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2013 IL App (3d) 110166-U

Order filed March 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0166
)	Circuit No. 10-CF-840
SIDNEY JONES,)	
)	Honorable
Defendant-Appellant.)	Carla Alessio-Policandriotes,
)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Holdridge concurred in the judgment of the court.
Presiding Justice Wright specially concurring in part and dissenting in part.

ORDER

¶ 1 *Held:* (1) Defendant has not shown that the trial court relied on an improper factor. (2) Defendant's extended-term sentence for burglary is reduced to the maximum nonextended-term sentence. (3) Defendant's fines are reduced to reflect appropriate modifications and credits.

¶ 2 Following a jury trial, defendant, Sidney Jones, was convicted of two counts of residential burglary (720 ILCS 5/19-3(a) (West 2010)) and one count of burglary of a motor vehicle (720 ILCS 5/19-1(a) (West 2010)). The trial court sentenced defendant to concurrent prison terms of

15 years for each residential burglary conviction and an extended-term sentence of 10 years for burglary of a motor vehicle. Defendant appeals, arguing that: (1) the cause should be remanded for a new sentencing hearing because the trial court relied upon an improper factor when fashioning the sentences; (2) the extended-term sentence for burglary should be reduced because it was a less serious offense than residential burglary; and (3) there should be a reduction in the victims' fund fine and defendant should be able to apply a credit towards other fines. He does not challenge the convictions. We conclude that remand for resentencing is not necessary, defendant's extended-term sentence for burglary should be reduced, and the fines should be modified.

¶ 3

FACTS

¶ 4 On September 16, 2010, the State filed a superseding indictment charging defendant with two counts of residential burglary (720 ILCS 5/19-3(a) (West 2010)) and one count of burglary of a motor vehicle (720 ILCS 5/19-1(a) (West 2010)). At trial on these charges, evidence established that on the night of April 23, 2010, defendant was escorted out of a club called Maneuvers by Thor Batchelor, who was working the door. Batchelor later noticed broken glass in the alley behind the club. After receiving a telephone call from an employee, Robert Lippert, that defendant had broken into Lippert's apartment, Batchelor chased defendant until he was apprehended by the police.

¶ 5 Testimony established defendant had broken into Lippert's bedroom, where he was discovered by Robert Griffin, Lippert's roommate. Upon inspection, it was discovered that the bedroom window was open and the blinds were twisted. Other evidence established that defendant broke into another apartment located behind Maneuvers rented by Brian Phillips.

Upon returning home from a White Sox game, Phillips discovered the lights were on in his house, a torn screen was flapping in the window, and his front door was open. Several items from his home were removed and located outside the apartment. Finally, evidence also showed that a minivan owned by Maria Escutia and parked near Maneuvers on April 23 was broken into, and a DVD player and camera were missing. When defendant was apprehended, police found Escutia's DVD player and camera, as well as a pair of scissors owned by Phillips, on defendant's person.

¶ 6 At the conclusion of the trial, the jury found defendant guilty on all three counts. At the sentencing hearing, the trial court reviewed the facts of the case. The court then stated:

"Quite frankly, I think Mr. Jones is lucky he picked the right home that night, otherwise he'd have a bullet through his head if he picked the wrong one, which would have been completely justified by the home owner. The State could have charged home invasion on this case, going into a residence to commit a theft when he knows people are on the inside."

After stating that the court had considered the factors in mitigation and aggravation, the court sentenced defendant to 15 years in the Department of Corrections on each of his residential burglary convictions and an extended-term sentence of 10 years on his burglary conviction. All sentences were set to run concurrently. The court also assessed a \$452 fine, \$72 victims' fund fine, \$15 drug court fine, and \$30 child advocacy center fine. Defendant appeals.

¶ 7

ANALYSIS

¶ 8

I.

¶ 9 First, defendant argues that the cause should be remanded for a new sentencing hearing

because the trial court relied upon an improper factor when fashioning its sentence. Initially, we note that the State contends that defendant has waived review of the issue because he failed to object during sentencing. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). However, in *People v. Martin*, 119 Ill. 2d 453 (1988), our supreme court held that when a trial court considers an improper factor, it is not necessary for counsel to interrupt the judge while he is explaining the sentence and point out the error in order to raise the issue on appeal. Thus, we conclude that defendant has not waived review of this issue. See *Id.*

¶ 10 While a trial court is given great deference in pronouncing a sentence, it may not consider an improper factor. *People v. Reed*, 376 Ill. App. 3d 121 (2007). Consideration of an improper factor in aggravation affects the defendant's fundamental right to liberty and will result in a remand for resentencing, except in circumstances where the factor is an insignificant element of the sentence. *Id.* In determining the correctness of a sentence, the reviewing court should not focus on a few words or statements made by the trial court, but must consider the record as a whole. *Id.* Thus, to obtain a remand for resentencing, a defendant must show that the trial court not only mentioned an improper factor but actually relied upon it in fashioning its sentence. *Id.* An isolated remark made in passing, even though improper, does not necessarily require a remand. *Id.*

¶ 11 In this case, defendant claims it was improper for the trial court to state, while pronouncing its sentence, that he could have been charged with home invasion. During the sentencing hearing, the court told defendant that he was "lucky" that he was not shot after breaking into a residence. Immediately thereafter, the court said that the State could have charged defendant with home invasion. Based on our review of the record, we conclude that it

was improper for the trial court to mention a possible home invasion charge as defendant had not been convicted of that offense. See *People v. Hill*, 14 Ill. App. 3d 20 (1973). However, we find nothing in the record to show that the trial court relied upon this supposition in fashioning defendant's sentence. Instead, it appears that the court mentioned the possible charge in an effort to inform defendant that the situation could have been much worse. Therefore, because we find that defendant has done no more than show that the trial court mentioned an improper factor, we do not believe that remand for resentencing is appropriate.

¶ 12

II.

¶ 13 Next defendant argues that his extended-term sentence for burglary, a Class 2 felony, should be reduced to the maximum nonextended term because burglary was a less serious offense than residential burglary, a Class 1 felony. Section 5-8-2(a) of the Unified Code of Corrections states that:

"A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth in Section 5-5-3.2 or clause (a)(1)(b) of Section 5-8-1 were found to be present." 730 ILCS 5/5-8-2(a) (West 2010).

¶ 14 In *People v. Jordan*, 103 Ill. 2d 192 (1984), our supreme court interpreted the above language to mean that a defendant convicted of multiple offenses may be sentenced to an extended-term sentence only on those offenses within the most serious class. However, an exception to that rule has emerged that allows the imposition of an extended term on a lower class of offenses if the offenses are separately charged and arise from unrelated courses of

conduct. *People v. Coleman*, 166 Ill. 2d 247 (1995).

¶ 15 In this case, it is undisputed that the trial court sentenced defendant to an extended term for an offense not within the most serious class. The State, however, argues that the exception applies because the offenses were separately charged and arose from unrelated courses of conduct. We disagree. Unlike in *Coleman*, the offenses here arose from a related course of conduct and were charged together in an indictment issued on September 16, 2010. Indeed, the State made this very argument in successfully resisting defendant's motion to sever. Consequently, the exception found in *Coleman* does not apply in this case. Therefore, the trial court erred in sentencing defendant to an extended term for burglary, and we reduce defendant's sentence to seven years, the maximum nonextended term available for a Class 2 felony. See 730 ILCS 5/5-4.5-35(a) (West 2010).

¶ 16

III.

¶ 17 Finally, defendant requests that we adjust certain fines assessed against him. First, he argues that the victims' fund fine should be reduced from \$72 to \$48. That fine is controlled by section 10 of the Violent Crime Assistance Fund Act. 725 ILCS 240/10(b) (West 2010) According to that section, if another fine is imposed, a penalty of \$4 for every \$40, or fraction thereof, of the fine imposed shall be collected from defendant. *Id.* In this case, defendant was assessed a \$452 fine. Therefore, we hold that defendant's victims' fund fine should be \$48.

¶ 18 Second, defendant claims that he is entitled to a \$5 per day credit against the: (1) \$452 fine assessed at sentencing; (2) \$15 drug court fine; and (3) \$30 child advocacy center fine. Pursuant to section 110-14 of the Code of Criminal Procedure of 1963, a defendant who is assessed a fine is allowed a credit of \$5 for each day spent in custody on a bailable offense for

which he did not post bail. 725 ILCS 5/110-14 (West 2010). Here, defendant spent 305 days in pretrial custody and is thus entitled to a possible credit of up to \$1,525. The State concedes the issue, and we agree with its concession. Defendant is entitled to apply the credit toward the \$452 fine, \$15 drug court fine, and \$30 child advocacy center fine, thereby eliminating those assessments.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Will County is affirmed in part, reversed in part, and modified.

¶ 21 Affirmed in part and reversed in part as modified.

¶ 22 PRESIDING JUSTICE WRIGHT, specially concurring in part and dissenting in part.

¶ 23 I agree with the majority regarding the first issue. I write separately because I believe the extended term sentence was proper and defendant has waived the issue of his improperly calculated fines.

¶ 24 The majority decides the trial court erred by sentencing defendant to an extended term sentence of 10 years for burglary, a Class 2 felony, after concluding the different offenses in this case arose from a related course of conduct. I disagree with this conclusion.

¶ 25 In *People v. Bell*, 196 Ill. 2d 343, 351 (2001), our supreme court held that when determining whether a defendant's actions constituted an "unrelated course of conduct" for purposes of imposing an extended-term sentence, the question to be resolved by the court is whether there was a "substantial change in the nature of [defendant's] criminal objective." If defendant's objective remained the same as he committed various offenses, then an extended term sentence is improper. *Id.* at 355.

¶ 26 In this case, defendant was charged with residential burglary for entering the apartments of Lippert and Phillips and charged with burglary for unlawfully entering Escutia's minivan. It is my view that there was a substantial change in the nature of defendant's criminal objective after defendant burglarized Phillips's residence, when he took on a completely new endeavor, *i.e.*, unlawfully entering Escutia's minivan. In other words, I view these offenses as unrelated where a different offense occurred at a different location to different victims.

¶ 27 The majority relies upon the fact that, during defendant's motion to sever, the State argued that defendant's offenses arose from a related course of conduct. However, I respectfully note that a motion to sever and the propriety of an extended term sentence raise separate questions of law. When considering whether to grant a motion to sever, the court must consider the prejudice to defendant caused by the joinder of multiple charges. 725 ILCS 5/114-8 (West 2010). In contrast, as detailed above, the only issue to be decided when determining whether a court may impose an extended term sentence is whether there was a substantial change in defendant's objective between offenses. Accordingly, I take no issue with the State arguing a different position on appeal, and I would affirm defendant's sentence.

¶ 28 Regarding the issue of sentencing credit, the State alleges the trial court's error in the calculation and assessment of the Crime Victims' Assistance Fund fee resulted in a voidable sentencing order, rather than a void order. While there is a defensible argument that any sentencing order containing a fine contrary to statute results in a void order, *People v. Arna*, 168 Ill. 2d 107, 113 (1995), I note defendant does not contend on appeal that the sentencing order in this case is void. Absent such a contention, I would conclude that the issue of whether the sentence is void or sentencing error is present in this record has been waived. Ill. S. Ct. R.

341(h)(7) (eff. July 1, 2008); Ill. S. Ct. R. 612(I) (eff. Sept 1, 2006).

¶ 29 For these reasons, I specially concur in part and dissent in part.