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2014 IL App (3d) 130055-U

Order filed November 17, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0055
DEMARCO GRAYER,)	Circuit No. 12-CF-672
Defendant-Appellant.)	Honorable Stephen A. Kouri, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Convictions for both unlawful possession of a weapon by a felon and aggravated unlawful use of a weapon violate the one-act, one-crime doctrine; (2) the trial court's order requiring defendant to pay a \$250 DNA analysis testing fee is vacated as void because defendant's DNA was previously on file.

¶ 2 Following a jury trial, defendant, Demarco Grayer, was convicted of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and aggravated unlawful use of a weapon charged as a Class 2 felony (720 ILCS 5/24-1.6(a)(1), (e) (West 2012)). He was sentenced to four years of imprisonment. Defendant was also ordered to give a DNA sample and

pay "a DNA testing fee of \$250 if not done." On appeal, defendant argues that: (1) his convictions violated the one-act, one-crime doctrine; and (2) the order requiring him to submit a DNA sample and pay the \$250 DNA testing fee should be vacated because his DNA sample was already on file with the Illinois State Police at the time of sentencing. We affirm in part and vacate in part.

¶ 3

FACTS

¶ 4

Defendant was charged with unlawful possession of a weapon by a felon and the Class 2 felony version of aggravated unlawful use of a weapon (AUUW). At trial, the parties stipulated that defendant had previously been convicted of a felony at the time of the offense in this case. The jury found defendant guilty of both charges.

¶ 5

On January 17, 2013, at the sentencing hearing, the trial judge stated, "I'm going to honor the jury verdict" and sentenced defendant to four years of imprisonment. The court entered a written order indicating that "the jury's verdicts of guilty to the charges of unlawful possession of firearm by felon and [AUUW] is accepted and entered of record." The order also indicated defendant was sentenced to four years of imprisonment. The trial court also ordered defendant to submit a DNA sample and "pay a DNA testing fee of \$250 if not done." The circuit clerk subsequently assessed a \$250 DNA analysis fee in this case.

¶ 6

The record additionally contains a written order entitled "Judgment – Sentence to Illinois Department of Corrections" (IDOC), which was also dated January 17, 2013. The order indicated that defendant was adjudged guilty of both offenses and was sentenced to confinement in the IDOC for a term of four years of imprisonment for unlawful possession of a weapon by a felon. No sentence was indicated for the offense of AUUW. We take judicial notice of information on the IDOC website indicating that defendant is currently serving a four-year

sentence for unlawful possession of a weapon by a felon and a four-year sentence for AUUW. See *People v. Mitchell*, 403 Ill. App. 3d 707, 709 (2010) (the appellate court may take judicial notice of information contained on the IDOC website as a public record of the Department of Corrections).

¶ 7 Defendant appeals, arguing that his AUUW conviction violates the one-act, one-crime doctrine and the \$250 DNA analysis fee is void.

¶ 8 ANALYSIS

¶ 9 I. One-Act, One-Crime

¶ 10 Under the one-act, one-crime doctrine, a criminal defendant may not be convicted of multiple offenses based on the same physical act. *People v. King*, 66 Ill. 2d 551 (1977). When a defendant is convicted of multiple offenses based upon the same single physical act, a sentence should be imposed on the most serious offense and any conviction entered on a less serious offense must be vacated. *People v. Lee*, 213 Ill. 2d 218 (2004).

¶ 11 In this case, the indictment for unlawful possession of a weapon by a felon alleged that on June 24, 2012, defendant knowingly possessed, on or about his person or on his own land or in his abode, a firearm, having been previously convicted of the Class 1 felony of unlawful possession of a controlled substance with intent to deliver. The indictment for the AUUW offense alleged that on June 24, 2012, defendant knowingly possessed, immediately accessible to him in a motor vehicle, an uncased, loaded firearm, at a time when he was not on his own land or in his own abode or fixed place of business, having been previously convicted of the felony offense of unlawful possession with the intent to deliver a controlled substance. Therefore, both the offenses were premised upon the same physical act of defendant knowingly possessing a firearm, one of which must be vacated.

¶ 12 Defendant's conviction for unlawful possession of a weapon by a felon is the more serious offense in that it is a Class 2 felony punishable by up to 14 years of imprisonment. See 720 ILCS 5/24-1.1(e) (West 2012) (the offense of unlawful possession of a weapon by a felon committed by a person who has been convicted of a Class 2 or greater felony under the Illinois Controlled Substances Act is a Class 2 felony punishable by 3 to 14 years of imprisonment). The AUUW conviction, by contrast, is a Class 2 felony punishable by up to seven years of imprisonment. See 720 ILCS 5/24-1.6(d)(3) (West 2012) (the offense of AUUW committed by a person who has been previously convicted of a felony is a Class 2 felony punishable by three to seven years of imprisonment). Accordingly, the less serious conviction of AUUW must be vacated.

¶ 13 The State argues the one-act, one-crime doctrine is not applicable because without the court imposing a sentence for AUUW there is no surplus conviction to vacate. Initially, we note the State has forfeited this argument by its failure to provide any citation to authority. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (requiring arguments on appeal to be supported by citation to authority, and an absence of such authority forfeits the argument); *People v. Ward*, 215 Ill. 2d 317, 332 (2005) (a point raised in a brief but not supported by citation to relevant authority fails to satisfy the requirements of supreme court rules and is therefore forfeited). However, we nonetheless acknowledge that a jury verdict alone does not constitute a conviction which must be vacated under the one-act, one-crime doctrine. See *People v. Cruz*, 196 Ill. App. 3d 1047, 1052 (1990) (a jury verdict is not the equivalent of a conviction); *People v. Cookson*, 335 Ill. App. 3d 786 (2002) (the one-act, one-crime doctrine is not applicable to a jury's guilty verdict on which the trial court declined to enter judgment).

¶ 14 Our supreme court has stated, "Depending on the context, the word 'conviction' can be

reasonably construed to mean the date of sentence or the date on which an adjudication of guilty was entered." *People v. Woods*, 193 Ill. 2d 483, 487 (2000) (holding that, as used in the Post-Conviction Hearing Act, the word "conviction " is a term of art that means a final judgment that includes both a conviction and a sentence); *People v. Hager*, 202 Ill. 2d 143 (2002). The Criminal of Code of 2012 defines the word "conviction" as "a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense." 720 ILCS 5/2-5 (West 2012). The Code of Criminal Procedure of 1963 defines "judgment" as "an adjudication by the court that the defendant is guilty or not guilty and if the adjudication is that defendant is guilty it includes the sentence pronounced by the court." 725 ILCS 5/102-14 (West 2012).

¶ 15 On the record before us, it is not clear whether the trial court intended to sentence defendant to four years of imprisonment on both offenses or solely on the offense of unlawful possession of a weapon by a felon. The court's oral and written pronouncements sentenced defendant to four years of imprisonment without specifying an offense. There is no indication in the record that the trial court intended for the lesser charged offense of AUUW to merge into the unlawful possession of a weapon by a felon conviction. The uncertainty in defendant's sentence is evidenced by the IDOC records showing that defendant is currently serving a four-year term of imprisonment on each offense despite the court's written "Sentence to Illinois Department of Corrections" indicating no sentence for AUUW. Given this lack of certainty regarding the sentencing, we take this opportunity to clearly state that no sentence should have been imposed on the guilty finding for AUUW and to the extent that a sentence was imposed, it is now vacated.

¶ 16 II. \$250 DNA Analysis Fee

¶ 17 The \$250 DNA analysis fee should also be vacated because defendant had a DNA sample

on file at the time of sentencing. Under section 5-4-3 of the Unified Code of Corrections, a person convicted of a felony shall be required "to submit specimens of blood, saliva, or tissue to the Illinois Department of State Police." 730 ILCS 5/5-4-3(a) (West 2012). If such a person is required to submit a DNA sample, they are also required to pay an analysis fee of \$250. 730 ILCS 5/5-4-3(j) (West 2012). A trial court is authorized in ordering a defendant to submit a DNA sample and pay a DNA analysis fee only when the defendant is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 293 (2011).

¶ 18 Despite the circuit court's instruction that the DNA analysis fee should be imposed only if the DNA analysis was not previously done, the circuit clerk nonetheless imposed the \$250 DNA analysis fee. Defendant had previously submitted a DNA sample in 2003, which was on file in the Illinois State Police DNA database at the time of sentencing in this case. Therefore, the \$250 DNA analysis fee is void in that it was not authorized by the statute. See *id.* at 302 (a sentence that does not conform to a statutory requirement is void and may be corrected at any time). Accordingly, we vacate the \$250 DNA analysis fee.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed in part and vacated in part.

¶ 21 Affirmed in part and vacated in part.