2017 IL App (1st) 143253-U

No. 1-14-3253

Order filed June 23, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 14488
	)	
KEVIN CLONEY,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's convictions for residential burglary and possession of a controlled substance as the police officers had probable cause to arrest him. We also correct the fines and fees order.

¶ 2 Following a bench trial, defendant Kevin Cloney was convicted of one count of possession of a controlled substance (720 ILCS 570/402(a)(1)(A) (West 2012)) and one count of residential burglary (720 ILCS 5/19-3(a) (West 2012)) and sentenced to four years' imprisonment. The trial court also imposed various fines and fees totaling $394. Defendant

appeals his convictions, arguing that because the police lacked probable cause to arrest him, evidence seized during the arrest should have been suppressed. He also contends that certain fees imposed against him were fines which should have been offset by his presentence incarceration credit. We affirm the convictions and modify the fines and fees order.

¶ 3 Defendant was charged with one count of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(1)(a) (West 2012)) and one count of residential burglary (720 ILCS 5/19-3(a) (West 2012)). Defendant filed a motion to quash arrest and suppress evidence.

¶ 4 At the hearing on the motion, Officer Christopher Kane testified that he responded to 3221 West 65th Street to assist Officer Cronin in the investigation of a residential burglary on July 6, 2013. Zelma Noreika told Cronin that her apartment had been broken into and a checkbook, a man's watch, and cash were missing from the apartment. Gintautas Sidaravicius, a tenant in Noreika's building, told Cronin that he had seen a man he knew to be a friend of Noreika's sister in the apartment building. Noreika's sister, Helena Hamilton, informed Cronin that the man Sidaravicius described was currently sleeping on a couch on the back porch of her residence. The officers went to the back of the building located at 3230 West 65th Place to confront the man. Hamilton gave them permission to enter the porch.

¶ 5 Inside the porch, Kane found the man, whom he identified in court as defendant, sleeping on a couch. Kane observed three foil packets resting on defendant's chest. He described the packets as pieces of foil that had been folded into "a third and then a third again over each other to make a small folded packet" and indicated that the packets were small enough to be held between his thumb and his forefinger. Kane stated that he had been a Chicago police officer for 18 years and had been involved in more than 20 narcotics recoveries in which narcotics had been

packaged similarly to those on defendant's chest. Based on his experience, he believed that the foil packets on defendant's chest contained heroin.

¶ 6 Kane awakened defendant. Defendant stood up and the packets fell to the floor. Kane recovered them and Cronin recovered a checkbook from defendant's back pants pocket. Kane placed defendant in custody for possession of suspect narcotics. A subsequent search of defendant produced a gold watch and U.S. currency.

¶ 7 The trial court denied defendant's motion to quash arrest, noting that Kane's testimony was "very credible and uncontradicted." It found that the officers had the right to place defendant under arrest based on their reasonable belief that he had narcotics on his chest and the subsequent search was valid.

¶ 8 Kane's testimony at trial mirrored his testimony at the suppression hearing. At trial, Kane also stated that when defendant awoke, the foil packets fell on the floor. Kane recovered the packets from the floor and Officer Cronin took checkbooks out of defendant's back pocket. Kane arrested defendant for possession of heroin and "the checkbook." As he was arresting defendant, Kane looked on the couch and observed a clear plastic bag full of foil packets identical to the packets that he recovered from the floor. Photographs of the checkbook and the plastic bag were identified by Kane and entered into evidence. A subsequent search of defendant uncovered cash and a gold watch.

¶ 9 Sidaravicius testified that he had allowed a man, whom he identified in court as defendant, into Noreika's building under the belief that she had asked defendant to perform maintenance inside the building. He identified the man sleeping on the porch to the officers as the man he had let into the building. Noreika testified that her apartment had been broken into

and a checkbook, cash, and a gold watch were missing. She stated that she had not given defendant permission to enter the building.

¶ 10 The parties stipulated that if Paula Bosco-Szum were to testify, she would state that she was a chemist at the Illinois State Police Crime Lab and that the foil packets that she received contained a total of 15.3 grams of heroin. Defendant made a motion for a directed finding, which the trial court denied.

¶ 11 The trial court found defendant guilty of possession of a controlled substance (720 ILCS 570/402(a)(1)(a) (West 2012)), a lesser included offense of the possession with intent to deliver charge, and residential burglary (720 ILCS 5/19-3(a) (West 2012)). The court gave substantial weight to the fact that defendant was found in possession of the stolen property a short time after the break-in occurred. Defendant filed a motion to reconsider, which the trial court denied. The court then sentenced defendant to two concurrent four-year sentences.

¶ 12 Defendant appeals, arguing that the trial court erred in denying his motion to quash arrest and suppress evidence because the police lacked probable cause to arrest him and evidence seized during the arrest should have been suppressed. Defendant asserts the police were not justified in arresting him because the incriminating nature of the three foil packets was not "immediately apparent" as required by the plain view exception to the warrant requirement of the fourth amendment.

¶ 13 Initially, we note that defendant failed to raise this issue in his motion for a new trial. Generally, to preserve an issue for appeal, a party must raise it at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). However, constitutional issues not raised on direct appeal can still be addressed in postconviction proceedings, because "the interests in judicial economy favor addressing the issue on direct appeal." *People v. Cregan*, 2014 IL

113600, ¶ 18. As defendant challenges the constitutionality of his arrest, we will review the trial court's denial of defendant's motion to quash arrest and suppress evidence on the merits.

¶ 14 When we review a court's ruling on a motion to quash arrest and suppress evidence, mixed questions of fact and law are presented. *People v Jones*, 215 Ill. 2d 261, 267 (2005). We accord great deference to the trial court's factual findings and only reverse if those findings are against the manifest weight of the evidence. *People v. Duran*, 2016 IL App (1st) 152678, ¶ 2. However, the ultimate legal question of whether police had probable cause to arrest the defendant is reviewed *de novo*. *Id*. A reviewing court is not limited to the evidence presented during the suppression hearing, but may also consider evidence that was presented during the defendant's trial. *People v. Shinohara*, 375 Ill. App. 3d 85, 94 (2007). "Where officers are working together in investigating a crime, the knowledge of each constitutes the knowledge of all, and probable cause can be established from all the information collectively received by the officers." (Internal quotation marks omitted.) *In re Edgar C.*, 2014 IL App (1st) 141703, ¶ 111 (quoting *People v. Ortiz*, 355 Ill. App. 3d 1056, 1065 (2005)).

¶ 15 The fourth amendment to the United States Constitution guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. A warrantless search is *per se* unconstitutional unless it falls within recognized exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). Two such exceptions are searches incident to a lawful custodial arrest and seizure of items in plain view. *Cregan*, 2014 IL 113600, ¶ 25; *People v. Garcia*, 2012 IL App (1st) 102940, ¶ 4.

¶ 16 The arrest of a person must be supported by probable cause. *People v. Maxey*, 2011 IL App (1st) 100011, ¶ 70; see also *People v. Sims*, 192 Ill. 2d 592, 614 (2000) ("To effect a valid,

warrantless arrest, a police officer must have probable cause to arrest"). Probable cause exists when the facts known to the officer at the time of the arrest are sufficient to lead a reasonably cautious person to believe that the arrestee has committed a crime. *Id*. Whether probable cause exists is governed by common sense considerations, rather than proof beyond a reasonable doubt. *People v. Hopkins*, 235 Ill. 2d 453, 475 (2009). " 'Indeed, probable cause does not even demand a showing that the belief that the suspect has committed a crime be more likely true than false.' " *Id.* (quoting *People v. Wear*, 229 Ill. 2d 545, 564 (2008)). In determining whether an officer had probable cause to arrest, the officer's factual knowledge, based on law enforcement experience, is relevant. *People v. Grant*, 2013 IL 112734, ¶ 11.

¶ 17 The plain view exception to the fourth amendment's warrant requirement allows a police officer to seize an object without a search warrant if the officer is lawfully located in the place where he observed the object, the object is in plain view, and the object's incriminating nature is immediately apparent. *Garcia*, 2012 IL App (1st) 102940, ¶ 4. " 'The requirement that an item's criminal nature be "immediately apparent" essentially translates into a probable cause requirement.' " *Id*. at ¶ 9 (quoting *People v. Watkins*, 293 Ill.App.3d 496, 502 (1997)). "The immediately apparent or probable cause element does not require a law enforcement officer to know that certain items are contraband or evidence of a crime." (Internal quotation marks omitted.) *Jones*, 215 Ill. 2d at 277 (quoting *Texas v. Brown*, 460 US 730, 741 (1983)). An appellate court may affirm on any basis supported by the record, and may do so regardless of whether the trial court's reasoning was correct. *People v. Lee*, 2016 IL App (2d) 150359, ¶ 14.

¶ 18 Defendant argues that officers unlawfully seized the foil packets that fell off his chest. He concedes that the officers were lawfully on the porch and the packets were in plain view. He

contends, however, that the incriminating nature of the packets was not immediately apparent, as required by the plain view exception to the warrant requirement. We disagree.

¶ 19 Officer Kane described the packets as pieces of foil that had been folded into "a third and then a third again over each other to make a small folded packet." In his 18 years of experience as a police officer, Kane had seen drugs packaged in this manner over 20 times. Based on his law enforcement knowledge and experience, Kane believed that the packets contained heroin. Therefore, based on defendant's possession of these packets of suspect heroin, the officers had probable cause to arrest him. See *Grant*, 2013 IL 112734, ¶ 11 (An officer's factual knowledge, based on law enforcement experience, is relevant in determining whether police had probable cause to arrest).

¶ 20 Defendant's contention that the packets on his chest were inherently innocuous and could have contained gum "which is commonly wrapped in small foil packets" is unavailing. While it is true that gum is often packaged in foil, the manner in which the packets were folded, as described by Officer Kane's testimony and displayed by the photograph of the bag of packets admitted into evidence as People's Exhibit # 5 and reproduced herein, would not lead a reasonable person to think that they contained chewing gum:

Accordingly, we affirm the trial court's denial of defendant's motion to quash arrest and suppress evidence.

¶ 21 Defendant also contends that certain "fees" imposed by the trial court are fines and should be offset by presentence credit. We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60. A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence incarceration. 725 ILCS 5/110-14(a) (West 2012). The credit for presentence incarceration can only reduce fines, not fees. *People v. Jones*, 233 Ill. 2d 569, 599 (2006). A "fine" is punitive in nature and is imposed as part of a sentence on a person convicted of a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A "fee" is a charge that seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id*. The legislature's classification of a charge as a fee or a fine is instructive, but the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant. *Id*. We may modify a fines and fees order without remanding the case to the trial court pursuant to Illinois Supreme Court Rule 615(b)(1). *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 22 The State correctly concedes that defendant is entitled to presentence custody credit toward two assessments labeled as fees: the $15 State Police Operations fee (705 ILCS 105/27.3a (1.5) (West 2012)) and the $50 Court System fee (55 ILCS 5/5-1101(c)(1) (West 2012)). This court has previously determined that these "fees" operate as fines. *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 (State Police Operations fee operates as a fine); *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 40 (Court System fee operates as a fine that is offset by presentence credit). As defendant spent 440 days awaiting sentencing and is entitled to

$2,200 of presentence credit, the $15 State Police Operations fee and the $50 Court System Fee are completely offset by his presentence credit. See *Bingham*, 2017 IL App (1st) 143150, ¶ 40.

¶ 23 The State contends that defendant has forfeited the remainder of his claims regarding fines and fees by failing to raise them in the trial court. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) ("To preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion"). Our supreme court has held, however, that claims for monetary credit under section 110-14 "may be raised at any time during court proceedings." *People v. Caballero*, 228 Ill. 2d 79, 88 (2008). Accordingly, we will address the merits of defendant's claims.

¶ 24 Defendant contends that the $15 Clerk's Automation fee (705 ILCS 105/27.3a (1), (1.5) (West 2012)) and $15 Clerk's Document Storage fee (705 ILCS 105/27.3c (West 2012)) assessed against him are actually fines, and should be offset by his presentence credit. However, this court has previously held that these charges are "compensatory and a collateral consequence of defendant's conviction," and therefore are fees rather than fines. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006). Accordingly, the $15 Document Storage fee and $15 Automation fee are not offset by defendant's presentence credit.

¶ 25 Similarly, defendant contends that he is entitled to presentence credit against both the $2 Public Defender Records Automation fee (55 ILCS 5/3-4012 (West 2012)) and the $2 State's Attorney Records Automation fee (55 ILCS 5/4-2002.1(c) (West 2012)) assessed against him. This court has found that both the State's Attorney Records Automation fee and the Public Defender Records Automation fee constitute fees, and not fines, as they are compensatory instead of punitive in nature. *People v. Jones*, 2017 IL App (1st) 143766, ¶ 53. Accordingly, neither of the Records Automation fees are offset by defendant's presentence credit.

¶ 26 To summarize: defendant's $15 State Police Operations fee and $50 Court System fee are completely offset by his presentence credit; the $15 Clerk's Document Storage fee, the $15 Clerk's Automation fee, the $2 Public Defender Records Automation fee, and the $2 State's Attorney Records Automation fee are not offset by credit. Pursuant to Illinois Supreme Court Rule 615(b)(1), we order the clerk of the circuit court to correct the fines and fees order accordingly. We affirm the judgment in all other respects.

¶ 27 Affirmed as modified.