2015 IL App (5th) 130281-U

NO. 5-13-0281

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 08-CF-1500
	)	
MARVIN MOORE,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Justices Goldenhersh and Cates concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant was not in custody while subject to home confinement with electronic monitoring as a condition of bond; he therefore did not have either a statutory right to receive credit against his sentence for this time or a liberty interest in receiving such credit.

¶ 2 The defendant, Marvin Moore, was charged with two counts of home invasion and one count of aggravated battery with a firearm. He posted bond and was subject to home confinement with electronic monitoring as a condition of bond. He eventually pled guilty to aggravated battery with a firearm and was sentenced to nine years in prison. The defendant subsequently filed a motion for an order *nunc pro tunc*, requesting that the mittimus be amended to reflect sentence credit for the time he spent in home

confinement. The court denied that request. On appeal, the defendant argues that (1) he had a protected interest in maximizing prejudgment sentence credit; and (2) due process required the State to notify him that he would not be eligible for sentence credit for time subject to home monitoring and/or detention. We affirm.

¶ 3 On December 4, 2008, the defendant was arrested and charged with two counts of home invasion (720 ILCS 5/12-11(a)(3), (a)(5) (West 2006)) and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)). The events giving rise to the charges took place approximately three weeks earlier, on November 14.

¶ 4 Bond was initially set at $500,000. On December 9, defense counsel made an oral motion to reduce the defendant's bond. Counsel argued that, if the defendant were a flight risk, he would have fled during the three weeks before his arrest. Counsel further argued that a reduction in bond was appropriate because the defendant had no prior criminal history. He indicated that home monitoring would be an acceptable option if the court wanted to impose that as a condition of bond. The State opposed the motion to reduce bond, emphasizing the serious nature of the charges. The court directed defense counsel to "prepare an order, ten percent, electronic monitoring." That same day, the court entered a written order granting the defendant's motion to reduce bond. The court set bond at $100,000, and ordered that the defendant "be screened for electronic monitoring and placed on [electronic monitoring] if acceptable."

¶ 5 The defendant did not post bond until September 3, 2010. At that time, he was released from the St. Clair County jail with home confinement subject to electronic

monitoring as a condition of bond. The defendant was returned to custody on May 17, 2011, for violating conditions of the bond.

¶ 6 On January 17, 2012, the defendant pled guilty to the charge of aggravated battery with a firearm. The State dismissed the other charges, and the court sentenced the defendant to nine years in prison. The mittimus gave the defendant credit for time spent in the St. Clair County jail between December 5, 2008, and September 2, 2010, and between May 17, 2011, and January 17, 2012; however, it did not give him credit for the time he spent in home confinement as a condition of his bond. (We note that the defendant was actually taken into custody on December 4.)

¶ 7 On January 9, 2013, the defendant filed a *pro se* motion for an order *nunc pro tunc*. He argued that he should have received credit for the time he spent in home confinement, and he requested that the court amend the mittimus to give him this credit. On March 5, 2013, the court entered an order. The court amended the mittimus to reflect the actual custody date of December 4 and to give the defendant credit for this day. However, the court denied his request for credit for the time in home confinement. This appeal followed.

¶ 8 The defendant acknowledges that Illinois courts have repeatedly held that a defendant in home confinement as a condition of bond is not "in custody" for purposes of sentence credit. See *People v. Ramos*, 138 Ill. 2d 152, 159 (1990); *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 50; *People v. Smith*, 2014 IL App (3d) 130548, ¶ 35; see also *People v. Beachem*, 229 Ill. 2d 237, 249-54 (2008) (distinguishing between a defendant required to report to the Cook County Sheriff's Department's Day Reporting

Center and a defendant subject to home confinement while out on bond). He argues instead that (1) he had a statutory right to credit for time spent in custody prior to sentencing; (2) under the fourteenth amendment, he had a liberty interest in maximizing sentence credit; and (3) due process required that he be given adequate notice of the fact that he would not be eligible for sentence credit so that he could make an intelligent decision before opting for home confinement with electronic monitoring as a condition of bond. We disagree.

¶ 9 In support of these contentions, the defendant relies primarily on the United States Supreme Court's decision in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and this court's decision in *People v. DuPree*, 353 Ill. App. 3d 1037 (2004). We find both cases distinguishable.

¶ 10 *Wolff* involved a Nebraska statutory scheme giving prisoners "good-time" sentence credit for satisfactory behavior while in prison. Pursuant to that statutory scheme, a prisoner could expect his sentence to be shortened "through the accumulation of credits for good behavior." *Wolff*, 418 U.S. at 557. However, the right to this credit was not absolute; good-time credit could be forfeited for serious misconduct. *Id*. An inmate brought a class action challenging the procedures used at the prison where he was incarcerated to determine whether an inmate had committed serious misconduct. He argued that the procedures in place did not comport with the requirements of procedural due process. *Id*. at 553.

¶ 11 Before considering this question, the Court addressed the State's argument that this claim was not cognizable because prisoners do not have a protected liberty interest in

prison disciplinary procedures. *Id*. at 556-57. In rejecting the State's argument, the Court first noted that the State of Nebraska was not constitutionally required to create a right to sentence credit for good behavior. The Court then explained, however, that because the State chose to create a statutory right to the credit and provide that the credit could be forfeited only for serious misconduct, "the prisoner's interest [in the credit] has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Id*. at 557. The Court went on to consider what procedures were necessary to comport with procedural due process and whether the procedures in place met these standards. *Id.* at 558-72.

¶ 12 The defendant argues that here, too, there is a constitutional liberty interest in sentence credit. However, there is a critical distinction between the instant case and *Wolff*. There, the inmate challenging the procedures had a statutory right to receive the credit, which would shorten his sentence. Although that right was not absolute, the Supreme Court found that the inmate's interest in maintaining the credit was sufficiently strong to require due process of law before any good-time credit could be forfeited. Here, by contrast, the defendant argues that he has a protected interest in receiving credit to which he is not entitled by statute. We acknowledge that defendants *do* have an important interest in receiving credit for time served when it is applicable. See *People v. Inman*, 2014 IL App (5th) 120097, ¶ 34 (explaining that the purpose of sentence credit for time spent in custody is to ensure that a defendant does not spend time in prison that

exceeds the sentence imposed, which is a requirement of double jeopardy protection (citing *North Carolina v. Pearce*, 395 U.S. 711, 718-19 (1969), and quoting *People v. Latona*, 184 Ill. 2d 260, 270 (1998))). However, a defendant who is on bond awaiting trial and sentencing has no reason to expect that he will receive credit against his eventual sentence, regardless of what conditions are imposed pursuant to the defendant's bond. See *Smith*, 2014 IL App (3d) 130548, ¶ 43 (noting that time released on bond is not considered time in custody "regardless of the restrictions imposed as a condition of release" (citing *Ramos*, 138 Ill. 2d at 160)).

¶ 13 It is also worth noting that unlike the sentence credit at issue in *Wolff*, credit for time served does not shorten a prisoner's sentence. It merely ensures that the defendant does not "remain incarcerated" for a term that exceeds his sentence. *Latona*, 184 Ill. 2d at 270. The defendant argues that he should have been advised that time spent in home confinement would not be credited against his eventual sentence so that he could make an informed choice before opting to post bond with home confinement as a condition. The alternative to posting bond would be to remain incarcerated. Although choosing to remain incarcerated would entitle the defendant to more sentence credit, it would not shorten his sentence; he would spend the time in custody prior to trial rather than later. Thus, whatever interest a defendant may have in choosing not to post bond in order to maximize sentence credit, we do not believe this rises to the level of the prisoner's interest in maintaining his good-time credit in *Wolff*. See *Smith*, 2014 IL App (3d) 130548, ¶ 43 (explaining that "the whole point" of posting bond is "to avoid custody"). We find no support for the defendant's position in *Wolff*.

¶ 14 We likewise find no support for the defendant's contentions in our holding in *DuPree*. The defendant in *DuPree*, like the defendant here, argued that he did not receive all the sentence credit he was entitled to for time spent in custody prior to sentencing. That is where the similarities end.

¶ 15 The question in *DuPree* was whether a defendant was in simultaneous custody on multiple charges under an unusual set of circumstances. The defendant there was arrested and taken into custody on the Jackson County charges at issue in the case on April 26, 2002. *DuPree*, 353 Ill. App. 3d at 1046. He posted bond on July 18, and was released the following day. At that time, he was notified that his trial was set to begin on August 12. *Id*. at 1047. He was arrested and taken into custody on unrelated charges in Saline County on August 7. Defense counsel became aware of the defendant's arrest in Saline County on August 9. *Id*.

¶ 16 When the Jackson County case came for trial on August 12, the defendant did not appear. Defense counsel informed the court that the defendant was being held on unrelated charges in Saline County under a different name. *Id*. Counsel did not file a motion to withdraw the defendant's bond in the Jackson County case. *Id*. at 1048. She did, however, request a continuance. *Id*. at 1047. The State opposed this request and asked the court to issue a warrant for the defendant for his failure to appear for trial. The court issued the warrant and set bond at $10,000, which was more than the $5,000 bond the defendant posted previously. *Id*. The defendant was served with this warrant on November 14, 2002. *Id*. at 1047-48. He was sentenced in the Jackson County charges on May 1, 2003. *Id*. at 1048. He remained in custody throughout this time. *Id*.

¶ 17 On appeal, the defendant argued that he was entitled to more credit than he was given for time spent in custody prior to sentencing. At issue was the period of time between August 12, when the Jackson County court increased his bond and issued a warrant for his failure to appear, and November 14, when the warrant was served. *Id*. at 1046. There was no question that the defendant was in custody during this period–he was incarcerated. At issue was whether he was in simultaneous custody on both the Jackson County charges and the Saline County charges. When a defendant is released on bond, then rearrested on another charge and returned to custody, he is not returned to custody on the first charge unless or until his bond is withdrawn or revoked. *Id*. at 1048 (quoting *People v. Arnhold*, 115 Ill. 2d 379, 383 (1987)). In *DuPree*, the defendant did not move to withdraw his bond, and the trial court did not revoke his bond. The defendant, however, argued that when the court increased his bond and issued a warrant on August 12, it "effectively revoked" his bond and returned him to custody on the Jackson County charges. *Id*. at 1046.

¶ 18 On appeal, this court rejected this contention. *Id*. at 1048. We found, however, that under the "unique facts" of the *DuPree* case, the defendant was "entitled to credit *for his incarceration* between August 12, 2002, and November 14, 2002." (Emphasis added.) *Id*. at 1048-49. We explained that because defense counsel was aware that the defendant was in custody in Saline County "[i]t behooved defense counsel to move to withdraw the bond posted in the [Jackson County] case in order to allow the defendant to earn credit against his eventual sentences in [that] case." *Id*. at 1049.

¶ 19 We note that in *DuPree*, we did not analyze the defendant's interest as a liberty interest. We simply held that, under the unique circumstances of the case, it would be unfair not to allow the defendant to receive the credit. The differences between the circumstances of *DuPree* and those of the instant case are stark. There, as we have emphasized, the defendant was incarcerated during the relevant time period. He was statutorily precluded from receiving the credit even though he was in custody only because his attorney failed to file a motion to withdraw bond. See *DuPree*, 353 Ill. App. 3d at 1048 (noting that it would have been improper for the court to deny such a motion (citing *People v. Hatchett*, 203 Ill. App. 3d 989 (1990))). Here, by contrast, the defendant was not in custody. The concerns underlying our decision in *DuPree* are not present in the instant case.

¶ 20 For the foregoing reasons, we affirm the order of the trial court denying the defendant's request to amend the mittimus.

¶ 21 Affirmed.