2015 IL App (1st) 132597-U

THIRD DIVISION
October 7, 2015

No. 1-13-2597

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 13019
	)	
HUGH LYEW,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's conviction for one count of aggravated fleeing or attempting to elude a peace officer where the trial court did not err in ordering a trial *in absentia*, nor did it violate defendant's due process rights by merging a dismissed count into his conviction; we vacate the $2 public defender records automation charge because defendant was represented by private counsel.

¶ 2 Following a jury trial, defendant Hugh Lyew was convicted of aggravated fleeing or attempting to elude a peace officer and sentenced to an extended-term of seven years' imprisonment. On appeal, defendant contends that the trial court erred when it assumed the State's role and *sua sponte* ordered a trial *in absentia*. Defendant also contends that the trial court

violated his right to due process when it merged a second count of aggravated fleeing or attempting to elude a peace officer into the first count where the State had dismissed the second count prior to trial. He finally maintains that the court improperly assessed a $2 public defender automation fee against him. We affirm as modified.

¶ 3 Defendant was charged with two counts of aggravated fleeing or attempting to elude a peace officer. Count 1 alleged that on June 29, 2012, defendant refused to obey a police officer's command to bring his vehicle to a stop, increased his speed, extinguished his lights, or otherwise fled or attempted to elude the officer, in violation of section 11-204(a) of the Illinois Vehicle Code (Vehicle Code) (625 ILCS 5/11-204(a) (West 2012)), and such flight or attempt to elude involved disobedience of two or more traffic control devices in violation of section 11-204.1(a)(4) of the Vehicle Code (625 ILCS 5/11-204.1(a)(4) (West 2012)). Count 2 differed only in that it alleged such flight or attempt to elude caused damage in excess of $300 to property, *i.e.*, a garage located at 1413 West 55th Street in Chicago in violation of section 11-204.1(a)(3) of the Vehicle Code (625 ILCS 5/11-204.1(a)(3) (West 2012)). Prior to trial, the State dismissed Count 2.

¶ 4 On August 2, 2012, defendant was arraigned and admonished that he could be tried and sentenced in his absence if he did not appear in court. Following a plea conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012) on January 15, 2013, the trial court offered defendant 42 months' imprisonment, which he rejected.

¶ 5 On February 19, 2013, defendant was present in court and defense counsel asked that the trial court re-open the 402 conference, requesting boot camp for defendant. The trial court denied defense counsel's request, and counsel asked for a jury trial. On March 21, 2013, defendant was again present in court but the State was not ready for trial. The matter was continued for trial to

May 13, 2013. On that date, defense counsel again requested boot camp for defendant, and the trial court denied the request. Both parties answered ready for trial but, due to the courtroom schedule, the matter was continued for trial to June 3, 2013.

¶ 6 On June 3, 2013, defense counsel inquired whether the 42-month offer was still available, and the court responded positively. Defendant asked the court to continue the matter for "24 hours to set everything up to make sure [his] family [was] straight." The court refused, indicated trial would be set for that day, and passed the matter momentarily. When the matter was recalled, defense counsel told the court that defendant ran out of the courtroom. The State indicated that it was ready for trial, and, when the court asked if a jury should be picked in defendant's absence, defense counsel replied affirmatively. The jury was subsequently selected and the matter proceeded to trial without defendant present.

¶ 7 At trial, Officer Michael Callahan testified that on June 29, 2012, he was working with his partner Officer Andy Palermo near Racine Avenue and 58th Street in Chicago. At about 1:10 a.m., the officers, who were in uniform and driving a marked squad car, saw a gold Mitsubishi missing a driver's side mirror. Callahan identified defendant as the driver of the vehicle and Darnell Franklin, who is not a party to this appeal, as the front seat passenger. Callahan attempted to pull defendant over, but defendant accelerated to between 40 and 55 miles per hour in a 25 miles per hour zone, and disregarded stop signs at 57th and Elizabeth Streets, and 56th and Elizabeth Streets. Callahan pursued the vehicle for a few minutes before defendant crashed into a garage. Defendant and Franklin fled on foot. Callahan pursued and ultimately arrested Franklin. Officer Serrano, who arrived on the scene, placed defendant under arrest and Callahan identified him as the driver of the vehicle.

¶ 8 During the second day of trial, defense counsel told the judge that he spoke to defendant

after the first day of trial. In particular, defense counsel advised defendant that there was a "no bail warrant for his arrest," and that he should appear in court "to minimize the consequences before the jury and any sentencing issues." Defendant responded that he had faith in counsel's abilities and that he would not appear in court.

¶ 9 The trial court held the jury instructions conference with the parties, and then closing arguments were made by counsel. The jury ultimately found defendant guilty of a single count of aggravated fleeing or attempting to elude a peace officer.

¶ 10 Defendant was subsequently apprehended and appeared in court for sentencing in July 2013. The court sentenced defendant to an extended term of seven years' imprisonment. In doing so, the court stated it was sentencing defendant on Count 1, and that Count 2 was merged into Count 1. The mittimus reflects that defendant was only sentenced on Count 1. The court also imposed a $2 public defender automation fee against him.

¶ 11 On appeal, defendant contends that he was improperly tried *in absentia*. In particular, he maintains that because section 115-4.1(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(a) (West 2012)), allows only for the State to request a trial *in absentia* and to affirmatively prove that a defendant willfully avoided trial before a trial in defendant's absence can be conducted, the circuit court erred when it assumed the State's role and *sua sponte* ordered a trial *in absentia*.

¶ 12 A criminal defendant has a constitutional right to be present at all stages of a trial and to confront all witnesses against him. U.S. Const., amend VI; Ill. Const. 1970, art. I, § 8; *People v. Smith*, 188 Ill. 2d 335, 340 (1999). A defendant waives this right when he voluntarily absents himself from trial. *Id*. at 341. A trial court's decision to proceed with a trial *in absentia* will not be reversed unless the court abused its discretion. *Id*.

¶ 13 When a defendant enters a plea of not guilty, the trial court shall advise him that if he is released on bond and fails to make required court appearances, his failure to appear constitutes waiver of the right to confront witnesses and permits the trial court to proceed in defendant's absence. 725 ILCS 5/113-4(e) (West 2012). When a defendant is properly admonished pursuant to section 113-4(e) of the Code, section 115-4.1(a) directs how a court should proceed where a defendant willfully absents himself from trial. *People v. Eppinger*, 2013 IL 114121, ¶ 23. In relevant part, section 115-4.1(a) states:

> "When a defendant after arrest and an initial court appearance for a non-capital felony or a misdemeanor, fails to appear for trial, at the request of the State and after the State has affirmatively proven through substantial evidence that defendant is willfully avoiding trial, the court may commence trial in the absence of the defendant." 725 ILCS 5/115-4.1(a) (West 2012).

To establish a *prima facie* case of a defendant's willful avoidance, "the State must demonstrate that the defendant: (1) was advised of the trial date; (2) was advised that failure to appear could result in trial *in absentia*; and (3) did not appear for trial when the case was called." *Smith*, 188 Ill. 2d at 343.

¶ 14 Here, the record clearly shows a *prima facie* case that defendant was willfully absent from trial. On August 2, 2012, the court advised defendant that failure to appear could result in a trial *in absentia* when it stated:

> "[Defendant], you're currently on bond. As a condition of your bond, you must appear for each court date. If you fail to appear, a warrant will be issued for your arrest. If your case is set for trial and you don't appear, that means you will be waiving your right to confront or cross examine witnesses or present witnesses on your behalf at trial.

Should you be found guilty or sentenced, if you don't appear, you could also be sentenced in your absence."

When the court asked defendant if he understood, he responded positively.

¶ 15 The record further indicates that defendant was present in court on his scheduled trial date of June 3, 2013. The following conversation occurred on that date:

"[Defense attorney]: [Defendant] asked me to relay that he has some unfinished business and asked the court for couple of days to finish that up.

THE COURT: Either that or we can go to trial today. You had a month.

DEFENDANT: I know, Your Honor. I haven't said anything this whole trial, Your Honor. I'm kind of just scared.

***

DEFENDANT: The facts [*sic*] is, I just need this twenty-four hours to set everything up to make sure my family is straight. Can I kiss my baby good-bye and I never miss court. I always came. I –

THE COURT: We can pick the jury today."

After the case was passed momentarily, the following exchange occurred:

"[Defense attorney]: As you can see, [defendant] is not standing next to me. I tried to catch him as he ran out the front door.

THE COURT: State?

[Assistant State's Attorney]: State is ready.

THE COURT: Do you want to pick a trial *in absentia*?

[Defense attorney]: I have a lot of money up in bond. I would do that right now.

***

THE COURT: Just so it is clear for any reviewing court, [defendant's] case has been continued for jury trial a couple of different times. The last court date it was continued today for picking a jury. The court was engaged and both sides were ready.

Earlier today *** the attorney for the defendant, had asked whether or not an offer that I presented to defendant on a prior court date would still be open if he wanted to plead guilty. I told him that it would.

They were asking for a stay of mittimus, which I denied. I told defendant that we will be proceeding to trial today. Defendant was properly admonished of his trial *in absentia* rights on this matter ***.

It is noted on the court file and I told defendant himself that he was going to trial today. Defendant apparently has chosen not to come back to court. His mother is in court.

[Defense attorney], have you had any contact with your client since the case was last called?

[Defense attorney]: I did. Not since it was last called. Earlier today, I had spoken to him on the phone. I actually chased him out of the courthouse. I followed him out. He wouldn't return. I talked to him on him on the phone. His girlfriend gave me a new number and he said he was not coming back.

THE COURT: You are willing to proceed on this right now, is that correct, [defense attorney]?

[Defense attorney]: Yes.

THE COURT: I think the record has been made. Defendant is voluntarily absenting himself from going to trial in this matter. The case was set for trial and I

> specifically told him it is going to trial. He has chose[n] not to appear and we will pick a jury and will proceed on the case."

¶ 16 Despite the above facts showing that the elements for a *prima facie* case of willful absence were established, defendant maintains that the trial court improperly *sua sponte* ordered his trial *in absentia* contrary to the requirements of section 115-4.1(a) of the Code, which provided that the State must request a trial *in absentia* and affirmatively prove that a defendant willfully avoided trial. We disagree with defendant's position that the trial court *sua sponte* ordered the trial *in absentia*. Instead, we agree with the State that it was defendant's own actions, his communication with the court, and defense counsel's representations to the court on the record that compelled the court to exercise its discretion and hold a trial in defendant's absence.

¶ 17 In this way, we find *Smith*, 188 Ill. 2d at 335, instructive to the case at bar. In that case, the defendant was charged with unlawful possession of a controlled substance. She was not present on her trial date, and the court asked the State if it wanted to proceed *in absentia*, and it replied affirmatively. Defense counsel objected, but the trial court overruled the objection, noting that the defendant had been advised that she could be tried *in absentia*. Thereafter, both the State and defense counsel gave opening statements, and, while the State was eliciting the direct testimony of its first witness, the defendant entered the courtroom. After the State rested, defendant testified on her own behalf. She was ultimately found guilty. In affirming the defendant's conviction, the supreme court held that:

> "the State had established a *prima facie* case of the defendant's willful absence from trial, and that defendant introduced no evidence to rebut the State's case to show that her absence was not her fault or due to circumstances beyond her control. We stress that the determination of whether a defendant is willfully absent from his or her trial is a

> matter within the sound discretion of the trial court. We emphasize that each case must be judged on the facts that exist at the time the trial court makes the decision whether to proceed in the defendant's absence." *Id*. at 349-50.

Defendant's actions here are even more obvious that he willfully avoided his trial than the actions of the defendant in *Smith*. Defendant told the court before trial that he was "scared," fled the courtroom while the matter was passed, and then never returned during the trial. Significantly, defense counsel agreed to proceed to trial in defendant's absence, acknowledging that he did not believe defendant would return.

¶ 18 In reaching this conclusion, we find *People v. Martinez*, 2011 Ill App (2d) 100498, *rev'd on other grounds, Martinez v. Illinois*, _ U.S. _ 134 S. Ct. 2070 (2014), relied on by defendant, inapplicable to the case at bar. In *Martinez*, the State requested a continuance because it did not have two material witnesses present, and the defense requested a continuance because the defendant had not yet arrived in court. The trial court nevertheless started the jury trial and the State failed to present any evidence. The defense moved for directed findings of not guilty on the charged counts, which the court granted. The State appealed, and the second district of this court found that "[t]he trial court abused its discretion in forcing the parties to trial when each had a sound statutory basis for continuance." *Martinez*, 2011 Ill App (2d) 100498, ¶ 52. The court further stated that, "since the State did not attempt, under section 115-4.1 of the Code, to establish grounds for trying defendant *in absentia*, it was error for the trial court to decide to proceed with jury selection." (citations omitted.) *Id*.

¶ 19 Here, as pointed out by the State, the matter at bar is completely different where not only did the State wish to proceed with defendant's trial *in absentia*, but defendant's own attorney wanted to do so as well. Defendant's explicit actions and representations made it obvious to both

parties and the court that he had willfully avoided trial. Therefore, the trial court did not err in holding defendant's trial in his absence. Moreover, despite defendant's contentions to the contrary, *Martinez* does not stand for the proposition that trial *in absentia* cannot occur without an explicit request by the State, or that a trial court improperly departs from section 115-4.1(a) of the Code when it recognizes that a defendant who literally runs from the courthouse as trial is about to start has voluntarily and willfully abandoned his right to be present.

¶ 20 Defendant next contends that the trial court violated his constitutional right to due process when it merged a second count of aggravated fleeing or attempting to elude a peace officer into the first count where the State had dismissed the second count prior to trial, and where the jury was not charged with finding him guilty of two separate counts of aggravated fleeing or attempting to elude a peace officer.

¶ 21 We note that defendant concedes that he waived this issue by failing to object to this alleged error at trial or raise it in a posttrial motion. He maintains that we should review this issue under the second prong of the plain error doctrine because convicting him of a dismissed charge affected the fairness of his trial and challenged the integrity of the judicial process. See *People v. Boyd*, 307 Ill. App. 3d 991, 998 (1999), citing *People v. Smith*, 183 Ill. 2d 425, 427 (1998) (convictions which should have been vacated by the trial court affect substantial rights and constitute plain error). However, the first step in the plain error analysis is to determine whether error occurred at all. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Here, we agree with the State that defendant has failed to show that any error occurred.

¶ 22 It is well-established that the oral pronouncement of the judge, rather than the written order, is the judgment of the court, and that where the oral assertion and the written judgment conflict, the oral assertion controls. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). "However,

often apparent inconsistencies may be resolved by examining the record as a whole to determine whether the written order expresses the intent of the judge's oral pronouncement, or conforms to the oral pronouncement's sense and meaning but is merely set forth with greater specificity. Where looking at the record as a whole, if the written order is *not* inconsistent with the intent, sense and meaning of the circuit court's oral pronouncement, the written order will be enforced." (Emphasis in original.) *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993).

¶ 23 Here, the record shows defendant was properly sentenced to one count of aggravated fleeing or attempting to elude a peace officer. Defendant was initially indicted on two counts of aggravating fleeing or attempting to elude a peace officer. However, the State proceeded only on Count 1, which alleged that defendant disobeyed two or more traffic control devices. During the State's motion *in limine*, it referenced the dismissal of Count 2, reminding the court that it dismissed one of the counts and would not "argue anything with respect to the dismissing of the second charge." Moreover, the State did not present evidence with respect to Count 2, nor did it reference that count during its closing argument. Significantly, the jury was only instructed on Count 1 and found him guilty of that count. Nevertheless, in sentencing defendant to seven years' imprisonment, the court stated, "Count 2 will merge into Count 1. Those are both Class 3 felonies. You'll be sentenced on the first count." Finally, the mittimus accurately reflects that defendant was only sentenced on Count 1.

¶ 24 We agree with the State that despite the trial court's statement that it was merging the two counts, the entire record proves that there was no second count to merge and that the trial court merely misspoke. This misstatement, in the context of the trial court's sentencing ruling, did not establish any error or affect defendant's sentence. Instead, the whole pretrial, jury trial, and posttrial proceedings focused solely on defendant's one count of aggravated fleeing or attempting

to elude a peace officer based on the disobedience of two traffic control devices. In so finding, we note that the cases relied on by defendant are distinguishable because they involved the State wrongly proceeding on previously *nolle prossed* counts. *People v. Hughes*, 2012 IL 112817, ¶ 26; *People v. Stafford*, 325 Ill. App. 3d 1069, 1073-74 (2001).

¶ 25 Defendant finally contends that pursuant to section 110-14(a) of the Code (725 ILCS 5/110-14(a) (West 2012)), he is entitled to a $5 per-day custody credit to offset the $2 public defender records automation fee (55 ILCS 5/3-4012 (West 2012)), imposed by the trial court. In so arguing, defendant represents that the $2 public defender records automation fee is actually a fine, and thus subject to *per diem* credit for the time he served in presentence custody.

¶ 26 We do not need to consider whether the $2 public defender records automation assessment is a fine or a fee in this case because, despite the State's assertion that defendant was represented by the Public Defender's Office at the time of trial, defendant correctly notes in his opening and reply briefs that he was represented by private counsel at all times in the proceedings in this matter. Therefore, the $2 public defender records automation assessment must be vacated. See 55 ILCS 5/3-4012 (West 2012) (stating that the Cook County Public Defender shall be entitled to a $2 fee to be paid by the defendant on a judgment of guilty to discharge the expenses of its office for establishing and maintaining automated record keeping systems).

¶ 27 For the foregoing reasons, we vacate the $2 public defender records automation fee, and affirm the trial court's judgment in all other respects.

¶ 28 Affirmed in part and vacated in part.