2014 IL App (4th) 121104-U

NO. 4-12-1104

FILED
May 22, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DEHRONE HOBBS, Defendant-Appellant.	))))))))	Appeal from Circuit Court of McLean County No. 08CF1337 Honorable Robert L. Freitag, Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The summary dismissal of defendant's *pro se* postconviction petition is affirmed.

(2) The trial court erred in imposing an extended-term sentence on defendant's Class 3 felony conviction because defendant was also convicted of a Class 2 felony in the same case based on the same course of conduct.

(3) The circuit clerk erred in imposing children's advocacy center and drug court fines.

(4) The trial court is directed to (1) impose (a) a five-year sentence on defendant for his Class 3 felony conviction, (b) the $15 children's advocacy center fine, (c) the $10 drug court fine, (d) the $5 spinal cord injury fine, and (e) the $10 county jail medical fine; (2) reduce defendant's drug-treatment assessment to $1,500; and (3) recalculate defendant's VCVA fine and criminal surcharge fine.

¶ 2 On July 24, 2012, defendant, Dehrone Hobbs, filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2010)).

On October 18, 2012, the trial court summarily dismissed the petition, finding the petition

frivolous and patently without merit. Defendant appeals, arguing his 10-year, extended-term sentence on count II, a Class 3 felony, is void because it is not statutorily authorized. Defendant also argues he is entitled to seven additional days of sentencing credit for time spent in custody prior to sentencing. The State argues this court should vacate certain fines imposed by the circuit clerk and remand for the imposition of certain mandatory fines. We affirm the summary dismissal of defendant's postconviction petition but remand this case to the trial court with directions.

¶ 3 I. BACKGROUND

¶ 4 On December 2, 2008, the State charged defendant by information with three counts of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2008)). On December 11, 2008, a grand jury indicted defendant on these same charges. All three counts were charged as Class 2 felonies. In July 2009, defendant was convicted of count I, which involved methylenedioxymethamphetamine (commonly referred to as MDMA), and count II, which involved clonazepam. The State dismissed the third count against defendant before the trial.

¶ 5 At defendant's bench trial, Bloomington police department Detective Todd McClusky testified he conducted a controlled drug buy on November 19, 2008, from a suspect he knew as "Y," whom he later identified as defendant. Defendant was not arrested that day. On December 1, 2008, McClusky learned through an informant defendant was in custody on other charges. On December 2, 2008, the State charged defendant with offenses related to the November 19, 2008, controlled drug buy. As noted above, the trial court found defendant guilty of counts I and II.

¶ 6 On September 18, 2009, the trial court sentenced defendant to two concurrent 12 year prison terms with two years of mandatory supervised release. Defendant was given credit for time served between December 2, 2008, and September 18, 2009. The court ordered defendant to pay a $120 street-value fine, a $100 drug trauma fund fine, a $100 lab fee, court costs, and a $2,000 drug-treatment assessment. The court stated defendant was eligible for $1,455 in credit against the drug-treatment assessment for the 291 days he spent in custody.

¶ 7 In October 2009, defendant filed a motion to reduce sentence. At the November 2009 hearing on that motion, the trial court noted count I was properly charged as a Class 2 felony but count II should have been classified as a Class 3 felony. As a result, the court vacated the sentence originally imposed on count II and stated defendant was eligible for an extended-term sentence between 2 to 10 years in prison on the charge. The court then sentenced him to 10 years on that count to run concurrently with his other 12-year sentence.

¶ 8 On March 7, 2011, this court affirmed defendant's conviction. *People v. Hobbs*, No. 4-09-0905 (Mar. 7, 2011) (unpublished order pursuant to Supreme Court Rule 23).

¶ 9 On July 24, 2012, defendant filed the *pro se* postconviction petition at issue in this case. On October 18, 2012, the trial court summarily dismissed the petition as frivolous and patently without merit.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 The issues defendant raises on appeal were not included in his *pro se* postconviction petition. Our supreme court in *People v. Jones*, 213 Ill. 2d 498, 505, 821 N.E.2d 1093, 1097 (2004), held any issue not raised in a postconviction petition may not be raised for the first time on appeal from the dismissal of the petition. Our supreme court stated:

> "[N]otwithstanding the fact that this court has only provided for successive petitions as the sole exception to the waiver language of section 122-3, our appellate court has repeatedly overlooked the waiver language of section 122-3 and has addressed claims raised for the first time on appeal for various and sundry reasons. [Citations.] Indeed, the appellate court's insistence on addressing the constitutional questions which arose from the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 * * * (2000), led to scores of opinions in which opposite conclusions were reached." *Id.* at 505-06, 821 N.E.2d at 1097.

The supreme court noted it had the authority to address an issue not raised in a postconviction petition under its supervisory authority. *Id.*, 821 N.E.2d at 1098. However, the supreme court made clear:

> "Our appellate court *** cannot similarly act. As we have repeatedly stressed, the appellate court does not possess the supervisory powers enjoyed by this court [citations] and cannot, therefore, reach postconviction claims not raised in the initial petition." *Id.* at 507, 821 N.E.2d at 1098.

An exception to the general rule stated in *Jones* exists when a defendant alleges his or her sentence—or a portion thereof—is void. *People v. Thompson*, 209 Ill. 2d 19, 23-27, 805 N.E.2d 1200, 1202-05 (2004). "[A] sentence, or portion thereof, that is not authorized by statute is void." *Id.* at 23, 805 N.E.2d at 1203. An issue regarding a void sentence can be raised at any time. *Id.* at 27, 805 N.E.2d at 1204-05.

¶ 13 A. Extended-Term Sentence

¶ 14 Defendant first argues his 10-year extended-term sentence on count II is void because it is not authorized by section 5-8-2(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-2(a) (West 2008)), which states, in relevant part, "[a] judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by [s]ection 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 [s]ection 5-5-3.2 or clause (a)(1)(b) of [s]ection 5-8-1 were found to be present."

¶ 15 Our supreme court has interpreted section 5-8-2(a) of the Unified Code (730 ILCS 5/5-8-2(a) (West 2008)) "to mean that a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only on those offenses that are within the most serious class" when the offenses arose from the same course of conduct. *People v. Bell*, 196 Ill. 2d 343, 350, 751 N.E.2d 1143, 1146-47 (2001). Defendant argues an extended-term sentence was not statutorily authorized on count II of this case because it was a Class 3 felony arising from the same course of conduct and charged in the same case as count I, which was a Class 2 felony. Defendant argues we should exercise our authority under Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) and reduce his sentence on count II to five years in prison, which is the maximum, non-extended-term sentence for a Class 3 felony.

¶ 16 The State concedes the trial court could not lawfully impose an extended-term sentence on defendant for the Class 3 felony conviction that arose from the same course of conduct as his Class 2 felony conviction. 730 ILCS 5/5-8-2(a) (West 2008). The State agrees defendant's sentence on the Class 3 felony should be reduced to the statutory maximum of five years in prison. 730 ILCS 5/5-8-1(a)(6) (West 2008); *Thompson*, 209 Ill. 2d at 27-29, 805

N.E.2d at 1204-06. We accept the State's concession and instruct the trial court to reduce defendant's sentence on the Class 3 offense to 5 years in prison.

¶ 17 B. Sentence Credit

¶ 18 Defendant next argues he is entitled to seven additional days of sentence credit for the period between November 25, 2008, and December 2, 2008. Defendant argues he was arrested for an unrelated offense on November 25, 2008, and remained in custody on that offense when he was charged in this case on December 2, 2008. The charges at issue in this case occurred on November 18, 2008.

¶ 19 Defendant was given sentencing credit for the period between December 2, 2008, and September 18, 2009. However, defendant argues he should have also been given credit for the period between November 25, 2008, and December 1, 2008, because the charges related to his November 25, 2008, arrest were later dropped and this time was not credited to him on any other sentence. 730 ILCS 5/5-8-7(c) (West 2008).

¶ 20 Section 5-8-7(c) of the Unified Code (730 ILCS 5/5-8-7(c) (West 2008)) states, "[a]n offender arrested on one charge and prosecuted on another charge for conduct which occurred prior to his arrest shall be given credit on the *** sentence *** for time spent in custody under the former charge not credited against another sentence." Citing this court's decision in *People v. Cook*, 392 Ill. App. 3d 147, 150-51, 910 N.E.2d 208, 210 (2009) (quoting *People v. Revell*, 372 Ill. App. 3d 981, 993, 868 N.E.2d 318, 328 (2007)), defendant argues he is entitled to credit for the period between November 25, 2008, and December 1, 2008, even though the State did not expressly drop the initial charge and recharge the defendant with another crime.

¶ 21 The State argues defendant is not entitled to these days because of limitations not included in the language of the statute. For example, the State argues defendant is not entitled to the credit in this case because the charges in case No. 08-CF-1317 were still pending when defendant was sentenced in this case and the charges in both cases did not involve the same conduct or the same victim. The State also argues the record does not show the charges of unlawful delivery of a controlled substance in this case replaced the charges of resisting a peace officer and obstructing justice in case No. 08-CF-1317. However, section 5-8-7(c) contains no such requirements, and we will not read those requirements into the statute. See *People v. McChriston*, 2014 IL 115310, ¶ 22.

¶ 22 The State does not contend defendant was not in custody during the period in question as a result of his arrest in case No. 08-CF-1317. Further, at defendant's sentencing hearing, the State noted it had decided it would not be proceeding with the charges stemming from his November 25, 2008, arrest contained in case No. 08-CF-1317 but would present evidence regarding these charges in aggravation in this case. To that end, the State called police officers to testify as to the events surrounding defendant's arrest on November 25. Finally, the record is clear the criminal acts at issue in this case occurred before defendant's arrest in case No. 08-CF-1317.

¶ 23 However, the record is not clear whether defendant received credit for these days in any other case. As defendant states in his brief, he was given credit for 112 days when he pleaded guilty in case No. 08-DT-484. The record does not show what days were counted in that case. As a result, we are not in a position to determine whether defendant should have been awarded credit for these days. See *People v. Caballero,* 228 Ill. 2d 79, 88, 885 N.E.2d 1044, 1049 (2008) ("if *** the basis for granting the application of the defendant [for sentencing

credit] is clear and available from the record, the appellate court may, in the 'interests of an orderly administration of justice,' grant the relief requested"). On remand, defendant may apply to the trial court for this credit.

¶ 24 C. Fines

¶ 25 Although not raised by defendant, the State notes the circuit clerk improperly imposed on defendant a $10 drug court fine and a $15 children's advocacy center fine. According to the State, we should vacate the circuit clerk's imposition of those fines and remand the case for the trial court to reimpose those mandatory fines. See *People v. Chester*, 2014 IL App (4th) 120564, ¶ 32; 55 ILCS 5/5-1101(d-5), (f-5) (West 2008). The State also notes the trial court should impose the following additional mandatory fines: $5 for the spinal cord injury fine (730 ILCS 5/5-9-1.1(c) (West 2008)) and $10 for the county jail medical fine (730 ILCS 125/17 (West 2008)). Defendant agrees with the State. We direct the trial court on remand to impose the $15 children's advocacy center fine, the $10 drug court fine, the $5 spinal cord injury fine; and the $10 county jail medical fine.

¶ 26 In his reply brief, defendant notes his drug-treatment assessment should be reduced from $2,000 to $1,500 because he was only convicted of one Class 2 felony and one Class 3 felony. See 720 ILCS 570/411.2(a) (West 2008). Defendant argues the $2,000 fine represents a void order and must be corrected. See *People v. Hunter*, 358 Ill. App. 3d 1085, 1094, 831 N.E.2d 1192, 1198-99 (2005). We direct the trial court on remand to reduce this fine to $1,500.

¶ 27 On remand, the trial court shall also recalculate the violent crimes victims assistance (VCVA) fine (725 ILCS 240/10(b) (West 2008)) and the criminal surcharge fine (730 ILCS 5/5-9-1(c) (2008)).

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the summary dismissal of defendant's postconviction petition. However, we vacate defendant's extended-term sentence on his Class 3 felony conviction and the $15 children's advocacy center fine and $10 drug court fine. We remand with directions for the trial court to (1) impose the five-year maximum-term sentence for defendant's conviction on count II, the $15 children's advocacy center fine, the $10 drug court fine, the $5 spinal cord injury fine, the $10 county jail medical fine; (2) reduce defendant's drug-treatment assessment to $1,500; and (3) recalculate defendant's VCVA fine and criminal surcharge fine.

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