2018 IL App (1st) 150338-U
No. 1-15-0338

SECOND DIVISION
May 22, 2018

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 15411
	)	
JOHN BUTTS,	)	
	)	The Honorable
Defendant-Appellant.	)	William G. Lacy,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Because the trial court's order denying defendant's motion to correct the mittimus to reflect additional credit for time served prior to sentencing was not final and appealable, the appellate court lacked jurisdiction over defendant's appeal.

¶ 2 Defendant, John Butts, appeals from the trial court's denial of his motion to correct the mittimus to reflect credit for the presentence time he served on electronic monitoring. For the reasons that follow, we conclude that this appeal must be dismissed for a lack of jurisdiction.

¶ 3 BACKGROUND

¶ 4 In 2011, following a bench trial, defendant was convicted of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2008)), unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1)/(a)(3)(C) (West 2008); 720 ILCS 5/24-1.6(a)(2)/(3)(A) (West 2008); 720 ILCS 5/24-1.6(a)(2)/(3)(C) (West 2008)). At sentencing, all counts merged into the conviction for armed habitual criminal, and defendant was sentenced to eight years' imprisonment and three years of mandatory supervised release. Although he argued at sentencing that he was entitled to credit against his sentence for time served on electronic monitoring under the Cook County Sheriff's Office's administrative mandatory furlough program, he was only given credit for the 54 days of time he served in physical confinement.

¶ 5 Following an unsuccessful direct appeal, defendant filed a postconviction petition in which he alleged, among other things, that the trial court erred in denying him credit for the time he served on electronic monitoring and that appellate counsel on direct appeal was ineffective for failing to argue that the trial court erred in denying his motion to suppress evidence. The trial court dismissed defendant's postconviction petition at the first stage, and defendant appealed. On appeal, defendant argued only that the trial court erred in dismissing his claim that appellate counsel was ineffective for failing to challenge the denial of his motion to suppress. On review, we concluded that defendant's ineffective assistance claim was not frivolous or patently without merit, and, accordingly, remanded the matter to the trial court for second-stage proceedings on all of the claims raised in defendant's postconviction petition. *People v. Butts*, 2016 IL App (1st) 142015-U.

¶ 6 While defendant's postconviction appeal was pending, defendant filed in the trial court a *pro se* "Motion for the rewarding of time served on Electronic monitoring (EM) and corrected Mittimus; alternatively relief from Judgement [*sic*]—(735 ILCS 5/2-1401)" ("motion to correct the mittimus"). In it, defendant argued that he should have been awarded credit for the time he served while on electronic monitoring. The trial court denied defendant's motion to correct the mittimus, and defendant brought this current appeal.

¶ 7 ANALYSIS

¶ 8 On appeal, defendant argues that the trial court erred in denying his motion to correct the mittimus, because he was "in custody" for purposes of receiving credit for time served under section 5-4.5-100(b) of the Unified Code of Corrections (730 ILCS 5/5-4.50-100(b) (West 2010)) during the time that he was on electronic monitoring. The State concedes that defendant was in custody while on electronic monitoring and that he should have received credit for the time he served on electronic monitoring. The State also argues, however, that we should affirm the trial court's denial of defendant's motion to correct the mittimus, because defendant has forfeited this contention and/or is barred from raising it by *res judicata*. According to the State, although defendant raised the credit issue at sentencing and in his postconviction petition, his failure to raise it on direct appeal or on appeal from the dismissal of his postconviction petition renders the contention forfeited and/or barred by *res judicata*.

¶ 9 We do not reach the question of whether defendant's contention is forfeited and/or barred by *res judicata*, as we conclude that we lack jurisdiction over this appeal. Although neither party raises any concerns about our jurisdiction over this appeal, we have an independent duty to ascertain whether we have jurisdiction. *People v. Smith*, 228 Ill. 2d 95, 104 (2008).

¶ 10 In *People v. Griffin*, 2017 IL App (1st) 143800, this district considered whether appellate jurisdiction existed where the defendant instituted an appeal from the denial of a motion to correct the mittimus. There, the defendant filed a *pro se* motion to correct the mittimus to correct his custody date for purposes of calculating his presentence detention credit. The trial court denied that motion, and the defendant appealed. On appeal, the defendant argued for the first time that he was erroneously assessed certain fines and fees and that he was entitled to a $5 *per diem* credit against other assessments for the time he spent in presentence custody pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2014)). This district concluded that it lacked jurisdiction over the defendant's appeal for two reasons: (1) the defendant had failed to file a motion to withdraw his guilty plea pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016), and (2) the order denying the defendant's motion to correct the mittimus was not a final and appealable order from which an appeal could be taken. Because defendant in the present case did not plead guilty, the former reason does not apply here; the latter, however, squarely applies.

¶ 11 Under the Illinois Constitution, we have jurisdiction over appeals from final judgments and from interlocutory orders as allowed by supreme court rules. Ill. Const. 1970, art. 6, § 6. Final and appealable orders are those that " 'determine[] the litigation on the merits so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment.' " *People v. Vari*, 2016 IL App (3d) 140278, ¶ 9 (quoting *People ex rel. Scott v. Silverstein*, 87 Ill. 2d 167, 171 (1981)). As discussed in *Griffin*, an order denying a defendant's motion to correct the mittimus is not a final and appealable order because it does not determine any part of the litigation on the merits—the sentencing judgment does. Instead, the denial of a motion to correct the mittimus does nothing more than confirm the correctness of the original judgment. It is not a

new judgment from which defendant can appeal. *Griffin*, 2017 IL App (1st) 143800, ¶ 13; see also *People v. Grant*, 2017 IL App (4th) 150636, ¶11 ("The trial court's order denying defendant's motion to amend mittimus is not a final order for purposes of appeal over which this court has jurisdiction. After the court's denial, the original judgments remained in place.").

¶ 12 We recognize that there are a multitude of cases that stand for the propositions that the issue of presentencing credit is not subject to forfeiture rules and may be raised at any time and that a trial court retains jurisdiction past the standard 30 days to correct clerical errors or matters of form. Neither of these propositions, however, alters our analysis. The notion that credit for time served prior to sentencing is not subject to forfeiture speaks only to the application of the forfeiture rules and whether a defendant must first raise the issue in the trial court before raising it in the appellate court. Such a proposition says nothing about the appellate court's jurisdiction; after all, our jurisdiction is not based on whether a specific issue has been forfeited. See *Griffin*, 2017 IL App (1st) 143800 (in analyzing whether it had jurisdiction over the defendant's appeal from the denial of his motion to correct the mittimus, not considering the fact that previous cases held that the $5 *per diem* credit under section 110-14 could be raised at any time and at any stage of the proceedings). Second, although the trial court retains jurisdiction to correct clerical errors and matters of form more than 30 days after judgment, "[t]hat jurisdiction *** does not automatically extend to this court." *Griffin*, 2017 IL App (1st) 143800, ¶ 12.

¶ 13 We note that in the title of defendant's motion to correct the mittimus, he labeled it, in the alternative, as a section 2-1401 petition, which, in its proper form, is a separate proceeding, independent of the original action (*Gas Power, Inc. v. Forsythe Gas Co.*, 249 Ill. App. 3d 255, 258 (1993)). Orders denying or granting section 2-1401 petitions are independently appealable. Ill. S. Ct. R. 304(b)(4) (eff. Mar. 8, 2016). Despite this, it appears from the substance of the

motion that it was intended only as a motion to correct the mittimus, as it contains no argument with respect to section 2-1401 or any required supporting documentation, and it was filed well outside the two year period of limitations. See 735 ILCS 5/2-1401; see also *People v. Patrick*, 2011 IL 1114, ¶ 34 ("Generally, the character of a motion is determined by its content or substance, not by the label placed on it by the movant."). Rather, defendant's motion to correct the mittimus simply asks that the trial court direct that a corrected mittimus reflecting additional credit for his time served on electronic monitoring be issued. Moreover, in his reply brief on appeal, defendant specifically requests that "this Court construe his motion as a motion to correct the mittimus [as opposed to a section 2-1401 petition], based on both the title and the substance of the motion."

¶ 14 Although we conclude that we lack jurisdiction over this appeal, we pause to comment on a couple of things. First, the State concedes that defendant is entitled to credit against his sentence for the time he spent on electronic monitoring pursuant to the Sheriff's administrative mandatory furlough program and that he should have been awarded that credit at the time he was sentenced. According to defendant's calculations, he spent 763 days on electronic monitoring in the Sheriff's program, equating to just over two years. Second, we observe that this issue could have been raised and resolved in the two previous appeals brought to us—defendant's direct appeal and his appeal from the dismissal of his postconviction petition. In both instances, the issue of credit for time served was plainly on the record, as the issue had been argued at sentencing and had been expressly raised in defendant's postconviction petition. Yet, in neither appeal did appellate counsel raise the issue.

¶ 15 Finally, we note that significant delays have occurred in the prosecution of this appeal. Defendant filed his notice of appeal in this matter on January 9, 2015. The Office of the State

Appellate Defender ("OSAD") made three requests for extension of time to file the record based on the fact that they had not received the complete record from the court reporters or the trial court. This court granted extensions to file the record through August 3, 2015, but the certificate in lieu of the record was not actually filed until November 12, 2015. Thereafter, OSAD requested and received three extensions to file defendant's brief on appeal. Ultimately, defendant's brief was due May 23, 2016. No brief was filed on his behalf by that date and nothing was heard from OSAD until more than a year and a half later when, on December 7, 2017, OSAD filed a motion for summary disposition. After the motion was denied, OSAD filed their brief *instanter* and requested that we enter an expedited briefing schedule because the appeal presented a single, "uncomplicated" issue, and because defendant's scheduled release date was just months away. Ultimately, the briefing of this appeal was completed by mid-March 2018, more than three years after defendant filed his notice of appeal.

¶ 16 We recognize that the trial courts, public defenders, and prosecutors of our criminal justice system are overwhelmed and overworked. Nevertheless, this case is an example of a situation that could have easily been avoided at multiple points along the way. First, as discussed in the context of fines and fees in *Griffin*, the State and the public defender should work together at the trial level to resolve these simple issues and ensure that defendants receive the credit they are entitled to. See *Griffin*, 2017 IL App (1st) 143800, ¶ 7. After all, "it is the State's Attorney's duty to see that justice is done not only to the public at large, but to the accused as well." *In re Derrico G.*, 2014 IL 114463, ¶ 107. Second, the issue was clearly argued during sentencing and could have been raised by OSAD and corrected on direct appeal in 2013, but was not. The third opportunity to fix this was again for the State to make its concession that defendant was entitled to credit when he filed his postconviction petition raising

the issue in 2014. Again, the State did not. Fourth, the issue could have again been raised by OSAD and corrected on the appeal from the dismissal of defendant's postconviction petition, but it was not. Had it been, defendant still would have received the benefit of a large portion of the credit. Now it is May 2018, and defendant is scheduled to be released on mandatory supervised release in a little over a month. Even if we had jurisdiction over this appeal, it would essentially be pointless, as the three year delay in getting this appeal ready to be decided essentially wiped out the entirety of defendant's credit. Ironically, in each of OSAD's requests for extension of time, it stated that defendant should not be penalized for delays in the preparation and filing of the record or the delays in filing his briefs due to OSAD's backlog. Yet, that is *exactly* what happened. All of the players of the criminal justice system failed defendant in this case—the trial court for denying defendant credit, the State for failing to make its concession earlier, and OSAD for failing to raise the issue on previous appeals and by failing to take into account the time sensitive nature of this "uncomplicated" issue and allowing the present appeal to be delayed for over three years. It is unfortunate, because there is no way to rectify the fact that the shortcomings of this system and its actors have forced defendant to serve an additional two years of imprisonment. At the very least, we encourage the State to promptly stipulate to relief for defendant on this issue in his pending postconviction petition.

¶ 17 Unfortunately, this issue was only made ready for our review on April 17, 2018, and was brought to us for the first time on an appeal from an order that is not final and appealable. Accordingly, we conclude that we lack jurisdiction over this appeal and it must be dismissed.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, the present appeal is dismissed.

¶ 20 Appeal dismissed.