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SECOND DIVISION
May 31, 2011

1-09-1021

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. 07 CR 21773
)	
DAWAYNE TOLLIVER,)	Honorable
)	John P. Kirby,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Karnezis and Harris concurred in the judgment.

ORDER

Held : Where the expert forensic chemist who testified at defendant's trial was not the chemist who tested and analyzed the suspected narcotics at issue, the defendant's right to confrontation was not denied because he was able to cross-examine the expert witness about the basis of her opinion that the substance was in fact narcotics, pursuant to the Illinois Supreme Court's holding in *People v. Williams*, 238 Ill. 2d 125 (2010). The assessment of a \$200 DNA collection and analysis fee was void because defendant had previously been convicted of a felony, but defendant's sentence to three years' mandatory supervised release was proper because defendant was sentenced as a Class X offender.

Defendant Dawayne Tolliver appeals after his conviction by a jury for delivery of a controlled substance. Defendant raises three issues on appeal: (1) that his rights under the

No. 1-09-1021

confrontation clause of the United States Constitution (U.S. Const. amend. VI) were violated when a chemist other than the one who analyzed the suspected narcotics that were at issue in the case testified at trial; (2) that the trial court erroneously imposed a \$200 DNA collection and analysis fee as part of his sentence; and (3) that the trial court erroneously sentenced him to three years' mandatory supervised release (MSR). We affirm defendant's conviction and sentence, but we vacate the \$200 DNA analysis fee.

BACKGROUND

Defendant was arrested on the morning of September 23, 2007, after he allegedly sold \$20 worth of heroin in two tinfoil packets to an undercover Chicago police officer. The tinfoil packets were later tested and analyzed by Arthur Kruski, a forensic chemist employed by the Illinois State Police Crime Lab. By the time of defendant's trial, however, Kruski had retired and moved out of state. In place of Kruski, the State presented the expert testimony of Angela Cloud Simmons, who was a forensic chemist and supervisor at the crime lab.

Simmons testified that Kruski had performed the actual forensic tests on the contents of the tinfoil packets and, using Kruski's notes, she detailed the practices and procedures that Kruski followed in testing the suspected narcotics as well as the results of the tests. Based on her review of Kruski's notes and the test results, Simmons testified that it was her expert opinion that the substance contained in the tinfoil packets was 0.2 grams of heroin. The defense cross-examined Simmons on her findings and opinion but did not otherwise object to her testimony or use of Kruski's notes.

After the parties presented all evidence and witnesses, the jury found defendant guilty of

No. 1-09-1021

delivery of a controlled substance, a Class 2 felony. See 720 ILCS 570/401(d)(i) (West 2008). Due to defendant's record of prior felony convictions, the trial court sentenced defendant as a Class X offender pursuant to section 5-5-3(c)(8) of the Unified Code of Corrections (730 ILCS 5/5-5-3(c)(8) (West 2008)). The trial court sentenced defendant to 10 years' incarceration, with a 3-year term of MSR following his release. See 730 ILCS 5/5-8-1(d)(1) (West 2008). Defendant timely filed his notice of appeal, and this case is now before us.

ANALYSIS

We first examine defendant's claim that his rights under the sixth amendment to the United States Constitution (U.S. Const. amend. VI) were violated because Arthur Kruski, the chemist who performed the forensic analysis on the suspected narcotics that were recovered from defendant, did not testify at trial. Defendant asserts that the confrontation clause of the sixth amendment requires the analyst who actually performed the forensic analysis at issue to testify to the results of the test, citing in support the U.S. Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), and *Crawford v. Washington*, 541 U.S. 36 (2004).

Defendant failed to raise this issue before the trial court in a posttrial motion and it is therefore forfeited on appeal. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“[T]he failure to raise an issue in a written motion for a new trial results in waiver of that issue on appeal.”). Additionally, defendant fails to argue that we should review this issue under the plain-error doctrine, so defendant has also forfeited plain-error review. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (“A defendant who fails to argue for plain-error review obviously cannot meet

No. 1-09-1021

his burden of persuasion.”). We consequently need not consider any of defendant's arguments on this issue.

However, we observe that even if we were to find that defendant had not forfeited review of this issue, defendant's argument is meritless. Defendant concedes that the Illinois Supreme Court's recent decision in *People v. Williams*, 238 Ill. 2d 125 (2010), is directly on point and rejected this very argument. In *Williams*, the court considered this issue in the context of DNA analysis and held that the confrontation clause does not require the testimony of the analyst who actually performed a forensic test. See *id.* at 150. Rather than attempt to distinguish *Williams*, however, defendant's sole argument here is that *Williams* was wrongly decided and he asks us to disregard it as binding precedent.

We will not. Defendant is free to petition the Illinois Supreme Court to revisit its analysis and holding in *Williams*, but it is not for this Court to ignore directly applicable precedent. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009) (“The appellate court lacks authority to overrule decisions of [the supreme] court, which are binding on all lower courts”). Even if we were to overlook defendant's forfeiture, the supreme court's holding in *Williams* would require us to find that Simmons' testimony did not violate defendant's confrontation rights in this case.

We next examine defendant's argument that the trial court improperly imposed a \$200 DNA analysis fee as part of his sentence. Defendant asserts that the fee was improper because he has previously been convicted of a felony and therefore has already submitted DNA for analysis and been assessed the fee. Section 5-4-3(j) of the Unified Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)) requires that anyone convicted of a felony in Illinois must submit a

No. 1-09-1021

blood, saliva, or tissue specimen to the Illinois State Police for analysis and must also pay an analysis fee of \$200. This issue is controlled by the supreme court's recent decision in *People v. Marshall*, No. 110765 (Ill. May 19, 2011). In *Marshall*, the supreme court held that section 5-4-3 "authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." *Marshall*, slip op. at 15. Because defendant in this case has already submitted DNA and paid the fee following previous convictions, the trial court's order imposing the \$200 DNA analysis fee is void. Although the State argues that defendant has forfeited this issue by failing to raise it before the trial court in a postsentencing motion, "[a] challenge to a void order is not subject to forfeiture." *Id.*, slip op. at 14.

Finally, we examine defendant's contention that the trial court erroneously sentenced him to three years' MSR pursuant to section 5-8-1(d)(1) of the Unified Code of Corrections (730 ILCS 5/5-8-1(d)(1) (West 2008)), because he was sentenced as a Class X offender under section 5-5-3(c)(8) (730 ILCS 5/5-5-3(c)(8) (West 2008)). Defendant argues that he should have been sentenced instead to two years' MSR because his underlying conviction for delivery of a controlled substance is only a Class 2 felony. See 730 ILCS 5/5-8-1(d)(2) (West 2008)) (mandating two years' MSR for defendants convicted of a Class 2 felony). Defendant acknowledges that this argument has been addressed in previous cases and found to be meritless. See *People v. Watkins*, 387 Ill. App. 3d 764 (2009); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Anderson*, 272 Ill App. 3d 537 (1995). However, defendant asserts that our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), supports his argument and

No. 1-09-1021

indicates that this entire line of cases was wrongly decided.

We disagree. Defendant's argument on this point has been addressed and rejected repeatedly in published opinions of this Court that extensively discuss and distinguish *Pullen* in this context. See, e.g., *People v. McKinney*, 399 Ill. App. 3d 77, 80-84 (2010); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); *People v. Lee*, 397 Ill. App. 1067, 1072-73 (2010). As we recently summarized in *People v. Lampley*, No. 1-09-0661, slip op. at 17-18 (Ill. App. Nov. 10, 2010), “when subject to the [Class X sentencing] enhancement, the MSR term for Class X offenses attaches to the sentence imposed.” Because defendant was sentenced as a Class X offender in this case, he was properly sentenced to three years' MSR.

CONCLUSION

For the reasons stated above, we affirm defendant's conviction and that part of the trial court's order sentencing him to three years' MSR, but we vacate that part of the sentencing order requiring defendant to submit a DNA sample and imposing a \$200 DNA analysis fee under section 5-4-3(j) of the Uniform Code of Corrections (730 ILCS 5/5-4-3(j) (West 2008)).

Affirmed in part and vacated in part.