

No. 1-09-2672

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 10516
)	
DANIEL VASQUEZ,)	The Honorable
)	Matthew E. Coghlan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Murphy concurred in the judgment.

ORDER

1. *HELD:* The jury's verdict will not be disturbed when the record fails to show how the trial court's *ex parte* communication with the State prejudiced defendant. Defendant could not allege on appeal that his presentence investigation report was inherently unreliable when he failed to correct it at sentencing. Pursuant to *People v. Jackson*, 2011 IL 110615 (Sept. 22, 2011), a defendant may be assessed \$10 for the Arrestee's Medical Costs Fund regardless of whether he received medical attention after his arrest.
2. After a jury trial, defendant Daniel Vasquez was convicted of the delivery of a controlled substance and possession of a controlled substance with intent to deliver, and sentenced to two concurrent terms of 25 years in prison. On appeal, he contends that he was denied a fair trial by the

trial court's *ex parte* communication with the State. He further contends that he was denied a fair sentencing hearing because his presentence investigation report (PSI) contained an unreliable account of his criminal history. Defendant also contests the imposition of a \$10 assessment, pursuant to the Arrestee's Medical Costs Fund, because he did not require medical attention after his arrest and requests that his mittimus be corrected to reflect the actual offenses of which he was convicted. We affirm and correct the mittimus.¹

3. Defendant was arrested in May 2008, and subsequently charged in an indictment with delivery of a controlled substance and possession of a controlled substance with intent to deliver. The indictment listed defendant's aliases as Antonio Garnicia-Torres and Alexis Crespos.

4. At a bond hearing, defendant testified that he had two felony convictions in California and had used several aliases in the past. Defense counsel later informed the court that defendant had indicated that the "second" conviction was not his. At another hearing, the State indicated that research had revealed that defendant had been deported twice, had two federal convictions, and had numerous convictions in California. The matter then proceeded to a jury trial.

5. At trial, Detective Kenneth Howard testified that he observed defendant get into the passenger seat of a brown jeep. Codefendant Nereida Camacho got into the driver's seat and drove to a strip mall. At the strip mall, the jeep parked next to a Cadillac Escalade and defendant and Camacho changed places. Codefendant Tyrone Lofton then exited the Escalade, went to the rear passenger side of the jeep, opened the door, and leaned inside. After 10-15 seconds, he emerged

¹ Although defendant initially contended that he was entitled to an additional day of presentence custody credit for the day that he was sentenced, he acknowledges in his reply brief that this argument is foreclosed in light of *People v. Williams*, 239 Ill. 2d 503, 509 (2011).

with a brick-shaped object wrapped in clear cellophane that he placed under his shirt. Lofton returned to the Escalade and drove away. When Howard and his team attempted to stop the Escalade, the officer observed Lofton throw the package out of a car window. After Special Agent Joseph Welsey recovered the package, Howard inventoried it.

6. Forensic scientist Adrienne Alley testified that the item tested positive for cocaine and weighed 978 grams.

7. Drug Enforcement Administration (DEA) Special Agent Joseph Wesley testified that he recovered the package thrown from the Escalade. The following day, while again engaged in surveillance, he observed defendant and Camacho enter the jeep. Defendant then drove the jeep away.

8. Officer Jeff Brouder testified that he curbed the jeep after he observed it make a left turn without signaling. He then approached the vehicle and asked defendant for his driver's license and proof of insurance. When defendant could produce neither, Brouder placed him in custody and requested a K9 inspection of the jeep.

9. Officer Thomas O'Boyle testified that he and Canine Britt responded to the "vehicle sniff" request. Upon their arrival, he gave Britt the command to search the jeep. Britt "indicated" that he smelled narcotics at the seam of the front driver's side door. As this gave the officers probable cause to search the jeep, a door was opened and Britt was commanded to search the interior. Britt then "indicated" at the glove compartment area.

10. Sergeant John Hamilton testified that based upon Britt's indication, he used a tool to partially remove the jeep's air bag cover and discovered a hidden compartment inside. The jeep was then taken to an impound lot, the compartment was opened, and two plastic wrapped bricks of white

powder were recovered.

11. Forensic scientist Thomas Halloran testified that the items recovered from the jeep tested positive for the presence of cocaine and weighed 964.25 and 982.84 grams respectively.

12. DEA Special Agent Terrence Glynn testified that when he met with defendant at a police station, he advised defendant of his *Miranda* rights and asked if defendant would answer certain questions. Defendant agreed and proceeded to tell Glynn that he had been involved in drug trafficking for nine to ten months. Defendant received cocaine from a man named "Toma," which he transported in hidden compartments in the jeep and a certain black bag. Although this conversation was not videotaped, Glynn took notes. The notes were in his office and he had not shared them. During the defense's cross-examination of Glynn, the court recessed for lunch.

13. After lunch, the court stated that it had instructed the State to have Glynn retrieve his interview notes. Defense counsel objected because the defense should have been present for that communication and the court should not have interjected itself into the proceedings by telling the State how to proceed. The defense further argued that it would be improper for the State to do anything other than introduce the notes. The court responded that the defense was entitled to the notes as part of discovery. The court then indicated that the State was allowed to elicit that the notes were retrieved and tendered to the defense, but could not use the contents as a sanction for the fact that the notes were not tendered to the defense prior to trial.

14. When the proceedings continued, Glynn testified during redirect that he had retrieved the notes and shown them to defense counsel.

15. At the close of the State's case, the defense moved for a mistrial. After the trial court denied the motion, the defense rested. The jury subsequently found defendant guilty of the delivery of a

controlled substance and possession of a controlled substance with intent to deliver.

16. The court then heard arguments on defendant's motion for a new trial which argued, *inter alia*, that the court erred when it engaged in *ex parte* communication with the State by instructing the State to have Glynn bring his interview notes to court. The trial court denied the motion and the matter proceeded to sentencing.

17. Defendant's PSI indicated that he had four prior convictions in California. At sentencing, the defense indicated that it had no changes to the PSI. Although the State highlighted the prior convictions in California, the defense argued that those convictions were over 10 years old and that defendant had never been convicted in Illinois. The defense also highlighted that it had not been presented with certified copies of the California convictions. In sentencing defendant, the court noted that defendant had a criminal background and had previously been deported. Ultimately, the trial court sentenced defendant to two concurrent terms of 25 years in prison. Defendant then filed a motion to reduce sentence, which the trial court denied.

18. On appeal, defendant first contends that he was denied a fair trial by the court's *ex parte* communication with the State because the court's instruction that Glynn retrieve his notes undercut defense counsel's cross-examination and permitted the State to rehabilitate Glynn.

19. A defendant has a constitutional right to be present at trial and all "critical" stages of the proceedings, from arraignment to sentencing. *People v. Lindsey*, 201 Ill. 2d 45, 55 (2002). Our supreme court has determined that any proceeding during which a defendant "asserts or waives" constitutional rights can be a critical proceeding. *Lindsey*, 201 Ill. 2d at 56. However, the right to be present at a critical stage is not unlimited, and a defendant's absence from a "critical" stage of the proceedings is not a *per se* constitutional violation. *Lindsey*, 201 Ill. 2d at 57. Rather, a defendant's

absence from such a proceeding will violate his constitutional rights only if the record demonstrates that the defendant's absence caused the proceeding to be unfair or if his absence resulted in the denial of an underlying substantial right. *Lindsey*, 201 Ill. 2d at 57-58; see also *People v. Childs*, 159 Ill. 2d 217, 227-28 (1994) (an *ex parte* communication serves as a ground for a new trial only if it results in injury or prejudice to the defendant).

20. When a defendant has preserved this issue for appeal, it is the State's burden to prove that the error was harmless beyond a reasonable doubt (*Childs*, 159 Ill. 2d at 228); if it is apparent that the *ex parte* communication did not injure or prejudice the defendant, a jury's verdict will not be set aside (*People v. Cotton*, 393 Ill. Ap. 3d 237, 262 (2009)).

21. The State contends that defendant was not prejudiced by the *ex parte* communication because he learned about it immediately after lunch, was able to argue against the introduction of the notes, and ultimately acquiesced in their admission provided that only their disclosure was revealed to the jury.

22. Here, this court cannot conclude that defendant's absence prejudiced him. The complained of communication took place during a break from trial and outside the presence of the jury. It has not been explained how the fact that neither defendant nor his counsel was present for the trial court's instruction to the State injured defendant. See *Childs*, 159 Ill. 2d at 227-28. Although the defense was precluded from objecting to the trial court's *ex parte* communication when it was issued because neither defendant nor counsel were present, the defense did have the opportunity to object when the court later informed the defense of the communication upon the parties' return from lunch. It was at that point that defense counsel objected, arguing that the court had improperly communicated with the State and interjected itself into the proceeding. The defendant further argued

that it would be improper for the State to do anything other than introduce the notes. The court agreed with the defense and barred the State from using the substance of the notes at trial. Presumably, had defense counsel been present for the initial communication between the court and the State, he would have advanced the same arguments and achieved the same result. Here, because defense counsel persuaded the court to permit Glynn only to testify that he had shown the notes to the defense, the record does not establish that defendant's absence from the original communication caused the proceeding to be unfair or resulted in the denial of an underlying substantial right. See *Lindsey*, 201 Ill. 2d at 57-58.

23. Although defendant is essentially arguing that his right to a fair trial was *per se* impacted based solely upon the trial court's *ex parte* communication, our supreme court has found that "a nonprejudicial *ex parte* communication is insufficient to impact the fairness of a defendant's trial." *People v. Johnson*, 238 Ill. 2d 478, 489 (2010). In the case at bar, the record reveals that defendant was not injured by the complained of communication when the defense was immediately informed of the communication and the defense had the opportunity to argue against the introduction of Glynn's notes before the testimony regarding their disclosure was presented to the jury. Accordingly, because we conclude that the *ex parte* communication did not prejudice defendant, the jury's verdict will not be set aside. See *Cotton*, 393 Ill. App. 3d at 262.

24. Defendant next contends that he was denied a fair sentencing hearing because the trial court relied on "insufficiently reliable" information contained in his PSI. Defendant does not dispute that he has a criminal background in California; rather, he contends that the PSI does not accurately reflect that background. However, the record reveals that defense counsel stated at sentencing that defendant did not have any changes to the PSI.

25. Pursuant to the doctrine of invited error, a defendant may not request that the trial court proceed in one manner and then later contend on appeal that the trial court's action was an error. *People v. Pryor*, 372 Ill. App. 3d 422, 432 (2007); *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001) (when a party acquiesces to proceeding in a certain manner, he is not in a position to later claim he was prejudiced by that course of action). In other words, a defendant cannot benefit from an error that he injected into the proceeding. *People v. Clarke*, 391 Ill. App. 3d 596, 622 (2009); *People v. Shelton*, 401 Ill. App. 3d 564, 579-80 (2010) (a defendant may not request that the trial court proceed in one manner and subsequently challenge that action on appeal).

26. Although defendant contends that the PSI is not a reliable indication of his criminal history, he ignores the fact that his counsel indicated that defendant did not have any changes to the PSI, thus inducing the trial court to rely upon it when determining defendant's sentence. He cannot now complain about the trial court's reliance upon the PSI (see *Shelton*, 401 Ill. App. 3d at 579-80), when he failed to correct it at sentencing. Any "unreliable" information in the PSI could have been raised by defendant and considered by the trial court; defendant cannot now use the error that he injected into the proceeding in order to obtain a second sentencing hearing. *Clarke*, 391 Ill. App. 3d at 622. As defendant permitted himself to be sentenced based on the PSI that was presented to the trial court, he cannot now argue that he was somehow prejudiced by his acquiescence (see *Villarreal*, 198 Ill. 2d at 227), and his claim must fail.

27. Defendant also contests the imposition of a \$10 assessment for the Arrestee's Medical Costs Fund (see 730 ILCS 125/17 (2008)), because there is no evidence that he received medical attention after his arrest.

28. In *People v. Jackson*, 2011 IL 110615 (Sept. 22, 2011), our supreme court held that the \$10

assessment is "collected from every defendant 'in order to create a fund to pay for medical expenses for all arrestees who required medical care while in custody.' " *Jackson*, 2011 IL 110615, ¶19 (quoting *People v. Hubbard*, 404 Ill. App. 3d 100, 104 (2010)). Accordingly, all convicted defendants are required to contribute to the Arrestee's Medical Costs Fund because an arrestee is required to reimburse the county only to the extent that he is reasonably able to pay for medical services rendered to him while in jail, and the Arrestee's Medical Costs Fund reimburses the county for the remainder. *Jackson*, 2011 IL 110615, ¶24. Thus, the \$10 assessment was properly imposed upon defendant.

29. Defendant finally contends, and the State concedes, that his mittimus must be corrected to reflect that he was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver, rather than two counts of delivery of a controlled substance. Accordingly, pursuant to our power to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the circuit court clerk to correct the mittimus to reflect that defendant was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver.

30. Accordingly, the judgment of the circuit court is affirmed. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order the mittimus be corrected to reflect that defendant was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver.

31. Affirmed; mittimus corrected.