2012 IL App (1st) 100079-U

SIXTH DIVISION
January 27, 2012

No. 1-10-0079

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 4721
	)	
CHRISTOPHER JOHNSON,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *Held:* Judgment entered on defendant's burglary conviction affirmed over claim that trial counsel was ineffective for failing to file a pretrial motion to suppress evidence; fines and fees order modified to reflect a credit of $30; DNA fee vacated.

¶ 2 Following a bench trial, defendant Christopher Johnson was found guilty of two counts of burglary. At sentencing, the court merged defendant's convictions, sentenced him as a Class X offender to 14 years' imprisonment, and assessed him fines and fees totaling $580. On appeal, defendant contends that trial counsel was ineffective for failing to file a pretrial motion to suppress a GPS device recovered from him prior to his arrest, that he was entitled to *per diem* credit for time spent in pre-sentence custody, that the court improperly assessed certain fines and

fees, and that his mandatory supervised release (MSR) term should be reduced from three years to two years.

¶ 3 The record shows, in relevant part, that shortly after 3 a.m. on February 23, 2009, a bystander observed defendant climb the fence of a parking lot behind the building at 1344 West Greenleaf Avenue and enter a silver Honda CRV which belonged to Michael Rubin and Pamela Telfer. When police arrived, they found defendant hiding underneath the vehicle, placed him in handcuffs, and recovered a GPS device belonging to the owners of the vehicle from his coat pocket. Defendant was then charged with two counts of burglary.

¶ 4 At trial, Matthew Keir testified that on February 23, 2009, he was staying at the apartment of William Barbara, and woke up that morning at 3 a.m. to drive back to his job in Ann Arbor, Michigan. After showering, he looked out a window facing east in the direction of a parking lot two buildings over. The weather was clear at the time with less than one-half to one inch of snow on the ground, and the parking lot was well-lit by an overhead light containing "mercury vapor type lamps" which reflected light off the snow.

¶ 5 As he was looking out the window, Matthew observed defendant walking down the alley and looking around. Defendant then hopped the fence into the parking lot, which was ordinarily accessed by a remote control gate, took another look around, and began looking inside the approximately 10 cars in the lot and "testing" their door handles. William called police while Matthew continued to watch the events unfold so that he could "accurately relay what happened."

¶ 6 Once defendant had tested "basically all the other doors in the parking lot," he came upon a silver Honda CRV which was parked at an angle, with its passenger side door facing the window from which Matthew was observing. When defendant tried that door, it opened, and he "quickly" entered the car and shut the door behind him. William, who was on the phone with police, noted that defendant had entered the car and was informed that someone was on the way.

¶ 7 Matthew testified that it was dark inside the vehicle, but that he saw one incandescent light on inside, which might have been "a light from a glove box," and also saw movement inside the car. Moments later, police drove past the parking lot through the alley, at which point defendant exited the car and crouched down near the back of it. When the police car began to "roll back," defendant "ducked under the car." Thereafter, two officers came into the parking lot, found defendant underneath the car, and drew their weapons. On cross-examination, Matthew stated that he did not see defendant remove anything from the car.

¶ 8 Pamela Telfer testified that on February 23, 2009, she lived with her husband Michael Rubin at 1344 West Greenleaf Avenue. At the time, they owned a silver Honda CRV with Illinois license plate number 289 5375 which was parked in the lot behind their building, and stored a stand-alone GPS unit inside of the car, in a compartment with a door located underneath the car stereo. Pamela testified that she does not know defendant, and did not give him permission to enter her car on the date in question.

¶ 9 Michael Rubin testified that on February 23, 2009, he lived at 1344 West Greenleaf Avenue, and co-owned with his wife a 2005 Honda CRV with Illinois license plate number 289 5375. Sometime after 3 a.m., Michael and Pamela woke up to loud knocking on their door, and found several police officers outside when they answered it. The officers first showed them a GPS unit, which Michael recognized as the one they kept in a cabinet underneath the car radio, then told them that an individual had entered their car. Michael testified that he does not know defendant, and did not give him permission to enter his car on February 23, 2009.

¶ 10 Michael further testified that earlier in the evening, he had driven the car to the grocery store and returned about 6 p.m. with multiple bags of very heavy groceries. He normally keeps his car locked, and intended to lock the car from his condo, but he forgot to do so that night. Michael testified that there was no way he could have accidently knocked the GPS unit onto the

ground that night because he and his wife were in the habit of placing it inside the compartment in the center console when they pulled into their parking spot, and he specifically remembered doing so that night.

¶ 11 After speaking with police, Michael went to his car and noticed that the glove compartment was open, that several items and papers were "strewn all over in a haphazard manner," and that there was "clearly some rifling through of our effects because there were cables that I had put away, you know, that were strewn all over the floor basically all our items left all over in the condition that I did not leave it in." He also observed that his GPS device was not in its usual place, and noted that the light in the parking lot behind their building was very bright.

¶ 12 Chicago police officer Michael Klemundt testified that about 3:15 a.m. on February 23, 2009, he and his partner, John Ventrella, were in uniform and riding in a marked squad car when they responded to a call of an auto theft in progress in the 1300 block of West Greenleaf Avenue involving a silver Honda CRV. As Officer Klemundt drove eastbound through the alley behind that block, the officers identified two Honda CRVs and initially drove towards the farther of the vehicles. However, they soon backed up and returned to the initial silver Honda CRV, at which point Officer Ventrella observed an individual in a black coat, with red and white shoes, get underneath the car.

¶ 13 The officers exited their vehicle, pried open the fence around the parking lot, and approached the vehicle. They then ordered defendant out from underneath it, and placed him in custody. At that time, the officers observed a silver item resembling a GPS in the right pocket of his jacket and recovered the item, which turned out to be a Garmin GPS device. The officers then opened the door of the vehicle defendant had been hiding under, and identified the power cord associated with the unit.

¶ 14 After running the license plate number of the vehicle, the officers spoke with the owners and showed them the GPS that had been recovered from defendant, which they identified. Officer Klemundt then read defendant his *Miranda* rights in the squad car, and the officers asked him how he obtained the GPS. Defendant responded that "he got it on the ground near the vehicle." When the officers asked him what he was doing with it, defendant told them "that he was going to try to sell it to provide for food for his kid." On cross-examination, Officer Klemundt stated that at the time defendant was placed in custody, the owner of the vehicle had not reported that anything had been taken from it.

¶ 15 The State introduced into evidence a certified copy of the chain of title showing that Michael and Pamela owned the 2005 Honda CRV in question, and the defense subsequently rested without presenting any evidence. The trial court found defendant guilty of both counts of burglary, noting that the evidence in the case was "overwhelming," and ultimately merged these convictions and sentenced him as a Class X offender to a single term of 14 years' imprisonment.

¶ 16 In this appeal from that judgment, defendant does not contest the sufficiency of the evidence to sustain his conviction, but claims that trial counsel provided ineffective assistance requiring reversal of his conviction or a remand for a new trial. To establish a claim of ineffective assistance of trial counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel; however, if the claim can be disposed of on the ground

that defendant did not suffer prejudice, the court need not consider the performance prong. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 17 Here, defendant claims that trial counsel was ineffective for failing to file a pretrial motion to suppress the GPS device which, he claims, was the product of an unlawful search and seizure. The State responds that defendant cannot establish that such a motion would have been meritorious where Officer Klemundt could have reasonably believed that the GPS device, which was in plain view, was evidence of a crime committed by defendant. The State further responds that even if the GPS device had been suppressed, it is not reasonably probable that the outcome of the trial would have been different because the remaining evidence was sufficient to prove him guilty of burglary beyond a reasonable doubt.

¶ 18 To prove defendant guilty of burglary in this case, the State was required to establish that defendant knowingly and without authority entered a motor vehicle with the intent to commit a theft therein. 720 ILCS 5/19-1(a) (West 2008). We initially observe that the crime of burglary is complete when defendant enters a motor vehicle with the requisite intent, regardless of whether he actually commits the intended felony or theft (*People v. Beauchamp*, 241 Ill. 2d 1, 8 (2011)), and that intent in a burglary case may be proved by inferences drawn from defendant's conduct and from the surrounding circumstances (*People v. McKinney*, 260 Ill. App. 3d 539, 544 (1994), citing *People v. Richardson*, 104 Ill. 2d 8, 12-13 (1984)). These include, the time, place, and manner of entry into the premises, defendant's activity therein, and any alternative explanations offered for his presence. *People v. Suane*, 164 Ill. App. 3d 997, 1005 (1987), citing *Richardson*, 104 Ill. 2d at 13.

¶ 19 Here, even excluding the GPS unit found on defendant's person in the parking lot, the evidence adduced by the State at trial established that shortly after 3 a.m. on February 23, 2009, defendant was observed by Matthew Keir entering the controlled access parking lot behind the

building at 1344 West Greenleaf Avenue by climbing the fence that bordered it. Matthew also saw him look inside the cars parked therein and try most of the door handles on those vehicles before finally gaining entrance to the passenger side door of the silver Honda CRV which was owned by Pamela Telfer and Michael Rubin, neither of whom gave defendant permission to enter it. Shortly thereafter, police drove past the parking lot, and defendant exited the vehicle and crouched near the back of it. When they returned, defendant hid underneath the vehicle, but the officers had seen him, and took him into custody after ordering him out from under the vehicle. When the owner of the vehicle, Michael, subsequently went to check it out, he discovered that the glove compartment had been opened, that several items and papers were strewn about haphazardly, and that there was "clearly some rifling through" of his and Pamela's property.

¶ 20 This evidence clearly shows that defendant knowingly entered Michael and Pamela's silver Honda CRV without authority. Defendant's conduct therein and the surrounding circumstances also support the inference that defendant entered the vehicle with intent to commit a theft therein regardless of whether any property was taken. *People v. Roberts*, 189 Ill. App. 3d 66, 71-72 (1989). In addition, the fact that he hid underneath the vehicle when police arrived on the scene indicates his guilty knowledge. *People v. Armstrong*, 43 Ill. App. 3d 586, 595 (1976). Also, his possession of the GPS indicates he took it from the vehicle because Michael testified that it was in the center compartment when he left the vehicle. Under these circumstances, we conclude that defendant has not shown a reasonable probability that a motion to suppress would have been granted. Further, there is no showing that the outcome of the trial would have been different had the GPS device recovered from defendant been suppressed (*Strickland*, 466 U.S. at 694; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005)), and defendant's ineffective assistance of counsel claim fails for lack of prejudice (*Flores*, 153 Ill. 2d at 283-84).

¶ 21 Defendant, nonetheless, takes issue with this conclusion, claiming that the State's "heavy reliance in closing argument on [defendant's] possession of the GPS device" indicates that the result at trial would have been different if the GPS device had been suppressed. We disagree. The fact that the State relied on the GPS device in closing argument to establish intent to commit theft does not mean *ipso facto* that the State could not have proved that element with alternative evidence. To the contrary, as discussed above, the State clearly presented sufficient evidence outside of the GPS device from which defendant's felonious intent could be readily inferred, and to support his conviction of burglary.

¶ 22 Defendant next challenges the calculation and assessment of certain of the pecuniary penalties imposed by the court. Although defendant did not raise these claims in the trial court, a sentence that does not conform to a statutory requirement is void and may be attacked at any time. *People v. Jackson*, 2011 IL 110615, ¶ 10. The propriety of court-ordered fines and fees raises a question of statutory interpretation, which we review *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 23 Defendant first claims that he was improperly assessed a $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) because his DNA profile was previously collected in connection with a prior conviction. The State concedes that this fee was improperly assessed and should be vacated because defendant's DNA profile is already registered in the Illinois State Police database. Pursuant to the supreme court's ruling in *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), we agree that the trial court was not authorized to assess defendant the $200 DNA fee where he is currently registered in the DNA database, and, thus, vacate that fee.

¶ 24 Defendant next claims that he was improperly assessed a $25 court services fee. He claims that the statute only authorizes assessment of the fee for certain qualifying offenses which

do not include burglary. The State responds that the statute authorizes assessment of the fee upon any judgment of conviction.

¶ 25 Under the Counties Code (55 ILCS 5/5-1103 (West 2008)), the court may assess a $25 court services fee against a defendant upon a finding of guilty resulting in a judgment of conviction, or for an order of supervision or probation made without entry of judgment under certain enumerated provisions. Here, defendant was convicted of burglary and, therefore, was eligible for the court services fee. *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010). We thus find that the assessment of the $25 court services fee was authorized by statute, and we reject defendant's argument to the contrary.

¶ 26 Defendant also claims that he is entitled to a credit of $1,475 for the time he spent in pre-sentence custody which should be applied to offset his $30 Children's Advocacy Center assessment. The State concedes that defendant is entitled to such credit, and that it should be applied as defendant has proposed. We agree. Defendant was entitled to a credit of $5 for each of the 295 days that he served in pre-sentence custody, for a total credit of $2,280 (725 ILCS 5/110-14(a) (West 2008)), and that credit should be applied to offset the $30 Children's Advocacy Center assessment, which has been held to be a fine (*People v. Jones*, 397 Ill. App. 3d 651, 664 (2009). Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we direct the clerk to modify defendant's fines and fees order to reflect a credit of $30.

¶ 27 Defendant finally contends that his MSR term should be reduced from three years to the two-year term which attaches to the underlying conviction, in this case, a Class 2 felony. Here, defendant was convicted of burglary, a Class 2 felony (720 ILCS 5/19-1(b) (West 2008)), and sentenced as a Class X offender based on his prior convictions (730 ILCS 5/5-5-3(c)(8) (West 2008)). This court has repeatedly held that where defendant is sentenced as a Class X offender,

he must serve the Class X MSR term of three years, rather than the term of MSR applicable to the underlying felony. *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011), and cases cited therein. We find no reason to depart from that determination, and thus conclude that defendant, who was sentenced as a Class X offender, was subject to a three-year term of MSR.

¶ 28 For the reasons stated, we order the clerk to modify defendant's fines and fees order to reflect a credit of $30, vacate the $200 DNA fee, and affirm the judgment in all other respects.

¶ 29 Affirmed, as modified.