2014 IL App (1st) 131827-U
No. 1-13-1827
December 16, 2014

SECOND DIVISION

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	Of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 14564(01)
	)	
JAMES GOUSKOS,	)	The Honorable
	)	Timothy J. Joyce,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pierce and Liu concurred in the judgment.

ORDER

¶ 1 *Held*: In grand jury proceedings, the State's reliance on leading questions does not deprive the defendant of due process. The defendant had fiduciary duties to persons who gave him checks for deposit into escrow accounts. Evidence of the defendant's breach of his fiduciary duties extended the statute of limitations period for the charges against the defendant. By failing to raise the issue in the trial court, the defendant forfeited the argument that the statute of limitations barred some of the charges because the evidence showed the theft victims discovered the thefts more than a year before the State indicted the defendant. The judge did not assume the role of prosecutor when he noted a statistical truth, and when he questioned a witness to clarify the witness's testimony. The court properly entered multiple convictions against the defendant for his many thefts. The defendant's more extensive criminal history, his co-defendant's decision to plead guilty, and the defendant's greater participation in the crime, all justified the disparity between the sentences imposed on

the defendant and his co-defendant. The trial court lacks authority to impose extended term sentences on crimes of lesser severity than the most severe class of crimes for which the defendant stands convicted. The appellate court may remand for assessment of fees when the trial court fails to impose statutorily mandated fees.

¶ 2 After a bench trial, the trial court found the defendant, James Gouskos, guilty of the offense of a continuing financial crimes enterprise and 24 separate thefts. In this appeal, Gouskos contends (1) grand jury proceedings did not comport with the requirements of due process; (2) the trial court should have dismissed several charges as untimely; (3) the judge acted as a prosecutor; (4) the court imposed multiple convictions for a single crime; (5) the court imposed indefensibly disparate sentences on Gouskos and his co-defendant; and (6) the court improperly imposed extended term sentences.

¶ 3 We agree with Gouskos that the court lacked authority to impose extended term sentences for the theft convictions, and we vacate the extended portion of those sentences. We also remand for the assessment of mandatory fees. In all other respects, we affirm the trial court's judgment.

¶ 4 BACKGROUND

¶ 5 Gouskos and Alexander Dobroveanu formed a corporation they named 4750 Winthrop, L.L.C. The corporation purchased real estate located at 4750 North Winthrop in Chicago. They planned to build at that location a 21-story structure with several condominium units on each floor. Gouskos, Dobroveanu, and Adriana Ples formed Uptown Real Estate, L.L.C., to act as exclusive sales agent for 4750 Winthrop. In 2005, Ples opened a checking account for Uptown, and she arranged to have checks for the purchase of units in the new building deposited into escrow accounts at the same bank.

¶ 6 Gouskos and Dobroveanu sold more than 30 units in the proposed building to more than 20 purchasers, who gave Uptown checks for about 5% of the contract purchase prices for deposit into escrow accounts. Gouskos and Dobroveanu told the purchasers that they expected to complete the building and have the units ready for the purchasers by July 2007. Work on the building never began. In late 2007 and early 2008, a number of purchasers asked for the return of the money in the escrow accounts. One or two obtained repayments, but most got nothing.

¶ 7 In April 2008, police contacted Ples and informed her that the escrow accounts in Uptown's name held no funds. On August 3, 2009, police arrested Gouskos and Dobroveanu on charges of theft.

¶ 8 On August 6, 2009, an assistant State's Attorney presented to the grand jury the testimony of William Lesko of the Chicago Police Department's financial crimes unit. Lesko answered "Yes" or "No" to a series of extremely leading questions. Lesko agreed that he found that Gouskos and Dobroveanu took more than $500,000 from deposits made for condominium purchases. The assistant State's Attorney also listed purchasers and amounts allegedly deposited, and asked Lesko whether all the deposits were withdrawn from Uptown's accounts. Lesko said, "Yes." Lesko agreed that by October 2008, all of the accounts held no funds.

¶ 9 The grand jury returned an indictment charging Gouskos and Dobroveanu with the offense of a continuing financial crimes enterprise (720 ILCS 5/16H-50 (West 2006), repealed 2011) and with 28 counts of theft, where each theft count named as the victim a purchaser not named in any other count, and where each named victim received no

repayment of his or her deposit. The indictment did not mention Gouskos's prior criminal record or the possibility of enhanced sentencing.

¶ 10 Gouskos and Dobroveanu moved to dismiss the indictment as untimely, claiming that the August 2009 indictment charged crimes completed before August 2006. Counts 20 through 27 all specified that Gouskos and Dobroveanu completed the thefts charged in those counts by January 2006.

¶ 11 The prosecution agreed that a three-year statute of limitations generally applied to the theft counts (see 720 ILCS 5/3-5(b) (West 2004)), but argued that an extension to the limitation period applied because the thefts involved breaches of fiduciary duties. See 720 ILCS 5/3-6(a)(2) (West 2004). Gouskos and Dobroveanu argued that they had no fiduciary duties to the purchasers, and therefore the extension did not apply. The trial court held that Gouskos and Dobroveanu had fiduciary duties once the purchasers entrusted them with checks for deposit into escrow accounts, and therefore the extension applied. The court denied the motion to dismiss the charges as untimely.

¶ 12 Dobroveanu pled guilty before trial. The trial court sentenced him to a term of four years in prison, which Dobroveanu could serve while in federal prison on charges of falsifying documents presented to banks to obtain loans for 4750 Winthrop, and for false statements on his tax returns.

¶ 13 At Gouskos's trial, the victims testified that they signed contracts to purchase units in the proposed building and paid deposits to be held in escrow until closing. Most eventually demanded return of their deposits, and none of the victims received anything in return. Several of the victims considered Gouskos a friend, and several had known Gouskos more

than 10 years and continued to socialize with him despite their losses. A few witnesses testified that Gouskos had promised to return the funds to them once he could recover the lost amounts.

¶ 14 Beverly White, operations supervisor at the bank where Uptown kept its bank accounts, presented Uptown's and Gouskos's banking records and identified a number of transfers of funds out of escrow accounts. White noted that the amounts transferred out of the escrow accounts matched amounts deposited into Uptown's checking account or Gouskos's personal account. White testified that starting in 2005, Uptown deposited directly into its checking account several checks labeled as deposits for units in the proposed building. White also testified that beginning in December 2005, Gouskos withdrew large sums from Uptown's checking account. He made 14 smaller withdrawals in January 2006, for a total of $28,000 withdrawn that month. The parties stipulated that White's exhibits showed transfers into Gouskos's personal account totaling $181,600.

¶ 15 On cross-examination, Gouskos's attorney challenged White's assertion that the last four digits of the account numbers, as shown on the exhibits, sufficiently identified the source accounts for White to assert that the deposits to Uptown's account and Gouskos's account came from the escrow accounts. The colloquy took place:

> "Q. So it is possible that the savings account ending in 8105 *** is not the same account [as] one of the other accounts [shown in] the documents you reviewed. Is that a fair statement?
>
> A. I don't believe I understand what you're asking me.

THE COURT: I do. I think the odds of that, strictly speaking, would be one in 10,000. ***

* * *

And I say that as a matter of arithmetic, not as a matter of a comment on the strength of anybody's case. It's a simple function of arithmetic. If you have a multi-[digit] number that ends in four digits, the odds that those will be two different numbers are one in 10,000."

¶ 16 Later, the court asked White the following questions and elicited the following answers, about exhibits not included in the record on appeal:

"[Q. One exhibit] happens to show a transfer to his account from some unspecified savings account, $7500; correct?

A. Correct, your Honor.

Q. The same as the amount that came out of Mr. Tanzillo's escrow account *** on the same date; correct?

A. Correct, your Honor.

Q. Now, from the records you've got, there's nothing that proves conclusively that, that $7500 came out of Mr. Tanzillo's escrow account is the $7500 that went into Mr. Gouskos'[s] account on the same date; correct?

A. Correct.

* * *

Q. Now, let's go down to this one, $13,000 on June 14, 2006, coming out of an account that ends in 1431 ***.

A. Yes, your Honor.

Q. The numbers correspond; correct?

A. Yes.

Q. This is an escrow account purporting to go to a Peter Faraci, showing an initial deposit on November 25, 2004, of $16,300; correct?

A. That's correct, your Honor.

* * *

Q. [That] purports to show *** some kind of transfer into that account on June 14, 2006, of $13,000; correct?

A. Correct.

Q. The same date that somebody transferred money out of Mr. Faraci's account in that amount, $13,000; correct?

A. Correct.

Q. Now, that $13,000, much like the $7500 I asked you before, there is no apparent notation indicating that it comes from some particular account; correct?

A. Correct.

> Q. All right. Am I correct then *** [that] all of the deposits reflected on the accounts you noted *** purport to have corresponding withdrawals indicated in the column noted withdrawal; correct?
>
> A. Yes.
>
> Q. On a particular date; correct?
>
> A. Yes.
>
> Q. And they purport to have corresponding entries on the same dates in the accounts either handled by Uptown [or] Mr. Gouskos [or] Mr. Dobroveanu ***; correct?
>
> A. Correct."

¶ 17 Gouskos testified that to secure financing to build the proposed development at 4750 Winthrop, he mortgaged his home, three condominium units he owned in a nearby building, and a car he insured for $90,000. He lost all of that property when he failed to build the proposed development. Gouskos testified that he did not transfer funds from the escrow accounts to his personal account. He did not know who transferred the funds. He always intended to build the proposed development at 4750 Winthrop, and gave up the project only when police arrested him. He admitted that bank records accurately showed that on several occasions he withdrew tens of thousands of dollars from his personal accounts throughout 2006 to cover his extensive gambling losses.

¶ 18 The trial court inferred from Gouskos's continued withdrawals from his personal accounts that he knew he had funds in those accounts, and he knew the funds came from the escrow

accounts. The court found Gouskos guilty of 24 counts of theft (21 class 2 felonies and 3 class 3 felonies), with each count naming a different victim, and one count of the offense of a continuing financial crimes enterprise with a full value in excess of $100,000, which is a class 1 felony. See 720 ILCS 5/16H-60(e) (West 2006), repealed 2011.

¶ 19 According to the prosecutor, courts found Gouskos guilty of burglary, residential burglary, and theft, all in 1988, and of four counts of computer theft in 2002. The court sentenced Gouskos to 14 years in prison for the class 1 crime, to concurrent extended terms of 14 years on each of the 20 class 2 convictions, and to concurrent extended terms of 10 years on each of the 3 class 3 convictions. The court added, "Fines, fees, and costs will be waived." Gouskos now appeals.

¶ 20 ANALYSIS

¶ 21 Gouskos raises three challenges to the convictions. He contends that the grand jury proceedings denied him due process, the trial court should have stricken several counts based on the statute of limitations, and the trial court deprived him of a fair trial by acting as an advocate for the prosecution. Gouskos also challenges his sentence, arguing that the court impermissibly imposed extended terms, imposed multiple convictions for a single offense, and improperly sentenced him to a far greater term than that imposed on Dobroveanu. The various issues require differing standards of review.

¶ 22 Grand Jury

¶ 23 When a defendant claims that the prosecutor's conduct in grand jury proceedings denied the defendant due process, the appellate court reviews the issue *de novo*. *People v. Reimer*, 2012 IL App (1st) 101253, ¶ 27. Because defendants have the due process protection of full

trials, the courts will look into possible abuse of grand jury proceedings only on limited grounds. *People v. DiVincenzo*, 183 Ill. 2d 239, 255 (1998). "The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. *** To warrant dismissal of the indictment, defendant must therefore show that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it." *DiVincenzo*, 183 Ill. 2d at 257-58.

¶ 24 Gouskos complains that Lesko gave only yes or no answers to a series of leading questions. However, he does not assert that Lesko gave perjured or materially false testimony. He disputes the testimony that "a majority of these purchasers invested in these condominiums because they knew [and] trusted James Gouskos." Five of the victims testified they considered Gouskos a friend; one said he knew Gouskos as an acquaintance for 8 years, and Gouskos's barber said he had known Gouskos for 20 years. Most of the other 17 victims testified that they met Gouskos through friends. Any minor inaccuracy in the testimony to the grand jury did not affect the validity of the proceedings or Gouskos's right to due process. See *DiVincenzo*, 183 Ill. 2d at 259.

¶ 25 In his reply brief, Gouskos raises a new argument, contending that the prosecutor misled the grand jury by failing to inform the jurors about the statute of limitations. However, he cites no case or statute for the proposition that the prosecutor bears responsibility for informing the grand jury of the statute of limitations for crimes. Imposing such a duty on the prosecutor appears to conflict with cases that establish that the statute of limitations for criminal prosecutions is an affirmative defense, and the defendant forfeits the affirmative

defense by failing to raise it in a timely fashion. *People v. Gwinn*, 255 Ill. App. 3d 628, 631 (1994); *People v. Williams*, 79 Ill. App. 3d 806, 808 (1979); see 725 ILCS 5/114-1(a)(2) (West 2006).

¶ 26 Gouskos admits that the court in *People v. Hirsch*, 221 Ill. App. 3d 772, 779 (1991), held that a prosecutor may rely on leading questions in grand jury proceedings. We hold that Gouskos has not met his burden of showing that "the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it." *DiVincenzo*, 183 Ill. 2d at 258. Accordingly, we find that the defendant's due process rights were not violated during the grand jury proceedings, and therefore, we will not reverse the convictions in this case.

¶ 27 Statute of Limitations

¶ 28 We review the trial court's factual findings to determine whether they conflict with the manifest weight of the evidence, but we review *de novo* the trial court's legal conclusions, including its construction of statutes. *People v. McCarty*, 223 Ill. 2d 109, 124, 148 (2006). The trial court found that Gouskos persuaded the victims to give him money, which he and Dobroveanu promised to deposit into escrow accounts which would retain the funds pending completion of the construction project. Gouskos and Dobroveanu subsequently, without permission of the depositors, took the money from the escrow accounts for personal use. For his argument concerning the statute of limitations, Gouskos does not contest the factual findings. The trial court held that the facts imposed on Gouskos "a fiduciary obligation," within the meaning of section 3-6(a) of the Criminal Code. See 720 ILCS 5/3-6(a) (West 2004). We agree with the trial court's legal conclusion that when Gouskos accepted the

victims' checks for deposit into escrow accounts to which he would retain access, he had fiduciary duties as an escrowee. See *Peters & Fulk Realtors, Inc. v. Shah*, 140 Ill. App. 3d 301, 306 (1986). Because of those fiduciary duties, section 3-6(a)(2) extended the limitations period for commencing prosecution.

¶ 29 In this appeal, Gouskos raises a new argument for dismissal of some charges. He claims that the evidence shows that some of the victims knew about the thefts more than a year before the State indicted him, and therefore he claims that the prosecution did not bring the charges within the extended term provided in section 3-6(a)(2). Section 3-6(a)(2) provides that "[a] prosecution for theft involving a breach of a fiduciary obligation to the aggrieved person may be commenced *** within one year after the discovery of the offense by an aggrieved person ***; or in the absence of such discovery, within one year after the proper prosecuting officer becomes aware of the offense." 720 ILCS 5/3-6(a)(2) (West 2004). In its argument to this court, the prosecution relies solely on the prosecuting officer's discovery of the theft, without any showing of when or whether the aggrieved persons learned of the thefts. We find that Gouskos forfeited this argument for dismissal by failing to raise it in a timely fashion. See *Gwinn*, 255 Ill. App. 3d at 631; *Williams*, 79 Ill. App. 3d at 808; 725 ILCS 5/114-1(a)(2) (West 2006). Accordingly, we will not reverse the convictions based on the statute of limitations.

¶ 30 Judge's Conduct

¶ 31 Next, Gouskos argues that the judge assumed the role of prosecutor when he used his mathematical understanding and when he questioned White about the bank's records. The trial court may take judicial notice of mathematical and statistical truths. *Theofanis v.*

Sarrafi, 339 Ill. App. 3d 460, 471 (2003). Here, the judge merely noted that integers have 10,000 possible four-digit endings, and therefore the chance of a random match of the last four digits of numbers longer than five digits is 1 in 10,000. The judge appropriately took judicial notice of this fact. See *Theofanis*, 339 Ill. App. 3d at 471.

¶ 32 Our supreme court clarified the basic principles concerning judicial questioning of witnesses in *People v. Palmer*, 27 Ill. 2d 311, 314-15 (1963), where the court said,

> "[A] trial judge has the right to question witnesses in order to elicit the truth or to bring enlightenment on material issues which seem obscure. [Citations.] The propriety of such examination must be determined by the circumstances of each case, and rests largely in the discretion of the trial court. [Citation.] This is especially true where the cause is tried without a jury, and the danger of prejudice lessened."

¶ 33 The judge here attempted to clarify White's testimony about bank records showing transfers out of Uptown's escrow accounts occurring in the same amounts and on the same days as transfers into Gouskos's accounts and Uptown's checking account. The court clarified that for some of the transfers, the bank could not identify the source of the funds entering Gouskos's accounts, leaving the court with only circumstantial evidence that the unexplained coincidental transfer of funds out of escrow accounts provided the source. For other transfers, the bank could conclusively state that a particular account, or one with the same last four digits, provided the source for the funds flowing into Gouskos's accounts. The questioning helped clarify somewhat obscure testimony and accorded with the judge's role as a seeker of truth. See *People v. Williams*, 173 Ill. 2d 48, 78-80 (1996); *People v. Trefonas*, 9

Ill. 2d 92, 100 (1956). We cannot say that the judge abused his discretion in his questioning of White, and therefore we find that the judge's conduct does not warrant reversal of the judgment.

¶ 34 Sentencing

¶ 35 The State concedes one of Gouskos's arguments in regard to sentencing. The trial court imposed extended term sentences on Gouskos for the 21 class 2 convictions and the 3 class 3 convictions it entered. However, the court did not impose an extended term on Gouskos for the class 1 offense of a continuing financial crimes enterprise.

¶ 36 The trial court may impose on a defendant an extended term sentence only for offenses in the most serious class of offenses for which the defendant stands convicted. *People v. Thompson*, 209 Ill. 2d 19, 23 (2004). The State agrees that the trial court lacked authority to enter the extended term sentences imposed for the class 2 and class 3 offenses here, because the court found Gouskos guilty of a more serious class 1 felony. We must vacate the extended term portion of those sentences and reduce all of those sentences to the statutory maximums. *Thompson*, 209 Ill. 2d at 24, 29. We reduce the sentences for all the class 2 theft counts to 7 years, and for the class 3 thefts, we reduce the sentences to 5 years, with all sentences to run concurrently. See 730 ILCS 5/5-8-1(a)(5), (a)(6) (West 2006).

¶ 37 Because Gouskos no longer faces any extended term sentences, we need not address his argument concerning the adequacy of the indictments to support the extended term sentences.

¶ 38 Next, Gouskos claims that we should eliminate all of the theft convictions under the principle that a single act constitutes only one crime. He compares his convictions to the

convictions in *People v. Moshier*, 312 Ill. App. 3d 879 (2000), and *People v. Kotero*, 2012 IL App (1st) 100951.

¶ 39 In *Moshier*, the defendant, a township official, stole money from Indian Point Township on several occasions, and a trial court found the defendant guilty of both theft and official misconduct. The appellate court looked to the indictments, which charged identical conduct, and found that the two convictions could not both stand. *Moshier*, 312 Ill. App. 3d at 882.

¶ 40 The defendant in *Kotero* stole money from the Village of Oak Park on several separate occasions, as he took bribes from several persons to remove Denver boots from the bribers' cars. The appellate court held that the official misconduct count incorporated all of the individual theft counts, where all the theft counts named the Village as the victim. *Kotero*, 2012 IL App (1st) 100951, ¶ 26.

¶ 41 Here, the theft counts allege distinct and separate acts of stealing from distinct victims, and only the single charge of a continuing financial crimes enterprise charged misconduct against all the different victims. The distinct crimes alleged in the multiple counts do not require reduction to a single conviction. See *People v. Myers*, 85 Ill. 2d 281, 288 (1981).

¶ 42 For his last issue, Gouskos argues that the extreme disparity between his sentence and the sentence imposed on Dobroveanu requires remand for resentencing. "An arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated, of course, cannot be defended. A disparity between sentences will not be disturbed, however, where it is warranted." *People v. Godinez*, 91 Ill. 2d 47, 55 (1982). "[A] mere disparity in sentences is not alone a violation of fundamental fairness [Citation.] It is not the disparity that counts, but the reason for the disparity. [Citations.] A difference in sentences may be

justified by factors including the codefendants' relevant character and history, their degree of culpability, their criminal records or their rehabilitative potential." *People v. Rodriguez*, 402 Ill. App. 3d 932, 939-40 (2010). The trial court has broad discretion to sentence the defendant within statutory bounds, and we will not disturb the sentence absent an abuse of discretion. *People v. Wolfe*, 156 Ill. App. 3d 1023, 1028 (1987).

¶ 43 Here, the trial court imposed a sentence of 14 years on Gouskos and a sentence of 4 years on Dobroveanu, while permitting Dobroveanu to serve his sentence in the federal penitentiary, where he is serving time for other offenses he committed in connection with 4750 Winthrop.

¶ 44 The State points to several important differences between Gouskos and Dobroveanu to justify the disparity. First, Gouskos had an extensive criminal history, with five separate felony convictions for theft plus additional convictions for burglary and residential burglary in his past, while Dobroveanu had no criminal history before his involvement with 4750 Winthrop. See *Wolfe*, 156 Ill. App. 3d at 1028. Second, Gouskos took the lion's share of the funds stolen from the victims. See *People v. Maxwell*, 130 Ill. App. 3d 212, 219 (1985). Third, Dobroveanu showed better rehabilitative potential when he took responsibility by pleading guilty to the charges. See *People v. Denton*, 256 Ill. App. 3d 403, 413 (1993). We cannot say that the trial court abused its discretion when it sentenced Gouskos to a term of 14 years in prison for conduct closely related to conduct that earned Dobroveanu a sentence of 4 years in prison.

¶ 45 Finally, the State contends that we must modify the sentence to include mandatory fines and fees, which the trial court held waived. The State asserts that we must modify the

sentence, because the trial court imposed a void sentence, as it lacked authority to sentence the defendant without requiring the payment of the mandatory fines, fees and costs. In *People v. Hodges*, 120 Ill. App. 3d 14, 15-17 (1983), the court held that it had the power to address the failure to assess mandatory fees on the defendant's appeal from his conviction. We agree with the State that applicable statutes mandate certain fees, although the statutes do not specify the amount of the fees. See 705 ILCS 105/27.2a (w)(1)(A), 27.3a.1 (West 2012); 55 ILCS 5/5-1103 (West 2012). Following *Hodges*, we remand for the assessment of mandatory fees.

¶ 46 CONCLUSION

¶ 47 The assistant State's Attorney's leading questions during grand jury proceedings did not deprive Gouskos of due process. Because the State showed that Gouskos breached fiduciary duties, the trial court correctly denied the motion to dismiss certain charges based on the statute of limitations. Gouskos forfeited the new arguments he raises on appeal for dismissal based on the statute of limitations. The judge did not assume the role of prosecutor when he noted a statistical truth, and when he questioned a witness to clarify the witness's testimony. The court properly entered multiple convictions against Gouskos for his many thefts. Several differences between Gouskos and Dobroveanu justified the disparity between their sentences. Because the judge improperly imposed extended term sentences on Gouskos for crimes not in the most severe class of crimes for which Gouskos stands convicted, we vacate the extended portion of all the sentences for the class 2 and class 3 convictions. We remand for the assessment of mandatory fees. In all other respects, we affirm the trial court's judgment.

¶ 48 Affirmed in part, vacated in part and remanded with directions.