2018 IL App (4th) 150892-U

NO. 4-15-0892

FILED
May 1, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
CHAD E. PAYNE,	)	No. 15CF153
Defendant-Appellant.	)	
	)	Honorable
	)	Mark A. Drummond,
	)	Judge Presiding.

PRESIDING JUSTICE HARRIS delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant has procedurally forfeited the issue of whether the trial court abused its discretion by denying his motion to continue the jury trial, and the doctrine of plain error does not avert the forfeiture.

(2) Because, under the most recent supreme court precedent, necessity was not an affirmative defense to a charge of driving while one's driver's license was suspended, it could not have been ineffective assistance to refrain from tendering a jury instruction on that legally unavailable affirmative defense.

(3) Defendant has procedurally forfeited the sentencing issues he raises for the first time on appeal, and the doctrine of plain error does not avert the forfeiture.

(4) Defendant is entitled to an additional day of presentence credit.

(5) Defendant is entitled to monetary credit against various fines—but not against the probation operations fee, which is a true fee instead of a fine.

¶ 2 A jury found defendant, Chad E. Payne, guilty of driving while his driver's license was revoked (625 ILCS 5/6-303(d)(2) (West 2014)), and the trial court sentenced him to

imprisonment for three years. He appeals on five grounds: (1) the court abused its discretion by denying his motion to continue the trial, (2) defense counsel rendered ineffective assistance by failing to tender a jury instruction on the affirmative defense of necessity, (3) the court committed sentencing errors, (4) he is due one additional day of presentence credit, and (5) the court failed to allow him monetary credit against fines.

¶ 3 We hold (1) and (3) to be procedurally forfeited. We find no merit in (2), since necessity is not an affirmative defense to the absolute-liability offense with which defendant was charged. The State concedes (4) and (5), except the State disagrees that the probation operations fee is a fine. We accept those concessions, and we adhere to our previous holdings that the probation operations fee is a true fee. We affirm the judgment in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 A. The Arrest of Defendant and His Release on Bond

¶ 6 On January 17, 2015, the police in Quincy, Illinois, arrested defendant for driving while his driver's license was suspended. That same day, the trial court released him on bond.

¶ 7 B. The Information and the Arraignment

¶ 8 On March 18, 2015, the State filed an information, which charged defendant with the Class 4 felony of driving while his driver's license was suspended (625 ILCS 5/6-303(d)(2) (West 2014)). The information alleged that on January 17, 2015, when he committed the present offense, he already had a previous conviction of driving while his driver's license was suspended and "the *** original suspension was for a violation of the Illinois Compiled Statutes, Chapter 625, Section 5/11-501," the statute criminalizing driving under the influence.

¶ 9 On the same day the State filed the information, the trial court advised defendant of the charge and the possible penalties and, at his request, appointed counsel.

¶ 10 C. Denial of Defendant's Motion For a Continuance

¶ 11 On April 21, 2015, defense counsel told the trial court:

> "MS. DAVIS: If I may, I believe [defendant] is going to be hiring private counsel. I would ask that we continue this two weeks to give him time to appear with private counsel.
>
> MR. JONES [(prosecutor)]: [Defendant] did indicate at another hearing that he was going to hire private counsel."

The court granted a continuance.

¶ 12 On April 28, 2015, defendant appeared with his appointed defense counsel, and the trial court asked him if he had hired private counsel yet. Defendant answered:

> "THE DEFENDANT: Yeah, I'm working on it right now.
>
> THE COURT: It's either a yes or a no[.]
>
> THE DEFENDANT: Yes; yes, sir.
>
> THE COURT: You haven't actually done it, though, because you don't have anybody here."

¶ 13 The trial court scheduled the case for a preliminary hearing in two weeks.

¶ 14 On May 12, 2015, defendant appeared with appointed counsel, and the trial court asked him if he was employed. Defendant answered he was employed only part time. The court asked him:

> "THE COURT: Are you going to hire private counsel?
>
> THE DEFENDANT: I'm trying.

THE COURT: Well, unfortunately, I don't think there is enough there to vacate the public defender appointment."

¶ 15 The trial court continued the case for two weeks for a preliminary hearing and advised defendant to "talk to [his attorneys from the public defender's office] and cooperate with them in [his] defense."

¶ 16 On May 26, 2015, the trial court held a preliminary hearing. A Quincy police officer, Farren Lindsey, testified. The court found probable cause, arraigned defendant, and scheduled the jury trial for July 13, 2015.

¶ 17 On July 1, 2015, in a pretrial hearing, appointed defense counsel moved to continue the case to the August docket. The State had no objection, and the trial court granted the motion.

¶ 18 On July 31, 2015, both parties told the trial court they were ready for trial. The court scheduled the final pretrial hearing for August 10, 2015.

¶ 19 On Monday, August 20, 2015, before the venire was called in, the trial court observed: "There's been a motion to continue filed this morning." It was a motion by the defense. The court told defense counsel: "Ms. Davis, you may be heard on this." She explained:

"MS. DAVIS: Your Honor, I spoke to [defendant] Friday late in the day. That was the first time he actually was willing to discuss this case with me. He's communicated to me that there are 15 wishes—15 witnesses he wishes me to call. I have not had time to do my due diligence and talk to those witnesses. I would ask that this be continued."

¶ 20 The trial court asked the State what its position was on the requested continuance. The prosecutor objected to a continuance because (1) the case was filed five months ago, and

defendant had waited until the last minute to disclose the 15 witnesses to his defense counsel and (2) the prosecutor was skeptical that these witnesses had any relevant information anyway, considering that, in his statement to the police, defendant mentioned only one witness, "an eight-year-old juvenile."

¶ 21 The trial court asked defense counsel if she had anything further to add. She answered: "[Defendant] had represented many times that he was going to hire private counsel, including at the preliminary hearing and also at the pretrial [hearing]."

¶ 22 The trial court then recounted the facts and circumstances of the case:

> "THE COURT: Ms. Davis was appointed on March 18th, filed a motion for speedy trial on March 19th. [Defendant] was in court with her on April 1st. The month of April went by, nothing happened. The month of May went by, nothing happened. The month of June went by, nothing happened. The month of July went by and nothing happened.
>
> Back in April there was a notation by Judge Mays that there was status on private counsel. So this was raised three months ago.
>
> He was released to work in Missouri on April 28th. The [public defender] appointment was continued in May. It was set for trial before Judge Lagoski.
>
> Discovery was provided on June 29th. The defendant filed a motion to continue from Judge Lagoski's calendar on July 2nd. It was continued to today. It's too late. We're proceeding to trial.
>
> THE DEFENDANT: How am I going to get a fair trial? Oh, hell no. Fifteen witnesses, and you ain't calling one of them?

THE COURT: [Defendant], you had an attorney, and you had the opportunity to discuss with your attorney your 15 witnesses, and bringing it up at the last minute—

THE DEFENDANT: This is the first time she's come up to talk to me.

THE COURT: Don't interrupt me. I'll let you talk, but this is the first time you've brought this up. So we are going to trial this morning.

You've requested a jury trial. Sixty people have rearranged their schedules to be here for your jury trial, and we are proceeding ahead this morning. It is too late for you to provide your attorney—

THE DEFENDANT: Well, I'd like to put on record that me and her had a conflict, and how am I going to get a fair trial?

THE COURT: Motion to continue is denied."

¶ 23 C. The Evidence in the Jury Trial

¶ 24 1. *The Testimony of Brandon Hawk*

¶ 25 Brandon Hawk testified that on January 17, 2015, he was in his residence, at North 11th and Elm Streets in Quincy, when he heard a truck revving its engine. By the time he looked outside, the truck, yellowish in color, was already in motion. It pulled out of a yard and into an alley and then "fled" down the street.

¶ 26 Photographs labeled as People's exhibit Nos. 1 to 4 were (Hawk agreed) a fair representation of the yard, and the truck pictured in People's exhibit Nos. 5 and 6 appeared to be the same color as the truck he had seen.

¶ 27 2. *The Testimony of Carolyn Krow*

¶ 28 Carolyn Krow testified that on January 17, 2015, she was employed at Dairy Queen, 801 North 12th Street, Quincy. She was taking the garbage out to a Dumpster, behind the Dairy Queen, when she heard the noise of vehicles. She turned toward the noise and saw two trucks entering the yard at 1025 Elm Street, a residence on a dead-end road behind the Dairy Queen. The two trucks drove into the yard at an angle. One truck was silver-colored, and the other truck was yellowish in color. The silver truck was behind the yellow truck, and the yellow truck ended up against a fence in the yard. The driver of the silver truck got out. He went to the driver's-side door of the yellow truck, and he had something in his hand. Krow saw his hand go back, and he appeared to hit the driver's-side window of the yellow truck, delivering one blow.

¶ 29 She went to the drive-through area, obtained a telephone from her coworkers, and called 911. By the time her gaze returned to 1025 Elm Street, the silver truck was gone, but the yellow truck was still in the yard. She then saw the yellow truck drive out of the yard and north on 11th Street. She never did see the driver of the yellow truck.

¶ 30 People's exhibit Nos. 1 to 4 accurately depicted the yard, including the angling tire tracks left by the trucks. The truck pictured in People's exhibit No. 6 appeared to be of the same yellowish color as the truck she saw on January 17, 2015. She agreed that, in the photograph, the driver's-side window of the yellow truck appeared to be broken.

¶ 31 3. *The Testimony of Farren Lindsey*

¶ 32 Farren Lindsey testified he was a Quincy police officer and that on January 17, 2015, he was dispatched to 1025 Elm Street to investigate a possible hit and run. Upon arriving, he saw two sets of muddy tire tracks in the yard. The tracks led to a fence and a Harley-Davidson motorcycle, both of which appeared to have sustained severe damage. Judging by the tire tracks,

the driver's side of one of the vehicles had run into the fence and the motorcycle. The tire tracks led out of the yard.

¶ 33 After speaking with Hawk and Krow, Lindsey began looking for a yellow-orange truck and a silver truck. Other police officers found a yellow-orange truck that they thought might have been involved. People's exhibit Nos. 5 and 6 accurately depicted the truck, including its busted windows and the damage to its driver's-side door. Lindsey learned the truck was registered to Janda Grimsley and that defendant was in a relationship with her.

¶ 34 Lindsey then spoke with defendant. The prosecutor asked Lindsey:

> "Q. What did defendant tell you about whether or not he was driving that yellow truck that we just saw on the photograph?
>
> A. Yeah. He admitted to me that he was driving it.
>
> Q. Did he tell you where he was driving it?
>
> A. Originally, he advised that he had been in an alley near Fourth and Elm Street, prior to the accident.
>
> Q. And what did he tell you after he said he was originally at the alley of Fourth and Elm Street?
>
> A. That—the entire—okay. Basically, he had been parked in that alley. He'd had an eight-year-old subject in the passenger seat of his vehicle at that time.
>
> [Defendant] advised that his brother, Cory, had drove up behind him in a silver pickup, and Cory had gotten out of his truck and approached [defendant] in his—which would have been the yellowish truck. He began a confrontation with

him or an argument. He had a wooden club of some type in his hand, began knocking the windows out of the yellowish pickup.

Q. What did [defendant] do at that point?

A. [Defendant] advised that he—his left forearm was struck at one point with the club, and he told the child to exit and run to his grandfather's house, which apparently is close to that area.

Q. And what did the defendant do then?

A. He then drove from the area, attempting to get away from Cory.

Q. Where did he end up?

A. At the 1025 Elm Street location.

Q. And after he was at 1025 Elm Street, did the silver truck follow him into the yard?

A. Yes.

Q. Did the silver truck then drive away?

A. Yes.

Q. And after the silver truck drove away and the defendant was in the yard at 1025 Elm Street by himself, apparently, what did he do? What did the defendant do?

A. I'm sorry. What was the last?

Q. According to the defendant, what did he do after the silver truck had driven away and he was in the yard by himself?

A. He advised that he actually knew the resident at that location, that he attempted to make contact there, but was unable to do so. He then stated that he left the area in his vehicle at that time.

Q. Got back in the car and drove away?

A. Yes.

Q. And he drove away in what direction and on what street?

A. Drove in a northern direction, out to 11th Street.

Q. And got on 11th Street and drove away?

A. Yes."

¶ 35 Lindsey testified that after receiving this account from defendant, he ran defendant's information through the dispatcher's office and learned his driver's license was suspended.

¶ 36 Without objection by the defense, the trial court admitted People's exhibit No. 7, "a driving abstract of the defendant, showing that on the date in question, January 17, 2015, [his] driver's license was, in fact, suspended." (In addition, as the prosecutor later noted outside the presence of the jury, People's exhibit No. 7 showed that (1) the suspension was a summary suspension for driving under the influence and (2) defendant previously was convicted of driving while his driver's license was suspended. The parties agreed that instead of informing the jury of these other crimes, the court merely should take judicial notice of People's exhibit No. 7 and the exhibit should not be shown to the jury.)

¶ 37 On cross-examination, defense counsel asked Lindsey:

"Q. Did [defendant] tell you at some point that the reason why he drove away was to seek assistance and to get help in finding a phone to call 911?

A. He did advise that he didn't have a phone at the time.

Q. Did he say at any point that he thought Cory was trying to kill him, and he felt it was necessary to get away?

A. He did advise that his brother was making statements to kill him, yes."

¶ 38 The State then rested. The defense rested without calling any witnesses or presenting any evidence. Defense counsel tendered no jury instructions.

¶ 39 D. Closing Arguments

¶ 40 During closing arguments, the prosecutor told the jury:

"Two questions that you have to answer, was he driving a motor vehicle[,] and was his license suspended? The why doesn't matter.

Why he might have done it, whether or not he had a reason is not for today's purposes.

Two questions and only two questions are what you are here to answer. If you consider anything else, you're not following the law because the jury instructions, what you'll be told by the judge to do is to answer those two questions."

¶ 41 Defense counsel told the jury:

"There's no question that [defendant] did not have his license at the time that this occurred. However, as you heard Officer Lindsey testify, [defendant] was in a vehicle. His brother was hitting the side of the vehicle, and he was scared for his life.

He was worried that he was going to be hurt or possibly even be killed. So he did the only thing that he could think to do. He took off as fast as he could, to get away from the person that was attacking him.

Was this a good decision? Probably not, but we all make decisions in times of great fear that maybe if we thought them out better would not have been our choice at the time."

¶ 42 The jury found defendant guilty of driving while his driver's license was suspended.

¶ 43 E. The Presentence Investigation Report

¶ 44 The presentence investigation report, which was filed on October 13, 2015, included a handwritten and signed statement by defendant. He wrote as follows in his statement:

"I was putting a radio in my truck at a friend[']s house with my cousins[,] and Mike was in the truck. My brother went to my house and threating [*sic*] my wife to tell her where I was. He was high on meth for the past year. He pulled up out of nowhere and had a baseball bat and beat all the lights and windows out of the truck as I tr[i]ed to get out. He hit me with the bat[,] so me and Mikey got glass in our arms and head. Mikey is 10 years old[,] and the other kid was younger[,] so I started the truck and started moving[,] and the kids had to jump out of the truck. My brother was ramming the truck from 4th Oak and College to tenth at high speeds until he pushed me into the Harley into the house. I knocked on the door[,] no answer. My brother said he was getting a gun to kill me. So I drove [the] truck to my house and called 911 and waited for the cops to show up."

¶ 45 F. The Sentencing Hearing

¶ 46 On October 13, 2015, the trial court held a sentencing hearing. The prosecutor recounted defendant's extensive criminal history and noted he was eligible for an extended sentence of six years' imprisonment. Instead of 6 years, however, the prosecutor recommended a sentence somewhere in the range of 3 1/2 to 4 years' imprisonment. Defense counsel agreed that defendant had "somewhat of a history with the court system," but because he had "manage[d] to stay out of trouble for a significant period of time," she recommended probation instead of imprisonment.

¶ 47 The trial court asked defendant if he wished to make a statement in allocution. Defendant stated: "Yeah. I'm just sorry for what happened. The kids, there was kids around where I was at, and I was trying to get them out of harm's way."

¶ 48 The trial court then stated:

> "The court's considered the evidence and the arguments, has considered the Presentence Investigation Report and has considered the factors in aggravation and mitigation.
>
> I know, [Defendant], you want me to concentrate on the factor in mitigation that—it could be: Three, the defendant acted under a strong provocation, or, the defendant's criminal conduct was induced or facilitated by someone other than the defendant. By wanting me to concentrate on what your brother was doing to you at that time. However, the bottom line is that you should not have been driving that truck, and although perhaps I can understand with the kids in it why you drove away, to keep the kids from your brother, it's not like you had the kids or the kids were in another person's truck and you jumped in to get them away.

According to your version, I quote: [‘]I was putting a radio in my truck.[’]

Well, if you don’t have a driver’s license, you shouldn’t have a truck, and I don’t know why you would put—be putting a radio—

THE DEFENDANT: It wasn’t my truck. It was my wife’s.

THE COURT: [‘]I was putting a radio[’]—

All I know is what I read.

THE DEFENDANT: Yeah, yeah.

THE COURT: And what I read is, quote: [‘]I was putting a radio in my truck at a friend’s house.[’]

So, I don’t know why you would be putting a radio in—your words—your truck, at a friend’s house, and if it is your wife’s truck, why you wouldn’t be putting the radio in her truck at your house?

THE DEFENDANT: That’s where we was staying at.

THE COURT: Somehow the truck had to get from your house to your friend’s house, and I still don’t have an adequate explanation in your version as to how the truck got there.

Now, you do have the factors in mitigation of—that you did, according to your version, call 9-1-1 and waited for the officers—officers to arrive, and all I know is what you’ve put in here. You did not write: [‘]My wife drove my truck to my friend’s house so that I could put a radio in her truck for her.[’] As far as I can see, there’s nothing about the wife driving the truck to and from the friend’s house.”

¶ 49 The trial court sentenced defendant to three years' imprisonment and allowed him presentence credit for August 10, 2015 (when his bond was revoked), to October 13, 2015.

¶ 50 Also, in a separate signed order, the trial court imposed upon defendant various fines, costs, and assessments, including $50 for the "Court fund," $5 for "State Police Op[erations]," $30 for "Child Advoc[acy]," $10 for "Crime Stoppers," $30 for "Juvenile Records," $30 as a "CASA [(Court[-]Appointed Special Advocates)] fee," and $10 for "Probation Op[erations]." The court allowed no monetary credit against those assessments.

¶ 51 II. ANALYSIS

¶ 52 A. The Denial of a Continuance

¶ 53 Defendant argues the trial court abused its discretion by denying the motion for a continuance that he filed the morning of the jury trial. See *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 100 (denial of a continuance will be reversed only if the trial court abused its discretion and the denial prejudiced the defense). He admits he never raised this issue in his posttrial motion and that, generally, issues omitted from the posttrial motion are procedurally forfeited (see *People v. Naylor*, 229 Ill. 2d 584, 592 (2008)). He argues, however, that the doctrine of plain error (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)) should avert the forfeiture, both because the evidence was closely balanced and because the denial of a continuance made the trial unfair and threatened the integrity of the judicial process (see *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)).

¶ 54 "To obtain relief under [the doctrine of plain error], a defendant must first show that a *clear or obvious* error occurred." (Emphasis added.) *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Arguable error is not enough. "[The] error must be 'clear or obvious' in order for the

analysis to proceed." *People v. Jones*, 2014 IL App (3d) 121016, ¶ 36 (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 55 If, in the present case, the trial court had "mechanically denied the [second motion for a continuance][,] without engaging in thoughtful consideration of the specific facts and circumstances presented in this matter," we might well find a clear or obvious error. *People v. Walker*, 232 Ill. 2d 113, 126 (2009). "All motions for continuance are addressed to the discretion of the trial court" (725 ILCS 5/114-4(e) (West 2016)), and reflexively denying such a motion, without apparently exercising discretion, would be erroneous (*Walker*, 232 Ill. 2d at 126). But that is not what happened in this case, and therefore defendant's invocation of *Walker* is unconvincing. Far from mechanically or reflexively denying defendant's motion for a continuance, the trial court heard both sides and thoughtfully considered the facts and circumstances. See *id.*

¶ 56 The trial court considered "the history of the case," noting that (1) the defense already had been granted a continuance of the trial and (2) it was three months ago when defendant expressed his intention to retain private counsel. *Id.* at 125. As the court put it, May, June, and July 2015 had gone by, and apparently nothing had happened.

¶ 57 The trial court also considered a related factor, "the movant's diligence." *Id.* This was an important factor, singled out in the statute. "All motions for continuance *** shall be considered in the light of the diligence shown on the part of the movant." 725 ILCS 5/114-4(e) (West 2016). Defense counsel explained to the court it was not until three days ago, late on Friday, that defendant gave her the names of 15 witnesses and that, until then, defendant had been unwilling to discuss the case with her. We recognize that defendant contradicted his counsel's statement. Defendant told the court: "[Friday was] the first time [defense counsel

came] up to talk to me." The court, however, was entitled to believe defense counsel over him. Instead of making new assessments of credibility, we review the court's decision for arbitrariness. See *Tuduj*, 2014 IL App (1st) 092536, ¶ 100. We can hardly characterize the denial of a continuance as arbitrary if, instead of affirmatively showing diligence on the part of defendant (see 725 ILCS 5/114-4(e) (West 2016)), the record contains evidence of his lack of diligence. A defendant who, until the eleventh hour, fails or refuses to cooperate with his or her own defense counsel is a dilatory defendant. *People v. Latimer*, 35 Ill. 2d 178, 181 (1966); *Tuduj*, 2014 IL App (1st) 092536, ¶ 101; *People v. Scales*, 307 Ill. App. 3d 356, 359 (1999). "[A] defendant may be forced to trial where there is no showing of diligence." *People v. Trolia*, 107 Ill. App. 3d 487, 498 (1982).

¶ 58 Because the record lacks this required showing of diligence, we are unconvinced that denying the requested continuance was a clear or obvious error. Absent a clear or obvious error, no plain error exists. *Jones*, 2014 IL App (3d) 121016, ¶ 36. In sum, defendant has forfeited the issue of whether the trial court abused its discretion by denying his motion for a continuance (see *Naylor*, 229 Ill. 2d at 592), and the doctrine of plain error does not avert the forfeiture.

¶ 59 B. The Claim of Ineffective Assistance

¶ 60 Defendant claims his defense counsel rendered ineffective assistance by failing to tender a jury instruction on the affirmative defense of necessity (720 ILCS 5/7-13 (West 2014)). Specifically, the affirmative defense would have been that it was necessary for defendant to commit the charged offense, driving while his driver's license was suspended (625 ILCS 5/6-303(d) (West 2014)), in order to escape suffering serious physical injury at the hands of his brother.

¶ 61 The State counters that, under *People v. Jackson*, 2013 IL 113986, ¶ 23, necessity is not an affirmative defense to the absolute-liability offense of driving while one's driver's license is revoked.

¶ 62 Indeed, the supreme court stated in *Jackson*, 2013 IL 113986, ¶ 23: "It is important to note, *** in light of the fact that both parties agree that section 6-303 [of the Illinois Vehicle Code (625 ILCS 5/6-303 (West 2010))] has been construed to set forth an absolute[-]liability offense, that there is no affirmative defense, such as insanity or necessity, to violations of that section where the defendant does not contest that his license was suspended or revoked." (Emphasis omitted.) But *cf. People v. Kite*, 153 Ill. 2d 40, 44 (1992) (an inmate charged with the absolute-liability offense of possessing a weapon could raise the affirmative defense of necessity). Defendant does not appear to contest that as of January 17, 2015, his driver's license was suspended. We have held that driving while one's driver's license is suspended "involves strict liability" (*People v. Johnson*, 170 Ill. App. 3d 828, 832 (1988)), another name for "absolute liability" (*People v. Kappas*, 120 Ill. App. 3d 123, 131 (1983)). At the time of the offense involved here, necessity was not an affirmative defense to the absolute-liability offense of driving while one's driver's license was suspended. Tendering an instruction on the affirmative defense of necessity would have been inconsistent with *Jackson*, and effective representation did not require defense counsel to take a position that was legally unmeritorious. *People v. Ivy*, 313 Ill. App. 3d 1011, 1018 (2000).

¶ 63 Defendant suggests that the quoted sentence from *Jackson* is "*dicta*." *Dicta* are "comments in a judicial opinion that are unnecessary to the disposition of the case." *People v. Williams*, 204 Ill. 2d 191, 207 (2003). We could not plausibly characterize as "unnecessary" a sentence that begins, "It is important to note." *Jackson*, 2013 IL 113986, ¶ 23. If a sentence is

important to note, it surely is necessary to the disposition. The sentence addressed the circuit court's rationale and described the allowable defense on remand. The circuit court had held that the defendant had the constitutional right to present a defense " 'in the nature of an affirmative defense' " to the charge of driving while his driver's license was suspended (625 ILCS 5/6-303 (West 2010)), namely, his alleged good-faith belief that his license had been renewed. *Id.* ¶ 8. The supreme court clarified that, actually, instead of presenting an affirmative defense, the defendant had the right to attempt to rebut the State's case in chief by presenting evidence "that he did, in fact, possess a valid license." *Id.* ¶ 16. This distinction between an affirmative defense and rebuttal evidence was, as the supreme court said, an "important" distinction, not a *dictum*. *Id.* ¶ 23.

¶ 64 C. Sentencing Issues

¶ 65 Defendant argues the trial court denied him a fair sentencing hearing by (1) relying on facts outside the record when considering who owned the truck and why it was parked at a friend's house and (2) disregarding the mitigating factor that, in driving the truck, defendant was trying to escape physical violence at the hands of his brother.

¶ 66 Defendant acknowledges he never raised these issues in the sentencing hearing and that he never filed a postsentencing motion. "It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." *Hillier*, 237 Ill. 2d at 544. Again, however, defendant seeks to avert the forfeiture by invoking the doctrine of plain error. See *id.* He argues that not only was the evidence in the sentencing hearing closely balanced, but the sentencing errors were so inherently egregious as to deny him a fair sentencing hearing. See *id.*

¶ 67 "To obtain relief under [the plain-error] rule, a defendant must first show that a clear or obvious error occurred." *Id.* at 545. We first consider the alleged sentencing errors to ascertain if they constitute *clear or obvious* errors. See *id.*

¶ 68 1. *Ownership of the Truck*

¶ 69 In a handwritten and signed statement, which was attached to the presentence investigation report, defendant wrote: "I was putting a radio in *my truck* at a friend[']s house with my cousins[,] and Mike was in the truck. My brother went to my house and threating [*sic*] my wife to tell her where I was." (Emphasis added.) In the sentencing hearing, the trial court told defendant: "According to your version, quote, [']I was putting a radio in my truck.['] Well, if you don't have a driver's license, you shouldn't have a truck." Defendant now argues: "Whether [defendant] owned a vehicle or not, is irrelevant to his sentence because he is not prohibited from owning a vehicle. Thus, focusing on vehicle ownership constitutes an improper sentencing factor[,] and [defendant] is entitled to a new sentencing hearing."

¶ 70 We disagree the trial court clearly or obviously erred by considering defendant's reference to the truck as "my truck." See *id.* Although defendant's wife actually owned the truck (as Lindsey had testified in the trial), defendant referred to the truck, in his written statement, as "my truck." By "my truck," then, he must have meant it was his truck in a sense other than legal ownership. He could have meant it was his truck in the alternative sense that he was its customary driver. The trial court also might well have recalled that, in the trial, Lindsey gave the following answers to the prosecutor's questions:

> "Q. What did defendant tell you about whether or not he was driving that yellow truck that we just saw on the photograph?
>
> A. Yeah. He admitted to me that he was driving it.

Q. Did he tell you where he was driving it?

A. Originally, he advised that he had been in an alley near Fourth and Elm Street, prior to the accident."

Thus, defendant "was driving" the truck—not "drove" the truck but "was driving" it. Equally significantly, defendant did not tell Lindsey that someone else had driven the truck to the alley near Fourth and Elm Streets.

¶ 71 2. *Why the Truck Was Parked at a Friend's House*

¶ 72 Defendant complains the trial court erroneously "presumed that [he] drove the truck to his friend's house, even though there is no evidence supporting that presumption." Defendant argues he is entitled to a new sentencing hearing because "the judge relied on matters outside the record."

¶ 73 We have already addressed this argument, but we add that the trial court could also reasonably infer that if someone other than defendant had driven the truck to the friend's house, defendant would have mentioned that fact in his statement, considering that he was about to be sentenced for driving while his driver's license was suspended. Because defendant chose to submit a written statement in his own defense, it is only fair that he be judged not only by what he said in the statement but also by what he did not say therein but might have been expected to say. *Cf. People v. Purnell*, 126 Ill. App. 3d 608, 620 (1984) ("[I]f [the defendant] elects to explain the circumstances, he is bound to tell a reasonable story or be judged by its improbabilities and inconsistencies"). Therefore, again, we find no clear or obvious error. See *Hillier*, 237 Ill. 2d at 545.

¶ 74 3. *Mitigating Factors*

¶ 75 Finally, defendant argues the trial court erred in the sentencing hearing by "failing to take into account the mitigating factors of 'strong provocation' or 'substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense.' " See 730 ILCS 5/5-5-3.1(a)(3), (4) (West 2014). Those mitigating factors boil down to the excuse that defendant drove the truck in an attempt to escape further physical assault by his brother.

¶ 76 We disagree the trial court made a clear or obvious error by discounting those mitigating factors. See *Hillier*, 237 Ill. 2d at 545. If defendant found himself in the predicament of having to flee in the truck despite the suspension of his driver's license, it was a predicament largely of his making, considering that, but for his unlawfully driving the truck in the first place, he probably would not have been in the truck at the time his brother confronted him and, thus, would not have faced the necessity of having to flee in the truck.

¶ 77 Having found no clear or obvious sentencing error, we proceed no further in the plain-error analysis (see *Jones*, 2014 IL App (3d) 121016, ¶ 36), and the procedural forfeiture of the sentencing issues will be honored (see *People v. Eppinger*, 2013 IL 114121, ¶ 19).

¶ 78 D. An Additional Day of Presentence Credit

¶ 79 On August 10, 2015, after the jury returned its guilty verdict, the trial court revoked defendant's bond. On October 13, 2015, the court sentenced him to three years' imprisonment, allowing him 64 days of presentence credit for the period of August 10 to October 13, 2015. See 730 5/5-4.5-100(b) (West 2014). Defendant argues he deserves an additional day of presentence credit for the day of his arrest, January 17, 2015.

¶ 80 The State concedes that defendant is entitled to an additional day of presentence credit for the day of his arrest. We accept the concession. The correct amount of presentence credit is 65 days instead of 64 days.

¶ 81 E. Credit Against Fines

¶ 82 Defendant argues that for each of the 65 days he spent in presentence custody, he is entitled to a credit of $5—a total of $325 (65 days times $5)—against 7 of the fines the trial court imposed on him. See 725 ILCS 5/110-14 (West 2014). He complains the court gave him no credit at all against these fines. He identifies the seven fines as the court finance fee of $50 (see 55 ILCS 5/5-1101(c), (g) (West 2014); *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54), the State Police operations assessment of $5 (see 705 ILCS 105/27.3a(1.5), (5), (West 2014); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31), the child advocacy fee of $30 (see 55 ILCS 5/1101(f-5) (West 2014); *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009)), the Crime Stoppers assessment of $10 (see 730 ILCS 5/5-6-3(b) (12), (13) (West 2014); *People v. Dowding*, 388 Ill. App. 3d 936, 948 (2009)), the juvenile records expungement fine of $30 (see 730 ILCS 5/5-9-1.17(a) (West 2014); *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 133-34), the assessment of $30 for the Court-Appointed Special Advocates Fund (55 ILCS 5/5-1101(f-10) (West 2014); *cf. Millsap*, 2012 IL App (4th) 110668, ¶ 30 (assessment for the Child Advocacy Center is a fine)); and the probation operations fee of $10 (see 705 ILCS 105/27.3a(1.1) (West 2014); *People v. Carter*, 2016 IL App (3d) 140196, ¶ 56).

¶ 83 The State agrees with defendant except for the probation operations fee, which the State regards as a fee, in accordance with our holdings in *People v. Heller*, 2017 IL App (4th) 140658, ¶ 74, and *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 39. We will adhere to *Heller* and *Rogers* by treating the probation operations fee as a fee instead of a fine. Otherwise, we accept the State's concessions regarding the other six assessments, which should be offset in their entirety by the total of $325 in presentence credit. See 725 ILCS 5/110-14 (West 2014).

¶ 84 III. CONCLUSION

¶ 85 For the foregoing reasons, we vacate the trial court's award of 64 days of presentence credit and remand with directions to award 65 days of presentence credit and the $5-per-day presentence credit against the six fines identified above. We otherwise affirm and award the State $50 in costs against defendant.

¶ 86 Affirmed in part, vacated in part, and remanded with directions.