

NOTICE
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2013 IL App (4th) 111096-U
NO. 4-11-1096
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
March 28, 2013
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Livingston County |
| ROBERT WEIRICK III, |) | No. 11CF120 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Jennifer H. Bauknecht, |
| |) | Judge Presiding. |

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

ORDER

- ¶ 1 *Held:* (1) The trial court did not err in imposing an extended-term sentence for defendant's retail-theft conviction.
- (2) The trial court did not err in imposing a three-year sentence for defendant's attempt-aggravated-battery conviction.
- (3) The circuit clerk erred in failing to apply defendant's presentence custody credit to defendant's Child-Advocacy-Center and State-Police-Operations fines.
- (4) The statute creating the offense of threatening a public official does not violate the proportionate penalties clause of the Illinois Constitution.
- ¶ 2 In August 2011, defendant, Robert Weirick III, entered an open guilty plea to the charges found in the State's nine-count-amended information. In September 2011, the trial court sentenced defendant to concurrent three, four, and five-year terms of imprisonment. Defendant appeals, arguing (1) the trial court erred (a) by sentencing him to an extended term for retail theft

and (b) by sentencing him to a term of imprisonment beyond that allowed by statute for attempt (aggravated battery); (2) the circuit clerk erred in failing to apply the court awarded presentence custody credit to defendant's Child-Advocacy-Center and State-Police-Operations fines; and (3) the statute creating the offense of threatening a public official violates the proportionate penalties clause of the Illinois Constitution. We affirm defendant's conviction and sentence but remand with directions for defendant's presentencing custody credit to be applied against his Child Advocacy Center and State Police Operations fines.

¶ 3

I. BACKGROUND

¶ 4 In May 2011, the State filed an amended information against defendant, charging him with retail theft (subsequent offense) (720 ILCS 5/16A-3 (West 2010); 730 ILCS 5/5-3.2(b)(1) (West 2010)), two counts of resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)), two counts of threatening a public official (720 ILCS 5/12-9(a)(1)(i), (a)(2) (West 2010)), two counts of attempt (aggravated battery) (720 ILCS 5/8-4(a), 12-4(b)(18) (West 2010)), obstructing a peace officer (720 ILCS 5/31-1(a) (West 2010)), and criminal damage to government supported property (720 ILCS 5/21-4(1)(a) (West 2010)).

¶ 5 On August 15, 2011, defendant entered an open guilty plea. The State offered the following factual bases for the charges. With regard to count I (retail theft), the State said it would call store employees and Officer John Hoy of the Dwight police department who would identify defendant as the person who knowingly took possession of several items with the intent to retain the merchandise without paying for the items. As to count II (resisting a peace officer), the State informed the court Officer Hoy would testify defendant knew he was a police officer and struggled with him in the booking room and while walking defendant to a holding cell.

¶ 6 With respect to count III (threatening a public official), the State disclosed Officer Hoy would testify defendant

"knowingly and willfully conveyed to a public official that being Officer John Hoy a communication containing a threat that would place Officer Hoy in reasonable apprehension of future bodily harm by stating several times in the presence of Officer Hoy that the [d]efendant was a Latin King, that he had Latin King brothers in Chicago, that they would come to town, kill Officer Hoy and that Officer Hoy would get a bullet in the head. All of these threats were conveyed because of the performance of Officer Hoy of his public duties as a police officer."

¶ 7 As to count IV (threatening a public official), Officer Hoy would testify defendant threatened his Latin King brothers in Chicago would also kill Officer Hoy's children because of Officer Hoy's performance of his public duties as a police officer. With respect to count V (attempt (aggravated battery)), the State planned to present evidence defendant attempted to spit on Officer Hoy while defendant was being booked at the Livingston County jail following his arrest.

¶ 8 As to count VI (obstructing a peace officer), the State informed the trial court it would present evidence defendant knowingly obstructed Dwight police chief Tim Henson and Officer Hoy's authorized act of booking defendant by physically struggling and contorting his body and limbs to remove himself from the booking area bench where he had been restrained. As to count VII (criminal damage to government supported property), the State's factual basis

included evidence defendant knowingly damaged the door frame of a police car and knocked the vehicle's window from its track, resulting in \$735.25 in damage to the vehicle.

¶ 9 With respect to count VIII (resisting a peace officer), the State proffered evidence defendant physically struggled with and pulled against Chief Henson's grasp while Henson escorted defendant to a police car to be transported from the Dwight police station to the Livingston County jail. As to count IX (attempt (aggravated battery)), the State would present evidence defendant "kicked out his right foot at *** Chief Henson while Chief Henson restrained the upper body of the Defendant after the Defendant tried to pull away from Chief Henson as Chief Henson was walking Defendant to a waiting squad car after he had been arrested."

¶ 10 On September 26, 2011, the trial court sentenced defendant to the following concurrent terms of imprisonment: (1) retail theft—four years (count I); (2) threatening a public official—five years (count III); (3) threatening a public official—five years (count IV); (4) attempt (aggravated battery)—three years (count V); (5) criminal damage to government supported property—three years (count VII); and (6) attempt (aggravated battery)—three years (count IX). On September 28, 2011, defendant filed a motion to reconsider sentence, arguing his sentence was unduly harsh, punitive, and excessive. The trial court denied defendant's motion.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Extended-Term Sentence for Retail Theft Conviction

¶ 14 Defendant first argues the extended-term sentence he received for his Class 4 retail-theft conviction is void as unauthorized by statute because it was not the most serious offense of which he was convicted. Although defendant did not raise this issue in a

postsentencing motion, a void sentence may be attacked at any time. *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004).

¶ 15 Defendant relies on section 5-8-2(a) of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2010)). Although defendant quotes an older version of the statute than the amended version in this case, it does not appear to make a difference for purposes of defendant's argument. Section 5-8-2(a) provides:

"A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present. If the pre-trial and trial proceedings were conducted in compliance with subsection (c-5) of Section 111-3 of the Code of Criminal Procedure of 1963, the judge may sentence an offender to an extended term as provided in Article 4.5 of Chapter V (730 ILCS 5/Ch. V, Art. 4.5)." 730 ILCS 5/5-8-2(a) (West 2010).

¶ 16 Our supreme court has "interpreted section 5-8-2(a) to mean that a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only on those offenses that are within the most serious class." *People v. Bell*, 196 Ill. 2d 343, 350, 751 N.E.2d 1143, 1146 (2001). However, our supreme court also stated "extended-term sentences may be imposed 'on separately charged, differing class offenses that arise from *unrelated courses of*

conduct.' " (Emphasis added.) *Bell*, 196 Ill. 2d at 350, 751 N.E.2d at 1147 (quoting *People v. Coleman*, 166 Ill. 2d 247, 257, 652 N.E.2d 322, 327 (1995)).

"[I]n determining whether a defendant's multiple offenses are part of an 'unrelated course of conduct' for the purpose of his eligibility for an extended-term sentence under section 5-8-2(a), courts must consider whether there was a substantial change in the nature of the defendant's criminal objective. If there was a substantial change in the nature of the criminal objective, the defendant's offenses are part of an 'unrelated course of conduct' and an extended-term sentence may be imposed on differing class offenses. If, however, there was no substantial change in the nature of the criminal objective, the defendant's offenses are not part of an unrelated course of conduct, and an extended-term sentence may be imposed only on those offenses within the most serious class." *Bell*, 196 Ill. 2d at 354-55, 751 N.E.2d at 1149.

¶ 17 Defendant argues there was no change in his motivation between the offenses.

According to defendant:

"[T]here was no change in [his] motivation between the offenses. [Defendant's] threats to the officer and struggles against him only occurred following the officer's discovery of the stolen items and his resulting attempt to take [defendant] into custody. Presumably, Weirick's attempts to avoid arrest were in order to get

away with the stolen merchandise."

¶ 18 The State argues defendant's objectives changed after he was arrested for retail theft. The other offenses occurred after defendant was taken into custody. We agree with the State "[u]pon defendant's arrest, his objective obviously changed from stealing the items to issuing threats and trying to batter the [police] officers ***." As a result, the trial court was authorized to impose an extended-term sentence on defendant for his retail-theft conviction.

¶ 19 B. Sentence for Attempt (Aggravated Battery)

¶ 20 Defendant next argues the sentence he received from the trial court for attempt (aggravated battery) is void. Although defendant did not raise this issue in his postsentencing motion, a void order may be attacked at any time. *Thompson*, 209 Ill. 2d at 25, 805 N.E.2d at 1203. According to defendant, he could not be sentenced to more than 364 days. Defendant argues:

"Aggravated battery as charged in this case is a Class 3 felony. 720 ILCS 5/12-4(b)(18), (e)(1) (West 2011). However, [defendant] pled guilty to *attempt* aggravated battery. [Citation.] The sentence to be imposed for an attempted Class 3 felony must fall within the range of sentences required for a Class A misdemeanor. 720 ILCS 5/8-4(c)(5) (West 2011)."

Defendant argues the "maximum term of imprisonment permissible for a Class A misdemeanor is less than one year." See 730 ILCS 5/5-4.5-55(a) (West 2010). As a result, defendant argues the three-year sentence he received was unauthorized by law and therefore void.

¶ 21 The State argues defendant was charged with attempting to commit aggravated

battery in violation of section 12-4(b)(18) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/12-4(b)(18) (West 2010)). Both counts of attempt (aggravated battery) charged defendant knew the victim was a "peace officer employee of a unit of local government engaged in the performance and execution of his official and authorized duties as such peace officer employee." Pursuant to section 12-4(e)(2) of the Criminal Code, "[a]ggravated battery that does not cause great bodily harm or permanent disability or disfigurement is a Class 2 felony when the person knows the individual harmed to be a peace officer *** engaged in the execution of any official duties ***." 720 ILCS 5/12-4(e)(2) (West 2010). Therefore, the State argues the trial court correctly sentenced defendant within the sentencing range for a Class 3 felony.

¶ 22 We agree. Section 8-4(c)(4) of the Criminal Code (720 ILCS 5/8-4(c)(4) (West 2010)) states "the sentence for attempt to commit a Class 2 felony is the sentence for a Class 3 felony[.]"

¶ 23 C. Presentence Incarceration Credit

¶ 24 At sentencing, the trial court ruled defendant should receive presentence custody credit of \$740 for the 148 days he spent in custody prior to sentencing. Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) states "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." Defendant argues his credit should have been applied to his \$180 Child-Advocacy-Center fine (55 ILCS 5/5-1101(f-5) (West 2010)) and his \$5 State-Police-Operations fine (30 ILCS 105/6z-82(b) (West 2010); 705 ILCS 105/27.3a(1.5), (5) (West 2010)). However, the circuit clerk failed to apply the presentence custody credit. Defendant argues we

should remand this case for the mittimus to be corrected.

¶ 25 Although defendant did not raise this issue in his motion to reconsider sentence, presentence incarceration credit cannot be forfeited and may be raised for the first time on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457, 677 N.E.2d 935, 945-46 (1997). The State concedes defendant is entitled to full credit against his \$180 Child-Advocacy-Center fine and his \$5 State-Police-Operations fine. We accept the State's concession.

¶ 26 D. Proportionate Penalties Clause

¶ 27 Defendant next argues the two sentences he received for threatening a public official must be vacated because the statute creating the offense violates the proportionate penalties clause of the Illinois Constitution. According to defendant, "the identical offense of aggravated assault of a peace officer has a maximum punishment of less than one year of imprisonment."

¶ 28 The proportionate penalties clause of our state constitution provides "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. We note statutes are presumed constitutional. *City of Chicago v. Morales*, 177 Ill. 2d 440, 448, 687 N.E.2d 53, 59 (1997).

¶ 29 In *People v. Sharpe*, 216 Ill. 2d 481, 517, 839 N.E.2d 492, 514 (2005), our supreme court stated "judging penalties by a comparison with penalties for offenses with different elements should never have been part of our proportionate penalties jurisprudence." The court stated "[a] defendant may no longer challenge a penalty under the proportionate penalties clause by comparing it with the penalty for an offense with different elements."

Sharpe, 216 Ill. 2d at 521, 839 N.E.2d at 517.

¶ 30 In addressing defendant's argument, we first determine whether the offenses of threatening a public official and aggravated assault of a peace officer have identical elements. According to defendant, "the threatening a public official statute violates the proportionate penalties clause because it is substantively identical to the offense of aggravated assault of a peace officer, but illogically, the two crimes are punished with disparate penalties." Threatening a public official is a Class 3 felony for a first offense. 720 ILCS 5/12-9(c) (West 2010). Aggravated assault as defined by section 12-2(a)(6) of the Criminal Code (720 ILCS 5/12-2(a)(6) (West 2010)) is a Class A misdemeanor "if a Category I, Category II, or Category III weapon is not used in the commission of the assault" (720 ILCS 5/12-2(b) (West 2010)).

¶ 31 At the time of the offenses in this case, the elements of threatening a public official were as follows:

"(a) A person commits the offense of threatening a public official when:

(1) that person knowingly and willfully delivers or conveys, directly or indirectly, to a public official by any means a communication:

(i) containing a threat that would place the public official or a member of his or her immediate family in reasonable apprehension of immediate or future bodily harm,

sexual assault, confinement, or
restraint; or

(ii) containing a threat that
would place the public official or a
member of his or her immediate
family in reasonable apprehension
that damage will occur to property in
the custody, care, or control of the
public official or his or her
immediate family; and

(2) the threat was conveyed because of the
performance or nonperformance of some public
duty, because of hostility of the person making the
threat toward the status or position of the public
official, or because of any other factor related to the
official's public existence.

(a-5) For purposes of a threat to a sworn law enforcement
officer, the threat must contain specific facts indicative of a unique
threat to the person, family or property of the officer and not a
generalized threat of harm." 720 ILCS 5/12-9(a), (a-5) (West
2010).

The elements of an aggravated assault pursuant to section 12-2(a)(6) at the time of the offenses in

this case were as follows:

"(a) A person commits an aggravated assault, when, in committing an assault, he:

* * *

(6) Knows the individual assaulted to be a peace officer, a community policing volunteer, a private security officer, or a fireman while the officer or fireman is engaged in the execution of any of his official duties, or to prevent the officer, community policing volunteer, or fireman from performing his official duties, or in retaliation for the officer, community policing volunteer, or fireman performing his official duties, and the assault is committed other than by the discharge of a firearm in the direction of the officer or fireman or in the direction of a vehicle occupied by the officer or fireman." 720 ILCS 5/12-2(a)(6) (West 2010).

At the time of the offense, section 12-1(a) of the Criminal Code stated: "A person commits an assault when, without lawful authority, he engages in conduct which places another in reasonable apprehension of receiving a battery." 720 ILCS 5/12-1(a) (West 2010).

¶ 32 The two offenses in question do not have identical elements. Therefore, pursuant to *Sharpe*, a proportionate penalty analysis is not applicable. In order for a defendant to be found

guilty of threatening a public official for a threat made to a police officer, section 12-9(a-5) requires "the threat must contain specific facts indicative of a unique threat to the person, family or property of the officer and not a generalized threat of harm." 720 ILCS 5/12-9(a-5) (West 2010). To be convicted of aggravated assault, the State need not prove the defendant made a threat containing "specific facts indicative of a unique threat to the person, family or property" of the police officer. We need not examine the statutes further for other differences.

¶ 33

III. CONCLUSION

¶ 34 For the reasons stated, we affirm the trial court's judgment as modified and remand for application of defendant's available \$185 presentence custody credit. Because the State successfully defended a portion of the criminal judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 620, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 35

Affirmed as modified; remanded with directions.