2016 IL App (4th) 140521-U

NO. 4-14-0521

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 6, 2016
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANDRE WINTERS,	)	No. 13CF562
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Pope and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's 10-year prison sentence following the revocation of his probation but vacated the $250 genetic-marker fee as it was improperly imposed.

¶ 2 In September 2013, defendant, Andre Winters, pleaded guilty to one count of aggravated battery, and the trial court sentenced him to 24 months' probation. In January 2014, the State filed a petition to revoke defendant's probation. In February 2014, the court found defendant violated his probation. In April 2014, the court resentenced defendant to 10 years in prison. In June 2014, the court denied defendant's motion to reconsider the sentence.

¶ 3 On appeal, defendant argues the trial court erred in (1) resentencing him to 10 years in prison and (2) assessing a $250 genetic-marker fee. We affirm in part and vacate in part.

¶ 4 I. BACKGROUND

¶ 5 In April 2013, the State charged defendant by information with single counts of

aggravated battery (count I) (720 ILCS 5/12-3.05(a)(1) (West 2012)), mob action (count II) (720 ILCS 5/25-1(a)(1) (West 2012)), and driving while license revoked (count III) (625 ILCS 5/6-303(a) (West 2012)). In September 2013, the State charged defendant by information with a second count of aggravated battery (count IV) (720 ILCS 5/12-3.05(c) (West 2012)). The charges related to an incident in which Anthony Jones was struck and kicked by three men outside a bar in Champaign, Illinois.

¶ 6 In September 2013, defendant pleaded guilty to count I as part of a fully negotiated plea agreement. In exchange for the guilty plea, the State agreed to dismiss counts II, III, and IV and recommend a sentence of 24 months' probation. After hearing the factual basis, the trial court accepted defendant's guilty plea. The court then sentenced him to 24 months' probation. The court also imposed various fees, including a $250 genetic-marker fee (730 ILCS 5/5-4-3(j) (West 2012)). The court required defendant to submit specimens of blood, saliva, or tissue to the Illinois State Police unless he had already done so.

¶ 7 In January 2014, the State filed a petition to revoke defendant's probation. The petition alleged defendant had been ordered as a condition of his probation to not violate any criminal statute. He allegedly violated his probation by committing the offenses of being an armed habitual criminal (720 ILCS 5/24-1.7(a)(1) (West 2012)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). The petition alleged defendant possessed a .380-caliber handgun and discharged the firearm in the direction of Ernest Mosely.

¶ 8 In February 2014, a jury acquitted defendant on the charges of being an armed habitual criminal and aggravated discharge of a firearm. That same month, the trial court conducted a hearing on the State's petition to revoke defendant's probation. The court took judicial notice of the criminal proceeding in which defendant was acquitted. The court also

reiterated some of the evidence from that trial. Mosely testified he knew defendant. On the night of the incident, Mosely told defendant to "grow up." Later, Mosely saw defendant pull up in a car, point a gun at him, and fire the gun. Three .380-caliber shell casings were recovered from the scene, and a pistol case found in defendant's residence was one that could "easily hold a .380[-]caliber pistol." The court stated it found Mosely to be "an incredibly credible individual," despite his prior criminal convictions. The court also commented on the jury's decision not to find defendant guilty beyond a reasonable doubt by stating "that's what happens sometimes." The court found defendant violated his probation.

¶ 9 In April 2014, the trial court conducted the resentencing hearing. Anthony Jones, the aggravated-battery victim, testified he was "assaulted" and kicked by several males while he was on the ground. He was knocked unconscious, sustained a minor concussion, and had a tooth broken. On cross-examination, Jones stated he was unable to identify any of his attackers.

¶ 10 In mitigation, the trial court noted defendant was "still a relatively young man" at 28 years of age and "has been able to occasionally obtain employment." In aggravation, the court noted defendant's convictions for battery, obstructing a police officer, burglary, cannabis delivery, and retail theft. The court also noted the need to deter others from committing the offense of aggravated battery. The court resentenced defendant to 10 years in prison.

¶ 11 Defense counsel filed a motion to reconsider the sentence, claiming the sentence was not in keeping with defendant's family situation, criminal history, and education and gave inadequate consideration to his rehabilitative potential. In June 2014, the trial court denied the motion. This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 A. Resentencing

¶ 14 Defendant argues the trial court erred in resentencing him for a violation of probation based on conduct occurring during his probation and not on the original offense. We disagree.

¶ 15 Initially, we note the State contends defendant has forfeited his argument by failing to raise it in his motion to reconsider the sentence. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). In his reply brief, defendant argues he raised the issue of his past criminal history in the motion to reconsider the sentence and, even if he did not, the issue should be reviewed as a matter of plain error. Because defendant did not set forth the specific claim that the court erred in considering conduct while he was on probation, we find the issue forfeited. However, we will consider the claim as a matter of plain error.

¶ 16 The plain-error doctrine allows a court to disregard a defendant's forfeiture and consider unpreserved error when either:

> "(1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31, 983 N.E.2d 1015.

¶ 17 Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine whether any error occurred at all. *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. "If error did occur, we then consider whether either prong of the

plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272.

¶ 18 The Illinois Constitution of 1970 mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *Hestand*, 362 Ill. App. 3d at 281, 838 N.E.2d at 326 (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)).

¶ 19 A trial court has broad discretion in imposing a sentence. *People v. Chester*, 409 Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118 (2011). A reviewing court gives great deference to the sentencing court's decision because the trial judge is generally in a better position to weigh these factors in fashioning a sentence. *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27.

¶ 20 "After revoking a sentence of probation, the trial judge may resentence a defendant to any sentence that would have been appropriate for the original offense." *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005). Moreover, when resentencing a defendant after a revocation of probation, the sentencing court may consider the defendant's conduct on probation. *People v. Rathbone*, 345 Ill. App. 3d 305, 312, 802 N.E.2d 333, 339 (2003). "[A] sentence within the statutory range for the original offense will not be set aside on review *unless* the reviewing court is strongly persuaded that the sentence imposed after revocation of probation was *in fact* imposed as a penalty for the conduct which was the basis of revocation, and *not* for the original offense." (Emphases in original.) *People v. Young*, 138 Ill.

App. 3d 130, 142, 485 N.E.2d 443, 450 (1985).

¶ 21 In the case *sub judice*, defendant pleaded guilty to the offense of aggravated battery, a Class 3 felony (720 ILCS 5/12-3.05(h) (West 2012)). A defendant convicted of a Class 3 felony is subject to a sentencing range of two to five years in prison. 730 ILCS 5/5-4.5-40(a) (West 2012). Because of defendant's criminal record, he was subject to an extended-term sentence. The maximum extended-term sentence for a Class 3 felony is 10 years in prison. 730 ILCS 5/5-4.5-40(a) (West 2012). Thus, defendant's extended-term 10-year sentence for aggravated battery fell within the relevant sentencing range.

¶ 22 Defendant argues the trial court improperly considered his conduct while on probation as an aggravating factor to increase his term of imprisonment. We find no error. At the resentencing hearing, the court stated it considered the presentence report, the comments of counsel, the testimony of the State's witness, defendant's statement, and the statutory factors in aggravation and mitigation. In mitigation, the court found defendant was "still a relatively young man" at 28 years of age, had been employed occasionally, and "he did plead guilty to this aggravated battery." In aggravation, the court noted defendant's criminal history and the need to deter others. The court also stated, in part, as follows:

> "This was a beating at a bar. This is the type of offense that is deterrable so the deterrent factor has to be something the Court considers as a statutory factor in aggravation.
>
> Now the offense was probationable when he pled guilty and it remains so today and the Court is obligated to consider a community-based sentence as the first alternative as set forth in the statute. When I consider the circumstances surrounding the

offense, the history, the character and condition of the Defendant, the Court has to make a determination as to whether or not this Defendant needs to be incarcerated because he's dangerous and/or would a sentence of—further sentence of probation or conditional discharge deprecate the seriousness of his conduct and be inconsistent with the ends of justice.

When I look to the history, the character and condition of the Defendant and his rehabilitative potential, if you will, the pre-sentence report I believe provides ample opportunity to make that call.

Now I've listed the criminal convictions and rarely does this Court ever consider petty traffic offenses but this Defendant has accumulated 28 traffic tickets over the course of his driving career. Eleven of those are driving without insurance. He also includes—added to that were four driving under suspension tickets. That says a lot about this Defendant and what he thinks about the laws of the state of Illinois. At least the traffic laws don't apply to him.

The other thing when I look to the history, character and condition of this Defendant this attack on Mr. Jones occurred at a bar and there was some indication that either [Defendant] or one of his party were offended by being bumped into. When I recall the testimony presented at the trial involving Mr. Mosely, that

basically started out the same way. There was some passing at the bar. Mr. Mosely made a comment which apparently offended the Defendant. He sought Mr. Mosely out and the testimony was basically tried to kill him. He fired at him.

Now the jury found him not guilty, and that's in the province of the jury. The Court heard the evidence. The Court heard the testimony. The Court made the determination that it was at least proven by a preponderance of the evidence if not beyond a reasonable doubt so again we have a strikingly similar situation, and alleged affront at a bar and the next thing you know somebody is being kicked into unconsciousness or being shot at all involving [Defendant]. Mr. Jones is right. [Defendant] is a dangerous young man.

The Court finds that a community-based sentence would definitely deprecate the seriousness of his conduct, would be inconsistent with the ends of justice, would not be the appropriate deterrent factor and because of the potential possibility that Mr. Winters has for more violence a period of incarceration in the Illinois Department of Corrections I believe is necessary. Therefore it will be for a period of 10 years."

¶ 23 Here, the record clearly demonstrates the trial court considered defendant's original offense when fashioning his sentence. In addition to noting the need to deter others, the court stated it had to consider whether a probationary term was warranted or whether defendant

was a danger to the community such that a prison sentence was necessary. In considering defendant's rehabilitative potential, the court noted defendant's criminal history. The court also mentioned the original offense centered on a bar fight and, in noting the similarity of defendant's conduct while on probation, found him to be a dangerous man. The court's consideration of defendant's conduct on probation was only one of many factors the court considered in resentencing him to the 10-year prison term. We find the court did not abuse its discretion in doing so. Because we have found no error occurred, we hold defendant to his forfeiture of this issue.

¶ 24 B. Genetic-Marker Fee

¶ 25 Defendant argues the trial court erred in assessing the $250 genetic-marker fee because he had previously been assessed the fee in a different case. The State, however, argues the fee was properly imposed as a condition of defendant's probation and this court lacks jurisdiction to review that order, as no appeal was taken from the original sentencing. We agree with defendant.

¶ 26 Section 5-4-3(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-4-3(a) (West 2012)) requires any person convicted of a felony in Illinois to submit specimens of blood, saliva, or tissue to the Illinois State Police to be analyzed and catalogued in a database. Under section 5-4-3(j) of the Code (730 ILCS 5/5-4-3(j) (West 2012)), the person providing the specimen is required to pay an analysis fee of $250. Our supreme court has held the genetic-marker fee can be assessed only once from an individual and cannot be assessed against a defendant whose genetic specimen is already in the database as a result of a prior conviction. *People v. Marshall*, 242 Ill. 2d 285, 303, 950 N.E.2d 668, 679 (2011).

¶ 27 The Illinois Supreme Court recently abolished the "void sentence rule"

established in *People v. Arna*, 168 Ill. 2d 107, 113, 658 N.E.2d 445, 448 (1995), which held any judgment failing to conform to a statutory requirement was void. *People v. Castleberry*, 2015 IL 116916, ¶ 1, 43 N.E.3d 932. A sentence is only void if it is entered without personal or subject-matter jurisdiction. *Castleberry*, 2015 IL 116916, ¶¶ 11, 12, 43 N.E.3d 932. The *Castleberry* opinion does not change the outcome here. Fines imposed by the circuit clerk are still void, and we have jurisdiction to rule on any amount improperly imposed. See *People v. Gutierrez*, 2012 IL 111590, ¶ 14, 962 N.E.2d 437 (stating "the appellate court had jurisdiction to act on void orders of the circuit clerk"). Moreover, a void judgment is one entered without jurisdiction and can be challenged " 'at any time or in any court, either directly or collaterally.' " *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103, 776 N.E.2d 195, 201 (2002) (quoting *Barnard v. Michael*, 392 Ill. 130, 135, 63 N.E.2d 858, 861-62 (1945)).

¶ 28 Here, at the guilty plea hearing, defendant agreed to the terms set forth by the prosecutor. The prosecutor stated defendant would plead guilty to count I in exchange for the State's sentence recommendation of probation. In addition, financial obligations would include a genetic-marker fee if defendant had not already paid that fee. The trial court sentenced defendant to probation and required him to pay the monetary obligation set forth in the order. Further, the court required defendant to submit specimens of blood, saliva, or tissue unless he had already done so. Accordingly, the circuit clerk only had the authority from the court to charge the genetic-marker fee if defendant had not submitted a sample previously. The presentence report indicates defendant submitted a sample to the Illinois State Police on May 15, 2006. Thus, the duplicate genetic-marker fee imposed by the circuit clerk is void and must be vacated.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment as it pertains to defendant's resentencing after the revocation of his probation and vacate the $250 genetic-marker fee. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed in part and vacated in part.