2011 IL App (4th) 100372-U

Filed 12/9/11

NO. 4-10-0372

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
SCOTT A. HAYES,	)	No. 08CF323
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Appleton and McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not err in sentencing defendant to an extended term on his lesser class felony offense.

(2) The trial court improperly imposed a public-defender reimbursement fee without first conducting a section 113-3.1 hearing on defendant's ability to pay.

(3) Defendant was entitled to an additional $105 of presentence credit to be applied to his fines.

¶ 2 In March 2009, in Livingston County case No. 08-CF-323, a jury convicted defendant, Scott A. Hayes, of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), a Class 3 felony; unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2008)), a Class 3 felony; and unlawful possession of a controlled substance (cocaine) (720 ILCS 570/402(c) (West 2008)), a Class 4 felony. In May 2009, the trial court sentenced defendant to 30 months' probation, with conditions including 180 days in jail, with

credit for 142 days as time served, and 60 hours of community service. The trial court also imposed a $200 public-defender reimbursement fee at the May 2009 hearing. On October 10, 2009, and October 13, 2009, defendant violated his probation when he admittedly ingested cocaine.

¶ 3 In October 2009, the State filed a petition to revoke probation. On January 24, 2010, the trial court conducted a hearing on the petition, and found defendant violated his probation. In March 2010, the trial court resentenced defendant to concurrent four-year prison terms on all three counts for which defendant was originally found guilty. The trial court also assessed a $100 public-defender reimbursement fee and gave defendant a $500 fine credit for time spent in custody.

¶ 4 Defendant appeals, arguing (1) the trial court improperly imposed an extended-term sentence on the lesser class offense, unlawful possession of a controlled substance–a Class 4 felony–and it is therefore void; (2) the trial court improperly imposed a public-defender reimbursement fee without first holding a section 113-3.1 hearing on defendant's ability to pay at the May 2009 and March 2010 hearings; and (3) the trial court incorrectly calculated defendant's $5-a-day credit against his fines and only credited him $500, when he was entitled to a total of $720. We affirm in part as modified, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 On December 17, 2008, defendant was evicted from his apartment at 1023 West Madison Street in Pontiac, Illinois. During the eviction, defendant allowed police officers to enter the apartment and perform a search. The officers found several rounds of .22 caliber long rifle type ammunition, one 9 millimeter Luger round, and a switchblade. Police also found two

smoking pipes with cannabis residue and a plate and straw containing cocaine residue. Defendant admitted snorting cocaine the day before the eviction but denied the pipes were his. Defendant denied the ammunition was his but admitted the switchblade was his.

¶ 7 In March 2009, the jury convicted defendant of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)); unlawful possession of firearm ammunition by a felon (720 ILCS 5/24-1.1(a) (West 2008)); and unlawful possession of a controlled substance (cocaine) (720 ILCS 570/402(c) (West 2008)). On March 31, 2009, defendant filed a motion for a new trial pursuant to section 116-1 of the Code of Criminal Procedure of 1963 (Procedure Code) (725 ILCS 5/116-1 (West 2008)). Defendant alleged the State failed to prove him guilty beyond a reasonable doubt and the jury's verdict was contrary to the manifest weight of the evidence. The trial court denied the motion.

¶ 8 In May 2009, the trial court sentenced defendant to 30 months' probation, with conditions including 180 days in jail, with credit for 142 days as time served, and 60 hours of community service. The trial judge ordered a drug and alcohol evaluation and restricted defendant from any drug or alcohol use. The court ordered defendant to pay "[a]ll the mandatory fines, costs, and assessments" and imposed a $200 public-defender fee. Fines and fees included a $500 drug assessment, a $12 crime-victim-fund fee, a $100 crime-lab fee, a $100 trauma-fund fee, a $5 drug-spinal-cord fee, and a $25 probation fee. The trial court gave defendant a $500 credit against assessments.

¶ 9 In October 2009, the State filed a petition to revoke defendant's probation. The State alleged defendant violated his probation by using an illegal substance. In January 2010, the trial court conducted a hearing and found defendant violated his probation after defendant

admitted ingesting cocaine on October 10, 2009, and October 13, 2009.

¶ 10 In March 2010, the trial court resentenced defendant to concurrent four-year prison terms for unlawful possession of a weapon by a felon, unlawful possession of firearm ammunition by a felon, and unlawful possession of a controlled substance. During the resentencing hearing, the trial judge ordered defendant to pay "whatever fines, costs, and assessments [that] were due and owing" within 12 months of release from imprisonment. The trial judge also noted she was "going to impose an additional hundred dollar [public-defender] assessment" and the original $200 public-defender fee was to be paid first out of defendant's bond, before the second $100 public-defender fee was deducted from the bond.

¶ 11 In April 2010, defendant filed a motion for reconsideration of sentence. In May 2010, the trial court denied the motion. Defendant filed a notice of appeal and an amended notice of appeal. We address in turn each argument raised by defendant on appeal.

¶ 12 I. ANALYSIS

¶ 13 A. Class 4 Felony Sentence

¶ 14 Defendant argues his sentence for the Class 4 felony of unlawful possession of a controlled substance is void. He first argues the sentence is void because the trial court resentenced him to four years–one year beyond the maximum nonextended term allowed under section 5-8-1 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-1(a)(7) (West 2008)). He further contends that even if the sentence were characterized as an extended-term sentence, it is still void because it was improperly imposed on the lesser class offense of the three offenses of which defendant was convicted.

¶ 15 The State initially argues defendant failed to preserve this issue for appeal by

failing to include it in his postsentencing motion and has therefore forfeited the issue. However, the Illinois Supreme Court has held that "[a]n argument that an order or judgment is void is not subject to waiver" and a "[d]efendant's argument that the extended-term portion of his sentence is void does not depend for its viability on his postconviction petition." *People v. Thompson*, 209 Ill. 2d 19, 27, 805 N.E.2d 1200, 1205 (2004). Finding defendant has not forfeited the issue, we proceed with a determination as to whether defendant's extended-term sentence is void.

¶ 16 1. *Section 5-8-2*

¶ 17 Section 5-8-2 of the Unified Code (730 ILCS 5/5-8-2(a) (West 2008)) allows a defendant to be sentenced to an extended term of the maximum sentence authorized by section 5-8-1 (730 ILCS 5/5-8-1 (West 2008)). To impose such a sentence, the trial court (1) must find to be present the aggravating factors "set forth in paragraph (b) of [s]ection 5-5-3.2 or clause (a)(1)(b) of [s]ection 5-8-1" and (2) the extended-term sentence must be "for the class of the most serious offense of which the offender was convicted." 730 ILCS 5/5-8-2(a) (West 2008); see also *People v. Jordan*, 103 Ill. 2d 192, 207, 469 N.E.2d 569, 576 (1984) ("extended-term sentences may only be imposed for the offenses within the most serious class of offense of which the accused is convicted").

¶ 18 Defendant first argues the four-year sentence on his conviction for unlawful possession of a controlled substance is void because it goes beyond the three-year nonextended maximum term allowed by the statute. The State asserts defendant was eligible for extended-term sentencing. We agree with the State. The State presented evidence in aggravation of defendant's conviction. The trial court was asked to consider defendant's prior criminal history in sentencing and it was reasonable for the court to do so. It is evident from the record that

aggravating factors set forth in section 5-5-3.2 were present and defendant therefore qualified for extended-term sentencing under section 5-8-1.

¶ 19 2. *Extended-Term Sentencing for Multiple Class Offenses*

¶ 20 Defendant further argues that an extended-term sentence cannot be entered on his conviction for unlawful possession of a controlled substance because it is a Class 4 felony and is not the most serious offense of which defendant was convicted. Defendant contends he was convicted of two Class 3 felonies arising from the same course of conduct as his lesser offense and argues that an extended-term sentence can only be applied to the more serious offense. The State, on the other hand, urges us to find that defendant's three convictions stem from an unrelated course of conduct and defendant was therefore properly sentenced to an extended term on his lesser class offense. We agree with the State.

¶ 21 The Illinois Supreme Court first addressed the issue of multiple offenses and extended-term sentencing in *Jordan*. The court found section 5-8-2 to mean that a defendant who is convicted of multiple offenses of differing classes can only be sentenced to "an extended-term sentence *** for the conviction within the most serious class." *Jordan*, 103 Ill. 2d at 206, 469 N.E.2d at 575. In *People v. Coleman*, 166 Ill. 2d 247, 253, 652 N.E.2d 322, 325 (1995), our supreme court further clarified its holding in *Jordan* and addressed the issue of extended-term sentences in the context of multiple class offenses arising from unrelated courses of conduct. The *Coleman* court found *Jordan* to be inapplicable because *Jordan* dealt with "lesser offenses arising from the same course of conduct as the greater offenses," whereas the defendant in *Coleman* was charged with four separate "offenses arising from unrelated courses of conduct." *Coleman*, 166 Ill. 2d at 254, 652 N.E.2d at 326.

¶ 22 More specifically, the defendant in Coleman was convicted of murder and three counts of armed robbery. *Coleman*, 166 Ill. 2d at 251, 652 N.E.2d at 324. The murder conviction stemmed from the defendant's participation in a fire bombing of a home that resulted in the death of a teenage girl. *Coleman*, 166 Ill. 2d at 250, 652 N.E.2d at 324. The defendant was convicted on three charges of armed robbery for his actions against three separate cab drivers at different locations, during different months. *Coleman*, 166 Ill. 2d at 250, 652 N.E.2d at 324. These four charges were consolidated and the defendant entered into a negotiated plea agreement with the State. *Coleman*, 166 Ill. 2d at 250-51, 652 N.E.2d at 324.

¶ 23 The *Coleman* court found "the consolidation [was] a joining of unrelated prosecutions rather than *** a fusion of cases into a single prosecution." *Coleman*, 166 Ill. 2d at 256, 652 N.E.2d at 326. Further, the court concluded that the defendant's four convictions arose from unrelated courses of conduct and were therefore subject to extended-term sentencing on each charge, regardless of whether they were separately prosecuted or consolidated. *Coleman*, 166 Ill. 2d at 257, 652 N.E.2d at 327.

¶ 24 After *Coleman*, our supreme court once again addressed the imposition of extended-term sentences on lesser class offenses and further explained what constitutes an "unrelated course of conduct" in *People v. Bell*, 196 Ill. 2d 343, 354-55, 751 N.E.2d 1143, 1149 (2001). The *Bell* court concluded that

> "in determining whether a defendant's multiple offenses are part of an 'unrelated course of conduct' for the purpose of his eligibility for an extended-term sentence under section 5-8-2(a), courts must consider whether there was a substantial change in the nature of

the defendant's criminal objective." *Bell*, 196 Ill. 2d at 354, 751 N.E.2d at 1149.

If a substantial change in the nature of a defendant's criminal objective is present, then the offenses are considered unrelated and the defendant can be sentenced to an extended-term on each charge. *Bell*, 196 Ill. 2d at 354-55, 751 N.E.2d at 1149.

¶ 25 Since *Bell*, this court has had an opportunity to determine whether a defendant's offenses were the result of an unrelated course of conduct in *People v. Peacock*, 359 Ill. App. 3d 326, 833 N.E.2d 396 (2005). The defendant in *Peacock* was convicted of home invasion, aggravated battery, and domestic battery after breaking into his girlfriend's apartment and beating her for hours in an effort to keep her from leaving him. *Peacock*, 359 Ill. App. 3d at 330, 833 N.E.2d at 399. We found it would be "unrealistic" to classify these convictions as unrelated, as defendant had the overall objective of dissuading his girlfriend from ending their relationship. *Peacock*, 359 Ill. App. 3d at 337-38, 833 N.E.2d at 406.

¶ 26 Unlike *Peacock*, we conclude defendant's convictions were the product of an unrelated course of conduct. Defendant urges us to find these convictions all stemmed from a related course of conduct because he only maintained one criminal objective–possession. However, the inquiry runs deeper than the surface-level characterization of his convictions. We do not find defendant maintained the same criminal objective for individually possessing ammunition, a weapon, and a controlled substance. The State contends defendant came into possession of each of these items on three different occasions, under three different circumstances, and therefore cannot claim his possession charges all arose from the same criminal objective. We agree with the State. By chance, defendant was found to be in

possession of all three items concurrently when the police conducted a search of his apartment pursuant to an eviction.

¶ 27 We find defendant's convictions were the result of an unrelated course of conduct as defined in *Bell*. The trial court properly resentenced defendant to an extended-term sentence on his lesser class offense. We do not find defendant's extended-term sentence is void.

¶ 28 B. Public-Defender Reimbursement Fee

¶ 29 1. *May 2009 $200 Public-Defender Reimbursement Fee*

¶ 30 Defendant next argues the trial court improperly imposed a $200 public-defender fee during his initial May 2009 sentencing hearing and a second $100 public-defender fee when he was resentenced in March 2010. Defendant alleges the fees were improper because he was not afforded a hearing on his ability to pay before the fees were assessed. The State argues this court does not have jurisdiction to determine whether the first $200 fee was properly assessed because defendant did not appeal his probation sentence and never preserved the issue for appeal as is required by Supreme Court Rule 606. Ill. Sup. Ct. R. 606 (amended eff. March 20, 2009). We agree with the State.

¶ 31 We lack jurisdiction to determine whether the trial court properly imposed the $200 public-defender fee assessed during defendant's initial May 2009 sentencing hearing. We have held that issues raised on appeal from the revocation of probation "must concern the propriety of the revocation and the sentence imposed." *People v. Bell*, 296 Ill. App. 3d 146, 154-55, 694 N.E.2d 673, 680. In *Bell*, the defendant was sentenced to probation and assessed a $100 public-defender fee. After he violated probation, his probation was revoked. He was then again resentenced to probation and assessed a new $100 public-defender fee, which replaced the first

$100 fee. *Bell*, 296 Ill. App. 3d at 147-48, 694 N.E.2d at 676. The State argued the defendant could not challenge the fee for the first time on appeal because the defendant never contested his original conviction and probation sentence. *Bell*, 296 Ill. App. 3d at 154, 694 N.E.2d at 680. However, we allowed the defendant to appeal his public-defender fee because we found it was a new fee, assessed after the revocation of probation, and not a reinstatement of the original fee. The defendant was no longer responsible for the original fee. *Bell*, 296 Ill. App. 3d at 154-55, 694 N.E.2d at 680. Under *Bell*, a reviewing court has jurisdiction over a newly imposed fee assessed after the probation-revocation hearing, but it does not have jurisdiction over a reinstated original fee that was never appealed. See *Bell*, 296 Ill. App. 3d at 154-55, 694 N.E.2d at 680.

¶ 32 Defendant did not appeal his original May 2009 conviction and sentence within 30 days as required by Rule 606. Defendant's failure to appeal the original fee leaves us without jurisdiction. Defendant therefore urges us to apply *Bell* and find we have jurisdiction where we normally would not. However, we find the facts in *Bell* are distinguishable from defendant's case. The May 2009 $200 fee was never replaced by the additional $100 fee imposed at the March 2010 resentencing hearing. The trial court's March 2010 mere reference at the resentencing hearing that the prior assessments remained "due and owing" does not bring the $200 fee within the *Bell* case because it remains a reinstated original fee that was never appealed. Therefore, we are without jurisdiction to address the propriety of the original May 2009 $200 fee.

¶ 33 2. *March 2010 $100 Public-Defender Reimbursement Fee*

¶ 34 The record indicates the trial court imposed an additional $100 public-defender fee at the March 2010 resentencing hearing. The State argues defendant forfeited his right to

appeal the March 2010 public-defender fee by failing to object to the fee in his motion to reconsider sentence. However, the State recognizes that this court has found it plain error to impose such a fine without a hearing and has forgiven forfeiture under similar circumstances. See *Bell*, 296 Ill. App. 3d at 155, 694 N.E.2d at 680-81. The State therefore concedes the March 2010 $100 fee was improperly imposed and should be vacated. We agree.

¶ 35 Section 113-3.1 of the Procedure Code (725 ILCS 5/113-3.1 (West 2008)) allows a trial court to order a defendant to pay a reasonable sum to reimburse the county for representation by court-appointed counsel. However, before a court can order a defendant to pay reimbursement, section 113-3.1(a) requires the court to hold a hearing into the defendant's financial circumstances and find an ability to pay. 725 ILCS 5/113-3.1(a) (West 2008); *People v. Love*, 177 Ill. 2d 550, 559, 687 N.E.2d 32, 36. In addition, a defendant must be given an opportunity to present evidence regarding his ability to pay and other relevant circumstances. *People v. Johnson*, 297 Ill. App. 3d 163, 164-65, 696 N.E.2d 1269, 1270 (1998). Absent such a hearing, an order for reimbursement must be vacated and remanded for a section 113-3.1 hearing. See *People v. Bass*, 351 Ill. App. 3d 1064, 1070, 815 N.E.2d 462, 468 (2004).

¶ 36 Defendant was not afforded a hearing on his ability to pay the $100 public-defender fee imposed during his March 2010 resentencing hearing. The trial court did not provide defendant notice of possible reimbursement or give defendant the opportunity to present evidence of his financial circumstances and ability to pay. Therefore, we must vacate the March 2010 $100 fee and remand for a section 113-3.1 hearing.

¶ 37 C. Credit Against Fines

¶ 38 Defendant finally argues the trauma-fund and drug-spinal-cord assessments are

fines, and he is therefore entitled to a $5-a-day credit against the assessments pursuant to section 110-14 of the Unified Code (725 ILCS 5/110-14 (West 2008)). Defendant spent a total of 144 days in custody prior to sentencing from December 17, 2008, to May 7, 2009, and November 18, 2009, to November 19, 2009, and argues he is entitled to $720 against his assessments. The trial court ordered defendant to pay $605 in fines and gave defendant a fine credit of $500. Defendant contends he is entitled to an additional $105 credit, and the State concedes.

¶ 39 Section 110-14 allows defendant to receive a credit of $5 a day for each day he was incarcerated, to be credited toward the fines levied against him on conviction. 725 ILCS 5/110-14(a) (West 2008). Section 110-14 applies to the $100 trauma-fund fine (*People v. Willhite*, 399 Ill. App. 3d 1191, 1197, 927 N.E.2d 1265, 1270 (2010)) and the $5 spinal-cord fine (*People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006)). Defendant is entitled to a credit of $105 in addition to the $500 awarded by the trial court, to be applied against the $605 of fines levied against him.

¶ 40 III. CONCLUSION

¶ 41 For the reasons stated, we affirm the trial court's imposition of an extended-term sentence on defendant's lesser class felony. We vacate the trial court's assessment of the March 2010 $100 public-defender fee imposed after defendant's probation revocation and remand for a section 113-3.1 hearing. However, we lack jurisdiction to consider the propriety of defendant's original May 2009 $200 public-defender fee. Finally, we award defendant an additional $105 in presentence credit, for a total of $605 to be applied against defendant's fines, and remand with directions for issuance of an amended sentencing judgment so reflecting.

¶ 42 Affirmed in part as modified and vacated in part; remanded with directions.