No. 1-09-2605

SIXTH DIVISION
January 21, 2011

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. ACC 90049
	)	
DOUGLAS LEMON,	)	Honorable
	)	Timothy J. Joyce,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

O R D E R

HELD: Where the record shows defendant failed to object to the court's finding of, and sentence for, direct criminal contempt, and neither amounts to plain error, we affirm the trial court.

Defendant Douglas Lemon appeals from an order of direct criminal contempt entered against him. He contends that the

trial judge was required to recuse himself from the contempt proceedings after he descended from the bench and physically restrained him; and, further, that the court erred in ordering his contempt sentence to be served "consecutively" with the pending underlying offense.

The contempt order entered in this case arose from a March 6, 2009, hearing to determine defendant's fitness to stand trial for a criminal offense. At that hearing, defendant repeatedly refused to follow the orders of the court to remain seated. The court, as well as his counsel, advised defendant that he would be found in contempt of court. Defendant became unruly and broke a courtroom table. During the fracas, several sheriff's deputies, as well as the trial judge, who descended from the bench out of "necessity," were required to restrain him. As a result, defendant was found in direct criminal contempt of court. During a subsequent hearing on March 10, 2009, the court sentenced him to six months' incarceration to be served upon his release from the term of imprisonment imposed on him for his underlying offense. The court gave defendant an opportunity to be heard before it imposed the sentence and also informed defendant that in order to substitute judges, defendant must file a written motion.

The record indicates that defendant did not contemporaneously object or file any motion objecting to the

entry of the contempt order or the imposition of the sentence, but on July 10, 2009, defendant filed a notice of appeal. The trial court denied it as untimely, and this court granted him leave to file a late notice of appeal on October 5, 2009.

On appeal, defendant first contends that the trial court could not administer a fair ruling where it was embroiled in the controversy, and should have recused itself from the contempt proceedings. Defendant acknowledges that he forfeited review of this issue by failing to object in the court below, but urges this court to review this issue as plain error.

The plain error doctrine permits us to review a forfeited clear and obvious error that affects a defendant's substantial rights where the evidence is closely balanced or where the forfeited error is so serious that it denied defendant both a substantial right and a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178 (2005). Before doing so, we must first determine whether error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

Defendant does not dispute that the evidence here is not closely balanced, but argues that the trial judge became so "enmeshed" in the contemptuous act that he could no longer fairly adjudicate the contempt proceedings, thereby tainting the integrity and reputation of the judicial process.

The record does not support defendant's claim. Our review shows that the trial judge repeatedly ordered defendant to be seated and both the trial judge and defendant's counsel advised him he would be found in contempt of court. When defendant became unruly, the trial judge descended from the bench and helped sheriff's deputies restrain him out of perceived necessity. The simple fact that the trial judge physically touched or restrained defendant does not support a finding that he could no longer fairly adjudicate the proceedings. Under the circumstances, we find no error by the trial judge in aiding the deputies to restore order. We also find nothing in the record which would preclude the court from entering an order of contempt in this situation. We, thus, find no basis for excusing defendant's forfeiture of this issue.

Defendant, nonetheless, asserts that we should apply the forfeiture rule in a less stringent manner because he is challenging the conduct of the court. Pursuant to *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009), we may excuse forfeiture involving conduct of the court in only the most extraordinary and compelling circumstances, such as when the trial court makes inappropriate comments to the jury or when the court prevents counsel from objecting to the point that an objection " 'would have fallen on deaf ears.' " *McLaurin*, 235 Ill. 2d at 487-88, quoting *People v. Davis*, 378 Ill. App. 3d 1, 10 (2007).

This is not such a case. The record shows that the setting was a hearing before a trial judge, with no jury present, and defendant has not challenged the contemptuous nature of his behavior which led to the ruling. The court gave defendant an opportunity to be heard before it imposed a sentence of six months' incarceration, and also informed defendant of the necessary steps to substitute judges. There is no indication in the record that an objection at this point would have fallen on deaf ears. *McLaurin*, 235 Ill. 2d at 487-88. Defendant has provided no extraordinary or compelling reasons to relax the forfeiture rule in this case and we decline to do so. *McLaurin*, 235 Ill. 2d at 488.

Defendant next contends that the trial court erred when it ordered his sentence to be served consecutively to his underlying case which was pending at the time of the contempt proceedings. Defendant again acknowledges that he forfeited review of this issue because he failed to raise a contemporaneous objection when his sentence was imposed or to include it in a postsentencing motion. He, however, urges us to review it for plain error. Before doing so, we must first determine whether there was error. *Piatkowski*, 225 Ill. 2d at 565.

We agree with the general proposition cited by defendant that a sentence may not be ordered to run consecutively to a sentence that has not yet been imposed. *People v. McNeal*, 301

Ill. App. 3d 889, 891 (1998), citing *People v. Reed*, 237 Ill. App. 3d 561, 562 (1992). However, we find this general proposition inapplicable to the case at bar, where the contempt sentence arose from defendant's unruly behavior at a hearing on his pending criminal charges.

In *McNeal*, the State conceded the issue and defendant in *McNeal* was charged with contempt in proceedings unrelated to his underlying charges. That case is therefore distinguishable from the case at bar in these two important respects. " 'A sentence to commence in the future must be so certain that the termination of the first term and the commencement of the second may be ascertained from the record without the necessity of construing or supplementing it.' " *People v. Simmons*, 256 Ill. App. 3d 651, 654 (1993), quoting *People v. Walton*, 118 Ill. App. 2d 324, 333-34 (1969). Here, the two sentences to run "consecutively" have been identified with certainty, one is for the contempt finding and the other is for defendant's underlying offense, for which he was in court when he received the contempt finding. However, it is important to note that defendant was not sentenced to "consecutive" terms, rather the court sentenced defendant to "be served upon [defendant's] release from the charges in [the underlying] case."

The situation here is more analogous to that in *People v. Jackson*, 326 Ill. App. 3d 1087, 1088-89 (2002), where defendant

was sentenced for contempt based on his courtroom behavior at his arraignment. The trial court sentenced him to six months' incarceration to be served consecutively to any sentence imposed in his underlying case. This court found that the order to serve the contempt sentence following any imposed sentence for the underlying charge did not amount to a consecutive sentence, but rather it created a sentencing credit issue. *Jackson*, 326 Ill. App. 3d at 1089, citing *People v. Brents*, 115 Ill. App. 3d 717 (1983).

Section 5-8-7(b) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-7(b) (West 2008)), provides that credit may be awarded for time spent in custody as a result of the offense for which sentence was imposed. Here, as in *Jackson*, defendant's contempt sentence was not a result of his underlying offense, it was the result of his unruly courtroom behavior. *Jackson*, 326 Ill. App. 3d at 1089. Nothing in the Code or caselaw requires the court to credit defendant with time served as a result of his contempt, and to find otherwise would " 'greatly diminish a defendant's incentive to comply with the trial court's order respecting proper decorum in the courtroom and render the contempt citation itself meaningless and inoperative.' " *Jackson*, 326 Ill. App. 3d at 1089, quoting *Brents*, 115 Ill. App. 3d at 721. We find no abuse of discretion by the court in ordering defendant to serve the contempt sentence upon the

release from the sentence imposed in his underlying criminal case, and, therefore, no error occurred which would excuse defendant's procedural default of the matter.

Accordingly, we affirm the judgment and sentence of the circuit court of Cook County.

Affirmed.