alleged that defendant was awarded 75 days of day-for-day sentencing credit in the Cook County case for time spent in presentence custody on that charge. The motion argued that defendant was entitled to an additional 75 days of sentencing credit in the present case for time spent in simultaneous custody on the present charge and the Cook County charge. To provide factual support for his claim, defendant's motion included a transcript in which the State admitted that defendant was in simultaneous custody in Cook County at least as early as December 2, 1993.

¶ 8 The court denied defendant's motion, finding that a *nunc pro tunc* motion was an unsuitable vehicle for challenging the court's decision about sentencing credit. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that he should receive additional sentencing credit under section 5-8-7(b) of the Code (730 ILCS 5/5-8-7(b) (West 1994)). He acknowledges that the *nunc pro tunc* motion was an improper method of raising his argument but urges us to construe his *nunc pro tunc* motion as a motion to amend the mittimus, citing *People v. Hollister*, 394 Ill. App. 3d 380, 381 (2009) and *People v. White*, 357 Ill. App. 3d 1070 (2005). On appeal, the State does not contest that argument. We accept defendant's argument and construe his motion as a motion to amend the mittimus.

¶ 11 The State claims that defendant has forfeited his sentencing credit claim by failing to raise it: (1) by contemporaneous objection when the court awarded the credit; (2) in a postsentencing motion; (3) on direct appeal; or (4) in his postconviction petition. However, our supreme court has made it clear that a sentence that does not conform to statutory requirements is void and may be challenged at any time. *People v. Arna*, 168 Ill. 2d 107, 113 (1995). That rule applies to a sentence that does not conform to the sentencing credit requirements of section 5-8-7(b) of the Code (730 ILCS 5/5-8-7(b) (West 1994)). *People v. Roberson*, 212 Ill. 2d 430, 440 (2004). Therefore, defendant may raise his claim at any time, and forfeiture does not apply. *People v. Johnson*, 401 Ill. App. 3d 678, 680 (2010).

¶ 12 A motion to amend the mittimus is a valid vehicle for correcting sentencing credit. See, e.g., *Hollister*, 394 Ill. App. 3d at 381; *White*, 357 Ill. App. 3d 1070; *People v. Wren*, 223 Ill. App. 3d 722, 731 (1992) (sentencing credit issues "should be raised by filing a motion to amend the mittimus in the trial court"). The trial court retains jurisdiction to correct nonsubstantial errors such as the amendment of the mittimus, despite the filing of a notice of appeal. *Baker v. Department of Corrections*, 106 Ill. 2d 100, 106 (1985); *Hollister*, 394 Ill. App. 3d at 381. The trial court in the present case therefore had jurisdiction to consider defendant's motion and, if warranted, amend the mittimus to award defendant the appropriate sentencing credit.

¶ 13 Here, defendant's motion made a sufficient showing that he received the incorrect amount of sentencing credit due under section 5-8-7(b) of the Code (730 ILCS 5/5-8-7(b) (West 1994)). Defendant was sentenced on January 17, 1995. The court awarded him 376 days' sentencing credit, for what we assume are days spent in custody from January 6, 1994, through January 16, 1995. See *People v. Williams*, 239 Ill. 2d 503, 509 (2011) (the first day of a sentence does not count as a day of presentence custody). However, defendant's motion alleged that he was in

simultaneous custody in Cook County since at least as early as December 2, 1993. The motion therefore makes a sufficient showing that defendant is entitled to some amount of additional credit.

¶ 14 A defendant is entitled to credit for any days spent in presentence custody, regardless of whether he receives credit for those same days in another case. *People v. Robinson*, 172 Ill. 2d 452, 461-63 (1996). A defendant is considered in custody for any time he is incarcerated after being charged with a crime but before being sentenced. *People v. Chamberlain*, 354 Ill. App. 3d 1070, 1075 (2005). Therefore, defendant is entitled to credit in the present case for any time he was incarcerated from the date he was charged—January 25, 1993—until the date he was sentenced—January 17, 1995—regardless of whether he was simultaneously in custody on the Cook County charge at the same time. The court granted him credit for January 6, 1994, through January 16, 1995. Defendant's motion alleges that he was in simultaneous custody on the present charge and the Cook County charge from at least as early as December 2, 1993. He is therefore entitled to an additional amount of credit.

¶ 15 Defendant's motion sufficiently alleged that he was denied presentence credit for at least the time he spent in custody from December 2, 1993, through January 5, 1994. As a result, we remand the cause to the trial court to determine how many additional days defendant was in custody from January 25, 1993, through January 5, 1994, and award defendant sentencing credit for those days.

¶ 16 **CONCLUSION**

¶ 17 The judgment of the circuit court of Kankakee County is reversed, and the cause is remanded with directions.

¶ 18 Reversed and remanded with directions.