2017 IL App (1st) 150854-U

No. 1-15-0854

Order filed November 16, 2017

Fourth 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. 14 CR 11192
	)	
MARCUS DAVIS,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's convictions for aggravated unlawful use of a weapon where his defense counsel acquiesced to the admission of a notarized letter from the Illinois State Police proving that he had not been issued a concealed carry license or Firearm Owner's Identification card and such acquiescence did not constitute ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant Marcus Davis was convicted of two counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5), (a)(3)(C) (West 2014)). After the trial court merged the two counts, it sentenced him to 54 months'

imprisonment. On appeal, defendant contends that: (1) the trial court violated his constitutional right to confrontation by allowing the State to admit into evidence a notarized letter from the Illinois State Police to prove he had not been issued a concealed carry license or Firearm Owner's Identification card; and (2) he is entitled to additional presentence custody credit toward the monetary assessments imposed against him as a result of his convictions.

¶ 3 In our original order, we found that the trial court committed plain error by allowing the State to admit into evidence the notarized letter from the Illinois State Police to prove that defendant had not been issued a concealed carry license or Firearm Owner's Identification card. However, following that decision, the State filed a petition for rehearing, arguing that, because defendant acquiesced to the admission of the notarized letter, he could not contest its admission was erroneous on appeal. On November 8, 2017, we granted the State's petition for rehearing and withdrew our original order. Upon reconsideration of the issue, we determine that a different result is warranted than in our original order. Thus, for the reasons that follow, we affirm defendant's convictions.

¶ 4 I. BACKGROUND

¶ 5 The State charged defendant with several firearm-related offenses based on an incident where the police found a loaded handgun in the trunk of a vehicle he had occupied. Relevant to this appeal, Count 4 charged him with aggravated unlawful use of a weapon for allegedly possessing an uncased, loaded and immediately accessible firearm in a vehicle outside of his own land without being issued a concealed carry license (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5) (West 2014)). Count 6 charged defendant with aggravated unlawful use of a weapon for allegedly possessing a firearm in a vehicle outside of his own land without being issued a Firearm Owner's Identification (FOID) card (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2014)).

¶ 6 The evidence at trial revealed that Craig Crawford met defendant through a social media "party line." Crawford testified that, on the night of June 15, 2014, he drove to East 69th Street and South Cottage Grove Avenue in Chicago to meet up with defendant. After defendant entered Crawford's vehicle, they drove around for some time until they picked up defendant's cousin, codefendant Raymoan Powe. The group then drove to a convenience store, where Powe handed defendant a handgun before going into the store. Defendant told Crawford that he needed the firearm for protection and wanted to put it in the trunk of the vehicle. Crawford unlocked the trunk, and defendant placed the handgun inside. Crawford testified that, at this point, he was "trying to figure out" a way to get out of the situation. Powe returned to the vehicle, and the group began driving around again until they pulled into a gas station. There, Crawford told defendant and Powe that he was going to a McDonald's across the street. Crawford walked toward the McDonald's but realized it was closed. From there, he called the police, who arrived at the scene shortly thereafter. An officer eventually recovered a loaded 9-millimeter handgun from the trunk of Crawford's vehicle.

¶ 7 At the conclusion of the State's case-in-chief, it sought to admit into evidence a certified copy of conviction showing that defendant had been convicted of burglary in Champaign County in case number 05 CF 1982. The State also sought to admit a notarized "certification" letter from the Illinois State Police dated July 29, 2014, which stated:

> "Based on the following name and date of birth information provided by the Cook County State's Attorney's Office, I, Administrative Assistant Debbie Claypool, Firearms Services Bureau (FSB), Illinois State Police, do hereby certify, after a careful search of the FSB files, the information below to be true and accurate for

> Marcus Davis whose date of birth is June 8, 1986, [that he] has never been issued a FOID or [concealed carry license] Card as of July 29, 2014."

The trial court asked defense counsel if he had any objection to the admission of the documents, and he replied "[n]o, Judge." The documents were subsequently admitted into evidence.

¶ 8 Following closing arguments, the trial court found defendant guilty of two counts of aggravated unlawful use of a weapon (Counts 4 and 6), observing that he constructively possessed a firearm but did not have a concealed carry license or FOID card. The court, however, found him not guilty on the remaining counts and found Powe not guilty on all the charges against him. After the court merged Count 4 into Count 6, it sentenced defendant to 54 months' imprisonment and imposed $364 worth of monetary assessments. The court subsequently reduced his assessments to $329 based on the application of presentence custody credit. This appeal followed.

¶ 9 II. ANALYSIS

¶ 10 A. Confrontation Clause

¶ 11 Defendant first contends that the trial court violated his constitutional right to confrontation when it allowed the State to admit into evidence the notarized letter from the Illinois State Police stating that he had not been issued a concealed carry license or FOID card. Defendant argues that the letter was testimonial hearsay, as it was an affidavit prepared by Debbie Claypool, who did not testify at his trial, admitted for the truth of the matter asserted. Because he did not have a prior opportunity to cross-examine her concerning the contents of the letter and she was not shown to be unavailable at trial, defendant asserts that the letter was inadmissible. He concludes that we must reverse his convictions and remand the matter for a new trial.

¶ 12 The sixth amendment of the United States Constitution and article I, section 8, of the Illinois Constitution guarantee a defendant the right to confront the witnesses against him. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. The right to confrontation protects the defendant from testimonial hearsay. *Davis v. Washington*, 547 U.S. 813, 823-24 (2006). Hearsay is a statement, other than one made by the declarant while testifying at trial, offered into evidence to prove the truth of the matter asserted. *Leach*, 2012 IL 111534, ¶ 66. Hearsay is inadmissible at trial unless the statement falls within an exception to this general prohibition. *People v. Tenney*, 205 Ill. 2d 411, 432-33 (2002). In *Crawford v. Washington*, 541 U.S. 36, 51-52, 68 (2004), although the United States Supreme Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,' " it did find that affidavits, the functional equivalent of in-court testimony, were among the core class of testimonial statements protected by the right to confrontation. Under *Crawford*, testimonial hearsay is only admissible at trial if the declarant is unavailable at trial and the defendant has had a prior opportunity to cross-examine the declarant. *Id.* at 59.

¶ 13 In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 307-09 (2009), the United States Supreme Court addressed whether certificates of state laboratory analysts, who averred that a substance the police had seized from a defendant was cocaine of a certain amount, were testimonial. The Court initially observed that, while the documents were labeled as " 'certificates,' " they clearly constituted affidavits and were "functionally identical" to the "testimony the analysts would be expected to provide if called at trial." *Id.* at 310. As such, the Court found the certificates, or affidavits, were testimonial. *Id.* at 311. And because the analysts did not testify at the defendant's trial, the prosecution had not shown they were unavailable to testify at trial and the defendant did not have a prior opportunity to cross-examine them

concerning the contents of the certificates, the admission of the certificates into evidence violated his right to confrontation. *Id.*

¶ 14 Recently, in *People v. Diggins*, 2016 IL App (1st) 142088, this court addressed a similar issue to that in *Melendez-Diaz* and the exact same one defendant raises here on appeal: whether the admission of the notarized letter from Illinois State Police violated his right to confrontation. In *Diggins*, the State charged a defendant with aggravated unlawful use of a weapon, alleging that he had possessed a firearm without a FOID card. *Id.* ¶ 3. At trial, the State entered into evidence over defense counsel's objection a notarized letter from a sergeant of the Firearms Services Bureau of the Illinois State Police, which stated that the defendant had not been issued a FOID card. *Id.* ¶¶ 6-7. The trial court eventually found the defendant guilty of aggravated unlawful use of a weapon. *Id.* ¶ 9. On appeal, he contended that the admission of the letter violated his right to confrontation because, as an affidavit admitted for its truth, it constituted testimonial hearsay and he did not have a prior opportunity to cross-examine the sergeant concerning the contents of the letter and the sergeant was not shown to be unavailable at trial. *Id.* ¶ 11.

¶ 15 Relying on the reasoning of *Melendez-Diaz*, this court agreed with the defendant, finding that the notarized letter "was an affidavit, as it was a declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Id.* ¶ 16 (citing *Melendez-Diaz*, 557 U.S. at 310). We next found that, because the letter was prepared after the defendant's arrest, it was "presumably" created for use at his trial where his failure to possess a FOID card was an element of the offense the State had to prove. *Id.* In light of these facts, we held that the letter constituted a testimonial statement, and "absent a showing that the witness was unavailable

to testify at trial and that defendant had a prior opportunity to cross-examine him, defendant was entitled to be confronted with the witness at trial." *Id.* ¶¶ 16-17.

¶ 16 Citing to *Diggins*, defendant argues that the admission of the notarized letter from the Illinois State Police violated his right to confrontation. Initially though, defendant acknowledges that he did not preserve his claim of error for review, as he neither objected to the notarized letter's admission at trial nor raised the issue in a posttrial motion. See *People v. Leach*, 2012 IL 111534, ¶ 60. Nevertheless, he argues that we may review the claim of error under the plain-error doctrine, which allows us to bypass a party's forfeiture if the error is clear or obvious, and either (1) the evidence was so closely balanced that the error alone threatened to tip the scales of justice against him, regardless of the seriousness of the error or (2) the error was so serious that it affected the fairness of his trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Smith*, 2016 IL 119659, ¶ 39. The State, however, contends that, because defendant acquiesced to the admission of the notarized letter at trial, he cannot now claim on appeal that its admission was erroneous. We agree with the State.

¶ 17 "[W]hen a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, she cannot contest the admission on appeal." *People v. Bush*, 214 Ill. 2d 318, 332 (2005); see also *People v. Caffey*, 205 Ill. 2d 52, 114 (2001) (same). By agreeing to the admission of certain evidence rather than making an objection, the "defendant deprives the State of the opportunity to cure the alleged defect." *Bush*, 214 Ill. 2d at 332.

¶ 18 Here, when the State sought to admit the notarized letter into evidence, the trial court asked defense counsel if he had any objection, and he replied "[n]o, Judge." Had counsel objected, "the State could have easily remedied the problem by simply calling the State employee to the stand." *People v. Cox*, 2017 IL App (1st) 151536, ¶ 75. Thus, where defendant

acquiesced to the admission of the notarized letter into evidence at his trial, he cannot contest on appeal that its admission, even though improper, was error. See *Bush*, 214 Ill. 2d at 332. Therefore, we cannot find any error by the trial court in allowing the letter into evidence. See *Cox*, 2017 IL App (1st) 151536, ¶ 76 (finding that, because defense counsel failed to object to the admission of a notarized letter from the Illinois State Police demonstrating that the defendant did not possess a FOID card, the trial court committed no error in allowing the letter to be admitted into evidence).

¶ 19 We also must reject defendant's alternative contention that his defense counsel was ineffective for failing to object to the admission of the notarized letter at trial. To establish that defense counsel was ineffective, the defendant must satisfy the standard articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Domagala*, 2013 IL 113688, ¶ 36. Under this standard, he must show that his counsel's performance was deficient and the deficiency prejudiced him. *Id.* More specifically, the defendant needs to show his "counsel's performance was objectively unreasonable under prevailing professional norms" and "a 'reasonable probability' " existed that, but for counsel's performance, the result of his trial would have been different. *Id.* (quoting *Strickland,* 466 U.S. at 694). Merely failing to object to evidence, even improper evidence, does not mean counsel performed deficiently. *Cox*, 2017 IL App (1st) 151536, ¶ 88. Rather, there is a "strong presumption that the challenged action or inaction may have been the product of sound trial strategy." *People v. Manning*, 241 Ill. 2d 319, 327 (2011). Both prongs of the *Strickland* test must be met, and we may analyze them in any order. *People v. Kirklin*, 2015 IL App (1st) 131420, ¶ 109.

¶ 20 Under the particular circumstances of the present case, "the only way that defense counsel's decision not to object to the certification could *possibly* be ineffective assistance was if

defendant actually had a FOID card and the certification was in error." (Emphasis in original.) *Cox*, 2017 IL App (1st) 151536, ¶ 88. And based on the record, there is nothing to suggest that defendant actually possessed a concealed carry license or FOID card and the letter certifying that he did not possess either was in error. See *id.* Rather, the record shows that counsel's failure to object to the letter's admission into evidence was part of his trial strategy. At trial, defense counsel chose to focus his defense on whether defendant actually possessed the firearm and to assail the credibility of Craig Crawford and his explanation for why the weapon was found in his vehicle. In light of this defense and the strong presumption that the challenged inaction of counsel may have been the product of sound trial strategy (see *Manning*, 241 Ill. 2d at 327), we cannot find that counsel's performance was objectively unreasonable under prevailing professional norms. See *Cox*, 2017 IL App (1st) 151536, ¶¶ 88-89 (finding that defense counsel was not objectively unreasonable for failing to object to the admission of a notarized letter establishing that the defendant did not possess a FOID card where counsel's trial strategy was to contest whether the defendant possessed the firearm).

¶ 21 B. Fines and Fees

¶ 22 Defendant next contends that three monetary assessments imposed against him by the trial court as a result of his convictions are actually fines despite being labeled as "fees and costs." He therefore argues that he should receive presentence custody credit toward them. The assessments at issue are his: $2 State's Attorney records automation assessment (55 ILCS 5/4-2002.1(c) (West 2014)), $2 Public Defender records automation assessment (55 ILCS 5/3-4012 (West 2014)), and $15 clerk document storage assessment (705 ILCS 105/27.3c (West 2014)).

¶ 23 Initially, defendant acknowledges that he forfeited this issue for review, as he did not challenge the assessments in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

Nevertheless, defendant asserts that we may review the assessments under the plain-error doctrine or, alternatively, argues that his defense counsel was ineffective for failing to challenge the assessments in the trial court. Though defendant has forfeited this issue for review, the rules of forfeiture apply equally to the State. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13. Where the State fails to argue that the defendant has forfeited an issue, the State itself forfeits the issue of forfeiture. *Id.* In the present case, the State has not argued that defendant forfeited his challenges to the assessments. Therefore, we may address the merits of defendant's monetary assessment claims.

¶ 24 The defendant is entitled to a $5 credit toward the fines levied against him for each day incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2014); see *People v. Johnson*, 2011 IL 111817, ¶ 8 (presentence custody credit applies only to fines, not any other fees or costs). Fines and fees are distinguished based upon their purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee is an assessment intended to " 'recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *Id.* (quoting *People v. Jones*, 223 Ill. 2d 569, 582 (2006)). In contrast, a fine is punitive, " 'a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense.' " *Id.* (quoting *Jones*, 223 Ill. 2d at 581). Although an assessment may be statutorily labeled as a "fee," it nevertheless may still be a "fine," despite the language used by our legislature. *Id.* While the legislature's language "is strong evidence" of its intent, "it cannot overcome the actual attributes of the charge at issue." *Jones*, 223 Ill. 2d at 599. The propriety of the imposition of fines and fees is a question of law which we review *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 25 Concerning the State's Attorney records automation assessment and Public Defender records automation assessment, the majority of decisions from this court have held that these

assessments are fees. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38; *People v. Murphy*, 2017 IL App (1st) 142092, ¶¶ 19-20; *People v. Green*, 2016 IL App (1st) 134011, ¶ 46; *Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56 (finding both assessments are fines). We agree with the majority of decisions on this issue and find that these assessments lack a punitive aspect. Therefore, the State's Attorney records automation assessment and Public Defender records automation assessment are fees.

¶ 26 Concerning the clerk document storage assessment, in *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006), this court held that this assessment is also a fee. The court reasoned that the assessment is compensatory in nature and merely a collateral consequence of the defendant's conviction. *Id.* Defendant acknowledges the holding of *Tolliver*, but asserts that *Tolliver* predates *Graves*, 235 Ill. 2d at 250, wherein our supreme court stated that, to be correctly designated as a fee, an assessment must reimburse the State for a cost that was incurred in the prosecution of the defendant. However, this court has followed the holding of *Tolliver* even after *Graves*. See *Brown*, 2017 IL App (1st) 150146, ¶ 39. Therefore, the clerk document storage assessment is a fee.

¶ 27 Because all three assessments at issue are fees, the trial court did not commit an error by failing to give defendant presentence custody credit toward them. Therefore, there is no plain error. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008) (stating that, if there is no error, there can be no plain error). Similarly, defense counsel cannot be deemed ineffective for failing to challenge the assessments. *People v. Johnson*, 218 Ill. 2d 125, 139 (2005) (stating that defense counsel cannot be deemed ineffective for failing to object to something that was proper). Accordingly, defendant is not entitled to any additional presentence custody credit.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.