

NOTICE
Decision filed 08/24/23. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2023 IL App (5th) 220603-U

NO. 5-22-0603

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Coles County.
)	
v.)	No. 04-CF-94
)	
ROY LAWHORN JR.,)	Honorable
)	James R. Glenn,
Defendant-Appellant.)	Judge, presiding.

JUSTICE VAUGHAN delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant’s motion for a *nunc pro tunc* order did not seek merely to correct the previous order, but instead sought to change the substance of the previous order, and no contrary argument would have merit. We therefore grant defendant’s appointed counsel on appeal leave to withdraw, and affirm the judgment of the circuit court, denying the defendant’s motion.

¶ 2 In 2012, defendant, Roy Lawhorn Jr., pled guilty to two counts of criminal sexual assault, and was sentenced on each count to 10 years in prison, to be served consecutively. In 2022, defendant filed a motion for an order *nunc pro tunc*, wherein he sought additional presentencing credit toward his sentence. The circuit court denied the motion, and defendant appealed. His appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), concluded this appeal presents no issue of arguable merit and filed a motion for leave to withdraw as counsel (see *Pennsylvania v. Finley*, 481 U.S. 551 (1987)), along with a memorandum of law in support thereof.

OSAD properly served the defendant with notice. This court gave him an opportunity to file a *pro se* brief, memorandum, or other document explaining why OSAD should not be allowed to withdraw as counsel or why this appeal has merit, but defendant declined the opportunity. Having considered OSAD's *Finley* motion and the supporting memorandum, as well as the entire record on appeal, this court concludes this appeal indeed lacks merit. Accordingly, we grant OSAD leave to withdraw as counsel and affirm the judgment of the circuit court.

¶ 3

BACKGROUND

¶ 4 In February 2004, defendant was charged by information in the instant case (Coles County case No. 04-CF-94) with two counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2004)), Class 1 felonies. In each of the two counts, the victim was defendant's 14-year-old stepdaughter. Defendant was accused of placing his penis in the girl's vagina and placing his mouth on her vagina.

¶ 5 In May 2004, defendant's appointed attorney and an assistant state's attorney appeared before the court. Defendant pled guilty to both counts of criminal sexual assault in the instant case; both pleas were open pleas. The defendant also pled guilty to five counts of child pornography in Coles County case No. 04-CF-108; those five pleas were also open pleas.

¶ 6 On July 9, 2004, the circuit court, after a hearing in aggravation and mitigation, sentenced defendant in the instant case to imprisonment for 14 years on each of the two counts of criminal sexual assault, with the sentences to be served concurrently. In case No. 04-CF-108, the court imposed a sentence of 14 years on each of the five counts of child pornography. Those five child-pornography sentences were made concurrent with one another, but consecutive to the two sentences in the instant case. In regard to the instant case, the court granted the defendant 163 days

of presentence custody credit—the time between the date of his arrest—January 28, 2004—and the date of sentencing.

¶ 7 Defendant timely appealed the judgment of conviction to the Appellate Court, Fourth District. However, in November 2004, the Fourth District dismissed defendant’s direct appeal, on defendant’s motion. *People v. Lawhorn*, No. 4-04-0923.

¶ 8 In April 2011, defendant, through counsel, filed a “motion for summary judgment,” wherein he sought to withdraw his guilty pleas in the instant case and in case No. 04-CF-108. He claimed the court improperly admonished him when it failed to state that the two sentences in the instant case were statutorily mandated to be consecutive. He asked to withdraw his guilty pleas in the instant case and in case No. 04-CF-108, and to have both cases set for trial.

¶ 9 On August 19, 2011, the court held a hearing on defendant’s motion for summary judgment. After hearing the arguments of counsel, the court denied “summary judgment” in case No. 04-CF-108, but the court granted it in the instant case. The court found defendant was not properly admonished in the instant case, just as he claimed. “He was correctly told that they would be consecutive to the sentences in 4-CF-108,” the court said, “but incorrectly told that it would be discretionary with the court that they’d be consecutive with each other.” Because of the improper admonishment, the court determined the two guilty pleas to criminal sexual assault were involuntary and defendant could withdraw those two guilty pleas and plead anew. Defendant expressed a desire to withdraw the two guilty pleas and the court vacated the pleas and the sentences in the instant case. It set bail at \$50,000 and scheduled a status hearing.

¶ 10 On October 6, 2011, defendant was released from prison in case No. 04-CF-108 and his custody was transferred to the Coles County jail in the instant case. He remained in the jail’s custody, unable to post the \$5000 bond, until the instant case was again resolved.

¶ 11 In April and May of 2012, defendant—for the second time—pled guilty to both counts of criminal sexual assault. In exchange for the pleas, the State agreed to cap its sentencing recommendation at an aggregate term of 22 years. The court accepted the pleas.

¶ 12 On November 9, 2012, the court, after a hearing in aggravation and mitigation, sentenced defendant to 10 years' imprisonment on each count of criminal sexual assault, with the sentences running consecutive to one another and also consecutive to the sentences in case No. 04-CF-108.

The court said:

“The credit will be 562 days and that gives him credit for the 163 days he received back in 2004, and *** the 399 days beginning the day after the parole on *** October 6, 2011. So, it is from October 7, 2011, until yesterday. Because with the Department of Corrections sentence, today would be the first day of the Department of Corrections sentence.”

The court noted the docket entry confirmed defendant received no presentence custody credit toward his sentence in case No. 04-CF-108, and found defendant was entitled to 562 days credit in the instant case.

¶ 13 On November 14, 2012, the court entered a written sentencing order that reflected the sentences imposed and the credit awarded on November 9, 2012. The written order stipulated that the defendant was “entitled to credit for 562 days served, so long as defendant did not receive that credit towards his sentence on 2004-CF-108.”

¶ 14 Defendant, through counsel, filed a motion to reconsider sentence. The parties appeared in court. The court and the attorneys discussed the content of the plea agreement, including the sentencing “cap,” and the court granted defense counsel leave to file an amended pleading “if deemed necessary.”

¶ 15 In January 2013, defendant filed, through counsel, a motion to withdraw guilty plea. The circuit court denied the motion to withdraw guilty plea. However, the Fourth District remanded the case due to counsel's insufficient Rule 604(d) certificate. *People v. Lawhorn*, No. 4-13-0263 (2013) (unpublished summary order under Illinois Supreme Court Rule 23(c)(2)).

¶ 16 On remand, in October 2014, defense counsel filed an amended motion to withdraw guilty plea. The amended motion incorporated the allegations of the original motion to withdraw and also added allegations regarding the inappropriate imposition of fines and requested an additional monetary credit for time in pretrial custody.

¶ 17 In November 2014, the circuit court held a hearing on the amended motion to withdraw guilty plea. After hearing arguments, the circuit court denied the motion to withdraw guilty plea, but corrected the fines and amended the statutory credit for time served. The appellate court affirmed the judgment. *People v. Lawhorn*, 2015 IL App (4th) 141019-U.

¶ 18 On January 20, 2022, defendant filed, *pro se*, (1) a motion for reduction of sentence, (2) a motion to reconsider sentence, and (3) a motion for order *nunc pro tunc*. The first two motions discussed the defendant's good behavior during his imprisonment. The third motion, and the subject of the instant appeal, was titled "Motion for Order *Nunc Pro Tunc*," and consisted of a preprinted form with a few blanks filled in by hand. In that motion, defendant asserted that the mittimus in his case failed to correctly reflect the time he spent in custody prior to sentencing. He alleged that he was entitled to 210 days of additional presentencing credit. In an accompanying "Memorandum of Law / Brief," defendant stated that his release date should be January 28, 2028, and not August 28, 2028, as the Illinois Department of Corrections had calculated. According to defendant, he was arrested on January 28, 2004, and had been in custody ever since that arrest.

¶ 19 On January 24, 2022, the circuit court denied the motions to reconsider and to reduce sentence, finding it lacked jurisdiction. The court also granted defendant additional time to supplement his motion for order *nunc pro tunc*. While the court again granted further time to supplement his motion on a few subsequent occasions, defendant never supplemented his motion.

¶ 20 On August 23, 2022, the court entered a docket-entry order denying defendant’s motion for order *nunc pro tunc*. The entry stated:

“When entered on 7/9/04, Deft was given credit for 163 days served in 04-CF-94 and no credit in 04-CF-108. The credit reflected time spent in custody from 1/28/04 to 7/8/04. The IDOC Notification of Projected Release from Custody document filed in 04-CF-108 reveals a release date of 10/6/11. When resentenced on 11/9/12 in 04-CF-94, Deft was given additional credit for 399 days served. That reflected time spent in custody from 10/7/11 to 11/8/12. Court finds that the mittimus correctly reflects the time Deft spent in custody prior to being sentenced.”

¶ 21 Defendant perfected the instant appeal from the judgment entered on August 23, 2022. The circuit court appointed OSAD to represent him.

¶ 22 ANALYSIS

¶ 23 Defendant appeals the circuit court’s order denying his motion for an order *nunc pro tunc*. OSAD filed a *Finley* motion to withdraw as counsel and a legal memorandum in support thereof. In that memorandum, OSAD raises the potential issue of whether the circuit court erred in denying defendant’s motion. We agree with OSAD that this appeal does not present a meritorious issue.

¶ 24 “*Nunc pro tunc*” is a Latin phrase that means “now for then.” Black’s Law Dictionary 1100 (8th ed. 2004). “The purpose of a *nunc pro tunc* order is to make the present record correspond with what the court actually decided in the past. Such orders may be used to correct clerical errors,

but may not be used to challenge a court's previous decision." *People v. White*, 357 Ill. App. 3d 1070, 1072 (2005); see also *Roach v. Coastal Gas Station*, 363 Ill. App. 3d 674, 678-79 (2006) ("evidence supporting a *nunc pro tunc* modification must clearly demonstrate that the order being modified fails to conform to the decree actually rendered by the court" (internal quotation marks omitted)).

¶ 25 Defendant's motion did not allege any type of "clerical error" that needed "correction" by the court. It was not intended to conform the present record to what the court actually decided in the past. To the contrary, the motion challenged the court's previous decision on the issue of presentencing credit. It was intended to award 210 days of additional presentencing credit, over and above what the court actually granted. The court's written order, entered on November 14, 2012, accurately reflected the court's calculation of presentencing credit at the sentencing hearing on November 9, 2012—a credit of 562 days. For this reason alone, the denial defendant's motion for order *nunc pro tunc* was proper.

¶ 26 We further note that even if defendant's motion for order *nunc pro tunc* could have been treated as a motion to amend the mittimus—denial of the motion would still be proper. In his motion, defendant stated that he was entitled to an additional 210 days of presentencing credit. As OSAD states in its legal memorandum, "there is no evidence in the record to establish that [the defendant] was in custody for this case for the additional 210 days of sentencing credit he seeks." Accordingly, denial would also be appropriate where defendant failed to sufficiently support his argument that he was entitled to 210 days of additional presentence custody credit.

¶ 27 CONCLUSION

¶ 28 The circuit court did not err in denying the defendant's motion for an order *nunc pro tunc*. The motion was not a true motion for order *nunc pro tunc*. Furthermore, even if the motion were

judged on its merits, no evidence supports the granting of the relief requested, or any relief. No arguments to the contrary would have merit. Accordingly, we grant OSAD leave to withdraw as counsel and affirm the judgment of the circuit court.

¶ 29 Motion granted; judgment affirmed.