

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).

FILED
December 18, 2015
Carla Bender
4th District Appellate
Court, IL

2015 IL App (4th) 131091-U

NOS. 4-13-1088, 4-13-1089, 4-13-1090, 4-13-1091 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
JEROME HARRIS,	)	Nos. 10CF105
Defendant-Appellant.	)	11CF9
	)	11CF173
	)	11CF175
)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court modified the written sentencing judgment, concluding defendant did not receive the benefit of his bargain.

¶ 2 In January 2013, defendant, Jerome Harris, entered a fully negotiated plea of guilty to three counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West Supp. 2007), (West 2010), 401/(c) (West 2010)) (case Nos. 10-CF-105, 11-CF-9, 11-CF-175), Class X felonies, and one count of delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)) (case No. 11-CF-173), a Class 2 felony, and the State dismissed other charges. The trial court sentenced defendant to a six-year prison term on No. 10-CF-105

with 634 days' sentence credit, to be served consecutively to a six-year prison term on No. 11-CF-9 with 538 days' sentence credit, to be served consecutively to a six-year term on No. 11-CF-173 with 658 days' sentence credit, to be served concurrently with a seven-year prison term on No. 11-CF-175 with 658 days' sentence credit, respectively. In October 2013, defendant filed a motion for order *nunc pro tunc* or to withdraw his guilty plea, which the trial court denied. Defendant appeals, arguing his (1) sentence must be restructured to account for the sentence credit included in his plea agreement because the Department of Corrections (DOC) refuses to enter credit for overlapping dates or (2) plea should be vacated. The State argues this court should restructure defendant's sentence. We affirm as modified.

¶ 3

I. BACKGROUND

¶ 4 In January 2013, defendant, Jerome Harris, entered a fully negotiated plea of guilty to three counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A) (West Supp. 2007), (West 2010), 401/(c) (West 2010)) (case Nos. 10-CF-105, 11-CF-9, 11-CF-175), Class X felonies, and one count of delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)) (case No. 11-CF-173), a Class 2 felony, and the State dismissed other charges.

¶ 5 The trial court sentenced defendant to a six-year prison term on No. 10-CF-105 with 634 days' sentence credit, to be served consecutively to a six-year prison term on No. 11-CF-9 with 538 days' sentence credit, to be served consecutively to a six-year term on No. 11-CF-173 with 658 days' sentence credit, which is to be served concurrently with a seven-year prison term on No. 11-CF-175 with 658 days' sentence credit, respectively.

¶ 6 On January 11, 2013, the trial court held a plea hearing and the following

discussion took place regarding defendant's sentence and sentencing credit:

"THE COURT: All right. Well, counsel, can you give me the credit that you believe for each one of these cases.

* * *

MS. LACY [(public defender)]: Okay. Your Honor, in 2010 CF 105 Mr. Harris has credit from March 3rd, 2010 to July 2nd, 2010, for 122 days.

He also has credit from August 18th, 2011 to January 10th, 2013, 512 days. Which is a total of 634 days.

In 11 CF 9 he has credit from January 3rd, 2011 to January 28th, 2011, that's 26 days. He also has credit from August 18th, 2011 to January 10th, 2013, for 512 days which is a total of 538 days of credit.

In 11 CF 173 he has credit from March 25th, 2011 to January 10th, 2013, that's 658 days.

In 11 CF 175, again, he has credit from March 25th, 2011 to January 10th, 2013 for 658 days ***.

* * *

THE COURT: All right. Is that the State's understanding about credit?

MRS. LAWLYES [(assistant State's Attorney)]: Yes, Your Honor.

* * *

THE COURT: All right. I will accept the plea agreement.

Judgment will enter on those counts in each of the cases.

Judgment will enter on each case.

In 10 CF 105 you will be sentenced to 6 years in [DOC] with credit for time served as was previously stated for a total of 634 days.

In 11 CF 9 you will be sentenced to 6 years on [c]ount I, 6 years in [DOC] with credit for time served. For a total of—as previously stated for a total of 538 days.

In 11 CF 173 judgment will enter. You will be sentenced to 6 years in [DOC] on that case, with credit for time served as previously stated for a total of 658 days.

In 11 CF 175 you will be sentenced to 7 years in [DOC] on that case, with credit as previously stated for time served for up to a total of 658 days in that case.

11 CF 173 and 11 CF 175 will be served concurrently or at the same time.

The sentence in 10 CF 105 will be served consecutively to the sentence in 11 CF 9. And the sentences in those 2 case[s] will be sentenced—served consecutively to the sentences in 11 CF 173 and 175."

¶ 7 Defendant received an aggregate prison term of 19 years with a total of 1,830 days of sentence credit.

¶ 8 On April 18, 2013, at a hearing on a motion to enforce bond, the trial court noted defendant sent a letter claiming he was not properly credited for time served as prescribed in the plea agreement and DOC improperly logged all of his sentences as consecutive. The State and defendant's counsel both stated they were working on fixing the sentencing issues.

¶ 9 On May 13, 2013, defendant filed a notice of hearing on his motion to amend the sentencing judgment.

¶ 10 On May 16, 2013, the trial court held a hearing on defendant's motion to amend the written sentencing judgment. The court granted the motion and amended the sentencing judgment to reflect case No. 11-CF-173 and case No. 11-CF-175 were to be served concurrently and consecutive to case Nos. 10-CF-105 and 11-CF-9. Additionally, case No. 11-CF-173 was amended to a Class 2 felony instead of a Class X felony and case No. 11-CF-175 was amended to a Class 1 felony instead of a Class X felony. Neither party mentioned the issue of defendant's sentence credit.

¶ 11 On October 8, 2013, defendant filed a *pro se* motion for order *nunc pro tunc* or to withdraw his guilty plea, seeking specific performance of his plea agreement. Defendant attached his sentence-calculation worksheet to his motion, which indicated he only received 804 days of sentence credit instead of the 1,830 days agreed upon in his plea agreement. Reportedly, DOC refused to give defendant sentencing credit for the same date range on more than one case. Additionally, the worksheet indicated DOC still had all four of defendant's sentences entered as consecutive, despite the amended sentencing judgment the trial court issued on May 16, 2013.

¶ 12 On November 3, 2013, the trial court denied the motion, stating it had already amended the sentencing judgment to reflect case No. 11-CF-175 and case No. 11-CF-173 were to be served concurrently instead of consecutively and the time for defendant to withdraw his plea has "long since passed."

¶ 13 This appeal followed.

¶ 14 Defendant filed a motion to consolidate these appeals, which this court granted. Case No. 10-CF-105 was docketed as No. 4-13-1091 on appeal, case No. 11-CF-9 was docketed as No. 4-13-1090, case No. 11-CF-173 was docketed as No. 4-13-1089, and case No. 11-CF-175 was docketed as No. 4-13-1088.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant argues his (1) sentence must be restructured to account for the sentence credit included in his plea agreement because DOC refuses to enter overlapping dates or (2) plea should be vacated. The State argues this court should restructure defendant's sentence. We conclude defendant failed to receive the benefit of the bargain and modify the sentencing judgment to reflect defendant's prison term in case No. 11-CF-9 is 6 years and his sentence credit is reduced to 26 days, case No. 11-CF-173 is reduced to 3 years and 71 days with 146 days' sentence credit, and case No. 11-CF-175, which is to be served concurrently with 11-CF-173, is reduced to 4 years and 71 days with 146 days' sentence credit.

¶ 17 If specific credit for time served is made part of a plea agreement, the defendant is entitled to receive a sentence that reflects the benefit of his agreed-to credit. *People v. McDermott*, 2014 IL App (4th) 120655, ¶ 27, 12 N.E.3d 148. This court has held this remains true even if applying the credit to the defendant's sentence would violate the rule set forth in

People v. Latona, 184 Ill. 2d 260, 271, 703 N.E.2d 901, 907 (1998), which states a defendant may not receive two sentence credits for a single day served in custody. *McDermott*, ¶ 27, 12 N.E.3d 148.

¶ 18 Here, defense counsel set forth the terms of the parties' plea agreement in open court and identified the amount of sentence credit and the date ranges from which the credit originated. The State agreed defense counsel's recitation accurately reflected the parties' agreement. The trial court then accepted the agreement and recited the terms in open court, which included the specified amount of sentence credit. During the plea hearing, defendant attempted to stress or clarify he would receive specific sentence credit, stating, "I just want to make sure that I receive my credit for each individual case that I plead guilty to."

¶ 19 The record clearly shows the terms of the parties' agreement included specified amounts of sentence credit. Given the facts presented, defendant was entitled to the agreed-upon amount of credit and failed to receive the benefit of the bargain with the State when DOC would not apply his sentence credit to his sentence.

¶ 20 Our supreme court has held when a defendant fails to receive the benefit of his bargain, there are two possible remedies: (1) the promise must be fulfilled; or (2) the defendant must be given the opportunity to withdraw his guilty plea. *People v. Whitfield*, 217 Ill. 2d 177, 202, 840 N.E.2d 658, 673 (2005). The most equitable solution is to modify the sentence to "approximate the penal consequences contemplated by the original plea agreement." *Id.* at 204-05, 840 N.E.2d at 674-75.

¶ 21 Defendant requests this court to restructure his sentence to account for the sentence credit included in his guilty plea. Since DOC reportedly refuses to enter overlapping

dates for each case, defendant suggests we remove any overlapping days of sentence credit and remove that given amount from his actual sentence. The State agrees.

¶ 22 In case No. 10-CF-105, defendant agreed to a sentence credit of 634 days for time served from March 3, 2010, to July 2, 2010 (122 days), and August 18, 2011, to January 10, 2013 (512 days). Defendant requests this sentence and the sentence credit remain the same.

¶ 23 In case No. 11-CF-9, defendant agreed to a sentence credit of 538 days for time served from January 3, 2011, to January 28, 2011 (26 days), and August 18, 2011, to January 10, 2013 (512 days). Since the latter date range was also used in case No. 10-CF-105 as sentence credit, defendant requests we instead only credit him for 26 days on 11-CF-9 from January 3, 2011, to January 28, 2011, to satisfy DOC by removing overlapping dates.

¶ 24 In case Nos. 11-CF-173 and 11-CF-175, which are to be served concurrently, defendant agreed to a sentence credit of 658 days from March 25, 2011, to January 10, 2013. Defendant proposes we apply the sentence credit from March 25, 2011, to August 17, 2011, for a total of 146 days, again to satisfy DOC by removing overlapping dates.

¶ 25 Removing the overlapping dates deprives defendant of 1,024 days of sentence credit, which he requests this court to subtract from his concurrent sentences in case Nos. 11-CF-173 and 11-CF-175. Defendant proposes his sentence in case No. 11-CF-173 should be reduced from 6 years' imprisonment to 3 years and 71 days (to account for 1,024 days of credit) with a sentence credit of 146 days. Additionally, defendant proposes his sentence in case No. 11-CF-175 should be reduced from 7 years' imprisonment to 4 years and 71 days (to account for 1,024 days of credit) with a sentence credit of 146 days. Since case No. 11-CF-173 was amended to a Class 2 felony and case No. 11-CF-175 was amended to a Class 1 felony, this proposal complies

with the statutory minimums for sentencing. See 730 ILCS 5/5-4.5-35, 5-4.5-30 (West 2010).

We find this the most equitable remedy to give defendant the benefit of his bargain.

¶ 26

III. CONCLUSION

¶ 27

We modify the written sentencing judgment to reflect defendant's prison term in case No. 11-CF-9 is 6 years and sentence credit is reduced to 26 days, case No. 11-CF-173 is reduced to 3 years and 71 days with 146 days' sentence credit, and case No. 11-CF-175, which is to be served concurrently with 11-CF-173, is reduced to 4 years and 71 days with 146 days' sentence credit.

¶ 28

In all other respects, we affirm the judgment.

¶ 29

Affirmed as modified.