

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).

2018 IL App (3d) 160027-U

Order filed June 1, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois.
Plaintiff-Appellee,)	
v.)	Appeal Nos. 3-16-0027, 3-16-0028 and 3-16-0029
JODIE A. COLE,)	Circuit Nos. 12-CF-188, 12-CF-578, and 14-CF-19
Defendant-Appellant.)	Honorable Paul L. Mangieri, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Presiding Justice Carter and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant should receive additional presentence custody credit.

¶ 2 Defendant, Jodie A. Cole, appeals her sentence of imprisonment, arguing that she is entitled to presentence custody credit. We affirm and remand with directions.

¶ 3 **FACTS**

¶ 4 In April 2012, the State charged defendant in case No. 12-CF-188 (Case 1) with unlawful possession of a controlled substance, 15 to 100 grams of cocaine. 720 ILCS 570/402(a)(2)(A) (West 2012). She was arrested on April 24, 2012, and remained in jail until May 18, 2012. Defendant pled guilty and the court sentenced her to four years' probation and 60 days in jail, day-for-day credit to apply. She received credit for 25 days already served, and the court stated that she only needed to serve 5 more days starting on October 19, 2012.

¶ 5 On December 7, 2012, while on probation in Case 1, defendant was arrested and charged with multiple counts of forgery (720 ILCS 5/17-3(a)(1) (West 2012)) in case No. 12-CF-578 (Case 2). On December 11, 2012, the State filed a petition to revoke defendant's probation in Case 1 based, in part, on her commission of the forgery offenses. Defendant admitted to the petition on January 30, 2013, and the court resentenced her in Case 1 to four years' probation and 180 days in jail, day-for-day credit to apply. The court indicated that she would receive credit for 85 days already served and would serve the other 5 days from January 30 to February 4, 2013.

¶ 6 Defendant pled guilty to Case 2 and agreed to a sentence of two years' probation, to run concurrently with the probation in Case 1. The court also sentenced defendant to 180 days in jail, but, as defendant had already served 90 days, she did not have to serve any additional jail time. The State filed petitions to revoke probation in both cases on July 30, 2013, as defendant had tested positive for cocaine. The court issued a warrant on January 15, 2014, when defendant failed to appear at a hearing on the petitions to revoke.

¶ 7 On January 24, 2014, defendant was arrested and charged with theft (720 ILCS 5/16-1(a)(1) (West 2014)) in case No. 14-CF-19 (Case 3). While in custody the same day, the court served her with the warrant for failure to appear on the probation revocation in Cases 1 and 2.

Defendant pled guilty in Case 3 and admitted the petitions to revoke in Cases 1 and 2. On March 5, 2014, the court did not impose a sentence on any case but instead released defendant pending a sentence of drug court probation.

¶ 8 The State, again, filed petitions to revoke probation in Cases 1 and 2 on May 8, 2014, alleging that defendant had tested positive for cocaine. She was arrested on May 14, 2014, and posted bond on May 15, 2014. Defendant admitted the petitions to revoke on July 16, 2014. The court sentenced her on all three cases to concurrent terms of two years' drug court probation. In agreeing to drug court probation, defendant signed a "Consent to Participate in the Drug Court Program" form. The form included a provision that stated,

"By participating in the program I voluntarily and knowingly waive credit for time served as it relates to the Drug Court Program, and agree that the Judge has the absolute right to impose sanctions of up to 180 days incarceration. If my eligibility to participate in the program is revoked and I am sentenced to a period of incarceration, I will receive credit for time served prior to sentencing to the Drug Court Program but will not receive credit for time served during program sanctions."

The drug court probation order enumerated a series of conditions the court could apply. One such condition stated,

"The Defendant shall serve a period of incarceration of up to 180 days with no credit for time served, to be served at the discretion of the Drug Court Judge as sanctions for failing to abide or comply with the terms of the program pursuant to 730 ILCS 166/25. If the

Defendant's eligibility to participate in the program is revoked and the Defendant is sentenced to a period of incarceration, the Defendant will receive credit for time served prior to the date of this Order but will not receive credit for time served as part of program sanctions."

However, the court did not check the box next to this condition.

¶ 9 While on drug court probation, the court ordered defendant to serve jail time on the following occasions for failing to comply with the drug court program: (1) August 19 to 21, 2014; (2) September 2 to 5, 2014; (3) December 7 to 20, 2014; (4) December 24 to 26, 2014; (5) December 30, 2014, to January 5, 2015; (6) January 20 to February 9, 2015; (7) June 2 to 4, 2015; and (8) June 23 to 29, 2015.

¶ 10 When defendant failed to appear in drug court on July 7, 2015, a warrant issued for her arrest. She was arrested on the warrant on September 5, 2015. The State filed petitions to revoke drug court probation in all three cases on September 8, 2015. Defendant admitted the petitions to revoke on September 24, 2015. The court stated that defendant had been incarcerated under drug court sanction until that day when the court set bond. Defendant remained in custody until November 12, 2015, when she was released on recognizance based on a medical issue. However, she was taken into custody the next day for testing positive for cocaine.

¶ 11 At a sentencing hearing on November 19, 2015, and the court sentenced defendant to eight years' imprisonment in Case 1, three years' imprisonment in Case 2, and five years' imprisonment in Case 3. All sentences were to run concurrently at 50%. The presentence investigation report stated that defendant was entitled to the following presentence custody: (1) April 24 to May 18, 2012 (25 days) in Case 1; (2) December 7, 2012, to January 30, 2013,

(55 days) in Case 2; and (3) January 24 to March 5, 2014, (41 days) in Case 3. The parties agreed that she would receive an additional two days of presentence custody credit for November 17 and 18, 2015.

¶ 12 ANALYSIS

¶ 13 On appeal, defendant solely argues that she is entitled to additional presentence custody credit. Specifically, defendant argues that she should receive 253 days of credit. At the outset, we note that the State concedes that defendant is entitled to 120 additional days of presentence custody credit. It is unclear how the State arrived at this number. It appears that the State agrees that defendant should receive credit for the time spent in custody starting on (1) October 19, 2012, (2) May 14, 2014, and (3) September 24, 2015, however, this presentence custody does not equal 120 days. We find the record does show that defendant was in custody on these dates and is entitled to the corresponding presentence custody credit. We thus remand for the court to calculate and impose credit for the abovementioned dates of presentence custody.

¶ 14 Next, we consider the periods of presentence incarceration that the State contests. Initially, defendant argues that she is entitled to presentence custody credit for the two periods of time she was simultaneously in custody on a petition to revoke and a pending new charge.

¶ 15 Section 5-4.5-100(b) of the Unified Code of Corrections (Code) states, “[an] offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment 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 2012). “Sentencing credit for time served is mandatory and a claim of error in calculating such credit cannot be forfeited.” *People v. Brown*, 2017 IL App (3d) 140907, ¶ 9. A defendant who is in simultaneous custody on two unrelated charges is entitled to credit for time served with regard to both sets of charges. *People*

v. Robinson, 172 Ill. 2d 452, 459 (1996). This includes when a defendant is in custody on a petition to revoke probation and a new charge. See *People v. Jones*, 2015 IL App (4th) 130711, ¶ 15; *People v. Hutchcraft*, 215 Ill. App. 3d 533, 536 (1991). The operative question is “whether defendant was ‘in custody’ on the petition to revoke.” *Jones*, 2015 IL App (4th) 130711, ¶ 15.

¶ 16 First, defendant was arrested and charged on December 7, 2012, in Case 2 while on probation in Case 1. The State filed a petition to revoke probation in Case 1 on December 11, 2012. Defendant admitted the allegations in the petition to revoke and the court resentenced defendant to probation on January 30, 2013. Though the record does not show that a warrant was served to defendant on the petition to revoke, the court found defendant in simultaneous custody on both offenses when it awarded defendant presentence custody credit on January 30, 2013, and ordered defendant to serve five additional days in jail, thus releasing her on February 4, 2013. Therefore, we find that defendant was in simultaneous custody on both cases and is entitled to 56 days presentence custody credit.

¶ 17 Second, the State filed petitions to revoke defendant’s probation in Cases 1 and 2 on July 30, 2013. On January 15, 2014, the court issued a warrant for defendant as she failed to appear at a hearing on the petitions to revoke. On January 24, 2014, defendant was arrested and charged in Case 3. On the same day, the court served defendant with the warrant on the petitions to revoke probation. She was in custody until March 5, 2014. Because the court served the warrant on the petitions to revoke on the day of defendant’s arrest in Case 3, she was in simultaneous custody on both cases and is entitled to 41 days presentence custody credit.

¶ 18 In coming to this conclusion, we reject the State’s reliance on section 5-4.5-100(e) of the Code for the proposition that defendant is not entitled to presentence custody credit because she

was on probation when charged with a subsequent offense. 730 ILCS 5/5-4.5-100(e) (West 2012). Section 5-4.5-100(e) states, in relevant part:

“An offender charged with the commission of an offense committed while on *** probation shall not be given credit for time spent in custody *** for that offense for any time spent in custody as a result of a revocation of *** probation where such revocation is based on a sentence imposed for a previous conviction, regardless of the facts upon which the revocation of *** probation is based, unless both the State and the defendant agree that the time served for a violation of *** probation shall be credited towards the sentence for the current offense.” *Id.*

We read this statute to mean, in defendant’s case, she could not receive credit in Case 2 or 3 for the time she spent in custody for her revocation of probation in Case 1. Stated another way, section 5-4.5-100(e) allows defendant to still receive credit on Case 1 for her revocation of probation in that case, but does not allow her to also receive credit in Case 2 or 3. It does not stand for the proposition that defendant is not entitled to any credit for the time spent in custody. Essentially this provision prohibits double credit for presentence incarceration. Here, defendant is only arguing that she is entitled to credit for Case 1, not Case 2 or 3. Therefore, the provision is not applicable.

¶ 19 Next, defendant argues that she is entitled to presentence custody credit for the time she spent in custody while on drug court probation. In agreeing to participate in drug court probation, defendant signed a consent form. One provision on the form stated,

“By participating in the program I voluntarily and knowingly waive credit for time served as it relates to the Drug Court Program, and agree that the Judge has the absolute right to impose sanctions of up to 180 days incarceration. If my eligibility to participate in the program is revoked and I am sentenced to a period of incarceration, I will receive credit for time served prior to sentencing to the Drug Court Program but will not receive credit for time served during program sanctions.”¹

The drug court probation order enumerated a series of conditions the court could apply. One such condition stated,

“The Defendant shall serve a period of incarceration of up to 180 days with no credit for time served, to be served at the discretion of the Drug Court Judge as sanctions for failing to abide or comply with the terms of the program pursuant to 730 ILCS 166/25. If the Defendant’s eligibility to participate in the program is revoked and the Defendant is sentenced to a period of incarceration, the Defendant will receive credit for time served prior to the date of this Order but will not receive credit for time served as part of program sanctions.”

¹Defendant contends that the Drug Court Treatment Act (Act) (730 ILCS 166/1 *et seq.* (West 2012)) does not allow her to waive presentence custody credit as a condition of participation in the drug court program. We disagree. While the Act may not specifically provide for waiving credit, defendant may agree to forego sentencing credit as part of a sentencing agreement. *People v. Williams*, 384 Ill. App. 3d 415, 417 (2008).

However, the court did not check the box next to this condition. Defendant argues that, since the court did not check this box, it intended to allow defendant credit for time spent in custody while on drug court probation. The State argues that, whether or not the box on the order was checked, defendant agreed that she would not receive credit for the time spent in custody while on drug court probation when she signed the consent form. We find the record does not reflect the court's intention regarding whether defendant would receive credit for the time spent in custody during drug court probation. Therefore, we remand to make such a finding. Should the court determine that it intended for defendant to receive such credit, defendant should be credited accordingly. Alternatively, if the court determines that defendant waived the credit, defendant should receive no additional credit for the time spent in custody as drug court sanctions.

¶ 20 In sum, defendant is entitled to some additional presentence custody credit as set out above. We thus remand and direct the court to do the following: (1) calculate and adjust the mittimus to provide defendant presentence custody credit for the time spent in custody starting on October 19, 2012, May 14, 2014, and September 24, 2015 (*supra* ¶ 13); (2) adjust the mittimus to reflect 56 days of presentence custody credit for December 11, 2012, to February 4, 2013 (*supra* ¶ 16); (3) adjust the mittimus to reflect 41 days of presentence custody credit for January 24 to March 5, 2014 (*supra* ¶ 17); and (4) determine whether defendant is entitled to credit for her drug court sanctions and, if so, adjust the mittimus to reflect such credit (*supra* ¶ 19).

¶ 21 CONCLUSION

¶ 22 For the foregoing reasons, we affirm the judgment of the circuit court of Knox County and remand with directions.

¶ 23 Affirmed and remanded with directions.