2018 IL App (1st) 151417-U
No. 1-15-1417
Order filed January 16, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 1551
	)	
DAVID ROBINSON,	)	Honorable
	)	Neil J. Linehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: We vacate three of defendant's sentences under the one-act, one-crime doctrine where they were based on the same act of possession of a firearm as his conviction for armed habitual criminal, affirm defendant's remaining sentences over his contention that they are excessive, and remand to the trial court to correct the mittimus and modify the fines and fees order.

¶ 2 Following a bench trial, defendant David Robinson was found guilty of one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), two counts of aggravated unlawful use of a weapon (AUUW) (720 ILCS 24-1.6 (a)(1), (2) (West 2012)), and two counts of unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a)

(West 2012)). He was sentenced to concurrent prison terms of eight years for armed habitual criminal, seven years for AAUW, and seven years for UUWF. On appeal, he argues three convictions must be vacated under the one-act, one-crime doctrine, his sentences are excessive, and the fines and fees order should be corrected. We vacate three sentences, affirm Robinson's remaining sentences as not excessive, and remand to the trial court to correct the mittimus and modify the fines and fees order.

¶ 3 Background

¶ 4 Robinson was charged by information with one count of armed habitual criminal (Count 1), four counts of AUUW (Counts 2 through 5), and two counts of UUWF (Counts 6 and 7) based on acts occurring on January 2, 2013, in Chicago. Counts 1 through 6 were predicated on Robinson's possession of a firearm, while Count 7 was predicated on Robinson's possession of firearm ammunition. The State ultimately nol-prossed Counts 2 and 4, and the case proceeded to trial.

¶ 5 The State provided the testimony of Chicago police officers Christine Skibinski, Mark Mayer, and Nick Olsen at trial. Skibinski and Mayer testified that, while canvassing the area of 8500 South Euclid Avenue for suspects involved in an armed robbery, they observed a man walking quickly in the alley of 8500 South Chappel Avenue. The man, identified in court as Robinson, was holding his left side and, after observing the officers, jumped over a fence. Skibinski pursued Robinson on foot and saw a dark object in Robinson's left hand, which she believed to be a handgun.

¶ 6 Mayer drove to Chappel Avenue, encountered Robinson, and pursued him on foot. He saw Robinson toss a handgun from his left hand between two houses. Robinson eventually

stopped, and Mayer placed Robinson into custody. Mayer and Olsen, who had responded to the scene, returned to where Mayer saw Robinson toss the handgun. Olsen recovered a loaded handgun containing five live rounds.

¶ 7 The parties stipulated that Robinson had a 2007 conviction for delivery of a controlled substance and a 2001 conviction for aggravated discharge of a firearm. The parties also stipulated that Robinson had never been issued a FOID or concealed carry license card.

¶ 8 The trial court found Robinson guilty of all charges. It stated Counts 3 and 5 merge together, and Counts 6 and 7 merge together. The trial court denied Robinson's written motion for a new trial and proceeded to sentencing.

¶ 9 In aggravation, the State highlighted Robinson's background, which, according to the presentence investigation report (PSI), included a 2001 aggravated discharge of a firearm conviction, for which he received six years in the Illinois Department of Corrections, and drug-related convictions in 2007 and 2005, for which he received seven and one years' imprisonment, respectively. He also had a 2001 misdemeanor gun possession case, for which he received 364 days in the Cook County Department of Corrections. The State asked for eight years' imprisonment in the IDOC.

¶ 10 In mitigation, defense counsel noted that Robinson's background was already being taken into consideration to create the armed habitual criminal offense. Counsel asserted that Robinson's problems "relate more to drug use than his propensity for violent crime that's evident from his earlier days." He noted that Robinson was receiving drug treatment program in Westcare and asked for the minimum sentence with credit for "whatever time that it can."

¶ 11 In allocution, at Westcare, Robinson had learned there was a connection between his drug use and criminal problems, and had received five certificates through the program. In addition, before this case, Robinson had not been convicted of a crime since 2007.

¶ 12 The trial court sentenced Robinson to concurrent prison terms of eight years' for the armed habitual criminal conviction (Count 1), seven years for the merged AUUW conviction (Counts 3 and 5), and seven years for the merged UUWF conviction (Counts 6 and 7). It assessed fines and fees in the amount $817. The trial court stated it had considered the facts, the matters in aggravation and mitigation, and the statements made by the parties. It highlighted Robinson's progress in the Westcare program and considered this as a factor in mitigation.

¶ 13 The trial court further found that Robinson's armed habitual criminal conviction was a "serious offense," which "the legislature saw fit that this sentence must be served at 85 percent." It stated that Robinson had a prior criminal history, including prior felonies. Given Robinson's background, the trial court did not think the minimum sentence was appropriate. And it said Robinson's mittimus would note that he "may be entitled to additional credit for Westcare," but refused to order additional credit as that determination is made by the IDOC. Robinson filed a written motion to reconsider his sentence, which the trial court denied. Robinson filed a timely notice of appeal.

¶ 14 Analysis

¶ 15 On appeal, Robinson argues (i) three convictions must be vacated in light of the one-act, one-crime doctrine, (ii) his sentences are excessive, and (iii) the fines and fees order should be corrected.

¶ 16 One-act, One-crime Doctrine

¶ 17 Robinson first argues that both of his AUUW convictions (Counts 3 and 5) and one UUWF conviction (Count 6) must be vacated because, in violation of the one-act, one-crime doctrine, these convictions are predicated on the same physical act as his armed habitual criminal conviction, namely possession of the handgun. Robinson does not challenge his other conviction for UUWF (Count 7), which is predicated on possession of firearm ammunition. See *People v. Almond*, 2015 IL 113817, ¶¶ 48-49 (holding act of possessing firearm is "material different" than act of possessing firearm ammunition, even if done so simultaneously). Although Robinson did not raise this claim in the trial court, "forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process." *People v. Nunez*, 236 Ill. 2d 488, 493 (2010).

¶ 18 Under the one-act, one-crime doctrine, "a defendant may not be convicted of multiple offenses that are based upon precisely the same physical act." *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). An act refers to "'any outward or overt manifestation which will support a different offense.'" *Nunez*, 236 Ill. 2d at 494 (quoting *People v. King*, 66 Ill. 2d 551, 566 (1977)). When a challenge is raised under the one-act, one-crime doctrine, the court first determines whether the defendant's conduct consisted of a single physical act or separate acts. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). If only one physical act was undertaken, then multiple convictions are improper. *Id.* We review the one-act, one-crime doctrine *de novo*. See *People v. Robinson*, 232 Ill. 2d 98, 105 (2008).

¶ 19 The State concedes both AUUW convictions (Counts 3 and 5) and the UUWF conviction based on possession of a firearm (Count 6) were predicated on the same physical act and must be vacated. We agree. Both the AUUW offenses and one of the UUWF offenses are predicated on

the same physical act of possession of the handgun, in violation of the one-act, one-crime doctrine. See *People v. West*, 2017 IL App (1st) 143632, ¶ 25.

¶ 20 When there is a violation of the one-act, one-crime doctrine, the court should impose sentence on the more serious offense and vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). Here, armed habitual criminal, a Class X felony, is the more serious offense over the offenses of AUUW and UUWF, which are Class 2 felonies. See 720 ILCS 5/24-1.7(b) (West 2012); 720 ILCS 5/24-1.6(d) (3) (West 2012); 720 ILCS 5/24-1.1(e) (West 2012). Accordingly, the sentences imposed on Counts 3 and 5 (AUUW) and Count 6 (UUWF), which are predicated on Robinson's possession of a handgun, are vacated, and the findings of guilt are merged into Count 1. Count 7, which charged UUWF based on Robinson's possession of firearm ammunition, remains. We remand to the circuit court to correct Robinson's mittimus accordingly. See *West*, 2017 IL App (1st) 143632, ¶ 25. Finally, we note the trial court improperly merged Counts 3 and 5 together and Counts 6 and 7 together. Rather, as discussed, Counts 3, 5, and 6 should merge into Count 1, which is the most serious offense. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007).

¶ 21 Challenges to Sentences as Excessive

¶ 22 Robinson next argues his eight-year sentence for armed habitual criminal and seven-year sentence for the remaining UUWF conviction are excessive in light of the seriousness of the offense, his potential for rehabilitation, and his criminal background. The trial court has broad discretion in imposing an appropriate sentence, and absent an abuse of discretion we will not alter it. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 60. An abuse of discretion occurs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly

disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). A trial court considers factors such as the nature of the crime, protection of the public, and the defendant's rehabilitation potential. *People v. Jackson*, 357 Ill. App. 3d 313, 329 (2005). It is presumed that the trial court considers mitigating evidence presented to it, absent some indication to the contrary, other than the sentence itself. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 23 We find the trial court did not abuse its discretion in imposing an eight-year prison sentence for the armed habitual criminal conviction and a seven-year prison sentence for the UUWF conviction. The offense of armed habitual criminal is a Class X felony, punishable by 6 to 30 years' imprisonment. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). UUWF is a Class 2 felony, punishable by 3 to 14 years' imprisonment. 720 ILCS 5/24-1.1(e) (West 2012). The eight-year and seven-year sentences fall within these statutory ranges and we therefore presume they are proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 47.

¶ 24 Robinson argues his sentences are excessive given the nonviolent nature of the offenses and the absence of harm resulting from his conduct. He asks that we reduce his sentences to the minimum allowed under the law. A sentence must reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55.

¶ 25 We reject Robinson's contention that the trial court failed to consider the seriousness of the offense and the absence of harm. The trial court explicitly stated it had considered the facts, the matters in aggravation and mitigation, and the statements made by the parties, and, thus, was

well aware that Robinson, after noticing police officers, ran and tossed away a loaded handgun between two houses. Given the danger to nearby residents and officers that this loaded and unattended gun posed, we conclude the trial court adequately considered the seriousness of the offense. Robinson cannot point to any evidence to the contrary. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38 (defendant "must make an affirmative showing the sentencing court did not consider the relevant factors"). Moreover, the armed habitual criminal offense was created by the legislature "to help protect the public from the threat of violence that arises when repeat offenders possess firearms." *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011). The trial court adequately considered the nature of the offense.

¶ 26 Robinson next argues the trial court did not adequately consider his rehabilitation potential and drug addiction. Specifically, Robinson argues that, while in custody awaiting trial, he made substantial progress in the Westcare drug treatment program. But, the record indicates the trial court was made aware of these facts. Both Robinson and defense counsel had told the court Robinson had been receiving treatment for his drug addiction. The trial court stated it had considered this participation in treatment as evidence in mitigation. The trial court was well aware of Robinson's problems with drugs, but was not required to give them the weight Robinson urges. See *People v. Coleman*, 183 Ill. 2d 366, 404 (1998) (("'[S]imply because the defendant views his drug abuse as mitigating does not require the sentencer to do so.'" (quoting *People v. Shatner*, 174 Ill. 2d 133, 159 (1996))). As Robinson has not affirmatively shown the trial court did not adequately consider this evidence, we cannot say the trial court abused its discretion in its consideration of his rehabilitation potential and efforts. See *Burton*, 2015 IL App

(1st) 131600, ¶¶ 37-38 (finding no abuse of discretion where defendant failed to make affirmative showing that trial court failed to consider his rehabilitative potential in mitigation).

¶ 27 Robinson argues that trial court's notation on his mittimus that he may be entitled to additional sentencing credit because of Westcare treatment indicates "the trial court was not aware that he was prohibited by statute from receiving such credit." He asserts that, had the trial court been aware of this, the court may have reduced Robinson's sentence to take into account this participation in the treatment program. We disagree. The trial court explicitly stated that it was up to IDOC to determine whether Robinson would receive additional credit for participation in drug treatment. Robinson merely speculates the trial court would have imposed a lower sentence.

¶ 28 Robinson argues his criminal background does not justify the sentences imposed and part of his background was already taken into account through the armed habitual criminal offense and its classification as a Class X felony. Specifically, he argues his 2006 delivery of a controlled substance and 1999 aggravated discharge of a firearm convictions were already taken into account through his conviction of armed habitual criminal. But, Robinson also had convictions for possession of a controlled substance and possession of a firearm. Indeed, the court explicitly stated the armed habitual criminal conviction was a "serious offense," and that, given his background, it did not consider the minimum sentence as appropriate. The trial court adequately considered Robinson's background. See *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123 (noting that presence of mitigating factors does not require minimum sentence be imposed).

¶ 29 Fines and Fees Order

¶ 30 Robinson next questions the assessments on his fines and fees order. He did not raise this argument in the trial court and admits that the issue is forfeited (see *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)), but argues we may review this issue for plain error under Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967). The State acknowledges that Robinson has "technically" forfeited the issue but agrees that the fines and fees order should be corrected. The parties suggest that we may review the issue under the plain-error doctrine. We reject the contention that we may address Robinson's challenge to the fines and fees order as plain error or under Rule 615(b), as the complained of errors are not "defects affecting substantial rights." *People v. Grigorov*, 2017 IL App (1st) 143274, ¶¶ 13-15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017).

¶ 31 Several of Robinson's challenges are directed to claiming presentence custody credit against fees he claims are actually fines subject to offset by the credit. See 725 ILCS 5/110-14(a) (West 2012) (defendant incarcerated on bailable offense, who does not supply bail and against whom fine is levied, is entitled to $5 per day credit against fine for each day spent in presentence custody). In *People v. Caballero*, 228 Ill. 2d 29, 88 (2008), our supreme court held that section 110-14 claims for presentence custody credit may be raised "at any time and at any stage of court proceedings, even on appeal in a post conviction petition." Thus, a defendant may "'piggyback'" a mathematical error or a claim under section 110–14 for *per diem* credit onto any properly filed appeal, "even if the claim is unrelated to the grounds for that appeal." *Griffin*, 2017 IL App (1st) 143800, ¶ 25, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017); *People v. Brown*, 2017 IL App (1st) 150203, ¶¶ 35-37.

¶ 32 Nonetheless, as we explained recently in *People v. Brown*, 2017 IL App (1st) 150203, "[g]ranting credit is a simple ministerial act that promotes judicial economy by ending any further proceedings over the matter," allowing for "the ministerial correction of a mathematical calculation called for under section 110-14." *Id*. ¶¶ 36, 40 (citing *People v. Woodward*, 175 Ill. 2d 435, 456-57 (1993)). Thus, *Caballero* and section 110-14 do not allow Robinson to raise the *substantive* issues he raises here regarding whether certain charges should have been assessed or particular assessments categorized as fees are actually fines subject to offset (*Brown*, 2017 IL App (1st) 150203, ¶ 40), and do not save his substantive arguments from forfeiture.

¶ 33 But because the State has failed to argue against the issue, the State itself has forfeited that forfeiture (*People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46) and we will address the merits of Robinson's challenges to his fines and fees order. We review *de novo* the propriety of the fines and fees imposed by the trial court. *People v. Green*, 2016 IL App (1st) 134011, ¶ 44.

¶ 34 Robinson contends, and the State correctly concedes, that the $250 state DNA identification fee (730 ILCS 5/5-4-3(j) (West 2012)) and $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) were improperly assessed. The DNA fee is only required when a defendant is not currently in the DNA database and, since Robinson was previously convicted of a felony in 2007, we presume his DNA is already in the database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011); *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. The electronic citation fee does not apply to Robinson's felony convictions. 705 ILCS 105/27.3e (West 2012) (fee is only imposed on defendant "in any traffic, misdemeanor, municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision"); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115. Accordingly, we vacate the $250 DNA fee and $5 electronic citation fee.

¶ 35 Robinson next contends that six of the fees imposed against him are actually fines subject to presentence incarceration credit under section 110-14. See *People v. Jones*, 223 Ill. 2d 569, 599 (2006) ("the credit for presentence incarceration can only reduce fines, not fees"); 725 ILCS 5/110-14(a) (West 2012). Robinson first argues, and the State correctly concedes, that the $15 state police operations charge (705 ILCS 105/27.3a(1.5) (West 2012)) and the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2012)) are fines subject to presentence incarceration credit. See *People v. Maxey*, 2016 IL App (1st) 130698, ¶¶ 140-41 ("[s]ince the state operations charge under section 27.3a(1.5) is a fine, defendant is entitled to presentence credit toward it"); *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 ("we hold that the $50 Court System fee imposed pursuant to section 5-1101(c) is a fine for which defendant can receive credit for the *** days he spent in presentence custody").

¶ 36 Robinson next argues the $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2012)), the $15 clerk automation fee (705 ILCS 105/27.3a(1) (West 2012)), the $15 document storage fee (705 ILCS 105/27.3c(a) (West 2012)), and the $25 court services fee (55 ILCS 5/5-1103 (West 2012)) are fines subject to presentence incarceration credit. This court has already considered challenges to these assessments and determined they are fees and, therefore, not subject to presentence incarceration credit. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006) ("[w]e find that all of these charges are compensatory and a collateral consequence of defendant's conviction and, as such, are considered 'fees' rather than 'fines' "); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the $190 felony complaint fee to be a fee); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81 (finding clerk

automation fee and document storage fee are fees not subject to offset by presentence incarceration credit).

¶ 37 Conclusion

¶ 38 We vacate both of Robinson's sentences for AUUW (Counts 3 and 5) and one sentence for UUWF (Count 6), and merge these offenses into Count 1, armed habitual criminal. We affirm Robinson's remaining sentences entered on Counts 1 and 7 as they are not excessive. We vacate the $250 DNA fee and the $5 electronic citation fee, and find the $15 state police operations charge and the $50 court system fee are fines subject to presentence incarceration credit. We remand to the circuit court to correct the mittimus and modify the fines and fees order accordingly.

¶ 39 Affirmed in part; vacated in part; and remand to the circuit court to correct the mittimus and for modification of fines and fees order in accordance with this order.