Illinois Official Reports

Appellate Court

People v. Donahue, 2022 IL App (5th) 200274

Appellate Court Caption	THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BARNEY DONAHUE, Defendant-Appellant.
District & No.	Fifth District No. 5-20-0274
Filed	March 31, 2022
Decision Under Review	Appeal from the Circuit Court of St. Clair County, No. 19-CF-490; the Hon. John J. O'Gara, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	James E. Chadd, Ellen J. Curry, and Christina M. O'Connor, of State Appellate Defender's Office, of Mt. Vernon, for appellant. James A. Gomric, State's Attorney, of Belleville (Patrick Delfino and Patrick D. Daly, of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.
Panel	JUSTICE WELCH delivered the judgment of the court, with opinion. Presiding Justice Boie and Justice Cates concurred in the judgment and opinion.

OPINION

¶ 1 This is a direct appeal from the circuit court of St. Clair County. The defendant, Barney Donahue, pleaded guilty to two counts of possessing child pornography. On July 16, 2020, he was sentenced to six years' imprisonment, followed by three years of mandatory supervised release (MSR). The defendant contends that he is entitled to 461 days of credit toward his sentence for the time he spent on pretrial in-home electronic monitoring. For the reasons that follow, we affirm.

¶ 2 I. BACKGROUND

¶ 3 On April 2, 2019, the State charged the defendant with 10 counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6) (West 2018)).[1] The defendant was arrested, and on April 5, 2019, the trial court granted his motion to reduce bail. The court set his bail at $90,000 with "(10% to apply)." The court ordered that, if the defendant posted bond, he would be subject to certain conditions, including "[e]lectronic monitoring through the probation department"; access to "revisit bond," if circumstances changed; and permission to travel to Missouri for work.

¶ 4 On April 11, 2019, the defendant posted bond and entered into an electronic supervision program agreement and conditions. The agreement provided that, as a condition of his bond, the defendant had been placed on the electronic supervision program, and he was subject to supervision by both the trial court and the probation department. The defendant agreed to remain at his residence unless he was leaving for an approved reason, or he was authorized to leave by a court order or a probation officer. He also agreed to be monitored by phone calls or personal visits to his home by a probation officer or the police department. The defendant agreed to wear a transmitter 24 hours per day during his participation in the program. The agreement warned that certain violations may subject the defendant to prosecution under Illinois law. The special conditions set forth in the agreement were the same as those declared in the court's prior order setting the defendant's bond amount and conditions of bond. The agreement was signed by the defendant, a probation officer, and the trial judge.

¶ 5 On July 16, 2020, the defendant entered a fully negotiated guilty plea. In exchange for pleading guilty to two counts of possessing child pornography, the defendant agreed to a sentence of three years imprisonment for each count, to run consecutively. The remaining counts were dismissed. The defendant was informed of the applicable MSR term and that he would be required to register as a sex offender for the rest of his life. The trial court then gave him the proper admonishments, counsel stipulated to the factual basis for the plea, and the court accepted the plea. Both parties waived the presentence investigation report, and the defendant was sentenced according to the plea agreement. The court then informed the defendant that he would receive credit against his sentence from March 28, 2019, to April 11, 2019. He was then released from his electronic monitor.

¶ 6 On August 12, 2020, the defendant filed two *pro se* motions. The first was to recoup the costs for his pretrial GPS monitoring. The second motion sought to recalculate his sentence to include credit for the time he spent on pretrial electronic monitoring. The defendant asserted

[1]On October 25, 2019, the State filed an amended indictment charging the defendant with a total of 20 counts of possessing child pornography (720 ILCS 5/11-20.1(a)(6) (West 2018)).

that his liberty was restricted while he was on electronic monitoring, and he was entitled to an additional 461 days of sentencing credit. The court denied both motions, finding that they were without merit and were not modified by counsel.

¶ 7 The defendant filed his notice of appeal on August 28, 2020.

¶ 8 II. ANALYSIS

¶ 9 The defendant's sole contention on appeal is that he is entitled to 461 days of credit toward his sentence for the time he spent on pretrial in-home electronic monitoring. According to the defendant, the recent amendment of section 5-4.5-100 of the Unified Code of Corrections (Code of Corrections) (Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-100)) demonstrates the legislature's intent to make such credit mandatory, where the statute was previously ambiguous, and Illinois courts have found that defendants who were ordered to home confinement as a condition of bond were not entitled to receive credit. The State argues that the defendant misreads section 5-4.5-100 and that, notwithstanding the recent amendment, the plain language of the statute still does not grant sentencing credit for a defendant who is released on pretrial home supervision. The State further asserts that *People v. Ramos*, 138 Ill. 2d 152 (1990), and *People v. Beachem*, 229 Ill. 2d 237 (2008), remain good law, and under such precedent, we must conclude that the defendant is not entitled to any sentencing credit for his time spent on in-home electronic monitoring.

¶ 10 The dispositive issue in this case is whether the defendant was participating in a home detention program, such that he would be entitled to sentencing credit under section 5-4.5-100(b) of the Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2020)). The answer to this issue requires that we look at the conditions of the defendant's bail versus the statutorily defined term, "home detention." Issues of statutory construction are reviewed *de novo*. *People v. Johnson*, 2013 IL 114639, ¶ 9. Whether a defendant is entitled to receive presentence custody credit against his sentence is also subject to *de novo* review. *People v. Jones*, 2015 IL App (4th) 130711, ¶ 12.

¶ 11 The defendant's bail bond included a financial term of $90,000 (with 10% required to be posted) and several other terms, including an order for electronic monitoring. The order for electronic monitoring included the condition that the defendant was required to remain in his residence, but he could leave to go to Missouri for work or for other approved reasons. As such, the bail and its conditions were authorized by the bail provisions of the Code of Criminal Procedure of 1963 (Code of Criminal Procedure) (725 ILCS 5/110-1 to 110-18 (West 2020)).

¶ 12 Specifically, section 110-10(b)(14) states that various conditions may be imposed on a defendant's bond, including that defendant may

> "[b]e placed under direct supervision of the Pretrial Services Agency, Probation Department or Court Services Department in a pretrial bond home supervision capacity with or without the use of an approved electronic monitoring device subject to Article 8A of Chapter V of the Unified Code of Corrections [(730 ILCS 5/5-8A-1 *et seq.* (West 2020))]." *Id.* § 110-10(b)(14).

Important to our consideration here is the designation, "home supervision." This term is not defined, so we give it its plain and ordinary meaning. *People v. McChriston*, 2014 IL 115310, ¶ 15 (an undefined term in a statute should be given its plain and ordinary meaning, which is often ascertained from the dictionary definition). "Supervision" is defined as "the act, process,

or occupation of supervising: direction, inspection, and critical evaluation." Webster's Third New International Dictionary 2296 (1976). Thus, the plain and ordinary meaning of home supervision is the inspecting, directing, and evaluating defendant's compliance with the terms of his bond conditions.

¶ 13 The other piece of the interpretive puzzle is "home detention." Section 5-4.5-100(b) provides for crediting "home detention":

> "(b) CREDIT; TIME IN CUSTODY; SAME CHARGE. Except as set forth in subsection (e), the offender shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days spent in custody as a result of the offense for which the sentence was imposed. The Department shall calculate the credit at the rate specified in Section 3-6-3 (730 ILCS 5/3-6-3). Except when prohibited by subsection (d), the trial court shall give credit to the defendant for time spent in home detention on the same sentencing terms as incarceration as provided in Section 5-8A-3. The trial court may give credit to the defendant for the number of days spent confined for psychiatric or substance abuse treatment prior to judgment, if the court finds that the detention or confinement was custodial." 730 ILCS 5/5-4.5-100(b) (West 2020).

¶ 14 " 'Home detention' " is further defined as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." *Id.* § 5-8A-2(C). For our purposes, an offender serving a valid "home detention" will receive sentencing credit; likewise, the offender will be given credit for time spent in "custody." *Id.* § 5-4.5-100(b).

¶ 15 When we compare the terms "home supervision" and "home detention," we end up with two separate and distinct concepts. For a defendant under home supervision, the agency tasked with the supervisory role will inspect, direct, and evaluate his performance in complying with the requirement he remain at his home. This may sound like "custody," meaning a duty to submit to legal authority. *People v. Riley*, 2013 IL App (1st) 112472, ¶ 12 ("custody" is an expansive concept referring to the duty to submit to legal authority; "incarceration," by contrast, refers to actual, physical confinement). We are, however, foreclosed from reaching such a conclusion by *Ramos*.

¶ 16 In *Ramos*, defendant was released on bond, but a condition of his bond required that he stay in his residence unless he received prior permission to leave from the trial court or a probation officer. *Ramos*, 138 Ill. 2d at 153-54. Defendant argued that his home confinement was the same as custody as contemplated in a prior version of section 5-4.5-100(b). The supreme court held that home confinement was unlike incarceration because the offender was not subject to the regimentation of life in jail or prison, and within the home, he was able to enjoy unrestricted freedom of activity, movement, and association. *Id.* at 159. The court further held that "custody" as contemplated by the statute did not encompass any time that an offender was released on bond, "regardless of the restrictions that might be imposed on him during that time." *Id.* at 160. Thus, for purposes of sentencing credit, although an offender may be subject to the direction of the supervising authority and may have a duty to submit to the agency's authority, any time spent released on bond, even time spent confined to his home, does not come under the scope of "custody" under section 5-4.5-100(b) (formerly Ill. Rev. Stat. 1987, ch. 38, ¶ 1005-8-7(b)). See *Ramos*, 138 Ill. 2d at 160, 162.

¶ 17 Our supreme court reinforced its holding in *Ramos* that time on bond would not be deemed "home detention" in *Beachem*, 229 Ill. 2d 237. There, defendant argued that his time in the Cook County Sheriff's Day Reporting Center program was "custody" under a prior version of section 5-4.5-100(b), thus entitling him to additional sentencing credit. *Id.* at 238, 241. Relevant to our decision here, the court noted that a defendant released on bond has significant due process rights, including "judicial procedures that not only protect him from arbitrary arrest, but also provide a means to modify or contest an aspect of or denial of bond." *Id.* at 249-50. Even if defendant was arrested for failing to comply with the terms of his bond, he could still qualify for bail at a later date. *Id.* at 250. Defendant may ask to have the terms of bail modified, and he is entitled to notice and certain processes if the State asks to modify the terms of bail, including the right to a hearing, cross-examination of witnesses, and representation of counsel. *Id.*

¶ 18 In contrast, the court noted that the Sheriff's Day Reporting Center program did not provide defendant with any of the protections and procedures that he was entitled to while under bond. *Id.* at 250-51. Defendant could not challenge the terms or the selection process of the program. *Id.* at 251. If defendant was charged with violating the program's rules, he would be reincarcerated without the right to a hearing or to counsel. *Id.*

¶ 19 The *Beachem* court further addressed the custody and confinement aspects of the program. Although a defendant was not confined for 24 hours a day, he was required to report to a "strictly supervised environment" for between 3 and 9 hours a day. (Internal quotation marks omitted.) *Id.* at 253. The court emphasized that defendant "was not free to come and go as he pleased. He was not free to structure his day as he saw fit. He was obligated to report at an established time to and participate in a state-run program." *Id.* If defendant did not appear and report to the program, he would immediately be arrested and reincarcerated. *Id.* Based on these factors, the court held that, "unlike a defendant on a traditional bond, a defendant in the Program is not only under the 'constructive custody' of the sheriff, he is also under the sheriff's physical custody for several hours a day." *Id.* Therefore, the court found that defendant was in "custody" while participating in the program and qualified for sentencing credit under section 5-4.5-100(b) (formerly 730 ILCS 5/5-8-7(b) (West 2004)). *Beachem*, 229 Ill. 2d at 253-54.

¶ 20 These two cases are illustrative of significant differences between bond, custody, and confinement. In *Ramos*, the court held that bond conditions would never qualify as "custody" or "confinement" for sentencing credit purposes. *Ramos*, 138 Ill. 2d at 160. Similarly, in *Beachem*, the court specifically distinguished the features of bond from both "custody" and "confinement." See *Beachem*, 229 Ill. 2d at 250-53. Under *Ramos* and *Beachem*, then, we must conclude that home supervision as a condition of bond, as is the case here, does not constitute either confinement or custody as those terms are understood in section 5-4.5-100(b) of the Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2020)).

¶ 21 Further, we note that, under the relevant statutory provisions, home detention is defined as confinement, meaning actual physical confinement. *Id.* § 5-8A-2(C). If home detention is confinement, then *Ramos* and *Beachem* both hold that in-home electronic monitoring as a condition of bond is not confinement. See *Ramos*, 138 Ill. 2d at 159-60; *Beachem*, 229 Ill. 2d at 253-54. Put another way, home monitoring as a condition of bond lacks the element of confinement necessary to fall under "home detention" as defined in the statutes and case law. This conclusion is reinforced by the Third District appellate court's decision in *People v. Smith*, 2014 IL App (3d) 130548. Relying on *Ramos* and *Beachem*, the *Smith* court concluded that the

Code of Corrections does not allow sentencing credit for time a defendant spends on bond. See *id.* ¶¶ 9-43. Therefore, if defendant's placement on home supervision was not custody, it also was not home detention, either condition being a necessary prerequisite to receiving sentencing credit for time spent on pretrial release.

¶ 22 The Second District appellate court held similarly in *People v. Stolberg*, 2014 IL App (2d) 130963, ¶¶ 49-50. There, defendant sought sentencing credit for his time spent released on pretrial bond under the condition of electronic monitoring. *Id.* Relying on the passage in *Smith* holding "that 'home confinement pursuant to an appeal bond does not qualify as custody entitling one to credit against his sentence under the statute' " (*id.* ¶ 50 (quoting *Smith*, 2014 IL App (3d) 130548, ¶ 35)), the court agreed with the *Smith* court's reasoning and concluded that "because defendant was released on bond while being subject to electronic monitoring, the trial court did not err in refusing to give him a credit." *Id.* With these principles in mind, we now consider what the difference between "home detention" and "home supervision" means for this case.

¶ 23 Here, the defendant is seeking to obtain sentencing credit for the time he was released on bail under the condition of home supervision, limiting his movements to his home and workplace. As previously stated, the bail statute expressly provides that, as a condition of bond, an offender may be placed into "a pretrial bond home supervision capacity with or without the use of an approved electronic monitoring device." 725 ILCS 5/110-10(b)(14) (West 2020). The fact that subsection (b)(14) expressly references the Electronic Monitoring and Home Detention Law (Home Detention Law) (730 ILCS 5/5-8A-1 *et seq.* (West 2020)) does not suffice to confer equivalency between home supervision and home detention. The term "home supervision" does not appear in the Home Detention Law. Instead, the Home Detention Law uses and defines the term "home detention."[2] The usage of two separate terms in these related statutes suggests that the legislature did not intend them to be synonymous. Rather, it evinces an intent that they mean different things. See *RVS Industries, Inc. v. Village of Shiloh*, 353 Ill. App. 3d 672, 676 (2004) (the expression of one thing implies the exclusion of another).

¶ 24 In other words, the use of "home supervision" in the bail provisions means that the legislature did not intend that any time an offender was released on bond with a condition that he remain at his residence (or residence and workplace), he would automatically be deemed to have been placed in a home detention program, thereby making him eligible for sentencing credit. Instead, if he were placed in a home detention program, the trial court would have to expressly state that the offender was being confined in a home detention program, and the requirements of that program would have to be followed for the offender to later qualify for sentencing credit. In short, considering our foregoing examinations and analysis, we hold that the legislature consciously and thoughtfully intended "home supervision," pursuant to the bail provisions of the Code of Criminal Procedure, and "home detention," pursuant to the Code of Corrections, to mean separate and distinct things.

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[2]Likewise, the fact that the defendant's Electronic Supervision Program Agreement and Conditions contains provisions similar to those in the Home Detention Law does not transform the defendant's pretrial home supervision into home detention. The term "detention" does not appear in the defendant's agreement, and the Home Detention Law is not referenced therein. Instead, the agreement uses the term "supervision."

¶ 25 Notwithstanding the foregoing, the defendant steadfastly argues that he was placed in electronic home detention and, under section 5-4.5-100(b) of the Code of Corrections (730 ILCS 5/5-4.5-100(b) (West 2020)), he is entitled to additional sentencing credit. We need not address this argument because the defendant's starting notion, that he was on home detention, is erroneous. Because the defendant was not on home detention, section 5-4.5-100(b) is not applicable. Instead, his time spent on in-home electronic monitoring was home supervision under section 110-10(b)(14) of the Code of Criminal Procedure (725 ILCS 5/110-10(b)(14) (West 2020)) pursuant to the conditions of his bail and, therefore, was ineligible for sentencing credit. See *Ramos*, 138 Ill. 2d at 160.

¶ 26 Because the defendant's in-home electronic monitoring did not equate to "home detention" as defined in the statutes, we next consider whether his restrictions rendered him in "custody" so as to qualify him to receive credit for that time. We hold it does not. While the defendant was confined to his place of employment and his residence, the central fact was that these restrictions were conditions of his bail, and *Ramos* clearly held that time spent on bail, regardless of the movement restrictions placed on a defendant, did not qualify to receive sentencing credit. *Id.* at 160, 162. We therefore hold, in accordance with *Ramos*, that even if we deny the defendant's contention that he was on "home detention," but accept that his in-home electronic monitoring was tantamount to custody, we cannot give him sentencing credit because he was on bond, and *Ramos* prohibits the award of sentencing credit for time spent on bond no matter how restrictive the conditions. *Id.*; see also *Beachem*, 229 Ill. 2d at 250-53.

¶ 27 The defendant argues strenuously that, because of recent amendments, section 5-4.5-100(b) unambiguously entitles him to credit for the time spent on pretrial in-home electronic monitoring. Before June 22, 2012, section 5-4.5-100(b) stated, pertinently, that "the trial court may give credit to the defendant for time spent in home detention *** if the court finds that the detention *** was custodial." 730 ILCS 5/5-4.5-100(b) (West 2010). After June 22, 2012, the statute was amended to state, pertinently, that "the trial court shall give credit to the defendant for time spent in home detention." 730 ILCS 5/5-4.5-100(b) (West 2012). Then, effective July 1, 2021, the statute was again amended to state, in relevant part, that

> "[t]he trial court shall give credit to the defendant for time spent in home detention on the same sentencing terms as incarceration as provided in Section 5-8A-3 (730 ILCS 5/5-8A-3). Home detention for purposes of credit includes restrictions on liberty such as curfews restricting movement for 12 hours or more per day and electronic monitoring that restricts travel or movement. Electronic monitoring is not required for home detention to be considered custodial for purposes of sentencing credit." Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-100(b)).

¶ 28 We agree with the defendant that the change indicates that a defendant is now required to receive sentencing credit for time spent in home detention. However, he again has failed to consider the impact of his bail agreement and whether it was compatible with "home detention" under the statute. As we have noted, home supervision pursuant to a bail agreement is distinct from home detention under the Home Detention Law. Accordingly, though the defendant appears to be correct about the recent amendment to section 5-4.5-100, it is inapplicable because he was on home supervision and therefore not eligible to receive any benefit from the amendments to section 5-4.5-100.

¶ 29 We can take another approach in deciding the issue of whether the defendant was on home detention. One of his lines of argument asserts that his pretrial in-home electronic monitoring

was established and overseen by the St. Clair County probation department. The Home Detention Law defines " [h]ome detention' " as "the confinement of a person convicted or charged with an offense to his or her place of residence under the terms and conditions established by the supervising authority." 730 ILCS 5/5-8A-2(C) (West 2020). For the sake of argument, we will assume that the defendant was on pretrial home detention in order to illustrate this alternative analysis, even though, as we have demonstrated above, there is no actual equivalence between home supervision as a condition of a pretrial bond and home detention. Returning to the alternative analysis, " '[s]upervising authority' " is defined as "the Department of Corrections, the Department of Juvenile Justice, probation department, a Chief Judge's office, pretrial services division or department, sheriff, superintendent of municipal house of corrections or any other officer or agency charged with authorizing and supervising electronic monitoring and home detention." *Id.* § 5-8A-2(E). Thus, not only must the offender be confined to his residence, that confinement must be pursuant to the terms and conditions established by the supervising authority, which includes the probation department.

¶ 30 The *Smith* court included a second rationale in reaching its holding that defendant there had not been on "home detention." See *Smith*, 2014 IL App (3d) 130548, ¶¶ 35-43. In *Smith*, the trial court released defendant on bond awaiting the resolution of his appeal. *Id.* ¶ 4. As a condition of his appeal bond, defendant was required to always wear a monitoring bracelet, and his release on bond was monitored by a private traffic school. *Id.* ¶ 5. Among defendant's restrictions was a requirement to remain in his residence, but with permission to leave and attend his employment. *Id.*

¶ 31 The appellate court affirmed the denial of sentencing credit for the time that defendant spent on in-home electronic monitoring. *Id.* ¶ 43. The court rejected defendant's argument that he was on "home detention" because he was " 'supervised by probation.' " *Id.* ¶ 42. The court noted that, contrary to defendant's assertion, his bond-release was supervised by a private traffic school and not by the probation department. *Id.* The court reasoned that, even if defendant had been supervised by the probation department, he still would not have been on home detention because the trial court, not the probation department, established the terms and conditions of his bond. *Id.* ¶ 43. The court further noted that "[d]efendant possessed the same right as the probation department to request that the court change the conditions and terms of his release." *Id.*

¶ 32 Here, unlike *Smith*, the defendant's in-home electronic monitoring was supervised by the St. Clair County probation department and not by a nongovernmental private entity. Still, the defendant was not on "home detention" under the statute because it was the trial court, not the probation department, that established the terms and conditions of his bond, including the condition of in-home electronic monitoring. The court allowed bond with the condition that the defendant stay within his residence other than to attend his employment or for another approved reason. The State and the defendant both had the right to ask the court to revisit the issue of bond if circumstances changed; additionally, the court could also modify the defendant's bond conditions *sua sponte*. 725 ILCS 5/110-6(a) (West 2020). There is nothing in the record to indicate that the probation department could change any conditions of the defendant's bond or that it could broaden or lessen the parameters of his release. In short, it was the court, not the probation department or any other "supervising authority," that established the terms and conditions of the defendant's in-home electronic monitoring. Without being placed into a pretrial in-home electronic monitoring by a supervising authority,

the defendant cannot maintain that he was on "home detention" pursuant to the Home Detention Law. As a result, the defendant is not entitled to sentencing credit under section 5-4.5-100(b) of the Code of Corrections.[3]

¶ 33 III. CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of St. Clair County is hereby affirmed.

¶ 35 Affirmed.

[3]Because we have concluded that the defendant is not entitled to sentencing credit even under the recently amended version of section 5-4.5-100(b) (see Pub. Act 101-652, § 10-281 (eff. July 1, 2021) (amending 730 ILCS 5/5-4.5-100(b))), we need not determine whether the amendment should be applied retroactively to his case.