NOTICE
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2011 IL App (4th) 100329-U

Filed 8/4/11

NO. 4–10–0329

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
TERRANCE VEAL,	)	No. 09CF120
Defendant-Appellant.	)	
	)	Honorable
	)	Robert L. Freitag,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Knecht and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The street-value fine assessed by the trial court was not authorized by section 5–9–1(a) of the Unified Code of Corrections because the court based the amount of the fine on the street value of all the drugs seized rather than the street value of the drugs that supported the charge to which defendant ultimately pleaded guilty.

¶ 2 In October 2009, defendant, Terrance Veal, entered an open guilty plea to unlawful delivery of a controlled substance within 1,000 feet of a church, a Class X felony (720 ILCS 570/407(b)(1) (West 2008)). In exchange for defendant's guilty plea, the State agreed to dismiss the remaining drug charges against defendant. In November 2009, the trial court sentenced him to seven years' imprisonment to be followed by a three-year period of mandatory supervised release. Additionally, the court ordered defendant to pay a $1,220 street-value fine based on all the drugs (specifically, cocaine and cannabis) seized regardless of whether the charges were dismissed pursuant to the plea agreement.

¶ 3 On appeal, defendant argues the trial court erred by assessing a street-value fine for those drugs which formed the basis for the charges dismissed as part of defendant's plea agreement. We agree and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In October 2009, defendant entered an open guilty plea to unlawful delivery of a controlled substance within 1,000 feet of a church, a Class X felony (720 ILCS 570/407(b)(1) (West 2008)). In exchange for defendant's guilty plea, the State agreed to dismiss five remaining drug charges against defendant.

¶ 6 At the sentencing hearing, Mike Gray, a detective with the Bloomington police department, testified defendant was the subject of a controlled buy arranged by the police department. As part of the controlled buy, a confidential source purchased approximately 1.5 grams of cocaine from defendant. Additionally, the police subsequently found 5.7 grams of cocaine in defendant's coat and over 130 grams of cannabis in his hotel room. Gray testified regarding the street value of the purchased cocaine, the cocaine found in defendant's coat, and the cannabis found in the hotel room.

¶ 7 During the sentencing hearing, the State argued defendant should be assessed a street-value fine in the amount of $1,490, which amounted to $250 for the cocaine recovered from the controlled buy (the basis of count 1), $740 for the cocaine found in defendant's coat (the basis of counts 2 and 3), and $500 for the cannabis found in his hotel room (the basis of counts 4 and 5). In contrast, defendant's attorney argued the trial court could only consider the street value of the cocaine recovered from the controlled buy when assessing the street-value fine because it was the only charge resulting in a conviction.

¶ 8 After considering the presentence investigation report, evidence presented at the sentencing hearing, the recommendations of counsel, defendant's statement in allocution, and the relevant statutory factors in aggravation and mitigation, the trial court sentenced defendant to 7 years' imprisonment to be followed by a 3-year period of mandatory supervised release and ordered him to pay a $1,220 street-value fine. In assessing the street-value fine, the court stated as follows:

> "[T]he plain language of [section 5–9–1.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5–9–1.1(a) (West 2008))] is that the [street-value] fine shall be levied for the value of the controlled substance or cannabis seized, and in this case, there is evidence that there was controlled substances, cocaine, specifically, that was involved in the delivery itself, that there was cocaine found in the hotel room and on the defendant's person, and that there was some cannabis found as well.
>
> I think that it is appropriate to levy a street value fine for all of those substances that were seized in this case. However, the court finds that based upon the evidence presented today the full street value of those things comes to 1,220 dollars. That is 150 dollars for the purchased cocaine, 570 dollars for the 5.7 grams that was tested by the lab and 500 dollars for the cannabis."

¶ 9 In December 2009, defendant filed a motion to withdraw plea, arguing (1) he had not fully considered the consequences of his actions at the time he pleaded guilty, and (2) his guilty plea was neither voluntary nor knowing. Also, in December 2009, defendant filed a

motion to reconsider sentence, arguing his sentence was excessive because the trial court failed to sufficiently consider certain mitigating factors set forth in section 5–5–3.1 of the Unified Code (730 ILCS 5/5–5–3.1 (West 2008)). In March 2010, the court denied the motion to withdraw plea and the motion to reconsider sentence.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues the trial court erred by assessing a street-value fine for those drugs that formed the basis for the charges dismissed as part of defendant's plea agreement. Defendant concedes his trial counsel failed to raise this issue in the motion to reconsider sentence. However, defendant urges this court to consider this argument under the plain-error doctrine. Specifically, defendant contends the trial court erred because the assessment of the fine (1) was arbitrary, (2) rendered the sentencing hearing unfair, and (3) undermined the integrity of the judicial process.

¶ 13 A. Plain-Error Doctrine

¶ 14 The plain-error doctrine allows a reviewing court to consider a forfeited error when (1) the evidence is closely balanced or (2) the evidence is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Wishard*, 396 Ill. App. 3d 283, 286, 919 N.E.2d 1118, 1120 (2009). Under either prong of the plain-error analysis, the defendant has the burden of persuasion. *Wishard*, 396 Ill. App. 3d at 286, 919 N.E.2d at 1120. Before reviewing the issue under the plain-error doctrine, however, we must first determine whether any error occurred. *Wishard*, 396 Ill. App. 3d at 286, 919 N.E.2d at 1120.

¶ 15 B. Street-Value Fine

¶ 16 The State argues the plain language of section 5–9–1.1(a) of the Unified Code requires the street-value fine be based on the full street value of all the drugs *seized*.

¶ 17 Section 5–9–1.1(a) of the Unified Code (730 ILCS 5/5–9–1.1(a) (West 2008)) provides, in pertinent part, as follows:

> "When a person has been *adjudged guilty* of a drug related offense involving possession or delivery of cannabis or possession or delivery of a controlled substance as defined in the Cannabis Control Act, the Illinois Controlled Substances Act, or the Methamphetamine Control and Community Protection Act in addition to any other penalty imposed, a fine shall be levied by the court at not less than the full street value of the cannabis or the controlled substances seized." (Emphasis added.)

¶ 18 The issue of whether this statutory language allows a trial court to assess a street-value fine based on all the drugs seized was previously addressed in *People v. Smith*, 198 Ill. App. 3d 695, 699, 556 N.E.2d 307, 310 (1990). In *Smith*, 198 Ill. App. 3d at 699, 556 N.E.2d at 310, the appellate court reduced the defendant's street-value fine because it determined the trial court "improperly based the fine on the total value of all narcotic contraband seized." Instead, the court stated the defendant "should have been fined for only that contraband supporting the charges underlying the *** conviction." *Smith*, 198 Ill. App. 3d at 699, 556 N.E.2d at 310. In reaching this conclusion, the court considered section 5–9–1.1(a) of the Unified Code and determined the phrase "adjudged guilty" indicated the trial court could not consider contraband which formed the basis for charges dismissed as part of a defendant's plea agreement when

assessing a street-value fine. *Smith*, 198 Ill. App. 3d at 699, 556 N.E.2d at 310.

¶ 19 Additionally, defendant cites *People v. Lewis*, 234 Ill. 2d 32, 49, 912 N.E.2d 1220, 1230 (2009), as support for his argument this court should review his claim as a matter of plain error. In *Lewis*, 234 Ill. 2d at 49, 912 N.E.2d at 1230, the supreme court concluded plain-error review was appropriate for the defendant's challenge to the imposition of a street-value fine as arbitrary because it was imposed without any evidentiary basis. According to the court, the imposition of a fine "without any evidentiary support in contravention of the statute implicates the right to a fair sentencing hearing." *Lewis*, 234 Ill. 2d at 48, 912 N.E.2d at 1230.

¶ 20 However, the State cites *People v. Price*, 227 Ill. App. 3d 253, 255-56, 591 N.E.2d 99, 100-01 (1992), to support its argument the trial court acted appropriately under the plain language of section 5–9–1.1(a) of the Unified Code. In *Price*, 227 Ill. App. 3d at 255-56, 591 N.E.2d at 100-01, the defendant argued his street-value fine should be reduced because it was based in part on a charge the State *nolle prossed* in accordance with a plea agreement. Although this court initially determined the defendant waived this issue on appeal by his failure to object at sentencing or raise the argument in a posttrial motion, this court addressed the merits of the case. *Price*, 227 Ill. App. 3d at 255, 591 N.E.2d at 100. In evaluating the merits of the case, this court noted the defendant entered a guilty plea which specified the amount of the street-value fine the trial court could impose. *Price*, 227 Ill. App. 3d at 256, 591 N.E.2d at 101. According to the court, "this defendant [was permitted] to negotiate a slightly higher street-value fine based on *all* the drugs he sold in exchange for the dismissal of the second, more serious charge pending against him." *Price*, 227 Ill. App. 3d at 256, 591 N.E.2d at 101. Therefore, this court determined the defendant's street-value fine should not be reduced because he agreed to pay

the amount assessed pursuant to the terms of the plea agreement. *Price*, 227 Ill. App. 3d at 256-57, 591 N.E.2d at 101.

¶ 21 Here, defendant entered an open plea to unlawful delivery of a controlled substance within 1,000 feet of a church. In exchange for defendant's plea, the State agreed to dismiss the remaining drug charges. The trial court imposed a total street-value fine of $1,220 but only $150 of that fine was attributable to the offense to which defendant pleaded guilty. This case is distinguishable from *Price* because (1) defendant's plea agreement did not specify the amount of the street-value fine that could be assessed by the trial court, and (2) defendant did not negotiate a slightly higher street-value fine based on all the drugs seized in exchange for the dismissal of the remaining charges.

¶ 22 Further, the imposition of the street-value fine based on all drugs seized regardless of whether a conviction results from the seizure is contrary to the emphasized statutory language in section 5–9–1.1(a) of the Unified Code. Defendant was not "adjudged guilty" of the charges on which his street-value fine was partly based because those charges were dismissed as part of his plea agreement. Therefore, the amount of the street-value fine imposed by the trial court was not authorized by section 5–9–1.1(a) of the Unified Code. Had defendant gone to jury trial and been found not guilty of all of the charges, save one, the court could not punish defendant for conduct for which no conviction was entered. There should be no difference where a defendant enters an open plea to a single charge and the State dismisses the other charges. The State failed to negotiate, as part of its plea deal, a street value fine that included the drugs supporting the dismissed charges. Thus, pursuant to our appellate powers, we hereby reduce the fine imposed in this cause to the sum of $150. Ill. Sup. Ct. R. 615(b)(4) (eff. Jan. 1, 1967).

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we remand the cause with directions to amend the sentencing judgment to reflect the assessment of a $150 street-value fine.

¶ 25 Affirmed as modified and cause remanded with directions.