2015 IL App (4th) 130643-U

NO. 4-13-0643

FILED
May 20, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
STEPHEN J. McCUNE	)	No. 09CF653
Defendant-Appellant.	)	
	)	Honorable
	)	William O. Mays,
	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court was not required to resentence defendant under the terms of his initial plea agreement following the revocation of his probation.

(2) Defendant was entitled to monetary credit against his fines for time spent in presentencing custody.

¶ 2 In May 2010, pursuant to a fully negotiated plea agreement, defendant, Stephen J. McCune, pleaded guilty to the offense of unlawful possession with intent to deliver between 30 and 500 grams of cannabis, a Class 3 felony (720 ILCS 550/5(d) (West 2008)). In exchange for his guilty plea, the State agreed to seek a prison sentence of no more than five years. The trial court sentenced defendant to 30 months' probation, 360 days' periodic imprisonment, and a number of monetary assessments including a $250 street-value fine and a $500 drug assessment. Defendant's probation was later revoked and the trial court resentenced him to six years in prison.

¶ 3 On appeal, defendant asserts that (1) his six-year prison sentence must be reduced to five years because he pleaded guilty in exchange for a sentence of no more than five years in prison, and (2) he is entitled to a monetary credit toward his fines for the 179 days served in presentencing custody. We affirm as modified.

¶ 4 I. BACKGROUND

¶ 5 On November 12, 2009, the State charged defendant, by indictment, with unlawful possession with intent to deliver between 30 and 500 grams of cannabis, a Class 3 felony (720 ILCS 550/5(d) (West 2008)), after the police recovered 11 bags of cannabis from his home, weighing a total of approximately 250 grams. On May 13, 2010, defendant pleaded guilty pursuant to the fully negotiated plea agreement. In exchange for his guilty plea, the State agreed to a five-year prison cap. Prior to accepting defendant's guilty plea, the trial court admonished defendant as follows:

> "[T]he negotiation, as I understand it, is you are going to be entering a plea of guilty to the offense, a Class 3 offense of unlawful possession with the intent to deliver cannabis.
>
> Without the negotiation, you would be eligible for a term between two and ten years in the Illinois Department of Corrections, a fine of up to $50,000. ***
>
> Okay. You understand what the charge is and the possible penalties?"

Defendant stated he understood. The court continued as follows:

> "The negotiation, however, is in exchange for your plea to that, I would be bound to sentence you to a term of no more than five

years in the [D]epartment of [C]orrections. *** [B]ut all sentencing alternatives are available to me, including probation."

Again, defendant stated he understood. The court ordered a presentence investigation report and continued the matter for sentencing.

¶ 6 At the July 8, 2010, sentencing hearing, the State sought a sentence of five years in prison, noting defendant's lengthy criminal history, including a conviction for the same offense to which he pleaded guilty in the instant case which resulted in a five-year prison sentence. Defendant sought a term of probation. The trial court sentenced defendant to 30 months' probation, 360 days' periodic imprisonment, and a number of monetary assessments including a $250 street-value fine and a $500 drug assessment.

¶ 7 On June 6, 2012, the State filed a petition to revoke defendant's probation, alleging that defendant violated a number of the terms and conditions of his probation. At a September 5, 2012, hearing, defendant admitted the allegations contained in the State's petition to revoke probation. Prior to accepting defendant's admission, the trial court addressed defendant as follows: "You understand there's no agreement as to the sentence that you're going to receive, and you'd be resentenced pursuant to the Class 3 felony of unlawful possession with the intent to deliver cannabis?" Defendant responded, "Yes, Your Honor."

¶ 8 At the June 12, 2013, resentencing hearing, the State sought a seven-year prison sentence. Defendant asked for another term of probation. The trial court resentenced defendant to six years in prison, noting that defendant was "sentenced to the Department of Corrections on basically the same offense for a period of five years previously. It seems to me the sentence should be higher than that. Therefore, it's six years in the Department of Corrections."

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant asserts that (1) his six-year prison sentence must be reduced to five years because he pleaded guilty in exchange for a sentence of no more than five years in prison, and (2) he is entitled to a monetary credit toward his fines for the 179 days served in presentencing custody.

¶ 12 A. Propriety of Defendant's Six-Year Prison Sentence

¶ 13 Defendant first asserts that his six-year prison sentence must be reduced because it exceeds the 5-year cap contemplated by the original fully negotiated plea agreement.

¶ 14 Generally, to preserve a sentencing issue for appeal, a defendant must raise the issue in a postsentencing motion. 730 ILCS 5/5-4.5-50(d) (West 2012). Defendant concedes that he did not file a postsentencing motion in this case, but he asks this court to consider the issue under the plain-error doctrine. See *People v. McBride*, 395 Ill. App. 3d 204, 208, 916 N.E.2d 1282, 1286 (2009) ("an improper increase in sentence is a matter affecting a defendant's substantial rights [and] *** is reviewable as plain error"); see also Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court."). Because we find no error in the trial court's sentence, we decline to do so. See *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010) (Only if error occurred will we consider whether either of the two prongs of the plain-error doctrine has been satisfied.). Alternatively, defendant contends that his sentence is void because he was not subject to the extended-term sentence he received.

See *People v. Thompson*, 209 Ill. 2d 19, 25, 805 N.E.2d 1200, 1203 (2004) ("a void order may be attacked at any time or in any court, either directly or collaterally").

¶ 15 Defendant cites *People v. Whitfield*, 217 Ill. 2d 177, 189, 840 N.E.2d 658, 666 (2005) (quoting *Santobello v. New York*, 404 U.S. 257, 262 (1971)) for the proposition that, " 'when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled.' " According to defendant, he is entitled to the benefit of his plea bargain and he asserts that the appropriate remedy is for this court to reduce his prison sentence from six years to five years.

¶ 16 Defendant claims that his case is similar to *People v. Taylor*, 368 Ill. App. 3d 703, 709, 859 N.E.2d 20, 26 (2006), where the record "[did] not demonstrate that, when he pleaded guilty, defendant knew that extended-term sentencing was a possibility." In *Taylor*, the defendant pleaded guilty to aggravated battery and criminal trespass to residence, pursuant to a fully negotiated plea agreement and was sentenced to 30 months' probation as provided for by the agreement. *Id*. at 704-05, 859 N.E.2d at 22-23. Prior to accepting the defendant's guilty plea, the trial court admonished him that the two offenses to which he was pleading guilty were punishable by up to 2 to 5 years and up to 1 to 3 years in prison, respectively, and "[*i*]*f* extended term applies," the prison terms would be 2 to 10 years and 1 to 6 years. (Emphasis added.) *Id*. at 704, 859 N.E.2d at 22. The defendant's probation was later revoked and he was resentenced to extended-term sentences. *Id*. at 706, 859 N.E.2d at 24. On appeal, the defendant argued, in relevant part, that the trial court erred in imposing extended-term sentences because he was not aware extended-term sentences were a possibility at the time he pleaded guilty. *Id*. at 706-07, 859 N.E.2d at 24. The Second District agreed, noting that the type of "conditional, tentative admonishment" given by the trial court "leaves a defendant to speculate whether an extended-

term sentence is indeed possible." *Id*. at 708, 859 N.E.2d at 25 (citing 730 ILCS 5/5-8-2(b) (West 2004), which states, " 'If the conviction was by plea, it shall appear on the record that the plea was entered with the defendant's knowledge that [an extended-term sentence] was a possibility. If it does not appear on the record, the defendant shall not be subject to such a sentence unless he is first given an opportunity to withdraw his plea without prejudice.' "). Accordingly, the court reduced the defendant's sentences to the maximum nonextended terms provided for by statute. *Id*. at 709, 859 N.E.2d at 26.

¶ 17 The instant case is distinguishable from *Taylor*. Here, the trial court's admonishment regarding defendant's eligibility for extended-term sentencing was not conditioned on *whether* defendant was extended-term eligible, nor was the court uncertain regarding defendant's eligibility for extended-term sentences. The court specifically admonished defendant that he *was* eligible for an extended-term sentence of 2 to 10 years, but that under the terms of the agreement, the court "would be bound to sentence [him] to a term of no more than five years" in prison. The admonishments in this case were not the type of "conditional, tentative admonishments" at issue in *Taylor*.

¶ 18 We further reject defendant's argument that he was not eligible for an extended-term sentence because the terms of his plea agreement capped any prison sentence at five years. Although cited by neither party, we find *People v. Landers*, 372 Ill. App. 3d 639, 867 N.E.2d 1184 (2007), instructive. In *Landers*, the defendant pleaded guilty pursuant to a fully negotiated plea agreement in exchange for a maximum sentence of three years in prison. *Id*. at 639, 867 N.E.2d at 1185. The trial court informed the defendant that if she were to proceed to trial on the Class 4 felony offense of which she was charged, she would be eligible for an extended-term sentence of 1 to 6 years in prison. *Id*. at 640, 867 N.E.2d at 1185. The defendant stated that she

understood the possible penalties. *Id*. Thereafter, the court accepted her guilty plea and sentenced her to a term of probation. *Id*. The court later revoked the defendant's probation and resentenced her to 42 months in prison. *Id*. at 640, 867 N.E.2d at 1185-86.

¶ 19 On appeal, the *Landers*' defendant asserted that the trial court lacked the authority to resentence her to 42 months in prison "because [her] original plea agreement was made in consideration of a sentence of no more than three years' imprisonment." *Id*. at 640, 867 N.E.2d at 1186. This court found the trial court did not abuse its discretion in resentencing the defendant to 42 months in prison where she was admonished during her guilty-plea hearing of the maximum penalty for a Class 4 felony, including the extended-term penalty for which she was eligible. *Id*. at 641, 867 N.E.2d at 1186. We noted that the "[d]efendant cannot now argue she did not receive the benefit of her bargain when she herself failed to live up to her end of that bargain." *Id*.

¶ 20 As in *Landers*, defendant in this case was admonished of the maximum penalty available for the class of offense of which he was charged, including the extended-term sentence for which he was eligible, at his guilty-plea hearing. Further, prior to accepting defendant's admission to the State's petition to revoke probation, the trial court addressed him as follows: "You understand there's no agreement as to the sentence that you're going to receive, and you'd be resentenced pursuant to the Class 3 felony of unlawful possession with the intent to deliver cannabis?" Defendant stated he understood. Moreover, the plea agreement at issue here did not provide for defendant's sentence in the event he was sentenced to a term of probation that was later revoked. Thus, defendant's argument that his prison sentence must be reduced to five years based on his initial plea agreement—the terms of which he violated—is unpersuasive. Based on

the above, the trial court did not abuse its discretion in resentencing defendant to six years in prison and the sentence is not void as claimed by defendant.

¶ 21 B. Monetary Credit

¶ 22 Defendant next asserts that he is entitled to monetary credit toward his fines for the 179 days he served in presentencing custody. The State concedes that defendant is entitled to full credit against his $250 street-value fine and $500 drug assessment. We accept the State's concession.

¶ 23 Section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)) provides as follows:

> "Any 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. However, in no case shall the amount so allowed or credited exceed the amount of the fine."

At sentencing, defendant was ordered to pay a $250 street-value fine and a $500 drug assessment, both of which are fines subject to offset by presentence custody credit. See *People v. Jones*, 223 Ill. 2d 569, 592, 861 N.E.2d 967, 981 (2006) (drug assessment); *People v. Warren*, 2014 IL App (4th) 120721, ¶ 150, 16 N.E.3d 13 (street-value fine). Defendant spent 179 days in presentencing custody and is entitled to a credit of up to $895 ($5 x 179) against his fines. The record does not show credit was applied to offset these fines. Thus, remand is required.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm as modified and remand this cause to the trial court for issuance of an amended sentencing judgment to reflect application of defendant's

monetary credit to the $250 street-value fine and the $500 drug assessment. As part of our judgment, because the State successfully defended a portion of this appeal, we award 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)).

¶ 26 Affirmed as modified; cause remanded with directions.