2012 IL App (3d) 110369-U

Order filed October 12, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0369
	)	Circuit No. 10-CF-1020
JOMO K. BALLENTINE,	)	
	)	Honorable
Defendant-Appellant.	)	Richard C. Schoenstedt,
	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justice Carter concurred in the judgment.
Presiding Justice Schmidt concurred in part and dissented in part.

ORDER

¶ 1 *Held:* (1) The evidence was sufficient to establish the elements of theft beyond a reasonable doubt. (2) Defendant was entitled to a $146 credit against his $146 fine for the days he spent in presentencing custody and a $28 refund from the miscalculation of fees.

¶ 2 Following a bench trial, defendant, Jomo K. Ballentine, was found guilty of theft. 720 ILCS 5/16-1(a)(1)(A) (West 2010). Defendant was sentenced to 12 months of conditional discharge and ordered to pay $750 in fines and fees. Defendant appeals, arguing that: (1) the evidence was

insufficient to prove he committed theft beyond a reasonable doubt; and (2) he is entitled to a $5-per-day credit against his fine for the time he spent in custody prior to trial, and he is entitled to a refund because the court miscalculated the criminal surcharge fee and the Violent Crime Victims Assistance Fund fee. We affirm as modified.

¶ 3 On June 10, 2010, defendant was charged by indictment with theft, a Class 3 felony. 720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2010). The indictment alleged that on May 17, 2010, defendant and two codefendants, Sheldon G. Fulford and Dwayne A. Thomas, stole steel concrete forms from D Construction, which had a total value between $300 and $10,000. Defendant was taken into custody on May 17, 2010, and released on bond on June 16, 2010.

¶ 4 On March 1, 2011, the cause proceeded to a bench trial. The only evidence presented was a five-page police report, which was stipulated to by both parties. The police report provided that on May 17, 2010, Gary Karn was driving his white pickup truck by a construction site at approximately 2:30 p.m. Karn saw three individuals load five or six steel concrete forms onto a trailer and called the police. Karn never saw the individuals unload any of the forms from the trailer.

¶ 5 When police officers arrived at the scene, they observed defendant behind the wheel of a blue pickup truck with an attached trailer. Fulford and Thomas were standing alongside the trailer holding a concrete form. As police approached, Fulford and Thomas dropped the form onto the ground near a pile of 10 or 12 forms. The officers observed that there were three concrete forms on the trailer.

¶ 6 Fulford explained to the officers that he, defendant, and Thomas came to the area to retrieve scrap metal. Fulford stated that they did not have permission to take the scrap metal from the site but that they had received permission in the past from a construction representative to take the scrap

metal. Defendant and Thomas confirmed that they did not have permission to take the forms. Fulford stated that they looked for a representative that day to get permission, but when they could not find one, they decided to load the concrete forms onto the trailer. Fulford could not provide the name of the individual, or the company that individual worked for, who had previously given them permission to take the scrap metal.

¶ 7 Fulford further stated that as they were loading the concrete forms onto the trailer, a man in a white pickup truck told them they could not take the forms because they were not scrap. Fulford said they began to unload the forms from the trailer when police arrived. Thomas confirmed that after the man notified them, they immediately began to remove the forms from the trailer.

¶ 8 Defendant stated that he told Fulford and Thomas he did not think that the concrete forms were scrap. Defendant also told them not to load the forms onto the trailer, but they did not listen.

¶ 9 The officers contacted D Construction's project manager for the site, Jeff Gillan. Gillan stated that the forms were not scrap and were worth $200 each. Gillan also stated that D Construction had never authorized anyone to take scrap metal from their job site because the company removes its own scrap metal and sells it to recycling companies. Gillan subsequently came to the scene and confirmed that the forms were property of D Construction.

¶ 10 The trial court took the matter under advisement. On March 14, 2011, the court found defendant guilty of theft. Defendant filed a motion for a new trial, which the court denied. The court then sentenced defendant to 12 months' conditional discharge and ordered him to pay a total of $750 in fines and fees. The fines and fees included, in part, a $146 fine, a $60 "Criminal Surcharge," and a $24 "Victims Fund-Fine."

¶ 11 I. Sufficiency of the Evidence

¶ 12 Defendant first argues that the evidence was insufficient to prove he committed theft beyond a reasonable doubt, because he did not knowingly obtain unauthorized control over the concrete forms or have the requisite intent to commit the theft. Specifically, defendant asserts that he and his codefendants made an honest mistake in believing that the concrete forms were scrap metal, and once informed that the forms were not scrap, they began to put them back.

¶ 13 Initially, we note that defendant seeks *de novo* review, contending that the issue is whether the uncontested facts were sufficient to prove the elements of theft. In response, the State asserts that we should use the reasonable doubt standard set forth in *People v. Collins*, 106 Ill. 2d 237 (1985). We agree with the State and will review this issue under *Collins* because, although the parties are not disputing the stipulated facts, defendant is challenging the trial court's inferences from those facts relating to defendant's intent, which is a challenge to the sufficiency of the evidence. See *People v. Stewart*, 406 Ill. App. 3d 518 (2010).

¶ 14 When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Collins*, 106 Ill. 2d 237; *People v. Beauchamp*, 241 Ill. 2d 1 (2011). Under this standard, a reviewing court resolves all reasonable inferences in favor of the State. *People v. Saxon*, 374 Ill. App. 3d 409 (2007). When weighing the evidence, the trier of fact is not required to disregard inferences that flow from the evidence, nor is it required to search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt. *Id.* We will not set aside a defendant's conviction unless the evidence was so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of defendant's guilt. *Beauchamp*, 241 Ill. 2d 1.

¶ 15 To prove a defendant guilty of theft, the State must prove that defendant knowingly obtained or exerted unauthorized control over property of the owner and intended to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a)(1)(A) (West 2010).

¶ 16 In this case, we find that the evidence was sufficient to prove beyond a reasonable doubt that defendant committed a theft. Defendant relies on *People v. Mills*, 356 Ill. App. 3d 438 (2005) to support his argument that he did not have the requisite intent to commit theft, because he and his codefendants made an honest mistake in believing they had permission to remove the concrete forms as abandoned scrap metal. *Mills*, however, is distinguishable. In *Mills*, there was an honest dispute over a vehicle repair bill when the customer took his vehicle without paying for the services. See *Mills*, 356 Ill. App. 3d 438. Defendant in this case, by contrast, knew he did not have permission to take the concrete forms, but they were nonetheless loaded onto the trailer. Moreover, although Fulford claimed that they took the concrete forms because they had gotten permission in the past to take scrap metal from the site, this claim was called into doubt when the company representative stated that he had never given permission in the past. Compare *People v. Baddeley*, 106 Ill. App. 2d 154 (1969) (holding that a *bona fide* belief that one has a right or claim to another's property can negate an intent to permanently deprive the owner of his property).

¶ 17 Additionally, defendant claims that after he and his codefendant were made aware that the concrete forms were not scrap, they began to put them back. However, attempting to return the concrete forms, after obtaining unauthorized control and intending to permanently deprive the owner of their use, does not remove the original criminal intent. See *People v. Davis*, 169 Ill. App. 3d 1 (1988). Based on the evidence from the police report, it was reasonable for the trial court to find defendant's intent to commit theft. See *Saxon*, 374 Ill. App. 3d 409. Therefore, viewing all the

evidence in the light most favorable to the State, we cannot say that the evidence was so improbable or unsatisfactory that it created a reasonable doubt of defendant's guilt. See *Beauchamp*, 241 Ill. 2d 1.

¶ 18 II. Fines and Fees

¶ 19 Defendant next argues that he is entitled to a $5-per-day credit against his $146 fine for the time he spent in custody prior to trial.

¶ 20 A defendant who is assessed a fine is allowed a credit of $5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14(a) (West 2010). After his arrest, defendant was incarcerated for 30 days on a bailable offense before being released on bond. Defendant did not receive any credit for the days he spent in custody. The State concedes that defendant is entitled to credit against his fine, and we agree. See 725 ILCS 5/110-14 (West 2010). Accordingly, we modify the mittimus to reflect a $146 credit.

¶ 21 Finally, defendant argues that he should receive a $28 refund because the court miscalculated the $60 criminal surcharge and the $24 Violent Crime Victims Assistance Fund fee. See 730 ILCS 5/5-9-1(c); 725 ILCS 240/10(b) (West 2010). Defendant admits that he waived this argument because he did not raise this issue at the time of sentencing or in a motion to reconsider sentence.

¶ 22 In *People v. Caballero*, 228 Ill. 2d 79 (2008), our supreme court held that a claim for a statutory monetary credit can be raised for the first time on appeal. The *Caballero* court cited, with approval, the statement in *People v. Scott*, 277 Ill. App. 3d 565 (1996), that " '[g]ranting the credit is a simple ministerial act that will promote judicial economy by ending any further proceedings over the matter.' " *Caballero*, 228 Ill. 2d at 88, quoting *Scott*, 277 Ill. App. 3d at 566; see also *People v. Woodard*, 175 Ill. 2d 435 (1997); *People v. Andrews*, 365 Ill. App. 3d 696 (2006); *People v. Wren*,

223 Ill. App. 3d 722 (1992).

¶ 23 Here, correcting the miscalculation is a simple, ministerial act analogous to *Caballero* and *Scott*, and the basis for granting the refund is clear and available from the record. Thus, to promote judicial economy by ending any further proceedings over this matter, we grant defendant the requested relief and award him a $28 refund for the miscalculation of the criminal surcharge fee and the Violent Crime Victims Assistance Fund fee.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we modify the mittimus to reflect a $146 credit against defendant's $146 fine and a $28 refund from the calculation of fees. The judgment of the circuit court of Will County is otherwise affirmed.

¶ 26 Affirmed as modified.

¶ 27 PRESIDING JUSTICE SCHMIDT, concurring in part and dissenting in part.

¶ 28 I concur except to the extent the majority grants defendant a $28 refund for the miscalculation of the criminal surcharge fee and the Violent Crime Victims Assistance Fund fee.

¶ 29 In support of its decision to award the refund, the majority cites *People v. Caballero*, 228 Ill. 2d 79 (2008), and other cases relating to section 110-14 sentencing credits. I agree that defendant was entitled to a $146 credit against his $146 fine. However, the issue with respect to the $28 refund has nothing to do with sentencing credits. The cases cited by the majority are inapposite.

¶ 30 There is no doubt that the court had jurisdiction and statutory authority to assess the $60 criminal surcharge and the Violent Crime Victims Assistance Fund fee. A sentence is voidable if it was entered because of a mistake of law or fact, and any such error can be waived. *People v. Harris*, 319 Ill. App. 3d 534 (2001). Even "[w]here the court imposes an excessive sentence because of a mistake of law or fact, the sentence is merely voidable, and the error can be waived. [Citation.]"

People v. Brown, 225 Ill. 2d 188, 205 (2007). Sentencing issues must be raised in a postsentencing motion in order to preserve them for appellate review. 730 ILCS 5/5-8-1(c) (West 2010); *People v. Reed*, 177 Ill. 2d 389 (1997). The defendant did not object to his Violent Crime Victims Assistance Fund fee or his criminal surcharge either at the sentencing hearing or in a postsentencing motion. The majority, citing case law that applies to mandatory sentencing credits, reviews the issue and grants defendant the requested relief. There is no support in the law for this.

¶ 31 It seems counterintuitive for me to suggest that a challenge to an excessive prison sentence can be forfeited for failure to raise it at sentencing or in a postsentencing motion, but a $28 miscalculation cannot be forfeited. The purpose of the statute, which requires sentencing errors be raised in the trial court, is to promote judicial economy by drawing the trial court's attention to any alleged error so that it can be corrected on the spot without an appeal. Here, citing judicial economy, the majority awards the defendant relief on a procedurally forfeited error. *Supra* ¶ 22.

¶ 32 Rather than promote judicial economy, the majority's decision would allow a defendant to bring a direct appeal from a $12 sentencing miscalculation, despite defendant's failure to raise it in the trial court where the matter could have been corrected without an appeal. I submit that the majority's treatment of this matter effectively nullifies the statute requiring sentencing errors to be raised below. 730 ILCS 5/5-8-1(c) (West 2010). The majority also walks right past plain-error considerations without as much as a mention. We are talking about the criminal justice system. If the right to challenge a $28 error cannot be forfeited, how can reasonable men argue that any sentencing error can be forfeited? In fact, here we do not have one $28 error, we have two errors: a $20 error in the calculation of the criminal surcharge fee and an $8 error in the calculation of the Violent Crime Victims Assistance Fund fee. Imagine the joy on cellblock C in a case where an

inmate's attorney tells him that although his ability to challenge his 60-year sentence has been forfeited, there is still good news: defendant gets a $6 refund because the trial judge could not add, and that error was not subject to forfeiture. Query: Where is the justice in a system that will not allow forfeiture of a small error in the calculation of a fine but will allow forfeiture of errors resulting in additional prison time?

¶ 33 In his reply brief, defendant contends for the first time that we should review this issue under the plain-error doctrine. Defendant admits that the failure to argue a point in the appellant's opening briefs results in waiver of the issue (Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008)), but claims that we can nonetheless consider his argument.

¶ 34 The plain-error doctrine applies in two instances: (1) where the evidence is closely balanced and the jury's guilty verdict may have resulted from the error; and (2) where the error is so serious that it denied defendant a fair trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). Under each prong of the doctrine, defendant bears the burden of persuasion, and if defendant fails to meet his burden, his procedural default will be honored. See *People v. Naylor*, 229 Ill. 2d 584 (2008). Here, defendant cites *People v. Anderson*, 402 Ill. App. 3d 186 (2010), for the first time in his reply brief, to argue for plain-error review under the second prong. Other than referring to *Anderson*, defendant did not explain how the trial court's $28 miscalculation was so serious that it must be remedied to preserve the integrity of the judicial process. The mere assertion, for the first time in a reply brief, that the alleged error should be reviewed under the second prong is insufficient to warrant review. I find the issue forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Nieves*, 192 Ill. 2d 487 (2000).

¶ 35 I also dissent from the majority's decision to issue an order as opposed to an opinion in this

case. If the majority is going to expand the law that applies to mandatory sentencing credits to sentencing errors such as the miscalculation here, then it should issue an opinion so that this law applies in all cases, at least in the Third District. The appellate defenders and prosecutors need to know what the law is. Clearly, this expansion of the law qualifies under Rule 23(a)(1) (with the exception of the two necessary votes). However, I am unsure how the majority could disagree that this constitutes an expansion of the law when, as mentioned above, it cites only cases relating to mandatory sentencing credits when addressing the miscalculation of fines issue.