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2013 IL App (3d) 110593-U

Order filed April 8, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 9th Judicial Circuit,
Plaintiff-Appellee,) Warren County, Illinois,
)
v.) Appeal No. 3-11-0593
) Circuit No. 09-CF-60
)
RONALD E. HANSON,) Honorable
) Raymond A. Cavanaugh,
Defendant-Appellant.) Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in denying defendant's motion to withdraw waiver of his right to a jury trial; (2) defendant is entitled to two additional days of sentencing credit; (3) defendant is entitled to an additional \$430 in sentencing credit; and (4) defendant's sexual assault fine is reduced to \$100.

¶ 2 Defendant, Ronald E. Hanson, was convicted of three counts of criminal sexual assault.

720 ILCS 5/12-13(a)(3) (West 1994). He was sentenced to a total of 16 years' imprisonment. On appeal, defendant argues that the court erred in denying his motion to withdraw his waiver of a

right to a jury trial and that he was entitled to various sentencing credits. We modify his sentence and otherwise affirm.

¶ 3

FACTS

¶ 4 On April 24, 2009, defendant was arrested and charged with five counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 1994)). He posted bond and was released on May 14, 2009. Defendant hired private counsel and, at a hearing on May 25, 2010,¹ entered a written waiver of his right to a jury trial as part of a negotiated guilty plea that was scheduled to be entered at a hearing on July 22, 2010. However, on July 15, 2010, private counsel filed a motion to withdraw from his representation of defendant, citing a disagreement between counsel and defendant about how to proceed with defendant's case. The court granted the motion and appointed a public defender to continue defendant's representation. Defendant eventually rejected the State's plea offer.

¶ 5 On November 10, 2010, defendant filed a motion to withdraw his jury waiver. The motion alleged that defendant did not knowingly, voluntarily, or understandingly waive his right to a jury trial; that private counsel had advised defendant to sign the waiver; and that defendant believed that the waiver could be revoked if he chose to reject the State's negotiated plea offer.

¶ 6 The court held a hearing on the motion. Defendant testified, explaining that private counsel had presented him with a negotiated plea offer from the State. According to defendant,

¹ The record on appeal does not contain a transcript of this hearing. In his appellant's brief, defendant asserts that the hearing was not recorded and that no transcript exists. A record of the hearing is not necessary for us to reach our decision in this case because subsequent testimony establishes the content of the hearing.

when private counsel presented him with the offer, counsel explained that it could be rejected at any time within the following 30 days. Defendant was under the impression that if he chose to reject the plea, then "everything would reset" and defendant would regain the right to proceed to a jury trial. However, defendant admitted that the trial court admonished him that if he waived his right to jury trial, he would not be able to later recover that right. Defendant testified that he understood the trial court's admonishment to apply only within the context of guilty plea negotiations, and that if he knew he was "waiving [his] right to a jury trial in any context, in any situation, [he] would have never have done it."

¶ 7 At the conclusion of the hearing on defendant's motion to withdraw the jury waiver, the trial court denied the motion. In reaching its decision, the court explained that it was persuaded by the fact that defendant was represented by counsel when he entered the waiver, that the court had explicitly asked defendant whether he understood that his waiver could not be revoked, and that allowing waivers to be revoked can provide an opportunity for defendants in general to delay trial court proceedings.

¶ 8 On May 23, 2011, the cause proceeded to a bench trial, and defendant was found guilty on three counts of criminal sexual assault. 720 ILCS 5/12-13(a)(3) (West 1994). The court remanded defendant to custody to await sentencing. On August 16, 2011, the trial court held a sentencing hearing. The charging information described defendant's crimes as having occurred on or about January 1995 through November 1999. As a result, defendant was given the option to choose which year's sentencing laws should apply to his sentencing. Defendant elected to be sentenced under the statutory language effective in 1995.

¶ 9 The court sentenced defendant to consecutive sentences of eight, four, and four years'

imprisonment and ordered defendant to pay a \$1,000 fine and a \$200 sexual assault fine (730 ILCS 5/5-9-1.7(b)(1) (West 2010)). The court awarded defendant presentence credit for time served from April 24, 2009, to May 14, 2009, and from May 23, 2011, to August 15, 2011. However, the court's written order gave defendant credit for time served only from April 26, 2009, to May 14, 2009, and from May 23, 2011, to August 15, 2011. The court awarded defendant \$5 per day credit for time served in presentence custody in the amount of \$100. 725 ILCS 5/110-14 (West 1994). Defendant appeals.

¶ 10

ANALYSIS

¶ 11

I. Withdrawal of Jury Trial Waiver

¶ 12 Defendant claims that the trial court abused its discretion when it refused to allow him to withdraw his valid waiver of his right to a jury trial. Defendant argues that his change of counsel created a change in circumstances meriting a withdrawal of his waiver. Specifically, defendant argues that his counsels' changing opinions about how to proceed with his case required that the trial court accept defendant's motion to withdraw his jury waiver.

¶ 13 Defendant did not raise this issue in a posttrial motion. As a result, the issue is forfeited and will be reviewed only as plain error. See *People v. Enoch*, 122 Ill. 2d 176 (1988) (a posttrial motion is required to preserve review after either a jury trial or bench trial); *People v. De la Hera*, 2011 IL App (3d) 100301; 725 ILCS 5/116-1 (West 2010). The plain error doctrine allows an appellate court to review unpreserved errors when: (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167 (2005). First, we must determine whether

error occurred at all.

¶ 14 Defendant concedes that he voluntarily waived his right to a jury trial. However, he claims that the trial court should have allowed him to withdraw that waiver after he rejected the State's plea agreement. The decision whether to allow the revocation of a jury waiver is within the discretion of the trial court unless the circumstances indicate that the defendant did not understand the consequences of his waiver. *People v. Catalano*, 29 Ill. 2d 197 (1963). Factors to consider in determining whether a court should have allowed a revocation include whether defendant was represented by counsel at the time the waiver was made and the timeliness of the revocation request. *Id.* Where a defendant is represented by counsel, it is presumed that counsel fully informed defendant of his rights. *Id.*

¶ 15 In the present case, defendant was represented at all times by counsel. As a result, we presume that defendant was fully informed that his jury trial waiver was permanent. This presumption is buoyed by the fact that the trial court explicitly informed defendant at the time of his waiver that the waiver could not be revoked. The court explained that the purpose behind prohibiting revocations was to preclude defendants from using the revocation to cause delay. Under these circumstances, defendant understood the consequences of his waiver, and the trial court acted within its discretion when it denied defendant's motion to withdraw his jury waiver.

¶ 16 Defendant argues that he should not be held accountable for entering his jury waiver because it was his counsel's decision to waive a jury trial and not his own. This argument is meritless. A decision to plead guilty is one over which defendant, not counsel, has authority. *People v. Medina*, 221 Ill. 2d 394 (2006). Here, defendant waived his right to a jury trial as part of his decision to accept a negotiated guilty plea. Therefore, on appeal, defendant cannot blame

counsel for decisions that were defendant's to make.

¶ 17 Defendant was represented by counsel at the time he waived his right to a jury trial, and the court admonished defendant that the waiver was irrevocable. Therefore, the trial court did not abuse its discretion in denying defendant's motion to withdraw his jury trial waiver. There was no error, and, therefore, no plain error.

¶ 18 II. Sentencing Credit

¶ 19 Defendant claims that he is entitled to an additional two days sentencing credit because the trial court's written order misstated the date that defendant was arrested. The State concedes that defendant is entitled to the additional credit. Therefore, defendant's sentencing order will be modified to grant defendant an additional two days of sentencing credit.

¶ 20 III. \$5 Per Day Credit Against Fines

¶ 21 Defendant next argues that he is entitled to additional \$5 per day credit against his fines. The trial court awarded defendant \$100 in \$5 per day credit under section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 1994)) corresponding to 20 days of time served in pretrial custody. Defendant argues that he is entitled to an additional \$430 in sentencing credit for an additional 86 days he spent in pretrial and posttrial custody.

¶ 22 Under section 110-14, a defendant is entitled to a credit of \$5 per day for any partial or full days spent in custody prior to sentencing. 725 ILCS 5/110-14 (West 1994). Effective January 1, 2005, the statute was amended to add subsection (b), which made the credit unavailable to defendants incarcerated for certain sex crimes, including criminal sexual assault. Pub. Act 93-699, § 5 (eff. Jan. 1, 2005) (amending 725 ILCS 5/110-14 (West 1994)); 730 ILCS 5/5-9-1.7 (West 2004). However, that amendment occurred after defendant committed the

present crimes, and he may elect to be sentenced according to the version of the statute in effect at the time of his crimes. See *People v. Varghese*, 391 Ill. App. 3d 866 (2009) (declaring in *dicta* that defendant was entitled to the application of section 110-14 as it existed at the time he committed the crime for which he was incarcerated). 730 ILCS 5/8-2-4 (West 2010).

¶ 23 Defendant chose to be sentenced according to the law as it existed in 1995. Under the statutory language in effect at that time, defendant is entitled to an additional \$430 in sentencing credit. 725 ILCS 5/110-14 (West 1994). The trial court's order shall be modified from \$100 in sentencing credit to \$530.

¶ 24 IV. Sexual Assault Fine

¶ 25 Defendant was assessed a \$200 sexual assault fine under section 5-9-1.7(b)(1) of the Unified Code of Corrections. 730 ILCS 5/5-9-1.7(b)(1) (West 2010). Defendant argues that the fine should have been assessed as \$100 under the version of the statute effective in 1995.

¶ 26 Defendant elected to be sentenced under the Unified Code of Corrections as it existed in 1995. See 730 ILCS 5/8-2-4 (West 2010). In 1995, section 5-9-1.7(b)(1) mandated that a \$100 fine be imposed for violations of, *inter alia*, criminal sexual assault. 730 ILCS 5/5-9-1.7(b)(1) (West 1994). Fines, including those imposed under section 5-9-1.7(b)(1), are considered punitive and must be assessed according to the statutory language in effect at the time defendant committed the offense(s) in question. *People v. Prince*, 371 Ill. App. 3d 878 (2007).

¶ 27 Defendant's sexual assault fine is modified from \$200 to \$100 to reflect the language of section 5-9-1.7(b)(1) effective in 1995. 730 ILCS 5-9-1.7(b)(1) (West 1994).

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, the judgment of the circuit court of Warren County is affirmed

in part and modified in part. Defendant's conviction is affirmed; his sentencing credit is modified to include an additional two days; his \$5 per day sentencing credit is modified from \$100 to \$530; and his sexual assault fine is modified from \$200 to \$100.

¶ 30 Affirmed in part and modified in part.