

NOTICE

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2014 IL App (4th) 120712-U

NO. 4-12-0712

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

January 21, 2014
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Macon County
ANTHONY TAYLOR,)	No. 09CF1366
Defendant-Appellant.)	
)	Honorable
)	Lisa Holder White,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Knecht concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court's finding defendant violated his probation was not against the manifest weight of the evidence.
- (2) The circuit clerk improperly imposed financial assessments against defendant, which are vacated and remanded with directions.
- ¶ 2 In June 2012, the trial court found defendant, Anthony Taylor, had resisted a peace officer in violation of his probation. At Taylor's July 2012 sentencing, the court terminated Taylor's probation and resentenced Taylor to three years in prison on the underlying burglary conviction. The record does not contain a judge's order assessing fines or fees, but the circuit clerk assessed several fines against Taylor.
- ¶ 3 On appeal, Taylor argues (1) the State failed to prove he resisted a peace officer by a preponderance of the evidence, and (2) the circuit clerk improperly imposed the financial assessments against Taylor. We affirm in part, vacate in part, and remand with directions.

¶ 4

I. BACKGROUND

¶ 5 In September 2009, the State charged Taylor with burglary (720 ILCS 5/19-1(a) (West 2008)), alleging Taylor entered the Pilot Travel Center with the intent to commit a theft when he attempted to pay for gasoline with a counterfeit traveler's check. In September 2010, Taylor entered into a negotiated plea agreement and the trial court sentenced him to 24 months' probation and ordered him to pay court costs and probation services fees.

¶ 6 In May 2011, the State petitioned to revoke Taylor's probation, alleging Taylor violated his probation by committing a new offense, resisting a peace officer (720 ILCS 5/31-1(a) (West 2010)). In June 2012, the trial court held an evidentiary hearing on the petition. Two witnesses testified at the hearing, Lonny Lewellyn, a patrol officer for the Decatur police department, and Taylor.

¶ 7 Lewellyn testified he was dispatched to Taylor's residence to respond to a complaint about loud music. When Lewellyn arrived, he said "police" and knocked on the door. The music was turned down and Lewellyn heard statements such as "Oh, God" and "Oh, God, please help me." No one opened the door, and Lewellyn felt the incident had turned to a "check the welfare situation" and entered the apartment using the building security officer's master key.

¶ 8 When Lewellyn entered the apartment, he found the door was "barricaded with a trash can and a [two-by-four] that was stuck between the door and the wall behind the door." Lewellyn removed the two-by-four, entered the apartment, and observed Taylor run from the living room to a bedroom. Lewellyn told Taylor to stop, but Taylor continued to run. Lewellyn gave loud commands for Taylor to come out of the bedroom, but Taylor did not and Lewellyn entered the bedroom. Lewellyn found Taylor in a closet attempting to close the door and ordered

Taylor out of the closet, but Taylor refused. Lewellyn told Taylor he was under arrest and pulled him out of the closet as Taylor pulled against him. Lewellyn spun Taylor around, pushed him into a hallway in Taylor's apartment, and secured Taylor in handcuffs.

¶ 9 While in handcuffs, Lewellyn and his backup officer escorted Taylor to the building's common hallway and informed him he was under arrest for resisting police and for disorderly conduct. As Lewellyn escorted Taylor, Taylor pulled his arms away from Lewellyn, turned toward Lewellyn, and "chest bumped" him. Lewellyn described the "chest bump" as Taylor lunging toward Lewellyn, causing Taylor's chest to make contact with Lewellyn. Lewellyn used pepper spray on Taylor, and Taylor fell to the ground. After the pepper spray, Taylor was fairly cooperative.

¶ 10 On cross-examination, Lewellyn explained Taylor seemed to be under the influence of alcohol, describing Taylor as "very intoxicated." On redirect, Lewellyn added Taylor appeared to understand Lewellyn was a police officer and that he (Taylor) was being arrested. Lewellyn also added Taylor told him he was praying because he knew police were outside and he knew he was going to jail for an outstanding warrant. The State rested its case.

¶ 11 Taylor testified he was praying because he had recently lost his mom and was feeling depressed. Taylor testified he did not resist the police but was video recording in his bedroom when the officers entered his apartment. Taylor stated he did not "chastise, bump, or disrespect any police officer" as he was a former correctional officer and has respect for the law. On cross-examination, Taylor stated he turned around to ask Lewellyn why he was being arrested, and Lewellyn pepper sprayed him and slammed him on the floor.

¶ 12 On cross-examination, Taylor testified his version of the events was captured on a videotape he had been recording in his bedroom. When the prosecutor asked if he had the videotape, Taylor explained:

"I had asked my previous attorney, public defender to subpoena the Redwood Apartments, the apartment that it was in, but the videotape that I was videotaping while he was coming in to arrest me, the following week, I got arrested again just for being in the hallway with the videocamera in my hand. That officer took that videotape, my videocamera and erased my mother's funeral that was on it, plus what I had recorded when I was in the bedroom, plus took my battery and hid my [automatic teller machine (ATM)] card so I couldn't bond myself out, but then he dropped the charges against me."

The trial court asked if the State had any rebuttal evidence and the prosecutor answered it did not. The defense rested, and the parties gave short closing arguments.

¶ 13 The trial court concluded "the State [had] sustained its burden of proof," finding Taylor had violated his probation by resisting a peace officer. At the July 2012 sentencing hearing, the court revoked Taylor's probation as unsuccessful and resentenced him to three years in prison followed by a two-year period of mandatory supervised release on the underlying burglary conviction. The court directed the clerk to file a notice of appeal on Taylor's behalf and appointed the office of the Appellate Defender to represent him. The circuit clerk had previously imposed several financial assessments against Taylor, including a \$10 Anti-Crime Fund fine.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, Taylor argues (1) the State failed to establish he committed the offense of resisting a peace officer by a preponderance of the evidence, and (2) certain financial assessments were improperly imposed against him and should be vacated and/or remanded.

¶ 17 A. Revocation of Probation

¶ 18 At a probation revocation proceeding, the State must prove a "violation of previously imposed conditions of probation, not the commission of a culpable offense." *People v. Williams*, 303 Ill. App. 3d 264, 267, 707 N.E.2d 729, 731 (1999). Probation revocation proceedings "are considered noncriminal, and the probationer is entitled to fewer procedural rights than he would receive in a criminal trial." *People v. Goleash*, 311 Ill. App. 3d 949, 955, 726 N.E.2d 194, 198 (2000). As a result, "the State's burden of proof at such a proceeding is preponderance of the evidence." *Williams*, 303 Ill. App. 3d at 267, 707 N.E.2d at 731. On review, we "will not disturb the findings in a proceeding to revoke probation unless they are against the manifest weight of the evidence." *Id.*

¶ 19 The State's petition to revoke Taylor's probation stated Taylor violated a condition of his probation by committing the separate offense of resisting a peace officer. A person commits the offense of resisting a peace officer when he or she "knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of an authorized act within his official capacity." 720 ILCS 5/31-1 (West 2010). Further, "[a] person may not use force to resist an arrest by one whom he knows to be an officer of the law, even if the arrest is unlawful." *People v. Crawford*, 152 Ill. App. 3d 992, 995, 505 N.E.2d 394, 396 (1987).

¶ 20 In this case, Taylor and Officer Lewellyn gave conflicting versions of the events and the trial court had to decide whose testimony was credible. See *Williams*, 303 Ill. App. 3d at 267, 707 N.E.2d at 731 (holding "the trial court, which sits as the trier of fact, has the function of weighing the evidence, assessing the credibility of the witnesses, and drawing reasonable inferences from the testimony presented"). "When the evidence is controverted," as it was here, "[w]e will not substitute our judgment for that of the trial court[.]" *Id.* The trial court could reasonably have believed Lewellyn's testimony rather than Taylor's. According to Lewellyn, Taylor ran from Lewellyn, had to be pulled from the bedroom closet, and "chest-bumped" Lewellyn after he had been handcuffed.

¶ 21 Defendant relies on the Fifth District decision *People v. Flannigan*, 131 Ill. App. 2d 1059, 1063, 267 N.E.2d 739, 742 (1971), where the conduct was deemed to amount to an "insubstantial display of antagonism or belligerence" and did not "constitute [] the offense of resisting a police officer." See *Id.* The court in *Flannigan* held a defendant who did not step immediately from his car, wanted to give the car keys to his girlfriend, argued with the arresting officer, and jerked his hand from the arresting officer did not commit the offense of resisting an officer. *Id.* Here, as testified by Lewellyn, Taylor's conduct went beyond that described in *Flannigan*. See *Id.* Taylor attempted to run from the officer, had to be pulled from a bedroom closet, and physically "chest bumped" Lewellyn after he was handcuffed.

¶ 22 Moreover, in *Crawford*, this court declined to follow *Flannigan*, explaining while a person can "protest and argue," a person "may not impede the arrest by physical action." *Crawford*, 152 Ill. App. 3d at 995, 505 N.E.2d at 396. The defendant's conduct in *Crawford* was sufficient to constitute a physical act impeding an arrest when the officer testified defendant

"attempted to pull away, struggled and caused the officers to use physical force to take him into custody." *Id.* at 394, 505 N.E.2d at 395. Here, Taylor ran from the officer, pulled against the officer when Lewellyn tried to get Taylor out of the closet, and "chest bumped" the officer; all of these actions are physical acts to impede arrest.

¶ 23 Last, defendant argues the State's failure to rebut Taylor's testimony the police destroyed a videotape corroborating his testimony is analogous to the failure to counter evidence a defendant simply cannot pay a financial obligation. We disagree. Defendant relies on *People v. Harder*, 59 Ill. 2d 563, 322 N.E.2d 470 (1975), *People v. Bullard*, 52 Ill. App. 3d 712, 367 N.E.2d 1017 (1977), and *People v. Davis*, 216 Ill. App. 3d 884, 576 N.E.2d 510 (1991), which hold, to revoke probation for willful failure to pay a financial obligation, the State must provide evidence rebutting a defendant's testimony failure to pay was due to circumstances beyond his or her control. However, when willful failure to pay is at issue, undisputed testimony claiming inability caused nonpayment renders the willful element of the infraction entirely unproved. Here, the trial court could have found the State met its burden to show Taylor resisted a police officer based on Lewellyn's testimony alone and could also have found Taylor's statement lacked credibility. Consequently, the State had no affirmative obligation to offer evidence proving Taylor's statement about the videotape false. As the court believed Lewellyn over Taylor, the preponderance-of-the-evidence standard was satisfied.

¶ 24 B. Financial Assessments and Fees

¶ 25 Taylor also argues this court should (1) vacate the \$10 Anti-Crime Fund fine because this fine applies to those sentenced to probation and (2) remand all other fines and

assessments against defendant because they were improperly assessed by the circuit clerk rather than the court. The State concedes error. We accept the State's concession, in part.

¶ 26

1. Anti-Crime Fund Fine

¶ 27

Defendant argues the \$10 Anti-Crime Fund fine (730 ILCS 5/5-6-3(b)(12), (13), 5-6-3.1(c)(12), (13) (West 2010)), which was imposed in this case, is not authorized against a defendant sentenced to prison rather than probation. See *People v. O'Laughlin*, 2012 IL App (4th) 110018, ¶ 16, 898 N.E.2d 755 (vacating the \$10 Anti-Crime Fund fine because it was not applicable to a defendant sentenced to prison). Here, the presentence investigation report prepared for the July 2012 sentencing hearing reflects the Anti-Crime Fund fine was assessed at the time Taylor was sentenced to probation back in 2010. Such a fine is properly assessed on a sentence of probation. Nevertheless, the record shows this fine was not imposed by the trial court at the time defendant was sentenced to probation. (The trial court assessed only costs and a \$25-per-month probation services fee.)

¶ 28

2. Other Fines Assessed By the Circuit Clerk

¶ 29

As "[t]he imposition of a fine is a judicial act," the circuit clerk has no authority to levy fines. *People v. Swank*, 344 Ill. App. 3d 738, 747, 800 N.E.2d 864, 871 (2003). When the circuit clerk imposes a fine without authority, the fine should be vacated and the cause remanded to the trial court for the proper imposition of mandatory fines. *People v. Shaw*, 386 Ill. App. 3d 704, 710, 898 N.E.2d 755, 762 (2008). Here, the record on appeal does not contain a trial judge's order authorizing fines, but multiple fines and assessments were imposed against Taylor. Consequently, we vacate all fines and remand to the trial court for a proper assessment by the court. See *People v. Williams*, 2013 IL App (4th) 120313, appendix A, 991 N.E.2d 914.

Although the Anti-Crime Fund fine could have been imposed initially by the court but was imposed instead by the clerk and is void, it should not be reassessed now that defendant has been sentenced to prison.

¶ 30

III. CONCLUSION

¶ 31 This court (1) affirms the trial court's revocation of probation, (2) vacates fines assessed by the circuit clerk, and (3) remands with directions for the trial court to impose the appropriate mandatory fines, but shall not include the \$10 Anti-Crime Fund fine. As part of this judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2012).

¶ 32 Affirmed in part and vacated in part; cause remanded with directions.