

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).

2013 IL App (4th) 120962-U

NO. 4-12-0962

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

August 21, 2013
Carla Bender
4th District
Appellate

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
JON P. SMALL,)	No. 10CF1902
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

ORDER

JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

¶ 1 *Held:* Because defendant is a fugitive from justice, his appeal is dismissed.

¶ 2 Defendant, Jon P. Small, appeals from his conviction of obstructing justice (720 ILCS 5/31-4(a) (West 2010)), for which the trial court sentenced him to probation for 30 months. We dismiss this appeal because he has failed to report to his probation officer, his probation officer does not know his whereabouts, and therefore he is a fugitive from justice, disentitled to relief from this court.

¶ 3 I. BACKGROUND

¶ 4 On November 12, 2010, the State filed an information charging defendant with obstruction of justice. The information alleged that on November 11, 2010, with the intent to prevent his own apprehension, defendant misrepresented to a police officer, Kristin Garcia, his name and date of birth.

¶ 5 On November 24, 2010, defendant filed a motion to suppress the evidence on the ground that Garcia had lacked any reasonable, articulable suspicion that he had committed a crime, so as to justify pulling him over.

¶ 6 On December 20, 2010, the trial court held an evidentiary hearing on the motion for suppression of evidence, and the court denied the motion.

¶ 7 On January 28, 2011, in a stipulated bench trial, the trial court found defendant guilty of obstructing justice.

¶ 8 Two other things happened on January 28, 2011: (1) defendant filed a motion for acquittal or, alternatively, for a new trial, alleging that the trial court had erred by denying his motion for suppression of evidence; and (2) the court gave him "permission to leave the State of Illinois to travel to Texas for employment purposes."

¶ 9 On April 21, 2011, a presentence investigation report was filed. The author of the report was Chris Jones, a probation officer. It appears from the report that defendant told Jones his current address was 1644 Barak Lane, Apartment B, Bryan, Texas 77802, and that defendant gave him three telephone numbers: a home number, a work number, and an emergency number (his mother's number).

¶ 10 Under "Employment Status," the report says: "The defendant reported obtaining full-time employment with Atmos Energy, beginning 01/10/11, employed as a construction foreman regarding the installation of gas lines ***." Attached to the report is a letter, dated April 6, 2011, from Laura White, operations assistant for Atmos Energy Corporation, to Judge Thomas Difanis, praising defendant as "a great asset to the company." White gives her own telephone number, under her job title in her signature block.

¶ 11 In the sentencing hearing, on April 27, 2011, the prosecutor, Duke Harris, told Judge Difanis: "I note the pre-sentence report reflects the Defendant lives in Bryan, Texas. I don't know the record is such that a sentence to the Illinois Department of Corrections is necessarily required in this case. It would seem at least to me at this point Mr. Small is essentially the problem of the state of Texas if he continues to get crossways with the law." Judge Difanis sentenced defendant to 30 months' probation and told him: "I'm going to authorize the Court Services Department to transfer your probation if they're able to to the state of Texas." The record does not appear to contain any indication that the probation ever was transferred to Texas.

¶ 12 After the trial court imposed the sentence of 30 months' probation, defendant appealed. On May 11, 2011, the circuit clerk sent defendant a letter, addressed to him at 1644 Barak Lane, Apartment B, Bryan, Texas 77802. In this letter, the circuit clerk stated:

"On May 03, 2011, our office attempted to mail you a copy of your Notice of Appeal filed in cause #10CF1902. It was returned to our office undelivered on May 10, 2011.

Our office has now noted that you have listed this address as your current address since 01/29/2011 in your interview with Court Services (Probation). We have no official change of address on file for your *[sic]* in this case.

Please submit to our office any change of address you may have while matters in this cause are pending."

The record does not appear to contain any response from defendant.

¶ 13 We dismissed defendant's appeal for lack of subject-matter jurisdiction, remanding the case for a ruling on the posttrial motion. *People v. Small*, No. 4-11-0374, slip order at 1-2 (September 11, 2012) (unpublished order under Supreme Court Rule 23).

¶ 14 On September 10, 2012, a probation violation report was filed. It is signed by an "adult probation officer," Dave A. Cardani. According to the report, one of the conditions of defendant's probation was that he "report in person to the Champaign County Court Services Department once per month or more or less often as that department might direct in writing." The report accuses defendant of violating this condition in that he "has not had contact with the Champaign County Court Services Department since June 2011 and is currently being considered an absconder."

¶ 15 On September 20, 2012, an assistant State's Attorney, Sarah J. Carlson, filed a petition to revoke defendant's probation on the ground that he had "failed to report to the Court Services Department since June 2011, his whereabouts are unknown and he is considered to be an absconder."

¶ 16 On September 21, 2012, Judge Chase Leonhard issued a warrant for defendant's arrest because of his violation of probation.

¶ 17 On October 10, 2012, Judge Difanis denied the posttrial motion.

¶ 18 This appeal followed.

¶ 19 **II. ANALYSIS**

¶ 20 The State argues we should dismiss this appeal because "defendant remains a probation absconder and a fugitive from justice." "Under the 'disentitlement' theory, a defendant's flight during the pendency of an appeal is construed as tantamount to waiver or abandonment of his claims***." *People v. Wicklund*, 363 Ill. App. 3d 1045, 1047 (2006).

¶ 21 Defendant argues against application of the disentitlement doctrine because, according to him, the record fails to indicate he is a fugitive from justice. The presentence investigation report said he had moved to Texas because he had found full-time employment there with Atmos Energy Corporation. He gave the probation officer the name of his employer as well as his residential address and telephone number in Texas. In the sentencing hearing, in April 2011, both the prosecutor and Judge Difanis knew that defendant had moved to Texas to pursue this employment opportunity, and Judge Difanis authorized the court services department to transfer the probation to Texas if possible.

¶ 22 Nevertheless, the record appears to contain no indication that the probation ever was transferred to Texas. As far as we can see, the condition of defendant's probation requiring him to "report in person to the Champaign County Court Services Department once per month or more or less often as that department might direct in writing" was still in effect, despite the department's knowledge that he lived and worked in Texas. Reporting "less often" was not a unilateral option on defendant's part but was something he had to work out with the probation officer. According to the petition to revoke probation, he not only failed to report, but the court services department does not know his whereabouts.

¶ 23 Granted, as defendant points out, the probation officer who signed the report of probation violation was not the same probation officer who signed the presentence investigation report, and the judge who issued the warrant for defendant's arrest was not the same judge who presided over the sentencing hearing. We have to assume, however, that before telling the State's Attorney he did not know defendant's whereabouts, the new probation officer opened up defendant's file and dialed the telephone numbers that defendant had given the previous probation officer. We can see, from the record, that defendant apparently no longer lives at the

Texas address he had given the court services department because a letter to that address from the circuit clerk was returned as undeliverable. We have looked at the current version of the docket sheet on the Champaign County circuit clerk's website, and we find no indication that defendant has shown up again. In short, we are unconvinced that this is all a misunderstanding.

¶ 24 Defendant argues we should not apply the disentitlement doctrine unless there is a "final adjudication establishing that [he] either willfully absconded or willfully violated any term of his probation." We are aware of no case holding that there has to be a "final adjudication" of a defendant's fugitive status before the reviewing court regards the defendant as a fugitive. *Wicklund* does not stand for that proposition. In *Wicklund*, the State filed a petition to revoke probation because the defendant had not been reporting to his probation officer. *Id.* at 1046. The trial court issued a warrant for the defendant's arrest, and the authorities were still looking for him when the appellate court dismissed the appeal under the disentitlement doctrine. *Id.* It does not appear that the trial court in *Wicklund* had ruled yet on the petition to revoke probation when the appellate court dismissed the appeal. See also *United States v. Henry*, 355 Fed. Appx. 75, 75 (7th Cir. 2009) ("Henry has again been placed on supervised release, from which he has absconded. The Probation Office has filed a report stating that Henry has not been seen by his counselor since June 24, 2009. The district court has issued a bench warrant for his arrest. This appeal *** is subject to dismissal under the fugitive disentitlement doctrine."); *United States v. Lanier*, 123 F.3d 945, 946 (6th Cir. 1997) (after receiving a copy of a warrant for the fugitive defendant's arrest, the Sixth Circuit issued a rule to show cause why the appeal should not be dismissed).

¶ 25 In sum, although we do not reach the question of whether Garcia had a reasonable, articulable suspicion of criminal wrongdoing when she pulled defendant over, we

refuse to barter with defendant or to hear his appeal while he is in the very process of disrespecting both the trial court and this court. One of the purposes of the disentitlement doctrine is to prevent the fugitive from "attempting to bargain with or to obtain a tactical advantage over the [reviewing] court: that is, to await the judicial result and return if it is favorable or to remain a fugitive if it is not. One may not invoke the power of judicial review only thereafter to obey or disobey the court's mandate as one sees fit. [Citation.] Thus we may dismiss an appeal of a fugitive, and the fugitive may later have to bear the consequences of that lost opportunity." *Katz v. United States*, 920 F.2d 610, 612 (9th Cir. 1990), *abrogated on other grounds by Lozada v. Deeds*, 964 F.2d 956 (9th Cir. 1992).

¶ 26

III. CONCLUSION

¶ 27

For the foregoing reasons, we dismiss this appeal.

¶ 28

Appeal dismissed.