2018 IL App (2d) 170790-U
Nos. 2-17-0790 & 2-17-0792 cons.
Order filed August 9, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-834
SEAN FARRELL,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 15-CF-1732
SEAN FARRELL,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for not exonerating defendant's bond and thus for not making him eligible for additional sentencing credit: defendant's claim was foreclosed by his plea agreement, in which he agreed that he would receive only the credit to which he was entitled without exoneration, and in any event he could only speculate that, had he been eligible for additional sentencing credit, the State would have offered the same plea deal and thus a sooner "out date."

¶ 2 Defendant, Sean Farrell, appeals from an order of the circuit court of Kane County granting the State's motion to dismiss his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), wherein he alleged that trial counsel was ineffective for failing to exonerate his bond, resulting in the loss of sentencing credit. He seeks correction of the mittimus to award him 190 days' credit against his sentence. Alternatively, he asks that the matter be remanded for a third-stage evidentiary hearing under the Act. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 16, 2016, defendant entered negotiated pleas of guilty to multiple offenses in several different cases. Pertinent here is defendant's plea of guilty in case No. 15-CF-1732 (appeal No. 2-17-0792) to one count of unlawful possession of ammunition by a convicted felon (720 ILCS 5/24-1.1(a) (West 2014)).[1] At the plea hearing, when the trial court asked the State to outline the terms of each guilty plea, the following occurred with respect to case No. 15-CF-1732:

"[THE STATE]: ***

[1] This is a consolidated appeal. Appeal No. 2-17-0790 concerns case No. 15-CF-834. Although defendant argued in his postconviction petition that counsel was ineffective for failing to seek one day of credit against his sentence in that case, he has abandoned that argument on appeal.

Your Honor, on 15 CF 1732, the defendant again would be pleading guilty to unlawful possession of ammunition by a felon, a Class 3 felony.

The defendant—a conviction would enter. The defendant would be sentenced to three years in the Department of Corrections, credit for time served of two actual days. That prison sentence would run consecutive to the prison sentence which he will receive on 15 CF 269 and 15 CF 722.

***

[DEFENSE COUNSEL]: That is my understanding of the conditions of the plea.

[THE COURT]: And those are the terms you discussed with your client?

[DEFENSE COUNSEL]: I did."

After hearing the terms of the plea on each offense, the following colloquy occurred between the trial court and defendant:

"THE COURT: All right.

Sir, after you have heard all of the terms of the pleas and the factual bases being outlined, do you have any questions?

THE DEFENDANT: No.

THE COURT: And after you have heard all of that, is this what you want to do on each and every one of these files?

THE DEFENDANT: Yes.

THE COURT: And all of these terms, are those the terms that your attorney reviewed with you on each particular file?

THE DEFENDANT: Yes.

THE COURT: And do you have any questions on any of those files?

THE DEFENDANT: Not—no."

After additional admonitions, the trial court accepted defendant's guilty pleas.

¶ 5 On May 25, 2017, defendant filed a postconviction petition, alleging that he was denied the effective assistance of counsel, where defense counsel failed to exonerate his bond in case No. 15-CF-1732, causing defendant to lose credit for time spent in custody. In his affidavit attached to the petition, defendant averred that, in case No. 15-CF-1732, he was arrested on October 25, 2015, and was in continuous custody until November 6, 2015. Defendant further averred that, on November 12, 2015, while out on bond, defendant was arrested in another case. From November 12, 2015, defendant attempted to have his bond reduced. On December 9, 2015, after his motion for a bond reduction was denied, defendant told defense counsel that he wanted his bond exonerated in case No. 15-CF-1732, so that he could get credit for time served. According to defendant, counsel told him that she would take care of it at the next court date on January 6, 2016. At the January 6 court date, defendant was represented by a different public defender, who told defendant that he would make sure that defendant received the proper credit. In April 2016, defendant spoke with a third public defender. Based on that conversation, defendant believed that the bond had been exonerated and that he would receive the proper credit. According to defendant, he did not realize that he had not received the proper credit until June 14, 2016, when his " 'out-date' " was calculated at the Northern Reception Center in Joliet. According to defendant, "[h]ad [he] been given the proper credits, he would have had his 'out date' set an earlier date." He asked that the mittimus be corrected to award him the proper credit.

¶ 6 Defendant's postconviction petition was advanced to the second stage, and the State filed a motion to dismiss. The trial court granted the motion, stating:

> "The court having had an opportunity to review the files and having had an opportunity to consider the arguments of counsel at this time finds that the plea bargain that was entered into between the parties and the resulting sentence does not meet the Strickland standard for ineffective assistance of counsel.
>
> The court finds that the plea bargain and the sentence disposed of many charges, and the court believes that this is the kind of buyer's remorse situation that the Strickland court seeks to eliminate. So the court will grant the motion to dismiss here at stage two."

¶ 7 Defendant timely appealed.

¶ 8 II. ANALYSIS

¶ 9 Defendant argues that the trial court erred in dismissing his postconviction petition, because he made a substantial showing that he was denied the effective assistance of counsel, where counsel did not exonerate defendant's bond, resulting in the denial of 190 days' sentencing credit. He seeks correction of the mittimus to award him 190 days' credit against his sentence. Alternatively, he asks that the matter be remanded for a third-stage evidentiary hearing under the Act. In response, the State argues that because defendant entered a negotiated plea he was not entitled to any additional sentencing credit. The State argues further that defendant's petition was properly dismissed because he did not make a substantial showing that he was prejudiced by counsel's arguable error.

¶ 10 The Act allows criminal defendants to assert that their convictions or sentences resulted from substantial denials of their federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction proceeding has three stages. At the first stage, the defendant files a petition and the trial court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). If the trial

court does not dismiss the petition at the first stage, it is then docketed for further consideration. *Id.* At the second stage, all well-pleaded facts not positively rebutted by the trial record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The relevant question is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Pendleton*, 223 Ill. 2d at 472-473. Here, the petition was dismissed at the second stage. We review a second-stage dismissal *de novo*. *Id.*

¶ 11 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced the defendant. *Id.* at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001). To show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

¶ 12 A defendant has a right to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing. See 730 ILCS 5/5-4.5-100(b) (West 2014); *People v. Nesbit*, 2016 IL App (3d) 140591, ¶ 44. Sentencing credit for time served is mandatory and cannot be forfeited. *People v. Brown*, 2017 IL App (3d) 100907, ¶ 9. A defendant who is out on

bond on one charge, and who is subsequently rearrested and returned to custody on another charge, is not returned to custody on the first charge until his bond is exonerated. *Nesbit*, 2016 IL App (3d) 140591, ¶ 44. Once a defendant exonerates his bond, he is considered in custody on both charges and earns credit for each day in presentencing custody. *Id.*

¶ 13 Defendant argues that he made a substantial showing that he was denied the effective assistance of counsel where counsel did not exonerate his bond, resulting in the denial of 190 days' sentencing credit. In support, defendant relies on *Nesbit*. In *Nesbit*, the defendant averred in his postconviction petition that, if his attorneys had informed him that he could receive sentencing credit if he surrendered his bond, he would have done so. *Id.* ¶ 47. The court found that the defendant's petition made a substantial showing of ineffective assistance of counsel, because counsel's failure to notify the defendant of his option to surrender his bond and receive sentencing credit was objectively unreasonable and because the prejudice to the defendant was "clear." *Id.* The court specifically noted that, but for counsel's deficient performance, the defendant would have received credit for 246 days in custody. *Id.* The court remanded for a third-stage evidentiary hearing. *Id.* ¶ 48.

¶ 14 The State contends that *Nesbit* is distinguishable, because it involved receiving credit after a trial, whereas here defendant was sentenced pursuant to a fully negotiated guilty plea. The State argues that, because defendant bargained for his sentence with a negotiated plea deal, he was not entitled to reduce his sentence. See *People v. Evans*, 174 Ill. 2d 320, 333-334 (1996). The State cites *People v. Williams*, 384 Ill. App. 3d 415 (2008), and *People v. Evans*, 391 Ill. App. 3d 470 (2009), for the proposition that a defendant can request sentencing credit at any time unless he agreed to forgo it as part of a plea agreement. We will address each in turn.

¶ 15 In *Williams*, following a bench trial with stipulated evidence, the defendant was found guilty of unlawful possession of cannabis with intent to deliver. *Williams*, 384 Ill. App. 3d at 416. The parties subsequently presented the trial court with an agreement that the defendant would receive "24 months' probation, 60 days in Douglas County jail, 'with no days['] pre-sentence credit.' " *Id.* Defense counsel also explicitly acknowledged in court that there would be " 'no credit for previous time in custody.' " *Id.* The defendant nevertheless argued on appeal that he was entitled to credit for time that he served prior to sentencing. *Id.* The Fourth District held that the defendant was precluded by the invited-error doctrine from receiving the sentencing credit, emphasizing that he got the benefit of his bargain. *Id.* at 417. The court stated: "Allowing defendant to agree to a sentence that included consideration of his presentencing credit, then on appeal get his agreed-upon sentence reduced, would be unfair." *Id.*

¶ 16 In *Evans*, the defendant pleaded guilty to aggravated fleeing or attempting to elude a police officer. *Evans*, 391 Ill. App. 3d at 471. The plea agreement provided for agreed sentencing credit from September 10, 2007, through October 30, 2007. *Id.* The defendant filed a *pro se* motion for correction of sentencing credit, alleging he should have gotten credit from March 20, 2007. *Id.* At the hearing on the motion, the State made clear that " '[sentence credit] was part of the negotiation, a large part of the negotiation as to why we went to [4½] years." *Id.* at 474. The trial court denied the motion, finding that it would be unfair to change the amount of the sentence credit after it was negotiated as part of the plea agreement. *Id.* at 472. Relying on *Williams*, the Fourth District agreed. Id. at 472-74. The court emphasized that the defendant bargained for his sentence and specifically acquiesced in the sentence imposed. *Id.* at 474. The court concluded that "[a]llowing defendant to agree to a particular sentence only to allow a reduction of the agreed-upon sentence would be unfair." *Id.*

¶ 17 *Williams* and *Evans* support the State's position that a defendant can forgo sentencing credit as part of a negotiated plea agreement. Defendant did so here. Although defendant claims that he did not realize that he had not received "proper" credit until after pleading guilty, the terms of the plea were clear. When defendant pleaded guilty, he heard the State say: "The defendant would be sentenced to three years in the Department of Corrections, credit for time served of two actual days." Defendant agreed that he discussed the terms with counsel and that he agreed with the terms. Given defendant's express agreement with the terms of the plea, allowing a change in the terms now would be unfair to the State.

¶ 18 Defendant nonetheless maintains that he could not have bargained away sentencing credit during a negotiated plea. In support, he relies on this court's decision in *People v. Whitmore*, 313 Ill. App. 3d 117 (2000). In *Whitmore*, pursuant to a partially-negotiated plea agreement, the defendant pleaded guilty to armed robbery. *Id.* at 118. Following the denial of his motion to withdraw his guilty plea, the trial court, "in accordance with the plea agreement, sentenced defendant to 8 years' imprisonment with credit for 207 days already served." *Id.* On appeal, the defendant argued that he was entitled to an additional day of sentencing credit. *Id.* at 120. The record confirmed the error. *Id.* The State acknowledged the error, but it argued that the "defendant waived the issue when he explicitly agreed that the court's award was proper." *Id.* at 120-21. We disagreed, stating: "Because sentence[ing] credit for time served is mandatory, a claim of error in the calculation of that credit cannot be waived. [Citation.] Even a defendant's affirmative agreement with the trial court's erroneous award does not render the issue unreviewable. [Citation.]" *Id.* at 121.

¶ 19 Defendant also relies on *People v. Brown*, 2017 IL App (3d) 140907. The defendant in that case entered into a plea agreement under which he would receive an 11-year prison sentence.

Id. ¶ 4. At sentencing, the court inquired whether the mittimus reflected sentencing credit from May 9, 2012, to May 9, 2013. *Id.* Defense counsel indicated that it did. *Id.* The court then "sentenced defendant pursuant to the plea agreement and gave him credit for time served from May 9, 2012, to May 9, 2013." *Id.* On appeal, the defendant sought an additional 41 days' sentencing credit, beginning from the date that the arrest warrant was issued. *Id.* ¶ 7. The reviewing court found that the defendant was entitled to the credit. *Id.* ¶¶ 10, 11. In so doing, the court distinguished *Williams*, finding that the plea agreement in the present case did not contain a prohibition against receiving sentencing credit. *Id.*

¶ 20 *Whitmore* and *Brown* are distinguishable. *Whitmore* involved a claim of error in the calculation of the credit, and the State acknowledged that the defendant was entitled to an additional day. In *Brown*, during sentencing, defense counsel agreed with the dates of custody on the mittimus, which later turned out to be incorrect. Here, there was no error in the calculation of credit, nor was there an agreement with an erroneous award. Rather, when defendant pleaded guilty, he was entitled to two days' sentencing credit, and that is exactly what he agreed to. It is regrettable that, likely because defendant's case was handled by so many attorneys, no one followed through on his request to have his bond exonerated. However, it remains that defendant expressly agreed to the terms of his negotiated plea agreement despite his knowledge that he would be entitled to far more than two days' sentencing credit if his bond had been exonerated.

¶ 21 Before we conclude, we note that there is an additional basis to affirm the trial court's second-stage dismissal of defendant's postconviction petition. The State argues that, notwithstanding defendant's express agreement at the plea hearing, dismissal is warranted because defendant cannot make a substantial showing that he was prejudiced as a result of any alleged deficient performance. The State notes that, even if defendant's bond had been

exonerated, the State could have easily taken the additional sentencing credit into account and negotiated for a longer sentence. Thus, according to the State, defendant has no basis to suggest that the terms of his plea agreement would have been more favorable to him absent counsel's allegedly deficient performance. We agree. Defendant's claim that his "out date" would have been different is mere speculation. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice."). As a result, defendant did not make a substantial showing that a reasonable probability exists that the outcome would have been different had counsel exonerated his bond.

¶ 22 II. CONCLUSION

¶ 23 For the reasons stated, we affirm the judgment of the circuit court of Kane County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 24 Affirmed.