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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WARREN WHITNEY,

Defendant-Appellant.

UNPUBLISHED
January 28, 2021

No. 352685
Wayne Circuit Court
LC No. 19-001530-01-FC

Before: JANSEN, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his guilty-plea conviction of armed robbery, MCL 750.529. The trial court sentenced defendant, as a fourth-offense habitual offender, MCL 769.12, to 7 to 20 years' imprisonment, with 114 days of credit. We affirm.

Defendant was initially charged with the instant offense in March 2018 but was not arrested at that time. He was subsequently arrested by Ohio authorities for a 2016 drug offense. On February 13, 2019, defendant was brought to Michigan pursuant to the Interstate Agreement on Detainers (IAD) to stand trial. Defendant pleaded guilty as charged pursuant to a *Cobbs*[2] evaluation, and the trial court sentenced him as indicated above. Defendant now appeals.

Defendant first argues the prosecution violated Article III(a) of the IAD[3] by failing to bring him to trial within 180 days of April 26, 2018. He argues he was arrested on that date pursuant to

[1] *People v Whitney*, unpublished order of the Court of Appeals, entered March 19, 2020 (Docket No. 352685).

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

[3] The IAD is a uniform law adopted by most states and the federal government. *People v Swafford*, 483 Mich 1, 8; 762 NW2d 902 (2009). It is codified in Michigan law at MCL 780.601, and is divided into nine articles. For ease of reference, we will simply refer to the relevant articles and exclude reference to MCL 780.601 throughout this opinion.

the detainer the prosecution had lodged against him and, as such, the prosecution was required to bring him to trial within 180 days under Article III(a). We disagree.

As an initial matter, defendant waived this claim of error by pleading guilty. *People v Wanty*, 189 Mich App 291, 293; 471 NW2d 922 (1991). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (quotation marks and citation omitted). Therefore, we need not address his claim. Nevertheless, defendant's rights under the IAD were not violated.

The proper interpretation of the IAD is a question of law that we review de novo. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009). Michigan, 47 other states, the federal government, and the District of Columbia have entered into the IAD to encourage the timely resolution of all charges pending against individuals serving a term of imprisonment. *Id*. at 8. To effectuate that purpose, the IAD imposes time limits on prosecutions made possible by the IAD. Defendant here argues the prosecution violated the time limit in Article III(a), which provides, in relevant part:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days *after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint*: Provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. [Emphasis added.]

If the time limit in Article III(a) is violated, the charge against the prisoner for which a detainer was lodged must be dismissed with prejudice. Art V(c).

Defendant was charged with armed robbery in Michigan on March 14, 2018. On December 12, 2018, the prosecution requested that the warden of a correctional facility in Orient, Ohio, give the prosecution temporary custody of defendant to stand trial for the charged offense. On January 15, 2019, defendant signed a form providing the prosecution with written notice of his place of imprisonment and invoking his right to a disposition of the armed robbery charge in accordance with the IAD. That form appears to have been sent to the prosecution on January 17, 2019. Also, on January 17, 2019, the Ohio warden sent the prosecution a certificate of defendant's inmate status that noted he was currently serving a four-year prison sentence, of which he had served 86 days so far.

Contrary to defendant's assertion, the 180 days within which the prosecution had to bring him to trial did not begin to run on April 26, 2018. We note that it is unclear whether defendant selected this as the key date because it was the day he was arrested, the day the prosecution allegedly filed a detainer against him, or the day the prosecution was allegedly put on notice of his

whereabouts. Whichever is his argument, it is without merit. "[T]he 180-day time period in Article III(a) of the IAD does not commence until the prisoner's request for final disposition of the charges against him has actually been delivered to the court and prosecuting officer of the jurisdiction that lodged the detainer against him." *Fex v Michigan*, 507 US 43, 52; 113 S Ct 1085; 122 L Ed 2d 406 (1993).[4] Although the record does not indicate when the prosecution actually received defendant's notice, that is of little importance here. Using January 17, 2019, the earliest date that defendant's notice could have been received by the prosecution, the 180 days required by Article III(a) expired on July 16, 2019. Defendant pleaded guilty on May 23, 2019. Therefore, he was "brought to trial within the period provided in Article III," and he was not entitled to a dismissal of the charge against him. Art V(c).

While defendant, in noting that Article III(a) required him to provide the prosecution with written notice of his place of imprisonment and request for final disposition of the pending charge, argues "such formality was unnecessary since the [prosecution] had already issued a detainer against him," the plain language of the statute states otherwise. To start the 180-day clock, defendant was specifically and unequivocally required to provide written notice to the prosecution. *Fex*, 507 US at 52. Further, defendant's emphasis on the fact that the prosecution had lodged a detainer against him misses the point of the relevant language, which is to inform the prosecution of both the location of the prisoner *and* his or her request for a timely disposition of the charges pending against him or her. See Art III(a). That the prosecution lodged a detainer against defendant does not mean defendant intended to invoke his right to a timely disposition under the IAD. Thus, defendant was required to provide the prosecution with written notice of his place of imprisonment and request for a timely disposition to begin the 180-day clock.

Defendant also claims he was denied the effective assistance of counsel because his trial counsel failed to object on the ground that his Article III(a) rights had been violated. Our review of this issue is limited to errors apparent on the record since defendant did not move the trial court for a new trial or a *Ginther*[5] hearing. *People v Lopez*, 305 Mich App 686, 693; 854 NW2d 205 (2014).

To obtain relief on a claim of ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). However, counsel's failure to raise a futile motion is not ineffective. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Because the prosecution tried defendant well within the 180 days required by Article III(a) of the IAD, defendant's trial counsel performed reasonably in failing to raise such

[4] "As a congressionally sanctioned interstate compact within the Compact Clause of the United States Constitution, art I, § 10, cl 3, the IAD is a federal law subject to federal construction." *New York v Hill*, 528 US 110, 111; 120 S Ct 659; 145 L Ed 2d 560 (2000) (quotation marks and citation omitted).

[5] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

an objection, and that failure did not affect the outcome of the proceedings. *Trakhtenberg*, 493 Mich at 51; *Fike*, 228 Mich App at 182.

Defendant next argues he is entitled to credit for the time he spent incarcerated in Ohio between his arrest on April 26, 2018, and the day he was returned to Michigan on February 13, 2019. This is so, he argues, because part of the reason he was incarcerated in Ohio was the detainer the prosecution lodged against him. We disagree.

"The question whether defendant is entitled to sentence credit pursuant to MCL 769.11b for time served in jail before sentencing is an issue of law that we review de novo." *People v Raisbeck*, 312 Mich App 759, 765; 882 NW2d 161 (2015) (quotation marks and citation omitted). Under certain circumstances, a defendant that served time in jail before being sentenced for an offense may be entitled to credit for that time. Under MCL 769.11b:

> Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

Defendant was arrested by Ohio authorities on April 26, 2018. That arrest, according to defendant's presentence investigation report, was related to a 2016 Ohio drug offense. Defendant was sentenced to four years of imprisonment for that offense on October 4, 2018. As noted earlier, the prosecution obtained temporary custody of defendant on February 13, 2019, pursuant to the IAD. Defendant pleaded guilty to armed robbery on May 23, 2019, and the trial court sentenced him on June 6, 2019. The trial court awarded defendant jail credit of 114 days for February 13, 2019 to June 6, 2019.

Defendant is not entitled to additional jail credit on his Michigan conviction. Defendant's time in jail from October 4, 2018 to February 13, 2019, was not "because of being denied or unable to furnish bond *for the offense of which he [was] convicted*." MCL 769.11b (emphasis added). Instead, defendant was incarcerated during that time because he was convicted of an unrelated offense in Ohio and sentenced to serve a term of incarceration for that offense. See *People v Waclawski*, 286 Mich App 634, 688; 780 NW2d 321 (2009) ("While defendant characterizes his time spent in the Illinois jail as time awaiting extradition on the Michigan charges, he ignores the fact that he was actually serving time in Illinois because he was convicted of a felony in Illinois and was serving his term of incarceration for that felony.").

Similarly, defendant was not entitled to credit for the time he spent in jail from April 26, 2018 to October 4, 2018. Defendant was incarcerated during that period because of the pending charges on an unrelated Ohio drug offense. Thus, once again, that time was not due to "being denied or unable to furnish bond *for the offense of which he [was] convicted*." MCL 769.11b (emphasis added). Defendant attempts to overcome this conclusion by arguing he was not detained solely for his Ohio charge, but *also* because of the detainer the prosecution lodged against him. Our Supreme Court repudiated this argument long ago in *People v Adkins*, 433 Mich 732, 742; 449 NW2d 400 (1989), when the Court held:

> [MCL 726.11b] does not require a court to grant sentence credit from the time a [detainer] either was or could have been placed. As explained in *Prieskorn*,[6] credit is to be granted for presentence time served in jail only where such time is served as a result of the defendant being denied or unable to furnish bond "for the offense of which he is convicted."

Defendant was in jail from April 26, 2018 to October 4, 2018, because he was charged with an unrelated offense in Ohio. That the prosecution may have lodged a detainer against him has no effect on his right to jail credit. *Id*. For these reasons, defendant is not entitled to additional jail credit.

Defendant's final argument is that, even if the trial court's refusal to award additional credit was correct under MCL 769.11b, he is entitled to specific performance of the trial court's promise to give him credit for the time he was incarcerated in Ohio before coming to Michigan. We disagree.

Before defendant agreed to plead guilty to armed robbery, he asked the trial court if he would receive credit for the time he was "on detainer for the past year in Michigan." The trial court informed him that he would "get credit for the time that [he had] been incarcerated." Defendant then pleaded guilty pursuant to a *Cobbs* evaluation. During the trial court's questioning of defendant to ensure he was entering his plea voluntarily, understandingly, and accurately, defendant asserted that he understood he had not been promised anything in exchange for his plea other than the *Cobbs* evaluation of 7 to 20 years' imprisonment. At sentencing, the trial court refused to give defendant credit for more than the 114 days he was incarcerated in Michigan.

We hold defendant is not entitled to specific performance for three reasons. First, defendant has not identified any case in his brief that supports his argument. While he provides a number of cases that support the proposition that a plea agreement, once accepted by the trial court, must be enforced, see, e.g., *Santobello v New York*, 404 US 257, 262; 92 S Ct 495; 30 L Ed 2d 427 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement *of the prosecutor*, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.") (emphasis added), that proposition is irrelevant to the issue before the Court. Defendant is not seeking specific performance of a promise made by the prosecution; he is seeking specific performance of a claimed promise by the trial court. Because defendant has "give[n] only cursory treatment [of an issue] with little or no citation of supporting authority," the Court may consider the issue abandoned. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (second alteration in original; quotation marks and citation omitted). Further, even when a prosecutor breaches a plea agreement, specific performance is not the sole remedy. *People v Gallego*, 430 Mich 443, 450-452; 424 NW2d 470 (1988) (noting that neither the United States Supreme Court nor our Supreme Court has held specific performance to be constitutionally required).

Second, the trial court's *Cobbs* evaluation did not include any reference to jail credit. The trial court made clear what its evaluation was:

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[6] *People v Prieskorn*, 424 Mich 327; 381 NW2d 646 (1985).

The Court: You've had an opportunity to discuss the offer that's been made by the People and your attorney did request a *Cobbs* evaluation. I'm going to indicate what the *Cobbs* Evaluation is, again, for the record.

If you are to plead guilty to… armed robbery, which has a statutory maximum penalty of life, the Court will sentence you to 7 to 20 years, which will be served concurrent with a sentencing served at the Ohio Department of Rehabilitation and Corrections.

Is that your understanding of the *Cobbs* Evaluation that's being made today, sir?

[*Defendant*] Yes, it is.

Notably absent was any mention of jail credit. Therefore, the trial court's refusal to grant defendant additional jail credit did not violate the court's *Cobbs* evaluation. In addition, a sentencing judge does not have any discretion in awarding or denying jail credit. See MCL 769.11b (providing that, where certain statutory circumstances are satisfied, "the trial court in imposing sentence *shall* specifically grant credit against the sentence for such time served in jail prior to sentencing.") (emphasis added). Thus, jail credit is not open to negotiation during plea-bargaining or a *Cobbs* evaluation, and defendant was on notice that his jail credit would be determined by the terms of the statute. Cf. *People v Ronowski*, 222 Mich App 58, 61; 564 NW2d 466 (1997) (holding that restitution is mandatory and, thus, defendants are on notice that it would be included in their sentence even if not mentioned during plea-bargaining). As discussed earlier, the terms of the jail credit statute do not permit defendant to be granted the requested jail credit.

Finally, the only remedy for a trial court's refusal to abide by a *Cobbs* evaluation is plea-withdrawal. "[A] defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation." *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). See also *People v Chappell*, 223 Mich App 337, 342-343; 566 NW2d 42 (1997) (remanding for the trial court to either abide by its *Cobbs* evaluation or give the defendant an opportunity to withdraw his plea). This right was codified in MCR 6.310(B)(2)(b), which provides:

[A]fter acceptance [of a plea] but before sentence,

* * *

(2) the defendant is entitled to withdraw the plea if

* * *

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

Therefore, even if additional jail credit was part of the trial court's *Cobbs* evaluation, defendant's remedy was to withdraw his plea. There is simply no legal basis to grant him additional time served.

Affirmed.

/s/ Kathleen Jansen
/s/ Deborah A. Servitto
/s/ Michael J. Riordan