2017 IL App (4th) 150244-U

NO. 4-15-0244

FILED
July 19, 2017
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
EDWARD JORDAN,	)	No. 13CF1010
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court remanded the cause (1) with directions for the trial court to conduct an examination under *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984); and (2) for an amended sentencing judgment for the proper imposition of fines and fees.

¶ 2 In December 2014, the trial court found defendant, Edward Jordan, guilty of unlawful delivery of a controlled substance within 1000 feet of a church, unlawful possession of a controlled substance, and aggravated fleeing or attempting to elude a peace officer. In February 2015, the court sentenced him to 13 years' imprisonment for unlawful delivery of a controlled substance within 1000 feet of a church, 3 years' imprisonment for unlawful possession of a controlled substance, and 3 years' imprisonment for aggravated fleeing or attempting to elude a peace officer, all to run concurrently. The court also ordered defendant to pay various fines and fees.

¶ 3 On appeal, defendant argues (1) his trial counsel was ineffective for failing to file a motion to suppress 13 recorded phone conversations, (2) the trial court failed to conduct an inquiry into his claims of ineffective assistance of counsel, and (3) the trial court erred in assessing fines and fees. We affirm in part, vacate in part, and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In August 2013, a grand jury indicted defendant on one count of unlawful delivery of a controlled substance within 1000 feet of a church (cocaine) (count I) (720 ILCS 570/407(b) (West 2012)), one count of unlawful possession of a controlled substance with the intent to deliver within 1000 feet of a church (cocaine) (count II) (720 ILCS 570/401(d) (West 2012)), one count of unlawful possession of a controlled substance (cocaine) (count III) (720 ILCS 570/402(c) (West 2012)), and one count of unlawful possession of cannabis (count IV) (720 ILCS 550/4(b) (West 2012)). In May 2014, a grand jury indicted defendant on two counts of aggravated fleeing or attempting to elude a police officer (counts V and VI) (625 ILCS 11-204.1(a)(4) (West 2012)), and one count of failure to stop after having an accident involving personal injury or death (count VII) (625 ILCS 5/11-401(a) (West 2012)). The indictments alleged the offenses occurred during the course of a controlled buy conducted on July 26, 2013, from which defendant fled in a motor vehicle.

¶ 6 In September 2014, defendant's bench trial commenced. At the close of the State's case, the State moved to dismiss counts IV, VI, and VII, and the case proceeded on the remaining four counts. Following closing arguments, the trial court found defendant guilty of counts I, III, and V. The court also ruled count II merged with count I. The court set defendant's sentencing hearing for February 6, 2015.

¶ 7 On December 23, 2014, defense counsel filed a motion for a new trial, alleging the State failed to prove defendant guilty beyond a reasonable doubt and the trial court's findings were against the manifest weight of the evidence.

¶ 8 On December 31, 2014, defendant filed a *pro se* motion for "rehearing or retrial, modification of the judgment or to vacate the judgment." Defendant alleged (1) the evidence was inconsistent as to the description of the person that law enforcement officers saw fleeing from a white Tahoe, (2) the State improperly impeached its own witness, (3) his Fourth amendment rights were violated when law enforcement entered his home before securing a search warrant, and (4) his constitutional rights were violated when law enforcement recorded his conversations with a confidential source without a warrant or probable cause to do so.

¶ 9 On January 20, 2015, the trial court received *pro se* correspondence from defendant. Defendant alleged his bench trial "was mishandled, thrown, and was ineffectively defended by my Public Defender." In support of his allegation, defendant stated defense counsel (1) did not question law enforcement officers about conflicting descriptions of the individual fleeing from a white Tahoe, (2) did not challenge the admissibility of defendant's phone conversations with a confidential source, (3) failed to discuss a trial strategy with defendant, (4) advised defendant he could not win at trial, and (5) refused to put on an entrapment defense. In response to defendant's *pro se* correspondence, the court directed the original correspondence to be placed in the court file and copies provided to the parties.

¶ 10 At defendant's sentencing hearing on February 6, 2015, the trial court first addressed defendant's *pro se* posttrial motion for "rehearing or retrial, modification of the judgment or to vacate the judgment" filed on December 31, 2014. Upon inquiry by the court, defense counsel declined to adopt the motion and thus, pursuant to a local rule, the motion was

stricken by the court. Next, following argument, the trial court denied defendant's motion for a new trial filed by defense counsel on December 23, 2014. The court did not address defendant's *pro se* correspondence filed on January 20, 2015, alleging ineffective assistance of counsel. Thereafter, the court sentenced defendant to concurrent terms of 13 years in prison for count I, 3 years in prison for count III, and 3 years in prison for count V. As previously stated, the court ruled count II merged with count I. In a supplemental sentencing order, the court imposed various fines and fees, including a $150 street-value fine on both counts I and III (for a total street-value fine of $300) and a $3000 drug treatment assessment fee on both counts I and III.

¶ 11 On February 9, 2015, defense counsel filed a motion to reconsider the sentence. The trial court denied the motion following a hearing on March 31, 2015.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 A. Defendant's Ineffective Assistance of Counsel Claims

¶ 15 Defendant first argues his trial counsel was ineffective for failing to file a motion to suppress defendant's phone conversations with a confidential informant. Defendant argues no law enforcement officer involved in the investigation secured judicial authorization to record conversations between defendant and the confidential informant, in violation of section 108A-3 of the Illinois eavesdropping statute (725 ILCS 5/108A-3 (West 2012)). The State argues the audio recordings of conversations between defendant and the confidential source were authorized by federal law during a joint federal and state narcotics investigation, and thus, were admissible even though the recordings may have violated the Illinois eavesdropping statute. Defendant admits a suppression motion would have failed if "both federal and state agents had participated in a joint investigation." Defendant also argues the trial court erred in failing to

conduct an inquiry into his claims of ineffective assistance of counsel as required by *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), including allegations defense counsel (1) did not question law enforcement officers about conflicting descriptions of the individual fleeing from a white Tahoe, (2) did not challenge the admissibility of defendant's phone conversations with a confidential informant (as discussed above), (3) failed to discuss a trial strategy with defendant, (4) advised defendant he could not win at trial, and (5) refused to put on an entrapment defense.

¶ 16 A *Krankel* inquiry is triggered "when a defendant raises a *pro se* posttrial claim of ineffective assistance of trial counsel." *People v. Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. Under *Krankel*, when a defendant raises such a claim, the trial court employs the following procedure to determine whether new counsel should be appointed. First, the court examines the factual basis of the defendant's claim. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. If the court determines the claim lacks merit or pertains only to matters of trial strategy, then the court does not need to appoint new counsel and may deny the *pro se* motion. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. However, if the allegations show possible neglect of the case, the court should appoint new counsel. *Jolly*, 2014 IL 117142, ¶ 29, 25 N.E.3d 1127. In examining the factual basis, the trial court may (1) ask defense counsel to "answer questions and explain the facts and circumstances" relating to the claim; (2) briefly discuss the claim with the defendant; or (3) evaluate the claim based on "its knowledge of defense counsel's performance at trial" as well as "the insufficiency of the defendant's allegations on their face." *People v. Moore*, 207 Ill. 2d 68, 78-79, 797 N.E.2d 631, 638 (2003).

¶ 17 The State concedes the trial court did not conduct any inquiry into defendant's

pro se ineffective assistance of counsel allegations. We accept the State's concession. The trial court was required to conduct a preliminary inquiry into the factual basis of defendant's allegations. See *Moore*, 207 Ill. 2d at 79, 797 N.E.2d at 638. Accordingly, this matter must be remanded to the trial court to conduct the required preliminary examination of defendant's claims. The court should clarify on the record whether this was a joint federal and state narcotics investigation.

¶ 18 B. Assessments

¶ 19 Defendant argues this court should vacate various fines and fees improperly imposed by the trial court. Defendant acknowledges he did not preserve this issue for appeal because he did not challenge the assessments in the trial court. He urges this court, however, to review his assessments under the plain-error doctrine. It is well settled a defendant forfeits a sentencing issue he or she fails to raise in the trial court through both a contemporaneous objection and a written postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue defendant has forfeited the issue, it waives the forfeiture. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13, 48 N.E.3d 290. Here, the State has not argued defendant forfeited his challenges to the assessments. Accordingly, we address the merits of defendant's claims. The propriety of the imposition of fines and fees presents a question of law, which we review *de novo*. *People v. Guja*, 2016 IL App (1st) 140046, ¶ 69, 51 N.E.3d 970.

¶ 20 1. *Drug Treatment Assessment*

¶ 21 Defendant argues, and the State concedes, his drug treatment assessment for unlawful possession of a controlled substance (cocaine) (count III), a Class 4 felony, should have been $500, not $3,000. We accept the State's concession. Section 411.2(a)(4) of the Illinois

Controlled Substances Act provides for a $500 assessment for a Class 4 felony. 720 ILCS 570/411.2(a)(4) (West 2012). Accordingly, we vacate the assessment, and on remand, we direct the trial court to correct the supplemental sentencing order to show a $500 drug treatment assessment fee for count III and also to recalculate defendant's statutory surcharge specific to count III. See 730 ILCS 5/5-9-1(c) (West 2012).

¶ 22 2. *Street-Value Fine*

¶ 23 Defendant next argues the trial court erred in ordering him to pay a $150 street-value fine on count III, claiming no evidence supported the assessment. We agree, and the State concedes.

¶ 24 When a defendant is convicted of possession or delivery of a controlled substance, section 5-9-1.1(a) of the Unified Code of Corrections requires the court to impose a fine of "not less than the full street value" of the controlled substance. 730 ILCS 5/5-9-1.1(a) (West 2012). The statute further provides the street value "shall be determined by the court on the basis of testimony of law enforcement personnel and the defendant as to the amount seized and such testimony as may be required by the court as to the current street value of the cannabis or controlled substance seized." 730 ILCS 5/5-9-1.1(a) (West 2012). The statute requires there to be an evidentiary basis for a street value-fine. *People v. Lewis*, 234 Ill. 2d 32, 46, 912 N.E.2d 1220, 1228 (2009). "The evidentiary basis may be provided by testimony at sentencing, a stipulation to the current value, or reliable evidence presented at a previous stage of the proceedings." *Lewis*, 234 Ill. 2d at 46, 912 N.E.2d at 1228.

¶ 25 In the present case, there is no support in the record for a street-value fine of $150 for defendant's unlawful possession conviction (count III). Accordingly, we must vacate the $150 street-value fine and remand the cause for a hearing to determine the appropriate amount to

impose, as the parties both agree. See *Lewis*, 234 Ill. 2d at 46, 49, 912 N.E.2d at 1229, 1230. Once an appropriate street-value fine is determined, the circuit clerk must recalculate defendant's statutory surcharge specific to count III. See 730 ILCS 5/5-9-1(c) (West 2012).

¶ 26 3. *Document Storage Fee*

¶ 27 Defendant also argues the circuit clerk improperly imposed a $5 document storage fee (705 ILCS 105/27.3c(a) (West 2012)) on each count (I, III, and V) where this court has held the clerk could assess only one document storage fee against a defendant, even where his or her case resulted in multiple convictions. See *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 101, 55 N.E.3d 117. The State argues the circuit clerk assessed a single $15 document storage fee (citing a McLean County Board resolution increasing the document storage fee to $15, effective October 1, 2014). In his reply brief, defendant admits, "[w]hile the State may be correct that this was a single $15 charge, the circuit clerk did not have authority to impose it because it is actually a fine, not a fee." Contrary to defendant's assertion, the document storage assessment is a compensatory fee and not a punitive fine. *People v. Tolliver*, 363 Ill. App. 3d 94, 97, 842 N.E.2d 1173, 1176 (2006); see also *People v. Carter*, 2016 IL App (3d) 140196, ¶ 60, 62 N.E.3d 267 (finding the automation fee and the document storage fee were properly imposed by the circuit clerk). Thus, we do not vacate this fee.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we remand the cause with directions to conduct an initial *Krankel* inquiry; vacate the above-noted improper fines and fees with directions to the McLean County circuit court for an amended sentencing judgment consistent with this order; and affirm the judgment in all other respects. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

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