2017 IL App (1st) 143479-U

No. 1-14-3479

Order filed March 8, 2017

THIRD 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 13480
	)	
TITUS BATES,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's Class 3 felony conviction for driving with a revoked license (DWLR) is affirmed where no evidence was presented at trial to counter the State's introduction of defendant's certified driving abstract reflecting nine prior DWLR convictions.

¶ 2 Following a bench trial, defendant Titus Bates was convicted of four counts of felony driving while his license was revoked (DWLR), in violation of section 6-303 of the Illinois Vehicle Code (the Code) (625 ILCS 5/6-303 (West 2012)). Based on his nine prior DWLR

convictions, defendant was subject to an enhanced Class 3 felony sentence pursuant to section 6-303(d-4) of the Code (625 ILCS 5/6-303(d-4) (West 2012)), and the trial court sentenced defendant to 3 1/2 years in prison and one year of mandatory supervised release. The trial court also imposed various fines and fees. On appeal, defendant contends his conviction should be reduced to a Class 4 felony because he did not have nine prior convictions for DWLR. He also contends his convictions on multiple counts of DWLR in this case violate the one-act, one-crime rule and that the trial court erroneously assessed several fines and fees and did not award the proper monetary credit for time that he spent in custody prior to sentencing.

¶ 3 Defendant was charged with four counts of DWLR. Count 1 of the indictment indicated the State's intent to seek to enhance defendant's sentence to a Class 3 felony pursuant to section 6-303(d-4) because his license had been revoked for a violation of Section 11-501 of the Code (625 ILCS 5/11-501 (West 2012)) (driving under the influence of alcohol or drugs) and because he had nine prior violations of section 6-303. The three remaining counts alleged various Class 4 felony versions of that offense that required proof of fewer than nine previous DWLR violations.

¶ 4 At trial, Chicago police officer Burks testified that at about 8 p.m. on March 21, 2013, he observed defendant drive a vehicle out of an alley in the 9000 block of South Colfax and turn on to the street without operating his turn signal. Officer Burks initiated a traffic stop and requested defendant's license and identification. Defendant gave the officer a state identification (ID) card indicating his date of birth. Officer Burks performed a computer search that indicated defendant's driver's license was revoked. The State introduced into evidence a certified copy of defendant's driving abstract. Defendant testified he was not driving the car on the date in question but acknowledged his date of birth was the same date on the state ID.

¶ 5 The trial court found defendant guilty of DWLR. At sentencing, the State asserted that defendant "has nine prior 6-303 convictions" and recommended a sentence of at least five years in prison. Defense counsel agreed that this offense was "Class 3." The trial court sentenced defendant to 3 1/2 years in prison.

¶ 6 On appeal, defendant contends his conviction should be reduced from a Class 3 felony to a Class 4 felony because he did not have nine prior convictions for DWLR. The trial court imposed a sentence of 3 1/2 years after determining defendant had nine prior DWLR convictions and was subject to a Class 3 felony sentencing range. A Class 3 felony carries a sentence of between 2 and 5 years in prison. 730 ILCS 5/5-4.5-40(a) (West 2012). By comparison, an offender with a record of between four and eight prior DWLR violations is guilty of a Class 4 felony and is subject to a sentence of between 1 and 3 years in prison. 625 ILCS 5/6-303(d-3) (West 2012); 730 ILCS 5/5-4.5-45(a) (West 2012).

¶ 7 The State claims that defendant waived the ability to now raise this issue because neither defendant nor his counsel disputed his driving record before the trial court. Defendant concedes this issue was not raised before the trial court or in a motion to reconsider. However, defendant seeks review under the plain error rule, which permits this court to consider a forfeited issue where either: (1) the evidence was closely balanced; or (2) the error was so serious that the defendant was denied a substantial right, namely a fair sentencing hearing. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010), citing *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Defendant asserts that his substantial rights were affected by the enhancement of this sentence. He further contends that, in lieu of plain error, his claim should be reviewed as one of ineffective assistance of counsel because his attorney conceded at his sentencing hearing that he was a "Class 3" offender.

¶ 8 An error in sentencing can warrant review under the second prong of plain error; however, a defendant must first show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010); see also *People v. Hood*, 2016 IL 118581, ¶ 18 (and cases cited therein) ("without error, there can be no plain error").

¶ 9 We thus consider whether any error occurred, *i.e.*, whether the State established at trial that defendant had nine prior convictions for DWLR. Defendant contends he only had seven prior DWLR convictions because two of the cases listed on his driving abstract did not result in convictions.

¶ 10 At trial, the State entered into evidence a certified copy of defendant's driving abstract issued by the Illinois Secretary of State, which is included in the record on appeal. A certified copy of the abstract of a motorist's driver's license is *prima facie* evidence of the facts stated therein. 625 ILCS 5/2-123(g)(6) (West 2012). Once an abstract is presented by the State, a defendant may present evidence to rebut its veracity; however, when that is not done, the contents of the abstract are deemed to be accurate. *People v. Meadows*, 371 Ill. App. 3d 259, 263 (2007).

¶ 11 The first relevant entry on defendant's driving abstract for the convictions he now challenges is for ticket number 8783237, which lists an arrest date of "11-11-94" and a disposition date of "01-27-95." The second relevant entry is for ticket number A162631, with an arrest date of "1-31-02" and a disposition date of "04-04-02." Both entries indicate that the convictions were for violations of section 6-303 of the Code, and both entries list "93" as the "Type [of] Action" code, which denotes an "immediate action conviction" for bond forfeiture.

¶ 12 Defendant does not challenge the accuracy of his driving abstract or dispute that a bond-forfeiture judgment was issued in each of those two cases. He further concedes that those

judgments constituted convictions under the Code, citing *People v. Borowski*, 2015 IL App (2d) 141081, ¶ 4. As noted in *Borowski*, several provisions of the Code include a bond-forfeiture judgment in the definition of a "conviction." *Id.*, citing, *inter alia*, 625 ILCS 5/6-100(b) (West 2012) (defining "conviction" as a "final adjudication of guilty *** after a bench trial, trial by jury, plea of guilty, order of forfeiture, or default"); 625 ILCS 5/6-204(c) (West 2012) ("a forfeiture of bail or collateral deposited to secure a defendant's appearance in court when forfeiture has not been vacated *** shall be equivalent to a conviction"); 625 ILCS 5/6-700 (West 2012) (conviction includes "a forfeiture of bail, bond or other security deposited to secure appearance by a person charged with having committed any such offense").

¶ 13 In *People v. Smith*, 345 Ill. App. 3d 179, 187-89 (2004), finding the issue to be one of first impression, this court held that for purposes of the Code, a conviction resulting from a bond forfeiture is "functionally equivalent to any other conviction" and can be used to enhance a defendant's sentence for DWLR. Citing the statutory sections discussed above, *Smith* noted that when a defendant fails to appear on charges and sustains a conviction in that manner, a defendant "may move to vacate that conviction" but if that does not occur, the "legislature has permitted courts to infer that the defendant has committed the offense." *Id.* at 187.

¶ 14 Defendant nevertheless argues that in the two cases at issue, neither judgment "resulted in a conviction." He asks this court to take judicial notice of "circuit court documents" included in the appendix to his brief.

¶ 15 A defendant may not attempt to supplement the appellate record by appending materials to his brief, where such materials were not made part of the trial record. *People v. Gacho*, 122 Ill. 2d 221, 254-55 (1988); *People v. Williams*, 2012 IL App (1st) 100126, ¶ 27. We note that defendant has also supplemented the record on appeal with documents that duplicate some of the

information that is in the records he appended to his brief. This court "may take judicial notice of matters that are readily verifiable from sources of indisputable accuracy." *People v. Alvarez-Garcia*, 395 Ill. App. 3d 719, 726-27 (2009) (taking judicial notice of a letter from the clerk of the Illinois Supreme Court to the Office of the State Appellate Defender).

¶ 16 The materials in the supplemental record bear the heading "Clerk of the Circuit Court of Cook County" but, as the State points out, the documents are not certified or authenticated in any way. The materials appear to be printed records of computer entries with information as to the disposition of the two traffic citations at issue. Defendant included these records in a supplemental common law record, but that does not change the fact that the trial court was never given an opportunity to review the documents or consider the driving abstract prepared by the Secretary of State's office in light of the apparent conflict. Therefore, we will not consider these documents for the first time on appeal. See *People v. Heaton*, 266 Ill. App. 3d 469, 477 (1994); see also *McCullough v. Knight*, 293 Ill. App. 3d 591, 594 (1997).

¶ 17 We have considered the issue raised in light of the evidence before the trial court at the time it rendered its decision. According to the driving abstract, the two traffic citations that defendant now challenges resulted in bond-forfeiture judgments, a resolution that is a "conviction" as defined by the Code. See 625 ILCS 5/6-100(b) (West 2012). Thus, the trial court was presented with a driving abstract, a self-authenticating document under Illinois Rule of Evidence 902(1) (Ill R. Evid. 902(1) (eff. Jan. 1, 2011)), which indicated that defendant had the requisite nine prior convictions to subject him to a Class 3 sentence. We cannot conclude that the trial court erred when, absent any contradictory information, it acted in accordance with the driving abstract. Similarly, we cannot conclude that defendant was denied the effective

assistance of counsel in the absence of evidence that defense counsel knew or should have known of the discrepancies, if any, between the driving abstract and the other records.

¶ 18 Defendant next contends on appeal that his multiple convictions for DWLR violate the one-act, one-crime rule because they were based upon the same physical act of driving. As with defendant's prior contention, this error was not raised before the trial court; however, forfeited arguments relating to the one-act, one-crime doctrine are reviewed under the second prong of the plain-error rule because the potential for a surplus conviction implicates the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010); *People v. Harvey*, 211 Ill. 2d 368, 389 (2004).

¶ 19 Under *People v. King*, 66 Ill. 2d 551, 566 (1977), "[m]ultiple convictions are improper if they are based on precisely the same physical act." The State concedes that because all counts are based on a single physical act of driving, defendant cannot be convicted of four counts of DWLR in this case, and we accept the State's concession. The parties further agree that defendant's convictions on Counts 2 through 4 should be vacated and that a conviction should be entered on Count 1 only. Therefore, defendant's conviction on Count 1 is affirmed and the remaining convictions are vacated.

¶ 20 Defendant's remaining contentions on appeal involve the total amount of various fines and fees and the credit he should receive toward those charges for the days he spent in custody prior to sentencing. The trial court imposed $474 in fines, fees and other assessments.

¶ 21 On appeal, this court reviews *de novo* the propriety of the trial court's imposition of fines and fees, as that involves issues of statutory interpretation. See *People v. Green*, 2016 IL App (1st) 134011, ¶ 44. Although defendant did not raise a challenge to his fines and fees in the circuit court, he contends we can reach this issue under the plain error doctrine or as a claim of

ineffectiveness of his trial counsel. Again, a sentencing error may affect a defendant's substantial rights and thus can be reviewed under the plain error rule. *People v. Akins,* 2014 IL App (1st) 093418-B, ¶ 20. Therefore, we may review these charges and, if necessary, modify the circuit court's order without remanding the case, pursuant to Supreme Court Rule 615(b) (eff. Aug. 27, 1999). See *People v. Bryant,* 2016 IL App (1st) 140421, ¶ 22.

¶ 22 We first address defendant's contentions that two charges were erroneously imposed. First, defendant argues, and the State correctly agrees, that he should not have been assessed a $20 probable cause hearing fee (55 ILCS 5/4-2002.1(a) (West 2012)) in this case because he was charged by indictment and thus, no such hearing was held. Accordingly, that charge is vacated.

¶ 23 Second, the State concedes that the $50 court system fee (55 ILCS 5/5-1101(c) (West 2012)) should not have been imposed for this offense. The State argues that instead, a $5 charge under a different subsection of that statute should have been assessed because this case involves a "violation of the Illinois Vehicle Code" (55 ILCS 5/5-1101(a) (West 2012)). The fines and fees order reflects that both the incorrect $50 court system fee and the correct $5 court system fee were imposed here. Therefore, the $50 court system fee is vacated.

¶ 24 Defendant next contends that several of the charges against him should be offset by monetary credit for the time he spent in custody prior to his sentencing. A defendant is entitled to a credit of $5 for each day he is incarcerated, with that amount to be put toward the fines levied against him as part of his conviction. 725 ILCS 5/110-14(a) (West 2012). Here, defendant spent 246 days in custody and, accordingly, has accumulated $1,230 worth of credit toward his eligible fees. Defendant was assessed $474 in fines, fees and other charges, and we have vacated $70 of those fees.

¶ 25 Before considering the individual charges challenged by defendant, we note that the credit at issue here can be applied only to fines, and we set out the difference between a "fine" and a "fee." A "fee" is defined as "a charge that seeks to recoup expenses incurred by the state or to compensate the state for some expenditure incurred in prosecuting the defendant (Internal quotations omitted.) *People v. Graves*, 235 Ill. 2d 244, 250 (2009), citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006). In contrast, a "fine" is "punitive in nature" and is "a pecuniary punishment imposed as a part of a sentence on a person convicted of a criminal offense." (Internal quotations omitted.) *Graves*, 235 Ill. 2d at 250, citing *Jones*, 223 Ill. 2d at 581, quoting *People v. White*, 333 Ill. App. 3d 777, 781 (2002). The labeling of a charge as a "fee" or a "fine" by the legislature is not dispositive. *Graves*, 235 Ill. 2d at 250-51 ("the most important factor is whether the charge seeks to compensate the state for any costs incurred in prosecuting the defendant").

¶ 26 With those definitions in mind, defendant argues, and the State correctly concedes, that this court has found the $15 State Police operations charge (705 ILCS 105/27.3a (1.5) (West 2012)) is a "fine" to which presentence custody credit should be applied. See *People v. Jackson*, 2016 IL App (1st) 141446, ¶ 35; *People v. Warren*, 2016 IL App (4th) 120721-B, ¶ 147. Defendant also contends the $5 Court System fee (55 ILCS 5/5-1101(a) (West 2012)), which we discussed above, is a fine, and we agree with that contention based on *Graves*, which described the charges in section 5-1101 of the Counties Code as "monetary penalties to be paid by a defendant on a judgment of guilty *** for violation of certain sections of the Illinois Vehicle Code or of the Unified Code of Corrections." *Graves*, 235 Ill. 2d at 253; *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21. Accordingly, defendant's presentence custody credit should also be applied to that $5 charge.

¶ 27 As to the remaining assessments challenged by defendant, we reach the opposite result. Defendant contends his presentence custody credit should be applied to the clerk's $15 automation charge (705 ILCS 105/27.3a(1) (West 2012)) and the $15 document storage charge (705 ILCS 105/27.3c(a) (West 2012)), arguing those charges constitute fines, not fees, because they do not relate to the costs incurred in prosecuting him. Similarly, he asserts the $25 Court Services (Sheriff) assessment (55 ILCS 5/5-1103 (West 2012)) is a fine because it applies to all criminal defendants who are found guilty and does not compensate the State specifically for the cost of his prosecution.

¶ 28 This court has held in *People v. Tolliver*, 363 Ill. App. 3d 94, 96-97 (2006), that those assessments are fees because they are compensatory and represent a "collateral consequence" of a defendant's conviction. The automation and document storage charges help to fund the maintenance of those systems (*People v. Martino*, 2012 IL App (2d) 101244, ¶¶ 29-30), and the statute authorizing the Court Services (Sheriff) charge expressly states that assessment is intended to defray court expenses. See 55 ILCS 5/5-1103 (West 2012).

¶ 29 Defendant acknowledges those cases, as well as additional authority in line with those holdings; however, he argues that those decisions contain no analysis as to why those charges should be considered fees. He contends that since *Tolliver* was decided, the supreme court clarified in *Graves* that to be designated as a fee, a charge must reimburse the State for a cost that was incurred in the defendant's prosecution. *Graves*, 235 Ill. 2d at 250. However, these charges represent a portion of the overall costs incurred in prosecuting defendant. Furthermore, several cases that have been decided since *Graves* have found these three charges to be fees. *People v. Larue*, 2014 IL App (4th) 120595, ¶¶ 62-68; *People v. Smith*, 2014 IL App (4th) 112118, ¶¶ 25-31; *Martino*, 2012 IL App (2d) 101244, ¶¶ 29-38. The fact that such assessments are not tailored

to each defendant's case does not negate that the charges compensate the State in some part for the costs incurred. See *Graves*, 235 Ill. 2d at 250 (a fee recovers the State's costs, *in whole or in any part*, for prosecuting the defendant).

¶ 30 Lastly, defendant contends that a portion of his presentence custody credit should be applied to the $2 State's Attorney and $2 Public Defender records automation charges, again asserting that those assessments do not reimburse the State for costs incurred in prosecuting a particular defendant. The statute enacting the State's Attorney records automation charge indicates, in pertinent part, that the $2 amount is assessed "to discharge the expenses of the State's Attorney's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/4-2002.1(c) (West 2012). The statute authorizing the $2 Public Defender records automation fee uses the same language as quoted above in regard to the Public Defender's office. 55 ILCS 5/3-4012 (West 2012).

¶ 31 Defendant recognizes this court's holdings that those charges are fees and thus not subject to offset by defendant's presentencing custody credit. See *Warren*, 2016 IL App (4th) 120721-B, ¶ 115 (finding the State's Attorney charge to be a fee because it is compensatory in nature and not punitive); *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; (finding "no reason to distinguish between the two statutes" given their nearly identical language and concluding that those charges are intended to reimburse those offices for expenses); see also *Green*, 2016 IL App (1st) 134011, ¶ 46; *People v. Daily*, 2016 IL App (4th) 150588, ¶ 30; *People v. Maxey*, 2016 IL App (1st) 130698, ¶ 144; *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17. See *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (the assessments do not compensate the State for any costs associated in prosecuting a particular defendant and thus cannot be considered fees). We agree with the analysis in *Warren, Bowen* and similar cases;

when a charge does not include a punitive aspect, it is a fee, not a fine. Thus, the State's Attorney and Public Defender records automation charges cannot be offset.

¶ 32 In conclusion on the topic of fines and fees, the $20 probable cause hearing fee and the $50 court system fee are vacated. Accordingly, defendant owes a total of $404 in fines and fees, as opposed to the $474 ordered by the trial court. Furthermore, defendant is entitled to have the $15 State Police operations charge and the $5 Court System charge offset by a portion of his presentence credit. Applying that offset, the $404 amount owed by defendant is reduced by another $20 to a total of $384 owed.

¶ 33 In summary, we affirm defendant's conviction for DWLR on Count 1 and his sentence as a Class 3 felony offender based on his nine prior DWLR convictions. Defendant's convictions on the remaining three counts are vacated under the one-act, one-crime rule. Pursuant to Rule 615(b)(1), we order the clerk of the circuit court to correct the fines and fees order to reflect a total amount due of $384.

¶ 34 Affirmed in part, vacated in part; fines and fees order corrected.