2017 IL App (1st) 150604-U

No. 1-15-0604

September 12, 2017

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 9018
	)	
TERRELL RAY,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE NEVILLE delivered the judgment of the court.
Justice Pierce concurred in the judgment.
Justice Mason concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Judgment on defendant's conviction for delivery of a controlled substance affirmed as modified where his contention that the trial court considered improper factors in aggravation at sentencing is forfeited and not reviewable as plain error; presentencing monetary credit applied against public defender and state's attorney fines; two additional fines are not subject to offset per statute.

¶ 2 Following a bench trial, defendant Terrell Ray was convicted of delivery of a controlled substance for selling heroin to an undercover police officer. The trial court sentenced defendant

to nine years' imprisonment as a Class X offender based upon his extensive criminal history. On appeal, defendant contends that the trial court considered improper factors in aggravation during sentencing. He also contends that he is due additional monetary credit against his fines. We apply $4 in credit against two of defendant's fines, and affirm his conviction and sentence in all other respects.

¶ 3 Defendant was charged with one count of delivery of a controlled substance, and one count of committing that offense within 1,000 feet of a school. At trial, Chicago police officer William Lepine testified that about 6:25 p.m. on May 1, 2014, he went to 2855 West Flournoy Street, a known drug area, to make a controlled purchase. Several men, including defendant, were standing on the corner. As Lepine approached, the group dispersed and defendant approached the officer. Lepine asked defendant for "black spades," referring to the style of bags used in that area. Defendant asked "blows?" referring to heroin. Lepine replied "yes, three." Defendant walked to a gangway, returned several seconds later, and handed Lepine three green-tinted Ziploc bags of suspect heroin. Lepine gave defendant $30 in prerecorded funds consisting of one $20 bill and one $10 bill.

¶ 4 Lepine walked away from the area and radioed his team that a positive buy had occurred. He described defendant as wearing a gray hat, gray pants, and a black jacket with a black hood. Within minutes, the enforcement officers notified Lepine that they had detained a man matching the description. Lepine drove past the location and identified defendant as the man who had sold him the drugs.

¶ 5 Chicago police officer Joe Papke received Lepine's radio message and went to the location of the purchase. He detained defendant, who was subsequently identified by Lepine.

During a custodial search, Papke recovered $185 from defendant, including the prerecorded $20 and $10 bills.

¶ 6 The State presented a stipulation that forensic chemist Laneen Blount tested 0.2 grams of powder from one of the green-tinted bags and found it positive for heroin. The State then rested.

¶ 7 The trial court granted defendant's motion for a directed finding as to the count alleging that the offense occurred within 1,000 feet of a school, but denied the motion as to the remaining delivery count.

¶ 8 Doris Jackson, defendant's mother, testified that between 6 and 6:30 p.m. on May 1, she was at another son's house in the 2900 block of Flournoy Street with her other son, his girlfriend, and defendant. Jackson and defendant walked down the street to a "cigarette house" and purchased loose cigarettes. They exited the cigarette house, and defendant exited the front gate while Jackson remained in the front yard speaking with a woman. Minutes later, Jackson observed a maroon police vehicle in front of the house and saw defendant speaking with a police officer. The officer searched defendant but did not remove any items from him. The officer then placed defendant in the maroon vehicle.

¶ 9 Defendant testified that he and his mother were at his brother's house on Flournoy Street and walked to a cigarette house. As defendant exited the cigarette house, a burgundy police vehicle pulled up and an officer called him to the vehicle. Defendant asked why and if he had done anything wrong. Defendant remained in the front yard while the officer tried to convince him to exit the gate. The officer then called defendant by his name. Defendant asked how he knew his name, and the officer replied that they were looking for him for an investigation and needed to speak with him. Two officers then exited the vehicle and told defendant that there had

been numerous shootings in the neighborhood in the previous days and they heard that he was the shooter. The officers handcuffed defendant and placed him against the vehicle. One officer stayed with defendant while the other searched the area, but returned with nothing. Defendant denied that he discussed a narcotics purchase with an officer, walked into a gangway, or handed any green-tinted bags to anyone. He also denied that he had been standing on a corner, and that he possessed any police funds. Defendant learned that he had been arrested for selling drugs when he was placed in the lockup at the police station.

¶ 10 In rebuttal, the State presented a stipulation that defendant had several prior felony convictions within the last 10 years. He had one conviction for Class 3 unlawful use of a weapon by a felon, and five convictions for Class 4 possession of a controlled substance.

¶ 11 The trial court found the State's witnesses more credible than those for the defense. Accordingly, the court found defendant guilty of delivery of a controlled substance.

¶ 12 At sentencing, in aggravation, the State argued that defendant had an "expansive criminal history" consisting of 10 prior felony convictions. The State pointed out that defendant had been repeatedly sentenced to prison terms of one year, three years and four years, and argued that such sentences had not deterred him from his criminal behavior. The State also noted that the court was required to sentence defendant as a Class X offender, and requested a substantial term to indicate that his repeated criminal behavior would not be tolerated.

¶ 13 In mitigation, defense counsel argued that defendant was 33 years old and had a strong relationship with his three children. Counsel noted that defendant had some high school education and a limited work history, and argued that he planned to further his education after being released from custody so that he could gain full-time employment. Counsel also argued

that none of defendant's prior convictions were for crimes of violence, and that the majority were for drug offenses. Counsel asserted that since defendant was subject to mandatory Class X sentencing, there was already a "built-in penalty" that elevated the offense from a Class 2 felony for a very small amount of narcotics. Counsel also noted that defendant had been working as a sanitation worker while in jail, and asked the court to impose the minimum term.

¶ 14 In allocution, defendant thanked the court for its impending decision, thanked the State and defense counsel, and stated that he was not angry. He also apologized to his mother for "having failed [her] again."

¶ 15 In imposing the sentence, the trial court stated:

> "Mr. Ray, I have to craft a sentence which I believe is fair to you, fair based on your history, your employment, your background, your education, your lot in life, as well as your criminal history, as well as a sentence that's fair to the community, and take into consideration the four factors of sentencing, that being rehabilitation, incapacitation, retribution, and deterrence.
>
> I don't know what to say, Mr. Ray. I mean, first off, I listened to the testimony here. The testimony was that you were selling, that you sold to an undercover officer, that you were immediately identified, part of the 1505 funds were recovered on you.
>
> I also have that you testified and, frankly, I didn't find your testimony to be believable. I didn't believe it then. I don't believe it now. I believe that you perjured yourself when you said that your – that the police officers put the money on you, put the dope on you, that you were just walking out of a cigarette house. I don't find that to be believable in one way, shape, or form.

The reason I note that is that even though you are respectful for everybody here today, when we come in to court, it's my impression that if [] lies [] serve your purpose, you'll lie to serve your purpose. And despite the oath that you take, it's irrelevant to your personal self-preservation here. I take that into consideration when I determine whether or not there is any type of rehabilitative potential for you.

Obviously, you have the right to plead not guilty and require the State to prove your guilt beyond a reasonable doubt. You're not being punished for that, but I have here – There's nothing else I can say than you are a career criminal.

While Mr. Brown is correct that most of your offenses are drug offenses, many of them are for with intent to deliver. It does not appear that any sentence you get deters any future criminal behavior."

¶ 16 The trial court noted that defendant was sentenced to four years' imprisonment in 2011, and after being released from prison, was charged with a new case "almost immediately." The court continued:

"And within about two months, you're out on the street corners dealing again.

I would expect you to be aging out of this type of behavior. I would think that you'd realize that you can't beat the system, that you keep getting caught. You keep going to the penitentiary but you keep going back on the street to do what you continue to do.

The range of sentencing possibilities is 6 to 30 years in the penitentiary. I know it's very severe, but it is the legislature's response to career criminals committing crimes time and time again. While it may not serve any rehabilitative potential, it does serve

some incapacitation purpose. In other words, you can't commit crimes while you're in the penitentiary. And some type of retribution, which is actually punishment for the offense that was committed.

I don't know whether or not any sentence that I ever craft in a courtroom deters other people from committing crimes, but I do not ignore the interests of the community when I craft a sentence, particularly a violent crime offense for someone who's a career criminal.

While somebody could say that I could give you 20 years and you wouldn't be committing crimes for 20 years, I think that's extreme. If I look at mitigating factors here, I don't find many, besides the fact of a mother who loves you and comes to Court all the time.

I find that you haven't been working since you were 19 years old, and that was back in 1999, which is about 16 years ago, albeit many of the – those days between 1999 and today you've been in the penitentiary. I struggle to find any real mitigating factors here besides your respect to everybody in the courtroom today.

This has to stop. You know better than I do the poison that people put on the streets not only affect[s] lives, cause[s] crimes, it kills people. It kills our young. It corrupts our young. And a whole segment of society never pulls themselves out because they are addicted to drugs. If they didn't have people selling the drugs, they couldn't be getting the drugs."

¶ 17 The trial court sentenced defendant to nine years' imprisonment as a Class X offender. Immediately thereafter, defense counsel submitted a written motion to reconsider the sentence, which the trial court denied.

¶ 18 On appeal, defendant first contends that the trial court considered two improper factors in aggravation during sentencing. Defendant argues that the court erred when it considered the societal harm caused by the drug trade because that factor is already inherent in the offense. Defendant further argues that the court erred when it considered its belief that he did not testify truthfully at trial. He claims that such consideration creates a chilling effect on a defendant's right to testify in his own defense. Defendant asks this court to reduce his sentence or remand his case for a new sentencing hearing before a different trial judge.

¶ 19 Defendant acknowledges that he did not preserve this issue for appeal because, although generally raised in his postsentencing motion, he failed to specifically object to the errors during sentencing. He asserts, however, that this court should review his claim under the second prong of the plain error doctrine because he was denied a fair sentencing hearing. Alternatively, he argues that trial counsel rendered ineffective assistance when he failed to object and preserve the issue for review.

¶ 20 The State responds that defendant forfeited review of the issue and that the plain error doctrine does not apply because the trial court committed no error. The State argues that the court did not rely on any improper factors during sentencing, but instead, exercised appropriate discretion and imposed a sentence within the statutory range based on defendant's extensive criminal history and his lack of rehabilitative potential. The State further argues that the court

was permitted to consider its belief that defendant committed perjury at trial because it is a relevant factor for determining his potential for rehabilitation.

¶ 21 It is well settled that in order to preserve a sentencing error for review, both a contemporaneous objection during the sentencing hearing and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, the record shows that defendant made no objection at any time during the sentencing hearing. Consequently, he failed to preserve his issue for appeal, and it is forfeited. *Id*. at 544-45.

¶ 22 Defendant argues, however, that his claim may be reviewed under the second prong of the plain error doctrine. The plain error doctrine is a limited and narrow exception to the forfeiture rule which can only be invoked after defendant first demonstrates that a clear or obvious error occurred. *Id*. at 545. Thereafter, defendant must show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that he was denied a fair sentencing hearing. *Id*. The burden of persuasion is on defendant, and if he fails to meet that burden, his procedural default will be honored. *Id*.

¶ 23 Initially, defendant asserts that this court must apply a *de novo* standard of review. We disagree. Whether the trial court considered an improper factor in aggravation at sentencing is reviewed for an abuse of discretion. *People v. Cotton*, 393 Ill. App. 3d 237, 264-65 (2009).

¶ 24 The trial court is generally prohibited from considering a factor implicit in the offense as an aggravating factor at sentencing. *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). In other words, one factor cannot be used as both an element of the offense, and as a basis for imposing a sentence that is harsher than what might otherwise have been imposed. *Id*. at 11-12. The court

may consider the nature of the offense when imposing a sentence, including the circumstances and extent of each element as committed. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009).

¶ 25 Some courts have found it improper to consider the general harm caused to society by drug use as an aggravating factor at sentencing because such consideration is inherent in drug offenses. *People v. McCain*, 248 Ill. App. 3d 844, 851-52 (1993) (cases cited therein). However, it is not improper *per se* for a court to refer to societal harm during sentencing because such commentary may encourage rehabilitation by providing a defendant a context in which he may develop feelings of remorse. *Id.* at 852.

¶ 26 In determining the propriety of a sentence, the reviewing court must consider the record as a whole and should not focus on a few words or statements made by the trial court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). The court's statements at sentencing cannot be considered in isolation. *People v. Csaszar*, 375 Ill. App. 3d 929, 952 (2007). Where the trial court mentions an improper factor, but gives insignificant weight to that factor which does not result in a greater sentence, the case does not need to be remanded for resentencing. *Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Bourke*, 96 Ill. 2d 327, 332 (1983)).

¶ 27 Here, when read in context, the record reveals that the trial court did not rely on the societal harm caused by drugs as an aggravating factor when sentencing defendant. The court expressly stated that it was required to craft a sentence that was fair to defendant based on his personal history, including his employment, education and background, as well as his criminal history. The court stated that it had to consider the four factors for sentencing, those being rehabilitation, incapacitation, retribution and deterrence. The record shows that the court

specifically considered each of those factors and was most concerned with defendant's lack of rehabilitative potential as demonstrated by his extensive and continuous criminal history. The court stated that it struggled to find any real mitigating factors. The record thus shows that the court gave proper consideration to the appropriate factors in aggravation and mitigation when imposing defendant's sentence.

¶ 28 We find that the court's commentary on the societal harm caused by drugs at the end of its sentencing pronouncement was intended to encourage defendant to put a stop to his continuing criminal behavior. The court began its comments by expressly stating "[t]his has to stop." The court's commentary shows that it was not considering societal harm as an aggravating factor, but instead, was attempting to encourage rehabilitation by giving defendant a context in which he may develop feelings of remorse. *McCain*, 248 Ill. App. 3d at 852. Accordingly, we find no error with these comments.

¶ 29 Nor do we find any error with the court's comments during sentencing that it believed defendant had perjured himself when he testified. Defendant acknowledges that both the United States Supreme Court and Illinois Supreme Court have held that a sentencing court may consider a defendant's perceived perjury at trial as a relevant factor in assessing his potential for rehabilitation. See *United States v. Grayson*, 438 U.S. 41, 52 (1978); *People v. Meeks*, 81 Ill. 2d 524, 536 (1980). Defendant argues that this court should follow the dissent in *Grayson*, which found that such consideration is improper during sentencing. See *Grayson*, 438 U.S. at 55-58 (Stewart, J., dissenting). We decline to do so. It is well settled that this court is bound to follow the holdings of our supreme court, and we lack authority to overrule those decisions. *People v. Artis*, 232 Ill. 2d 156, 164 (2009); *People v. Leavitt*, 2014 IL App (1st) 121323, ¶ 48.

¶ 30 Here, when the trial court stated that it did not believe defendant's testimony, it expressly stated that it would consider that finding when determining whether or not defendant had "any type of rehabilitative potential." The record thus shows that the court properly gave this finding the precise consideration intended by the Illinois and United States Supreme Courts.

¶ 31 In sum, we conclude that the record, when considered as a whole, shows that the trial court did not consider any improper factors in aggravation during sentencing, and therefore, committed no error. Instead, the court properly exercised its discretion when it sentenced defendant to nine years' imprisonment, which is within the statutory range and just three years above the minimum term. 730 ILCS 5/5-4.5-25(a) (West 2014) (Class X sentencing range is 6 to 30 years' imprisonment). Accordingly, we find the defendant forfeited this issue.

¶ 32 In addition, we find no merit in defendant's alternative argument that counsel rendered ineffective assistance when he failed to preserve this issue for appeal. As the sentencing challenge is without merit, defendant was not prejudiced by counsel's failure to preserve the issue, and thus, counsel did not render ineffective assistance. See *People v. Coleman*, 158 Ill. 2d 319, 349 (1994) (defendant was not denied effective assistance of counsel where the issues counsel failed to preserve for appeal were without merit and did not prejudice defendant).

¶ 33 Defendant next contends that his fines and fees order must be amended. He argues that he is entitled to have an additional $19 in monetary credit applied against four fines.

¶ 34 Defendant acknowledges that he did not preserve this issue for appeal because he did not challenge the assessments in the trial court. He urges this court, however, to review his assessments under the plain error doctrine, or find that trial counsel was ineffective when he failed to challenge the assessments below. As stated above, a defendant forfeits a sentencing

issue that he or she fails to raise in the trial court through both a contemporaneous objection and a written postsentencing motion. *Hillier*, 237 Ill. 2d at 544. However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue that defendant has forfeited the issue, it waives the forfeiture. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. Here, the State has not argued that defendant forfeited his challenges to the assessments. Accordingly, we address the merits of defendant's claims. The propriety of the imposition of fines and fees is a question of law which we review *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 35 Pursuant to section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2014)), a defendant is entitled to have a credit applied against his fines of $5 for each day he spent in presentence custody. Here, defendant spent 272 days in presentence custody, and is therefore entitled to a maximum credit of $1,360. The record shows that defendant was assessed $1,469 in fines and fees, given credit of $1,035 against his fines, and has a remaining balance of $434.

¶ 36 Defendant first contends that he is entitled to credit against the $2 State's Attorney Records Automation fee assessed pursuant to section 4-2002.1(c) of the Counties Code (Code) (55 ILCS 5/4-2002.1(c) (West 2014)) and the $2 Public Defender Records Automation fee assessed pursuant to section 3-4012 of the Code (55 ILCS 5/3-4012 (West 2014)). Defendant points out that these assessments apply to all defendants who are found guilty of an offense, and that the purpose of the assessments is to discharge the expenses associated with establishing and maintaining automated record keeping systems. He argues that the assessments therefore do not compensate the State for prosecuting a particular defendant, and thus, they constitute fines rather than fees.

¶ 37 The credit under section 110-14 can only be applied to offset fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). To determine whether an assessment is a fine or a fee we consider the nature of the assessment rather than its statutory label. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Our supreme court has defined a "fine" as "punitive in nature" and "a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense." (Internal quotation marks omitted.) *Id.* (quoting *Jones*, 223 Ill. 2d at 581). A "fee," on the other hand, is "a charge that 'seeks to recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *Id.* (quoting *Jones*, 223 Ill. 2d at 582).

¶ 38 This court has found that the $2 State's Attorney Records Automation assessment and the $2 Public Defender Records Automation assessment are fines because they do not compensate the State for the costs associated with prosecuting a particular defendant. *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56. In *Camacho*, we explained that the costs associated with developing and maintaining automated record keeping systems for the State's Attorney's and public defender's offices were not related to the prosecution of a specific defendant. *Id.* ¶ 50. In addition, the public defender assessment may be imposed against any guilty defendant, regardless of whether or not he was represented by the public defender. *Id.* ¶ 51. Consequently, we concluded that the assessments are fines, and thus, entitled to be offset by the *per diem* credit. *Id.* ¶ 56. *Contra People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (finding the assessments are fees because they compensate the State for the costs associated with prosecuting a particular defendant).

¶ 39 In accordance with *Camacho*, in this case, we similarly conclude that the $2 State's Attorney Records Automation fee and the $2 Public Defender Records Automation fee are fines.

Defendant is therefore entitled to offset these fines with his presentence custody credit. Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to amend the fines, fees and costs order to reflect a $4 credit to offset these fees.

¶ 40 Defendant next contends that he is entitled to credit against the $5 Spinal Cord Injury Paralysis Cure Research Trust Fund fine assessed pursuant to section 5-9-1.1(c) of the Unified Code of Corrections (730 ILCS 5/5-9-1.1(c) (West 2014)) and the $10 Arrestee's Medical Costs Fund fee assessed pursuant to section 17 of the County Jail Act (730 ILCS 125/17 (West 2014)). Defendant argues that both of these assessments have been held to be fines, and therefore, he is entitled to offset them with his presentencing credit.

¶ 41 The State responds that the statutes for both of these assessments specifically provide that the fees "shall not be considered a part of the fine for purposes of any reduction in the fine." In reply, defendant "acknowledges" that the statutes contain language to the effect that the charges are not subject to offset by the presentencing credit, but does not expressly withdraw or concede his argument.

¶ 42 The statute providing for the spinal cord fee expressly states "[t]his additional fee of $5 shall not be considered a part of the fine for purposes of any reduction in the fine for time served either before or after sentencing." 730 ILCS 5/5-9-1.1(c) (West 2014). Similarly, the statute providing for the medical costs fee states "[t]he fee shall not be considered a part of the fine for purposes of any reduction in the fine." 730 ILCS 125/17 (West 2014). Based on the plain language of these statutes, we find that defendant is not entitled to offset the charges with his presentencing custody credit.

¶ 43 For these reasons, we direct the clerk of the circuit court to amend the Fines, Fees and Costs order to reflect a credit of $4 to offset the $2 State's Attorney Records Automation fee and the $2 Public Defender Records Automation fee. Defendant's adjusted total assessment should be $430. We affirm defendant's conviction and sentence in all other respects.

¶ 44 Affirmed as modified; fines and fees order amended.

¶ 45 JUSTICE MASON, concurring in part and dissenting in part.

¶ 46 I concur in the majority's decision to affirm the circuit court's judgment. But I respectfully dissent from the majority's decision to review Ray's challenge to $19 of his assessments (less than 2% of the $1,469 total) for plain error. Illinois Supreme Court Rule 615(a) (eff. Jan. 25, 1966) provides that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights *shall be disregarded*." Although the State has not argued against Ray's invocation of plain error to review these unpreserved issues, that does not mean that this "narrow and limited exception" to forfeiture applies. See *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Because the assessments challenged by Ray on appeal cannot be said to affect substantial rights, we should, consistent with Rule 615(a), disregard this claimed error.

¶ 47 I have also previously concluded that the $2 Public Defender Records Automation Fee and the $2 States Attorney Record Automation Fee are not fines and I adhere to that determination. *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 29. Therefore, I further respectfully dissent from the majority's conclusion that these assessments are fines against which Ray is entitle to *per diem* credit.