2019 IL App (5th) 150004-U

NO. 5-15-0004

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 14-CF-632
	)	
KAYLA HOWELL,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm the order of the circuit court of St. Clair County that denied the defendant's motion to withdraw her fully negotiated guilty plea and vacate her sentence, because the trial judge correctly surmised that he did not have discretion to exempt the defendant from sex offender registration requirements that were a collateral consequence of her conviction, and because this direct appeal is not a proper way for the defendant to challenge those requirements as applied to her; we correct the mittimus to reflect an additional day spent in presentence custody, as we agree with the parties that the defendant is entitled to this relief.

¶ 2 The defendant, Kayla Howell, appeals the order of the circuit court of St. Clair County that denied her motion to withdraw her fully negotiated guilty plea and vacate her sentence. For the following reasons, we affirm the trial court's order; we also correct the mittimus to reflect an additional day spent in presentence custody, because we agree with the parties that the defendant is entitled to this relief.

¶ 3 FACTS

¶ 4 On May 5, 2014, the defendant was charged, by information, with three offenses. Count I charged the defendant with the Class 2 felony of aggravated criminal sexual abuse, "[more than] 5 [years] older [than the victim]," and alleged that on or about May 1, 2014, the defendant "knowingly committed an act of sexual penetration with a male, a minor with initials J.L. and date of birth of 1/26/2000, who was at least 13 years of age but under 17 years of age, in that the defendant placed her mouth on the penis" of J.L., and in that the defendant "was at least five years older" than J.L. Count II charged the defendant with the Class A misdemeanor offense of domestic battery/physical contact and alleged that on or about May 1, 2014, the defendant "knowingly made physical contact of an insulting or provoking nature with [J.P.], a family or household member of the defendant, in that she struck [J.P.] in the face with her fist." Count III charged the defendant with the Class A misdemeanor offense of battery/cause bodily harm and alleged that on or about May 1, 2014, the defendant "knowingly made physical contact of an insulting or provoking nature with [L.W.] in that she struck [L.W.] in the chest with her fist."

¶ 5 At a preliminary hearing on May 9, 2014, the issue of the defendant's fitness was raised. Private defense counsel hired by the defendant's family stated that the defendant had "been diagnosed as mentally retarded" and did not "understand the nature of the charges" against her. The State requested that a fitness evaluation be undertaken. At a hearing on June 6, 2014, it was noted that Dr. Cuneo had spoken with the defendant, but had not yet submitted a report to the court. At a hearing on August 1, 2014, the court noted that Dr. Cuneo's report had been received. New defense counsel, from the office of the public defender, indicated that the defendant was not yet ready to stipulate to Dr. Cuneo's conclusions and had expressed to counsel "that she wasn't understanding some of what I was trying to tell[ ] her." At a hearing on August 8, 2014, both the State and the defendant stipulated to Dr. Cuneo's report and to Dr. Cuneo's ability to testify as

an expert. The court accepted Dr. Cuneo as an expert and accepted his opinion about the defendant's fitness. The court noted that it found the defendant to be competent and that she understood "what she is faced with."

¶ 6 On September 30, 2014, the parties appeared before the Honorable Robert B. Haida, who had not been the judge for any of the previous proceedings. Judge Haida asked if there had been "plea negotiations" in the matter. Counsel for the State answered affirmatively, then stated the following:

> "And for the most part, the plea is a fully negotiated plea. There is one issue at—one issue at issue, Your Honor, and that is in regard[ ] to the registration requirement. The People's negotiations though would recommend a plea of guilty to Count I of the charge *** and would dismiss Counts II and III, the misdemeanor charges. And pursuant to the negotiated terms, the defendant would be sentenced to 24 months probation, would undergo DNA genetic sampling, would have to complete anger management. And the People's argument is that the defendant would also have to comply with the sex offender registration and undergo STD and HIV testing. And those would be the terms of our negotiations."

¶ 7 Judge Haida gave defense counsel the opportunity to respond. Defense counsel stated, "That is correct, Your Honor. The only issue we would bring up would be the registration." Defense counsel noted that Dr. Cuneo found the defendant to be fit to stand trial "as long as special provisions [were] made."[1] Defense counsel argued that because of the defendant's special

[1]Dr. Cuneo's report is included in the record on appeal. The "special provisions" he recommended to insure the defendant could follow what was happening at trial were that (1) "the vocabulary and sentence structure be kept simple," and (2) "there be periodic checks to insure [the defendant] understands what is happening during the trial," during the latter of which recommends "she not be asked yes or no questions," but instead "be asked to explain back in her own words what was happening." He described the defendant's thinking as "very concrete and simple" and stated that she was

circumstances, in light of a previous case from the Appellate Court (*People v. Watters*, 231 Ill. App. 3d 370 (1992)), Judge Haida had "discretion in principle to alter or deviate from statutory mandates and sentencing." The State responded that *Watters* involved a much different statutory scenario, and that accordingly no such discretion existed in this case. The State argued that the defendant, like anyone else, would be required by law to register as a sex offender if convicted pursuant to the plea. Judge Haida then asked defense counsel if he agreed "with the other elements of the plea as outlined by" the State. Defense counsel answered, "Yes."

¶ 8 Subsequently, Judge Haida stated that he had "reviewed the report from Dr. Cuneo and considered the plea negotiations." He added, "If the defendant pleads guilty, I will concur in the negotiations to the extent that I will sentence her to probation in accordance with the terms outlined." He noted that he wanted "to consider this other element of [the] reporting requirement" and would "hear more argument on that here in a bit." He then admonished the defendant about, *inter alia*, the charges and penalties she faced. He told her that she faced "a minimum of three to a maximum of seven years in the Illinois Department of Corrections, which is the Illinois prison system," as well as "two years of mandatory supervised release" if she was convicted of the felony, but noted that she was eligible for probation, which was "the recommendation that—and the plea negotiations that I have said I would concur with. In other words, I would agree with it in the event that you pled guilty." He then admonished her with

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"quick to say that she understands a concept when she does not." Dr. Cuneo did not render an express opinion as to whether the defendant was fit to enter a guilty plea. His only reference to such an occurrence was his statement that the defendant had "a very basic understanding of the concepts of plea bargaining and probation." We note, however, that it has long been the law in Illinois that a defendant who is fit to stand trial is also fit to enter a guilty plea. See, *e.g.*, *People v. Heral*, 62 Ill. 2d 329, 335 (1976) ("finding of competency to stand trial necessarily involves a finding that, with the advice and assistance of counsel, defendant is capable of waiving some or all of [the defendant's] constitutional rights, whether by a plea of guilty or during the course of *** trial"). Therefore, despite Dr. Cuneo's statement that the defendant's understanding of the concept of plea bargaining was "very basic," we find that his overall conclusion that the defendant was fit to stand trial supports the defendant's fitness to enter her plea, subject to Dr. Cuneo's aforementioned "special provisions."

regard to other matters related to her plea. At one point in the admonishments, Judge Haida stated, "All right. This issue about whether you have to report in the future years if you're convicted of this offense, no one has promised you how that's going to turn out, right?" The defendant responded, "No."

¶ 9 At the conclusion of the admonishments, Judge Haida asked for a factual basis for the guilty plea. The State contended that were the matter to proceed to trial, the State would prove beyond a reasonable doubt that, *inter alia*, (1) J.L. stated in an interview at the Child Advocacy Center that the defendant "started touching his area," after which "she sucked his thing and put it in her mouth," and (2) the defendant was interviewed by police and "admitted to placing her mouth on the victim's penis." Defense counsel stipulated to the factual basis, and when Judge Haida asked the defendant, "[I]s that what happened?" she responded, "Yes." Judge Haida then found a sufficient factual basis, and found that the defendant's plea was knowing and "in all respects" voluntary. He entered judgment on the plea, after which the parties agreed to waive the preparation of a presentence investigation and to proceed to sentencing.

¶ 10 At that point, Judge Haida entertained the defendant's arguments about Judge Haida's discretion to exempt the defendant from the registration requirements of the Sex Offender Registration Act (730 ILCS 150/1 *et seq.* (West 2014)) and its accompanying statutory scheme (hereinafter collectively the SORA requirements). Judge Haida then asked the defendant if she had anything she wished to say before he imposed sentence. The defendant answered, "No." Judge Haida then sentenced the defendant in accordance with the fully negotiated plea agreement that had been presented to him. He stated that he was familiar with the *Watters* case (see 231 Ill. App. 3d 370 (1992)), but added that he did not believe he had the discretion to depart from the SORA requirements, and so would "decline or reject" the defendant's request "to order any reporting timetable different from the requirement pursuant to statute." He told the defendant that

she could appeal his ruling, and admonished her that she would first have to file a motion to withdraw her guilty plea. He told the defendant, "If I grant your motion, then we would set aside the plea and sentence that took place today, and we would start over with your case."

¶ 11 On October 28, 2014, the defendant filed a motion to withdraw guilty plea and vacate sentence. Therein, she contended, *inter alia*, that her guilty plea was not knowing and voluntary, and that Judge Haida did in fact have discretion to exempt her from the SORA requirements. She asked the trial court "to grant her permission to withdraw her plea of guilty and [to] vacate the judgment of conviction." On the same date, she filed a motion to reconsider sentence, wherein she made essentially the same arguments. On November 25, 2014, a hearing was held on both motions. Following the hearing, Judge Haida denied the motions. This timely appeal followed. Additional facts will be provided as necessary below.

¶ 12 ANALYSIS

¶ 13 In the fact section of her opening brief on appeal, the defendant notes that "after a fully negotiated plea agreement, the State and defense counsel agreed that [the defendant] would plead guilty to aggravated criminal sexual abuse for a sentence of 24 months of probation." However, the defendant does not persist in her trial-court-level request to have the fully negotiated guilty plea withdrawn. Nor does she persist in her trial-court-level contention that her entry of the plea was not knowing and voluntary. Instead, she argues that, as applied to her, the SORA requirements are a punishment that violates both the U.S. Constitution and the Illinois Constitution, and that Judge Haida had the discretion to exempt her from the SORA requirements, despite his belief that he did not. She also contends she is entitled to an extra day of presentence credit, a point with which the State agrees. The relief she requests from this court in the prayer for relief that accompanies her opening brief is "that this [c]ourt declare the Illinois SORA Statutory Scheme unconstitutional as applied to her *** or alternatively, remand this case

to the trial court for a SORA hearing to determine whether [the defendant] should be granted a variance from a lifetime of sex offender registration. Additionally, [the defendant] requests that this court amend the mittimus to reflect an extra day of pre-sentence custody credit."

¶ 14 We first note that we are not unsympathetic to the concerns the defendant raises in her briefs about the application of the SORA requirements to individuals, such as herself, with intellectual disabilities. However, for the reasons explained below, we are unable to grant the defendant the relief she seeks in this direct appeal from the denial of her motion to withdraw her fully negotiated guilty plea and vacate her sentence. In *People v. Bingham*, 2018 IL 122008, ¶¶ 16-18, the Illinois Supreme Court held, *inter alia*, that even if compliance with the SORA requirements were to be deemed a punishment, "it would not be 'punishment imposed by the trial court' " for purposes of satisfying the criteria of Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967), which must be satisfied to invoke the powers of a reviewing court in a criminal case. The court held that the SORA requirements were "a matter controlled by statute" rather than "a requirement imposed by the trial court." *Id.* ¶ 1. The court noted that the SORA requirements were a "collateral consequence" of the defendant's conviction, and reiterated its long-held position that "[a] collateral consequence is an effect upon a defendant that the circuit court has no authority to impose, and it results from an action that may or may not be taken by an agency that the trial court does not control." *Id.* ¶ 10 n.1 (citing *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009)); see also, *e.g.*, *In re T.C.*, 384 Ill. App. 3d 870, 877 (2008) (SORA requirements are collateral consequences, not part of sentence imposed by trial court). The *Bingham* court concluded that "[a]llowing defendants to challenge the collateral consequences of a conviction on direct appeal would place a reviewing court in the position of ruling on the validity (or resolving the details) of regulatory programs administered by state agencies and officials that are not parties to the action." 2018 IL 122008, ¶ 19 (Illinois State Police is agency responsible for

implementing the SORA requirements (citing *People v. Molnar*, 222 Ill. 2d 495, 500 (2006))). The court noted that "[t]he two proper ways" for a defendant to challenge the SORA requirements are "through a direct appeal from a case finding a defendant guilty of violating the regulation [the defendant] attempts to challenge as unconstitutional" and/or "by filing a civil suit seeking a declaration of unconstitutionality and relief from the classification as well as the burdens of" the SORA requirements. *Id.* ¶ 21.

¶ 15 The foregoing analysis in *Bingham* demonstrates that Judge Haida was correct when he determined that he did not have the discretion to exempt the defendant from the SORA requirements, because those requirements were collateral consequences of the defendant's conviction, not part of the sentence imposed by the trial court.[2] This court, of course, is likewise bound by the decisions of the Illinois Supreme Court (see, *e.g.*, *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 26), and we conclude that *Bingham* precludes this court from considering, in this direct appeal, the defendant's contentions regarding the SORA requirements as applied to her. Accordingly, we affirm Judge Haida's denial of the defendant's motion to withdraw her fully negotiated guilty plea and vacate her sentence.[3]

[2]Although the defendant argues that *Bingham* is distinguishable because therein the SORA requirements were "at no point *** mentioned in the trial court," we do not believe it matters whether the trial court mentioned the requirements or not: they still were a collateral consequence, regardless of how much they may, or may not, have been mentioned, discussed, and/or analyzed by the trial court. In other words, merely invoking the question of whether the trial court can deviate from the SORA requirements does not transform the nature of the SORA requirements: they are, and always remain, collateral consequences that arise by operation of law, not by the actions of the trial court, which is the principal point made by the Illinois Supreme Court in *Bingham*.

[3]The defendant also asks this court to consider *People v. Coty*, 2018 IL App (1st) 162383, and *People v. Kochevar*, 2018 IL App (3d) 140660, in support of her position. We have considered both cases and do not believe either case provides a mechanism to allow this court to circumvent the Illinois Supreme Court's clear holding in *Bingham*. We note as well that on January 31, 2019, the Illinois Supreme Court, in *People v. Tetter*, No. 123905 (Ill. Jan. 31, 2019), entered a supervisory order in which it directed this court to vacate its judgment in another case upon which the defendant relies, *People v. Tetter*, 2018 IL App (3d) 150243, and to consider the effect of *Bingham* thereupon.

¶ 16 However, we agree with both the defendant and the State that because this court has the authority to correct the mittimus, at any time and without remanding the matter to the trial court (see, *e.g.*, *People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)), the mittimus in this case must be corrected to reflect an additional day spent in presentence custody. It is undisputed that the defendant was arrested on May 1, 2014, and was placed on bond with electronic monitoring on August 27, 2014. Accordingly, the defendant is correct that she is entitled to credit for 119 days in presentence custody during the period from May 1, 2014, to August 27, 2014, which is a period of 119 days, because sentencing credit accrues when a defendant is in custody for any part of a day. See, *e.g.*, *People v. Curtis*, 233 Ill. App. 3d 416, 419 (1992). The trial court gave the defendant credit for only 118 days. Therefore, we correct the mittimus to reflect an additional day spent in presentence custody.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we affirm the order of the circuit court of St. Clair County that denied the defendant's motion to withdraw her fully negotiated guilty plea and vacate her sentence, and we correct the mittimus to reflect an additional day spent in presentence custody.

¶ 19 Affirmed; mittimus corrected.