2018 IL App (1st) 152831-U

No. 1-15-2831

Order filed August 20, 2018

First Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 MC1 244646
	)	
OCTAVIUS GRAHAM,	)	Honorable
	)	Daniel J. Gallagher,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Mikva and Griffin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's finding that defendant violated his sentence of conditional discharge is affirmed. The mittimus is amended to reflect the correct name of the offense defendant was convicted of, and the cause is remanded for a determination regarding the amount of credit defendant is entitled to for days spent in presentence custody.

¶ 2 Following a hearing, defendant Octavius Graham was found to have violated his sentence of conditional discharge for misdemeanor aggravated assault and was sentenced to 180 days in jail. On appeal, defendant contends that this court should vacate the trial court's finding of a

violation because the State offered no evidence (1) as to what the conditions of his conditional discharge were or that he had been given notice of any conditions, and (2) that he violated his conditional discharge by violating a "criminal statute." In the alternative, defendant contends that the mittimus should be corrected to reflect the proper name of the offense he was convicted of and a sentence credit of 199 days.

¶ 3 For the reasons that follow, we affirm the finding of a violation of conditional discharge, order amendment of the mittimus to reflect the correct name of defendant's conviction, and remand for a determination of how much credit, if any, defendant is entitled to for time spent in presentence custody.

¶ 4 On December 3, 2014, defendant pled guilty to one count of misdemeanor aggravated assault and was sentenced to 18 months of conditional discharge. The misdemeanor complaint alleged that defendant pointed a BB gun at Lewis Flowers and stated, "I'll fucking kill you." The attorneys stipulated to the factual basis for the plea. When announcing sentence, the trial court stated, "Eighteen months conditional discharge, no contact with Mr. Flowers. And you can't go back to that school. If you violate this order and go back to that school or contact Mr. Flowers I'll put you in jail, do you understand?" Defendant replied that he understood. The court sheet from the date of the guilty plea reflects the sentence of 18 months of conditional discharge, but no separate written sentencing order or certificate of conditional discharge appears in the record.

¶ 5 On January 23, 2015, the State filed a petition to revoke defendant's conditional discharge, alleging that he committed the subsequent offense of "8-24-040 replica firearm" on December 23, 2014. The citation referred to in the petition is a Chicago ordinance which

provides that “no person shall possess or discharge a replica air gun in the city of Chicago.” Chicago Municipal Code § 8-24-040(b) (amended Sept. 11, 2013).

¶ 6 A hearing on the State’s petition was held on March 27, 2015. When talking with the attorneys at the beginning of the hearing, the court asked to see “both of his files” and then made the following comments:

> “On this one -- so you guys know -- there is no document in this case that says he got supervision or anything or conditional discharge. It has been removed from the file in terms of what happened. On this one it appears that he got conditional discharge on -- he is on conditional discharge on the case ending in 646, and it’s my writing from December 3, 2014, plea of guilty, jury waiver, finding of guilty, 18 months conditional discharge, no contact, and I gave him his appellate rights.”

¶ 7 The State called Chicago police officer Craig, who testified that around 6:30 p.m. on December 23, 2014, he and his partner curbed a vehicle for a traffic violation. As Craig approached the vehicle with a flashlight, he detected a strong odor of cannabis coming from it. When he arrived at the car, he saw defendant in the front passenger seat and what looked like the butt of a gun under that seat, between defendant’s feet. Craig removed defendant from the car, placed him in custody, and recovered the item, which he described as a “replica firearm” of a black Beretta. Defendant told Craig it was his gun and that he had forgotten to take it out of the vehicle.

¶ 8 In closing, defense counsel argued, among other things, that the State failed to show that defendant was on conditional discharge, as no sentencing order or certified copy of disposition

was entered into evidence, and that the State failed to show that as a condition of the conditional discharge, defendant was not to commit any criminal actions. In response, the prosecutor argued, "As far as the court file not having the conditional discharge paperwork, we believe that the court can take judicial notice of the fact that the defendant did enter into a plea where conditional discharge was agreed upon in this courtroom and given by Your Honor."

¶ 9 In announcing its decision, the trial court stated it was taking judicial notice that defendant was on conditional discharge, based on the court sheet on which the court had hand-written "18 mo CD no contact." The court then found that defendant had violated his conditional discharge and sentenced him to a jail term of 364 days for misdemeanor aggravated assault.

¶ 10 Defendant filed a motion for a new hearing and a motion to reduce sentence. In the motion for a new hearing, defendant argued, *inter alia*, that the State failed to prove both that he was on conditional discharge and that it was a condition of his conditional discharge to refrain from committing any new criminal offenses. The trial court denied the motion for a new hearing, but granted the motion to reduce sentence and resentenced defendant to 180 days in jail. Defendant's mittimus indicates he was convicted of "720-5/12-2-C-1 AGG ASSAULT/USE DEADLY WE" and is entitled to "0000" days of presentence custody credit.

¶ 11 On appeal, defendant first contends that this court should vacate the trial court's finding that he violated his conditional discharge because the State offered no evidence as to what the conditions of his conditional discharge were and no evidence that he had been given notice of any conditions. He argues that contrary to the statutory directive that an "offender sentenced to probation or to conditional discharge shall be given a certificate setting forth the conditions thereof," (730 ILCS 5/5-6-3(d) (West 2014)), here, the trial court gave him no written notice of

any of the conditions of his sentence, and only told him orally of two conditions: that he was to have no contact with the victim, and not go back to "that school." Defendant asserts that due to the lack of notice, this court must reverse.

¶ 12 In making this argument, defendant urges us to reject the holdings of *People v. Glover*, 140 Ill. App. 3d 958 (1986), and *People v. Brown*, 137 Ill. App. 3d 453 (1985).

¶ 13 In *Glover*, 140 Ill. App. 3d at 959, the defendant was sentenced to probation. The trial judge did not give the defendant a certificate setting forth the conditions of probation and did not orally inform the defendant that a condition of probation was that he not violate any criminal statute. *Id.* at 961. During the probation term, the State filed a petition for revocation of probation based on the defendant having committed theft and retail theft. *Id.* at 959-60. The defendant moved to dismiss the petition, contending that the only condition of probation recited in the original sentencing order was the performance of community service work and, consequently, any subsequent alleged violation of a criminal statute could not be the basis for the violation of a condition of probation when it was not stated in the order as a condition. *Id.* at 960. The trial court denied the motion to dismiss, found that the charges had been proved, revoked the defendant's probation, and sentenced him to three years' imprisonment. *Id.*

¶ 14 On appeal, the defendant in *Glover* contended that he could not be found in violation of his probation for allegations of criminal conduct where the only stated condition of his probation in the sentencing order was that he perform community service work. *Id.* He argued that if the condition that a probationer not violate any criminal statute is not specifically set out in the order of probation, a later violation of a criminal statute cannot be the basis for revoking probation. *Id.* In support of that argument, the defendant referred to the statutory provision providing that an

"offender sentenced to probation or to conditional discharge shall be given a certificate setting forth the conditions thereof." *Id.* (quoting Ill. Rev. Stat. 1981, ch. 38, par. 1005-6-3(c) (now 730 ILCS 5/5-6-3(d) (West 2014))).

¶ 15 This court concluded that the certificate requirement in section 5-6-3(c) (now section 5-6-3(d)), was "salutary and should be followed," but was "not a mandatory requirement." *Id.* at 961. The court noted that the term "shall" may be interpreted as permissive, depending upon the context of the provision and the intent of the drafters. *Id.* at 961. The court then determined that nothing in the Council Commentary to section 5-6-3(d) or in the statutory provision itself indicated a legislative intent that the mere failure of a probationer to receive a certificate of the conditions of his probation would "result in all such terms being nugatory despite some other appropriate method of advising an offender of the conditions of his probation." *Id.* at 962. The court noted that other jurisdictions with similar statutory provisions had held a failure to furnish the required certificate would not invalidate a probation revocation where the probationer had in some other way been advised of the condition which resulted in revocation of probation. *Id.* Further, the court explained that finding the provision to be directory, rather than mandatory, would avoid raising doubts as to the statute's validity, as the provision attempted to dictate the actual content of the judge's pronouncement of sentence, which is exclusively a function of the judiciary. *Id.*

¶ 16 In *Brown*, 137 Ill. App. 3d at 455, this court held that the certificate requirement must be strictly construed, but added that this strict construction must occur "in light of the particular condition for which revocation was sought." Specifically, the *Brown* court determined that whether a certificate is required depends on whether the condition in question was enumerated in

the statutory section setting forth mandatory conditions of probation and conditional discharge, or whether the trial court independently fashioned the condition or chose it from among a list of suggested conditions. *Id.* The *Brown* court explained that because the statute defining the conditions of probation and of conditional discharge enumerates a series of specific conditions which attach to all sentences of probation and conditional discharge – the first of which is that the probationer not violate any criminal statute of any jurisdiction – a certificate reflecting the imposition of such automatic conditions "would be superfluous." *Id.* (citing Ill. Rev. Stat. 1981, ch. 38, par. 1005-6-3(a), now 730 ILCS 5/5-6-3(a) (West 2014)).

¶ 17 We decline to depart from the precedent of *Glover* and *Brown*. Here, although the record is not perfectly clear, it appears that defendant was not provided with a certificate setting forth the conditions of his conditional discharge. Moreover, the transcript of proceedings reveals that defendant was not orally admonished that he should not violate any criminal statute of any jurisdiction during his term of conditional discharge. Nevertheless, we will not reverse the trial court's finding that defendant violated his conditional discharge based on either of these circumstances. Pursuant to *Glover*, the trial court was not required to provide defendant with a certificate, and pursuant to *Brown*, the condition that defendant avoid future criminality automatically attached to his conditional discharge and need not have been memorialized. Defendant's arguments fail.

¶ 18 Defendant next contends that we should vacate the finding that he violated his conditional discharge because the statute defining conditional discharge provides that a defendant not violate "any criminal statute of any jurisdiction," and he only violated a city ordinance, which he asserts does not constitute a "criminal statute." Defendant acknowledges

that a prosecution for violating a municipal ordinance is quasi-criminal in nature, but maintains that it is civil in form and is tried and reviewed as a civil proceeding.

¶ 19 In arguing his position, defendant again urges us to disregard precedent. In this instance, he asserts that we should reject the opinion in *People v. Goleash*, 311 Ill. App. 3d 949 (2000), *appeal denied*, 193 Ill. 2d 592 (2001).

¶ 20 In *Goleash*, the defendant was sentenced to probation. *Id.* at 951. While on probation, he committed the offense of driving while his license was revoked (DWR). *Id.* at 952. The State successfully moved to revoke the defendant's probation based on his commission of DWR. *Id.* at 952-53.

¶ 21 On appeal, the defendant contended that the statute prohibiting DWR was not a "criminal" statute and, therefore, his violation of it did not constitute a violation of "any criminal statute of any jurisdiction." *Id.* (quoting 730 ILCS 5/5-6-3(a)(1) (West Supp. 1995)). This court rejected the defendant's contention, finding that his premise was unsound. *Id.* at 953. We explained that because different jurisdictions employ different systems of codification, the system chosen to prohibit criminal behavior is irrelevant to the command set forth in section 5-6-3(a)(1). *Id.* Thus, the *Goleash* court determined that any analysis of whether a statute is "criminal" must focus on whether the statute proscribes conduct for which a violator can be jailed. *Id.* at 953-54.

¶ 22 Defendant argues that *Goleash* is "suspect" because a case from which the *Goleash* court stated it drew support, *People v. Hasprey*, 308 Ill. App. 3d 841 (1999), which involved the issue of whether a statute was "criminal" for purposes of ordering restitution, was reversed in part by our supreme court in *People v. Hasprey*, 194 Ill. 2d 84 (2000). We are not persuaded by

defendant's argument. Leave to appeal in *Goleash* was denied in 2001, after our supreme court decided *Hasprey* in 2000. Thus, the decision in *Goleash* remains valid, and we decline defendant's invitation to depart from its holding.

¶ 23 Moreover, *Hasprey* is not on point. In *Hasprey*, the defendant was convicted of reckless driving and, among other things, ordered to pay restitution. *Hasprey*, 194 Ill. 2d at 85. After this court affirmed, the defendant appealed, contending that restitution was not authorized because reckless driving is part of the Illinois Vehicle Code, and not part of the Criminal Code. *Id.* at 86. Our supreme court agreed, holding that section 5-5-6 of the Unified Code of Corrections (730 ILCS 5/5-5-6 (West 1998)) authorizes restitution only for violations of the Criminal Code, which the defendant had not been convicted of violating. *Id.* Accordingly, our supreme court reversed this court's holding regarding restitution and vacated the trial court's order of restitution. *Id.* Here, in contrast to *Hasprey*, the applicability of restitution is not at issue. As such, our supreme court's decision in *Hasprey* does not affect our decision.

¶ 24 Defendant does not dispute that during his term of conditional discharge, he violated a city of Chicago ordinance prohibiting the possession of a replica air gun. Chicago Municipal Code § 8-24-040(b) (amended Sept. 11, 2013). That ordinance provides that any violator shall be "fined not less than $500.00 nor more than $1,000.00 for each offense, or imprisoned for a period not to exceed six months, or both such fine and imprisonment." *Id.* § 8-24-040(e). The ordinance defendant violated proscribed conduct for which he could be jailed. As such, pursuant to the holding of *Goleash*, the ordinance constituted a "criminal statute of any jurisdiction" for purposes of section 5-6-3(a)(1). Defendant's argument to the contrary fails.

¶ 25 Defendant next contends that the mittimus should be corrected. First, he argues that the mittimus, which indicates he was convicted of "720-5/12-2-C-1 AGG ASSAULT/USE DEADLY WE," should be amended to remove the reference to a deadly weapon. The State, while observing that the mittimus reflects the correct statutory citation for the offense to which defendant pled guilty (720 ILCS 5/12-2(c)(1) (West 2014)), nevertheless states it has no objection to changing the wording of the mittimus to reflect defendant's use of an "air rifle," rather than a deadly weapon. See 720 ILCS 5/24.8-0.1 (West 2014) ("Air rifle" means and includes any *** B-B gun"). We agree with the parties that the mittimus should reflect the offense as it was set forth on the charging instrument, *i.e.*, aggravated assault with a BB gun. As such, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we direct the clerk of the circuit court to amend the mittimus to reflect the correct name of defendant's conviction.

¶ 26 Finally, defendant argues that the mittimus should be corrected to reflect 199 days of presentence custody credit. Under section 5-4.5-100(b) of the Unified Code of Corrections, defendants "shall be given credit *** for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014). Because sentencing credit for time served is mandatory, a claim of error in the calculation of such credit cannot be forfeited. *People v. Brown*, 2017 IL App (3d) 140907, ¶ 9.

¶ 27 The State does not challenge defendant's mathematical computation of how many days he served in presentence custody. However, the State argues that the issue of presentence custody credit is moot because defendant was sentenced to 180 days in jail on July 2, 2015, and therefore, he "already served" that sentence by the time he filed his opening brief in 2017.

Defendant responds that it is "not clear" whether he has officially discharged his sentence of 180 days in jail. Relying on the State's argument in aggravation at sentencing, defendant asserts that he had two felony charges pending at the time of sentencing. Further, he notes that at the hearing on his motion to reduce sentence, he was found guilty of contempt of court twice, with the trial court imposing consecutive six-month sentences for each finding. Moreover, as defendant points out, the Illinois Department of Corrections website does not list his misdemeanor sentence and indicates he is currently serving unrelated felony sentences ranging from 3 to 13 years, with custody dates of January 4, 2015, and January 21, 2015. See *People v. Young*, 355 Ill. App. 3d 317, 321 n.1 (2005) (this court may take judicial notice of information provided on the Illinois Department of Corrections website).

¶ 28 We agree with defendant that it is not clear from the record whether he has completed his 180-day sentence for this case. It is also not clear whether he was ever in simultaneous presentence custody on the instant charge and one or more unrelated felony charges, which could affect his right to receive double credit for time served. See *People v. Latona*, 184 Ill. 2d 260, 271 (1998) ("to the extent that an offender sentenced to consecutive sentences had been incarcerated prior thereto on more than one offense simultaneously, he should be given credit only once for actual days served"). While Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967) allows us to modify a sentencing order without remand to reflect credit for the amount of time spent in presentence custody, here, where the record on appeal is insufficient to determine whether defendant actually had multiple cases pending while he was in presentence custody for the instant offense, and if so, the nature of those cases, we find that the cause should be remanded to the trial court for clarification. As such, we remand to the circuit court with

directions to determine the proper credit, if any, to which defendant is entitled for time spent in presentence custody on the underlying ordinance violation, and to amend the mittimus accordingly.

¶ 29 For the reasons explained above, we affirm the finding that defendant violated his conditional discharge. We order amendment of the mittimus to accurately reflect the name of the crime of which defendant was convicted, and remand for a determination of whether defendant has discharged his sentence or is entitled to presentence custody credit against it.

¶ 30 Affirmed in part; mittimus amended; remanded with directions.