

No. 1-09-2418

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. 05 CR 5737
)	
MICHAEL FRANKLIN,)	
)	
	)	Honorable
Defendant-Appellant.	)	Catherine Haberkorn,
	)	Judge Presiding.

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff -Appellee,	)	Cook County.
)	
v.	)	No. 05 CR 25785
)	
MICHAEL FRANKLIN,)	
)	
	)	Honorable
Defendant-Appellant.	)	William Timothy O'Brien,
)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.

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Presiding Justice Lavin and Justice Sterba concurred in the judgment.

HELD: Defendant waived review of his claim that his sentence for violation of probation was excessive; cause remanded for proper admonishments under Rule 605(c); mittimus corrected to reflect proper amount of presentence custody credit; fine vacated.

This appeal arises from an order of the circuit court that revoked defendant Michael Franklin's probation for possession of a controlled substance and subsequent sentence for a 15-year prison term and a separate order which sentenced him to a 15-year prison term for home invasion, to run concurrently. Defendant raises six issues on appeal: (1) whether the trial court erred in revoking his probation for possession of a controlled substance and in sentencing him to a 15-year prison term where the trial court only considered the nature of the offense giving rise to the revocation and relied on an inaccurate recollection of the facts in evidence; (2) whether the mittimus on the violation of probation case should be corrected to reflect an additional 179 days of pre-sentence credit; (3) whether his 15-year sentence for home invasion is excessive; (4) whether the trial court improperly dismissed his motion to reduce his sentence on the home invasion because counsel failed to file a 604(d) certificate; (5) whether the mittimus on the home invasion case should be corrected to reflect an additional two days of pre-sentence credit; and (6) whether the trial court erred in imposing a \$30 Children's Advocacy Fine. For the following reasons, we affirm the revocation of probation and ensuing sentence; correct the mittimus to reflect 176 additional days of pre-sentence custody for purposes of the revocation of probation case; remand the home invasion case for proper Rule 605(c) (eff. Oct. 1, 2001) admonishments;

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correct the mittimus to reflect 1314 days of pre-sentence custody for purposes of the home invasion case; and vacate the \$30 Children's Advocacy Fine.

BACKGROUND

Defendant was initially charged with two counts of possession of a controlled substance (cocaine and marijuana) with intent to deliver on February 6, 2005, case number 05 CR 5737. The State subsequently reduced the cocaine charge from class x to class one, which allowed for a sentence of up between 4 to 15 years' imprisonment or up to four years' probation. On August 1, 2005, defendant entered into a negotiated guilty plea agreement for one count of possession of a controlled substance in exchange for an 18-month term of probation. The remaining charge was withdrawn by the State.

While defendant was serving his probation, he was arrested on October 21, 2005, and subsequently charged with 8 counts of home invasion, 8 counts of aggravated unlawful restraint, 8 counts of reckless discharge, and two counts of robbery in case number 05 CR 25785. As a result of defendant's arrest, the State filed a motion to revoke his probation. Each case proceeded simultaneously in separate courtrooms over a period of several years.

Probation Revocation for Possession of a Controlled Substance

Defendant's revocation of probation hearing for possession of a controlled substance was held on March 31, 2009. At the hearing, Felicia Allen testified that on October 21, 2005, she lived at 10026 South LaSalle in Chicago with Kimberly McCullough (Kimberly), Vernita McCullough (Vernita), Porsche McKinley, and several other people, including three young children. The two-story home included three bedrooms on the first floor, and one room on the

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second floor. Allen stated that at approximately 12:10 a.m., she was asleep with Kimberly in the first bedroom on the first floor when she heard knocking at the front door. When Vernita went to answer the door and asked who was there, a voice replied “police” three times. Vernita told Allen that the police were at the door. As Allen started to leave the bedroom, three men, two of whom were armed with guns, kicked in the locked door and entered the house. Allen stated that defendant was one of the two men who had a gun. She further stated that defendant was wearing all black with a stocking over his face.

Upon entering the house, one of the armed men pushed Allen into the first bedroom with Vernita, Kimberly, and Porsche. The second armed man then took Kimberly into the kitchen while defendant stayed with the others in the room. Defendant, while holding the gun, ordered the girls to “be quiet” and “get down.” Allen stated that she, Vernita, and Porsche then lay across the bed. However, at one point, Vernita got up from the bed and attempted to talk to defendant, and he hit her on the head with the handle of his gun. Defendant then briefly stepped out of the room, and Allen attempted to call the police on her cellular phone, but she was forced to hang up when defendant quickly re-entered the room, swirling the gun in his hand. In an effort to distract defendant, Porsche attempted to talk to him. Defendant subsequently took the stocking off his face, and Allen successfully contacted the police and gave the location of the house.

Allen also testified that she heard the other armed man in the kitchen with Kimberly ask where the money was hidden in the house. Allen further stated that the third man went through the house and placed various items in a pillowcase while defendant remained in the bedroom with the girls. The unarmed man subsequently entered the bedroom, took various items, and then

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told defendant and the other man to leave the house. Allen saw the unarmed man leave the house but then heard three gunshots in the hallway. She then began to leave the bedroom but went back inside when she heard more gunshots from outside because she was concerned for the safety of the small children who were in the home. Once police arrived, Allen saw bullet holes in the kitchen wall and floor. Several hours later, Allen identified defendant in a line-up at the police station. Allen stated that she never saw defendant before that night, nor did she give him permission or authority to enter her home at any time.

After the court heard Allen's testimony, the hearing was continued to April 16, 2009, for Chicago police officer Gadzik's testimony. He testified that he was patrolling the area near 9900 South LaSalle with his partner in an unmarked police car just after midnight on October 21, 2005. He heard the radio dispatcher announce that multiple shots had been fired at 10026 South LaSalle. Two offenders were detained at the scene, however, a third offender escaped. He was described as a black male in his late 20s to early 30s; approximately 5 feet 5 inches to 5 feet 6 inches tall; wearing a black, hooded sweatshirt, black jeans, and white gym shoes; and holding a baseball bat. Officer Gadzik saw defendant walking down LaSalle, approaching the corner of 99th and LaSalle. Gadzik called to defendant, who ignored him and kept walking. Gadzik then exited the vehicle and called to defendant a second time, at which time defendant approached him. Defendant was detained; shortly thereafter, officers from the scene arrived and identified defendant as one of the men who ran out of the house with a gun. Defendant was subsequently arrested.

Defendant then testified on his own behalf, and stated that on October 21, 2005, a friend

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dropped him off near 95th and the Dan Ryan expressway because he was on his way to a party near 103rd and Perry. Before walking to the party, defendant stopped at a nearby liquor store and purchased some liquor. He then continued on his way to the party, but he heard gunshots as he approached 100th Street so he immediately turned around and began walking in the opposite direction because he thought the shots were fired at him. Defendant could not tell where the shots were coming from. He was then approached by Officer Gadzik and subsequently arrested. Defendant denied entering the house located at 10026 South LaSalle.

On cross-examination, defendant stated that he tossed the liquor when he was detained by the police. He denied stating to Officer Gadzik that he was on his way to a house on 101st and LaSalle to buy cigarettes. He admitted that when detained by the police, he was visibly sweating, but explained that it was from drinking the liquor. He further stated that he was wearing a long-sleeved white shirt that night, not a black hoodie.

Defendant's counsel then read into evidence a stipulated agreement between the parties, which provided, in pertinent part, that the results from the gunshot residue kit indicated that defendant may not have discharged a firearm, and if he did, the particles were either removed by activity, not deposited, or were not detected by the procedure.

The State then recalled Officer Gadzik in rebuttal. He testified that defendant was wearing a short-sleeved white shirt and he never saw a bottle of liquor in defendant's hand or near his feet. Gadzik also stated that defendant said he had been running because he went to a house at 101st and La Salle to buy cigarettes and someone started shooting.

At the close of evidence and arguments by both sides, defendant was found guilty of

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violating his probation for possession of a controlled substance. The court found that Allen's testimony was credible, noting that she had ample opportunity to see defendant's face while he was in her home. The court further found Officer Gadzik's testimony to be extremely credible, especially when he was called in rebuttal and was able to recall what defendant was wearing when arrested. The court also found that defendant's testimony was not credible because he gave three different versions of his story to the police and then a fourth and new version at the hearing. The matter then proceeding to sentencing on the violation of probation charge.

Prior to the commencement of the sentencing hearing, defendant filed a motion for a new violation of probation hearing, which was denied. After the sentencing hearing, defendant was sentenced to a 15-year prison term and received credit for 1,313 days of pre-sentence incarceration. As the basis of its ruling, the trial court stated as follows:

“Well, first of all, I'm not going to consider any of the prior negotiations or whether he was going to admit to this or not admit to that because that's not relevant. We had a hearing. There's no punishment for taking a hearing. He has those rights, and he exercised those rights. And I assure you that that's not going to enter into my consideration in terms of sentencing.

This defendant has two prior convictions. One of those convictions being this which was a case that was I believe reduced to a Class I so that he could receive probation on it. And then – now, we're here on violation of probation which is based on a

home invasion, armed robbery.

The defendant and two other people went into a home. They were wearing masks. They were carrying guns, and they terrorized women and children. And during the course of this armed robbery, one of the victims was able to use her cell phone to call the police. As the defendant and his co-defendants were leaving the residence, they began shooting at the police who responded to the scene. There was a chase, and the defendant was apprehended a short distance away. And the State has clearly proved their case.

So I have an egregious set of facts where women and children were terrorized at gunpoint, a home invasion, armed robbery, where they then exchanged gunfire with the police as they fled. I don't know that there's much more - - much more set of facts under - - that could be more egregious than obviously somebody being hit by that gunfire.

And then, I look at the defendant's pretrial investigation, and I see that this is someone who has had opportunity after opportunity. And it was after he, himself, was given great benefit from a mandatory Class X sentence to a probational Class I which was his second felony conviction that he went out and participated

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in this horrific crime.

Mr. Mullenix, I appreciate your request for 12 years in the Illinois Department of Corrections, but quite frankly 15 years is not enough, but it is what I'm limited to. So the sentence of this Court will be 15 years in the Illinois Department of Corrections.”

Defendant's untimely motion for reduction of sentence was filed on August 17, 2009. The motion was heard and subsequently denied by the trial court.

Guilty Plea for Home Invasion

On June 12, 2008, defendant requested a 402 conference relating to the home invasion charges. Following the conference defendant rejected the offer, and the trial court noted that the offer was revoked. Subsequently, the trial court heard argument on defendant's motion to quash arrest and suppress evidence, which was denied.

At the next hearing date on August 27, 2008, pursuant to the terms offered at the previous 402 conference, defendant pled guilty to home invasion in exchange for a 10-year sentence. However, after the plea was entered and the factual basis had been accepted, defendant asked the court if the sentencing offer of 10 years would still be available if he chose to withdraw his plea and proceed to a jury trial. The court responded that 10 years was within the sentencing range of 6 to 30 years, but that without having the opportunity to hear witness testimony he could not predict whether the sentence would increase after a jury trial. The court further explained that if he chose to proceed with a jury trial, then the offer of a 10-year prison term would be revoked, and the order dismissing the remaining counts. Defendant then asked how he could be charged

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with armed robbery and home invasion without evidence of a gun. After the court advised defendant to talk to his lawyer, defendant responded by saying, "I want to appeal or something. Man, it's like I've been forced into this. I've been here three years." After this statement, the court immediately rejected and revoked the plea agreement.

On May 27, 2009, defendant, for the third time, agreed to plead guilty to home invasion. Defendant was admonished as to the constitutional rights he was waiving, and the charge was read in court. The trial court sentenced defendant as follows:

"THE COURT: It's my understanding in exchange for your plea of guilty to this charge that you will be sentenced to 15 years Illinois Department of Corrections. That is to run concurrent with the sentence received under Case Number - - what was the number of the VOP?

THE CLERK: 05 CR 05737.

THE COURT: Concurrent with 05 CR 05737. And there is a 3-year period of mandatory supervised release, mandatory fees and costs in the amount of \$585, aggregate credit in the amount of - -

MR. MULLENIX: 1313. 1,313 days credit.

THE COURT: Is that your understanding of the agreement?

DEFENDANT FRANKLIN: Yes."

The parties then stipulated to the factual basis of the plea as follows: Defendant and his

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two codefendants, Terreon Brooks and “z” forced their way into a house at 10026 South LaSalle in Chicago. Defendant and Brooks were armed with handguns. All three yelled “where is the money” when they entered and Brooks forced Kimberly McCullough into the kitchen. Both defendant and Brooks hit her with their handguns and subsequently fired the handguns while in the home. Defendant made several of the victims go upstairs and one of the victims used a cellular phone to call the police. Defendant and Brooks later ran out of the house with guns in their hands and were confronted by four police officers. Brooks aimed his gun at Officer Montgomery who responded by shooting Brooks in the leg. Defendant ran towards the alley with officers in pursuit and was subsequently arrested. He was later identified in a lineup by the victims and other witnesses. The court accepted the factual basis for the guilty plea, and the State dismissed the remaining counts against defendant. Defendant was thereafter sentenced to a 15-year prison term to run concurrent with the 15-year sentence he received for the violation of probation case. Additionally, defendant received a mandatory supervised release period of 3 years plus mandatory fees and costs. The trial court then admonished defendant of his right to appeal and advised him that prior to filing an appeal, within 30 days he must file a written motion to reconsider the sentence if only the sentence was being challenged, or a motion to withdraw his plea if the guilty plea was being challenged.

Defendant filed a motion to reconsider his sentence on June 25, 2009, which was subsequently denied by the trial court. Defendant’s counsel did not file a Rule 604(d) certificate of compliance along with defendant’s motion to reconsider. This appeal follows.

DISCUSSION

Defendant first contends that the trial court erred in revoking his probation for possession of a controlled substance and in sentencing him to a 15-year prison term where the trial court only considered the nature of the offense giving rise to the revocation and relied on an inaccurate recollection of the facts in evidence. He acknowledges that he failed to file his motion to reconsider sentence in a timely manner, but concludes that the sentencing issue can be reviewed under the plain error doctrine because the trial court's error was fundamental and deprived him a fair hearing.

To preserve a claim of sentencing error, a defendant must file a written postsentencing motion within 30 days following the sentence. 730 ILCS 5/5-8-1(c) (West 2008); *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). As defendant's postsentencing motion was untimely, the issue is forfeited. However, we may review this claim of error if defendant has established plain error. *Hillier*, 237 Ill. 2d at 545. In the context of a sentencing hearing, a forfeited error may be considered under the plain error doctrine when the evidence is closely balanced or the error is so fundamental that it may have deprived the defendant of a fair sentencing hearing. *People v. Calhoun*, 377 Ill. App. 3d 662, 663 (2007). Under both prongs of the plain error doctrine, the defendant has the burden of persuasion. *Hillier*, 237 Ill. 2d at 545.

Here, defendant asserts that the trial court committed plain error when it sentenced him based on an improper factor- namely his conduct on probation. See *People v. Rathbone*, 345 Ill. App. 3d 305, 312 (2003). However, when resentencing after a revocation of probation, trial courts are entitled to consider the defendant's conduct on probation. *Rathbone*, 345 Ill. App. 3d at 312; *People v. Young*, 138 Ill. App. 3d 130, 142 (1985). After revoking a sentence of

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probation, the trial judge may resentence a defendant to any sentence that would have been appropriate for the original offense. *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). In *Rathbone*, the court held that it was an insufficient argument for plain error review to state that because sentencing affects the defendant's fundamental rights to liberty, any error committed at that stage is reviewable as plain error; a more in-depth analysis is required as all sentencing errors arguably affect the defendant's fundamental right to liberty. *Rathbone*, 345 Ill. App. 3d at 311.

Thus, although defendant asserts that he was sentenced based on an improper factor, a more accurate characterization of his claim is that the trial court gave a proper factor undue weight. See *Rathbone*, 345 Ill. App. 3d at 312. Such a claim addresses the trial court's exercise of discretion and not the fairness of the proceedings or the integrity of the judicial process; thus defendant's claim does not warrant plain error review. See *Rathbone*, 345 Ill. App. 3d at 312.

Next, defendant contends that the mittimus on the violation of probation case should be corrected to reflect an additional 179 days of pre-sentence credit. The State concedes that the mittimus should be corrected; however, the correction should be for 176 additional days of pre-sentence credit. In his reply brief, defendant contends that the mittimus should be corrected to reflect 176 days of pre-sentence custody for the time he spent in jail prior to his original probation and an additional day for the time he spent in jail prior to sentencing for the probation revocation, for a total of 177 additional days' of presentence credit.

It is undisputed that a defendant is entitled to custodial credit for every day spent in custody, including the day of his sentencing and commitment. *People v. Williams*, 239 Ill. 2d

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503, 505 (2011). However, the date a defendant is sentenced and committed is to be counted as a day of sentence and not as a day of presentence credit. *Williams*, 239 Ill. 2d at 510.

Here, defendant was initially arrested in the possession case on February 6, 2005, and held until the day he received probation, August 1, 2005, a total of 176 days. Defendant was arrested on October 21, 2005, for home invasion and held until the day he was sentenced, May 27, 2009, a total of 1,314 days. The mittimus currently gives defendant credit for 1,313 days spent in presentence custody. This court has the authority to directly order the clerk of the circuit court to make the necessary corrections to defendant's sentencing order. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). We therefore direct the clerk of the court to correct the mittimus to reflect an additional 177 days of presentence credit.

Defendant further contends that his 15-year sentence for home invasion is excessive because he did not have an extensive or violent background, was not the sole participant in the offense, and had rehabilitative potential.

Initially we note that the State raises a question of this court's jurisdiction with respect to this issue. The State contends that this issue is not properly before this court as defendant's guilty plea was negotiated and as such, he was required to vacate his guilty plea and vacate the judgment. The State points to the trial court's usage of the phrase "in exchange" to establish that defendant had a negotiated guilty plea. Defendant, on the other hand, contends that it was an open guilty plea as he was not admonished under the rule dealing with negotiated guilty pleas but was admonished under the rule for open guilty pleas.

A trial court's compliance with the admonition requirements of Illinois Supreme Court

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Rule 605 is reviewed *de novo*. *People v. Young*, 387 Ill. App. 3d 1126, 1127 (2009). Our examination of the record reveals that defendant did, in fact, have a negotiated guilty plea, however, he was improperly admonished of his rights under Rule 605.

Here, the record reveals that although the trial court used the phrase “in exchange” when discussing defendant’s guilty plea and resulting sentence, after sentencing defendant, the trial court clearly admonished defendant under Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001) and not Rule 605(c) (eff. Oct. 1, 2001). Specifically, the trial court told defendant that if he wished to challenge his sentence, he must file a motion to reconsider sentence within 30 days of the sentencing date, which is the procedure for challenging the sentence on an open guilty plea under Rule 605(b). Rule 605(c) applies to negotiated pleas and requires a defendant to withdraw the guilty plea prior to challenging the sentence. The record is also clear that defendant pleaded guilty in exchange for a set sentence. See *People v. Linder*, 186 Ill. 2d 67, 74 (1999) (where a defendant agrees to plead guilty in exchange for a recommended sentencing cap, he must first file a motion to withdraw his guilty plea before he can challenge the sentence imposed.). As such, the trial court was required to admonish defendant that he had to file a motion to withdraw his plea in conjunction with any challenge to his sentence. Ill. S. Ct. R. 605(c)(eff. Oct. 1, 2001).

We find that the trial court improperly admonished defendant and remand for the purpose of receiving new admonishments strictly complying with Rule 605 and the filing of new postsentencing motions under Rule 604(d) (eff. July 1, 2006). *Young*, 387 Ill. App. 3d at 1129 (citing *People v. Flowers*, 208 Ill. 2d 291, 301 (2003); *People v. Jamison*, 181 Ill. 2d 24, 29-30 (1998)).

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Our disposition of this issue makes it unnecessary to consider the merits of defendant's contention that a remand is necessary because defense counsel failed to file a 604(d) certificate of compliance.

Defendant next contends that the mittimus for his home invasion conviction should be corrected to reflect 1,315 days of presentence credit. The State concedes but contends that defendant is due an additional day of credit for a total of 1,314 days. We have previously determined that defendant is due presentence credit from his arrest date of October 21, 2005, through the day prior to his sentencing date of May 27, 2009, for a total of 1,314 days. We direct the clerk of the court to correct the mittimus to reflect the change. *McCray*, 273 Ill. App. 3d at 403.

Finally, defendant contends that the trial court erred in imposing a \$30 Children's Advocacy Fine. The State concedes and requests this court to vacate the fine as it was not in effect at the time defendant committed the offense. We accordingly vacate the fine. See *People v. Cornelius*, 213 Ill. 2d 178, 207 (2004) (retroactive application of a law that inflicts greater punishment than did the law that was in effect when the crime was committed is forbidden by the *ex post facto* clauses of the United States Constitution).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Cook County relating to defendant's 15-year sentence for violation of probation is affirmed; the cause is remanded for proper admonishments in accordance with Rule 605(c) for home invasion; the mittimus is corrected to reflect the proper amount of presentence credit; and the \$30 Children's Advocacy

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Fine is vacated.

Affirmed in part; remanded in part; mittimus corrected; fine vacated.