2015 IL App (1st) 133498-U

SIXTH DIVISION
January 8, 2016

No. 1-13-3498

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. 11 CR 11449
	)	
DARIUS BROWN,	)	Honorable
	)	Rosemary G. Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices HOFFMAN and DELORT concurred in the judgment.

O R D E R

¶ 1 *Held*: We vacate one of defendant's convictions for aggravated battery to a peace officer under the one-act, one-crime rule where the indictment did not apportion defendant's separate acts so that each formed the basis for a separate offense; fines and fees order modified.

¶ 2 Following a bench trial, defendant Darius Brown was convicted of two counts of aggravated battery to a peace officer and one count of resisting arrest, and sentenced to three years for each of the aggravated battery convictions and one year for resisting arrest, all terms to

be served concurrently. On appeal, defendant contends, and the State concedes, that one of his convictions for aggravated battery to a peace officer should be vacated under the one-act, one-crime rule where the information asserted that these convictions were premised on the same conduct. Defendant also contests certain fines and fees, which the State also concedes.

¶ 3 By information, defendant was charged, in pertinent part, with two counts of aggravated battery. Count 2 stated that on or about July 6, 2011, defendant, in committing a battery, "knowingly caused bodily harm to Sean Najm, to wit: [defendant] struck Sean Najm about the body and [defendant] knew Sean Najm to be a peace officer ***." Count 3 stated that on or about July 6, 2011, defendant, in committing a battery, "knowingly made physical contact of an insulting or provoking nature with Sean Najm, to wit: [defendant] struck Sean Najm about the body and [defendant] knew Sean Najm to be a peace officer ***."

¶ 4 The evidence at trial established that Officer Najm and several other officers, who were all in uniform and marked squad cars, responded to a call about a loud party at 4801 South Shields Avenue in Chicago about 2 a.m. on July 6, 2011. When the officers arrived, there were 100 to 200 people on the street, sidewalk, and in a vacant lot. The officers dispersed the party, and were able to clear the lot of all cars, except for defendant's vehicle because he refused to move it to a legal parking spot. The officers looked inside of defendant's vehicle and saw a clear bottle of suspect cannabis. The officers conducted a surveillance of the vehicle, and when they saw defendant get inside, they pulled their squad car behind defendant's vehicle. Defendant exited his vehicle and began walking away. The officers got out of their squad car and ordered defendant to stop, but he continued walking away. The officers grabbed defendant, but he pulled away and shoved Najm in the chest. Defendant was eventually placed in the backseat of the

squad car where he kicked Najm in the chest, causing pain and a swollen red area on his chest. Defendant denied pushing and kicking Najm, and testified that police beat and choked him.

¶ 5 Following trial, the court found the evidence sufficient to prove both counts of aggravated battery of a peace officer and one count of resisting arrest. In so finding, the court stated that the State proved defendant pushed and kicked Officer Najm, and that there was insulting or provoking contact and bodily harm.

¶ 6 On appeal, defendant contends, and the State agrees, that the trial court erred in convicting him on both counts of aggravated battery where the convictions were based on the same conduct, *i.e.*, striking Officer Najm about the body.

¶ 7 Defendant concedes that he waived this issue because he did not object at trial or include the issue in his posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, we will review this issue under the second prong of the plain error doctrine. *People v. Lee*, 213 Ill. 2d 218, 226 (2004).

¶ 8 The one-act, one-crime doctrine prohibits multiple convictions when they are carved from precisely the same physical act. *People v. Miller*, 238 Ill. 2d 161, 165 (2010); *People v. King*, 66 Ill. 2d 551, 566 (1977). However, even when multiple acts could support multiple convictions, the charging instrument must demonstrate that the State intended to treat the conduct charged as such. *People v. Crespo*, 203 Ill. 2d 335, 342-45 (2001).

¶ 9 Here, the evidence showed that defendant pushed and kicked Officer Najm, and that each strike constituted a separate and distinct act. However, the push and kick were not separately charged as multiple offenses. Instead, both aggravated battery counts simply stated that defendant struck Najm about the body. Therefore, under *Crespo*, 203 Ill. 2d 343, defendant's two convictions for aggravated battery violated the one-act, one-crime doctrine. See *People v.*

James, 362 Ill. App. 3d 250, 256 (2005) (convictions for aggravated domestic battery and attempted murder cannot be sustained where the State did not charge multiple stabbings as separate acts).

¶ 10 Generally, when multiple convictions are obtained for offenses arising out of a single course of conduct, as in this case, the conviction for the less serious offense must be vacated. *Lee*, 213 Ill. 2d 226-27. Where the reviewing court is unable to determine the most serious offense, a remand to the trial court is required so that the trial court can make this determination. *People v. Artis*, 232 Ill. 2d 156, 177 (2009). However, under the circumstances presented, we find remand is unnecessary since both of defendant's convictions were for the same offense, and defendant received identical concurrent sentences for each conviction. See *People v. Price*, 221 Ill. 2d 182, 195 (2006) (holding remand was unnecessary where one-act, one-crime principles required vacation of multiple theft convictions since both the statutory penalty and the concurrent sentences imposed were identical). Accordingly, we accept the State's suggestion and vacate defendant's conviction and sentence in connection with Count 3.

¶ 11 Defendant next contends, and the State concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)), must be vacated. We agree that the $5 electronic citation fee cannot be imposed because a defendant must pay that fee only in a "traffic, misdemeanor, municipal ordinance, or conservation case" (705 ILCS 105/27.3e (West 2012)), and, as aggravated battery and resisting arrest are not one of the offenses enumerated in the statute, we vacate the $5 electronic citation fee.

¶ 12 Defendant finally contends, and the State agrees, that he spent time in custody before sentencing and is entitled to a $5 per-day custody credit to offset fines imposed by the trial court pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963. 725 ILCS 5/110-14(a)

(West 2012). Here, the fines imposed against defendant included a $10 mental health court assessment, a $5 youth diversion/peer court assessment, a $5 drug court assessment, and a $30 children's advocacy assessment. 55 ILCS 5/5-1101(d-5),(e),(f),(f-5) (West 2012). Because fines are subject to reduction (*People v. Jones*, 223 Ill. 2d 569, 587-599 (2006)), defendant is entitled to a pre-sentence incarceration credit to offset them. Defendant correctly asserts that he served 196 days in pre-sentencing custody, entitling him to a pre-sentence custody credit of up to $980. Since this credit should be applied to the above fines, his fines and fees order should be reduced by $50. After applying defendant's $50 pre-sentence custody credit and vacating the $5 electronic citation fee, his fines and fees order is reduced from $479 to $424.

¶ 13 For the foregoing reasons, we vacate defendant's aggravated battery conviction in Count 3 because it was carved from the same physical act as his aggravated battery conviction in Count 2; vacate the $5 electronic citation fee; find that defendant is entitled to a $5 per day credit to offset the mental health court fine, youth diversion/peer court fine, drug court fine, and children's advocacy assessment; and affirm the judgment in all other respects.

¶ 14 Affirmed as modified.