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2015 IL App (3d) 130377-U

Order filed April 30, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit Court
ILLINOIS,)	of the 10th Judicial Circuit,
)	Peoria County, Illinois,
Plaintiff-Appellee,)	
)	Appeal No. 3-13-0377
v.)	Circuit No. 11-CF-681
)	
JOHN K. LARIMORE,)	The Honorable
)	Kevin Lyons,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Due to the ambiguity in the record as to the number of days defendant spent in presentencing custody, this cause is remanded for the trial court to determine the correct number of days for which defendant is entitled to sentencing credit. On remand, the trial court is directed to award defendant a \$5 *per diem* credit toward his applicable fines for each day he spent in presentencing custody. Also on remand, the trial court is directed to review and recalculate the monetary charges assessed against defendant and impose, by court order, any applicable statutorily mandated fines and fees.

¶ 2 Defendant, John K. Larimore, entered a partially-negotiated plea of guilty to theft. The trial court sentenced him to six years of imprisonment. On appeal, defendant argues this case should

be remanded for: (1) a recalculation of the number of days he spent in presentence custody; and (2) clarification and recalculation of monetary charges. We affirm as modified and remand with directions.

¶ 3

FACTS

¶ 4

Defendant entered a partially-negotiated plea of guilty to one count of theft and agreed to a six-year sentencing cap. The factual basis for the plea was that, in May and June of 2011, defendant wrote and deposited a series of checks against an account he knew had been closed.

¶ 5

An arrest card in the record indicated defendant had a "book date" of June 18, 2011, and an "arrest date" of June 30, 2011, regarding this and other pending matters. On July 9, 2011, defendant signed a notice to appear in court on July 27, 2011. On July 27, 2011, defendant failed to appear, and the trial court issued an arrest warrant.

¶ 6

On August 4, 2011, defendant was arrested pursuant to the warrant. On August 5, 2011, defendant appeared in a video bond hearing. Defendant indicated that he failed to appear because he had been in the Fulton County jail on July 27, 2011. Bail was set at \$10,000 and, by agreement of the parties, defendant was released on a personal recognizance bond. Defendant made subsequent appearances in court "out of custody."

¶ 7

On September 24, 2012, defendant appeared in court and entered a partially-negotiated guilty plea. The trial court continued the case for sentencing. The presentence investigation (PSI) report indicated that defendant failed to appear on July 27, 2011, and was subsequently arrested for failure to appear in this matter on August 4, 2011, and released the following day on a personal recognizance bond. The PSI report also indicated that on June 18, 2011, defendant was charged with possession of drug paraphernalia and, on September 29, 2011, was sentenced to 40 days in jail with credit for 22 days served.

¶ 8 On November 2, 2012, defendant failed to appear for sentencing in this case. The trial court sentenced defendant to six years of imprisonment. The trial court gave defendant two days of presentencing credit for August 4-5, 2011, and entered "a judgment for costs." The trial court also issued "a warrant with no bond for [defendant's] arrest." On November 13, 2012, defendant was arrested pursuant to the warrant.

¶ 9 On November 15, 2012, the trial court entered written judgment sentencing defendant to the Illinois Department of Corrections (DOC), awarding defendant credit for time served from June 30 to August 5, 2011. Defendant filed a motion to reconsider, which was denied. He also filed a motion to withdraw guilty plea, which was denied.

¶ 10 Defendant appealed.

¶ 11 ANALYSIS

¶ 12 On appeal, defendant argues that this cause should be remanded for: (1) clarification of presentencing custody credit; and (2) the proper entry of monetary charges. Issues of sentencing credit involve an issue of statutory construction requiring a *de novo* review. *People v. Roberson*, 212 Ill. 2d 430, 437 (2004). Similarly, the propriety of fines, fees, and costs imposed by the trial court is reviewed *de novo* as questions of statutory interpretation. *People v. Hunter*, 2014 IL App. (3d) 120552, ¶ 11.

¶ 13 I. Sentencing Credit

¶ 14 Sentencing credit for time served is a right afforded by statute and a defendant's failure to present the issue to a trial court, either by contemporaneous objection or postsentencing motion, does not result in procedural default. *People v. DuPree*, 353 Ill. App. 3d 1037, 1045 (2004). Pursuant to section 5-4.5-100(b) of the Unified Code of Corrections (Code), a defendant is entitled to credit against his sentence "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) (formerly cited as 730 ILCS 5/5-8-7). Other than the "custody" requirement, there are no additional conditions which limit the application of this section of the Code. *People v. Robinson*, 172 Ill. 2d 452, 462 (1996).

¶ 15 Once a defendant is arrested for an offense, he is "in custody" for that offense even before he is formally charged. *Roberson*, 212 Ill. 2d at 439. A defendant who is simultaneously in custody on two unrelated offenses is entitled to credit for time served with regard to both offenses. *Robinson*, 172 Ill. 2d at 452. When a defendant is out on bond on one offense and subsequently arrested on a second offense, that defendant is not returned to custody on the first offense until his bond is withdrawn or revoked. *Id.* at 459.

¶ 16 In this case, the record is not clear as to how many days defendant spent in presentencing custody. According to the arrest card, defendant may have been arrested either on June 18 or 30, 2011. The arrest card conflicts with the PSI report, which indicates that defendant was initially arrested was on August 4, 2011. Additionally, it appears defendant may have been arrested on other charges and was released on a personal recognizance bond in this case.

¶ 17 Defendant asks this court to take judicial notice of jail records from Peoria County and Fulton County regarding time he spent in jail for various other offenses because either: (1) he exonerated his bond in this case to be under simultaneous pretrial custody in this case and the unrelated cases; or (2) his counsel was ineffective for failing to exonerate his bond. Jail records indicate that defendant was in police custody on various other charges from June 18 to July 9, 2011 (Peoria County); July 9 to August 4, 2011 (Fulton County); August 4-5, 2011 (Peoria County); November 7-8, 2011 (Peoria County); June 14, 2012 (Peoria County); and July 13-14,

2012 (Peoria County).¹ The State argues that the jail "records" are not sufficient to establish simultaneous custody.

¶ 18 Due to the ambiguity in the record as to defendant's initial arrest date and possible simultaneous custody status, we remand this case to the trial court to determine the number of days defendant is entitled to sentencing credit for time spent in presentence custody. Once the number of days of presentencing custody is determined, defendant is entitled to an award of \$5 *per diem* credit against his fines for each day of presentencing custody credit. See 725 ILCS 5/110-14 (West 2012) (any person who is incarcerated on a bailable offense and does not post bail is entitled to a credit of \$5 for each day spent in presentence custody against his fines, not to exceed the amount of fines).

¶ 19 II. Ineffective Assistance of Counsel Regarding Sentencing Credit

¹ The Peoria County jail records were printed from the Peoria County website, which we find is similar to this court taking judicial notice of information from the official DOC website. See *People v. Mitchell*, 403 Ill. App. 3d 707, 709 (2010). However, the purported records from the Fulton County Sheriff's Department are uncertified documents. Defendant cites authority in support of his request for this court to take judicial notice of these records, which is distinguishable. See *People v. Garret*, 62 Ill. 2d 151, 163 (1975) (reviewing court took judicial notice of pathology report and coroner's protocol, noting that pursuant to statute a certified coroner report that was kept in the ordinary course of business is *prima facie* evidence of facts, findings, diagnoses, and opinions contained therein); *People v. Hill*, 409 Ill. App. 3d 451, 456 (2011) (affirming the trial's court decision to take judicial notice of the fact that the county jail was on public property and instructing the jury thereon).

¶ 20 Defendant also argues that if his bond was not withdrawn when he was in custody on unrelated charges, then his counsel was ineffective for failing to surrender him in exoneration of his bond. To establish a claim of ineffective assistance of counsel, a defendant must show that: (1) his attorney's conduct fell below an objective standard of reasonableness; and (2) he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504 525-27 (1984). Defendant must overcome a strong presumption that counsel's advocacy was effective. *Albanese*, 104 Ill. 2d at 526. Where defense counsel is aware that the defendant is in custody in another jurisdiction " '[i]t behoove[s] defense counsel to move to withdraw the bond posted in the instant case in order to allow the defendant to earn credit against his eventual sentence[] in the instant case at the same time that he earned credit against his sentence in the [other jurisdiction].' " *People v. Centeno*, 394 Ill. App. 3d 710, 714 (2009), quoting *DuPree*, 353 Ill. App. 3d at 1049.

¶ 21 Here, there is no indication that defendant's counsel was aware that defendant was in custody in another jurisdiction after defendant posted bond. Therefore, based on this record, we cannot say that the conduct of defendant's attorney fell below an objective standard of reasonableness.

¶ 22 III. Monetary Charges

¶ 23 Defendant argues that a remand to the trial court is necessary for the proper imposition of fines and fees because a number of monetary charges against him were improperly imposed by the circuit clerk. The Peoria County clerk's case payment record indicates that \$769.50 of monetary charges was assessed against defendant. The State concedes that any fines imposed by the circuit clerk are void but argues that the clerk had authority to assess \$557 in fees.

¶ 24 Monetary assessments that do not conform to statutory authorizations are void and may be attacked at any time. *People v. McAfee*, 366 Ill. App. 3d 726, 729 (2006). The imposition of a fine is a judicial act, and the circuit clerk is not authorized to impose fines or certain fees. *People v. Gutierrez*, 2012 IL 111590, ¶ 24; *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 20. Any fine or assessment required to be imposed by the court that is imposed by the circuit clerk's office is void at its inception. *Alghadi*, 2011 IL App (4th) 100012, ¶ 20. Where the specific amount of fines intended to be imposed by the trial court is unclear, a remand for the trial court to incorporate the correct financial charges into a written order is proper. *Hunter*, 2014 IL App (3d) 120552, ¶ 17 (stating that any miscalculation with regard to monetary charges are best addressed in the trial court, with both parties present).

¶ 25 Therefore, we remand this matter to the trial court with directions to review and recalculate the monetary assessments and to impose, by court order, any applicable statutorily mandated fines and fees. Thereafter, the defendant shall be given a \$5 *per diem* credit against any applicable fines for each day that he spent in presentencing custody, not to exceed the amount of his fines.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Peoria County is affirmed as modified and remanded with directions.

¶ 28 Affirmed as modified; cause remanded with directions.