2017 IL App (1st) 152121-U

No. 1-15-2121

Order filed November 3, 2017

Sixth 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 13372
	)	
ANTONIO ORTEGA,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for residential burglary affirmed over his contention that the evidence was insufficient to prove he entered the victim's "dwelling." Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Antonio Ortega was convicted of residential burglary (720 ILCS 5/19-3(a) (West 2014)) and sentenced to four years' imprisonment. On appeal, defendant contends that the evidence was insufficient to convict him of residential burglary

because the State failed to prove he entered the victim's "dwelling," and contests various fines and fees. For the following reason, we affirm and order the fines, fees, and costs order corrected.

¶ 3 Defendant was charged with residential burglary for "knowingly and without authority, enter[ing] the dwelling place of Daniel Munoz *** with the intent to commit therein a theft." At trial, Deborah Pelletier testified that, on May 20, 2014, she lived at 3009 West 21st Place, and her home was in between Munoz's home and defendant's home. Between 4 and 5 p.m. on that date, Pelletier was home and heard her dogs barking and then heard the gate of her gangway open. Her home shares the gangway with Munoz's home. She observed defendant carrying a cooler. He exited the gangway and walked toward his residence. A few minutes later, Pelletier again heard the gate of the gangway open and observed defendant walk from the gangway across the front of her house towards his own house, this time with a bicycle that she believed was red.

¶ 4 After approximately 5 to 10 minutes, Pelletier took her garbage out to her backyard. Munoz was in the alleyway behind his home speaking with his mother-in-law. Pelletier told Munoz what she observed with regard to defendant. Munoz thereafter called the police, who spoke with Pelletier upon arrival. After speaking with the police, she observed a police officer and Munoz walk to defendant's door. They knocked on defendant's door, which opened on its own. The cooler and bike were "right there" inside the door. The police retrieved the items and brought them back to Munoz's house. Pelletier recognized the bicycle as the one that defendant had taken a few minutes prior.

¶ 5 Pelletier did not remember telling the police that the bike was pink and white, but she knew the recovered bike was the same as the one that defendant crossed her yard with earlier that day.

¶ 6 On cross-examination, Pelletier testified that Munoz lives in a multiunit building, and other families live in it as well. She confirmed that she saw defendant going back and forth from Munoz's gangway, but acknowledged that, at the time, she told a detective that she believed the individual she observed was defendant although she was "not a hundred percent sure." On re-direct, Pelletier stated she was now a hundred percent sure the individual was defendant.

¶ 7 Mercedes Ortega testified that on May 20, 2014, she was living at 3007 West 21st Place and knew defendant, who also lived in her building. She had seen defendant approximately a dozen times around the building. On that date, she saw defendant exiting his house and entering Munoz's yard. Mercedes was in front of her building cleaning out her mother's car. After a few minutes, she observed defendant come out of Munoz's gangway with a bicycle that she believed was red. He ran up the stairs to his apartment in a rush with the bicycle. Mercedes did not tell anyone that she saw defendant take a bicycle into his house, but she spoke with either Munoz or his wife about it several days later.

¶ 8 On cross-examination, Mercedes testified she was outside cleaning her mother's car for approximately 40 minutes. She did not see the police at her building that day because they were at the front of the building, and her apartment was located at the rear of the building.

¶ 9 On re-direct, Mercedes testified that when she saw defendant carrying the bike, she did not yet know there was an issue. When Munoz came to fix something in her home, his "robbery" came up in the course of their conversation so she told him that she had seen something that day.

¶ 10 Daniel Munoz testified that on May 20, 2014, he was living at 3011 West 21st Place in a first floor apartment with his wife and children. Between 4 and 5 p.m., he was working at a hardware store located across the back alley from his house. At some point during that hour,

Munoz received a call from his mother-in-law, who was watching his children. After receiving the call, Munoz walked back to his house and saw bags that contained clothes, along with chairs and "other stuff," which he stored on his porch, on the ground. When he left his house, the items had been on his porch. Munoz's back porch was enclosed and led to his apartment. He was missing several items, including "some bikes," and a cooler containing papers, a radio, and "some other stuff." When he discovered the items were missing, he called the police. His neighbor, Pelletier, told him that she had seen who had "done it."

¶ 11 After speaking with police officers, he went with the officers to defendant's home at 3007 West 21st Place. Defendant had lived at that residence for approximately a year prior to the incident, but Munoz had only seen him two to three times. A police officer knocked on defendant's door, which swung open, and Munoz saw his property in the hallway. With the help of police, Munoz recovered his missing items. He never gave defendant permission to enter his residence or remove anything from his back porch.

¶ 12 On cross-examination, Munoz testified that his building has four units, one on each floor. Each unit has its own patio or porch. Munoz's enclosed porch is located at the rear of the building on the first floor. It could be accessed from his apartment or a door to the outside at the basement level, which has a lock on it. Inside that door, there is a set of stairs that lead from the basement level up to Munoz's first floor apartment, and then up to the subsequent apartments. Although there is no door separating Munoz's porch from the stairs, the porch is part of Munoz's apartment and was not part of a common area. The stairs, however, were a common area for the building residents. Munoz locked the apartment door leading to his porch and the stairs.

¶ 13 Munoz testified that defendant's building was also a multiunit building with an attic apartment, a first floor apartment where defendant lives, and a basement apartment. The door that the police knocked on was a common area, but defendant was the only person with access to that part of the building. Munoz talked to Pelletier about his case between one and three times. He also talked to his other neighbors because their community is close. A few days after the incident, Munoz spoke with Mercedes Ortega; however, he did not give her name to the police. Within a month or two prior to trial, Munoz told the State's Attorneys about Mercedes, and that was the first time he mentioned her name.

¶ 14 On re-direct, Munoz identified a photograph depicting the basement level porch and the locked door that led outside. That door locked the entire stairwell. Pelletier told Munoz what she observed that day, but Munoz did not tell her who to identify or what to testify to. Mercedes lived in the back apartment of defendant's building. Munoz worked as a handyman in defendant's building, and, in the course of his work, he told Mercedes to be careful because he "just had somebody rob [him] in [his] own house." Based on that statement, Mercedes and Munoz had a conversation about what she had seen on May 20, 2014.

¶ 15 On re-cross, Munoz described a photograph which depicted his enclosed porch after his items were stolen.

¶ 16 Chicago police officer Kimberly Akins testified that on May 20, 2014, she was assigned to a burglary call at 3011 West 21st Place. When she arrived at the scene, she spoke with Munoz and Pelletier. During their conversation, Akins learned that Pelletier witnessed an individual with a pink and white bicycle and a red cooler. Based on Pelletier's description of the offender, Akins went two doors down to the offender's house with Munoz. The door was ajar, and opened when

she knocked on it. Inside the door, Akins found a pink bike and a cooler containing miscellaneous papers, which Munoz identified as his missing items. They subsequently recovered the bicycle and the cooler.

¶ 17 On cross-examination, Akins acknowledged that, prior to going to 3007 West 21st Place, Munoz told her other items were missing, but they were not in the doorway. She stated that she put in her police report that she and Munoz walked to defendant's address and knocked on the door, but acknowledged that the report said only that they relocated "to 3007 West 21st Place to locate the offender with negative results." Akins also acknowledged that the report did not list any of Munoz's property as being recovered.

¶ 18 On re-direct, Akins testified that it was a mistake that the police report did not show that Munoz's bicycle and cooler were recovered. She denied knowing defendant, Munoz, or Pelletier prior to May 20, 2014. The entryway where she recovered Munoz's missing items was only an entryway to defendant's apartment, and did not provide access to any other unit in the building.

¶ 19 Following arguments, the court found defendant guilty of residential burglary. With respect to whether the porch constituted a dwelling, the court stated the following.

> "The only question in this case -- the only question in this case is whether or not this is a residential burglary.
>
> What's been presented to the Court and described by the witnesses in this matter is that there is a porch attached to the apartment that the victim lives in. He indicated that each apartment in that building was assigned a porch. The fact that the common stairways run through one portion of the porch area is not any different than most porches in the City of Chicago.

> The other tenants of the building do have common access to those stairs as they get to their own premises in question. I suppose they could venture into the porch area, but that's not their porch area. They have their own porch area."

¶ 20 At a hearing on defendant's posttrial motion for a new trial, defense counsel argued that the State failed to prove residential burglary because the porch did not constitute a dwelling. Counsel argued that because the building was a multiunit property, the porch was part of a common area accessible to all the building tenants. Additionally, counsel asserted that Munoz used the porch for storage and not as a living area. The State responded that the porch was a dwelling because it was screened-in, led to Munoz's kitchen, and held items that demonstrated it was part of Munoz's residence. The court denied defendant's motion and sentenced him to four years' imprisonment. This appeal followed.

¶ 21 On appeal, defendant first argues that the State's evidence was insufficient to prove beyond a reasonable doubt that he committed residential burglary.

¶ 22 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43), and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). We will not overturn a criminal conviction "unless the

evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 23 A person commits residential burglary when he "knowingly and without authority enters or knowingly and without authority remains within the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." 720 ILCS 5/19-3(a) (West 2014). Section 2-6 of the Criminal Code of 2012 states that: "For the purposes of Section 19-3 of this Code, 'dwelling' means a house, apartment, mobile home, trailer, or other living quarters in which at the time of the alleged offense the owners or occupants actually reside or in their absence intend within a reasonable period of time to reside." 720 ILCS 5/2-6(b) (West 2014).

¶ 24 Here, defendant asks that we reduce his residential burglary charge to simple burglary, and, necessarily, does not contest the sufficiency of the evidence to prove burglary. Instead, he challenges only the "dwelling" element of residential burglary. Defendant asserts that because the enclosed porch was used only for storage, it was not a "dwelling" within the meaning of section 2-6(b). To support his position, defendant relies on *People v. Thomas*, 137 Ill. 2d 500 (1990).

¶ 25 In *Thomas*, our supreme court considered whether the defendant was properly charged with burglary rather than residential burglary when he killed the victim in her garage while attempting to steal perfume products stored there. The defendant argued that the evidence demonstrated that he committed residential burglary rather than burglary because he entered the victim's attached garage and the State acted "arbitrarily" when it charged him with burglary. *Id.* at 519. The *Thomas* court noted that the victim's body was found in her garage, which was part of a multiunit structure, where all the living units and garage units were attached and under the

same roof. *Id.* The court held that "*here* [] an attached garage *is not necessarily* a 'dwelling' within the meaning of the residential burglary statute" and that "[a] garage, *at least in this instance,* whether attached to the various living units or not, cannot be deemed a residence or living quarters." (Emphasis added.) *Id.*

¶ 26 The court went on to conclude that its decision was not "necessarily" inconsistent with *People v. Dawson,* 116 Ill. App. 3d 672 (1983), which held that the entry into an attached garage constituted residential burglary because that case predated the legislature's adoption of a "new definition of 'dwelling.' " *Id.* at 520. See *Dawson*, 116 Ill. App. 3d at 675 (because the house and the garage were attached with one roof, one foundation, and a connecting door, once the defendant had broken "the close of the garage," he had entered a " 'dwelling place' [sufficient] to establish residential burglary"). Ultimately, however, our supreme court declined to resolve "the question of whether the entry of an unoccupied portion of the second floor [citation] or the porch [citation] of a house constitutes the unlawful entry of a residence." *Thomas,* 137 Ill. 2d at 520.

¶ 27 Although defendant is correct that *Thomas* held that the garage in that case was not a "dwelling" under the residential burglary statute, the court limited its holding to the facts of that case and declined to create a *per se* rule that an attached garage cannot be a dwelling. *Id.* The court also declined to resolve whether a porch constituted a dwelling. *Id.* We therefore do not find *Thomas* dispositive of the instant case.

¶ 28 Rather, we find the instant case analogous to *People v. McIntyre,* 218 Ill. App. 3d 479 (1991). In *McIntyre*, the defendant was convicted of residential burglary after the screen door to an enclosed porch attached to a residence was torn, the porch door unlocked, and a gas grill

removed from the porch. *Id.* at 480. On appeal, the defendant argued that the evidence was insufficient to establish residential burglary where the porch attached to a house did not qualify as a "dwelling." *Id.* at 481. The court noted that the *Thomas* court did not resolve the question of whether the unlawful entry into the porch of a house "may constitute the unlawful entry of a residence," and similarly declined to determine "whether every porch is part of a dwelling." *Id.* However, the *McIntyre* court concluded that in that case, the porch was part of the homeowners' "living quarters," based on the wood-frame structure with solid walls and screens, its attachment to the house, and the doors with locks which provided access to the house and the backyard respectively. *Id.* at 481-82. The court also noted that the porch was furnished with a table and chairs, had a gas grill, and the homeowners ate on the porch in the summer. *Id.* at 482. Thus, the court concluded that because the porch was "attached, enclosed, and used for sitting, eating and cooking," the porch was "part of the living quarters of the house," and therefore constituted a "dwelling." *Id.*

¶ 29 Here, the evidence at trial established that defendant was observed coming and going from Munoz's gangway with Munoz's bike and cooler, both of which had been on Munoz's enclosed porch. Similar to the porch in *McIntyre*, the porch here was attached, enclosed, and had locked doors leading to Munoz's apartment. Aside from the door that led from Munoz's home to the porch, the porch was accessible only through a locked door located at the basement level of the multiunit building. The photographs depict that the porch was enclosed by solid walls with windows, and was part of Munoz's specific apartment, as the other units had their own porches. We therefore conclude that the enclosed porch in this case was part of the apartment and qualified as a "dwelling" under section 2-6(b).

¶ 30 In reaching this conclusion, we reject defendant's argument that the porch was not a dwelling because it was used only for storage rather than living quarters. In *People v. Cunningham*, 265 Ill. App. 3d 3, 8-9 (1994), the court concluded that an attached garage of a single-family home, which led directly into a room of the house, was a part of the dwelling under the residential burglary statute, and the State was not required to prove that anyone was actually "living" in the garage. In that case, the evidence established that the defendant entered an attached garage of a home which had a door that led directly into the family room, that the side door to the garage was locked and that the garage was used primarily to store tools and the children's toys. *Id.* at 9. The court therefore concluded that, under those facts, the jury could have found beyond a reasonable doubt that the garage was part of the dwelling for purposes of the residential burglary statute. *Id.*

¶ 31 Likewise, in this case, the stairwell door to the outside was locked, the porch led to Munoz's apartment, and, based on the evidence, the space was used for storage. Based on *Cunningham*, the State did not need to prove that Munoz actually lived on the porch for it to be considered part of the dwelling under section 2-6(b). See *id.* at 8-9. Accordingly, we find that the evidence, when viewed in the light most favorable to the State, established that the elements of residential burglary beyond a reasonable doubt.

¶ 32 Next, defendant contests various fines and fees imposed by the trial court. Defendant acknowledges that he did not preserve this issue below, but argues that fines and fees issues are reviewable under the second prong of the plain error doctrine and Supreme Court Rule 615(b). We disagree that defendant's challenge is reviewable under plain error and Rule 615(b). *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9.

Nevertheless, because the State does not argue that defendant has forfeited review of his challenge to the assessed fines and fees, it has forfeited any forfeiture argument. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (rules of waiver and forfeiture apply to the State). Therefore, although defendant did not raise his challenge to the assessed fines and fees in the trial court, we will review defendant's claims. The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 33 Defendant first contends, and the State concedes, that the $5 electronic citation fee should be vacated. We agree, and vacate the $5 electronic citation fee because defendant was not convicted in "any traffic, misdemeanor, municipal ordinance, or conservation case." See 705 ILCS 105/27.3e (West 2014).

¶ 34 Next, defendant argues that various assessed fees are instead fines that should be offset by his $5 per day presentence incarceration credit.

¶ 35 The record reveals defendant was entitled to credit for 341 days for time served prior to sentencing. Under section 110-14(a) of the Code of Criminal Procedure of 1963, defendant is entitled to a credit of $5 toward his fines for each day he was incarcerated before his sentencing. 725 ILCS 5/110-14(a) (West 2014). "The plain language of this statute indicates that the credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Fines and fees differ according to their purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Fees are "intended to reimburse the state for a cost incurred in the defendant's prosecution," while a fine is punitive and "part of the punishment for a conviction." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63 (citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006)).

¶ 36 Defendant argues, and the State concedes, that the $15 State Police operations fee (705 ILCS 105/27.3a (1.5) (West 2014)) and the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) are actually fines that should be offset by defendant's presentence incarceration credit. We agree that both of these "fees" are actually fines because these assessments do not reimburse the State for expenses incurred in defendant's prosecution. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 ("we find that the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution"); *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21 (awarding defendant credit for court system fee imposed under section 5-1101(c) of Counties Code, stating, "Most important, the assessment is not intended or geared to compensate the State (or the county) for the cost of prosecuting a defendant.").

¶ 37 Defendant next argues that his presentence incarceration credit should apply to the $2 public defender records automation charge (55 ILCS 5/3-4012 (West 2014)), and the $2 State's Attorney's records automation charge (55 ILCS 5/4-2002.1(c) (West 2014)) because they are fines, rather than fees intended to reimburse the State and public defender's office for costs associated with prosecuting and defending defendant. The States responds that the two $2 fees were properly assessed because they are compensatory in nature, and therefore fees, not fines.

¶ 38 In *People v. Brown*, 2017 IL App (1st) 142877, ¶¶ 76, 78, this court found that the $2 public defender's records automation and the $2 State's Attorney records automation assessments are fees. The *Brown* court acknowledged the decision in *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56, which concluded that these charges are fines. However, the court in *Brown* noted that, other than the name of the recipient, the fees are "identical" and concluded that it would "follow the weight of authority that holds that the State's Attorney records

automation fee is indeed a fee." *Brown*, 2017 IL App (1st) 142877, ¶¶ 76, 78. Likewise, we acknowledge the decision in *Camacho*; however, we follow *Brown* and conclude that these assessments are fees and not fines. See *id.* We therefore find that defendant is not entitled to offset the $2 State's Attorney records automation fee nor the $2 public defender records automation fee.

¶ 39 Defendant next asserts that his presentence incarceration credit should apply to the $190 Felony Complaint Clerk charge (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), as it is intended to recoup the clerk's expenses, rather than reimburse the State for costs relating to prosecuting defendant. The State maintains that the $190 assessment is a fee, according to precedent, and is therefore not eligible to be offset by defendant's credit. Defendant's argument was previously rejected in *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006), which determined that the Felony Complaint Clerk assessment is a fee rather than a fine. Accordingly, defendant's presentence incarceration credit does not apply to the $190 Felony Complaint Clerk fee.

¶ 40 Defendant also contends that the $15 Clerk Automation fee (705 ILCS 105/27.3a(1) (West 2014)) and the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)) imposed by the trial court are creditable fines. The State, relying on *People v. Brown*, 2017 IL App (1st) 142877, counters that in this court has previously concluded the both assessments are fees, rather than fines. We agree with the State and find that this court previously determined these assessments were fees because "these charges are compensatory and a collateral consequence of defendant's conviction." *Tolliver*, 363 Ill. App. 3d at 97. Thus, defendant is not entitled to apply his presentence incarceration credit to the automation fee or the document storage fee.

¶ 41 Finally, defendant argues the $25 court services (sheriff) assessment (55 ILCS 5/5-1103 (West 2014)) is a creditable fine. He asserts that sheriff's "security guards" provide a neutral service, the charge does not compensate the State for the costs incurred to prosecute defendant, and it finances a component of the "overall court system." The State maintains that this charge is a fee.

¶ 42 Section 5-1103 of the Counties Code, the statute authorizing the court services (sheriff) fee, states: "A county board may enact by ordinance or resolution a court services fee dedicated to defraying court security expenses incurred by the sheriff in providing court services or for any other court services deemed necessary by the sheriff to provide for court security." 55 ILCS 5/5-1103 (West 2014). To prosecute defendant, court security services were necessarily used, and thus, as we held in *Tolliver*, court security expenses were a "collateral consequence" of his prosecution and conviction. *Tolliver*, 363 Ill. App. 3d at 97. Accordingly, we conclude that defendant is not entitled to presentence custody credit toward this charge. See *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74 (finding that the court services (sheriff's) assessment is a fee and not a fine).

¶ 43 In sum, we vacate the $5 electronic citation fee. The $15 State Police operations assessment and $50 court systems assessment are creditable fines that should have been offset by defendant's presentence custody credit. With these corrections, defendant's fines, fees, and costs total $399. We therefore order the circuit court to modify the fines, fees, and costs order accordingly. The judgment of the circuit court is affirmed in all other respects.

¶ 44 Affirmed; fines and fees order corrected.