2012 IL App (3d) 100274-U

Order filed January 5, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD G. TYLER, Defendant-Appellant.	) Appeal from the Circuit Court) of the 14th Judicial Circuit,) Henry County, Illinois,)) Appeal No. 3-10-0274) Circuit No. 09-CF-255)) Honorable) Charles H. Stengel,) Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not consider an improper factor at sentencing. Pursuant to the one-act, one-crime doctrine, one of defendant's convictions for aggravated battery must be vacated. We remand to determine the proper calculation of fines, fees, and costs to be assessed against defendant.

¶ 2 Following a bench trial, defendant, Ronald G. Tyler, was found guilty of two counts of aggravated battery of a peace officer (720 ILCS 5/12-4(b)(18) (West 2008)) and one count of resisting a peace officer (720 ILCS 5/31-1(a) (West 2008)). Defendant was sentenced to concurrent eight-year terms of imprisonment for each aggravated battery, and one concurrent

six-year term of imprisonment for resisting a peace officer. On appeal, defendant argues that the trial court erred when it: (1) improperly considered an unreliable aggravating factor at sentencing; (2) convicted and sentenced him on two counts of aggravated battery in violation of the one-act, one-crime doctrine; and (3) improperly assessed fines, fees, and costs against defendant. We affirm in part, vacate in part, and remand.

¶ 3 FACTS

¶ 4 On July 29, 2009, defendant was charged with two counts of aggravated battery of a peace officer and one count of resisting a peace officer. The State alleged, *inter alia*, that on or about July 21, 2009, while defendant was in court for a bond-reduction hearing, he head-butted and resisted peace officer Robin Jontz. Defendant pled not guilty, and the cause proceeded to a bench trial.

¶ 5 At trial, Jontz testified that she was the court transport officer responsible for transporting defendant between the courtroom and the jail. Defendant was in court for a forgery case involving his mother and her company. Jontz claimed that after defendant's bond reduction was denied, he became upset. Defendant asked Jontz if he could hug his mother before he went back to jail, but Jontz denied the request. Jontz was able to handcuff defendant, and successfully removed him from the courtroom. Jontz instructed defendant's mother to stay in the courtroom. Shortly thereafter, defendant head-butted Jontz, and she believed it was intentional. Jontz radioed Deputy Bruce Mahaffey for assistance. Before Mahaffey arrived, defendant continued to struggle, and when Jontz grabbed for his handcuffs defendant jerked his hands away and dislocated Jontz's thumb. Defendant also pushed Jontz into a wall in the hallway.

¶ 6 Jontz reported that as a result of the incident, she sustained bruising and an abrasion to

her right eye, bruising to her right shoulder, and a dislocated right thumb. When Mahaffey arrived, both deputies were able to get defendant into the elevator. Defendant continued to resist the deputies, despite his insistence that he was not resisting. Jontz radioed for two more deputies to assist, and the four deputies successfully moved defendant from the elevator to his cell. Mahaffey's testimony at trial confirmed Jontz' recollection of the events.

¶ 7 Defendant testified that when he was denied a hug with his mother, he was sad but not upset. He tried to stop and tell his mother he loved her, but Jontz told him, "[l]et's go[.]" He started walking too fast, and moved his arm too quickly away from Jontz. Immediately after, Jontz called for backup. Defendant denied head-butting and pushing Jontz, and stated he was not resisting her. Defendant asserted that he did not injure Jontz, but that she received her injuries when she ran into a doorframe. After defendant's testimony, the State introduced three prior convictions for unlawful possession of a weapon by a felon, burglary, and forgery for impeachment purposes.

¶ 8 After hearing testimony from other witnesses, the trial court found Jontz and Mahaffey to be credible witnesses and defendant incredible. The trial court then found defendant guilty on all three counts. Defense counsel's subsequent motion for a new trial was denied. At defendant's sentencing hearing on March 18, 2010, he testified that he was not guilty. Defendant testified that he had no grudge against Jontz, and did not intend to harm her. On cross-examination, the State introduced that defendant had prior juvenile misdemeanors, consisting of two batteries, one aggravated assault, and three counts of resisting a peace officer.

¶ 9 In aggravation, the State referenced the victim information section of the presentence investigation report (PSI), where Jontz reported that she was very concerned about defendant's

continued threats against her since this incident. She further asserted that defendant made comments indicating he was going to find her and hurt her when he got out of prison. Jontz claimed that another inmate was so concerned about the comments defendant made that the inmate reported those comments to other deputies. In mitigation, defense counsel argued that defendant did not contemplate or intend that his conduct would cause serious harm to anyone, but instead was caused by an emotional reaction or stress.

¶ 10 After hearing the evidence in mitigation and aggravation, the trial court said to defendant, "[y]ou do have a record of criminality, and I am bothered by the threats that you've made against the victim after the incident. It shows that you don't have any remorse. I think a sentence is necessary to deter others from committing the same crime[.]" The court also specifically referenced defendant's prior convictions for burglary, a weapons charge, and forgery, and sentenced defendant to concurrent eight-year terms of imprisonment for each aggravated battery, and one concurrent six-year term of imprisonment for resisting a peace officer. Defense counsel did not file a postsentencing motion. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 I. Sentencing

¶ 13 First, defendant argues that the trial court considered an improper factor at sentencing. Specifically, defendant contends that the court should not have considered multiple levels of hearsay regarding alleged threats defendant made against Jontz because these allegations were unreliable, uncorroborated, and from unknown sources.

¶ 14 Defendant admits that he failed to preserve this issue for review by failing to file a postsentencing motion. However, a sentencing court's reliance upon an improper factor in

sentencing will be reviewed under the plain error doctrine if the evidence is closely balanced, or if the error is of such magnitude that defendant is denied a fair sentencing hearing. *People v. Kopczick*, 312 Ill. App. 3d 843 (2000). Before addressing whether the forfeited issue can be reviewed under the plain error doctrine, we must determine whether an error occurred at all. *People v. Herron*, 215 Ill. 2d 167 (2005).

¶ 15 Ordinary rules of evidence are relaxed at sentencing hearings. *People v. Hudson*, 157 Ill. 2d 401 (1993). When determining the admissibility of evidence at a sentencing hearing, the only requirement is that evidence be reliable and relevant, as determined by the sound discretion of the sentencing court. *Hudson*, 157 Ill. 2d 401. Thus, merely because evidence contains hearsay does not render it *per se* inadmissible at a sentencing hearing. *People v. Harris*, 375 Ill. App. 3d 398 (2007). However, the sentencing court must determine the accuracy and reliability of such evidence, including the facts contained in a PSI. *People v. Blanck*, 263 Ill. App. 3d 224 (1994).

¶ 16 Defendant argues that the alleged threats against Jontz could be construed as evidence of unprosecuted conduct, and therefore requires witness testimony and corroboration. *Blanck*, 263 Ill. App. 3d 224. While these threats could be used as unprosecuted conduct, the record shows that the sentencing judge specifically used the alleged threats as evidence of defendant's lack of remorse. The lack of remorse may be used as an aggravating factor, when considered in light of all the other evidence presented, because it bears on defendant's rehabilitative potential. *People v. Ward*, 113 Ill. 2d 516 (1986). Defendant was sentenced to 8 years' imprisonment for aggravated battery of a peace officer, which is at the low end of the sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2008). Considering defendant's rehabilitative potential in light of his criminal history and continued assertion of innocence, it is

unlikely that the trial court would have given him a lesser sentence even if the alleged threats were not introduced in aggravation.

¶ 17 Furthermore, there is no suggestion in the record that the allegations were unreliable for any reason other than hearsay. The only evidence to rebut the alleged threats was defendant's testimony at sentencing where he denied having any grudge against Jontz, and that he had no intention of harming her. However, the trial court specifically found Jontz credible and defendant incredible during the trial proceedings. Therefore, it was not an abuse of discretion to find the alleged threats relevant and reliable, and to consider them in relation to defendant's lack of remorse and potential for rehabilitation. See *Ward*, 113 Ill. 2d 516.

¶ 18 However, even if we find that the sentencing court abused its discretion in considering the threat allegations, we find that this error does not satisfy either prong of the plain error doctrine. A review of the record reveals that the evidence at sentencing was not closely balanced, nor was consideration of the threat allegations so egregious that it denied defendant a fair sentencing hearing. See *Herron*, 215 Ill. 2d 167. Therefore, we find that no reversible error occurred.

¶ 19 We also cannot review defendant's claims under the theory of ineffective assistance of counsel. Defendant claims trial counsel was ineffective for failing to object to the State's use of the alleged threats in sentencing, and for failing to file a postsentencing motion addressing the court's consideration of an improper factor. However, even if defendant can arguably state that counsel's performance fell below the minimum professional standards, in light of the limited mitigating evidence at defendant's sentencing hearing, defendant is unable to prove that the result of his sentence would have been different without consideration of that evidence. See

Strickland v. Washington, 466 U.S. 668 (1984).

¶ 20 II. One-Act, One-Crime

¶ 21 Defendant argues, and the State concedes, that both of defendant's convictions for aggravated battery of a peace officer were based upon the same physical act of head-butting. Although this issue was not preserved for appeal, we will review it under the second prong of the plain error doctrine. See *In re Samantha V.*, 234 Ill. 2d 359 (2009).

¶ 22 Pursuant to the one-act, one-crime doctrine, a reviewing court must vacate the less serious offense, which is determined by comparing the relevant punishments for the offenses. *People v. Artis*, 232 Ill. 2d 156 (2009). However, where punishments are identical, reviewing courts must consider which offense requires the more culpable mental state, which we review *de novo*. *Samantha V.*, 234 Ill. 2d 359. Where a reviewing court cannot determine which offense is more serious, the cause should be remanded for the trial court to determine which conviction should be vacated. *Artis*, 232 Ill. 2d 156.

¶ 23 Here, both of defendant's aggravated battery convictions were based on head-butting Jontz, and required the same mental state of "intentionally or knowingly." 720 ILCS 5/12-4(a) (West 2008). The only difference is that count I alleged that defendant caused "bodily harm," and count II alleged that defendant made "physical contact of an insulting and provoking nature." Defendant suggests, and the State agrees, that count II should be vacated because making physical contact of a provoking nature is less serious than causing bodily harm. We agree with the parties; thus, defendant's conviction and sentence for count II is vacated.

¶ 24 III. Fines, Fees and Costs

¶ 25 Defendant argues that he is entitled to a reduction in the total amount of fines, fees, and

costs assessed against him. Defendant asserts that although he did not preserve this issue for appeal, it is not forfeited. We agree. A sentence that does not conform to a statutory requirement is void. *People v. Arna*, 168 Ill. 2d 107 (1995). It is well established that a void judgment may be attacked at any time, and is not subject to waiver. *People v. Thompson*, 209 Ill. 2d 19 (2004).

¶ 26 Defendant disputes assessment of the clerk fee, State's Attorney fee, court fee, violent crime fee and deoxyribonucleic acid (DNA) analysis fee, alleging they were improperly calculated. As the State suggests, we are unable to determine from the record precisely how the fees assessed against defendant were calculated. However, we have concluded that, at the very least, the court fee of $150 assessed against defendant needs to be reduced because one of his aggravated battery convictions is vacated. See 55 ILCS 5/5-1101 (West 2010). Upon remand, the trial court should also review the assessment of the remaining fines, fees and costs for their proper calculation.

¶ 27 Additionally, defendant was erroneously ordered to submit a DNA sample and assessed a $200 DNA analysis fee. *People v. Marshall*, 242 Ill. 2d 285 (2011). The State concedes that defendant's DNA has been on file since January 23, 2005, relating to a previous felony. Upon remand, if the trial court determines that defendant's DNA is still currently registered in the database, it should vacate the portion of defendant's sentence ordering him to submit his DNA and pay a $200 DNA fee.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed in part and vacated in part, and the cause is remanded for further proceedings.

¶ 30 Affirmed in part and vacated in part; cause remanded.