

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (4th) 130388-U

NO. 4-13-0388

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

March 16, 2015

Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
CHRISTOPHER S. PARSONS,)	No. 12CF95
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed in part as modified, vacated in part, and remanded with directions, concluding the trial court (1) did not err in denying defendant's second amended motion to withdraw his guilty plea; (2) erred in awarding defendant presentence credit for time where he was not in custody as a result of the current offense; and (3) upon remand must impose all mandatory fines as authorized by statute at the time of the offense.
- ¶ 2 In February 2010, defendant, Christopher S. Parsons, was sentenced to two years in the Illinois Department of Corrections (DOC) for violating the Sex Offender Registration Act (Registration Act) (730 ILCS 150/1 to 12 (West 2008)). In April 2012, defendant was charged in the current case with one count of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2010)) as a result of an October 2011 incident where he threw an unknown liquid substance at a correctional officer. At the time defendant was charged with aggravated battery, he was serving his mandatory supervised release (MSR) term incarcerated in DOC for reasons not in the record.

¶ 3 On January 22, 2013, the trial court issued a remand order, directing DOC to release defendant to the Livingston County jail at the conclusion of his term of imprisonment. On February 3, 2013, defendant was released from DOC and transferred to the Livingston County jail. At a February 27, 2013, status hearing, defendant asked the trial court to grant him a personal recognizance bond. The trial court denied his request. Defendant then entered into a negotiated plea with the State whereby he agreed to serve three years in DOC followed by two years of MSR. The trial court accepted defendant's plea and awarded him presentence credit for time spent in custody between its January 22, 2013, remand order and February 26, 2013.

¶ 4 In March 2013, defendant filed a motion to withdraw his guilty plea. He thereafter filed an amended motion and a second amended motion to withdraw his guilty plea. A hearing was held, and the trial court denied defendant's second amended motion. Defendant now appeals, arguing (1) he is entitled to withdraw his guilty plea as a result of the trial court's improper admonishments regarding the length of his sentence; (2) his written sentencing judgment must be amended to include 320 days of presentence credit for time spent in DOC prior to sentencing; and (3) two fines were improperly imposed by the circuit clerk and must be vacated. We affirm in part as modified, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 On February 3, 2010, defendant was sentenced to two years in DOC for violating the Registration Act (730 ILCS 150/1 to 12 (West 2008)). On April 13, 2012, while defendant was serving his MSR term incarcerated in DOC, defendant was indicted in the current action and charged with one count of aggravated battery (720 ILCS 5/12-3.05(d)(4)(i) (West 2010)) for throwing an unknown liquid substance at a correctional officer in October 2011. Defendant proceeded *pro se* from April 2012 until October 2012, at which point he invoked his right to

counsel and the court appointed the Livingston County Public Defender, Randell S. Morgan, to represent him.

¶ 7

A. Pretrial Proceedings

¶ 8

At a December 2012 pretrial hearing, defendant indicated he was going to be released from DOC in February 2013, and he asked the trial court to grant him a personal recognizance bond. The trial court denied defendant's request, stating, "Well, there is no bond in this case at this time. If and when you come up for parole, then at that point I can take the issue up; and you'd be remanded to Livingston County subject to whatever bond; but there is no bond at this time. You're not being held on this case."

¶ 9

On January 22, 2013, the trial court issued an order remanding defendant from DOC custody to the Livingston County jail. The order stated:

"Upon completion of said defendant's current term of imprisonment, [DOC] shall deliver into the custody of the Sheriff of Livingston County, Illinois ***, the person of defendant *** for his return to the County of Livingston, State of Illinois.

The defendant's bond upon his release from imprisonment by [DOC] is set at \$10,000 ***."

On February 3, 2013, defendant reportedly was released from DOC and remanded to the Livingston County jail.

¶ 10

B. Defendant's Guilty Plea

¶ 11

At a February 27, 2013, status hearing, defendant again requested he be released on a personal recognizance bond and the trial court denied his request. Later that day, the court recalled defendant's case to hear a proposed plea agreement. Defendant asked the court to accept

his change of plea as a result of an agreement with the State whereby he would serve three years in DOC followed by two years of MSR. The court stated:

"THE COURT: Okay. So as I understand it, you are going to change your plea today to a plea of guilty to one count of aggravated battery, a Class 2 felony.

In exchange for that plea, you'll receive a three year sentence in [DOC] plus a two year [MSR] period, court costs and then the [Violent Crime Victims Assistance (VCVA)] fee and the [Child Advocacy Center (CAC)] fee would be due within 12 months of your release from [DOC].

There would be some credit for time served. I think the remand order was entered on January 22nd, 2013. My calculations show that's 36 days. So you have incarceration credits that will offset the VCVA fee and the CAC fee so those are reduced to zero. So you just have the court costs due within one year of your release from [DOC].

THE DEFENDANT: Okay.

THE COURT: It is a three year sentence. You are eligible for 50 percent good time so that's a year and a half. I believe that DOC has reinstated the other six months good time so that's a year minus about a month that you've served so you are looking at about eleven months. Then you do have a two year [MSR term].

Any questions about that?

THE DEFENDANT: No, Your Honor."

¶ 12 The trial court finished admonishing defendant and accepted his guilty plea.

According to the signed sentencing judgment, the trial court imposed a \$100 VCVA fine and a \$20 CAC fine, which were offset by defendant's presentence incarceration credit for time served between the court's January 22, 2013, remand order and February 26, 2013.

¶ 13 C. Defendant's Motion To Withdraw His Guilty Plea

¶ 14 In March 2013, defendant filed a motion to withdraw his guilty plea. In the motion, defendant alleged:

"Said motion is based upon Defendant's understanding of the sentence, and possible sentence alternatives which Defendant states were not fully understood by him, that he has a valid defense to this cause, and that he wishes to proceed to trial."

¶ 15 In April 2013, defendant filed an amended motion to withdraw his guilty plea and a second amended motion to withdraw his guilty plea (to correct a typographical error). In his second amended motion, defendant alleged:

"Said motion is based upon Defendant's belief that he was compelled to enter a plea of guilty, that the motion for a personal recognizance bond should have been entered, which would have allowed Defendant to more fully prepare for trial, that he has a valid defense to this cause, and that he wishes to proceed to trial."

¶ 16 Defendant attached an affidavit in support of his second amended motion to withdraw his guilty plea. In the affidavit, defendant stated, "I believe that I was coerced and compelled into pleading guilty." He further alleged, "The State[']s Attorney made improper

arguments leading to the denial of my motion for a personal recognizance bond, thereby compelling my plea." He also claimed, "The Court improperly denied my motion for a personal recognizance bond," and "a bond should not have been required as I have served all of my time in this case and should be released based upon time served since the Indictment on April 13, 2012."

¶ 17 On May 6, 2013, a hearing on defendant's second amended motion to withdraw his guilty plea commenced. At the hearing, Attorney Morgan stated he would stand on defendant's second amended motion and affidavit. He then explained:

"[Defendant] believes the State made improper arguments concerning [his motion for a personal recognizance bond]; and [the motion] should have been granted; and he felt compelled at that time to proceed with the agreed plea; and it's a result of that pressure from that matter that he entered into an agreed plea; and that he believes he does have a valid defense to the case if he can proceed and withdraw his guilty plea ***."

At the conclusion of the hearing, the trial court denied defendant's second amended motion to withdraw his guilty plea.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant asserts the trial court abused its discretion in denying his second amended motion to withdraw his guilty plea. Specifically, defendant alleges he did not voluntarily plead guilty because he "was improperly admonished by the trial court that he would only serve eleven months of his three year sentence." Defendant further argues he should

receive credit against his sentence for time served in presentence custody starting on the date he was charged in the instant cause, April 13, 2012, rather than the date the trial court issued its remand order, January 22, 2013, for a total of 320 days' presentence credit. Last, defendant argues this court should vacate fines which were improperly assessed by the circuit clerk. We address each issue in turn.

¶ 21 A. Defendant's Motion To Withdraw His Guilty Plea

¶ 22 1. *Standard of Review*

¶ 23 "The decision to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the circuit court and, as such, is reviewed for abuse of discretion." *People v. Baez*, 241 Ill. 2d 44, 109-10, 946 N.E.2d 359, 398 (2011).

¶ 24 2. *Defendant Forfeited His Argument That the Trial Court Misinformed Him About the Approximate Period of Time He Would Serve in Custody*

¶ 25 Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013) provides, in pertinent part, as follows:

"No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court *** a motion to withdraw the plea of guilty and vacate the judgment. *** *Upon appeal any issue not raised by the defendant in the motion to reconsider the sentence or withdraw the plea of guilty and vacate the judgment shall be deemed waived.*" (Emphasis added.)

¶ 26 Defendant's original motion to withdraw his guilty plea stated it was "based upon [his] understanding of the sentence, and possible sentence alternatives," which he stated "were not fully understood by him." Defendant argues his original allegation regarding his

misunderstanding of his sentence is sufficient to warrant review of the issue he now raises on appeal—that he was actively misled as to the terms and length of his sentence. Because we conclude defendant withdrew his original allegations when he filed his amended and second amended motions, we disagree.

¶ 27 Defendant's second amended motion to withdraw his guilty plea was independently complete and contained no reference to his earlier unamended motion. As our supreme court has long recognized, "Where an amendment is complete in itself and does not refer to or adopt the prior pleading, the earlier pleading ceases to be a part of the record for most purposes, being in effect abandoned and withdrawn." *Bowman v. County of Lake*, 29 Ill. 2d 268, 272, 193 N.E.2d 833, 835 (1963). Thus, any arguments made in defendant's original motion but not in his second amended motion were effectively withdrawn.

¶ 28 When we look to the substance of defendant's second amended motion, we see defendant did not reallege that he misunderstood his sentence. Rather, he claimed his motion was "based upon [his] belief that he was compelled to enter a plea of guilty," and "that the motion for a personal recognizance bond should have been entered, which would have allowed [him] to more fully prepare for trial." In other words, defendant's second amended motion was based entirely upon his belief that he was compelled to enter a plea of guilty as a result of improper arguments made by the State concerning his request for a recognizance bond. Accordingly, we conclude defendant forfeited his claim of error by failing to allege that the court's admonitions leading up to the guilty plea were improper.

¶ 29 Defendant makes no argument to establish any basis for this court to review his forfeited claim as plain error. We therefore uphold the trial court's denial of defendant's second amended motion to withdraw his guilty plea.

¶ 30

B. Defendant's Request for Presentence Credit

¶ 31

Defendant next asserts this court should order the trial court to issue an amended sentencing judgment granting him credit against his sentence for time served in presentence custody from April 13, 2012, through February 26, 2013, a period of 320 days. Because calculation of presentence credit is a question of statutory interpretation, we review defendant's claim *de novo*. *People v. Williams*, 239 Ill. 2d 503, 506, 942 N.E.2d 1257, 1259-60 (2011).

¶ 32

1. *Defendant Was Not Serving His MSR in Custody
as a Result of the Aggravated Battery Charge*

¶ 33

Defendant contends he is entitled to additional presentence credit because he was "in custody as a result of the offense for which the sentence was imposed *** even where he was also serving his MSR in [DOC]." See 730 ILCS 5/5-4.5-100 (West 2010). Citing this court's decision in *People v. Hughes*, 2011 IL App (4th) 100687, 962 N.E.2d 969, he specifically argues his lack of a charged MSR violation entitles him to presentence credit starting on April 13, 2012, the date he was indicted in the current action. We disagree.

¶ 34

In *Hughes*, the defendant was serving a two-year sentence for retail theft when he threw an unknown liquid substance at a correctional officer. The defendant was formally charged with aggravated battery nine months before his scheduled release date on the retail theft conviction. When his scheduled release date arrived, defendant remained in DOC custody as a result of the pending aggravated battery charge. Defendant was ultimately found not guilty by reason of insanity and transferred to the Department of Human Services (DHS). In determining when defendant's maximum-commitment period began, the trial court refused to award defendant credit for the period between his scheduled release from custody and his transfer to DHS because he was also serving his MSR on the retail theft conviction. On appeal, we reversed. We concluded defendant should have been given credit toward his maximum-

commitment period even though he was serving his MSR in DOC because the record made it clear he was being held past his release date "solely in connection with the pending aggravated-battery charge." *Id.* ¶ 20, 962 N.E.2d 969.

¶ 35 The instant case is distinguishable. Here, defendant began serving a two-year sentence for violating the Registration Act on February 3, 2010. He was not charged in the current action until April 13, 2012—more than one month after his scheduled release date on the prior conviction. Instead of being released in February 2012 to serve his MSR, however, defendant remained in the custody of DOC at the time he was indicted for reasons not contained in the record.

¶ 36 Defendant maintains, because it is not clear from the record why he was serving his MSR in DOC, his case should be remanded for the trial court to discern whether he was being held in connection with the aggravated battery charge. We disagree. While the record may not reflect exactly why defendant was held past his scheduled release date, what is clear is that defendant could not have been held in February 2012 in connection with the aggravated battery charge because the aggravated battery charge did not exist until April 2012.

¶ 37 Even after the charge was filed, the record makes it clear defendant was not being held in connection with the aggravated battery. At the December 2012 status hearing, defendant indicated to the trial court that he was being released from prison in February 2013, and he requested he be released on a personal recognizance bond. The trial court denied defendant's request, stating, "Well, there is no bond in this case at this time. If and when you come up for parole, then at that point I can take the issue up; and you'd be remanded to Livingston County subject to whatever bond; but there is no bond at this time. *You're not being held on this case.*" (Emphasis added.)

¶ 38 At the February 2013 status hearing, defendant again asked the trial court for a personal recognizance bond. His attorney stated to the court that defendant had served his sentence on the prior conviction and had been released from DOC custody on February 3, 2013—exactly three years after he was admitted to DOC to serve a two-year sentence. Given the record before us, we find remand on this issue unnecessary. Defendant was not being held in DOC in connection with the pending aggravated battery charge and is therefore not entitled to the presentence credit he requests.

¶ 39 *2. Defendant's Sentencing Judgment Must Be Amended
To Remove Presentence Credit*

¶ 40 The State contends the trial court erroneously ordered presentence credit to begin on the date of its January 22, 2013, remand order because the court's remand order did not take effect until "completion of said defendant's current term of imprisonment." Thus, the State claims defendant should have only been given credit for "time served in county custody between his release from prison and sentencing," *i.e.*, February 4, 2013, through February 26, 2013. See *People v. Latona*, 184 Ill. 2d 260, 272, 703 N.E.2d 901, 907 (1998). We agree in part.

¶ 41 Section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2010)) provides a defendant with presentence credit "for time spent in custody as a result of the offense for which the sentence was imposed." Looking to the plain language of both the trial court's remand order and section 5-4.5-100(b), we conclude defendant was not in custody as a result of his aggravated battery charge until after his release from DOC on February 3, 2013. However, defendant was in custody in the Livingston County jail for at least a portion of February 3, 2013. Accordingly, defendant's sentencing judgment must be amended to remove the improperly awarded presentence credit. On remand, defendant should receive presentence credit only for time served between February 3, 2013, and February 26, 2013.

¶ 42

C. Fines

¶ 43 Finally, defendant asserts and the State concedes this court must vacate two fines which were improperly assessed by the circuit clerk. We agree.

¶ 44 1. *The Court-Finance Assessment: A Fine Improperly Imposed by the Clerk*

¶ 45 Defendant first argues and the State concedes the circuit clerk improperly imposed a \$50 "Court" fine. We agree. In accepting the State's concession, we are compelled to address our position previously taken in *People v. Larue*, 2014 IL App (4th) 120595, ¶ 70, 10 N.E.3d 959. In *Larue*, this court found the circuit clerk may properly impose a court-finance fee for each judgment of guilty or order of supervision. See 55 ILCS 5/5-1101(c) (West 2010). However, as pointed out in *People v. Smith*, 2014 IL App (4th) 121118 ¶ 49, 18 N.E.3d 912, *Larue* did not involve determining whether the court-finance assessment was properly characterized a fine or a fee. Instead, the analysis in *Larue* centered on the propriety of imposing the court-finance assessment on more than one count. When confronted with determining the proper designation—fine or fee—we found, pursuant to the supreme court's statement in *People v. Graves*, 235 Ill. 2d 244, 250, 919 N.E.2d 906, 909 (2009), and an analysis of the purpose of the assessment, the proper designation to be a fine. See *Smith*, 2014 IL App (4th) 121118, 18 N.E.3d 912. In this matter, we adhere to *Smith*. Thus, the clerk improperly imposed the court-finance fine and we must vacate the assessment. Because defendant pleaded guilty, the court may properly assess the \$50 court-finance fine against defendant. We direct the trial court to impose the \$50 court-finance fine on remand.

¶ 46 2. *Imposition of the Probation Operations Assistance Assessment Violated Ex Post Facto Principles*

¶ 47 Defendant next argues the circuit clerk improperly imposed a \$10 probation operations assistance assessment. See 705 ILCS 105/27.3a(1.1) (West 2012) (added by Pub. Act

97-761 (eff. July 6, 2012)). The State concedes this assessment took effect after defendant committed his October 18, 2011, offense. We therefore vacate the clerk's imposition of this assessment, as it violated *ex post facto* principles. See *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624.

¶ 48 *3. Other Fines To Be Imposed on Remand*

¶ 49 In its brief, the State asserts various other fines should have been imposed by the trial court. On remand, we direct the trial court to impose all mandatory fines as authorized by statute at the time of the offense. In addition, the trial court's imposition of a \$100 VCVA fine (725 ILCS 240/10(b) (West 2012) (amended by Pub. Act 97-816 (eff. July 16, 2012))) is vacated on account of *ex post facto* principles. *Devine*, 2012 IL App (4th) 101028, ¶ 10, 976 N.E.2d 624. On remand, we direct the trial court to recalculate the VCVA fine pursuant to the correct version of the statute (725 ILCS 240/10(b) (West Supp. 2011)) (adding "an additional penalty of \$4 for each \$40, or fraction thereof, of fine imposed"). A criminal surcharge fine must also be imposed. 730 ILCS 5/5-9-1(c) (West 2010). As a result of the amended sentencing judgment, defendant is entitled to \$120 in presentence credit for the 24 days served in the Livingston County jail. The court should apply this credit to offset any creditable fines imposed on remand.

¶ 50 **III. CONCLUSION**

¶ 51 For the foregoing reasons, we (1) affirm the trial court's denial of defendant's second amended motion to withdraw his guilty plea; (2) remand for the trial court to amend the sentencing judgment to reflect the proper amount of presentence credit; and (3) vacate the improperly imposed fines and remand with directions for the trial court to impose all mandatory fines as authorized by statute at the time of the offense. We direct the parties to provide copies of their briefs on appeal to the trial court and the circuit clerk on remand. We further direct our

clerk to provide an extra copy of our disposition directly to the attention of the clerk of the circuit court. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 52 Affirmed in part as modified and vacated in part; cause remanded with directions.