2013 IL App (1st) 121157-U

FOURTH DIVISION
November 14, 2013

No. 1-12-1157

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 96CR29795
	)	
JORGE FLORES,	)	The Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Howse and Justice Lavin concur in the judgment.

Held: Where defendant is unable to show that trial court was in error when it determined he had already been credited with time served while in simultaneous custody, and record is incomplete such that this court has insufficient evidence before it to determine that the trial court erred, trial court's denial of defendant's motion to correct the mittimus is affirmed.

¶ 1 **ORDER**

¶ 2 Defendant Jorge Flores appeals the denial of his motion to amend his mittimus "to reflect custody credit for simultaneous out of state incarceration." For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 In 1996, defendant was charged with possession of a controlled substance with intent to

deliver in case number 96 CR 29795 (the 1996 case). He was released on bond and, leading up to trial, defendant appeared numerous times before the court. He did not, however, appear in court on the two days of his trial. On July 11, 1997, a warrant was issued for defendant's arrest. The trial proceeded, and defendant was found guilty *in absentia*. Defendant was sentenced to 30 years' imprisonment.[1]

¶ 5 On November 5, 2001, prior to serving any time on his Illinois sentence in the 1996 case, defendant was taken into federal custody in Del Rio, Texas, where he was charged with conspiring to possess and distribute marijuana (the federal case). Defendant's federal pretrial services report from the Western District of Texas/Del Rio, included in the record on appeal, describes the "offense charged/arrest behavior" as:

> "On November 5, 2001, the defendant and five (5) co-defendants

---

[1] Defendant eventually appealed this conviction, arguing that the trial court abused its discretion in denying his motion for a new trial where: (1) it issued insufficient admonishments regarding the possibility of trial *in absentia*; and (2) his absence from the trial was due to circumstances beyond his control and, therefore, was not willful. *People v. Flores*, No. 1-04-2773 (2006) (unpublished order under Supreme Court Rule 23). Defendant also challenged the trial court's denial of his motion to quash his arrest and suppress the resulting evidence. *People v. Flores*, No. 1-04-2773 (2006) (unpublished order under Supreme Court Rule 23). This court affirmed the decision of the trial court. *People v. Flores*, No. 1-04-2773 (2006) (unpublished order under Supreme Court Rule 23). We do not address this direct appeal in detail here, as it is not pertinent to the instant cause.

> were taken into custody by U.S. Customs Service Agents near the Seminole Canyon State Historical Park in Val Verde County, Texas, and charged by complaint pursuant to the above noted offense [possession with intent to distribute a quantity of marijuana]. The case agent advises the defendants were observed loading backpacks into a motor home parked at campsite 19 at the Seminole Canyon State Historical Park. During the loading of the motor home, U.S. Border Patrol Agents observed a 1992 Mercury Sable driven by co-defendant (Ricardo Ledezma) enter and leave the Historical Park several times. U.S. Border Patrol Agents stopped the motor home as it left the campsite. A search of the motor home resulted in the seizure of approximately 391 pounds of marijuana. As a result of the seizure of marijuana, the Mercury was stopped near Del Rio, Texas. The vehicle was driven by co-defendant (Ledezma) and fellow co-defendants (Cesar Perez and Jose Juan Flores-Rodriguez) were passengers in the vehicle. According to the arresting agents, there were no other aggravating circumstances for this defendant."

On December 11, 2001, federal authorities learned of defendant's outstanding Illinois warrant, which rendered him ineligible for bond in the federal case. An addendum to defendant's federal pretrial services report from the Western District of Texas/Del Rio states:

"On November 30, 2001, the defendant appeared before U.S. Magistrate Judge Alia Moses Ludlum for a Preliminary and Detention Hearing. At that time, agents reported that the fingerprint checks conducted on the defendant did not coincide with the name he was using. Judge Ludlum ordered the defendant detained and Pretrial Services to re-interview the defendant. During the second interview, the defendant stated he was using his true name and he had documentation to verify who he was. He also requested to speak to his attorney and declined to any further interview by Pretrial Services. Pretrial Services then contacted the U.S. Marshals Office in Del Rio for further investigation into the defendant's true identity. Fingerprint records revealed that the defendant's true name was *Jorge A. Flores* and the defendant had been sentenced to 30 years imprisonment with the Illinois Department of Corrections. Contact with the Pretrial Services Office in Chicago, Illinois confirmed that the defendant had been convicted of Possession of Cocaine on June 13, 1997 and sentenced to 30 years imprisonment in absentia on July 11, 1997. Warrant issued June 4, 1998. Collateral record checks from Chicago Pretrial Services was received on December 11, 2001. U.S. Marshals office in Del Rio, Texas was notified of the above

> information."

Subsequently, on May 3, 2002, defendant pled guilty to one count of Misprision of Felony, 18 U.S.C. § 4, and received a 21-month sentence. The court credited him with time served since defendant's November 5, 2001 arrest, and described the sentence thusly:

> "The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of TWENTY-ONE (21) MONTHS. The sentence imposed herein shall run concurrently with the sentence imposed in the Illinois State Court Case. The defendant shall receive credit for time served while in federal custody on this charge from November 5, 2001."

Following his federal sentence, defendant was transferred to Illinois custody to serve his sentence on the 1996 case. Then, on December 5, 2005, defendant pled guilty to a charge of solicitation of harassment of a witness (720 ILCS 5/8-1(32-4A(A)), and sentenced to six years' imprisonment, sentence to be served consecutive to the sentence in the 1996 case. Defendant explains in his brief on appeal that this case (the 2004 case) arose from an "alleged threat he made against a witness in the 1996 case." He also admits that the 2004 case "involved an alleged threat" against the trial judge, who voluntarily recused himself from both cases on January 28, 2004, and again, after the case came back before him, in 2010.

¶ 6 Since entering Illinois custody in 2003, defendant has filed several *pro se* motions on various issues, including a renewed motion for a new trial in the 1996 case, a postconviction petition, and several motions addressing sentence credit in various permutations. None of these

motions are pertinent to the instant cause.

¶ 7 In January 2012, defendant filed a "motion to amend mittimus to reflect custody credit for simultaneous out-of-state incarceration" that is the subject of this appeal. By that motion, defendant contended his period of incarceration on his federal case should be treated as simultaneous to his incarceration on the 1996 case and, for that reason, he should receive credit against his Illinois sentence for all of his time served in federal custody. Specifically, defendant argued that, after he was tried *in absentia* in Cook County and convicted on July 11, 1997, of manufacture/delivery of a controlled substance, a warrant was issued for his arrest. Then, on November 5, 2001, he was arrested by federal agents in Texas and detained based on the Illinois warrant. Defendant also claimed that on May 3, 2002, he entered into a plea agreement wherein he pled guilty to a federal count of misprision of a felony in exchange for a 21-month sentence, with credit for time served since his November 5, 2001, arrest, to be served concurrently with the sentence imposed "in the Illinois State Court Case." Defendant alleged he was entitled to custody credit from November 5, 2001. On March 7, 2012, the trial court denied defendant's motion. In so doing, the court stated that defendant was entitled to pretrial incarceration credit, but that the credit had been credited to another pending case, the 2004 case. Specifically, the court stated:

> "THE COURT: All right. I think your math is correct, however, what [defendant] does not include in his motion for a corrected mitt is that he was also sentenced on 96 CR 29795. The sentence in both of those cases were to run consecutive to one another. The

> time credit was given on the earlier in time case. So while [defendant] is correct in that he was owed that time, it should have been on the 96-case, which is the case in front of me. There was a - - I'm sorry. The time credit was given on the '04 case. Apparently Mr. Flores filed motion to correct the mitt on May 16th, 2011 - - sorry, he filed it on March 9th of 2011. The Court denied it May 16th, 2011 finding that the time credit was given on the other case and not the '96 case.
>
> For that reason the defendant's pro se motion for corrected mitt will be denied."[2]

¶ 8 Defendant appeals.

¶ 9 ANALYSIS

---

[2] Defendant explains in his brief on appeal that, although the court stated his motion to correct the mittimus was filed on March 9, 2011, "this appears to actually be a reference to the motion for corrected mittimus filed on February 22, 2011, which was entered into the clerk's system on February 24, 2011. The only activity in the case on March 9, 2011, was the entry of a 651(c) certificate by appellate counsel regarding [defendant's] then-pending post-conviction petition; no motion was filed on that date." For the sake of this appeal, we proceed herein under the presumption that the trial court, when referring to the motion to correct the mittimus filed on March 9, 2011, actually meant the motion to correct the mittimus which was filed in January 2012, which motion is at issue in this appeal.

¶ 10 On appeal, defendant contends he has not been properly credited with time spent in simultaneous custody, and asks this court to modify the mittimus in his 1996 case to include 310 days of credit for time served against his 30-year sentence in the 1996 case. Specifically, defendant argues that he was in simultaneous custody on the federal case and the 1996 Illinois case from December 11, 2001, to October 17, 2002.[3] He argues that, because of his outstanding Illinois warrant (from the 1996 case), he was ineligible for bond in the federal case. Accordingly, then, he was in simultaneous custody when he entered federal custody on December 11, 2001, and is entitled to credit against his 30-year sentence in the 1996 case.[4]

¶ 11 A defendant is entitled to credit for time spent in custody as a result of the offense for which a sentence is imposed. *People v. Williams*, 239 Ill. 2d 503, 507 (2011). Section 5-8-7(b) of the Unified Code of Corrections provides that an offender "shall be given credit * * * for time

---

[3] Defendant acknowledges that the State, in its brief on appeal, as well as the trial court, describes the applicable period as the period "from November 5, 2001." Defendant explains, however, that the period of simultaneous custody actually ran from December 11, 2001, to October 17, 2002, the day when federal authorities became aware of the outstanding Illinois warrant to the date defendant was sentenced in the federal case.

[4] Defendant does not seek credit for time spent in federal custody after he entered a guilty plea in the federal case, noting that "his incarceration in the federal Bureau of Prisons to serve [his federal] sentence can fairly be characterized as being based solely on his federal case; he therefore does not seek sentence credit for the time period from October 17, 2002, to May 16, 2003."

spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-8-7(b) (West 2010); *People v. Trujillo*, 2012 IL App. (1st) 103212, ¶ 16. This provision entitles a defendant to sentencing credit for both offenses when he is simultaneously in presentence custody on two unrelated charges, including when a defendant is incarcerated on one charge and his bond in the other is withdrawn or revoked. *People v. Robinson*, 172 Ill. 2d 452, 458 (1996); *People v. Chamberlain*, 354 Ill. App. 3d 1070, 1073 (2005).

¶ 12 "In cases where a person is imprisoned, incarcerated, confined, or committed, the mittimus is a document that reflects the judge's signed judgment or order and details the defendant's sentence." *People v. Thomas*, 402 Ill. App. 3d 1129, 1132 (2010); 735 ILCS 5/2-1801(a) (West 2010). Correction of the mittimus is a ministerial act, and this court has authority under Supreme Court Rule 615(b)(1) to order the clerk of the circuit court to correct a mittimus when the court finds error. Ill. S. Ct. R. 615(b)(1); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995); *Thomas*, 402 Ill. App. 3d at 1132.

¶ 13 In the instant case, defendant argues that the trial court erred in not granting his motion for 310 days of custody while he was in simultaneous custody on a federal case and the 1996 Illinois case. This argument misses the mark, however, as the trial court did not deny defendant credit against his sentence. Rather, the trial court reviewed its records and found that, while credit was appropriate for time spent in simultaneous custody, that credit had already been granted against defendant's 2004 conviction. Specifically, the trial court stated:

> "THE COURT: All right. I think your math is correct, however, what [defendant] does not include in his motion for a corrected

> mitt is that he was also sentenced on 96 CR 29795. The sentence in both of those cases were to run consecutive to one another. The time credit was given on the earlier in time case. So while [defendant] is correct in that he was owed that time, it should have been on the 96-case, which is the case in front of me. There was a - - I'm sorry. The time credit was given on the '04 case. Apparently Mr. Flores filed motion to correct the mitt on May 16th, 2011 - - sorry, he filed it on March 9th of 2011. The Court denied it May 16th, 2011 finding that the time credit was given on the other case and not the '96 case.
>
> For that reason the defendant's pro se motion for corrected mitt will be denied."

We have very little information before us regarding the 2004 case, and the briefs do not adequately address this particular element of the case. The record on appeal, which is in substantial disarray, includes a document entitled "Official Statement of Facts" from case No. 04 CR 4741. It is stamped "DEFENDANT'S COPY." It appears that the document was included with a motion for voluntary recusal filed in October 2010 by an assistant Cook County Public Defender on behalf of defendant, in which defendant requests that the trial court recuse itself. It states:

> "On December 16, 2003, at Division 1 Cook County Jail, Chicago, IL., the defendant, Jorge Flores, age 37, was in Cook County Jail

> awaiting a ruling on a motion for a new trial in case 96CR-29795. Defendant had been tried and sentenced in absentia in that case. While waiting, he befriended an individual named Brian Chandler. Beginning in November 2003, they began talking about the cases and Chandler eventually was asked to help kill the witness on that case and if that didn't work, the judge. A Cook County sheriff visited the defendant in custody and taped the conversations. Throughout the tapes, the conversations dealt with finding the witness, not killing him. No mention was made of the judge. The defendant was eventually arrested and admitted to asking Chandler and the undercover officers to contact the witness and have him not come to court. The defendant should not be released early and it should be noted that this case is consecutive to 96CR-29795, total sentences of 30 years plus 6 years IDOC."

Here, defendant has challenged various aspects of his mittimus on several occasions and the trial court has denied his challenges each time. Although the 2004 mittimus is included in the record and does not reflect presentencing credit, neither defendant nor the State attempt to explain what the trial court was referring to and relying upon during the hearing at which it denied defendant's motion. Rather, defendant argues that he was, in fact, in simultaneous custody and that this court should "issue an order directing that he receive credit for that time period." Defendant also challenges the trial court's determination that he was credited this time against his 2004 sentence

but, rather than explaining what the trial court may have been relying upon in its decision, he instead tells us:

> "Court documents and IDOC records confirm that Flores has not received credit for the time he served in federal custody prior to his transfer to Illinois custody on May 16, 2003. The IDOC website lists Flores' projected parole date as May 16, 2021, and his projected discharge date as May 16, 2024. Based on a 36-year sentence served at 50%, this projected parole date means his effective admission date was May 16, 2003–the exact date that Flores was actually taken into custody by the State of Illinois. Nor has a corrected mittimus ever been issued in case 96 CR 29795 or case 04 CR 4741; the mittimus in each case reflects no credit for time served in federal custody. (See Appendix ___, faxed from IDOC copies of all sentencing documents it has received in 96 CR 29795 and 04 CR 4741)."

Unbelievably, the appendix allegedly containing the documents upon which defendant hangs his hat is, as shown above, pinpoint cited as "Appendix ___" because there is no such appendix containing these documents in the record before us. Nor does defendant give us a citation to the record to any court document that, he claims, "confirm[s] that Flores has not received credit for the time he served." Our thorough review of the record has revealed none, either. What we are left with, then, is defendant's numerical calculations taken from the dates he claims to have found

on the Illinois Department of Corrections website. Based on these calculations of the date he was taken into custody and his projected parole date, in conjunction with a speculation that he will serve his 36-year sentence at 50%, he speculates that he was not given credit for the time he served in simultaneous custody. Such speculation is not an adequate basis upon which we may conclude that the circuit court incorrectly ruled on defendant's motion to amend the mittimus.

¶ 14 Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391. An appellant has the burden of presenting this court with a record which is sufficient to support his claims of error. *Foutch*, 99 Ill. 2d at 391. Any doubts or deficiencies arising from an incomplete record will be construed against the appellant. *Foutch*, 99 Ill. 2d at 391. When presented with an insufficient record, we will indulge every reasonable presumption in favor of the judgment appealed from. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Accordingly, in the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record *** against the appellant." *Foutch*, 99 Ill. 2d at 392.

¶ 15 Defendant here fails to provide us with evidence that the trial court was mistaken in its statement that defendant had already been credited against his sentence in the 2004 case for the

time requested. We are bound by the record before us and, accordingly, under the circumstances of this case, we must presume that the circuit court's ruling had a sufficient factual basis and was in conformity with the law. See *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 795 (2009) (quoting *Coombs v. Wisconsin National Life Insurance Co*., 111 Ill. App. 3d 745, 746 (1982) ("In the absence of a complete record 'the reviewing court must presume the [trial] court acted properly in the absence of a contrary indication in the record.' ")*.*

¶ 16 CONCLUSION

¶ 17 For all of the aforementioned reasons, the decision of the circuit court of Cook County is affirmed.

¶ 18 Affirmed.