2013 IL App (4th) 120514-U

NO. 4-12-0514

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 21, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
MARQUIS L. LOWERY,	)	No. 11CF1201
Defendant-Appellant.	)	
	)	Honorable
	)	Lisa Holder White,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Steigmann and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The right to poll the jury is not a fundamental decision reserved solely for a defendant and may be waived by counsel.

(2) The merits of defendant's ineffective assistance of trial counsel claim were not considered because it would be better addressed in proceedings on a petition for postconviction relief.

(3) The six-year extended-term sentence was improper because it was entered on an offense other than the most serious felony of which defendant was convicted. The appellate court vacated this sentence and remanded with directions to modify the sentencing judgment to reflect a three-year prison sentence.

(4) The fines imposed by the circuit clerk were vacated and the cause remanded for imposition of the mandatory fines.

¶ 2 In September 2011, defendant filed a motion to substitute Judge Timothy Steadman as a matter of right (725 ILCS 5/114-5(a) (West 2010)). In October 2011, Judge Steadman granted defendant's motion for substitution. In December 2011, the parties appeared

before Judge Lisa Holder White and announced they were ready for trial. The case was reassigned to Judge Steadman and defendant's jury trial commenced the same day. The following day, as the jury was deliberating, Judge Steadman read through the docket entries and discovered he had allowed the motion for substitution. With the consent of defense counsel and the State, the verdicts were then sealed and the case continued until further order.

¶ 3 During several status hearings (December 2011, January 2012, and February 2012) before Judge Holder White, defense counsel acknowledged she had not informed the trial court of the substitution. Defendant expressed his wish for a mistrial. Defense counsel did not think the law supported a mistrial and believed defendant waived his right to substitution by failing to bring the issue up himself before Judge Steadman. Counsel believed the court should open the verdicts. The State initially advocated for a new trial, but it later changed its position and suggested opening the verdicts. In March 2012, after hearing arguments from both parties and reviewing the audio recording of defendant's jury trial herself, Judge Holder White found defendant's participation in the trial before Judge Steadman was a waiver of his motion for substitution of judge and ordered the verdicts unsealed. Defendant was found guilty of unlawful possession of a controlled substance with a prior conviction (720 ILCS 570/402(a)(2)(A) (West 2010)) and unlawful possession of cannabis with a prior conviction (720 ILCS 550/4(c) (West 2010)).

¶ 4 In May 2012, the trial court sentenced defendant to concurrent prison terms of 8 years and 6 years respectively, in addition to various fines and fees. The Macon County circuit clerk imposed additional assessments not ordered by the trial court.

¶ 5 Defendant appeals, arguing (1) he was deprived of his fundamental right to poll

the jury; (2) he received ineffective assistance of counsel where defense counsel abandoned her role as defendant's advocate; (3) his six-year extended-term sentence for unlawful possession of cannabis must be vacated; and (4) this court should vacate the fines improperly assessed by the circuit clerk. We affirm as modified and remand with directions.

¶ 6 I. BACKGROUND

¶ 7 In August 2011, the State filed a four-count information against defendant, charging him with (1) unlawful possession of a controlled substance with intent to deliver (15 grams or more, but less than 100 grams of cocaine), a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2010)) (count I); (2) unlawful possession of a controlled substance with a prior conviction (15 grams or more, but less than 100 grams of cocaine), a Class 1 felony (720 ILCS 570/402(a)(2)(A) (West 2010)) (count II); (3) unlawful possession of cannabis with intent to deliver within 1,000 feet of school property, a Class 3 felony (720 ILCS 550/5.2(c) (West 2010)) (count III); and (4) unlawful possession of cannabis (more than 10 grams but not more than 30 grams) with a prior conviction, a Class 4 felony (720 ILCS 550/4(c) (West 2010)) (count IV).

¶ 8 In September 2011, defendant waived a preliminary hearing and the matter was scheduled for a pretrial hearing before Judge Steadman in October 2011. That same month, defense counsel filed a motion to substitute judge, requesting "as a matter of right, to substitute the Honorable Timothy Steadman, who was assigned to this cause on September 7, 2011." (725 ILCS 5/114-5(a) (West 2010)). At the October 2011 pretrial hearing, Judge Steadman allowed defendant's motion for substitution of judge over the State's objection.

¶ 9 On December 1, 2011, defendant, defense counsel, and a new prosecutor (who

was not present at the October 2011 hearing) appeared before Judge Holder White and announced they were ready for trial. Judge Holder White announced the case would be assigned to Judge Steadman and defense counsel replied, "okay."

¶ 10 Later that day, the parties appeared before Judge Steadman and defendant's jury trial commenced. The next day, at the close of evidence, the jury began deliberations. While the jury was deliberating, Judge Steadman reviewed the docket entries associated with the case and discovered he had allowed the motion for substitution of judge as a matter of right on October 3, 2011. Judge Steadman suggested to counsel they seal the verdicts and continue the case until further order to allow them some time to determine how to proceed . Judge Steadman asked the State and defense counsel whether they had any objections to sealing the verdict and they responded they did not. Less than two hours after deliberations began, the bailiff instructed the court the jury had reached a verdict. The jury returned to the courtroom and Judge Steadman announced he was not going to read the verdicts at that time and discharged the jury. With the consent of defense counsel and the State, the verdict forms and instructions were sealed in an envelope and placed in the court file and the case continued until further order.

¶ 11 In December 2011, Judge Holder White convened a status hearing in which defense counsel and the prosecutor who tried the case were present but defendant was not. Judge Holder White asked each party for its position. The State announced its position was the case would need to be retried, whereas defense counsel believed the court should open the verdicts. Because defendant was not present, Judge Holder White continued the hearing so defendant could be present and addressed by the court.

¶ 12 In January 2012, Judge Holder White reconvened the matter. Defendant, defense

counsel, and the prosecutor were present. Defense counsel informed the court defendant was aware she filed the motion for substitution of judge. Counsel acknowledged she had not called the substitution to Judge Holder White's attention when the judge assigned the case to Judge Steadman for trial, nor did she inform Judge Steadman prior to the commencement of the jury trial. The prosecutor also admitted he had not called the substitution to the court's attention.

¶ 13 The prosecutor announced the State was still taking the position a new trial was required. The trial court noted there seemed to be a distinction in the case law between substitution for cause and substitution as a matter or right. Defense counsel agreed and opined as follows:

> "I am adopting the position of the defendant [who would like a new trial]. Do I believe that's the law? No, I don't. But that is his position. And, I guess, the Court will have to make a decision as to what the law is. It is an agreement. [Defendant] wants a new trial and the State wants to give him a new trial.
>
> I don't agree that that's the law, but I have to bow to my defendant's position. Where there is no clear[-]cut answer here where neither one of us have a case that's directly on point and all we can do is argue the—the two sides. I—I think it's going to be a problem no matter what. The whole thing makes me sick. But [defendant] has made it very clear that he believes he should get a new trial because he didn't want to go in front of Judge Steadman and here we are."

The court then asked the prosecutor whether he believed the law required a new trial. The prosecutor responded he had not researched whether a difference between substitution for cause and substitution as a matter of right was supported by the case law. The court asked defendant whether he wanted a new trial and he answered affirmatively. The court gave the parties 14 days to file written arguments in support of their decisions.

¶ 14 In February 2012, Judge Holder White reconvened and asked the parties to state their positions. Defense counsel responded, "I believe the law says that he waived argument and that he received a fair trial. There was never any question about that and that, therefore, the verdict should be opened. That's what I believe the law requires. I know what he says he wants, but I don't think that's—." The State announced it had changed its position to some extent, opining "I don't think that the defendant has a right to ask for—or ask that a mistrial be held at this point owing to the fact that, for the most part, with all deference of counsel, I think the defendant in this case invited that error, and can't use that to then backstop that error." The State opined Judge Steadman acted properly during the trial and believed the verdict should be opened. The court asked defense counsel if she had any further comment and counsel responded as follows:

> "I think it's also important to remember, Judge, that Mr. Lowery acknowledged that he realized he was in front of a Judge that had been substituted and never said a word. So, I think that was an obvious waiver. He submitted himself to jeopardy. We've got a verdict. I think that's the way to go."

The court announced the matter remained under advisement and a written decision would be

issued.

¶ 15 In March 2012, Judge Holder White filed her written decision, which she also tendered to the parties in open court on the same date. She found defendant's participation in the trial before Judge Steadman amounted to a waiver of his motion for substitution of judge and ordered the verdicts unsealed. Defendant was found guilty of unlawful possession of a controlled substance with a prior conviction (count II) and unlawful possession of cannabis with a prior conviction (count IV).

¶ 16 In May 2012, Judge Holder White sentenced defendant to 8 years' imprisonment for unlawful possession of a controlled substance with a prior conviction for the same offense (count II) and ordered him to pay court costs, a $2,000 mandatory assessment, a $2,835 street-value fine, and a $100 crime-laboratory-analysis fee. The court sentenced defendant to a concurrent term of 6 years' imprisonment for unlawful possession of cannabis with a prior conviction for the same offense (count IV) and ordered him to pay a $500 mandatory assessment and a $100 crime-laboratory-analysis fee. The court awarded defendant credit for time served and directed an $885 credit against his fines.

¶ 17 Thereafter, the Macon County circuit clerk imposed additional assessments, including $14.25 for child advocacy, $5 for youth diversion, $10 for medical costs, $99.50 "Nonstandard" assessment, $10 for "Anti-Crime Fund," $536 for violent crime, a lump-sum surcharge of $1,340, a "State Police Ops" of $15, and a "Clerk Op Add-On" of $1.25.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant asserts (1) he was deprived of his fundamental right to poll

the jury; (2) he received ineffective assistance of counsel where defense counsel abandoned her role as defendant's advocate; (3) his six-year extended-term sentence for unlawful possession of cannabis must be vacated; and (4) this court should vacate the fines improperly assessed by the circuit clerk.

¶ 21 A. Right To Poll the Jury

¶ 22 Defendant asserts he was deprived of his fundamental right to poll the jury where the trial court discharged the jury and sealed the verdicts and a different judge unsealed the verdicts and entered judgment three months later, despite defendant's wish to declare a mistrial.

¶ 23 We note defense counsel did not object, and in fact agreed, to the procedure employed in this case. Defendant did not file a posttrial motion preserving this issue for review. However, defendant asserts, "[b]ecause defense counsel in this case usurped an important strategic decision that was reserved exclusively to Mr. Lowery, this Court should conclude that Mr. Lowery neither forfeited the error nor acquiesced to the error in the trial court."

¶ 24 The plain-error doctrine set forth in Illinois Supreme Court Rule 615(a) (Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)) provides a narrow exception to the general rule of forfeiture. *People v. Walker*, 232 Ill. 2d 113, 124, 902 N.E.2d 691, 697 (2009).

> "Under the plain-error doctrine, this court will review forfeited challenges when: (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process,

regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431.

The defendant has the burden of persuasion under both prongs of the plain-error analysis. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). Prior to determining whether plain error occurred, we first determine whether error occurred at all. *Id*. If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied. *People v. Sargent*, 239 Ill. 2d 166, 189-90, 940 N.E.2d 1045, 1059 (2010).

¶ 25 The opportunity to poll jurors after a verdict is returned is a basic tenet of our legal system which requires unanimity among all jurors. *People v. Wheat*, 383 Ill. App. 3d 234, 237, 889 N.E.2d 1195, 1199 (2008); *People v. Rehberger*, 73 Ill. App. 3d 964, 968, 392 N.E.2d 395, 398 (1979); 725 ILCS 5/115-4(o) (West 2010). "Polling the jury safeguards the defendant's right to a verdict that is the product of the free and unhampered deliberations of each juror." *People v. Beasley*, 384 Ill. 3d 1039, 1048, 893 N.E.2d 1032, 1040 (2008). "In Illinois, after a guilty verdict is returned but before it is accepted and recorded, a criminal defendant has an absolute right to poll the jury regarding whether each individual agreed with the pronounced verdict." *Wheat*, 383 Ill. App. 3d at 237, 889 N.E.2d at 1199. However, all that is actually required is an *opportunity* for a defendant to poll the jury, and the right to poll the jury may be waived. *Id*.

¶ 26 Whether an error occurred in this case depends on whether the right to poll the jury is a fundamental decision reserved solely for defendant, or whether it is a right that can be waived by defense counsel. The following five fundamental decisions are reserved solely for defendants: "(1) what plea to enter; (2) whether to waive a jury trial; (3) whether defendant will

testify on his own behalf; *** (4) whether to appeal"; and (5) "whether to submit an instruction on a lesser-included offense at the conclusion of the evidence." *People v. Clendenin*, 238 Ill. 2d 302, 318, 939 N.E.2d 310, 320 (2010) (citing *People v. Ramey*, 152 Ill. 2d 41, 54, 604 N.E.2d 275, 281 (1992), and *People v. Brocksmith*, 162 Ill. 2d 224, 229, 642 N.E.2d 1230, 1232 (1994)). "[A]part from these decisions, which are to be personally made by a defendant, trial counsel has the right to make the ultimate decision with respect to [all other] matters of tactics and strategy ***." *Clendenin* at 319, 939 N.E.2d at 320.

¶ 27 Defendant asserts the right to poll the jury implicates the second fundamental decision reserved for defendants alone, *i.e.*, whether to waive a jury trial. According to him, a defendant's absolute right to poll the jurors is a substantial component of the fundamental right to an impartial jury and having such an opportunity is a personal decision only he may make. We disagree.

¶ 28 We find *People v. McGhee*, 2012 IL App (1st) 093404, 964 N.E.2d 715, instructive. In *McGhee*, the trial court failed to conduct a jury poll despite trial counsel's request to do so. *McGhee*, 2012 IL App (1st) 093404, ¶ 17, 964 N.E.2d 715. The court acknowledged counsel's request, but it discharged the jurors without conducting the poll. *Id*. In his postconviction petition, the defendant asserted appellate counsel was ineffective for failing to raise the issue of the jury poll on direct appeal. *Id*. ¶ 14, 964 N.E.2d 715. Because both parties agreed an error occurred, *i.e.*, the court failed to conduct the poll upon request, the appellate court was charged with determining whether the error rose to the level of plain error. *Id.* ¶ 19, 964 N.E.2d 715. Because the court had previously determined, in the defendant's direct appeal, the evidence was not closely balanced, the defendant's argument could succeed only if the second

prong of the plain-error doctrine was satisfied. *Id*. As a matter of first impression, the court had to determine "whether the trial court's failure to poll the jury on defendant's request is the kind of error that mandates reversal regardless of whether defendant was prejudiced by the error." *Id*. ¶ 21, 964 N.E.2d 715.

¶ 29 The *McGhee* court was guided by our supreme court's decisions in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), and *People v. Glasper*, 234 Ill. 2d 173, 917 N.E.2d 401 (2009). In these cases, the court had to determine whether the failure to question the venire pursuant to the version of Illinois Supreme Court Rule 431(b) in effect at the time was a structural error requiring reversal. In *Glasper*, Rule 431(b) (eff. May 1, 1997) required the trial court to question the venire regarding the four *Zehr* principles (*People v. Zehr*, 103 Ill. 2d 472, 469 N.E.2d 1062 (1984)) only upon request by the defendant, whereas in *Thompson*, Rule 431(b) (eff. May 1, 2007) mandated the trial court question the venire regarding these principles regardless of defendant's request. In both cases, the court determined a trial court's failure to comply with Rule 431(b), although important, was not a structural error requiring reversal because "failure to comply with Rule 431(b) does not necessarily result in a biased jury." (Internal quotation marks omitted.) *McGhee*, 2012 IL App (1st) 093404, ¶ 23, 964 N.E.2d 715.

¶ 30 *McGhee* noted, "rather than being an indispensable part of a fair trial, a defendant's right to a Rule 431(b) inquiry at issue was merely a procedural device promulgated by supreme court rule that aids in the selection of an impartial jury." *Id*. ¶ 25, 964 N.E.2d 715. Similar to the procedural device at issue in *Glasper* and *Thompson*, the *McGhee* court found as follows:

"[T]he requirement that the trial court poll the jury upon request is

> a common-law rule that is designed to help ensure that the jury's verdict is unanimous, but it is not the sole means of ensuring a unanimous verdict. Other procedural requirements exist; for example, the requirement that the jurors individually sign the verdict form. Like questioning the venire under Rule 431(b), polling the jury is merely a procedural device that helps to ensure that the jury's verdict is unanimous, but it is not an indispensable prerequisite to a fair trial.
>
> In light of the supreme court's analysis in *Thompson* and *Glasper*, we must conclude that polling the jury on request, while mandatory, is not so fundamental that the failure to do so affects the fairness of a defendant's trial and challenges the integrity of the judicial process." *Id.* ¶¶ 25-26, 964 N.E.2d 715.

The court noted the second prong of the plain-error doctrine could potentially be satisfied where a defendant presents evidence the verdict was not unanimous; however, defendant failed to present any such evidence. *Id.* ¶ 26, 964 N.E.2d 715.

¶ 31 We agree with *McGhee* that polling the jury is not so fundamental that the failure to do so would challenge the integrity of the judicial process or affect the fairness of a defendant's trial. We hold the decision to poll the jury is a strategic one that may be waived by defense counsel, rather than a fundamental decision reserved solely for a defendant. We find support in two Second District Appellate Court decisions. In *People v. Carter*, 85 Ill. App. 3d 818, 827, 407 N.E.2d 584, 591 (1980), the court found as follows:

> " 'Customarily, before a sealed verdict is returned, there is an agreement of counsel that the jury may return a sealed verdict and separate, and the defendant's counsel waives polling the jury.' [Citation.] Although there is nothing in the record before us indicating that an agreement existed between the State and defense counsel not to poll the jury, we do not find defense counsel's failure to request the jury to be polled is evidence of ineffective assistance of counsel. We view such failure as an exercise of defense counsel's judgment, discretion or trial strategy."

Likewise, in *People v. Hood*, 262 Ill. App. 3d 171, 178, 634 N.E.2d 404, 410 (1994), the court again noted, "Although the defendant is correct that the right to poll the jury is 'substantial' [citation], that right may still be waived [citation]. The waiver of the right to poll the jury does not constitute ineffective assistance of counsel. [Citation.]."

¶ 32 In this case, had defense counsel determined it would be good trial strategy to poll the jury, counsel could have informed Judge Steadman prior to the jury's discharge that she would require its return to open court if it were determined the sealed verdicts should be opened and recorded. Counsel could have informed Judge Holder White she wished the jury to be polled during any of the hearings which took place after the verdict was sealed but prior to its opening. Recalling the jury three months after it was discharged may not have been feasible, but had defense counsel wanted to do so, she could have brought it to the attention of the trial court. Defendant did not raise this issue in a posttrial petition. We find the right to have the opportunity to poll the jury is not a fundamental decision reserved solely for defendant. Therefore, no error

was committed when defense counsel failed to request a jury poll. Defendant has forfeited this issue by failing to preserve it in the trial court proceedings and we need not conduct a plain-error analysis.

¶ 33 B. Ineffective Assistance of Counsel

¶ 34 Next, defendant asserts he received ineffective assistance of counsel where defense counsel abandoned her role as defendant's advocate. Specifically, defendant argues trial counsel was ineffective because she (1) failed to inform the trial court Judge Steadman had been substituted as a matter of right; (2) blamed him for the failure to inform the court of the substitution before his trial commenced; and (3) advocated unsealing the verdict after the jury was discharged against defendant's express wish for a mistrial.

¶ 35 We decline to reach the merits of defendant's argument because this claim is better pursued under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)).

¶ 36 Claims of ineffective assistance of counsel are determined under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at

219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *Clendenin*, 238 Ill. 2d at 317-18, 939 N.E.2d at 319. "We review a defendant's claim of ineffective assistance of counsel in a bifurcated fashion, deferring to the trial court's findings of fact unless they are contrary to the manifest weight of the evidence, but assessing *de novo* the ultimate legal question of whether counsel was ineffective." *People v. Manoharan*, 394 Ill. App. 3d 762, 769, 916 N.E.2d 134, 141 (2009).

¶ 37 "In considering whether counsel's performance was deficient, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' " *People v. Patterson*, 217 Ill. 2d 407, 441, 841 N.E.2d 889, 908-09 (2005) (quoting *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). "Generally, matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel failed to conduct any meaningful adversarial testing." *Patterson*, 217 Ill. 2d at 441, 841 N.E.2d at 909.

¶ 38 This court has previously held where "consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief," where a complete record can be made. *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990); see also *People v. Pelo*, 404 Ill. App. 3d 839, 870-71, 942 N.E.2d 463, 490 (2010).

¶ 39 In this case, the issue of whether defendant's trial counsel was ineffective requires

consideration of matters outside of the record. Trial counsel did not alert Judge Steadman to the fact he had been substituted as a matter of right, resulting in him presiding over defendant's jury trial. Defendant argues counsel offered no strategic explanation for her failure to bring the substitution to Judge Steadman's attention when pressed for an explanation by Judge Holder White, but rather, counsel "simply acknowledged that she had not brought the matter to the court's attention." Our review of the record reveals counsel was not asked to explain her failure to bring this matter to Judge Steadman's attention. Instead, counsel was asked whether she ever advised the court or Judge Steadman of the substitution, to which she responded—without explanation—she had not. Counsel was also asked whether defendant was aware of the motion for substitution, to which she responded he was; however, defendant did not personally acknowledge he was aware of the substitution. Counsel informed the court based on her understanding of the law, defendant had waived any issue regarding the substitution. While counsel informed the court of defendant's wish for a mistrial, she stated she did not believe that was the law and asserted the verdicts should be opened. Counsel's decisions may have been rooted in trial strategy—or they may not have—but based on the record before us, we cannot make that determination.

¶ 40 Because the issue of whether trial counsel was ineffective in this case would be better addressed in a postconviction petition, we decline to consider the merits of defendant's ineffective-assistance claim.

¶ 41 C. Extended-Term Sentence

¶ 42 Next, defendant asserts his six-year extended-term sentence for unlawful possession of cannabis must be vacated because it was imposed on a count that was not the most

serious felony of which he was convicted. Defendant contends this court should remand for a new sentencing hearing on this conviction or, in the alternative, reduce his sentence to one within the permissible range for a non-extended-term Class 4 felony. The State concedes the six-year extended-term sentence was improper but asserts remand is not necessary and urges this court to reduce defendant's sentence on this offense to three years' imprisonment.

¶ 43 We review *de novo* whether a trial court imposed an unauthorized sentence. *People v. Thompson*, 209 Ill. 2d 19, 22, 805 N.E.2d 1200, 1202 (2004). A sentence not authorized by statute is void. *Id*. at 23, 805 N.E.2d at 1203. A void judgment is not subject to forfeiture and may be reviewed at any time. *Id*. at 27, 805 N.E.2d at 1205.

¶ 44 Section 5-8-2 of the Unified Code of Corrections (730 ILCS 5/5-8-2(a) (West 2010)) provides, "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by [Section 5-8-1] for the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in [paragraph (b) of] Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." "[W]hen a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may only be imposed for the conviction within the most serious class ***." *People v. Jordan*, 103 Ill. 2d 192, 206, 469 N.E.2d 569, 575 (1984).

¶ 45 In this case, defendant was convicted of unlawful possession of a controlled substance containing cocaine (a Class I felony) and unlawful possession of cannabis (a Class IV felony due to his prior conviction). Because of defendant's prior conviction for unlawful possession of a controlled substance containing cocaine, the normal sentencing range of 4 to 15 years was enhanced to a maximum possible sentence of 30 years. See 720 ILCS

570/402(a)(2)(A); 570/408(a) (West 2010). The State requested an 11-year prison sentence while defense counsel requested 5 years for the cocaine offense. The trial court sentenced defendant to eight years' imprisonment. Because of defendant's prior conviction for unlawful possession of cannabis (normally a Class A misdemeanor), the sentencing range was enhanced to a Class 4 felony. See 720 ILCS 550/4(c) (West 2010). The State requested a six-year prison sentence while defense counsel requested three years. The trial court sentenced defendant to six years' imprisonment for this offense, which is the maximum extended-term sentence for a Class 4 felony. See 730 ILCS 5-4.5-45(a) (West 2010). Pursuant to section 5-8-1 of the Unified Code of Corrections (730 ILCS 5/5-8-1 (West 2010)), the six-year prison sentence was improper.

¶ 46 Our review of the record indicates the trial court wished to sentence defendant to more than the minimum sentence available for this Class 4 felony. The court pointed to defendant's substantial criminal record that included drug-related offenses, a history of violence, and unlawful possession of a firearm or ammunition. The State requested and defendant was sentenced to six years in prison, which is the maximum extended-term sentence available for a Class 4 felony. Because an extended-term sentence is not available for this conviction, and the evidence indicates the court's wish for a maximum sentence, we remand with directions to modify the written sentencing judgment to reflect a three-year prison sentence. We also note defense counsel requested a three-year prison sentence for this offense at the time of sentencing.

¶ 47 D. Fines Imposed by Circuit Clerk

¶ 48 Defendant asserts this court should vacate the fines improperly assessed by the circuit clerk and remand for imposition of those fines which are mandatory. The State concedes this issue. We accept the State's concession.

¶ 49 We review *de novo* the propriety of the imposition of fines. *Vine Street Clinic v. HealthLink, Inc.*, 222 Ill. 2d 276, 282, 856 N.E.2d 422, 427 (2006). A sentence that does not conform to a statutory requirement is void and may be attacked at any time. *Thompson*, 209 Ill. 2d at 27, 805 N.E.2d at 1205.

¶ 50 At the sentencing hearing, the trial court ordered defendant to pay court costs, a $2,000 mandatory assessment, a $2,835 street-value fine, and a $100 crime-laboratory-analysis fee on the cocaine offense. The court also ordered defendant to pay a $500 mandatory assessment and a $100 crime-laboratory-analysis fee on the cannabis offense. A document entitled "payment status information" with the signature of the clerk listed court costs and fees, including $14.25 for child advocacy, $5 for youth diversion, $10 for medical costs, $99.50 "Nonstandard" assessment, $10 for "Anti-Crime Fund," $536 for violent crime, a lump-sum surcharge of $1,340, a "State Police Ops" of $15, and a "Clerk Op Add-On" of $1.25.

¶ 51 The imposition of a fine is a judicial function beyond the authority of the clerk. *People v. Allen*, 371 Ill. App. 3d 279, 285, 868 N.E.2d 297, 303 (2006). The circuit clerk may only collect judicially imposed fines. *People v. Shaw*, 386 Ill. App. 3d 704, 710, 898 N.E.2d 755, 762 (2008).

¶ 52 In this case, the circuit clerk improperly imposed these fines without authority to do so. We vacate the anti-crime fine outright because this fine may not be imposed where the defendant is sentenced to a term of imprisonment. *People v. Mitchell*, 395 Ill. App. 3d 161, 167, 916 N.E.2d 624, 630 (2009). We vacate the remaining fines imposed by the clerk and remand to the trial court for imposition of those fines that are mandatory.

¶ 53 III. CONCLUSION

¶ 54 We affirm as modified and remand with directions.

¶ 55 Affirmed as modified; cause remanded with directions.