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FIRST DIVISION
April 14, 2014

No. 1-12-1174
2014 IL App (1st) 121174-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 11 CR 6772
)	
CLEVELAND COX,)	Honorable
)	Mary Margaret Brosnahan,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Hoffman and Cunningham concurred with the judgment.

ORDER

Held: State proved defendant guilty of possession of stolen vehicle beyond a reasonable doubt; trial court did not abandon its role as neutral arbiter when it took judicial notice of traffic violations; defendant properly sentenced as Class X offender; MSR term was proper; and trial court miscalculated certain fines and fees levied against defendant.

¶ 1 Defendant Cleveland Cox was convicted of possession of a stolen motor vehicle after a bench trial, and was sentenced to seven years in prison. On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt, that the trial court abandoned its role as a neutral arbiter during the course of trial, that defendant was not properly sentenced as a

Class X offender, that his mandatory supervised release (MSR) term was improper, and that the trial court miscalculated the fines and fees levied against him. For the following reasons, we affirm the conviction and sentence as modified.

¶ 2

I. BACKGROUND

¶ 3 Defendant was arrested and charged with one count of possession of a stolen motor vehicle on April 19, 2011. Defendant advised the court that he wished to exercise his right to proceed *pro se* and represent himself. The court questioned defendant extensively about his educational history and prior experience representing himself. The court asked the State what the sentencing range defendant would be facing if convicted, and the State advised the court that defendant was "X mandatory" based on two prior burglary convictions, and thus he would be sentenced to a range of 6 to 30 years if convicted. The defendant still wanted to proceed *pro se*, so the court allowed the public defender to withdraw.

¶ 4 On September 29, 2011, defendant waived his right to a jury trial and the case proceeded to a bench trial. Officer Mackowiak of the Chicago Police Department testified that on April 19, 2011, at approximately 11:03 p.m., he was on patrol in a marked squad car in the area of 5800 South Loomis in Chicago, when he observed a vehicle fail to stop at a stop sign. Officer Mackowiak and his partner followed the vehicle, which was a Chevy Cavalier. The vehicle had a temporary license plate, which the officers ran through their LEADS system. The license plate was registered to a 2000 Chevy Venture, "which is a van." Officer Mackowiak testified that he activated the emergency lights and attempted to pull the Cavalier over, but it did not stop. The vehicle continued on for approximately 45 more seconds until it came to an alley. Once the vehicle came to a stop at the alley, Officer Mackowiak observed defendant flee on foot from the

driver's seat. He pursued defendant on foot for 15 to 20 seconds until he caught defendant and put him in handcuffs.

¶ 5 Officer Mackowiak testified that after defendant had been apprehended, his partner determined through the VIN number of the vehicle that the Cavalier had been reported stolen. Defendant was then transported to the police station. Officer Mackowiak testified that he read defendant his *Miranda* rights but did not have him sign a *Miranda* waiver. Defendant indicated that he understood the *Miranda* rights and waived them. Defendant then told Officer Mackowiak that he had rented the vehicle for \$50 from a man by the name of "Kilo" from 59th Street and Morgan Street. Defendant also stated that Kilo was "known in the neighborhood to rent stolen vehicles."

¶ 6 On cross-examination, Officer Mackowiak testified that he had issued defendant tickets on the night in question, but that he believed those tickets had been "dropped." Officer Mackowiak testified that the front driver's side tire was flat, there was a "donut" on the front passenger-side tire, and there was some damage to the driver-side mirror. Officer Mackowiak testified that on his report, he selected the box for "none" where it asked for evidence of stripping damage.

¶ 7 Siobhan Hayes testified that she was the owner of the vehicle, which was a 2007 Chevrolet Cobalt, not a Cavalier. She testified that at the end of March 2011, she was in New York when she received a call from her boyfriend, John Rice, stating that the car had been stolen. She filed a police report and on April 19, 2011, received a call from the police stating that her car had been recovered. Hayes testified that she did not know defendant and that she had never spoken to him or given him permission to use her car. Hayes further testified that when she

retrieved her car from the police station, all four tires had to be replaced, there was a scratch on the driver's side door, and the passenger mirror was missing.

¶ 8 Defendant chose not to present any direct evidence. In his closing argument, however, defendant argued that the State failed to meet its burden of proving him guilty beyond a reasonable doubt because he had never been identified, nor was he placed at the scene of the crime. He argued that any traffic violations against him had been dropped, and asserted that Officer Mackowiak was not credible. Defendant speculated that Hayes' boyfriend did not testify at trial because he had something to do with the vehicle's theft, and that maybe he was "Kilo."

¶ 9 Following closing arguments, the trial court found defendant guilty of possession of a stolen motor vehicle. The court explained that defendant had not been charged with theft of the vehicle, but rather with possession of the vehicle. The court stated that Officer Mackowiak observed defendant driving the vehicle, that the officer observed him run a stop sign, and that when the officer attempted to pull him over, defendant continued driving and then eventually fled the vehicle and ran from police officers. The trial court stated: "I'm going to take judicial notice of what is in the Court file and what's been testified to, the officer said he issued tickets. There are five separate tickets issued to [defendant], all from April 19th of 2011 at 11:00 o'clock p.m. for various traffic violations on that date."

¶ 10 The court then found that defendant's flight from the car, coupled with the statement he made to police regarding Kilo being known for renting out stolen vehicles, showed that he knew the vehicle he was driving had been stolen. The court found defendant guilty of possession of a stolen vehicle.

¶ 11 The court appointed a public defender for purposes of preparing posttrial motions and conducting the sentencing hearing. At sentencing, the State noted defendant's prior Class 2

burglary convictions from 2005 and 2006. Defendant had been sentenced to 24 months' probation for the 2005 burglary, which was revoked on September 7, 2006. Defendant then received three years' incarceration for the probation revocation, to be served concurrently with the sentence for the second burglary. Defendant was sentenced to six years' incarceration for the second burglary.

¶ 12 The trial court sentenced defendant to seven years' incarceration in the instant case after stating that the sentencing range was 6 to 30 years, and that defendant's mittimus reflected that he was a Class X offender. Defense counsel moved to reconsider the sentence, which the court denied. The trial court awarded defendant 395 days of pretrial detention credit. Defendant now appeals.

¶ 13 **II. ANALYSIS**

¶ 14 On appeal, defendant contends that the State failed to prove him guilty beyond a reasonable doubt of possession of a stolen vehicle, that the trial court abandoned its role as a neutral arbiter during the course of trial, that defendant was not properly sentenced as a Class X offender, that his MSR term was improper, and that the trial court miscalculated the fines and fees levied against him.

¶ 15 Defendant's first argument is that the trial court should reverse defendant's conviction because the State failed to prove him guilty of possession of a stolen vehicle beyond a reasonable doubt. Specifically, defendant contends that evidence presented, which showed that he ran from the vehicle and that he rented the car from someone known to rent stolen vehicles, was not enough to prove he had knowledge that the vehicle was stolen. The State responds that the evidence presented was sufficient to prove him guilty beyond a reasonable doubt. We agree with the State.

¶ 16 When reviewing a challenge to the sufficiency of the evidence, a reviewing court must consider "whether, viewing the evidence in the light most favorable to the State, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis in original). *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). This standard of review applies regardless of whether the evidence is direct or circumstantial, and regardless of whether the defendant receives a bench or jury trial. *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007). This court will not retry a defendant when considering a sufficiency of the evidence challenge. *Id.* "The trier of fact is best equipped to judge the credibility of the witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *Id.* at 114-115.

¶ 17 For a defendant to be convicted of possession of a stolen motor vehicle, the State must prove beyond a reasonable doubt that the defendant was in possession of the vehicle, that the vehicle was stolen, and that the defendant knew the vehicle was stolen. 625 ILCS 5/4-103(a)(1) (West 2010). Here, defendant does not dispute that the vehicle was stolen or that he was in possession of the vehicle. Rather, he argues that the State did not prove beyond a reasonable doubt that he knew the vehicle was stolen. An inference of defendant's knowledge can be drawn from the surrounding facts and circumstances. *People v. Whitfield*, 214 Ill. App. 3d 446, 454 (1991). Defendant's knowledge may be established by proof of circumstances that would cause a reasonable person to believe property had been stolen. *Id.* Evidence of flight may be considered to infer the defendant's knowledge that the vehicle was stolen. *Id.*

¶ 18 In the case at bar, Officer Mackowiak testified that when he activated his squad car's emergency lights, defendant did not stop the car. Instead, he continued driving for another 45 seconds until the vehicle was in an alley. Once he stopped the vehicle in the alley, he exited the

car and fled on foot. Officer Mackowiak had to pursue defendant until he was caught. Officer Mackowiak testified that defendant told him that he had rented the vehicle from a man named "Kilo" who was known in the neighborhood to rent stolen vehicles. Officer Mackowiak testified that the front driver's side tire was flat, there was some damage to the driver-side mirror, and there was a "donut" on the front passenger-side tire. Siobhan Hayes, the owner of the vehicle, testified that when she picked her car up from the police station, the tires had to be replaced, there was a scratch on the door, and the passenger mirror was missing. Based on the damage to the car, plus defendant's knowledge that he was renting a car from someone who was known to rent stolen cars, we find that a reasonable person would believe the vehicle was stolen.

Additionally, defendant's flight both in the car and on foot creates an inference of knowledge on his part that the vehicle was stolen. *Whitfield*, 214 Ill. App. 3d at 454. Accordingly, we find that when viewing this evidence in a light most favorable to the State, a rational trier of fact could have found that defendant had knowledge that the vehicle was stolen beyond a reasonable doubt. *Collins*, 106 Ill. 2d at 261.

¶ 19 Defendant's next argument on appeal is that the trial court abandoned its role as a neutral arbiter during the course of the trial. Defendant contends that the trial court undertook an independent investigation of the case file in order to bolster the credibility of the State's main witness, Officer Mackowiak, by taking judicial notice of the traffic violations in the court file. The State maintains that the trial court properly took judicial notice of the traffic citations in the court's file.

¶ 20 As an initial matter, the State notes that defendant has forfeited this issue on appeal because defendant neither objected to it at trial, nor raised it in a posttrial motion. See *People v.*

Enoch, 122 Ill. 2d 176, 186 (1988) (issue must be both objected to at trial, as well as included in a posttrial motion, in order to be preserved on appeal). Accordingly, the issue has been forfeited.

¶ 21 As a result, this court may only review this case pursuant to the plain error doctrine, which allows a reviewing court to consider unpreserved error when either "(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Defendant contends that the second prong of plain error applies in this case because it involves a trial court's conduct and goes to the crux of the State's key evidence because the trial court depended heavily on Officer Mackowiak's testimony.

¶ 22 Illinois Rule of Evidence 201(b) provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Ill. R. Evid. 201(b) (eff. Jan. 1, 2011); see also *People v. Davis*, 65 Ill. 2d 157, 165 (1976) (judicial notice may be taken of facts that, if not generally known, are "readily verifiable from sources of indisputable accuracy"). "A court may take judicial notice, whether requested or not." Ill. R. Evid. 201(c) (eff. Jan. 1, 2011).

¶ 23 Here, as the trial judge was announcing its findings in the case, it stated: "And I am going to take judicial notice of what is in the Court file and what's been testified to, the officer said he issued tickets. There are five separate tickets issued to [defendant], all from April 19th of 2011 at 11:00 p.m. for various traffic violations on that date." The fact that there were five separate tickets issued to defendant was readily verifiable from sources of indisputable accuracy, and thus the trial court did not abandon its role of neutral arbiter when it took judicial notice of the tickets.

Defendant's reliance on *People v. Jackson*, 409 Ill. App. 3d 631 (2011), does not persuade us otherwise.

¶ 24 In *Jackson*, this court found that the trial court abandoned its role as a neutral arbiter by adopting a prosecutorial role when it questioned defendant's expert witness, and relied on matters based on prior private knowledge. *Jackson*, 409 Ill. App. 3d at 647. The court found that the manner in which the trial court questioned defendant's expert witness indicated that the court prejudged the outcome of the case before hearing all the evidence. The trial court also expressed its personal feelings toward IQ testing as "a total canard" and interjected its thoughts on the relevance of IQ testing. *Jackson*, 409 Ill. App. 3d at 650. The facts in *Jackson* are completely inapposite to the facts of our case. The *Jackson* opinion does not discuss judicial notice, but rather focuses on the appropriateness of a trial court's questioning of a witness. The judge did not question any witness in this case, but rather merely took judicial notice of the traffic tickets in the court file, which was permissible under the Illinois Rules of Evidence.

¶ 25 We are also not persuaded by defendant's reliance on *People v. Drake*, 172 Ill. App. 3d 1026 (1988), for the proposition that "[p]ending traffic tickets have been held to be improper subjects of judicial notice." (Def's. Brief, at 15). In *Drake*, defense counsel sought to argue that defendant ran from the scene of a crime because he had pending traffic offenses against him. Defense counsel requested that the trial court take judicial notice of the pending offenses, but the defendant never presented the court with authenticated copies of these pending offenses. *Drake*, 172 Ill. App. 3d at 1029. There is no indication that such pending traffic violations existed in the court file in that case. Here, however, the traffic violations in question occurred on the night of defendant's arrest for possession of a stolen vehicle and were therefore in the court file in front of the judge during the bench trial. We find that the trial court properly took judicial notice of the

traffic violations. Accordingly, there was no plain error here. *People v. Lann*, 261 Ill. App. 3d 456, 478 (1994) (a reviewing court cannot correct an error pursuant to the plain error rule unless the error is clear under current law).

¶ 26 Defendant's next contention on appeal is that he should not have been sentenced as a Class X offender. The Unified Code of Corrections requires that in order to be sentenced as a Class X offender, the defendant must be convicted of two qualifying offenses before committing the instant offense:

"(b) When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now (the date of the Class 1 or Class 2 felony was committed) classified in Illinois as a Class 2 or greater Class felony and those charges are separately brought and tried and arise out of different series of acts, that defendant shall be sentenced as a Class X offender.

This subsection does not apply unless:

- (1) The first felony was committed after February 1, 1978 ***;
- (2) The second felony was committed after conviction on the first;
and
- (3) The third felony was committed after conviction on the
second." 730 ILCS 5/5-4.5-95(b) (West 2010).

¶ 27 In the instant case, defendant was convicted of burglary, a Class 2 felony, on December 5, 2005, and sentenced to probation. He was again convicted of burglary, a Class 2 felony, on September 7, 2006. Because he had violated his probation for his December 5, 2005, conviction, defendant was resentenced on that conviction to a term of imprisonment to run

concurrently with this sentence in the September 7, 2006, conviction. Accordingly, when he was found guilty of his third Class 2 felony in the case at bar, defendant was subject to Class X sentencing pursuant to section 5-4.5-95(b) of the Code. Defendant contends, however that his sentence is void because when he was resentenced on the violation of probation for his first conviction on the same date as the sentence for his second conviction, he was not eligible as a Class X offender under section 5-4.5-95(b)(2), which requires that the second felony was committed after the conviction on the first. We disagree. Resentencing does not constitute reconviction, and thus defendant's second felony was still committed after he was convicted of the first felony. Defendant's reliance on *People v. Lemons*, 191 Ill. 2d 155 (2000), does not convince us otherwise.

¶ 28 In *Lemons*, the supreme court addressed the effect of resentencing for probation violations on extended-term sentencing under section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5-5-3.2(b)(1) (West 2010)). Under that section, a trial court can impose an extended term sentence when a defendant is convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody. 730 ILCS 5-5-3.2(b)(1) (West 2010). The *Lemons* court found that for purposes of the extended-term sentencing based on a prior conviction, the 10-year limitation period began to run on the date the defendant's sentence of probation was last revoked and he was last sentenced, rather than using the original date of sentencing as the effective date, which would provide "absurd results" and allow a defendant to benefit by violating his probation. *Lemons*, 191 Ill. 2d at 160. The court explained that to rule otherwise would allow a defendant to benefit by violating his probation and postponing the resentencing on

the revocation of probation in order to later escape sentencing under the extended-term statute provisions. *Id.* The findings in *Lemons* have no bearing on the case at bar, which deals with an entirely different sentencing statute. For the reasons stated above, defendant was properly convicted as a Class X offender.

¶ 29 Defendant's next contention on appeal is that he should only have been sentenced to serve two years of MSR instead of three years, where he was convicted of a Class 2 offense. The State maintains that while possession of a stolen vehicle is a Class 2 offense, defendant was sentenced as a Class X offender due to his two prior Class 2 felony convictions, and therefore received the corresponding MSR for a Class X felony. We agree with the State.

¶ 30 "The law is clear that when a defendant qualifies for Class X sentencing, a three-year period of MSR is necessarily imposed." *People v. Brisco*, 2012 IL App (1st) 101612, ¶ 60. In *People v. Anderson*, 272 Ill. App. 3d 537, 541 (1995), this court explained the reasoning behind imposing a three-year MSR period on an offender who was Class X eligible by background, but not convicted of a Class X offense, stating "the gravity of the conduct offensive to the public safety and welfare, authorizing Class X sentencing, justifiably requires lengthier watchfulness after prison release than violations of a less serious nature." See also *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000).

¶ 31 Defendant acknowledges these holdings but argues that *People v. Pullen*, 192 Ill. 2d 36 (2000), compels a different result. In *Pullen*, our supreme court considered the consecutive sentencing provision and its application to section 5-5-3(c)(8) of the Unified Code of Corrections, making certain offenders Class X eligible by background. 192 Ill. 2d at 38; 730 ILCS 5/5-5-3(c)(8) (West 2010). Our supreme court explained that section 5-5-3(c)(8) requires persons subject to its provisions to be sentenced as Class X offenders, not that their offenses are

to be treated as Class X felonies for sentencing purposes. *Pullen*, 192 Ill. 2d at 43. Therefore, where the defendant was convicted of two Class 2 felonies, but was sentenced as a Class X offender, the maximum permissible sentence imposed should have been based on the maximum permissible sentence for two Class 2 felonies, not two Class X felonies. *Id.* at 43-44.

¶ 32 Several cases have examined *Anderson*, *Smart*, and *Watkins* in light of *Pullen* and nevertheless concluded that a defendant sentenced to a Class X offender due to prior convictions is required to serve the Class X MSR term of three years. See *Brisco*, 2012 IL App (1st) 101612, ¶ 62; *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. McKinney*, 399 Ill. App. 3d 77, 81-82 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010). These cases have reasoned, and we agree, that *Pullen* merely limits the extent to which separate sentences for separate offenses may be served consecutively, and it does not disturb the conclusion that, because the MSR term is part of the sentence, an individual subject to Class X sentencing for whatever reason will be subject to Class X MSR. See *Brisco*, 2012 IL App (1st) 101612, ¶ 62. We decline to depart from these decisions and find that a three-year period of MSR is appropriate.

¶ 33 Finally, defendant contends, and the State agrees, that defendant is entitled to presentence incarceration credit towards his fines, and that his \$30 misdemeanor complaint conviction fee should be vacated. The trial court charged defendant with \$540 in fines, fees, and costs.

¶ 34 Section 110-14 of the Code of Criminal Procedure provides that a defendant who is assessed a fine is allowed a credit of \$5 for each day he was in custody on a bailable offense for which he did not post bail. 725 ILCS 5/11-14 (West 2010). The statute indicates that the credit applies only to "fines" that are imposed pursuant to a conviction. *People v. White*, 333 Ill. App. 3d 777, 781 (2002). This court has previously found that a "fine" is a "pecuniary punishment imposed as part of a criminal sentence." *People v. Bishop*, 354 Ill. App. 3d 549, 562 (2004).

¶ 35 Defendant is entitled to a presentence incarceration credit toward several fines: Mental Health Court Fine (\$10), Youth Diversion Fine (\$5), Drug Court Fine (\$5), and the Children's Advocacy Center Fine (\$30). Defendant was incarcerated on a bailable offense for 395 days and, therefore, could receive a credit of up to \$1,975 against his fines. However, since only \$50 in fines were imposed on defendant, and defendant can only receive the value of the fines actually imposed, defendant is entitled to a \$50 credit. Additionally, his \$30 misdemeanor complaint conviction fee should be vacated because he was not convicted of a misdemeanor, but rather was convicted of a felony. Accordingly, the fines, fees, and costs amount of \$540 should be reduced to \$460.

¶ 36 For the foregoing reasons, we affirm the conviction of the circuit court of Cook County, and modify the sentence to reflect the correct fines, fees, and costs totaling \$460.

¶ 37 Affirmed as modified.