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2014 IL App (3d) 100792-U

Order filed February 27, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THRID DISTRICT

A.D., 2014

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Plaintiff-Appellee,	)	Peoria County, Illinois,
	)	
	)	Appeal No. 3-10-0792
	)	Circuit No. 09-CF-953
v.	)	
	)	
	)	
ETRREC LEE WALKER,	)	Honorable
	)	James E. Shadid,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Schmidt and O'Brien concurred in the judgment.

¶ 1 *Held*: (1) The defendant's sentence to a term of imprisonment of 28 years for armed robbery did not violated the proportionality clause of the Illinois constitution; (2) the indictment was neither void for failure to charge a statutory offense, nor for failure to apprise the defendant of the nature of the charged offense; and (3) the People conceded that the order that the defendant provide a DNA sample and pay a DNA analysis fee was error where the defendant had provided a DNA sample as the result of a prior conviction.

¶ 2 The defendant, Etrrec Lee Walker, was found guilty of armed robbery and sentenced to a term of imprisonment of 28 years, which included a mandatory 15-year enhancement following

the jury's determination that the defendant, or one for whose conduct he was responsible, was armed with a firearm. The defendant raised three issues on appeal: (1) whether the 15-year enhanced sentence under the armed robbery statute (720 ILCS 5/18-2(b) (West 2010) was unconstitutional; (2) whether the defendant's armed robbery conviction was void because the indictment charged him with an offense that had been abolished and alleged mutually exclusive offenses in a single charge; and (3) whether this court should vacate the DNA analysis assessment fee since it was undisputed that he had provided a DNA sample as the result of a previous conviction.

¶ 3 Following submission of briefs by the parties, our supreme court allowed a petition for leave to appeal in *People v. Connie Blair*, 2012 IL App (3d) 100743, in which this court held that the armed robbery statute under which the defendant received an enhanced sentence was unconstitutional. Following the People's motion, this court issued an order holding the instant matter in abeyance pending the outcome of our supreme court's ruling in *Blair*. While the matter was held in abeyance, the People filed a motion to add authority regarding the second issue in this case, *i.e.*, whether the indictment charging the defendant with robbery while armed with a dangerous weapon was a void indictment. *People v.Wright*, 2013 IL App (3d) 100522. With the benefit of our supreme court's ruling in *People v. Blair*, 2013 IL 114122, we now affirm the defendant's conviction for armed robbery and trial court's imposition of a 15-year enhancement to his armed robbery conviction. In accordance with the holding in *Wright*, we likewise affirm the defendant's conviction for armed robbery while armed with a dangerous weapon. The State concedes that the DNA sample fee imposed upon the defendant must be vacated pursuant to *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 4 FACTS

¶ 5 The defendant was charged by indictment with two counts of armed robbery. 720 ILCS 5/18-2(a)(2) (West 2010). Count 1 alleged that, on or about August 22, 2009, the defendant, "while armed with a dangerous weapon, a firearm, being a rifle," took a computer from Shane Parker by threatening the imminent use of force. Count 2 alleged that, on or about August 22, 2009, the defendant, "while armed with a dangerous weapon, a firearm, being a rifle," took a computer from Tiffany Tinkler by threatening the imminent use of force.

¶ 6 Evidence presented at the defendant's jury trial established that on August 22, 2009, Shane Parker and his girlfriend, Tiffany Tinkler, lived with their three children in a single family residence in Peoria, Illinois. Around midnight on that date, Parker was watching television in the bedroom while Tinkler was in the shower. The defendant, known to both victims through mutual friends, entered the residence through a back door. The defendant appeared to be unarmed. Parker came downstairs when he heard the defendant enter the house. The defendant told Parker that another friend of Parker's, T.J. Grant, and Grant's girlfriend were waiting out in the care to see if Parker and Tinkler would invite them in to play cards. Parker agreed to the card game and went up stairs to tell Tinkler to get dressed and come downstairs to play cards. As Parker came down the stairs, he heard a "blast" from a rifle and saw that he had been shot in the leg. Parker testified that he was approximately four steps from the bottom of the stairs and about five steps from the shooter, who was standing at the bottom of the stairs. Parker testified that the defendant was not the shooter.

¶ 7 Parker further testified that the defendant came toward him and struck him above his left eye with the "butt" of another rifle. Parker also saw a third individual standing in the doorway to

the living room which was near the bottom of the stairs. According to Parker, the defendant then took him up the stairs to the bedroom and forced him to lie face down on the floor.

¶ 8 Tinkler told the police that, while in the shower, she heard screaming, then someone pulled her out of the shower and made her lie on the floor next to Parker. Tinkler also told the police that while she was on the floor she looked up and saw the defendant. After they made eye contact, the defendant hit her in the head with a rifle. Subsequently, Tinkler denied any knowledge of who hit her and claimed that she never saw the defendant with a rifle.

¶ 9 Parker testified that while the two victims were on the ground, the defendant demanded to know where the televisions were. Parker told him that their large screen television had been recently pawned in order to pay bills. Defendant then demanded money, and Tinkler told him where money could be found downstairs. The defendant went downstairs while one of his cohorts remained in the room with a rifle trained on the pair. The defendant returned shortly thereafter and demanded to know where "the weed" was. Parker told the defendant that they did not have any "weed" but told him they had a computer under the bed. Shortly thereafter, the defendant told his two companions that they had all they needed and it was time to go. He told Parker and Tinkler not to call the police and the three perpetrators left the residence.

¶ 10 Parker immediately called the police after the trio left. He was transported to a local hospital for treatment for a gunshot wound to the leg and was released the next day. Parker reported missing a computer and Tinkler's wallet which contained an unstated amount of cash. Parker admitted that he had pled guilty to theft in 2009 and felony auto theft in Indiana in 2005.

¶ 11 Officer Robert McMillan of the Peoria police department testified that he interviewed the defendant shortly after the incident. After receiving appropriate warnings, the defendant admitted

to McMillan that he had accompanied two other individuals to steal a television from Parker's house.

¶ 12 During the People's closing argument, the prosecutor noted that the jury had to determine whether the allegation that the defendant was armed with a "firearm" had been proven. It was also noted that the evidence showed that the defendant had been armed with a dangerous weapon, a .22 caliber rifle, which was a firearm. The jury then received instructions which provided that the People had to prove that the defendant, or one for whom he was legally accountable, "carried on or about his person a dangerous weapon or was otherwise armed with a dangerous weapon." The jury was also instructed to determine whether the defendant, or one for whom he was legally accountable, was "armed with a firearm" in order to find the defendant guilty of armed robbery. The jury found the defendant guilty on both counts, specifically finding that the armed robbery was committed while "armed with a firearm."

¶ 13 The defendant was sentenced to 28 years of imprisonment on count 1, which included a 15-year enhancement based upon the jury's special finding that the defendant, or someone for whom he was legally accountable, was armed with a firearm at the time of the robbery. The trial court imposed various costs and fees, and ordered that the defendant submit a sample of DNA and pay a DNA "testing fee" of $200. This timely appeal followed.

¶ 14 DISCUSSION

¶ 15 A. Constitutionality of the 15-year enhancement

¶ 16 The defendant first maintains that the trial court erred when it added a 15-year enhancement to his sentence, arguing that his enhanced sentence violated the proportionate penalties clause of the Illinois constitution which provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and the objective of restoring the

offender to useful citizenship." Ill. Const. 1970, art. I, §11. A statute violates the proportionate penalties clause where two offenses have identical elements but one carries a greater sentencing range than the other. *People v.* Baker, 341 Ill. App. 3d 1083, 1087 (2003). Here, the defendant argues that his conviction for armed robbery with the 15-year enhancement for commission of the offense with a dangerous weapon resulted in a sentencing range of 21 to 45 years. By contrast, the offense of armed violence predicated on an offense or robbery while armed with a firearm carried a sentencing range of only 15 to 30 years, despite the fact that the two offenses shared identical elements. The defendant maintains, therefore, that the enhanced portion of his sentence for armed robbery was unconstitutional and his sentence should be vacated and remanded to the circuit court for re-sentencing within the non-enhanced range for the crime of armed robbery.

¶ 17 Our supreme court, in *Blair*, recently addressed the identical issue raised by the defendant, finding that an enhanced sentence for the commission of armed robbery while armed with a dangerous weapon did not violate the proportionality clause of our constitution. In a detailed and comprehensive analysis, the *Blair* court explained that the defendant's proportionality argument had merit until the legislature amended the armed violence statute in 2007 to remove the offense of armed violence predicated on robbery. The court further noted that the legislature's express purpose in amending the armed violence statute was to provide different elements for armed violence and armed robbery so as to remove the proportionality objection to an enhanced sentence upon conviction for armed robbery with a dangerous weapon. *Blair*, 2013 IL 114122 ¶ 37-38. In accordance with the holding in *Blair*, we find that the defendant's enhanced sentence for armed robbery was constitutionally proper and we, therefore, affirm his 28-year sentence for armed robbery.

¶ 18 B. Sufficiency of the Indictment

¶ 19 The defendant next maintains that his conviction for armed robbery should be reversed because the indictment charged him with a category of armed robbery that had been previously abolished and because the indictment alleged mutually exclusive offenses of armed robbery in a single charge.

¶ 20 In *People v. Wright*, 2013 IL App (3d) 100522, this court recently addressed the identical issue raised herein by the defendant. In *Wright*, under facts essentially the same as the instant matter, we held that an indictment charging armed robbery committed with a dangerous weapon, a firearm, was not a void indictment. *Wright* 2013 IL App (3d) 100522 ¶17. We further rejected the claim that an identical indictment to the one at issue herein was not void for alleging mutually exclusive offenses. We noted in *Blair* that there was no uncertainty that a defendant charged in a manner consistent with the defendant herein was alleged to have committed a robbery involving a firearm. *Wright*, at ¶20. We therefore reject the defendant's argument that his conviction was void based upon a defective indictment, and we affirm his conviction for armed robbery.

¶ 21 C. Duplicate DNA Sample and Fee

¶ 22 The People agree with the defendant's position that the $200 DNA analysis fee and the order for him to submit a DNA sample was erroneous and should be vacated. *People v. Marshall*, 242 Ill. 2d at 291. We therefore vacate that portion of the defendant's sentence which ordered submission of a DNA sample and imposed a $200 DNA analysis fee.

¶ 23 CONCLUSION

¶ 24 The judgment of the circuit court of Peoria County on defendant's conviction for armed robbery while armed with a firearm and imposing a sentence of 28 years is affirmed. The

portion of the judgment ordering the defendant to provide a DNA sample and pay a $200 DNA analysis fee is vacated.

¶ 25 Affirmed in part; vacated in part.