

NOTICE

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2019 IL App (4th) 170376-U

NO. 4-17-0376

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

April 22, 2019

Carla Bender

4th District Appellate Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
KENNETH R. BATES,)	No. 14CF254
Defendant-Appellant.)	
)	Honorable
)	Thomas E. Griffith Jr.,
)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices DeArmond and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court committed no error in denying defendant’s motion for order *nunc pro tunc*, seeking additional presentence credit.

¶ 2 Defendant, Kenneth R. Bates, pleaded guilty to domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)) and was sentenced to 24 months’ probation. After defendant was arrested and charged with additional criminal offenses, his probation was revoked, and the trial court re-sentenced him to 4½ years in prison. Following his sentencing, defendant filed a motion for order *nunc pro tunc*, seeking additional sentence credit for time he spent in custody after the State alleged a violation of his probation and before his resentencing. The trial court denied defendant’s motion and he appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2014, the State charged defendant in case No. 14-CF-254 with domestic battery as a Class 2 felony based on defendant having four or more prior convictions for the same offense (720 ILCS 5/12-3.2(a)(1) (West 2012)) and resisting a peace officer (720 ILCS 5/31-1 (West 2012)). In May 2014, defendant pleaded guilty to the domestic battery charge and was sentenced to 24 months' probation.

¶ 5 In November 2014, the State filed a petition alleging defendant violated his probation. Specifically, it alleged that defendant committed, and was charged in case No. 14-CF-1464, with two new offenses—(1) domestic battery with four or more prior domestic battery convictions (720 ILCS 5/12-3.2(a)(1) (West 2012)) and (2) aggravated battery to a pregnant person (720 ILCS 5/12-3.05(d)(2) (West 2012)). Following a hearing in April 2015, the trial court found that the State proved a probation violation by a preponderance of the evidence.

¶ 6 In June 2015, the trial court resentenced defendant in case No. 14-CF-254 to 4½ years in prison and 4 years' mandatory supervised release. In imposing defendant's sentence, the court noted that defendant's presentence investigation report showed "credit dates" of February 27, 2014, through May 12, 2014, the date of his original sentencing. The following colloquy then occurred between the court and the parties:

“THE COURT: *** Does [defendant] have any additional credit dates on this case, or is [defendant] being held on the other case which I don't think he is?

MRS. KOLL [(ASSISTANT STATE'S ATTORNEY)]: I don't think we ever set a bond on the probation [violation] case. So, he's—as far as I know, he's only being held on the new case.

THE COURT: What's the bond on the new case[] ***?

THE MACON COUNTY CORRECTIONAL OFFICER: 30,000.

THE COURT: Okay. All right. But he's not being held on this case. Is that right, Mrs. Hawkins [(defense attorney)]?

MRS. HAWKINS: I—I—that's correct, Judge, to my knowledge.

THE COURT: Okay. All right. All right.

THE MACON COUNTY CORRECTIONAL OFFICER: Correct."

The court determined defendant's "credit dates" were February 27, 2014, through May 12, 2014. However, the court also acknowledged that defendant had spent approximately eight months in custody prior to his resentencing and stated that it "factored in the eight months *** as part of [its] sentence." The record reflects that defendant's new charges in case No. 14-CF-1464 were dismissed at the conclusion of the hearing.

¶ 7 Following his resentencing, defendant *pro se* filed various motions with the trial court including motions for reconsideration of his sentence. In June 2016, he filed a second amended motion to reconsider with the aid of counsel. In August 2016, the court conducted a hearing in the matter and denied defendant's motion. Defendant appealed but immediately thereafter *pro se* filed a motion alleging his counsel provided ineffective assistance at the hearing on his second amended motion to reconsider. The court ordered defendant's motion stricken as moot because his case was pending on appeal. Defendant then filed an amended notice of appeal.

¶ 8 In February 2017, this court granted a motion by defendant to dismiss his appeal and ordered "the cause returned to the trial court for compliance with [Illinois] Supreme Court Rule 606(b) [(eff. Dec. 11, 2014)], including a hearing and ruling on defendant's *pro se* motion ***." The same month, defendant *pro se* filed a motion for order *nunc pro tunc* with the trial

court, alleging he was entitled to additional sentence credit for time he spent in custody prior to his resentencing. In April 2017, defendant filed a motion for order *nunc pro tunc* with the aid of counsel. He alleged that on November 23, 2014, he was arrested on new charges in connection with case No. 14-CF-1464 and thereafter held in continuous custody. Defendant further alleged that he was arraigned on the State's probation violation petition on January 9, 2015, and that he was entitled to sentence credit from that date until June 29, 2015, the day prior to his resentencing.

¶ 9 In May 2017, the trial court conducted a hearing in the matter. The trial court first considered and denied defendant's August 2016 motion, alleging ineffective assistance of counsel. It then addressed and denied defendant's motion for order *nunc pro tunc*. In so holding, the court noted that it had taken the time defendant spent in custody prior to resentencing into consideration when imposing his sentence. Additionally, it stated as follows: "I think based on the case[]law, since it was a separate case, and there was no bond set on your probation violation in this case, that per the law, you are not entitled to the additional credit."

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues he is entitled to an additional 217 days' sentence credit. Specifically, he contends that from November 25, 2014, when the State petitioned to revoke his probation, to June 30, 2015, when he was resentedenced in this case, "he was in simultaneous custody for violating his probation on the original offense, and for the subsequent offenses which triggered the violation of his probation."

¶ 13 Section 5-4.5-100 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-

100 (West 2014)) sets forth circumstances under which a defendant is entitled to sentence credit for time spent in presentence custody. Subsection (b) of that section provides that an “offender shall be given credit on the determinate sentence *** for the number of days spent in custody as a result of the offense for which the sentence was imposed.” *Id.* § 5-4.5-100(b). Additionally, subsection (c) provides as follows:

“An offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit on the determinate sentence *** for time spent in custody under the former charge not credited against another sentence.” *Id.* § 5-4.5-100(c).

“Whether a defendant should receive presentence custody credit against his sentence is reviewed under the *de novo* standard of review.” *People v. Jones*, 2015 IL App (4th) 130711, ¶ 12, 44 N.E.3d 1112.

¶ 14 On appeal, the State asserts that defendant is not entitled to additional sentence credit under either subsection (b) or (c) of section 5-4.5-100 of the Code. It relies heavily on this court’s decision in *Jones* to support its argument. We agree that *Jones* is factually similar to this case and directly on point regarding the issue presented for review.

¶ 15 In *Jones*, the defendant was found guilty of burglary and sentenced to 30 months’ probation. *Id.* ¶ 3. While on probation, he was arrested and charged with theft. *Id.* ¶ 4. Thereafter, the defendant’s probation was revoked, he was resentenced to seven years in prison, and the theft charge was nol-prossed. *Id.* ¶¶ 5-8. In resentencing the defendant, the trial court denied his request for sentence credit for time he spent in custody on his theft charge. *Id.* ¶ 6. On review, this court also determined that the defendant was not entitled to additional presentence credit for time

spent in custody in connection with the theft charge. *Id.* ¶ 25.

¶ 16 Initially, we addressed whether the defendant was entitled to presentence credit under section 5-4.5-100(b) because he was in simultaneous custody on the petition to revoke his probation in his burglary case and on the theft charge in his new case. *Id.* ¶¶ 14-15. We determined that the defendant was not “in custody” as contemplated by section 5-4.5-100(b) on the petition to revoke. *Id.* ¶ 15. Specifically, we noted that the common law record in defendant’s burglary case did not indicate that a warrant had been issued, that defendant was arrested, or that a bond was surrendered. *Id.* The transcripts in the case also failed to support a finding of simultaneous custody in that they indicated defendant was only being held in custody in connection with his theft charge and not on the petition to revoke. *Id.* In particular, we noted that even the defendant’s counsel asserted the belief that the defendant was only “ ‘in custody on his new case’ ” and not in connection with his burglary case. *Id.*

¶ 17 Here, defendant cites section 5-4.5-100(b) of the Code in his brief and concludes that he was “in simultaneous custody for violating his probation on the original offense, and for the subsequent offenses” in case No. 14-CF-1464. However, although the record reflects that defendant was arrested and held in connection with his charges in case No. 14-CF-1464, it does not similarly reflect that he was “in custody” in connection with the State’s probation violation petition. Notably, defendant has failed to cite to any portion of the record that would support a finding of simultaneous custody. Further, as the State points out, nothing in the record in this case shows that a warrant was issued for defendant’s arrest, that defendant was arrested in connection with the State’s probation violation petition, or that a bond was ever set. Finally, at resentencing, both parties acknowledged that defendant was being held in custody in connection with only his

new charges in case No. 14-CF-1464. Accordingly, like in *Jones*, we find defendant was not “in custody” in connection with the probation revocation proceedings and he is not entitled to additional sentence credit under section 5-4.5-100(b) of the Code for time he spent in custody on only his new charges in case No. 14-CF-1464.

¶ 18 On appeal, defendant also cites section 5-4.5-100(c) of the Code in asserting that he is entitled to additional sentence credit. 730 ILCS 5/5-4.5-100(c) (West 2014)). As noted, that section states as follows:

“An offender arrested on one charge and prosecuted on another charge for conduct that occurred prior to his or her arrest shall be given credit on the determinate sentence *** for time spent in custody under the former charge not credited against another sentence.” *Id.* § 5-4.5-100(c).

¶ 19 In *Jones*, we also found that the defendant failed to establish an entitlement to presentence credit under section 5-4.5-100(c) of the Code. In addressing that section, we stated that “[t]he language ‘[a]n offender arrested on one charge,’ refers to the arrest(s) that occurred first in time and the language ‘and prosecuted on another charge’ refers to the charge filed after the original charge(s).” *Jones*, 2015 IL App (4th) 130711, ¶ 18. “The statute then provides for credit against the sentence imposed in the subsequent charge *** for time spent in custody on the original charges *** that has not been credited against another sentence, so long as the conduct in the subsequent charge occurred prior to the arrest on the first charge(s).” (Internal quotation marks omitted.) *Id.* Additionally, we noted that the purpose of section 5-4.5-100(c) is “ to ‘prevent the State from dropping an initial charge and recharging a defendant with another crime, with the intent of denying credit for time spent in jail on the first charge.’ ” (Emphasis omitted.)

Id. ¶ 20 (quoting *People v. Robinson*, 172 Ill. 2d 452, 460, 667 N.E. 2d 1305, 1309 (1996)).

¶ 20 In *Jones*, the defendant crafted an argument in which he referred to his arrest on his theft charge as the arrest that occurred first in time. *Id.* ¶ 19. He also referred to the proceedings on his petition to revoke in his burglary case as a “prosecution” occurring subsequent to his theft charge. *Id.* Ultimately, we disagreed with the defendant’s interpretation of the statute, finding that it was the defendant’s burglary arrest that occurred first in time and that “section 5-4.5-100(c) ‘does not allow credit for time spent in custody on a subsequent charge that is dismissed[.]’ ” *Id.* ¶ 22 (quoting *People v. Clark*, 2014 IL App (4th) 130331, ¶ 24, 15 N.E.3d 539). We also concluded that “a petition to revoke probation and subsequent resentencing on a prior conviction” was not “analogous with the prosecution of a new charge which results in conviction and imprisonment.” (Internal quotation marks omitted.) *Id.*

¶ 21 Here, defendant does not present any specific argument regarding why section 5-4.5-100(c) of the Code should apply under the facts of his case. Moreover, as stated, *Jones* is factually similar to this case and controlling of the issue presented. Defendant’s arrest and his charges in this case, case No. 14-CF-254, occurred prior in time to his arrest and the filing of new charges against him in case No. 14-CF-1464. Additionally, there was no sentence imposed in connection with case No. 14-CF-1464—as would be required for application of section 5-4.5-100(c)—because those new, subsequent charges were ultimately dismissed. Further, as stated in *Jones*, the proceedings in which the trial court found a violation of defendant’s probation and resentenced him did not amount to the “prosecution” of a new charge. Accordingly, defendant was also not entitled to additional presentence credit under section 5-4.5-100(c) of the Code.

¶ 22

III. CONCLUSION

¶ 23 For the reasons stated, we affirm the trial court's judgment.

¶ 24 Affirmed.