2015 IL App (1st) 130872-U

FIFTH DIVISION
JUNE 12, 2015

No. 1-13-0872

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. 12 CR 13144
	)	
JOE THOMAS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice McBride concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant did not establish error when the judge presiding over his probation revocation hearing did not set out the details of the original offense for which he was being sentenced. Moreover, defendant was entitled to some monetary credit to offset his fines but cannot receive credit for days spent on electronic monitoring.

¶ 2 After a hearing, defendant Joe Thomas was found in violation of his probation in November 2012 and was sentenced to six years in prison on his original crime of possession of a controlled substance (cocaine) with intent to deliver. On appeal, defendant contends his case

should be remanded for resentencing because the trial judge who imposed that sentence was not the same jurist who placed him on probation and did not indicate defendant was being sentenced on the original conviction or describe the nature or circumstances of the original offense. In addition, defendant challenges the imposition of various fines and fees and asserts that his order of commitment should be amended to properly reflect his conviction. We affirm defendant's conviction and sentence but amend the mittimus and fines and fees order.

¶ 3 On August 2, 2012, defendant pled guilty to one count of possession of between 1 and 15 grams of cocaine with intent to deliver, which is a Class 1 felony (720 ILCS 570/401(c)(2) (West 2012)). The factual basis for defendant's plea, as read to the court, indicated that on June 21, 2012, police officers conducting narcotics surveillance observed defendant engage in three hand-to-hand transactions near 1540 South St. Louis Avenue in Chicago involving packets that tested positive for 1.4 grams of cocaine. The trial court sentenced defendant to 30 months of probation.

¶ 4 On November 6, 2012, the State filed a petition for violation of probation, alleging that defendant violated the conditions of his probation by possessing a controlled substance on November 5, 2012. At the hearing on the probation violation, Chicago police officer Mendez testified that he and his partner, Officer Pratscher, were conducting a routine patrol with two other officers in the vicinity of 1532 South St. Louis. Mendez observed a man, who was arrested along with defendant, shouting "LL," which is street terminology for selling PCP. Mendez observed defendant leave a nearby vacant lot after throwing a tin-foil packet about the size of a dime onto the sidewalk. The parties stipulated the packet contained .5 gram of PCP. The trial court found the State proved defendant's probation violation by a preponderance of the evidence.

¶ 5 At the resentencing hearing, the court reviewed a copy of defendant's presentence report. The assistant State's Attorney informed the court that defendant was 23 years old and "has this felony that's before you, which is PCS with I, Class 1." The State also reported on defendant's prior criminal convictions, including felony drug convictions in 2007 and 2009.

¶ 6 After hearing evidence in mitigation of defendant's sentence and allowing defendant the opportunity to address the court, the court stated: "Okay, you stated this is a Class 1; is that correct?" to which the prosecutor responded affirmatively.

¶ 7 The court made the following remarks before imposing defendant's sentence:

> "Mr. Thomas has been previously convicted of two prior drug felony offenses. He received probation in 2009, which was revoked, and he got 15 months in the Illinois Department of Corrections in May 2010.
>
> He also received probation from Judge Cannon – I'm sorry received one year IDOC [in the Illinois Department of Corrections] from Cannon in 2007. He was on this probation, a probation he originally received from Judge Wilson on August 2, 2012, despite the fact that he had two previous felony convictions.
>
> After that he was again found in possession of drugs, which leads to the basis of this violation. Apparently efforts to rehabilitate this defendant have gone unsuccessful. Penitentiary sentences haven't woken him up. Probation sentences after the penitentiary sentences have not woken him up. Defendant obviously maliciously decides that he is going to continue to commit crime despite the consequences and despite the fact that he should know better by now.

His probation is revoked. He is going to be sentenced to six years Illinois Department of Corrections."

¶ 8 Defense counsel filed a motion to reconsider sentence, which the court denied, stating as follows:

"With regard to the motion to reconsider the sentence, I did take into consideration after a finding of violation in this matter, as to revocation of his probation, matters in aggravation, mitigation, this sentence, I believe is fair and just. Defendant was revoked on a Class 1, violation of probation, where he was looking at four to 15 years in the penitentiary. Based on the defendant's participation in continued crimes during this period of time that he was on probation, I believe that this is a fair sentence, six years Illinois Department of Corrections."

¶ 9 On appeal, we first note the State's assertion that defendant failed to include his claim of the trial court's error in his post-sentencing motion. The State contends defendant has forfeited the review of this issue under the plain error doctrine because he did not refer to plain error in his opening brief to this court. However, our supreme court has found the inclusion of a plain-error discussion in a defendant's reply brief, as defendant did here, is sufficient to trigger such review. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

¶ 10 The plain-error doctrine is applied when either a clear or obvious error occurred and: (1) the evidence "is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error" or (2) "the error 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. Piatkowski*, 225 Ill. 2d 551

(2007). Defendant invokes the second alternative of plain error, asserting that the judge undermined the fairness of the sentencing process by failing to consider the facts surrounding his original offense. He contends his six-year sentence should be vacated and his case remanded for resentencing.

¶ 11 The first step in a plain-error analysis is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). In plain-error review, the burden of persuasion rests with the defendant. *Id*. A reviewing court may not overturn the sentencing decision of a trial court absent an abuse of the trial court's discretion. *People v. Varghese*, 391 Ill. App. 3d 866, 876 (2009).

¶ 12 Upon the revocation of a defendant's probation, the trial court may sentence the defendant to any term that would have been appropriate for the underlying offense. *People v. Vilces*, 186 Ill. App. 3d 983, 986 (1989). As with any felony sentencing, a court that is sentencing a defendant upon a revocation of his probation is to be provided with a written presentence report. *People v. Harris*, 105 Ill. 2d 290, 299 (1985).

¶ 13 The trial court may not resentence a defendant on a revocation of probation based upon or as punishment for the offense that constituted the probation violation. *Varghese*, 391 Ill. App. 3d at 876. For a reviewing court to sustain the trial court's sentence, the record must clearly demonstrate that the trial court considered the original offense and that the sentence imposed was appropriate for the original offense. *People v. Hess*, 241 Ill. App. 3d 276, 284 (1993).

¶ 14 Conduct that resulted in the revocation of the defendant's probation can be considered as evidence of the diminishment of a defendant's rehabilitative potential. *Vilces*, 186 Ill. App. 3d at 986. Although a trial court may consider the defendant's actions while on probation as a factor in

assessing rehabilitative potential, the court may not punish the defendant for those acts. *Id*. Thus, in reviewing a sentence imposed following a revocation of probation, this court must determine if the trial court improperly "commingled" the underlying offense and the defendant's subsequent acts. *Id*. The defendant's sentence should not be disturbed on appeal unless this court is "strongly persuaded" that the sentence imposed after revocation of probation was imposed as a penalty for the conduct which was the basis of revocation, and not for the original offense. *Id*., citing *People v. Young*, 138 Ill. App 3d 130, 142 (1985).

¶ 15 A review of the trial court's remarks in their entirety demonstrates that the judge was sentencing defendant for his original conviction. The record does not indicate that the trial court "commingled" the two offenses or punished defendant for the latter offense. Here, the trial court sentenced defendant to six years in prison upon his original conviction of the Class 1 felony of possession of between 1 and 15 grams of cocaine with intent to deliver. A Class 1 felony has a sentencing range of 4 to 15 years in prison. 730 ILCS 5/5-4.5-30(a) (West 2012). Defendant's six-year term fell within the statutory range and indeed was at the lower end of the range of his potential sentence. The offense that triggered the revocation of probation was simple possession of a controlled substance (720 ILCS 570/402(c) (West 2012)), which is a Class 4 felony. Before imposing sentence, the court expressly indicated that it was imposing the sentence on defendant for the Class 1 felony that constituted the original offense.

¶ 16 Defendant points out that the sentencing judge did not mention the name of the original offense or the nature or circumstances of the conduct that led to the original offense; however, defendant cites no authority stating those rote recitations are required in order to validate the trial court's sentence. Rather, as we have noted, the trial court can consider the most recent behavior

as a diminution of the defendant's rehabilitative potential (see *Vilces*, 186 Ill. App. 3d at 986), as the court expressly did here by noting that "efforts to rehabilitate this defendant" had not succeeded.

¶ 17 Defendant compares the facts of this case to those in several cases, including *People v. Ellis*, 48 Ill. App. 3d 221 (1977), in which a judge who was not the same jurist that imposed probation ultimately sentenced the defendant upon the revocation of probation. Defendant argues that here, as in *Ellis*, the judge at the resentencing hearing did not receive "any evidence of the original offense." We do not find *Ellis* is at all similar to his case, since the State in *Ellis* conceded on appeal that no evidence of the defendant's prior offense was presented in the sentencing hearing. *Id*. at 225. Here, in contrast, the record clearly indicates that the court was informed of, and expressly noted, that the sentence being imposed was for a Class 1 felony offense.

¶ 18 Defendant also cites *People v. Bouyer*, 329 Ill. App. 3d 156 (2002), in arguing that his sentence should be vacated because the trial court failed to mention the offense or conduct for which defendant was being sentenced. As with *Ellis*, the facts of *Bouyer* are distinguishable. The defendant in *Bouyer* pled guilty to burglary and was sentenced to 30 months of probation and ordered to pay restitution. *Id*. at 158. Upon the defendant's probation violation, he was sentenced to five years in prison based on a "willful violation" of the terms of his probation, namely failing to comply with the agreement to pay restitution. *Id*. at 160-61. On appeal, this court remanded for resentencing, stating that the trial court did not punish the defendant for his initial crime, but instead punished him for the inability to make restitution. *Id*. at 162 (noting that courts have disapproved of making a defendant's sentence contingent on his ability to pay restitution). The

appellate court also noted that the State did not seek to revoke the defendant's probation based on a failure to pay restitution. *Id*. Here, in contrast to the facts in *Bouyer*, the trial court made clear that it was imposing sentence on defendant's original conviction, and the fact that the court did not mention the original offense by name or describe the underlying conduct does not negate the record's affirmative showing on that point.

¶ 19 In conclusion on this issue, the record in this matter, when considered as a whole, clearly demonstrates that the court was sentencing defendant on the original Class 1 felony offense of possession of a controlled substance with intent to deliver, and not on the offense that led to the revocation of probation. Without error, there can be no plain error. *People v. Bannister*, 232 Ill. 2d 52, 79 (2008). Accordingly, defendant's plain error argument is rejected.

¶ 20 Next, defendant contends on appeal that the mittimus in this case should be amended to accurately reflect his conviction. The mittimus contained in the record states that defendant was convicted of "MFG/DEL 1<15 GR COCAINE/ANLG," citing "720 ILCS 570/401(c)(2)." The offenses of manufacture/delivery and the possession with intent to deliver share that statutory citation, which creates ambiguity as to the basis of defendant's actual conviction.

¶ 21 The State correctly concedes the mittimus should be amended to reflect a conviction for possession of cocaine with intent to deliver. Therefore, we direct the clerk of the circuit court to amend the mittimus to reflect defendant's conviction for possession of cocaine with intent to deliver. See *People v. Cotton*, 393 Ill. App. 3d 237, 268 (2009) (remand not required for correction of the mittimus).

¶ 22 Defendant's remaining contentions involve the total amount of various fines and fees and the credit he should receive for the days he spent in custody prior to sentencing. Here, after

accepting defendant's guilty plea for the original offense on August 2, 2012, the trial court imposed $1,060 in various fines and fees against defendant. We first address defendant's contentions as to several of those charges. Questions regarding the appropriateness of fines, fees and costs imposed by a sentencing court are reviewed *de novo*. *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 26.

¶ 23 An offender who has been assessed one or more fines is entitled to a $5-per-day credit for time spent in custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2012). This credit applies only to "fines" imposed for a conviction, not to other fees or costs. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 41. A "fine" is a charge that is punitive in nature and not intended to compensate the State for costs incurred in prosecuting the defendant but instead to finance the court system. *People v. Breeden*, 2014 IL App (4th) 121049, ¶ 83.

¶ 24 First, defendant argues the $50 Court System fee (55 ILCS 5/5-1101(c)(1) (West 2010)) represents a fine and thus should be included among the total amount to be offset by the $5-per-day credit. The State responds, however, that charge is a fee that compensates Cook County for the "cost of providing a court system."

¶ 25 In addressing the various charges included in section 5-1101 of the Counties Code, our supreme court held in *People v. Graves*, 235 Ill. 2d 244, 253 (2009), that the charges in that statute represent "monetary penalties to be paid by a defendant" who pleads or is found guilty of certain offenses. See also *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21 (noting that *Graves* refers to the assessment under section 5-1101(c) as a fine and analyzes that it meets the criteria for a fine). Although the State urges in this appeal that *Smith* was wrongly decided and "should

not be followed," we find no basis to depart from its reasoning and its reliance upon the binding authority in *Graves*. This court also has adopted the analysis in *Graves* that the charges imposed under section 5-1101 are fines in *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54, and in *Ackerman*, 2014 IL App (3d) 120585, ¶ 30. In line with that authority, we hold that the $50 Court System fee imposed pursuant to section 5-1101(c) was a fine for which defendant can receive credit for the time spent in presentence custody.

¶ 26 Defendant next contends, and the State correctly agrees, that the $15 State Police Operations charge (705 ILCS 105/27.3a (1.5) (West 2011)) is a fine subject to offset by defendant's presentence incarceration credit because it does not reimburse the State for costs incurred in defendant's prosecution. See *People v. Millsap*, 2012 IL (4th) 110668, ¶ 31. The State also correctly concedes that the $5 Electronic Citation fee (705 ILCS 27.3e (West 2011)) should be vacated because defendant was not convicted in a traffic, misdemeanor municipal or conservation case. See *People v. Howard*, 2014 IL App (1st) 122958, ¶ 19.

¶ 27 Therefore, based on our agreement with defendant's position that the Court System and State Police Operations charges are fines, we conclude that $645 of the charges against defendant constitute fines for which he can receive a $5-per-day credit for time spent in presentence custody. However, the parties disagree on the number of days for which defendant should receive such credit. The State asserts that the mittimus incorrectly reported that defendant spent 123 days in custody and instead contends defendant was in custody for 121 days. In his reply brief, defendant agrees with the State's calculation that he was in custody for 121 days, which included 80 days of incarceration and 41 days of electronic monitoring.

¶ 28 The State further argues that of those 121 days, defendant is only entitled to presentence credit under section 110-14(a) for the 80 days during which he was incarcerated, and not the 40 days spent on electronic monitoring. This issue has been addressed in *People v. Riley*, 2013 IL App (1st) 112472, ¶ 11, which concluded the presentence credit in section 110-14(a) applies only to days in which a defendant is physically incarcerated. The *Riley* court acknowledged that a separate statute was recently amended to allow credit toward the number of days of the defendant's sentence for the time that the defendant spent on electronic home detention. 730 ILCS 5/5-4.5-100(b) (West 2012) (see Pub. Act 97-697, § 5, eff. June 22, 2012); see also *People v. Stolberg*, 2014 IL App (2d) 130963, ¶ 49-50 (citing *People v. Beachem*, 229 Ill. 2d 237, 243 (2008)).

¶ 29 Defendant points to the amendment to section 5-4.5-100(b) of the Unified Code of Corrections to contend that monetary presentence credit under section 110-14(a) should be similarly interpreted and that the holding in *Riley* should not be followed. He further contends that the conditions of his electronic home monitoring were akin to confinement.

¶ 30 However, because section 110-14(a) is the statute in question, we find *Riley* to be on point. *Riley* holds that a defendant is "only entitled to a *per diem* monetary credit for days that he was actually physically incarcerated and not for those days that he was on home confinement." *Riley*, 2013 IL App (1st) 112472, ¶ 13; see also *People v. Kuhns*, 372 Ill. App. 3d 829, 839-40 (Gilleran Johnson, J., concurring in part and dissenting in part).

¶ 31 In conclusion, we affirm defendant's conviction and six-year sentence on his original conviction for possession of a controlled substance with intent to deliver. We order the mittimus be corrected to accurately state that conviction. Defendant is entitled to $400 of credit toward his

fines for the 80 days he spent in actual custody prior to sentencing. In addition, we vacate the $5 Electronic Citation fee imposed against defendant.

¶ 32 Affirmed in part, vacated in part, and mittimus and fines and fees order to be amended.