2018 IL App (1st) 160926-U

No. 1-16-0926

Order filed December 14, 2018

Fifth Division

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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. 15 CR 7147
	)	
THOMAS FULTZ,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for unlawful possession of a weapon by a felon affirmed over his challenge to the sufficiency of the evidence. Fines, fees, and costs order corrected.

¶ 2 Following a bench trial, defendant Thomas Fultz was found guilty of unlawful possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2014)), and sentenced to three years and six months' imprisonment. Defendant appeals, contending that the State failed to prove

him guilty beyond a reasonable doubt and that certain fines and fees were erroneously imposed. We affirm and correct the fines, fees, and costs order.

¶ 3 Defendant was charged in a three count indictment. Two counts alleged UUWF (720 ILCS 5/24-1.1(a) (West 2014)) and a third count alleged possession of cannabis (720 ILCS 550/5(d) (West 2014)). Relevant here, count 2 alleged UUWF based on possession of a .25-caliber handgun "on or about his own abode" after defendant had previously been convicted of delivery of cannabis in case number 99 CR 2403301. [1] See 720 ILCS 5/24-1.1(a) (West 2014).

¶ 4 At trial, Chicago police officer Ron Norway testified that he executed a search warrant for a residence located in the 5800 block of South Laflin Street in Chicago on April 9, 2015. When he entered the home, the only occupant was Antoine Brown. Brown was detained and Norway and other officers searched the residence. In a closet near the front door, Norway found two handguns, a .40 caliber Sig Sauer and a .25 caliber Armi. He later learned that the .40 caliber weapon was loaded with 10 rounds and the .25 caliber weapon with 3 rounds. Norway alerted the evidence officer, Paul Szurna, who photographed the weapons and collected them as evidence.

¶ 5 Norway also found a red cooler on the floor next to a dining table. On the table was a grinder and a Zip-Loc bag containing suspected cannabis. Inside the cooler were 40 Zip-Loc bags of suspected cannabis and 22 knotted bags of suspected cannabis.

¶ 6 Norway testified that he found three documents with defendant's name in the cooler, and identified them at trial. The first document is a statement from Cricket Wireless dated March 16, 2015. The statement identifies defendant as the account holder at the South Laflin Street address.

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[1] The trial court granted defendant's motion for a directed finding on one count of UUWF and the cannabis charge. We therefore recite only the background necessary for an understanding of the charge on which defendant was convicted.

The second document is a social security card with defendant's name and a social security number. It does not have an address. The third document is a voter registration card with the name Thomas Fultz Sr. and an address in the 5700 block of South Sangamon Street. The "canvas date" on the registration card is June 25, 2010.

¶ 7 After defendant's subsequent arrest, Norway interviewed him at a police station. Norway read defendant the *Miranda* warnings, and defendant indicated he understood. Norway testified:

> "I asked him about the guns that were recovered. He stated not verbatim but that he bought both guns, the big one, about four years from the day he was in [the police station] for, I think, $200 and the smaller one for, I believe, $50 from the street for his protection."

¶ 8 On cross-examination, Norway acknowledged that Brown was the only person in the residence when he arrived to execute the warrant and that Brown was arrested after suspected contraband pills were found on his person. Norway and his team searched the entire two-story house, but the guns, drugs, and cooler were all recovered from the first-floor front room. Norway acknowledged that this area contained living room furniture, and that there was no indication it was used as a bedroom. Norway also acknowledged that he never saw defendant in the residence and did not encounter him until two hours later at the police station. Norway did not make an audio or video recording of defendant's statement.

¶ 9 Chicago police officer Paul Szurna testified consistently with Norway, describing photographing and inventorying the items recovered during the search. The State presented a stipulation regarding the weight and cannabis content of the items recovered from the red cooler and the table. The State also presented two certified statements of conviction, one of which

identified Thomas Fultz in case number 99 CR 2403301 and indicated a conviction for delivery of cannabis (10 to 30 grams) on February 15, 2000. The State then rested.

¶ 10 Defendant moved for a directed finding, on all three counts. The court granted the motion on two of the counts, but denied it with regard to count 2.

¶ 11 Maia Earnest, the mother of two of defendant's children, testified that she and defendant had known each other for 13 years and their children were 11 and 8 years old. They resided together at the Laflin address beginning in 2012 or 2013. Defendant moved out on June 5, 2014, after a disagreement between them. Earnest had the only set of keys to the house, after she lost her set and defendant gave her his set. On April 9, 2015 she lived there with her two children and her stepson Antoine Brown. She and defendant co-parented the three children.

¶ 12 That day, Earnest was working at a Target store. She received a phone call on her cell phone from defendant, but did not answer it. Then she was paged over the store intercom, and received a call from defendant on the store's phone telling her police had "raided" her house. She met defendant near a bus stop two blocks from the house. He was arrested as he walked with her toward the house.

¶ 13 On cross-examination, Earnest testified that she and defendant originally obtained the residence together. At that time they each had a set of keys. After they broke up and defendant moved out, in order for defendant to get into the house, he had to have Earnest admit him. Defendant and Earnest continued to co-parent, but did not have a romantic relationship. Earnest had a cell phone, and used Cricket as the provider. Defendant also used Cricket, but they had separate accounts, each in his or her own name. Defendant was at the house "a lot" to see his children even after he and Earnest broke up. However, he was never alone at the house, and

never watched their children there. Earnest did not see the cooler before she left for work the day the search warrant was executed. She was in the front closet nearly every day, as she kept her mail there, but never saw weapons in the closet. She and her children frequently played the monopoly game kept in the closet.

¶ 14 On redirect examination, Earnest testified that she was not the only one that used the closet and that it did not have a lock.

¶ 15 Following closing arguments, the trial court found defendant guilty stating:

> "I have heard the testimony. Specific findings are that the combination of the placement of the guns, where they were found, the proof of residency found inside of the home and the defendant's statement as well as all the other factors equal that the State has met its burden of proof as to count two. So there is a finding of guilty as to count two [UUWF for possession of the .25 caliber handgun]."

¶ 16 Defendant filed a motion to reconsider or in the alternative for a new trial. During argument on the motion, defendant argued that the State had failed to prove the South Laflin residence was his abode. The trial court denied the motion. It subsequently sentenced defendant to three years and six month's incarceration, with credit for 335 days presentence custody, and fines, fees, and costs totaling $594. Defendant moved to reconsider his sentence, and the trial court denied the motion. Defendant timely appealed.

¶ 17 Defendant first contends that the evidence was insufficient to establish beyond a reasonable doubt that he possessed the .25 caliber weapon in his abode. When we review a challenge to the sufficiency of the evidence, our function is not to retry the defendant. *People v. Nere*, 2018 IL 122566, ¶ 69 (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)). The appropriate

question for a reviewing court is 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.) *Id.* (quoting *People v. Collins*, 106 Ill. 2d 237, 261 (1985) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979))).

¶ 18 A person commits the offense of UUWF if he possesses "on or about his person or on his land or in his own abode or fixed place of business" a firearm or firearm ammunition after having been convicted of a prior felony. See 720 ILCS 5/24-1.1(a) (West 2014); *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 38. In this case, the indictment alleged that defendant possessed a handgun in his "abode." In *People v. Price*, 375 Ill. App. 3d 684 (2007), this court defined "abode" as follows:

> "In sum, we hold that the ordinary meaning of 'abode' is a place of residence where an individual maintains substantial and long-lasting contacts—*i.e.,* his home—and that the legislature intended this definition when it used the word 'abode' in the unlawful-use offenses. Although under this definition it is true that an individual may have more than one abode, it does not follow that any place a defendant spends the night as a guest qualifies as his abode." *Id.* at 695.

¶ 19 Possession can be either actual or constructive. *People v. Faulkner*, 2017 IL App (1st) 132884, ¶ 39. To establish constructive possession, the State must present evidence that the defendant "(1) had knowledge of the presence of the weapon and (2) exercised immediate and exclusive control over the area where the weapon was found." *Id.* (citing *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)). Control can be established through evidence of habitation in the premises where contraband is discovered. *People v. Spencer*, 2012 IL App (1st) 102094,

¶ 17. “Proof of residency in the form of rent receipts, utility bills and clothing in closets is relevant to show the defendant lived on the premises and therefore controlled them.” *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993). Although possession must be exclusive, the rule that possession must be exclusive does not mean that possession may not be joint. *People v. Givens*, 237 Ill. 2d 311, 335 (2010). When deciding whether constructive possession has been proven, the trier of fact may rely on reasonable inferences of knowledge and possession. *Spencer*, 2012 IL App (1st) 102094, ¶ 17.

¶ 20 We find the evidence sufficient to prove defendant guilty of UUWF as charged. Defendant made a statement to Norway in which he described the two weapons recovered (albeit generically as the large weapon and the smaller weapon), admitted that he purchased the weapons, and even recounted the amounts he paid for them. This admission constituted direct evidence of defendant’s knowledge of the relevant weapon, *i.e.*, the .25 caliber handgun.

¶ 21 The voters’ registration card and social security card suggest more than just a casual relationship with the residence. Both are important forms of identification which would be likely stored in a place of safety where they could be easily accessed when needed and would be undisturbed when not needed. In other words, storing these documents at the residence is circumstantial evidence that defendant had control over the residence or at least the smaller area where the contraband was located. It is also circumstantial evidence that the residence was defendant’s abode at the time the guns were recovered, as these are not the types of things an occasional visitor or overnight guest would leave behind. The cell phone statement likewise demonstrates defendant’s control and connection to the residence. The statement was dated only about three weeks prior to the date the search warrant was executed and bore defendant’s name

and the address of the residence. This is circumstantial evidence that the residence was defendant's home near the time of the search.

¶ 22 We conclude that this circumstantial evidence, in conjunction with the direct evidence of knowledge in the form of defendant's statement to Norway, was sufficient such that we cannot find that no rational trier of fact would have found defendant guilty beyond a reasonable doubt. See *Nere*, 2018 IL 112566, ¶ 69.

¶ 23 Defendant argues that Earnest's testimony that defendant no longer lived at the residence was clear, unequivocal and unrebutted. However, a trial court may accept or reject as much of a witness's testimony as it pleases. *People v. White*, 2015 IL App (1st) 131111, ¶¶ 19, 24. The trial court was not obligated to accept Earnest's testimony that defendant had moved out in light of the circumstantial evidence that the residence was still his abode. See *People v. Ferguson*, 204 Ill. App. 3d 146, 151 (1990) ("The trier of fact is not required to accept defendant's version of the facts, but may consider its probability or improbability in light of the surrounding circumstances.").

¶ 24 Defendant also argues that the presence of the cell phone bill, voter's registration card, and social security card was "more consistent with what would be expected from a frequent visitor of the home, rather than an actual occupant," and that defendant "simply failed to update his address after he moved out." Although these hypotheses are consistent with an innocent interpretation of the circumstantial evidence, the trial court was not required to accept them over the inferences establishing guilt. See *People v. Jenkins*, 117 Ill. App. 3d 33, 39 (1983) ("The [trier of fact] need not be satisfied beyond a reasonable doubt as to each link in the chain of circumstances relied on to establish guilt so long as all the evidence taken together satisfies the

[trier of fact] beyond a reasonable doubt of the accused's guilt, nor must the [trier of fact] search for a series of possible explanations compatible with innocence and elevate them to the status of reasonable doubt.").

¶ 25 Defendant next contends that several corrections should be made to the fines, fees, and costs order. The State agrees, in part. We will address each argument in turn.

¶ 26 Initially, defendant acknowledges that he failed to preserve the fines and fees issue by objecting at the trial level. Defendant argues that the issue regarding his presentence custody credit cannot be forfeited and we can address the remaining issue under plain error. See *People v. Woodward*, 175 Ill. 2d 435, 446 (1997) (discussing presentence custody credit); *People v. Hillier*, 237 Ill. 2d 539, 545 (2010) (discussing plain error). However, the rules of waiver and forfeiture are also applicable to the State. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. The State agrees that defendant is entitled to review of these issues, and has therefore waived the issue of forfeiture. *Id.*

¶ 27 The parties correctly agree that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) and $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) should be vacated. The $5 electronic citation fee was improperly assessed as defendant was not convicted of a traffic, misdemeanor, municipal ordinance, or conservation offense. See 705 ILCS 105/27.3e (West 2014). Similarly, because defendant was not convicted of a violation of the Vehicle Code, the $5 court system fee does not apply. See 55 ILCS 5/5-1101(a) (West 2014). Accordingly, we vacate both fees.

¶ 28 Defendant next claims he is entitled to presentence custody credit against certain fines that have been incorrectly labeled as fees. Under section 110-14(a) of the Code of Criminal

Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)) any person incarcerated on a bailable offense is entitled to a credit of $5 per day against his or her fines. The $5 per day credit of section 110-14(a) applies, however, only to fines not fees.[2] See *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009). The central characteristic that separates a fee from a fine is whether the assessment is intended to reimburse the State for some cost incurred in prosecution or whether it is punitive in nature and intended to punish. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63. A fee reimburses the State and a fine punishes the defendant. *Id.* We review *de novo* whether an assessment constitutes a fine or a fee. *Id.* ¶ 60.

¶ 29 As an initial matter, defendant argues that he is entitled to 334 days of presentence custody credit rather than the 335 days awarded by the trial court and indicated on the fines, fees, and costs order. Defendant argues that he is not entitled to monetary credit for the day of sentencing and relies on *People v. Williams*, 239 Ill. 2d 503 (2011), in which the court found the day of sentencing is the first day a defendant is committed to the Department of Corrections, and thus counts as a day of his sentence and not as a day of presentence custody credit. See *Id.* at 509. The State agrees with defendant's calculation and concedes the error. We do not accept the State's concession.

¶ 30 Defendant was arrested on April 9, 2015 and sentenced on March 8, 2016; a total of 335 days. It is well established that, under section 110-14(a) of the Code of Criminal Procedure (725 ILCS 5/110-14(a)(West 2014)), a defendant is entitled to monetary credit for each day or portion of a day he is held in presentencing custody including the day of sentencing. See *People v.*

[2] The issue of the proper determination of whether the $2 public defender records automation, $2 State's Attorney records automation, $190 felony complaint filed, $15 automation (clerk), and $15 document storage (clerk) assessments constitute fines or a fees is currently pending before our supreme court in *People v. Clark*, No. 122495 (oral argument held September 12, 2018).

Robinson, 391 Ill. App. 3d 822, 844-45 (2009). In *Williams*, the supreme court determined the day of sentencing was not a day of presentence custody credit. See *Williams*, 239 Ill. 2d at 509. However, the court made this determination for the purpose of sentencing credit under section 5-4.5-100 of the Unified Code of Corrections (730 ILCS 5/5-4.5-100 (West 2008)), not monetary credit under section 110-14(a) of the Code of Criminal Procedure. *Id.* at 509-10. The court specifically recognized the apparent conflict with section 110-14(a), and held that it was the result of interpreting two sections of entirely separate codes and did not affect its analysis. *Id.* Therefore, we conclude that the trial court was correct in awarding defendant 335 days monetary credit and the fines, fees, and costs order correctly reflects this amount. At $5 per day, that represents a potential credit of $1675.

¶ 31 The parties correctly agree that the $15 state police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)) is, in fact, a fine because it does not reimburse the State for a cost of prosecuting defendant. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. The parties are also correct that the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) is indeed a fine because its stated purpose is to finance the court system. See *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21. We order the clerk of the circuit court to modify the fines, fees, and costs order accordingly.

¶ 32 Defendant argues that the $190 felony complaint filed fee (705 ILCS 105/27.2a(w)(1)(A) West 2014)), the $25 automation (clerk) fee (705 ILCS 105/27.3a(1) (West 2014)), and the $25 document storage fee (705 ILCS 105/27.3c(a) (West 2014)) are all, in fact, fines. We disagree. This court has long held that these assessments are fees because they reimburse the State, in part, for costs incurred in prosecuting defendant. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97

(2006); see also *People v. Smith*, 2018 IL App (1st) 151402, ¶ 15. We continue to adhere to this precedent and find that these assessments are fees not subject to offset.

¶ 33 Defendant also argues that the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) and the $2 public defender records automation fee (55 ILCS 5/3-4012 (West 2014)) are, in fact fines.[3] Defendant relies on *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, which held that these assessments do not compensate the State for costs associated in prosecuting a particular defendant. However, we follow the weight of authority to find these assessments are fees. See, *e.g.*, *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30; see also *People v. Reed*, 2016 IL App (1st) 140498, ¶ 16.

¶ 34 The $10 probation and court services operations fee (705 ILCS 105/27.3a(1.1) (West 2014)) is in fact a fine. There is a split among the districts of this court. Compare *People v. Staake*, 2016 IL App (4th) 140638, ¶ 106 (holding the assessment is a fee where the probation office is involved in creating a presentence investigation) with *People v. Carter*, 2016 IL App (3d) 140196, ¶ 56 (holding the assessment is a fine because it is imposed regardless of a defendant's actual utilization of probation services). However, this district has sided with the *Staake* line of cases and holds that the plain language of the statue indicates the assessment is fee. *People v. Mullen*, 2018 IL App (1st) 152306, ¶¶ 55-56. Therefore, we conclude that this assessment is a fee not subject to offset.

¶ 35 In conclusion, we affirm defendant's conviction for UUWF, vacate the $5 electronic citation fee and $5 court system fee, and order the clerk of the circuit court to modify the fines,

[3] Defendant has withdrawn his initial argument that the $10 arrestee's medical cost fund assessment was a fine.

fees, and costs order to reflect that the $15 state police operations fee and $50 court systems fee are subject to offset by defendant's $5 per day presentence custody credit.

¶ 36 Affirmed in part and vacated in part; fines, fees, and costs order corrected.