

NOTICE
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2012 IL App (4th) 110479-U

Filed 8/22/12

NO. 4-11-0479

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 |
| RICKY E. CONDON, |) | No. 10CF362 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Jennifer H. Bauknecht, |
| |) | Judge Presiding. |

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice McCullough concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The sentence of six years' imprisonment for unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) is not an abuse of discretion.

(2) Inasmuch as the sentence fails to specify the amounts of fines as offset, whenever required, by the *per diem* credit in section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), the sentence is indefinite and uncertain, a defect that must be corrected on remand.

(3) The convictions of unlawful use of a weapon (720 ILCS 5/24-1(a)(8) (West 2010)) violate the one-act, one-crime doctrine because those convictions are based on precisely the same physical act as the conviction of unlawful possession of a weapon by a felon.

¶ 2 Defendant, Ricky E. Condon, entered open pleas of guilty to one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), two counts of unlawful use of a weapon (720 ILCS 5/24-1(a)(8) (West 2010)), and two counts of aggravated assault (720 ILCS 5/12-2(a)(1) (West 2010)). The trial court sentenced him to concurrent terms of imprisonment: six

years for unlawful possession of a weapon by a felon and three years for each of the two counts of unlawful use of a weapon. (The court imposed no sentence on the two counts of aggravated assault.) In addition, the court imposed fines. Except for the Trauma Center Fund fine (730 ILCS 5/5-9-1.10 (West 2010)), however, the court did not specify the amounts of the fines, leaving it to the circuit clerk to do so in a subsequently mailed printout.

¶ 3 Defendant appeals on three grounds. First, he argues that six years' imprisonment is too severe a sentence. Second, he argues that the printout by the circuit clerk fails to allow him a *per diem* credit against those listed assessments which, under case law, are fines rather than fees. Third, he argues that his convictions of unlawful use of a weapon violate the one-act, one-crime rule, considering that he also was convicted of unlawful possession of a weapon by a felon.

¶ 4 We find no abuse of discretion in the sentence of six years' imprisonment. We find the sentence to be uncertain and indefinite, however, with regard to the amounts of the fines. Consequently, we vacate the fines and remand this case with directions to reimpose the fines in definite amounts, reduced, whenever required, by the *per diem* credit (and the trial court, rather than the circuit clerk, must determine and specify the net amounts of these fines). Also, we vacate the convictions of unlawful use of a weapon as violating the one-act, one-crime rule—an issue the State concedes.

¶ 5 I. BACKGROUND

¶ 6 A. The Information

¶ 7 The information, filed on December 27, 2010, consisted of five counts, each count charging defendant with committing an offense in Livingston County on December 26, 2010.

¶ 8 Count I charged him with unlawful possession of a weapon by a felon (720 ILCS

5/24-1.1(a) (West 2010)) in that, having previously been convicted of burglary in Iroquois County case No. 05-CF-186, he knowingly possessed on his person a .32 caliber revolver.

¶ 9 Count II charged him with unlawful use of a weapon (720 ILCS 5/24-1(a)(8) (West 2010)) in that while he was in a place licensed to serve liquor, Rick & Anita's Bar in Chatsworth, he knowingly possessed the revolver.

¶ 10 Count III charged him with unlawful use of a weapon (720 ILCS 5/24-1(a)(8) (West 2010)) in that while he was in another place licensed to sell liquor, The Highlander Bar in Chatsworth, he knowingly possessed the revolver.

¶ 11 Count IV charged him with aggravated assault (720 ILCS 5/12-2(a)(1) (West 2010)) in that he knowingly pointed a silver-colored pistol in Steven LaFlamme's face.

¶ 12 Count V charged him with aggravated assault (720 ILCS 5/12-2(a)(1) (West 2010)) in that he "knowingly used a device manufactured and designed to be substantially similar in appearance to a firearm, in that said defendant knowingly pointed a silver-colored object with the appearance of a pistol at the face of Steven LaFlamme."

¶ 13 B. The Guilty Pleas

¶ 14 On February 24, 2011, defendant entered open pleas of guilty to all five counts of the information. After admonishing defendant, the trial court accepted his guilty pleas.

¶ 15 C. The Sentencing Hearing

¶ 16 1. *The Presentence Investigation Report*

¶ 17 a. Defendant's Age

¶ 18 On April 5, 2011, the trial court held a sentencing hearing, in which a presentence investigation report was admitted in evidence. According to the report, defendant was born on

October 11, 1976. Thus, he was 35 years old.

¶ 19 b. His Educational and Vocational Background

¶ 20 Defendant graduated from high school and obtained certifications in heating, ventilation, cooling, and electrical schematics. He had worked as a handyman and as a certified mechanic. He previously was a partner in Paxton Gas and Towing.

¶ 21 c. His Family Circumstances

¶ 22 Defendant was single and had no children. He had been living, however, with his fiancée and had been providing for her five children.

¶ 23 d. The Date of His Arrest

¶ 24 Defendant was arrested on December 26, 2010. He had been in custody ever since.

¶ 25 e. His Previous Convictions

¶ 26 In 1993, as a juvenile, defendant was convicted of theft of property worth more than \$300. This was his only juvenile conviction.

¶ 27 He had quite a few previous convictions as an adult, the vast majority of which were misdemeanors and traffic offenses (and unless we say otherwise, the convictions we list below are misdemeanors or traffic offenses).

¶ 28 In 1994, he was convicted of possession of alcohol by a minor

¶ 29 In 1996, he again was convicted of possession of alcohol by a minor.

¶ 30 In 1997, he was convicted of resisting a peace officer, possession of liquor by a minor in public, and unlawful transportation of alcohol.

¶ 31 In 1999, he was convicted of resisting a peace officer, criminal trespass to a residence, and criminal damage to property in an amount greater than \$300.

¶ 32 In 2000, he was convicted of domestic battery.

¶ 33 In 2001, he was convicted of battery, resisting a peace officer, theft of property worth more than \$300, and possessing a firearm with an expired firearm owner's identification card.

¶ 34 In 2002, he was convicted of driving while his driver's license was revoked.

¶ 35 In 2003, he was convicted of driving under the influence.

¶ 36 In 2004, he was convicted of reckless driving.

¶ 37 In 2005, he was convicted of driving with a revoked driver's license.

¶ 38 In 2006, he was convicted of retail theft of merchandise worth more than \$150. This was a felony case. He was sentenced to probation, but the probation was revoked, and he was resentenced to imprisonment for three years.

¶ 39 In 2007, he was convicted of unlawful possession of a weapon by a felon. This likewise was a felony case. He was sentenced to imprisonment for five years.

¶ 40 In 2009, he was convicted of criminal trespass, aggravated assault of first-aid personnel, and resisting a peace officer. His sentence for resisting a peace officer included "alcohol/drug treatment," presumably as a condition of probation.

¶ 41 The felony conviction of burglary, alleged in count I in the present case, does not appear to be listed in the presentence investigation report. Nor does the report appear to mention Iroquois County case No. 05-CF-186, in which the burglary conviction allegedly occurred. Nevertheless, in the guilty-plea hearing on February 24, 2011, the prosecutor stated, as part of the factual basis for count I: "The state would also prove by way of certified conviction that the defendant does have a previous felony conviction for burglary, that being Case No. 05-CF-186 in Iroquois County." The trial court asked defendant and his defense counsel if they had "any objection

or disagreement with the factual basis that the state ha[d] provided," and they both answered no.

¶ 42 f. Mental Health

¶ 43 Defendant told the probation officer that he began mental-health services at age 15 and that he was " 'on and off' " the services until 2010. He had been treated for depression, post traumatic stress syndrome, and attention deficit hyperactivity disorder. In 2004 or 2005, he was hospitalized for a suicide attempt.

¶ 44 Psychiatrists had prescribed various medications over the years. He was supposed to take Klonopin, Lithium, and Trazadone, but, out of embarrassment, he quit taking the medications about six months before his arrest in this case. He believed that people looked down on him for taking medicine and getting help.

¶ 45 In 1998, a woman whom he was going to marry and who was pregnant with his child died in a car accident. He had been in turmoil ever since.

¶ 46 g. Alcoholism

¶ 47 Defendant told the probation officer that he first tried alcohol at age 13 and that he last drank it on December 26, 2010, the day he was arrested. In fact, each time in his life he was taken to jail, he was drunk. Since he stopped taking medications about six months before his arrest, he had been drinking every day. He consumed half a gallon of vodka a day, preferring that type of liquor because it was odorless and people could not smell it on his breath.

¶ 48 He admitted, now, that he had a problem with alcohol. But " 'it never registered before this arrest.' " He had been evaluated at Iroquois County Mental Health Center, but he always was told that his problem was psychological. " 'I have never been educated on alcohol,' " he explained, " 'or been to alcohol treatment.' "

¶ 49

2. The Testimony of Muhamad Malik

¶ 50

Defendant offered the testimony of Dr. Muhamad Malik as evidence in mitigation. Malik testified he owned a gas station and car business and that defendant, whom he met three years ago through a friend, had worked for him for a year as a mechanic. Malik regarded defendant as a very good worker and as a friend. The work hours had ranged from 2 to 12 hours a day. According to Malik, defendant was the nicest person, and he was very intelligent when he was not drinking. He was neither a criminal nor a user of drugs.

¶ 51

3. Defendant's Statement in Allocution

¶ 52

Speaking in allocution, defendant described how alcohol had consumed him and ruined his life. He told the trial court:

"[I]t's pretty sad when it's taken over my family, my life, everything. I've had the time sitting in county. You really think about your life while this is going crazy now. To have control is one thing; but when it takes over everything, it's nuts.

I have family that's in law enforcement that don't even want nothing to do with me because of my drinking. When I'm not drinking, like Mr. Malik had said, I'm the funniest and nicest guy. I just can't, I don't know the education behind it to stay away. You know what I'm saying? You get, different moods you want to drink; and it's taking over my life.

I would like to say I'm sorry to all my loved ones, friends and family both, for putting them in the position that they are at that they

don't want to be right now around me. Maybe someday but not right now. They know I have a problem, and I have to work it out. I have to take care of it myself, and I hope you'll give me the opportunity to do that."

¶ 53 *4. The Sentence and the Trial Court's Rationale*

¶ 54 a. Imprisonment for Six Years

¶ 55 At the conclusion of the sentencing hearing, the trial court acknowledged that defendant was highly intoxicated when he committed the offenses in the present case and that his intoxication contributed to his bad judgment. The court commended him for acknowledging his problem with alcohol. Nevertheless, in the court's view, defendant's actions to the present date spoke louder than his words. At age 35, he was not a young man. He should have known by now that he needed to address his alcoholism, and over the course of his life, he had plenty of opportunities to do so. In light of his criminal history, the instant incident was not an aberration, and the need for treatment should have occurred to him a long time ago. The court could not ignore the considerable aggravating factors—including a prior conviction of unlawful possession of a weapon by a felon, an offense that he repeated in the present case. A drunk person with a gun was dangerous. The court concluded that defendant posed a very real threat of harm to others.

¶ 56 In view of these considerations, the trial court sentenced defendant to six years' imprisonment on count I (unlawful possession of a weapon by a felon) and three years' imprisonment on counts II and III (unlawful use of a weapon), ordering that these terms of imprisonment run concurrently.

¶ 57 b. Fines and Costs

¶ 58 The trial court told defendant that his sentence would include monetary assessments, some of which would be offset by a *per diem* credit for the time he had spent in presentence custody.

The court told him:

"There are some court costs associated with this including the CAC [(Children's Advocacy Center)] fee, the VCVA [(Violent Crime Victims Assistance Fund)] fee, and the court cost. These would be due within one year of your release from the Illinois Department of Correction[s]. You are entitled to an incarceration credit of up to \$505 which would offset some of the cost and fines associated with this case."

At that point, the prosecutor interjected:

"MR. LUCKMAN: Judge, I apologize for interrupting. I guess I missed one of the statutes. There's the 24-1.1 which is count 1 as one of the 5-9-1.10. That's the \$100 weapons fine.

THE COURT: All right. And the State did ask for an additional fine. I am not going to impose the discretionary fine based upon everything else in the case. So what's the short name for that?

MR. LUCKMAN: It's the, if you look on the, it's the one on our standard for probation cases order it's the Section 5-9-1.10 special weapons fine. I haven't seen the, checked the statute lately; but I don't think there have been any changes after the first of the year.

THE COURT: All right. So in addition I will impose that

fine."

Also, the trial court told defendant that it would impose a public defender assessment in the amount of \$200.

¶ 59 At the bottom of the sentencing order, on the blank lines after the preprinted language "IT IS ORDERED that," the trial court wrote: "VCVA / Ct. costs / CAC / P.D. Assessment \$200 / \$100 Spec. Weapons fine. [I]ncarceration credits of up to \$505. All due within 12 mos of [defendant's] release from DOC."

¶ 60 Subsequently, the circuit clerk mailed defendant the following bill:

| | |
|--------------------|---------|
| "Clerk | 80.00 |
| State's Atty | 40.00 |
| Sheriff | 10.00 |
| Court | 50.00 |
| Automation | 5.00 |
| Violent Crime | 12.00 |
| Judicial Security | 25.00 |
| Public Defender | 200.00 |
| Document Storage | 3.00 |
| Trauma Center | 100.00 |
| Child Advocacy Fee | 20.00 |
| State Police Ops | 5.00 |
| Total | 550.00" |

The bill says nothing about monetary credit for time served.

¶ 61 II. ANALYSIS

¶ 62 A. The Severity of Six Years' Imprisonment

¶ 63 Defendant argues that, "[g]iven the mitigation in this case due to [his] mental deficits along with his alcohol problems, his work history and his remorsefulness, the six years' incarceration cannot be justified by either the nature of the offenses or [his] criminal history."

¶ 64 Actually, defendant's criminal history was not trivial. He had three previous felony

convictions, all in Iroquois County: burglary in case No. 05-CF-186, retail theft in case No. 06-CF-134, and unlawful possession of a weapon by a felon in case No. 07-CF-191. Committing the same offense again—unlawful possession of a weapon by a felon—after being convicted of it and punished for it once arguably is indicative of indifference that can be penetrated, if at all, only by a strong and emphatic response. See *People v. Visor*, 313 Ill. App. 3d 567, 574 (2000) (trial court could have considered, as an aggravating factor, "the defendant's repeated history of speeding and violent behavior while under the influence of alcohol"). If one commits a felony again, some three years after being sentenced for that same felony, the first penalty evidently was so weak as to make no lasting impression, and therefore the second penalty arguably should be more robust. Defendant has a tendency to repeat offenses, as his numerous misdemeanor convictions especially demonstrate (e.g., two convictions of theft, five convictions of resisting a peace officer, two convictions of criminal trespass, and two convictions of battery). When determining a sentence, the trial court was supposed to take into account defendant's character (see *People v. Somers*, 2012 IL App (4th) 110180, ¶ 19), and so many repeated offenses could be indicative of a lawless character.

¶ 65 Granted, defendant appears to be addicted to alcohol, and by his own account, he suffers from unmedicated psychological disorders, and these conditions could deteriorate his judgment. Uncontrolled addiction to alcohol, however, could be considered an aggravating factor if it leads to criminal conduct (*People v. Ward*, 187 Ill. 2d 249, 261 (1999))—danger to society does not become more tolerable for being caused by alcohol abuse—and as for his psychological disorders, defendant chose to stop taking medications for the rather superficial reason that he did not want people looking down on him. Besides, it is unclear how alcoholism, depression, post traumatic stress syndrome, or attention deficit hyperactivity disorder caused him to acquire a pistol that he

knew—knew quite vividly from a previous criminal case— that it was a felony for him to possess.

¶ 66 So, we agree with the trial court that there really was no excuse for defendant's acquiring a pistol and pointing it in someone's face. He has had ample opportunity and numerous occasions, over the years, to address his alcoholism, and his eleventh-hour epiphany about his need for treatment would not necessarily inspire confidence. Given his criminal history, six years' imprisonment is not an unreasonable sentence within the statutory range of 2 to 10 years' imprisonment (see 720 ILCS 5/24-1.1(e) (West 2010)). We assume the trial court took into account his work history and his expressions of remorse. See *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998). Hence, we find no abuse of discretion in the sentence of six years' imprisonment. See *id.*

¶ 67 *B. Per Diem Credit*

¶ 68 When orally pronouncing the sentence, the trial court told defendant: "You are entitled to incarceration credits of up to \$505 which would offset some of the costs and fines associated with this case." Likewise, the sentencing order, signed by the judge, says: "[I]ncarceration credits up to \$505." Nevertheless, the printout from the circuit clerk says nothing about incarceration credit, and for that reason (among the other stated reasons), defendant appeals.

¶ 69 In the eyes of the law, the trial court's oral pronouncement of the sentence trumps the circuit clerk's printout. It is the oral pronouncement of the judge that is the judgment of court. *People v. Williams*, 97 Ill. 2d 252, 310 (1983); *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). The printout is merely the circuit clerk's assertion of what defendant owes, and inasmuch as it conflicts with the court's oral pronouncement that defendant has \$505 of presentence credit, the oral pronouncement controls. See *id.*

¶ 70 When pronouncing a sentence, though, is it enough merely to state that the defendant

is entitled to a *per diem* credit of some amount, say, \$505? The problem with simply announcing a lump-sum *per diem* credit is that further analysis is required, on the part of the defendant and the circuit clerk, to determine which particular monetary assessments should be reduced by the *per diem* credit. A sentence must be "definite and certain" (*People v. Montana*, 380 Ill. 596, 608 (1942))—so definite and certain that no construction is necessary to ascertain its meaning (*People v. Dennison*, 399 Ill. 484, 485-86 (1948); *People v. Willis*, 235 Ill. App. 3d 1060, 1075 (1992)). The specific meaning of the judgment must be evident from its language alone (*Dennison*, 399 Ill. at 485-86), making it "unnecessary for anyone to try to figure out what the sentencing judge had in mind when imposing sentence" (*People v. Davis*, 125 Ill. App. 3d 568, 569 (1984)). If a sentence is so vague or nonspecific as to invite legal analysis by a ministerial officer, the ministerial officer could end up dictating the content of the sentence, such as the amount of fines. See *People v. Hollingsworth*, 89 Ill. 2d 466, 468 (1982).

¶ 71 A fine—and therefore the amount of the fine—is part of the sentence. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 96. The *per diem* credit reduces the amount of fines as opposed to fees. *Id.*, ¶ 99. "Any person incarcerated on a bailable offense who does not supply bail and against whom a *fine* is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of defendant." (Emphasis added.) 725 ILCS 5/110-14(a) (West 2010). If, when announcing the sentence, the trial court states a lump-sum *per diem* credit and leaves it at that, someone then has to decide the legal question of which of the various assessments are fees and which are fines subject to being offset by the *per diem* credit. Consequently, someone other than the court would decide the amounts of fines—or, more probably, the defendant and the circuit clerk would get into a dispute over the amounts of the fines.

¶ 72 According to case law, some of the assessments in this case are fines. For example, the Children's Advocacy Center charge is a fine (55 ILCS 5/5-1101(F-5) (West 2010); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009)) as is the Trauma Center Fund charge (730 ILCS 5/5-9-1.10 (West 2010); *People v. Lee*, 379 Ill. App. 3d 533, 541 (2008)), which the prosecutor and the trial court called a "special weapons fine." The only fine, however, for which the trial court itself gave an amount was the Trauma Center Fund fine (the "special weapons fine") of \$100. Otherwise, the sentencing order merely says "VCVA" (Violent Crime Victims Assistance Fund (725 ILCS 240/10(b) (West 2010)) and "CAC" (Children's Advocacy Center fine), without specifying the amounts. So, we vacate all the fines in this case on the ground of their indefiniteness, and we remand this case with directions to specify each of the fines, as distinct from the fees, along with the amount of each fine as reduced, if statutory law so provides, by the *per diem* credit in section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)). Again, because fines are punishment and are part of the sentence, this is something the court itself must do, not the circuit clerk. *People v. Evangelista*, 393 Ill. App. 3d 395, 401 (2009).

¶ 73 C. The One-Act, One-Crime Doctrine

¶ 74 Defendant contends that, pursuant to the one-act, one-crime doctrine, counts II and III, charging unlawful use of a weapon, should merge into count I, charging unlawful possession of a weapon by a felon, because the three counts "are based on precisely the same physical act": possession of the .32 caliber revolver. *People v. Miller*, 238 Ill. 2d 161, 165 (2010). The State agrees with defendant, and in our *de novo* review (*People v. Mimes*, 2011 IL App (1st) 082747, ¶ 45), so do we. Therefore, we vacate the convictions and sentences on counts II and III and remand this case with directions to issue an amended sentencing order reflecting the change.

¶ 75

III. CONCLUSION

¶ 76 For the foregoing reasons, we affirm the trial court's judgment in part and vacate it in part and remand this case with directions. We affirm the conviction and sentence on count I, but we vacate the convictions on counts II and III, and we vacate the fines. Also, we remand this case with directions to (1) issue an amended sentencing order reflecting the vacation of counts I and II and (2) judicially reimpose fines in definite amounts, as offset by the monetary credit in section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) inasmuch as statutory law requires the offset. We award the State \$50 in costs.

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