

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).

Order filed April 25, 2014

2014 IL App (4th) 140018-U

Modified upon denial of rehearing June 2, 2014

NO. 4-14-0018

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

In re: KAYLA F., a Minor,)	Appeal from
THE PEOPLE OF THE STATE OF ILLINOIS,)	Circuit Court of
Petitioner-Appellee,)	Morgan County
v.)	No. 06JD14
KAYLA F.,)	
Respondent-Appellant.)	Honorable
)	Jeffrey E. Tobin,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Appleton and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court reversed the trial court's judgment and remanded for further proceedings to determine whether respondent is entitled to credit for time spent on house arrest.
- ¶ 2 In November 2006, respondent, Kayla F., pleaded guilty in juvenile court to voluntary manslaughter of an unborn child and three counts of aggravated battery. In the extended jurisdiction juvenile (EJJ) proceedings, the trial court sentenced her to 5 years' juvenile probation, along with a stayed adult term of 12 years in prison. In November 2010, the State filed a petition to revoke the stay of respondent's adult sentence. In February 2011, the court lifted the stay and sentenced her to 12 years in prison. This court affirmed as modified and remanded with directions. In July 2012, respondent filed a *pro se* postconviction petition, which the trial court summarily dismissed. This court affirmed as modified and remanded with directions. In November 2013, respondent filed a motion for order *nunc pro tunc*, which the trial

court denied.

¶ 3 On appeal, respondent argues the trial court erred in finding her motion for order *nunc pro tunc* was moot. We reverse and remand for further proceedings.

¶ 4 I. BACKGROUND

¶ 5 In August 2006, the State filed a supplemental petition for adjudication of wardship, alleging respondent, born in June 1990, was a delinquent minor. The petition alleged respondent committed the offense of intentional homicide of an unborn child (720 ILCS 5/9-1.2(a)(2) (West 2006)), claiming she knew Ashliegh Fredericks was pregnant and, without lawful justification and with the knowledge that her acts created a strong probability of great bodily harm to Fredericks, ran over her with a vehicle, thereby causing the death of Fredericks' unborn child. The petition also alleged respondent committed the offenses of aggravated battery (720 ILCS 5/12-4 (West 2006)) against Fredericks (two counts), Meltara Childs (one count), and Skiya Finkle (one count). The trial court found probable cause to believe respondent was a delinquent minor and it was a matter of immediate and urgent necessity that she be detained.

¶ 6 On November 2, 2006, the State filed a motion to transfer from juvenile court and to permit prosecution of respondent under the criminal laws. The State also filed a motion to designate the matter as an EJJ proceeding (705 ILCS 405/5-810 (West 2006)). On November 27, 2006, the State filed a second supplemental petition for adjudication of wardship, charging the additional offense of voluntary manslaughter of an unborn child (720 ILCS 5/9-2.1(a) (West 2006)). On that same date, respondent entered into a plea agreement for both a juvenile and an adult sentence. She pleaded guilty to three counts of aggravated battery and one count of voluntary manslaughter of an unborn child.

¶ 7 As part of her juvenile sentence, respondent agreed to five years' probation, house

arrest from November 27, 2006, until the end of the school year, and 30 days' detention with credit for 30 days served. She was also ordered to have no contact with the victim and to comply with all other terms in the juvenile order of probation. Respondent was prohibited from leaving her home except for "emergency purposes and school." Respondent's adult sentence, which would be stayed as long as she remained compliant with juvenile probation, was 12 years in prison for the offense of voluntary manslaughter of an unborn child and concurrent terms of 180 days in jail for the three counts of aggravated battery. The parties agreed respondent would be given credit for time already served in detention.

¶ 8 In November 2010, the State filed a petition to revoke the stay of respondent's previously imposed adult criminal sentence. The State alleged respondent had on numerous occasions made contact with the victims in this case. In particular, the State alleged respondent contacted Fredericks by text message and then threw a shoe at her when Fredericks came over to respondent's residence. The State alleged respondent committed the offenses of criminal damage to property (720 ILCS 5/21-1(1)(a) (West 2010)) and endangering the life or health of a child (720 ILCS 5/12-21.6(a) (West 2010) (two counts)).

¶ 9 In February 2011, the trial court held a hearing on the petition to revoke. Witnesses were heard and arguments given. The court found respondent had made contact with Fredericks. Moreover, the court found by a preponderance of the evidence that respondent endangered the life of a child and criminally damaged property. The court lifted the stay and ordered respondent to serve the 12-year prison sentence. The sentencing order indicated respondent was required to serve 85% of her sentence. The court also sentenced respondent to 180 days in jail on the aggravated-battery counts to be served concurrent with her prison sentence.

¶ 10 On direct appeal, respondent argued she was entitled to credit for time served in juvenile detention from June 9, 2006, until November 27, 2006, and in jail prior to sentencing from October 24, 2010, until October 26, 2010. This court affirmed as modified and remanded with directions that respondent be awarded 175 days of sentence credit. *People v. Francis*, 2012 IL App (4th) 110349-U.

¶ 11 In July 2012, respondent filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)), claiming she was innocent of the charges, she received ineffective assistance of counsel, and she was entitled to an additional two days of sentence credit. In August 2012, the trial court summarily dismissed the petition, finding it frivolous and patently without merit.

¶ 12 On appeal, respondent argued, *inter alia*, she was entitled to two additional days of sentence credit because she was arrested on June 7, 2006, and not June 9, 2006. The State agreed, and we affirmed as modified to reflect two additional days of sentence credit. *People v. Francis*, 2013 IL App (4th) 120840-U, ¶¶ 58-60. Respondent also argued appellate counsel was ineffective for failing to request sentence credit for the time she served on house arrest. However, we found this issue forfeited because respondent did not raise this claim in her postconviction petition. *Francis*, 2013 IL App (4th) 120840-U, ¶ 52.

¶ 13 In November 2013, respondent filed a *pro se* motion for order *nunc pro tunc* to correct the sentencing judgment, arguing she was entitled to 192 days for time spent on house arrest. On December 2, 2013, the trial court denied the motion, asserting the issue of whether respondent was entitled to credit for time served was "moot" because the "issue of proper credit [was] previously addressed" on appeal.

¶ 14 Respondent filed an untimely notice of appeal on January 10, 2014. On January

22, 2014, a late notice of appeal was filed. This court granted the late notice of appeal on January 29, 2014.

¶ 15 II. ANALYSIS

¶ 16 A. Jurisdiction

¶ 17 Initially, the State questions this court's jurisdiction, asserting respondent filed an insufficient motion for leave to file a late notice of appeal under Illinois Supreme Court Rule 606(c) (eff. Feb. 6, 2013). While the State describes defendant's motion for leave to file a late notice of appeal as insufficient, what it is actually arguing is defendant's *reasoning* for filing a late notice of appeal was insufficient to establish the delay in filing her notice of appeal was not due to her culpable negligence. Defendant did provide a reason for the delay in her filing. We note her motion was not untimely or missing an element required by Rule 606(c) and we found defendant's reasoning in this case was sufficient to establish the delay in filing was not due to her culpable negligence. Thus, this court has already determined defendant's late notice of appeal met the requirements of Rule 606(c), and we see no need to address it again. Our decision in no way means jurisdictional arguments can be forfeited.

¶ 18 B. *Nunc Pro Tunc*

¶ 19 Respondent argues the trial court erred by finding her motion for order *nunc pro tunc* was moot as a result of this court's April 2012 decision on direct appeal, "even though that decision did not address the issue of credit for time served while on house arrest." The State argues the trial court never awarded respondent sentence credit for time served in home confinement and thus seeking a *nunc pro tunc* order is improper.

¶ 20 A *nunc pro tunc* "order is designed to allow the record to reflect that which was already done previously, but which was omitted from the record." *People v. Adams*, 144 Ill. 2d

381, 394, 581 N.E.2d 637, 643 (1991).

"[T]he use of *nunc pro tunc* orders or judgments is limited to incorporating into the record something which was actually previously done by the court but inadvertently omitted by clerical error. It may not be used for supplying omitted judicial action, or correcting judicial errors under the pretense of correcting clerical errors." *People v. Melchor*, 226 Ill. 2d 24, 32-33, 871 N.E.2d 32, 36 (2007).

A trial court may enter a *nunc pro tunc* order "only when the correcting order is based upon evidence such as a note, memorandum or memorial paper remaining in the files or upon the records of the court." *Anderson v. Alberto-Culver USA, Inc.*, 337 Ill. App. 3d 643, 662, 789 N.E.2d 304, 318 (2003). Such evidence in the record "must clearly show 'that the order being modified failed to conform to the decree actually rendered by the court.' [Citation.]" *McCloud v. Rodriquez*, 304 Ill. App. 3d 652, 659, 710 N.E.2d 37, 42 (1999).

¶ 21 In the case *sub judice*, respondent filed a motion for an order *nunc pro tunc*, asking the trial court to correct the sentencing judgment to reflect an additional 192 days of sentence credit for time she served in home confinement. However, respondent cannot provide any citation to the record where the court actually awarded her sentence credit for time served in home confinement. Instead, respondent is seeking further consideration of her claim, which is inappropriate when seeking a *nunc pro tunc* order.

¶ 22 While the request for a *nunc pro tunc* order was inappropriate, respondent's motion is better characterized as a motion to amend the sentencing judgment. See *People v. Hollister*, 394 Ill. App. 3d 380, 380, 916 N.E.2d 592, 593 (2009); *People v. White*, 357 Ill. App.

3d 1070, 1073, 831 N.E.2d 657, 660 (2005) (construing the defendant's *nunc pro tunc* motion as a motion to amend the sentencing judgment). We note that "even after it has otherwise lost jurisdiction, the trial court retains jurisdiction to amend a mittimus to reflect additional sentencing credit." *People v. O'Neill*, 367 Ill. App. 3d 439, 440, 854 N.E.2d 1154, 1156 (2006); see also *People v. Purcell*, 2013 IL App (2d) 110810, ¶ 7, 987 N.E.2d 813; *People v. Flores*, 378 Ill. App. 3d 493, 495, 882 N.E.2d 1051, 1052 (2008).

¶ 23 Under the statute in effect at the time of the offense here, a court had the authority to give credit for time spent in home detention if the court found the home detention was custodial in nature. 730 ILCS 5/5-8-7(b) (West 2006). Here, however, the merits of whether respondent is entitled to 192 days' credit for time spent on house arrest have not been considered. Because the factual determination as to whether respondent was in custody at the time of the house arrest is an open question, remand is required to enable the trial court the opportunity to determine whether the sentencing judgment must be amended to reflect any credit against respondent's sentence.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 26 Reversed and remanded for further proceedings.