2011 IL App (4th) 100588-U

Filed 11/14/11

NO. 4-10-0588

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
MARSHALL KING, JR.,	)	No. 09CF207
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* The court vacated defendant's conviction for unlawful possession of a weapon by a felon as it violated the one-act, one-crime rule and denied defendant's request for *per diem* credit against his Violent Crime Victims Assistance Act fine because it is prohibited by statute.

¶ 2 In April 2010, the trial court convicted defendant, Marshall King, Jr., of one count of being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)) (count I) and one count of unlawful possession of a weapon by a felon (second offense) (720 ILCS 5/24-1.1(a) (West 2008)) (count II). In June 2010, the court sentenced defendant to 22 years' imprisonment on count I and 7 years' imprisonment on count II, to run concurrently. Defendant appeals, arguing (1) his conviction for unlawful possession of a weapon by a felon must be vacated under the one-act, one-crime rule, and (2) he is entitled to *per diem* credit against his $20 Violent Crime Victims Assistance Act (VCVAA) fine. We affirm in part, vacate in part, and remand with

directions.

¶ 3 I. BACKGROUND

¶ 4 In August 2009, defendant was charged by information with being an armed habitual criminal (720 ILCS 5/24-1.7 (West 2008)) and unlawful possession of a weapon by a felon (second offense) (720 ILCS 5/24-1.1(a) (West 2008)). Both counts were based on defendant's possession of a "Hi-Point Firearms model C-9 compact 9mm pistol." Defendant waived his right to a jury trial and a bench trial was scheduled in April 2010. On the day the bench trial was to start, defendant requested permission to proceed *pro se* but admitted he was not prepared to proceed to trial that day. The trial court denied his request as untimely and proceeded to trial. Testimony and exhibits from the bench trial showed the following.

¶ 5 Defendant was a passenger in a car driven by his girlfriend when they were stopped by police because the car they were in had an expired license plate. During the traffic stop, police discovered defendant's girlfriend had a warrant out for her arrest and took her into custody. Because of confusion about who owned the car, police asked defendant to exit the vehicle. Defendant exited the vehicle and was patted down for officer safety. Police discovered a loaded firearm tucked into the waistband of his pants. Defendant had previously been convicted of unlawful possession of a weapon by a felon (Cook County case No. 98-CR-2083101) and aggravated vehicular hijacking (Cook County case No. 94-CR-0558602). Defendant did not testify.

¶ 6 At the conclusion of the bench trial, the trial court found defendant guilty of both counts, and set the matter for sentencing. Defendant filed a motion for a new trial and other posttrial relief, requesting a new trial and arguing the court erred in (1) finding him guilty

beyond a reasonable doubt, as the evidence was insufficient; (2) denying his request to proceed *pro se*; (3) denying his motion to suppress evidence of his search and seizure; and (4) improperly admitting evidence obtained as a result of his search and seizure. In June 2010, the trial court denied defendant's motion and sentenced him to concurrent terms of 22 years' imprisonment on count I and 7 years' imprisonment on count II, and the court found defendant was required to serve 85% of his 22-year sentence on count I. In July 2010, the court modified defendant's sentence on count I, finding he was eligible for day-for-day good-time credit on his 22-year sentence.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant raises two arguments: (1) his conviction for unlawful possession of a weapon by a felon violates the one-act, one-crime rule as it is based on the same physical act as his conviction for being an armed habitual criminal; and (2) he is due a $5-per-day credit against his $20 VCVAA fine. The State concedes defendant's conviction on count II must be vacated but argues defendant is not due any credit against his $20 VCVAA fine.

¶ 10 A. The One-Act, One-Crime Rule

¶ 11 Defendant failed to raise the one-act, one-crime issue prior to appeal. Generally this would result in forfeiture. However, "an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule" and allowing the issue to be raised on appeal. *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977), the supreme court stated: "Prejudice results to the

defendant *** in those instances where more than one offense is carved from the same physical act." Review under the one-act, one-crime rule requires the court to determine whether the multiple convictions arise out of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996). "Multiple convictions are improper if they are based on precisely the same physical act." *Id.*

¶ 12 Defendant was charged with two separate crimes connected to the single physical act of possessing a single firearm. Though defendant could have been charged in count II for possessing firearm ammunition, the State chose to charge him with possession of the firearm in both counts. See 720 ILCS 5/24-1.1(a) (West 2008) (unlawful for convicted felon to possess firearm ammunition). The First District recently addressed this issue in *People v. Bailey*, 396 Ill. App. 3d 459, 465, 919 N.E.2d 460, 465 (2009), and concluded one of the defendant's convictions for unlawful use of a weapon by a felon must be vacated as his conviction for being an armed habitual criminal was based on possession of the same firearm. We conclude defendant's case is directly analogous to *Bailey* and vacate his conviction on count II because it is based on the same physical act as his conviction on count I.

¶ 13 B. Five-Dollar-Per-Day Credit Against VCVAA Fine

¶ 14 Defendant next contends he is due a $5-per-day credit against his $20 VCVAA fine. Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2008)) requires anyone held on a bailable offense who is not released on bail and later has a fine levied against them be given a $5-per-day credit for each day they are so incarcerated, upon application by the defendant. Defendant failed to raise this issue before the trial court, and it would normally be subject to forfeiture. See Ill. S. Ct. R. 605(b)(6) (eff. Oct. 1, 2001).

However, as the statutory right to *per diem* credit is conferred in mandatory terms upon application of the defendant, the normal rules of forfeiture do not apply, and defendant's request is reviewable on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457-58, 677 N.E.2d 935, 945-46 (1997).

¶ 15 As the State correctly points out, section 10(c) of the VCVAA states a VCVAA fine "shall not be subject to the provisions of Section 110-14 of the Code of Criminal Procedure of 1963." This clause expressly prohibits *per diem* credit against defendant's $20 VCVAA fine. See *People v. Chitwood*, 148 Ill. App. 3d 730, 740, 499 N.E.2d 992, 999 (1986) (VCVAA fines not subject to section 110-14). We deny defendant's request for *per diem* credit and affirm the $20 VCVAA fine.

¶ 16 III. CONCLUSION

¶ 17 We vacate the defendant's conviction on count II and affirm the $20 VCVAA fine on count I. We remand for issuance of an amended sentencing judgment reflecting a conviction and sentence on count I only. Because the State has in part successfully defended a portion of the judgment, we grant the State its statutory assessment of $50 against defendant as costs of this appeal.

¶ 18 Affirmed in part, vacated in part, and cause remanded with directions.