

NOTICE
Decision filed 10/20/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140041-U

NO. 5-14-0041

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Randolph County.
)	
v.)	No. 97-CF-81
)	
KEVIN BLUMBERG,)	Honorable
)	Eugene E. Gross,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Stewart concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where defendant seeks double credit for time he spent in custody on consecutive sentences, the circuit court properly denied his motion for an order *nunc pro tunc*.
- ¶ 2 Defendant, Kevin Blumberg, appeals the denial of his motion titled "Motion for order *nunc pro tunc* correcting omission in previous order." The Office of the State Appellate Defender (OSAD) was appointed to represent him. OSAD has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). Defendant was given proper notice and granted an extension of time to file briefs, objections, or any other document

supporting his appeal. Defendant did not file a response. We considered OSAD's motion to withdraw as counsel on appeal. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Randolph County.

¶ 3 BACKGROUND

¶ 4 According to the Illinois Department of Corrections¹ (IDOC) website, defendant was taken into custody for convictions of murder and armed robbery on January 19, 1991. He was sentenced to 55 years' incarceration for the murder and 30 years for the armed robbery. We do not have the record of that case before us, but given the projected parole date of January 19, 2020, defendant is serving those sentences concurrently.

¶ 5 Defendant pleaded guilty to two counts of aggravated battery committed on March 22, 1997, while he was incarcerated in the IDOC. On November 3, 1997, while still incarcerated on the murder and armed robbery convictions, the court sentenced him to three years on each aggravated battery conviction, to run concurrently to each other, but consecutively to the sentences defendant was already serving. Defendant received no credit towards the three-year sentences for any time he was in custody prior to the sentencing on the two aggravated battery convictions.

¹(<https://www.illinois.gov/IDOC/OFFENDER/Pages/InmateSearch.aspx> (last visited Sept. 3, 2015)), of which we may take judicial notice (*Cordrey v. Prisoner Review Board*, 2014 IL 117155, ¶ 12).

¶ 6 Subsequently, defendant filed a motion to withdraw his guilty plea, which the circuit court denied. Defendant appealed his sentence, but not the denial of his motion to withdraw his guilty plea. For reasons unrelated to this appeal, this court vacated defendant's sentence and remanded for a new sentencing hearing. *People v. Blumenberg*, No. 5-98-0284 (1999) (unpublished order under Supreme Court Rule 23). On March 26, 1999, the circuit court again sentenced defendant to three years' imprisonment on each count, to run concurrent to each other and consecutive to the sentences defendant was already serving.

¶ 7 On December 3, 2013, defendant filed a *pro se* motion titled "Motion for order *nunc pro tunc* correcting omission in previous order." In his motion, defendant stated that the mittimus did not give him sentence credit for the time spent in custody prior to sentencing on the aggravated battery charges. Defendant relied on section 5-8-7 of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-7 (West 2008)). He alleged that he is entitled to credit against his aggravated battery sentences for the time he spent incarcerated from March 22, 1997 (the day of the aggravated batteries), to November 3, 1997 (the first sentencing date). He requested that the court enter an order *nunc pro tunc* altering the mittimus to reflect credit for the 227 days he spent in custody prior to sentencing.

¶ 8 The circuit court denied defendant's motion, finding that he was not entitled to any credit against his sentence. Defendant appealed, and OSAD was appointed to represent him. OSAD filed a *Finley* motion asking to withdraw as counsel on appeal because there is no merit to the appeal.

¶ 9

ANALYSIS

¶ 10 In his motion for an order *nunc pro tunc*, defendant asserted that he was entitled to 227 days' credit against his aggravated battery sentences for the time he spent in custody from the date he committed the batteries until the date of his sentencing, time during which he was already in custody on his previous convictions. He relied on section 5-8-7 of the Code, which at the time of his sentencing stated: "The offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for time spent in custody as a result of the offense for which the sentence was imposed ***." 730 ILCS 5/5-8-7(b) (West 1996). This statute provides defendants credit for time served in custody prior to sentencing. Defendant fails to understand that it is section 5-8-4 of the Code, not section 5-8-7, that addresses how consecutive sentences are to be calculated. 730 ILCS 5/5-8-4, 5-8-7 (West 1996). Relevant to this case, section 5-8-4 states that consecutive sentences of determinate length shall be treated as one determinate sentence equal in length to the addition of the lengths of the two determinate sentences. 730 ILCS 5/5-8-4(e)(1) (West 1996). Additionally, the Code states that the offender shall receive credit against the single sentence "for all time served in an institution since the commission of the offense or offenses and as a consequence thereof ***." 730 ILCS 5/5-8-4(e)(4) (West 1996).

¶ 11 While defendant's aggravated battery convictions run concurrent to each other, they run consecutive to the sentences defendant was already serving, creating one single sentence. "Section 5-8-4(e)(4) of the Code specifically governs the calculation of consecutive sentences and impacts upon the application of sentence credit; therefore, it controls over

section 5-8-7(b), which would otherwise, generally, apply to calculations of credit." *People v. Latona*, 184 Ill. 2d 260, 270 (1998) (citing *People v. Villarreal*, 152 Ill. 2d 368, 379 (1992)). "[T]o allow an offender sentenced to consecutive sentences two credits [for each day spent in custody]—one for each sentence—not only contravenes the legislative directive that his sentence shall be treated as a 'single term' of imprisonment, but also, in effect, gives that offender a double credit ***. That cannot be what the legislature intended." *Id.* at 271. "Allowing offenders sentenced to consecutive sentences a double credit for each day of actual custody would frustrate the legislature's clearly expressed intent." *Id.* "Defendants must be given credit for all the days they actually served, but no more." *Id.* at 272.

¶ 12 According to the IDOC website, defendant was first taken into custody on January 19, 1991, and his projected parole date is January 19, 2020, a sentence length of 29 years. At the time defendant was sentenced for the murder and armed robbery convictions, the law provided he would receive day-for-day credit against his 55-year sentence. Ill. Rev. Stat. 1989, ch. 38, ¶ 1003-6-3(a)(2). The law in effect at the time of defendant's conviction for aggravated battery allows him day-for-day credit against that sentence. 730 ILCS 5/3-6-3(a)(2.1) (West 1996). Defendant's aggregate sentence consists of 55 years for murder, and 3 years for aggravated battery, a total of 58 years. Receiving day-for-day credit against the aggregate sentence means that defendant could be eligible for release after serving 29 years, which is exactly the amount of time defendant is expected to serve, according to the IDOC. Because defendant has received credit for all the time he has spent in custody, he is not

entitled to additional credit against his sentence for aggravated battery. Therefore, the circuit court properly denied defendant's motion.

¶ 13

CONCLUSION

¶ 14 The circuit court properly denied the defendant's motion for an order *nunc pro tunc* because he is not entitled to double credit for the days he served in custody. Therefore, OSAD's motion to withdraw as counsel on appeal is granted, and the judgment of the circuit court of Randolph County is affirmed.

¶ 15 Motion granted; judgment affirmed.