2013 IL App (3d) 120177-U

Order filed November 13, 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 9th Judicial Circuit,
	)	Knox County, Illinois
Plaintiff-Appellee,	)	
	)	
v.	)	Appeal No. 3-12-0177
	)	Circuit No. 11-CF-367
CARLTON C. MOREN,	)	
	)	Honorable Paul L. Mangieri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: The State presented evidence sufficient to prove defendant guilty of violation of an order of protection beyond a reasonable doubt. The trial court erred by failing to conduct the proper inquiry into defendant's *pro se* posttrial allegation of ineffective assistance of counsel.

¶ 2 Following a trial in the Knox County circuit court, a jury found defendant, Carlton Moren, guilty of unlawful violation of an order of protection. The trial court sentenced defendant

to three years in the Illinois Department of Corrections.

¶ 3 Defendant subsequently filed a motion to reconsider sentence, alleging his sentence was excessive. The trial court denied the motion.

¶ 4 Defendant appeals, claiming that the State failed to prove beyond a reasonable doubt that defendant had been served with the plenary order of protection, therefore warranting reversal of his conviction. Defendant further claims that the trial court erred in failing to conduct an inquiry into his *pro se* posttrial claims of ineffective assistance of counsel.

¶ 5 We affirm in part and remand for further proceedings.

¶ 6 BACKGROUND

¶ 7 An information charged defendant, Carlton Moren, with unlawful violation of an order of protection, a Class 4 felony. The information alleged that defendant violated the order of protection by coming within 500 feet of the protected person, Summer Johnson, in violation of section 12-30 of the Criminal Code of 1961 (the Code) (720 ILCS 5/12-30 (West 2010)) (now renumbered at 720 ILCS 5/12-3.4 (eff. July 1, 2011).

¶ 8 A public defender was appointed on defendant's behalf. The matter proceeded to jury trial on November 21, 2011.

¶ 9 Directly following opening statements, the State requested that the court take judicial notice of No. 2010-OP-268, the Knox County case in which the plenary order of protection was entered against the defendant on December 1, 2010. That order prohibited defendant from coming within 500 feet of Summer Johnson, the mother of defendant's child. The order was effective for two years, or until December 1, 2012. In its request, the State informed the court, in

the presence of the jury, that case No. 2010-OP-268 also showed that defendant had been served with the order of protection by the Knox County sheriff on January 12, 2011.

¶ 10 The trial court then admitted State's exhibit A and took judicial notice of Knox County case No. 2010-OP-268 without objection. The court addressed the jury, stating, "[l]adies and gentleman, what that means is that by way of documented evidence without objection from [defendant] the court has taken notice that in particular case Knox County 2010-OP-268 an order of protection was entered against Mr. Moren. One of the conditions of that order of protection was that he should stay 500 feet away from a Summer Johnson. Alright. You may consider that for that limited purpose only."

¶ 11 The State called Officer Jack Sperry of the Galesburg police department as its first witness. Officer Sperry testified that after receiving a call about a possible order of protection violation, he located the defendant approximately eight blocks from Johnson's residence. He and his colleague, Officer Robert Nichols, arrested the defendant.

¶ 12 Summer Johnson testified that she obtained a protective order against defendant in "December maybe" of 2010, and that order was still in effect in August of 2011. Johnson stated that defendant came to her home and started yelling at her. She then left her apartment to go to a neighbor's home to call the police. Defense counsel attempted to question Johnson about previous occasions where Johnson had allowed and/or invited defendant within 500 feet of her. The State objected; the trial court sustained the objection on relevancy grounds.

¶ 13 The State rested following Johnson's testimony. Defense counsel moved for a directed verdict of not guilty, arguing that the State had not shown that defendant had been given notice of

the order of protection. The State asserted that it had proved the notice requirement when it offered Knox County case No. 2010-OP-268, which showed that the Knox County sheriff personally served defendant with a copy of the plenary order of protection on January 12, 2011. Defendant countered that the State had "offered an exhibit with a certified copy of an order of protection but there's no proof that the defendant received knowledge or received notice of that ***."

¶ 14 Outside the presence of the jury, the trial court further addressed defendant's motion for a directed verdict, stating, "Clearly, [the State] did make the request that the Court take judicial notice not only of the entry of a plenary order of protection in case No. 2010-OP-268, but specifically that the defendant was served with the order of protection on January 12th of 2011. In looking at 10-OP-268, there is, in fact, a return of service from the Knox County Sheriff that indicates that the defendant, Mr. Moren, was personally served on January 12th of 2011. In addition to that, the court would also note that State's exhibit A that was admitted, again without objection, does contain within it the following specific findings relative to parties present: that the respondent has been served with notice pursuant to statute at the time the order was entered." The trial court found that the State made a *prima facie* case and denied defendant's motion for a directed verdict.

¶ 15 The defense rested and the case was handed over to the jury for deliberations. The jury indicated that it could not reach a unanimous verdict, and the trial court responded with the first paragraph of a *Prim* instruction. The jury then reached a unanimous verdict, finding defendant guilty of unlawful violation of an order of protection.

¶ 16 Defendant did not file a motion for new trial following the verdict. Defendant did, however, file a *pro se* motion to dismiss, alleging Summer Johnson lied at trial, that she and defendant had an ongoing relationship during the time the protective order was in effect, and that Johnson's lies were directly tied to the Department of Children and Family Services' (DCFS) involvement with their minor child. The trial court sent defendant, his court-appointed public defender, and the State's Attorney a letter enclosing defendant's correspondence and advising that such *ex parte* communications could not be considered. The court placed defendant's letter in the file so that the communication would be a matter of record.

¶ 17 The matter proceeded to sentencing, where defendant questioned whether the presentence investigation correctly reflected past convictions. The record reflects a lengthy criminal record; defendant was convicted of two previous Class 4 felonies in 2003 and 2009, both for violations of orders of protection.

¶ 18 Defendant called Summer Johnson to testify to mitigating factors. Johnson testified that she did not want defendant to go to prison and that she had not wanted to testify at his trial.

¶ 19 The State requested an extended-term sentence of six years, citing defendant's significant criminal history involving domestic violence and that his conduct in this case threatened serious harm.

¶ 20 The trial court dismissed the State's argument that defendant's conduct threatened serious harm, but acknowledged that imprisonment was necessary to deter defendant's conduct and protect the public. The trial court imposed a three year sentence on defendant, along with four years of mandatory supervised release as required pursuant to section 5-8-1(d)(6) of the Unified

Code of Corrections (730 ILCS 5/5-8-1(d)(6) (West 2010)).

¶ 21 Following sentencing, defendant, again, sent a letter to the court claiming that Johnson testified against him because the State had threatened to terminate her parental rights. The court responded in the same fashion as it had to defendant's first *ex parte* communication. One week later, defendant sent another letter, this time alleging that his trial counsel had been ineffective. Specifically, he alleged that his attorney had not told him he was eligible for an extended-term sentence based on his prior convictions, and that counsel did not properly inquire into defendant's concerns regarding Summer Johnson's testimony. The trial court, again, placed the correspondence in the file.

¶ 22 Defense counsel then filed a motion to reconsider sentence, asserting that defendant's sentence was excessive. The trial court denied defendant's motion after a brief hearing. This timely appeal followed.

¶ 23 ANALYSIS

¶ 24 I. Sufficiency of the Evidence

¶ 25 Defendant raises a sufficiency of the evidence challenge, arguing that there was no evidence presented to show that defendant received service of the plenary order of protection, thus the State failed to prove him guilty beyond a reasonable doubt. We disagree.

¶ 26 When presented with a challenge to the sufficiency of the evidence, it is not the function of the reviewing court to retry defendant; rather, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Internal quotation marks

omitted.) See *People v. Wheeler*, 226 Ill. 2d 92, 114 (2007) (citing *People v. Collins*, 106 Ill. 2d 237 (1985)). A conviction will not be overturned unless the evidence is so palpably contrary to the verdict, or so unreasonable, improbable, or unsatisfactory as to create a reasonable doubt of the defendant's guilt. *People v. Adams*, 161 Ill. 2d 333, 343 (1994).

¶ 27 Violation of an order of protection is codified at section 12-3.4 of the Code, which provides:

> "(a) A person commits violation of an order of protection if:
>
> (1) He or she knowingly commits an act which was prohibited by a court or fails to commit an act which was ordered by a court in violation of:
>
> (i) a remedy in a valid order of protection authorized under paragraphs (1), (2), (3), (14), or (14.5) of subsection (b) of Section 214 of the Illinois Domestic Violence Act of 1986,
>
> * * *
>
> (2) Such violation occurs after the offender has been served notice of the contents of the order, pursuant to the Illinois Domestic Violence Act of 1986 *** or otherwise has acquired actual knowledge of the contents of the order." 720 ILCS 5/12-3.4 (West 2010).

¶ 28 The jury was instructed in accordance with Illinois Pattern Jury Instructions, Criminal, No. 11.78 (4th ed. 2000) (hereinafter IPI Criminal 4th), which provided as follows:

> "To sustain the charge of violation of an order of protection, the State

must prove the following propositions:

First Proposition: That the defendant came within 500 feet of Summer Johnson; and

Second Proposition: That an order of protection prohibited the defendant from performing the act; and

Third Proposition: That the order of protection was in effect at the time the defendant came within 500 feet of Summer Johnson; and

Fourth Proposition: That at the time the defendant came within 500 feet of Summer Johnson, he had been served notice of the contents of an order of protection." IPI Criminal 4th No. 11.78.

¶ 29 Here, the first three elements are not in dispute. Defendant focuses solely on the fourth proposition and the State's failure to prove that he had been served notice of the contents of the order of protection. Interestingly, defendant's argument is not that he was not served—he clearly was—but rather that the State failed to present to the jury evidence of service, thereby failing to prove the notice requirement.

¶ 30 Specifically, defendant contends that while the trial court took judicial notice of Knox County case No. 2010-OP-268 containing proof of service, the State did not move to enter the court file into evidence, nor did the trial court advise the jury of the fact that defendant had been served with the order of protection. Citing to *People v. Davis*, 180 Ill. App. 3d 749, 753 (1989), defendant argues that even though judicial notice may be taken in some circumstances, no court can judicially notice a fact, regulation, ordinance, document, or administrative rule unless it has

been supplied with, or has ready access to, the matter to be noticed. Defendant also argues that while the State told the trial court that case No. 2010-OP-268 would show that defendant had been served with the order of protection, that statement is not evidence according to *People v Simms*, 192 Ill. 2d 348, 396 (2000) (arguments are not themselves evidence and must be disregarded if not supported by the evidence).

¶ 31 Defendant further argues that State's exhibit A that was published to the jury did not show service on him. Exhibit A did not include the sheriff's return of service that was in the case file, but indicated via a checked box that defendant had been served notice pursuant to the statute. According to defendant, exhibit A only states that defendant was served with notice of the *hearing* on the petition for entry of a plenary order of protection, and is thus insufficient to show that defendant was served with notice of the order of protection after it was entered.

¶ 32 We find defendant's various arguments to be without merit. The trial court properly took judicial notice of Knox County case No. 2010-OP-268. Illinois courts recognize that documents containing readily verifiable facts capable of instant and unquestionable demonstration may be judicially notice. *May Department Stores Co. v. Teamsters Union Local No. 743*, 64 Ill. 2d 153 (1976). Public documents that are included in the records of other courts and administrative tribunals may be the subject of judicial notice (*NBD Highland Park Bank, N.A. v. Wien*, 251 Ill. App. 3d 512, 520 (1993)), and indeed fall within the category of " 'readily verifiable facts.' " *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 169 (2005) (quoting *May Department Stores Co.*, 64 Ill. 2d 153, 159). Here, notice of the case aided in the efficient disposition of the case (see *Davis*, 180 Ill. App. 3d at 753) and was readily verifiable. As the State points out, the case was a

matter of public record that indisputably indicated defendant had been provided the order of protection, or at the very least, notice of its contents.

¶ 33 Furthermore, defendant's contention that the jury was not advised of the sheriff's service of the order is erroneous. In the presence of the jury, the State noted that case No. 2010-OP-268 demonstrated that defendant was personally served with the order of protection on January 12, 2011, and the court then took judicial notice of the file on the record. Thus, the proof of service within the file then became a judicially-noticed fact, which the jury could, and did, consider conclusive. At no point during this exchange, did the defendant object to the file being judicially noticed or the statement that the Knox County sheriff personally served the defendant.

¶ 34 We briefly note that defendant's argument that the trial court did not instruct the jury pursuant to Illinois Rule of Evidence 201(g), which states that, "[i]n a criminal case, the court shall inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed" is forfeited on appeal. Ill. R. Evid. 201(g) (eff. Jan. 1, 2011). Defendant did not tender the instruction, object at trial to the failure to give this instruction, or allege error in a posttrial motion. An argument not raised in the trial court is forfeited on appeal, and we need not review it. *People v. Vasquez*, 388 Ill. App. 3d 532, 543 (2009). Defendant does not argue plain error.

¶ 35 Defendant's reliance on *People v. Hinton*, 402 Ill. App. 3d 181 (2010), in this regard is misplaced. In *Hinton*, the defendant was served with an emergency order of protection while incarcerated in the Will County jail. That emergency order was extended to a plenary order of protection under the same terms while defendant remained incarcerated. *Id*. at 182. The State presented two exhibits. The first was a certified copy of both the emergency and plenary orders.

Id. The second was a cover sheet for orders of protection kept within the ordinary course of business at the sheriff's department, showing that defendant was personally served with notice of the emergency order while incarcerated. *Id*. at 183. In reversing defendant's conviction for violation of the order, this court found that:

> "The State presented evidence that the defendant was personally served with the emergency order of protection while he was in the Will County jail. The State also showed that the emergency order was extended on November 14, 2007. The State failed, however, to present any evidence to show that the defendant received notice of the plenary order. Although the emergency order warned the defendant that a plenary order could be entered against him by default if he failed to appear at the hearing, the defendant was still in jail on the date of the hearing. The State did not show that the defendant was brought to court for the hearing or that he was later served with notice of the plenary order." *Hinton*, 402 Ill. App 3d at 184.

¶ 36 The court went on to focus its inquiry on whether the defendant had otherwise acquired knowledge of the order. Concluding that he had not, the court thus found the evidence was insufficient to sustain his conviction. *Id*. at 185.

¶ 37 The circumstances of this case render *Hinton* inapposite. In *Hinton*, the defendant claimed to have never received any notice whatsoever of the plenary order. The State failed to meet its burden, presenting no evidence to prove the notice element of the offense. Here, the

State clearly presented evidence of notice. Perhaps even more compelling, defendant does not actually contest the sheriff's return of service, nor does he argue that he was unaware of the contents of the order. Defendant's argument in the lower court was that Summer Johnson had allowed defendant to be within 500 feet of her on previous occasions, negating his criminal intent to violate the order. In our view, the record demonstrates that defendant acquired actual notice of the order. 720 ILCS 5/12-3.4(a)(2) (West 2010).

¶ 38 Accordingly, we find that the evidence supports defendant's conviction for violation of an order of protection beyond a reasonable doubt.

¶ 39 II. Inquiry Into Defendant's Posttrial Ineffective Assistance Claims

¶ 40 Defendant also alleges that the trial court erred in failing to conduct an inquiry into his *pro se* posttrial allegations that his trial counsel rendered ineffective assistance. Where the trial court has made no determination on the merits of the defendant's *pro se* claim of ineffective assistance, our review is *de novo*. *People v. Moore*, 207 Ill. 2d 68, 75 (2003); *People v. Remsik-Miller*, 2012 IL App (2d) 100921, ¶ 9.

¶ 41 The State concedes this point, acknowledging that the trial court failed to address defendant's *pro se* posttrial claim of ineffective assistance of counsel. When a defendant raises such a claim, the trial court must "conduct some type of inquiry into the underlying factual basis" of the defendant's claims. *People v. Moore*, 207 Ill. 2d at 79. Here, there is no dispute that defendant raised this issue in his correspondence to the trial court, clearly triggering his right to a *Krankel* (102 Ill. 2d 181 (1984)) inquiry. *Moore*, 207 Ill. 2d at 79 (holding that a *pro se* defendant is not required to do any more than bring his or her claim to the trial court's attention).

¶ 42 More recently in *Moore*, our supreme court outlined the various routes a trial court could take to effectively inquire into such claims, including: (1) by engaging in some interchange with trial counsel regarding the facts and circumstances surrounding the allegations; (2) by having a discussion with the defendant; and (3) by relying on its own evaluation of trial counsel's performance at trial and the sufficiency of defendant's allegations on their face. *Moore* at 78-79; see also *People v. Peacock*, 359 Ill. App. 3d 326, 339 (2005).

¶ 43 A review of the record reveals that the trial court failed to expressly address defendant's concerns at all, nor did the court employ any of the devices enunciated in *Moore* that would pass *Krankel* muster for the purposes of our review. As such, we remand this matter for the limited purpose of conducting a proper inquiry into defendant's posttrial allegations of ineffective assistance.

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed in part and remanded for proceedings consistent with this order.

¶ 46 Affirmed in part; remanded for proceedings.

¶ 47 JUSTICE McDADE, dissenting.

¶ 48 I respectfully dissent. There were no facts properly placed before the jury – either judicially noticed or otherwise in evidence – to show that defendant was served with notice of the contents of the order of protection or that he otherwise had acquired actual knowledge of the order's contents. 720 ILCS 5/12-3.4(a)(2) (West 2012). Accordingly, I would reverse defendant's conviction.

¶49 The majority has concluded that the trial court's taking of judicial notice of the file in Knox County case No. 2010-OP-268, together with the State's request that it do so, was sufficient to place before the jury the fact that the file contained a return of service showing defendant was served with the plenary order of protection (OP). I disagree. The fact that the court file contained a return of service was certainly capable of being judicially noticed, as this constitutes a readily verifiable fact from a source whose accuracy cannot reasonably be questioned. *People v. Mann*, 341 Ill. App. 3d 832, 835-36 (2003). See also Ill. R. Evid. 201(b) (eff. Jan. 1, 2011). The record in this case reveals, however, that the fact defendant was served with the OP did not come into evidence via judicial notice, because the jury was never instructed of the judicially-noticed fact.

¶ 50 At the outset of its case–in-chief, the State moved for the court to take judicial notice of Knox County case No. 2010-OP-268. It asserted that the file contained a valid OP entered against defendant and a return of service showing defendant was served. The court took judicial notice of the file. It then instructed the jury:

> "[T]he Court has taken notice in the particular case Knox County 10-OP-268 an order of protection was entered against Mr. Moren. One of the conditions of that order of protection was that he should stay 500 feet away from Summer Johnson. All right. You may consider that for that limited purpose only."

It is plain from this instruction that the only judicially-noticed fact that was placed before the jury was that an OP was entered against defendant prohibiting him from coming within 500 feet of

Ms. Johnson. At no point in the State's case-in-chief did the trial judge inform the jury that it had judicially noticed the fact that defendant was served with the OP.

¶ 51 Judicial notice is a procedure by which the trial court can admit facts into evidence without formal proof. *See In re Ch. W.*, 408 Ill. App. 3d 541, 548 (2011). Here, when the judge took judicial notice of the court file, it did not introduce, wholesale, the contents of the entire court file into evidence and charge the jury with knowledge of the file's contents. Instead, only the facts which the court judicially noticed and informed the jury of came into evidence. It is evident from the court's statement that the facts it judicially noticed were the entry of the OP and the stay-away provision of the OP, not the service of the OP.

¶ 52 Moreover, the fact that the court did not instruct the jury it had judicially noticed that defendant was served means that this fact was not before the jury. Courts from other jurisdictions generally recognize that a trial court must inform the jury of any fact it judicially notices. *State v. Jones*, 240 Or. 129, 400 P.2d 524, 525 (1965) ("[The court must] declare to the jury any facts judicially known by the court. In the absence of any such declaration the judicial knowledge in the mind of the court could not be used by the jury in arriving at its verdict."); *Graham v. State*, 275 Ga. 290, 565 S.E.2d 467, 469-70 (2002) (where trial court took judicial notice of fact necessary to prove element of crime, but did not inform the jury of that fact, that fact was not before the jury and there was insufficient evidence to prove element to jury). See also *Thomas v. Commonwealth*, 48 Va. App. 605, 633 S.E.2d 229, 232 (2006). While Illinois does not appear to have similar precedent, the requirement that the court inform the jury of facts it judicially notices is logically implicit in Illinois Rule of Evidence 201(g), which requires that

the court "inform the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." Ill. R. Evid. 201(g) (eff. Jan. 1, 2011). I find the State's failure to ensure that the court properly informed the jury of the facts it wished to be judicially noticed proves fatal to its case.

¶ 53 I acknowledge the possibility that in some instances, the jury may be informed of the judicially-noticed fact by the court's assent when counsel makes its offer of proof. As Professor Graham has stated:

> "If the matter is one that would fall within the province of the jury were judicial notice not taken, the court must ensure that the jury is aware that the particular fact has been judicially noticed. This may be accomplished at the time judicial notice is taken, as a direct result of the jury hearing counsel's request for judicial notice and the court's concurrence, or by the judge's advising the jury specifically at the time that he has judicially noticed the particular fact." Michael H. Graham, Graham's Handbook of Illinois Evidence § 201.5, at 85 (10th ed. 2010).

For two reasons, this proposition would not apply here. First, the State's Attorney requested that the court take judicial notice of the court *file*, not of the specific fact that defendant was served. It would therefore not be clear to the jury, upon hearing the court's concurrence, that the court noticed that defendant was served with the OP. Second, and more importantly, the court's statement specified which facts were judicially noticed. It told the jury it judicially noticed the

fact that the file contained an OP against defendant and the conditions of the OP, and instructed the jury that "*You may consider that for that limited purpose only*." (Emphasis added.) The jury, of course, is presumed to have followed the court's instruction. See *People v. Taylor*, 166 Ill. 2d 414, 438 (1995). Therefore, I conclude that the fact that defendant was served with an order of protection was not before the jury pursuant to judicial notice.

¶ 54 Apart from judicial notice, the State has argued on appeal that the OP itself, which was entered into evidence as an exhibit, was sufficient to prove that defendant was served with notice of the contents of the OP. On page three of the OP, under the section titled "Findings (Jurisdiction)," a box is marked reading "Respondent was served with notice pursuant to the statute." When examining the OP and the provisions of the Domestic Violence Act of 1986, it is obvious that this box is only referring to the fact that defendant was served with a summons or notice of the hearing on the plenary OP. It does not indicate defendant was served with notice of the OP itself. Under our decision in *People v. Hinton*, 402 Ill. App. 3d 181 (2010), having notice of a hearing on a plenary order of protection is not sufficient to prove that the defendant had notice or actual knowledge of the contents of a plenary OP.

¶ 55 Finally, the State has not pointed to any other evidence admitted at trial which indicates defendant otherwise had actual knowledge of the contents of the OP. Thus, even viewing the evidence in the light most favorable to the prosecution, there was no evidence from which a rational trier of fact could have found this element of the crime was proven beyond a reasonable doubt.