2014 IL App (4th) 130001-U

NO. 4-13-0001

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 3, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
HEITH E. EVANS,	)	No. 12CF1
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State presented sufficient evidence for a reasonable jury to determine defendant's driving under the influence of alcohol was the proximate cause of the accident which resulted in the victim's death.

(2) The record is insufficient to determine whether trial counsel was ineffective for failing to file a motion to suppress evidence on the grounds that police lacked probable cause for demanding blood and urine samples from defendant.

(3) Defendant's sentence was not excessive and the sentencing court did not improperly rely upon an inherent factor of the offense as a factor in aggravation in fashioning defendant's sentence.

(4) We vacate fines imposed by the circuit clerk and remand to the trial court to reimpose the mandatory fines and to amend the sentencing judgment to reflect the appropriate amount of monetary credit toward the fines imposed.

¶ 2 Defendant appeals from the trial court's judgment entered upon the jury's verdict of guilty for the offense of aggravated driving under the influence of alcohol (DUI) and his 10-year sentence imposed upon his conviction. In particular, defendant claims (1) the evidence was

insufficient to prove him guilty of the offense, (2) the police officer lacked probable cause to demand a blood and urine sample from defendant and his trial counsel was ineffective for failing to make such a challenge, and (3) his 10-year sentence was excessive as evidenced by the trial court's use of an inherent element of the offense as a factor in aggravation. The State claims certain assessments must be vacated and properly imposed by the trial court, and the appropriate amount of monetary credit should be awarded toward those assessments. We vacate the assessments imposed at sentencing and remand for the proper imposition of fines, fees, and monetary credit. We otherwise affirm the court's judgment.

¶ 3 I. BACKGROUND

¶ 4 On January 5, 2012, a grand jury indicted defendant on one count of aggravated DUI, alleging defendant "was involved in a motor vehicle accident causing the death of Jessica M. Williamson, a passenger on the defendant's motorcycle, and said violation was the proximate cause of the death of Jessica M. Williamson, in violation of 625 ILCS 5/11-501(d)(1)(F) [(West 2010)]." A few days before trial, the State filed an information, charging defendant with a second count of aggravated DUI, alleging he "knowingly drove a motor vehicle, upon a highway in Woodford County, Illinois, at a time when he had an alcohol concentration in his blood of .08 or more and was involved in a motor vehicle accident causing the death of Jessica M. Williamson, a passenger on the defendant's motorcycle, and said violation was the proximate cause of the death of Jessica M. Williamson, in violation of 625 ILCS 5/11-501(d)(1)(F) [(West 2010)]."

¶ 5 The following evidence was presented at defendant's September 2012 jury trial. The State called as witnesses Sara Althiser and Jeremiah Althiser. Sara and Jeremiah, a married couple, each testified they participated in a charity motorcycle ride on the evening of September

30, 2011. Sara rode as a passenger on her husband Jeremiah's motorcycle. The ride, which included approximately 50 motorcycles, began in East Peoria. The first stop was a tavern in Metamora. After a few hours, they traveled to another tavern, Barbie's, in Metamora. Jessica Williamson, Jeremiah's stepsister, participated in the ride. At approximately 10 p.m., most of the group left Barbie's. The motorcycles traveled as a group heading west on Route 116, an east-west, four-lane highway. Williamson rode from Barbie's with defendant on his motorcycle, though she had not ridden with him earlier.

¶ 6 Once on Route 116, Jeremiah's motorcycle was traveling in the left lane with Timothy "TJ" Massey's motorcycle slightly ahead of him on the right, but also in the left lane. Sara said most of the motorcycles were behind them. The weather was cool and the pavement was dry. Jeremiah said he heard a collision and saw "a bunch of stuff in front of [him]." He decided to "ditch the bike" to prevent colliding with whatever was ahead of him. He hit the brake and let the motorcycle slide, knowing the motorcycle would go toward the guardrail in the median. He and Sara hit the pavement and rolled. Jeremiah briefly lost consciousness. They both laid at the side of the road until the ambulance arrived. According to Jeremiah, Massey's motorcycle was somewhere in front of him but he did not know where.

¶ 7 Woodford County Sheriff's Deputy Marc Wright testified he responded to the accident scene where the following three motorcycles and five individuals, three males and two females, were involved: (1) Massey, who was alone on his motorcycle, (2) Sara and Jeremiah on their motorcycle, and (3) defendant and Williamson, who were on defendant's motorcycle. Williamson died at the scene. When he arrived, Wright began to evaluate the scene. Wright was a certified accident reconstructionist, but he was not at the scene in that capacity. Rather, he was there to assist the Illinois State Police. Wright learned some individuals from the larger group of

riders had moved the motorcycles to the side of the road, making it difficult to determine what exactly had caused the accident. However, he and Illinois State Police Trooper Rodney Slayback concluded that defendant's foot peg hit Massey's motorcycle from behind in the crank case, causing fluid to leak onto the pavement and onto the front of defendant's motorcycle. Deputy Wright testified it was "pretty clear that you could see where the one motorcycle went up and hit the other one on the side, and that's where all the fluid came from." The lead rider in the larger pack of motorcycles following Massey, Althiser, and defendant said he saw sparks flying but did not see the accident. No other witnesses could say what had occurred.

¶ 8 Ashley Aeschliman testified she was working as a nursing student in the emergency room (ER) at OSF St. Francis Hospital in Peoria where the trauma patients were taken on the night of the incident. Aeschliman described defendant as "very upset" and "slightly combative." She said, as she was cleaning his face, she "could smell the alcohol on his breath." She said defendant told ER personnel he had drank a "12-pack."

¶ 9 Julie Barron, a nurse in the ER at OSF St. Francis on the night of the incident, testified that Illinois State Trooper Cynthia Pfau told her to "draw a DUI kit" on defendant, which includes a blood draw and a urine sample. Barron used a catheter to retrieve defendant's urine sample. According to Barron's notes, defendant was fighting the staff regarding treatment and refusing treatment. Barron also described defendant as "confused," as he would first deny having been in a motorcycle accident, then later stated he remembered it. Defendant was given Haldol, a sedative pain medication.

¶ 10 Shannon George, the State's expert witness in the field of toxicology, testified he received the sealed DUI kit containing defendant's blood and urine. He conducted an analysis of the samples and discovered defendant's blood had an alcohol concentration of .128.

¶ 11 Trooper Pfau testified she was dispatched to OSF hospital in response to the motorcycle accident. She saw Sara, Jeremiah, and defendant arrive. Defendant was "fighting and screaming." Pfau obtained defendant's wallet from his pants' pocket. Pfau asked Barron to obtain a DUI kit from defendant because when she spoke with him, she noticed a strong odor of alcohol. She watched as the nurse collected the blood and urine samples and placed them in the sealed containers.

¶ 12 On cross-examination, Pfau said defendant seemed confused because he said he had been beaten up by his friends. With regard to defendant's arrest, Pfau said she was unable to put handcuffs on him due to his injuries. She did not read the warning to motorist to defendant after placing him under arrest but before requesting the blood and urine samples. She said she "made a mistake." She acknowledged she drew blood and urine "contrary to state law." A few hours after the accident, Trooper Slayback appeared at the hospital. Pfau advised Slayback of her mistake. Slayback went to defendant's room and read him the warning to motorist, "trying to correct [Pfau's] mistake."

¶ 13 Larry Lechner testified he left Barbie's with the group of motorcycles at approximately 10 p.m. Lechner led the group as they traveled on Route 116. He saw sparks ahead and then came upon the accident where he saw three motorcycles and five people in the road.

¶ 14 Massey testified as to his version of the accident. He left Barbie's on his motorcycle with the Althisers. He was traveling on Route 116, a four-lane highway, in the left lane. The Althisers were also in the left lane staggered behind him. Massey said he felt "a thump" on his motorcycle. He said he got hit but he did not "go down." He coasted to a stop, got off his motorcycle, and walked back toward where the collision occurred. He said his

motorcycle was damaged primarily on the back left, but some damage to the right side. He said the fiberglass in the back broke and the crash bar was bent in the front. He said he did not notice any leaking fluid.

¶ 15 The State called Trooper Slayback, who testified he responded to the site of the motorcycle accident. When he arrived, he saw emergency medical personnel, as well as other police officers. He saw four injured individuals and three motorcycles he believed were involved. The motorcycles had been moved from the original crash position to the shoulder of the road. Defendant's motorcycle sustained damage to the engine, the exhaust, and the right foot peg. There was fluid on the engine but the motorcycle did not seem to be leaking fluid. The Althisers' motorcycle sustained damage to the engine. Massey's motorcycle had "significant damage to the left rear. The rear saddle bag area was destroyed." Slayback noticed fluid markings approximately 10 to 15 feet from the point of impact indicated by scratches and gouges within the roadway. He saw a black impact mark on the lower part of the guardrail in the median. Upon questioning by the prosecutor, the following exchange occurred:

> "Q. On the defendant's motorcycle, did you notice any evidence that helped you determine the cause of the crash?
>
> A. Yes.
>
> Q. What did you see?
>
> A. Saw the right side of the motorcycle near the engine had—had impact.
>
> Q. Had impact damage?
>
> A. The foot peg was bent, so it appeared to be a point of contact.

Q. You already testified to the photograph People's exhibit No. 6 regarding the peg and the fluid?

A. Yes.

Q. What was significant to you about the fluid?

A. It was significant because it didn't appear that it had came from his motorcycle, that it had not dripped down from there.

Q. And you have a photograph in front of you regarding the fluid marks, correct?

A. Yes.

Q. And the exhibit number on that is?

A. 6.

Q. Okay. On People's exhibit [No.] 6, why do you believe that that's relevant?

A. Feel there is an importance there because it correlates with the defendant's bike of fluid being dispersed from impact onto his motorcycle and onto the roadway."

¶ 16 Slayback said he spoke with a number of people at the scene (there were approximately 30 to 40 individuals there), but no one saw the accident. He arrived at the hospital and spoke with defendant. He read the warning to motorist to defendant at approximately 2 a.m. and requested blood and urine samples from him. Defendant told Slayback to return later. Slayback read defendant his *Miranda* (*Miranda v. Arizona*, 384 US 436 (1966) rights at approximately 3 a.m. and defendant consented to further questioning. According to Slayback, defendant's answers to his questions made sense. Defendant said he had drank five to

six beers. Slayback described defendant's demeanor as "uncooperative" and said defendant had a "moderate smell of alcohol."

¶ 17 On cross-examination, Slayback said he had not received training in accident reconstruction, but he did the best he could to determine how the accident occurred based upon the evidence at the scene. On redirect, Slayback said he spoke with Lechner, who told him he saw sparks up ahead of him while traveling on Route 116.

¶ 18 Dr. John Scott Denton, the State's expert in the field of pathology, testified he performed the autopsy on Jessica Williamson. Denton opined that Williamson died from cranial-cerebral injuries due to a motorcycle collision. She had a blood-alcohol concentration of .113 and a urine-alcohol concentration of .118. The State rested. Defendant's only evidence was the introduction of a document from the Farmer's Almanac showing the moon phases for September 2011. Defendant rested. After the close of evidence and arguments of counsel, the jury found defendant guilty of both counts of aggravated DUI.

¶ 19 On October 25, 2012, the trial court conducted a sentencing hearing and considered testimony from Angela Vaughn, defendant's former partner and mother of his six-year-old son. She testified defendant has a very close relationship with his son. She also said he was "really upset with everything that happened." Jennifer Nunn testified she has been defendant's girlfriend for approximately one year. Defendant has "absolutely" expressed remorse after the accident for Williamson's family and her children, in particular. She also said defendant has a close relationship with his son. Michael Roth testified defendant has worked for him for approximately three years as a mechanic. Roth testified as to defendant's good character.

¶ 20 Defendant made a statement in allocution, explaining his remorse for the loss of Williamson. The trial court was presented with defendant's presentence investigation report

(PSI), which reflected that he had approximately 20 traffic offenses, consisting of speeding violations and driving while suspended offenses. His criminal offenses included unlawful possession of drug paraphernalia, disorderly conduct, unlawful possession with intent to deliver, and manufacturing of more than 50 cannabis plants. After considering the evidence, defendant's statement, the PSI, arguments of counsel, and the factors in aggravation and mitigation, the court stated:

> "Having regard to the nature and circumstances of the offense, and to the history, character, and condition of the offender, court is of the opinion that imprisonment is necessary for the protection of the public and probation would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice, and that no extraordinary circumstances exist.
>
> * * *
>
> Court has considered each relevant statutory factor in aggravation and mitigation, including the fact the defendant's conduct caused serious physical harm to another—strike that. The only mitigation would be that the imprisonment of the defendant would entail hardship on the dependents of the defendant, although the court, once again, does not find it necessarily to be excessive hardship, inasmuch as the mother of his children is present and able to support the children.

> In aggravation, the defendant's conduct caused serious harm. The defendant has a history of prior delinquency and criminal activity, including prior Class 2 felony, as well as numerous traffic violations, as well as five revocations. Sentence is necessary to deter other from committing the same crime.
>
> Court would note that one of the reasons for the sentencing scheme in these types of instances is a deterrent and, in fact, this particular offense with these particular facts mandate prison unless extraordinary circumstances are found. In addition, this defendant has a prior Department of Corrections sentence and certainly had the ability, the knowledge, and the opportunity to prevent this crime from occurring."

¶ 21 The trial court sentenced defendant only on count II to 10 years in prison. Defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 A. Proximate Cause

¶ 25 Defendant first argues the State failed to prove his guilt beyond a reasonable doubt because the evidence was insufficient to prove defendant caused the accident. We disagree.

¶ 26 We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State and determining whether any rational trier of fact could

have found the essential elements of the offense beyond a reasonable doubt. *People v. Johnson*, 392 Ill. App. 3d 127, 130 (2009). The trier of fact determines the credibility of the witnesses and the weight to be given, resolves conflicts in the evidence, and draws reasonable inferences from that evidence. *Johnson*, 392 Ill. App. 3d at 130. " '[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt.' " *Johnson*, 392 Ill. App. 3d at 130 (quoting *People v. Rowell*, 229 Ill. 2d 82, 98 (2008)).

¶ 27 Defendant was charged with aggravated DUI (625 ILCS 5/11-501(d)(1)(F) (West 2010)). A person commits the offense of DUI if he has actual physical control of a motor vehicle while his blood-alcohol content is 0.08 or more. 625 ILCS 5/11-501(a)(1) (West 2010). Driving under the influence becomes aggravated when, in violating section 11-501(a), a driver is involved in a "motor vehicle *** accident that resulted in the death of another person, when the violation of subsection (a) was a proximate cause of the death." 625 ILCS 5/11-501(d)(1)(F) (West 2010).

¶ 28 Illinois courts have found the felony of aggravated DUI arises when a driver violates the provisions of the misdemeanor described in paragraph 11-501(a) under specified circumstances set forth in paragraph 11-501(d). The physical injury of others caused by the misdemeanor act creates the felony. *People v. Quigley*, 183 Ill. 2d 1, 10 (1998). The first inquiry is whether defendant operated a vehicle in a condition that violated the misdemeanor definition of driving under the influence. *People v. Martin*, 2011 IL 109102, ¶ 26. If the defendant violated section 11-501(a) by driving with a blood-alcohol content in excess of 0.08, then the question becomes whether the driving was a proximate cause of the other person's death. *Martin*, 2011 IL 109102, ¶ 26. Illinois courts have recognized that this does not require the

defendant's intoxication to be the sole cause of the accident. *People v. Merritt*, 343 Ill. App. 3d 442, 448 (2003); *People v. Ikerman*, 2012 IL App (5th) 110299, ¶ 49.

¶ 29 In *Merritt*, the defendant hit a jogger while driving under the influence of alcohol. The jogger, who was wearing headphones, crossed the road in front of the defendant in the dark. The defendant argued the jogger's actions caused the accident. This court began its analysis by noting the trial court had found (1) the defendant would have had more time to react if she had been more attentive, and (2) the defendant's alcohol consumption impaired her ability to take prompt action. *Merritt*, 343 Ill. App. 3d at 447. Noting the sufficiency of the circumstantial evidence presented, we held the State had "presented sufficient evidence from which the trial court could have found beyond a reasonable doubt defendant's alcohol consumption impaired her driving ability, and thus her driving while under the influence of alcohol was a proximate cause of the victim's death." *Merritt*, 343 Ill. App. 3d at 448.

¶ 30 We concluded that, even though the jogger's actions were also a proximate cause of his own death, his actions do not defeat the defendant's culpability. Whether other factors might also constitute a proximate cause was irrelevant. We stated:

> "The fact that the victim's actions were also a proximate cause of his injuries does not warrant reversal of defendant's conviction. A person commits aggravated DUI when his or her driving under the influence 'was *a* proximate cause of the injuries' (emphasis added) (625 ILCS 5/11-501(d)(1)(C) (West 2000)), not the sole and immediate cause of the victim's injuries." *Merritt*, 343 Ill. App. 3d at 448.

¶ 31 *Ikerman* confirmed the principle that a defendant's intoxicated driving need not be the sole and immediate cause of a fatal accident. *Ikerman*, 2012 IL App (5th) 110299, ¶ 49 (citing *Merritt*, 343 Ill. App. 3d at 448). In *Ikerman*, the defendant struck an automobile that had run out of gas in the roadway. Several witnesses testified the victim had stopped his car in the right lane of the roadway. *Ikerman*, 2012 IL App (5th) 110299, ¶¶ 4-5. The defendant argued the State failed to prove his intoxication was the proximate cause of the accident. The reviewing court stated:

> "The offense of aggravated DUI is committed when a person's driving under the influence is a proximate cause of the victim's injuries, not the sole and immediate cause of the injuries. [Citation.] 'Proximate cause includes both cause in fact and legal cause.' [Citation.] In the present case, the defendant argues the State failed to present sufficient evidence to prove cause-in-fact proximate cause. The cause-in-fact requirement of proximate cause is present when reasonable certainty exists that the defendant's actions caused the injury or damage." *Ikerman*, 2012 IL App (5th) 110299, ¶ 49.

¶ 32 The appellate court rejected the defendant's assertion he was absolved because the victim had "created a dangerous situation by parking his darkly colored vehicle on the road with no headlights at night." *Ikerman*, 2012 IL App (5th) 110299, ¶ 51. The court found the State had presented sufficient evidence that the defendant's driving was a proximate cause of the deaths. The contribution of dangerous parking to the accident did not mean the defendant's

driving was not a cause in fact for determining proximate cause. *Ikerman*, 2012 IL App (5th) 110299, ¶ 51.

¶ 33 In *Johnson*, the defendant's vehicle was involved in a collision at an intersection while racing another vehicle. Another car had entered the intersection illegally and collided with the defendant's vehicle. A passenger in the defendant's vehicle died as a result of the collision and the driver of the other vehicle was injured. A police officer testified he spoke with the defendant at the hospital and smelled an odor of alcohol on the defendant's breath. *Johnson*, 392 Ill. App. 3d at 129. The defendant argued his impairment was not the proximate cause of the accident. This court, citing our decision in *Merritt*, held as follows:

> "Evidence that [the victim] may have run a red light does not negate defendant's actions as being a proximate cause of the victims' injuries. While defendant's actions were not the sole and immediate proximate cause of the victims' injuries in this case, the evidence sufficiently established his actions were a proximate cause and satisfied the elements for a conviction of aggravated DUI." *Johnson*, 392 Ill. App. 3d at 131-32.

¶ 34 Defendant argues that no one competently testified to the actual cause of the accident. He claims the officers' testimony that *he* caused the accident was purely speculative and insufficient to support the proximate-cause element of the offense. We disagree. We find the evidence presented at the trial was circumstantial, not speculative. Officer Wright and Trooper Slayback each testified that they had concluded, based upon their observations of the motorcycles involved, the roadway, and the statements of witnesses, that defendant's motorcycle had hit Massey's motorcycle causing defendant to lose control and crash. The Althisers and

Massey testified that each was traveling in the left lane with the Althisers staggered behind and to the left of Massey. The fact that (1) defendant's right foot peg was damaged, (2) defendant's motorcycle had fluid on the right front of his motorcycle, but was not found to be leaking fluid, (3) Massey's motorcycle was damaged on the left side, and (4) no one testified the three motorcycles were traveling together, implies that defendant came upon and between Massey and the Althisers' motorcycles and hit Massey's on his left side.

¶ 35 After considering this evidence, the jury could have reasonably concluded that defendant's driving, while under the influence of alcohol, was the proximate cause of Williamson's death. That is, the jury could have reasonably found defendant's driving under the influence of alcohol was a natural or probable sequence which caused Williamson's death. As this court has stated:

> "However, in the case of a defendant convicted of DUI, the law holds him accountable for precisely those harms actually risked by his conduct–namely, that he might seriously injure pedestrians on or next to the roadway, or that he might crash his vehicle into other vehicles on the roadway, seriously injuring their occupants. All of this is fully foreseeable, and no stretch of logic is required to view the injuries caused as those actually risked by the conduct of driving drunk." *People v. Martin*, 266 Ill. App. 3d 369, 380 (1994).

¶ 36 We find the State presented sufficient circumstantial evidence to support the jury's verdict of guilt beyond a reasonable doubt. The evidence sufficiently established defendant's actions were a proximate cause and satisfied the elements for a conviction of aggravated DUI.

¶ 37 B. Ineffective Assistance of Counsel

¶ 38 Defendant next claims his trial counsel was ineffective when he failed to file a motion to suppress evidence, arguing that Trooper Pfau demanded blood and urine samples from defendant without first having probable cause to do so. Defendant insists Pfau had no evidence before her that defendant had been driving—a requirement in order to prove a violation of the statute governing chemical testing. See 625 ILCS 5/11-501.2(c)(2) (West 2010). Defendant claims his counsel's motion to suppress, had one been filed, would have had a reasonable probability of success. Therefore, according to defendant, by not filing such a motion, counsel's performance fell below an objective standard of reasonableness.

¶ 39 Claims of ineffective assistance are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed, a defendant must demonstrate (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's conduct, the results of the proceeding would have been different. *Strickland*, 466 U.S. at 687. See also *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008).

¶ 40 In *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990), this court held that adjudication of a claim of ineffective assistance of counsel is often better made in proceedings on a petition for postconviction relief, where a complete record can be made. In *Kunze*, the ineffective assistance of counsel claim turned on whether the defendant would have testified had he known in advance that the State would use his prior convictions to impeach him. *Kunze*, 193 Ill. App. 3d at 725. Because nothing in the record permitted such a determination to be made, this court declined to adjudicate defendant's claim. *Kunze*, 193 Ill. App. 3d at 726.

¶ 41 Likewise, in this case, whether defendant suffered prejudice for counsel's failure to make the suggested motions depends on the likelihood of their success. As the State points out, the record is devoid of factual findings on the issues pertinent to defendant's claim. The record contains nothing to review with respect to either the appropriateness of Trooper Pfau's actions or whether she knew defendant was driving. At this stage of the proceedings, we will not interpret the record in such a way that would determine that the lack of evidence as to Trooper Pfau's knowledge at the time she demanded the DUI kit necessarily means she lacked probable cause. Nor can this court determine whether counsel's failure to file a motion to suppress involved trial strategy. We therefore decline the opportunity to consider these questions. Rather, defendant may pursue his claim under the Post Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2010)). *People v. Flores*, 231 Ill. App. 3d 813, 827-28 (1992) (held, without an explanation from trial counsel, reviewing court cannot determine whether trial counsel's omissions involved the exercise of judgment, discretion, or trial tactics, which are not reviewable matters; recommended postconviction petition as a better forum for adjudication of ineffective assistance claim); *People v. Palacio*, 240 Ill. App. 3d 1078, 1087 (1993) (held, "[t]he appellate court is not the appropriate forum to decide contested questions of fact," and defendant could pursue his claim pursuant to the Post-Conviction Hearing Act, under which the court could hear evidence and make appropriate findings); *In re Carmody*, 274 Ill. App. 3d 46, 56 (1995) (noting the record on direct appeal rarely contains any explanation of the tactics of trial counsel, and holding that if those tactics are to be the subject of scrutiny, a record should be developed in which they can effectively be reviewed); *Kunze*, 193 Ill. App. 3d at 725-26 ("Where *** consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in

proceedings on a petition for post-conviction relief."); *People v. Holloman*, 304 Ill. App. 3d 177, 186-87 (1999) (determination of whether the defendant's fourth amendment rights were violated by the warrantless search and arrest would best be considered in postconviction proceedings since the record contains nothing with respect to either the appropriateness of the officer's actions or the defendant's standing to raise fourth amendment issues).

¶ 42 C. Sentence

¶ 43 Last, defendant claims this court should reduce his 10-year sentence as excessive when it was apparent that the trial court considered a factor inherent in the offense as a factor in aggravation and failed to properly consider factors in mitigation. Defendant filed a motion to reconsider his sentence, claiming the court "abused its discretion by imposing an unduly harsh and excessive sentence that failed to give proper weight to mitigating factors and placed too much weight on factors in aggravation." Because defendant raised in his postsentencing motion the issue of the court's consideration of proper sentencing factors, we find defendant's claims set forth in his motion were sufficient to preserve his claim of error in this appeal.

¶ 44 Defendant also claims the trial court ignored the statutorily mandated objective of restoring defendant to useful citizenship. He claims he has "good rehabilitative potential," in the form of an education, good employment, and strong family ties. He also emphasized his expressed remorse for the commission of the offense. All of these factors combined, he claims, demonstrate that the court's sentencing decision was excessive.

¶ 45 Defendant insists the trial court erred in relying on the fact that defendant's conducted caused serious harm, which is precisely how the offense was elevated to an aggravated offense. See 625 ILCS 5/11-501(d)(1)(F) (West 2010) (person is guilty of aggravated DUI if, while under the influence, a motor vehicle accident occurred and resulted in

the death of another person). In reviewing the court's sentencing pronouncement, it appears the court merely mentioned the seriousness of the physical injury, rather than weighing the factor in sentencing consideration. The court referred to the seriousness, but did not make any further mention of Williamson's death. It does not appear the court placed any undue weight on the fact she was killed as a result of the offense. According to its oral pronouncement, the court considered proper factors in aggravation and mitigation.

¶ 46 Although it is a "general rule" that an element of the offense should not also be used as a sentencing factor, "this rule should not be applied rigidly." *People v. Burge*, 254 Ill. App. 3d 85, 88 (1993). "The rule that a court may not consider a factor inherent in the offense is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense." *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991).

> "The legislature has established the range of sentences permissible for a particular offense. [Citation.] 'Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant.' [Citation.] A trial court's sentencing determination is given great deference because that court, having observed the defendant and the proceedings, is in a better position to consider the particular circumstances of each case, such as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits. [Citation.] Therefore, the reviewing

> court must proceed with great caution when considering the trial court's sentence, and it must not substitute its own judgment for that of the trial court just because it would have weighed the factors differently. [Citation.] 'A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' [Citation.] Accordingly, a reviewing court may not reduce the defendant's sentence unless the sentence constitutes an abuse of discretion. [Citation.]" *Ikerman*, 2012 IL App (5th) 110299, ¶ 54.

¶ 47 Here, the trial court sentenced defendant for this Class 2 felony to 10 years in prison. Our legislature determined that the crime is punishable by a term of 3 to 14 years. 625 ILCS 5/11-501(d)(1)(F), (2)(G) (West 2010). Because we find nothing erroneous about the sentence within the prescribed range or improper within the court's sentencing pronouncement, we affirm the sentence, holding the court did not abuse its discretion.

¶ 48 D. Fines and Sentencing Credit

¶ 49 The State raises two issues not raised by defendant: (1) the fines imposed by the circuit clerk should be vacated and the cause remanded for the trial court to impose the mandatory fines, and (2) defendant has not been given the appropriate credit against his fines.

¶ 50 In his reply brief, defendant characterizes the State's argument as an unauthorized cross-appeal. Specifically, defendant argues (1) the State's contention is a freestanding claim of error; (2) the State may not properly appeal the imposition of a fine because such appeals by the State are not authorized by Illinois Supreme Court Rule 604(a) (eff. July 1, 2006); and (3) the

order reflecting fees and fines imposed by the circuit clerk is voidable, not void, and as such, the State cannot raise this claim of error.

¶ 51 Defendant contends because he did not challenge the imposition of the fines or whether the monetary credit was awarded properly, "[t]he State's argument is not in response to an argument about a 'judgment [***] from which the appeal is taken' " (quoting Ill. S. Ct. R. 615(b)(1) (eff. Jan.1, 1967)). However, in this case, defendant's notice of appeal indicates he is challenging his conviction and sentence. Therefore, defendant placed his entire sentence, which includes the imposition of fines and fees, before this court for review. *People v. Warren*, 2014 IL App (4th) 120721, ¶ 150; *People v. Chester*, 2014 IL App (4th) 120564, ¶ 32 (fines are part of sentence a judge must impose)). We specifically addressed this issue in *Warren* and stand by our decision and analysis there.

¶ 52 In *Warren*, we stated:

> "Even if, for the sake of argument, we considered the State's street-value fine argument to be a 'free-standing claim of error,' we would not change our conclusion the State could properly point out this error. Rule 604(a) strictly limits the circumstances under which the State may appeal a trial court's judgment. Ill. S. Ct. R. 604(a) (eff. July 1, 2006); see also *People v. Ramos*, 339 Ill. App. 3d 891, 904 [] (2003) (the rule 'strictly limits the State's right to appeal'). The rule does not permit the State to challenge the propriety of the sentence imposed on a defendant. *City of Chicago v. Roman*, 184 Ill. 2d 504, 509-10 [] (1998). Where an appeal by the State is not authorized by Rule

604(a), the appellate court lacks jurisdiction to entertain the issue. *In re K.E.F.*, 235 Ill. 2d 530, 540-41 [] (2009).

The State may, however, seek to correct a void or partially void judgment on appeal. See *People v. Malchow*, 306 Ill. App. 3d 665, 675-76 (1999) (where the trial court ordered a sentence less than that mandated by statute, the sentence was 'illegal and void' and 'the appellate court ha[d] the authority to correct the sentence at any time, and Rule 604(a)(1) [did] not limit the State's right to appeal'). 'A void judgment is one entered by a court that lacks, *inter alia*, the inherent power to make or enter the particular order involved. A void judgment may be attacked at any time, either directly or collaterally.' *Roman*, 184 Ill. 2d at 510 []. A trial court is obligated to order the criminal penalties mandated by the legislature and has no authority to impose punishment other than what is provided for by statute. *Id.* 'The court exceeds its authority if it orders a lesser sentence than what the statute mandates.' *Id."* *Warren*, 2014 IL App (4th) 120721, ¶¶ 151-52.

¶ 53 Here, the record indicates the trial court imposed only a $750 law-enforcement fine and the clerk imposed $978 in "costs." However, these clerk-imposed "costs" actually included fines improperly imposed by the circuit clerk. We therefore vacate the fines imposed by the circuit clerk and remand for imposition of the fines by the trial court.

¶ 54 Further, we remand for the imposition of a $5-per-day credit for the 37 days defendant spent in pretrial custody for a total monetary credit of $185 to be applied to all creditable fines. See 725 ILCS 5/110-14(a) (West 2010).

¶ 55 III. CONCLUSION

¶ 56 For the reasons stated, we affirm in part and vacate in part the trial court's judgment and remand for the trial court to reimpose the mandatory fines vacated herein and impose all other fines mandated by statute. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 57 Affirmed in part and vacated in part; cause remanded with directions.