2011 IL App (2d) 100136-U
No. 2-10-0136
Order filed September 20, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ROBERT A. CASCIO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 08-CF-2917 Honorable Gary V. Pumilia, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Bowman and McLaren concurred in the judgment.

ORDER

Held: Defendant was not denied the effective assistance of counsel by pleading guilty to armed violence predicated on unlawful possession of a weapon by a felon despite a possible statutory exception to that charge. We affirmed the judgment and the assessment of the $200 DNA analysis fee because that fee is not a fine and not subject to monetary credit for time spent in custody before sentencing. We further modified defendant's sentence for his armed violence conviction to allow day-for-day good-conduct credit and vacated the portion of the trial court's sentencing order requiring defendant to pay a $100 lab fee.

¶ 1 In March 2009, defendant, Robert A. Cascio, pleaded guilty to one count of attempted first-degree murder (720 ILCS 5/9-1 (West 2008)) and one count of armed violence predicated on unlawful possession of a weapon by a felon (the armed violence statute) (720 ILCS 5/33A-2(a)

(West 2008)). Defendant was sentenced to 25 years' imprisonment for the attempted first-degree murder plea to run consecutively with his sentence of 10 years' imprisonment for his armed violence plea, with 246 days' credit for time served. Defendant subsequently filed postsentencing motions to withdraw his plea or reduce the sentences, arguing that he was denied the effective assistance of counsel and that the armed violence conviction did not contain an element of great bodily harm. The trial court denied the motions and defendant now timely appeals, contending that (1) he was denied the effective assistance of counsel because the armed violence statute precludes using the offense of unlawful possession of a weapon by a felon as a predicate offense; (2) defendant's sentence for armed violence must be modified to allow him to earn day-for-day good-conduct credit; and (3) defendant's $200 fee for DNA analysis should be satisfied due to credit for time spent in custody before sentencing pursuant to section 110-14 of the Code of Criminal Procedure (the Criminal Procedure Code) (725 ILCS 5/110-14 (West 2008)) and that a $100 lab fee should be vacated because his convictions did not result from possession of a controlled substance (see 730 ILCS 5/5-9-1.4(b) (West 2008)). For the reasons set forth below, we affirm defendant's conviction and the assessment of the $200 DNA analysis fee because that fee is not subject to monetary credit for time spent in custody prior to sentencing. We further modify the trial court's order to provide that defendant is entitled to for day-for-day good-conduct credit for his armed violence conviction and vacate the trial court's sentencing order requiring defendant to pay a $100 lab fee.

¶ 2 I. BACKGROUND

¶ 3 The State's factual basis reflected that, on July 27, 2008, defendant approached the victim as she was entering her apartment in Rockford. Defendant possessed a knife and a gun, threatened to kill the victim, and stabbed the victim five times. The victim suffered severe injuries to her left

arm, shoulder, and chest, requiring 82 staples. The victim was told she has less than a 10 percent chance of fully recovering from the nerve damage to her left hand.

¶ 4 On September 10, 2008, defendant was charged by indictment with nine counts. Count one charged defendant with attempted first-degree murder, carrying a sentencing range of 6 to 30 years; count two charged defendant with armed violence predicated on the offense of aggravated domestic battery, carrying a sentencing range of 15 to 30 years; count three charged defendant with armed violence predicated on the offense of unlawful possession of a weapon by a felon, carrying a sentencing range of 10 to 30 years; count four charged defendant with armed violence predicated on the offense of burglary, carrying a sentencing range of 10 to 30 years; count five charged burglary, carrying a sentencing range of 7 to 14 years; count six charged unlawful possession of a weapon by a felon, carrying a sentencing range of 7 to 14 years; and counts seven, eight, and nine charged aggravated battery, carrying an aggregate sentencing range of 21 to 42 years. On March 13, 2009, defendant pleaded guilty to counts one and three; the State dismissed the remaining counts. Attorney John Palmer represented defendant during the plea negotiations and hearing.

¶ 5 The case proceeded to sentencing on April 14, 2009. After hearing the victim's testimony, the trial court concluded that defendant inflicted severe bodily harm, stabbing the victim at least five times. The trial court further noted that defendant did not use his gun. With respect to count three, the trial court stated:

> "Count [three] is basically a status offense. This is not an offense that deals with causing or directly inflicting physical injury. It's an offense that exists because of his status and his possession. That is an offense that frankly started long before the attempt[ed] murder even got started."

The trial court sentenced defendant to 25 years' imprisonment for attempted first-degree murder and 10 years' imprisonment for armed violence, to run consecutive, and ordered defendant to serve 85% of both sentences pursuant to truth-in-sentencing provided in section 3-6-3(a) of the Code of Corrections (the Corrections Code) (730 ILCS 5/3-6-3(a) (West 2008)).

¶ 6 Defendant subsequently filed a *pro se* postsentencing motion, alleging he was denied the effective assistance of counsel because his attorney did not explain the consequences of his guilty plea. The trial court appointed attorney Patrick Braun to represent defendant, and on April 29, 2009, defendant filed a motion to withdraw his guilty plea. On September 17, 2009, defendant filed an amended motion to withdraw plea or reduce sentence, and on December 2, 2009, defendant filed a second amended motion. The motion alleged that the "elements of the offense of armed violence do not contain an element of great bodily harm, thus rendering [truth-in-sentencing] inapplicable to defendant." On February 10, 2010, the trial court heard testimony from defendant and Palmer regarding their pre-plea discussions. Palmer testified that he discussed other possible defenses, such as mental competence defenses, fitness to stand trial, and the possibility of an insanity defense. Palmer also testified that he discussed the differences between a fully negotiated plea and an open plea, the possibility of having a jury or bench trial, the type of defenses available, the witnesses defendant would likely call, and what would happen if defendant was found either guilty or not guilty. The trial court denied defendant's motions, and defendant now timely appeals.

¶ 7 II. DISCUSSION

¶ 8 A. Ineffective Assistance of Counsel

¶ 9 Defendant first contends he was denied the effective assistance of counsel. Specifically, defendant argues that, because the armed violence statute precludes using the offense of unlawful possession of a weapon by a felon as the predicate offense for armed violence, Palmer was

ineffective for allowing him to plead guilty to that charge. Defendant further argues that Braun was ineffective for failing to raise this specific issue in his postplea motions. The State counters that defendant cannot establish that either Palmer's or Braun's performances were deficient or that he suffered prejudice because the plea agreement benefited him.

¶ 10 For a defendant to succeed on a claim of ineffective assistance of counsel, a two-part test must be met: (1) counsel's representation of the defendant must fall below an objective standard of reasonable performance, and (2) there must be a reasonable probability the outcome of the trial would have been different but for counsel's unprofessional conduct. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Wilson*, 191 Ill. 2d 363, 370 (2000). Failure by the defendant to satisfy either prong of the test precludes a finding of ineffective assistance of counsel. *Wilson*, 191 Ill. 2d at 370. Furthermore, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance [and] *** might be sound trial strategy." *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (citing *Strickland*, 466 U.S. at 687).

¶ 11 In the context of a guilty plea, an attorney's conduct is deficient if he or she failed to ensure that the defendant's guilty plea was entered voluntarily and intelligently. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). To satisfy the prejudice prong, a defendant must show that, absent counsel's errors, she or he would not have pleaded guilty and insisted on going to trial. *Id.* However, a bare allegation that had counsel not been deficient during plea discussions, the defendant would not have pleaded guilty and gone to trial is insufficient to establish prejudice. *People v. Rissley*, 206 Ill. 2d 403, 458 (2003). Rather, the defendant's claim must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial. *Hall*, 217 Ill. 2d at 335-36. Thus, the question of whether a defendant suffered prejudice by pleading guilty rather than going

to trial depends in large part on a prediction of whether the defendant would have likely succeeded at trial. *People v. Pugh*, 157 Ill. 2d 1, 15 (1993) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

¶ 12 In the current matter, Palmer's and Braun's representation did not fall below an objective standard of reasonableness, and therefore, defendant cannot satisfy the first prong of the *Strickland* test. Initially, we note that it is not necessary for us to determine whether the armed violence statute excludes using unlawful possession of a weapon by a felon as the predicate offense because, even if it does, Palmer could still have reasonably advised defendant to plead guilty to that offense. The Appellate Court previously addressed whether a defendant was denied the effective assistance of counsel after pleading guilty to charges despite having an affirmative defense. In *People v. Sifford*, 247 Ill. App. 3d 562 (1993), the defendant argued on appeal that he was denied the effective assistance of counsel after pleading guilty to a charge of indecent liberties with a child after the statute of limitations for that offense had expired. *Id.* at 563. The appellate court agreed with the defendant, first noting that the statute of limitations for that charge had expired when the defendant entered his guilty plea. *Id.* at 563-64. The appellate court further rejected the State's argument that the defendant made a tactical decision to plead guilty despite the expiration of the statute of limitations because the defendant could have also been charged with the Class X felony of aggravated criminal sexual assault. In rejecting this argument, the court noted that it was unclear whether the alleged conduct supporting such a charge occurred before or after the statute creating the offense of aggravated criminal assault took effect, the State did not allege aggravated criminal sexual assault in its amended information, and, based on trial counsel's testimony, it was "clear that such a tactical decision [to plead guilty] was never discussed with the defendant." *Id.* at 565-66. Thus, the appellate court concluded:

> "Here, it is clear that the statute of limitations expired for the offense of indecent liberties with a child. Also, the defendant could not have been legally prosecuted for the offenses of aggravated criminal sexual assault or aggravated criminal sexual abuse. Since the defendant was prosecution-proof, we cannot discern *any* trial strategy which would require the defendant to plead guilty to these offenses." (Emphasis in original.) *Id.*

¶ 13 Although *Sifford* is distinguishable because it involved pleading guilty despite an affirmative defense as opposed to pleading guilty despite a possible statutory exception to the crime, its reasoning is compelling. In finding that the defendant was denied the effective assistance of counsel, the reviewing court in *Sifford* emphasized that it could not discern "*any*" trial strategy requiring the defendant to plead guilty to charges after the statute of limitations expired because he was otherwise prosecution-proof. *Id.* Conversely, here, defendant was not prosecution-proof. In addition to being charged with armed violence predicated on unlawful possession of a weapon by a felon, defendant was also charged with attempted first-degree murder, burglary, unlawful possession of a weapon by a felon, and aggravated battery. Defendant does not dispute that he could have been prosecuted for any of the other charges, including the two other charges of armed violence predicated on aggravated domestic battery and burglary, and he also pleaded guilty to attempted first-degree murder. Therefore, Palmer could have reasonably concluded that pleading guilty to armed violence predicated on unlawful possession of a weapon by a felon, even if exempted by the armed violence statute, and attempted first-degree murder in exchange for the other charges not being prosecuted was prudent trial strategy.

¶ 14 Unlike *Sifford*, this is not a situation where the record is clear that the tactical decision of pleading guilty to count three was not discussed with defendant. In his testimony on February 10, 2010, Palmer testified that he discussed possible defenses with defendant, including filing a motion

to suppress identification and the possibility of other defenses relating to defendant's mental health. Palmer also testified that he discussed with defendant the witnesses he potentially could call and what would happen if defendant was found either guilty or not guilty. Thus, given the strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, Palmer could have reasonably recommended pleading guilty to counts one and three in exchange for the other charges not being prosecuted was sound trial strategy, considering the evidence and other available defenses. Moreover, as will be discussed in more detail below, defendant likely received a further benefit by pleading guilty to armed violence predicated on unlawful possession of a weapon because the trial court specifically found that that conviction was a status offense that did not result in great bodily harm. Therefore, defendant was eligible for day-for-day good-conduct credit for that conviction. Had defendant pleaded guilty to armed violence predicated on aggravated domestic battery or burglary, the trial court might not have concluded that the armed violence offense was a status offense. Thus, defendant might not have been eligible for day-for-day good-conduct credit because such a conviction might have caused great bodily harm.

¶ 15 In reaching our determination, we recognize that the trial court sentenced defendant to 10 years' imprisonment for the armed violence conviction even though the armed violence statute could exempt the offense of unlawful possession of a weapon from serving as the predicate offense for armed violence. However, Illinois reviewing courts have previously held that it is not unlawful for the State and a defendant to enter into a guilty plea for even a nonexistent crime so long as the defendant receives a benefit. In *People v. Myrieckes*, 315 Ill. App. 3d 478 (2008), the defendant pleaded guilty to three counts of predatory criminal sexual assault of a child and three counts of aggravated criminal sexual abuse. *Id.* at 479. On appeal, the defendant contended that one count of predatory criminal sexual assault of a child should be reversed because the evidence was

insufficient to support that charge. The reviewing court rejected the defendant's argument, first noting that the purpose of the legal challenge to an indictment for failure to state an offense is to challenge the sufficiency of the allegation, not the sufficiency of the evidence. Therefore, whether there was sufficient evidence to support the indictment was irrelevant to challenging the sufficiency of the indictment. *Id.* at 485. The reviewing court noted that a voluntarily guilty plea waived all nonjurisdictional errors or defects, including constitutional errors, and that "it is not unlawful for the State and a defendant to bargain for a plea of guilty to even a non-existent crime if the defendant receives a benefit." *Id.* (citing *People v. Johnson*, 200 Ill. App. 3d 1018, 1023 (1990)). The court concluded that, because the defendant secured dismissal of 11 additional charges in exchange for his guilty plea, he was not in a position to challenge the sufficiency of the evidence in support of his conviction. *Myrieckes*, 315 Ill. App. 3d at 485.

¶ 16 Although *Myrieckes* involved a challenge to the sufficiency of the evidence supporting a charging instrument and not a challenge to the sufficiency of the allegation in a charging instrument, its holding that the State and a defendant are not prohibited from entering into a guilty plea to a nonexistent crime so long as the defendant receives a benefit is no less true. In other words, whether a defendant is challenging the sufficiency of the allegations in a charging instrument or the evidence supporting a charging instrument does not affect our analysis of whether the State and a defendant are prohibited from entering into a guilty plea to a nonexistent crime so long as the defendant receives a benefit. Here, even if the armed violence statute exempts using unlawful possession of a weapon by a felon as a predicate offense, there is no doubt that defendant received a benefit resulting from his guilty plea—the dismissal of the seven other charges. Therefore, the trial court did not err when it sentenced defendant as a result of his guilty plea to count three.

¶ 17 In sum, we conclude that Palmer's and Braun's representation of defendant was not deficient because defendant received a benefit from his plea agreement. Therefore, pleading guilty to count three could have been reasonable trial strategy even if the armed violence statute exempted using the offense of unlawful possession of a weapon by a felon as the predicate offense. Therefore, because defendant cannot satisfy the first prong of the *Strickland* test, his claim that he was denied the effective assistance of counsel fails and we need not address the second prong. See *Wilson*, 191 Ill. 2d at 370.

¶ 18 B. Truth-in-Sentencing

¶ 19 Defendant's second contention on appeal is that his sentence for armed violence should be modified to allow him to earn day-for-day good-conduct credit. Defendant maintains that the trial court erroneously applied the truth-in-sentencing provisions to his armed violence conviction because it failed to make a finding that the armed violence charge resulted in great bodily harm, which is required by section 3-6-3(a)(2)(iii) of the Corrections Code (730 5/3-6-3(a)(2)(iii) (West 2008)) for application of truth-in-sentencing.

¶ 20 Our resolution of this issue turns on the construction of a statute, which is subject to *de novo* review. *People v. Salley*, 373 Ill. App. 3d 106, 109 (2007). The primary rule of statutory construction is to ascertain and give effect to the legislature's intent, which is best determined from the language of the statute. *People v. Horsman*, 406 Ill. App. 3d 984, 987 (2011). We construe the language of the statute as whole, affording the language used in the statute its plain and ordinary meaning. *People v. Marshall*, 242 Ill. 2d 285, 292 (2011). However, if a statute is reasonably capable of being understood in two or more different ways, the statute is ambiguous and a court may consider extrinsic aids of construction to discern the legislative intent. *Id.*

¶ 21 "Truth-in-sentencing" is a label applied to a change in the statutory method the Department of Corrections uses to calculate good conduct credit. *Salley*, 373 Ill. App. 3d at 109 (citing *People ex rel. Ryan v. Roe*, 201 Ill. 2d 552, 556 (2002)). Generally, an inmate receives day-for-day good-conduct credit; however section 3-6-3(a)(2)(iii) provides that a defendant serving a sentence for:

> "armed violence with a category I weapon or a category II weapon, when the court has made and entered a finding, pursuant to subsection (c-1) of section 5-4-1 of this Code [citation], that the conduct leading to conviction for the enumerated offense resulted in great bodily harm to a victim, shall receive no more than 4.5 days of good conduct credit for each month of his or her sentence of imprisonment." 730 ILCS 5/3-6-3(a)(2)(iii) (West 2008).

In other words, "such a defendant must serve at least 85% of his or her sentence and does not receive normal day-for-day good-conduct credit." *Roe*, 201 Ill. 2d at 556.

¶ 22 Pursuant to the plain and unambiguous language contained in section 3-6-3 of the Corrections Code, the legislature intended that a defendant will be ineligible for day-for-day good-conduct credit for an armed violence conviction only when the trial made and entered a finding that the armed violence offense resulted in great bodily harm. Here, the record clearly reflects that the trial court made no such finding, but rather expressly found that defendant's armed violence conviction did *not* deal "with causing or directly inflicting physical injury." Accordingly, the truth-in-sentencing provision provided in section 3-6-3(a)(2)(iii) does not apply to defendant, and he is entitled to day-for-day good-conduct credit conduct for that conviction. Accordingly, we modify defendant's sentence for his armed violence conviction by vacating the portion of trial court's sentencing order requiring defendant to serve at least 85% of his sentence for the armed violence conviction before attaining eligibility for mandatory supervised release. See *People v. Cunningham*, 365 Ill. App. 3d 991, 997 (2006) (vacating the portion of the trial court's sentencing order requiring

the defendant to serve 85% of his sentence when the trial court erred in finding that great bodily harm had been inflicted on the victim).

¶ 23 C. Assessment for DNA Analysis and Lab Fee

¶ 24 Defendant's final contention on appeal is whether the trial court erred in assessing a $200 fee for DNA analysis because he is entitled to a statutory $5 per day credit for the time he spent in custody before sentencing pursuant to section 110-114 of the Criminal Procedure Code (725 ILCS 5/110-14 (West 2008)), and whether the $100 lab fee should be vacated because his convictions do not relate to controlled substances or cannabis (see 730 ILCS 5/5-9-1.4(b) (West 2008)). Although the State confesses error, we reject its confession with respect to applying defendant's $5 per day credit for time he spent in custody to the $200 fee for DNA analysis because it is not a fine.

¶ 25 Section 110-114(a) of the Criminal Procedure Code provides:

> "Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $ 5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine." 725 ILCS 5/110-14 (West 2008).

Pursuant to the plain language of the statute, the credit only applies to "fines," and not other charges. *People v. Littlejohn*, 338 Ill. App. 3d 281, 283 (2003). In *People v. Guadarrama*, 2011 IL App (2d) 100072 (Aug. 12, 2011), this Court addressed whether a DNA analysis is a fee or a fine for the purposes of awarding the defendant monetary credit for the time he served in custody prior to sentencing. *Id.* at ¶ 1. Relying on *People v. Marshall*, 242 Ill. 2d 284 (2011), in which our supreme court noted that the DNA analysis fee is intended to cover the costs of a DNA analysis and that it is paid only when the extraction, analysis and filing of an offender actually occurs, we held that

DNA analysis fee was truly a "fee" and not a "fine." *Guadarrama*, 2011 IL App (2d) 100072 at ¶ 5, citing *Marshall*, 242 Ill. 2d at 287-97. Specifically, we concluded:

> "Based on *Marshall*, it is clear that a DNA analysis fee is not imposed on a defendant as any type of punishment. Rather, the fee is used to cover the costs incurred in collecting and testing a DNA sample that is taken from a defendant convicted of a qualifying offense. Thus, the DNA analysis is truly a fee, and, because it is not a fine, defendant cannot offset it by any credit for the time he served in custody before sentencing." *Guadarrama*, 2011 IL App (2d) 100072 at ¶ 5.

Accordingly, pursuant to our recent holding in *Guadarrama*, we hold that defendant is not entitled to use the monetary credit for time spent in custody before sentencing to offset the $200 DNA analysis fee.

¶ 26 Therefore, we affirm the trial court's order assessing a $200 fee for the DNA analysis because such assessment is a fee, not a fine, and not subject to monetary credit pursuant to section 110-14 of the Criminal Procedure Code. However, and pursuant to Supreme Court Rule 615(b) (eff. Jan. 1, 1967), we vacate the portion of the trial court's sentencing order requiring defendant to pay a $100 lab fee because defendant was not convicted of any drug offenses. See 730 ILCS 5/5-9-1.4(b) (West 2008) (providing that a defendant convicted of certain drug-related offenses shall be subject to a criminal laboratory analysis fee of $100 for each offense).

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons we modify defendant's sentence for armed violence by vacating the trial court's order requiring defendant to serve 85% of his sentence for the armed violence conviction. We further vacate the trial court's order that defendant pay a $100 lab fee. We affirm the judgment of the circuit court of Winnebago County in all other respects.

¶ 29 Affirmed as modified.