

NOTICE
Decision filed 03/04/19. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2019 IL App (5th) 150542-U

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).

NO. 5-15-0542

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clay County.
)	
v.)	No. 13-CF-100
)	
BRYAN S. HARMON,)	Honorable
)	Allen F. Bennett, ¹
Defendant-Appellant.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the denial of the defendant’s motion to reconsider sentence, but remand so the circuit court may recalculate the amount of credit to which the defendant is entitled, and may thereafter amend the mittimus to properly reflect that credit.

¶ 2 The defendant, Bryan S. Harmon, appeals the denial, by the circuit court of Clay County, of his motion to reconsider sentence. For the following reasons, we affirm the denial of the defendant’s motion to reconsider sentence, but remand so the circuit court may recalculate the amount of credit to which the defendant is entitled, and may thereafter amend the mittimus to properly reflect that credit.

¹Judge Bennett died in November of 2017.

¶ 3

FACTS

¶ 4 On April 13, 2015, the defendant appeared in the circuit court for what had been scheduled to be a final pretrial hearing in this case. At the hearing, the defendant entered a partially negotiated plea of guilty to two felony counts of burglary. In exchange for the plea, the State agreed, *inter alia*, to a sentencing cap of 12 years in the Illinois Department of Corrections. A factual basis for the plea was given, as well as a recital of the defendant's prior criminal history. In addition, the defendant was admonished of the rights he was foregoing by entering the plea, after which the defendant indicated that he still wished to enter the plea. The circuit court accepted the plea, bound itself to the sentencing cap, and set the matter for sentencing.

¶ 5 On July 22, 2015, a sentencing hearing was held. Therein, the State presented no witnesses, and indicated that it had no evidence to offer in aggravation, other than the presentence investigation, about which the State would offer argument. The defendant testified on his own behalf, as did one other witness. Thereafter, the parties presented argument, with the State requesting a sentence of 12 years, and the defendant requesting a sentence of 6 years. Following argument, the defendant made a statement in allocution. The circuit court sentenced the defendant to the capped maximum sentence of 12 years in prison.

¶ 6 On August 20, 2015, the defendant filed a motion to reconsider sentence. On December 7, 2015, a hearing was held on the motion, in which the defendant's plea counsel raised, *inter alia*, the concern that the circuit court had relied upon an improper factor when sentencing the defendant. At the hearing, the defendant presented, over the State's objection, the testimony of three witnesses. Thereafter, the parties presented argument on the defendant's motion to reconsider sentence, with the defendant asking for the sentence to be reduced to 10 years in prison, and the State arguing for the sentence to remain at 12 years in prison. Judge Bennett stated, in reference to the original sentencing hearing, that he believed his evaluation of the

defendant's case was "based on the totality of the circumstances." Accordingly he denied the defendant's motion to reconsider sentence. This timely appeal followed.

¶ 7

ANALYSIS

¶ 8 In his opening and reply briefs on appeal, the defendant contended: (1) there is no procedural bar to this court reaching the merits of his improper sentencing factors claim, (2) plea counsel failed to strictly comply with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013), (3) a new sentencing hearing is required because Judge Bennett relied on improper factors at the original sentencing hearing in this case, and (4) plea counsel was ineffective in the handling of the defendant's bond in this case, which necessitates remand for the calculation of the proper amount of presentence custody credit to which the defendant is entitled. However, subsequent to the completion of briefing, but prior to scheduled oral argument, the Illinois Supreme Court issued its ruling in *People v. Johnson*, 2019 IL 122956. In light of *Johnson*, the defendant's counsel on appeal in this case filed a motion to cite adverse authority, and thereafter moved to withdraw her first three arguments on appeal and to waive oral argument. Counsel's motion was granted.

¶ 9 Accordingly, the defendant's sole remaining contention on appeal is that plea counsel was ineffective in the handling of the defendant's bond in this case, which necessitates remand for the calculation of the proper amount of presentence custody credit to which the defendant is entitled. The State concedes that plea counsel's failure to withdraw the defendant's bond in this case, once plea counsel learned that the defendant was being held in another county on an unrelated case, constituted ineffective assistance of counsel, because plea counsel's inaction directly deprived the defendant of approximately 10 months of sentencing credit to which he was clearly entitled. The State also concedes that the proper remedy, under the circumstances of this case, is a remand of this case so the circuit court may recalculate the amount of credit to which

the defendant is entitled, and may thereafter amend the mittimus to properly reflect that credit.

We agree with the parties.

¶ 10

CONCLUSION

¶ 11 For the foregoing reasons, we affirm the denial of the defendant's motion to reconsider sentence, but remand so the circuit court may recalculate the amount of credit to which the defendant is entitled, and may thereafter amend the mittimus to properly reflect that credit.

¶ 12 Affirmed and remanded.