2012 IL App (2d) 100968-U
No. 2-10-0968
Order filed March 29, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-2593
ADRIAN RIVERA,	)	Honorable John T. Phillips,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justice Hudson concurred in the judgment.
President Justice Jorgensen dissented.

ORDER

Held: (1) Because defendant's criminal objective (avoiding apprehension) was the same as to both his armed violence and his possession of a fraudulent identification card, his extended sentence for the lesser offense was void; therefore, the extended sentence reduced to the maximum nonextended term; (2) defendant's successive (and thus unauthorized) DNA analysis fee vacated.

¶ 1 Following a jury trial, defendant, Adrian Rivera, was found guilty of armed violence (720 ILCS 5/33A-2(a) (West 2008)), aggravated battery (720 ILCS 5/12-4(b)(18) (West 2008)), unlawful use of a weapon (720 ILCS 5/24-1.1(a) (West 2008)), and unlawful possession of a fraudulent

identification card (15 ILCS 335/14B(b)(1) (West 2008)). The trial court merged the aggravated battery and the unlawful use of a weapon convictions with the armed violence conviction. The trial court sentenced defendant to 25 years' imprisonment on the armed violence conviction and 6 years' imprisonment on the conviction of unlawful possession of a fraudulent identification card, to be served concurrently. Defendant was also ordered to pay various fees, fines, and costs, including a $200 DNA analysis fee. Defendant timely appealed and now argues that: (1) his extended-term sentence for unlawful possession of a fraudulent identification card is void and must be reduced to a nonextended-term sentence; and (2) the $200 DNA analysis fee must be vacated. For the reasons that follow, we reduce defendant's sentence for unlawful possession of a fraudulent identification card from six years' imprisonment to the nonextended maximum term of three years' imprisonment, and we vacate the $200 DNA analysis fee.

¶ 2 I. BACKGROUND

¶ 3 The evidence at defendant's jury trial established the following relevant facts. At about 9:30 p.m., on June 13, 2008, several Waukegan police officers went to a certain residence to look for a suspect in an unrelated incident. The officers saw the lights on in an unattached garage at the residence. When they approached the garage, they heard voices from inside and smelled marijuana. When the garage door opened and two women exited, the officers entered the garage and found eight men, including defendant. The officers told the men why they were there. The officers also told the men that they did not intend on arresting the men for smoking marijuana. They asked the men for their identifications and told them that they wanted to make sure that none of the men had outstanding warrants. Defendant produced a Wisconsin driver's license in the name of "Adan Rodriguez."

¶ 4 While one officer was checking the men's identifications, all of the men, except defendant, were sitting on couches or chairs in the garage. Defendant was kneeling on the floor and was not following directions. Defendant asked if he could sit on a stroller that was in the garage. He said that his knees were falling asleep. He kept putting his hands on his waistband and adjusting his shorts. He was moving and shifting around. One officer instructed another officer to pat down defendant. As defendant was being escorted out of the garage, his wallet dropped from his pants. An officer told him to leave the wallet on the ground. As one officer went to pick up the wallet, defendant began to struggle with the officer who was escorting him out of the garage. Defendant was told to put his hands against the wall, but he kept moving his hands toward his waistband. The officers decided to place defendant in handcuffs before patting him down. As the officers attempted to grab defendant's arms to handcuff him, defendant pulled a small chrome handgun from his waistband. Defendant pointed the gun at the head of the officer who had escorted him out of the garage and, using the officer as a shield, said to the other officers, " 'I'll do it, I'll do it, don't make me do it.' " When defendant did not drop the gun after being instructed to do so, one officer fired three shots at defendant. When defendant did not fall or drop the gun, the officer fired six more shots. Eventually, defendant fell to the ground and the officers recovered the gun.

¶ 5 Defendant was found guilty of armed violence, aggravated battery, unlawful use of a weapon, and unlawful possession of a fraudulent identification card. The trial court merged the aggravated battery and the unlawful use of a weapon convictions with the armed violence conviction. In sentencing defendant, the court noted that, at the time of the offenses, defendant was on felony probation and there was an outstanding warrant for his arrest. The trial court sentenced defendant to 25 years' imprisonment on the armed violence conviction and 6 years' imprisonment on the

conviction of unlawful possession of a fraudulent identification card, to be served concurrently. In addition to various other fees, fines, and costs, defendant was assessed a $200 DNA analysis fee.

¶ 6 Defendant timely appealed.

¶ 7 II. ANALYSIS

¶ 8 A. Extended-Term Sentence

¶ 9 On appeal, defendant contends that the six-year sentence imposed on the conviction of unlawful possession of a fraudulent identification card is void, because an extended-term sentence may be imposed for only the most serious offense, *i.e.*, armed violence.

¶ 10 When a defendant is convicted of multiple offenses, he may be sentenced to an extended term on only the most serious offense. *People v. Bell*, 196 Ill. 2d 343, 350 (2001). However, a court can impose extended-term sentences on separately charged, differing classes of offenses that arise from unrelated courses of conduct. *Bell*, 196 Ill. 2d at 350. Defendant was convicted of unlawful possession of a fraudulent identification card, a Class 4 felony. 15 ILCS 335/14B(b)(1), (c)(1) (West 2008). He was also convicted of armed violence, a Class X offense. 720 ILCS 5/33A-2(a), 33A-3(a-5) (West 2008). Ordinarily, a Class 4 felony carries a possible punishment of one to three years in prison (730 ILCS 5/5-8-1(a)(7) (West 2008)), while the Class X armed violence subjected defendant to a term ranging from 10 to 30 years' imprisonment (720 ILCS 5/33A-3(a-5) (West 2008); 730 ILCS 5/5-8-2(a)(3) (West 2008)). Here, defendant received an extended-term sentence of six years on the Class 4 felony conviction. 730 ILCS 5/5-8-2(a)(6) (West 2008). Defendant maintains that this was improper because his convictions of armed violence and unlawful possession of a fraudulent identification card were not "unrelated."

¶ 11 As an initial matter, we note that defendant did not raise this issue in the trial court. Because, however, defendant contends that his sentence is void, his failure to file a motion to reconsider does not bar our review of his claim. See *People v. Wilson*, 181 Ill. 2d 409, 413 (1998) (failure to file a motion to withdraw guilty plea did not bar review of the defendant's claim that sentence was void); *People v. Williams*, 179 Ill. 2d 331, 333 (1997) (same). The State's contention that these cases do not apply because defendant's sentence, despite his contention, is not actually void is without merit, as the cases merely require that defendant contend that his sentence is void, not that he be correct in his contention. See *Wilson*, 181 Ill. 2d at 413 ("a *challenge* to a trial court's statutory authority to impose a particular sentence is not waived when a defendant fails to withdraw his guilty plea and vacate the judgment" (emphasis added)); *Williams*, 179 Ill. 2d at 333 (holding that the defendant's failure to move to withdraw his guilty plea was not a bar where the defendant "*argue[d]* that the court imposed a sentence which, under the statute, it had no authority to impose" (emphasis added)).

¶ 12 We now turn to the merits. In determining whether the offenses of armed violence and unlawful possession of a fraudulent identification card were part of unrelated courses of conduct, we must consider whether there was a "substantial change in the nature of the defendant's criminal objective." *Bell*, 196 Ill. 2d at 354. Defendant argues that there was no substantial change in the nature of his criminal objective when he committed the two crimes. According to defendant, his overall criminal objective was to avoid identification and, therefore, detention, by the police. The State disagrees. The State argues that, "[a]lthough the defendant's original objective in producing a Wisconsin driver's license in the name of Adan Rodriguez was to avoid identification without confrontation or violence, once he pulled the .25 semi-automatic handgun and placed it against

Detective Alexander's head, his objective changed from avoiding detection to avoiding apprehension."

¶ 13 We agree with defendant. Under the facts of this case, there is little difference between defendant's detection and his apprehension, because detection would necessarily lead to apprehension. When the offenses occurred, defendant was on felony probation and there was an outstanding warrant for his arrest. If he were detected, he would have been apprehended. Similarly, his criminal objective in committing armed violence (while unsuccessful) was avoiding apprehension. Thus, we find that, in committing each offense, there was no substantial change in the ultimate criminal objective of avoiding apprehension.

¶ 14 The present case is distinguishable from *People v. Collins*, 366 Ill. App. 3d 885 (2006), upon which the State relies. In *Collins,* the defendant entered the victim's van and drove off in it. The victim pursued the van on foot and caught up to the van while it was stuck in traffic. When the victim entered the van, the defendant demanded money from the victim and struck him. The defendant was convicted of possession of a stolen motor vehicle and attempted robbery and was sentenced to an extended sentence on each offense. On appeal, the defendant argued that the trial court had authority to impose an extended sentence on only the most serious offense of which he was convicted, possession of a stolen motor vehicle, because there was no substantial change in his criminal objective. The reviewing court disagreed. The court found that the defendant's initial objective was to enter the van and leave without being seen. The court stated that, when the victim "caught up with [the defendant] and entered the van, [the] defendant's goal changed from avoiding detection to violently confronting the victim to obtain his money." *Id.* at 902. Thus, the court found that the extended-term sentence on each offense was proper. The facts of *Collins* are distinguishable

because in *Collins* the change of objective was clear. Here, however, as noted above, defendant's objective remained at all times to avoid apprehension.

¶ 15 Accordingly, we vacate defendant's extended-term sentence on the unlawful possession of a fraudulent identification card conviction and we resentence defendant to the maximum nonextended term of three years (730 ILCS 5/5-8-1(a)(7) (West 2008)).

¶ 16 B. DNA Analysis Fee

¶ 17 The State agrees that the $200 DNA analysis fee should be vacated based on *People v. Marshall*, 242 Ill. 2d 285, 303 (2011), which held that "section 5-4-3 [of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)] authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." Because the record establishes that the Illinois State Police collected a sample of defendant's DNA in 2002, the fee was not authorized. Accordingly, we vacate the DNA analysis fee.

¶ 18 III. CONCLUSION

¶ 19 In light of the foregoing, the judgment of the circuit court of Lake County is affirmed as modified in part and vacated in part.

¶ 20 Affirmed as modified in part and vacated in part.

¶ 21 PRESIDING JUSTICE JORGENSEN, dissenting:

¶ 22 I respectfully dissent from the majority's analysis of the extended-term sentencing issue because I disagree with its conclusion that the offenses here are related courses of conduct and that defendant's criminal objective did not substantially change.

¶ 23 Based on the facts here, I conclude that the offenses were unrelated courses of conduct. Defendant carried a false identification bearing the name of "Adan Rodriguez" because he wanted to avoid disclosing his true identity. In other words, he wanted to prevent police from learning of the outstanding warrant for his arrest. When the officer escorted defendant out of the garage to conduct a pat down, defendant was at this point in the police's grasp not because of a name check or even his detection, but of his independent actions: while kneeling on the garage floor, defendant was not following directions, kept putting his hands on his waistband and adjusting his shorts, asked to sit in a stroller, and was moving and shifting around. Once the officers decided to pat down defendant, defendant struggled with the officer as he was being escorted out of the garage and kept moving his hands toward his waistband. When the officers decided to place defendant in handcuffs, defendant was aware a pat down would reveal the gun he was carrying on his person. Defendant then resisted the pat down by retrieving his gun and pointing it toward the escorting officer's head. This conduct constituted, in my view, a substantial change in the nature of defendant's criminal objective: once outside the garage, he sought not to avoid detection of an outstanding warrant, but to attempt an escape and thereby avoid an arrest for a firearm-related offense.

¶ 24 The majority's analysis is, in my view, overly broad. By its reading, all criminal objectives could be subsumed under the broad goal of avoiding apprehension and few, if any, extended sentences would ultimately be imposed. I cannot agree with an analysis that eviscerates a statutorily-authorized sentencing option.

¶ 25 I would affirm the six-year sentence on the conviction of unlawful possession of a fraudulent identification card.