2018 IL App (1st) 150748-U

No. 1-15-0748

Order filed February 1, 2018

Modified upon denial of rehearing March 22, 2018

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 4685
	)	
LANARD GAYDEN,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: The State presented sufficient evidence to prove defendant guilty beyond a reasonable doubt of unlawful use or possession of a weapon. The record is insufficient to determine whether trial counsel was ineffective for failing to file a motion to quash arrest and suppress evidence. Fines, fees, and costs order modified.

¶ 2 Following a bench trial, defendant Lanard Gayden was convicted of unlawful use or possession of a weapon (UUW) and sentenced to two years' imprisonment. On appeal, he argues

that the State failed to prove him guilty beyond a reasonable doubt, that he was denied the effective assistance of trial counsel, and he asks us to correct his fines and fees order. For the following reasons, we affirm and correct the fines and fees order.

¶ 3 Defendant was charged with one count of UUW for possessing a shotgun that had a barrel that was less than 18 inches in length. 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 4 At trial, Chicago police officer Patrick Glinski testified that, at around 12:40 p.m. on February 15, 2014, he responded to "a call of a man with a shotgun" at 8952 South Burley Avenue. He went to "the north side of the three-flat building to enter." Glinski knocked on the exterior door, entered, and took a staircase to the third floor. There, he saw a man, identified in court as defendant, standing five feet away "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski and then defendant "threw the shotgun on the ground and slammed the door on [Glinski]." Glinski "knocked in the door." Defendant was "right on the other side of the door when [Glinski] knocked it in," *i.e.*, "five or six feet" away. The shotgun Glinski had seen defendant holding was on the floor a few feet from the door. Other police officers arrived and defendant was arrested.

¶ 5 Chicago police officer Schaffer testified that, around 12:50 p.m. on February 15, 2014, he responded to a report of "a person with a shotgun in front of the location" at 8952 South Burley. There were already police officers at the scene when he arrived. Schaffer went to the third floor and saw a shotgun on the floor "immediately upon entering the apartment." He recovered the shotgun and ejected three live shells. He took the shotgun to the police station to inventory it and to get "a measurement of the barrel." Schaffer used a measuring tape and found the shotgun's

barrel to be 17 1/2 inches long. He also observed that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state."

¶ 6 The State rested its case, and defendant made a motion for a directed finding, which the court denied.

¶ 7 Shavonnetay Carpenter testified that she was defendant's friend. She arrived at 8952 South Burley at 9 p.m. on February 15, 2014, to pick up defendant's children to "take them out." Others were present, including two women named Sierra and Evelyn, a man, Ray, and "somebody else" who Carpenter could not recall. At about 10:10 p.m., everyone was in the living room when the police "bum rushed the door." Three police officers entered, aimed their guns at defendant, and "had him on the ground." Carpenter was with defendant at all times that night and she never saw him with a gun or saw a gun anywhere in the front room or hallway. Defendant never stepped out of the apartment. After defendant was arrested, Carpenter took his children to their mother's home.

¶ 8 On cross-examination, Carpenter testified that she had known defendant 10 years. She had dated defendant years earlier. She planned to take defendant's two children, ages five and six, to sleep at her home that night. Carpenter never saw a shotgun.

¶ 9 Defendant testified that, at about 10 p.m. on February 15, 2017, he was in his "three bedroom duplex apartment" at 8952 South Burley with Carpenter, Sierra, Evelyn, his two kids, and his roommates, Raymond and Anthony. Everyone was in the front room, except for the children and Anthony. The door to the unit was unlocked because Sierra and her parents lived "right next door" and there was "a lot of in and out between both apartments." Sierra's sister and her boyfriend were "back and forth" that night.

¶ 10 At about 10:15 p.m., defendant heard a "large commotion" in the hallway and "marched" to his door to lock it. Before he could do so, the doorknob turned and the door began to open. Defendant stated, "it's like a tug of war which I'm pushing my door in, he's pushing it from the outside." Defendant shut the door, but it was "forced back open with a hand sticking out, blue sleeve color and a gun waving." Seeing this, defendant backed off the door and a police officer "fell into [his] apartment. The officer was "waiving [*sic*] the gun around." Raymond dropped to the floor and defendant put his hands in the air. Defendant was arrested. Two more police officers followed soon after.

¶ 11 Defendant denied holding and throwing a gun that night, or ever seeing a gun. He did not see the officers recover a gun from the apartment and "was long gone before anything, they even say anything to [him] about a gun."

¶ 12 On cross-examination, defendant answered in the negative when asked if the police knocked or announced their office before entering the apartment.

¶ 13 The trial court found defendant guilty. Defendant filed a motion for new trial and motion to reconsider the guilty finding, arguing that the State failed to prove defendant was guilty beyond a reasonable doubt because it did not present sufficient evidence to establish that he ever "had possession of the sawed off shotgun that was recovered." The court denied the motion and sentenced defendant to two years' imprisonment.

¶ 14 This timely appeal followed.

¶ 15 Defendant first argues that the evidence at trial was insufficient to prove him guilty of UUW because the State failed to prove beyond a reasonable doubt that the barrel of the shotgun

was less than 18 inches, an essential element of the offense. He has abandoned his claim that he never possessed the weapon.

¶ 16 As a preliminary matter, defendant asks us to take judicial notice of information readily available on government websites to bolster his challenge to the sufficiency of the evidence of the length of the shotgun's barrel. The first website, that of the United States mint, details the size of a dime, which defendant offers as an example of how small the half-inch difference between the legal length of a shotgun barrel and the length of his shotgun's barrel was. The second website sets out the procedure used by the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) to measure the barrel length of a shotgun, which differs from the method used in this case. "Courts may take judicial notice of facts proven by 'immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy.' " *Central Austin Neighborhood Ass'n v. City of Chicago*, 2013 IL App (1st) 123041, ¶ 13 (quoting *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983)). "However, courts 'will not take judicial notice of critical evidentiary material not presented in the court below, and this is especially true of evidence which may be significant in the proper determination of the issues between the parties.' " *Id.* (quoting *Vulcan Materials Co.*, 96 Ill. 2d at 166). As the information was not presented to the trier of fact, we decline to consider it on appeal.

¶ 17 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d

at 43) and we do not retry the defendant (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is within the province of the trier of fact "to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *Id.* at 228. A defendant's claim that a witness was not credible, standing alone, is insufficient to reverse a conviction. *Id.* We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 18 To prove defendant was guilty of UUW, the State had to prove that he knowingly possessed "a shotgun having one or more barrels less than 18 inches in length." 720 ILCS 5/24-1(a)(7)(ii) (West 2014).

¶ 19 We conclude that, viewing the evidence in a light most favorable to the State, a trier of fact could find defendant guilty of UUW. Officer Glinski testified he responded to a call of a man with a shotgun at 8952 South Burley. He went up to the third floor, and saw defendant on the threshold of the doorway holding a shotgun, which he threw to the ground before shutting the door. Glinski "knocked in the door" and saw defendant and the shotgun. Officer Schaffer testified that he measured the barrel to be 17 1/2 inches and that the end of the barrel "looked uneven" and felt "gritty," like it had been "sawed off or somehow manipulated from its original state." Given this evidence, we find that a rational trier of fact could have concluded that the barrel of the recovered shotgun was less than 18 inches.

¶ 20 Nevertheless, defendant argues that the State failed to prove him guilty of UUW beyond a reasonable doubt because "the only evidence regarding the length of the shotgun was the

testimony of one police officer that simply said that, using 'measuring tape,' he found the barrel to be '17 and a half inches.' "

¶ 21 The testimony of a single witness is sufficient to establish guilt beyond a reasonable doubt, so long as the testimony is positive and the witness credible. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Based on the record, it was not unreasonable for the trial court to conclude beyond a reasonable doubt that Schaffer properly measured the gun and that his measurement was accurate. There is nothing in the record indicating that Schaffer improperly measured the shotgun's barrel length. Schaffer not only measured the barrel's length, but noted signs indicating that the barrel had been purposefully shortened. Therefore, we cannot conclude that no rational trier of fact could have found beyond a reasonable doubt that defendant was in possession of a shotgun with a barrel less than 18 inches in length.

¶ 22 Next, defendant contends he was denied the effective assistance of trial counsel where counsel failed to file a motion to quash his arrest and suppress the recovered shotgun. Defendant argues that the motion would have been granted because "the police clearly violated [defendant's] rights under the Fourth amendment" when they entered his property "without a warrant, probable cause, or exigent circumstances" and recovered the shotgun. The State argues that the failure to file a motion to quash cannot support a claim of ineffective assistance of counsel because the motion would have been denied where the police's warrantless entry into defendant's apartment was lawful because there was probable cause to arrest him and, additionally, exigent circumstances existed that excused the need for a warrant.

¶ 23 A criminal defendant has a constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. To demonstrate ineffective assistance of

counsel, defendant must show that (1) his counsel's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceedings would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 24 A reviewing court, however, should not simply proceed to the merits of every ineffective assistance of counsel claim. When a claim of ineffective assistance of counsel is based on the failure to file a motion to suppress evidence, the record may be inadequate for a reviewing court to make a conclusion on the issue and the better resolution may be to raise the issue in a collateral challenge under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)). See *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (citing *Massaro v. United States*, 538 U.S. 500, 506 (2003)). Recently, our supreme court cautioned against adopting an approach to ineffective assistance of counsel claims that presumes such claims are always better suited to collateral proceedings. *People v. Veach*, 2017 IL 120649, ¶ 45. Instead the *Veach* court held: "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim." *Id.* ¶ 46. Reviewing courts must therefore "carefully consider each ineffective assistance of counsel

claim on a case-by-case basis" before deferring consideration of the claim to collateral review. *Id.* ¶ 48.

¶ 25 Here, after a careful review of the record on appeal, we decline to consider defendant's claim of ineffective assistance of trial counsel because the record is devoid of evidence that would allow this court to determine whether a motion to quash arrest would have been granted or whether police acted lawfully under the circumstances. The record reflects that Officer Glinski responded to "a call of a man with a shotgun." Upon arriving at the address, he approached the "three-flat," knocked on the "exterior" door, and entered. Glinski went to the third floor, where he saw defendant "in the doorway [and] holding a shotgun." Defendant made eye contact with Glinski, "threw the shotgun on the ground and slammed the door." Glinski "knocked in the door" and arrested defendant.

¶ 26 There are numerous unanswered factual questions that preclude us from deciding the substantive fourth amendment claims that underlie defendant's claim of ineffective assistance of counsel. Presumably the State is relying on the plain-view doctrine to justify the seizure. A warrantless seizure of evidence in plain view does not violate the fourth amendment. *People v. Garcia*, 2012 IL App (1st) 102940, ¶ 4. This exception allows a police officer to seize an object without a search warrant if the object is in plain view, the object's incriminating nature is immediately apparent, and the officer is lawfully located in the place where he observed the object. *Id.* The third factor can be satisfied by the exigent circumstances exception to the warrant requirement. *Id.*

¶ 27 The record in this case is devoid of information necessary to fully address and resolve defendant's fourth amendment claim that the police entered into his property without lawful

authority. Specifically, we do not know the layout of the apartment building, how access to the apartments is gained, whether the front entrance was locked, exactly how the police gained entry, whether the common areas are accessible to the public, the totality of the information known to the police when they entered, and exactly where defendant was standing when the police went upstairs.

¶ 28 We note that, subsequent to the filing of our original order, defendant filed a petition for rehearing, in which he asserted our finding that there was an insufficient record to analyze his claim of ineffective assistance of counsel was erroneous. In this manner, defendant's petition contains impermissible reargument. See Ill. S. Ct. R. 367(b) (eff. Nov. 1, 2017) ("Reargument of the case shall not be made in the petition."). Defendant has also raised a new issue in his petition that the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2016)) is unavailable to him because he was released from mandatory supervised release in February 2016. This issue was never raised in his opening brief or in his reply brief, which also violates Supreme Court Rule 367(b) (eff. Nov. 1, 2017), as "[t]he petition shall state briefly the points claimed to have been overlooked or misapprehended by the court." A petition for rehearing is not an opportunity to raise new issues. See *People v. Clinton*, 397 Ill. App. 3d 215, 231 (2009).

¶ 29 Therefore, we decline to address defendant's ineffective assistance of counsel claim because the record, as it exists, is insufficient for us to determine whether defendant was lawfully arrested, whether trial counsel's decision to file a motion to quash arrest and suppress was strategic, or whether such a motion would likely have succeeded. *Veach*, 2017 IL 120649, ¶ 46.

¶ 30 Defendant next argues that the trial court improperly assessed the $5 electronic citation and the $5 court system fee against him and that it failed to give him $5 per day of presentence

custody credit against other monetary assessments which qualified as fines. The State agrees that the $5 electronic citation and the $5 court system fee should be vacated and that the $15 State Police operations fee and $50 court system fee are fines subject to offset by presentence custody credit, but it does not agree that defendant is entitled to presentence credit against the remaining assessments that defendant challenges, including a $190 felony complaint fee, a $15 automation fee, a $15 document storage fee, a $25 court services (sheriff) fee, a $2 State's Attorney records automation fee, and a $2 public defender records automation fee, which it argues are not fines.

¶ 31 Defendant did not challenge these assessments at trial and acknowledges his claims are, therefore, forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). He contends, however, that we may review his claims under plain error or, alternatively, that trial counsel was ineffective for failing to object to the assessments. The State agrees with defendant in that, even though he forfeited his claims by failing to raise them in the trial court, the plain error doctrine permits the reviewing court to review the issues under the plain error doctrine.

¶ 32 We disagree that defendant's challenge is reviewable under plain error. *People v. Grigorov*, 2017 IL App (1st) 143274, ¶ 15; *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017); *contra People v. Cox*, 2017 IL App (1st) 151536, ¶ 102 (holding that the improper imposition of fines and fees affects "substantial rights" and thus may be reviewed under the second prong of the plain error doctrine). Nevertheless, because the State does not argue forfeiture on appeal, it has thus forfeited that argument and we will address the merits of defendant's claims. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 70 (rules of waiver and forfeiture apply to the State). 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.

¶ 33 Defendant first claims, and the State properly concedes, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) was improperly assessed and must be vacated because it only applies to traffic, misdemeanor, municipal ordinance, and conservation cases, and is inapplicable to his felony conviction. See *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). Accordingly, we vacate the electronic citation fee.

¶ 34 Defendant also claims, and the State again properly concedes, that the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) was improperly assessed and must be vacated because it only applies to violations of the Illinois Vehicle Code and similar county and municipal ordinances. As defendant was not found guilty of a violation of the Illinois Vehicle code, the $5 court system fee was erroneously assessed against him. See *People v. Price*, 375 Ill. App. 3d 684, 698 (2007). Accordingly, we vacate the $5 court system fee.

¶ 35 Defendant also argues that he is entitled to presentence custody credit toward the following assessments imposed by the trial court, which he argues are fines and, therefore, subject to offset: a $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)), a $50 court system fee (55 ILCS 5/5-1101(c) (West 2014)), a $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), a $15 automation fee (705 ILCS 105/27.3a-1 (West 2014)), a $15 document storage fee (705 ILCS 105/27.3c (West 2014)), a $25 court services fee (55 ILCS 5/5-1103 (West 2014)), a $2 State's Attorney records automation fee (55 ILCS 5/4- 2002.1(c)

(West 2014)), and a $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)). The State agrees that defendant is owed presentence custody credit against the $15 State Police operations fee and the $50 court system fee, but argues that the remaining assessments defendant challenges as fines are not fines and, thus, are not subject to offset by presentence custody credit.

¶ 36 A defendant is entitled to a $5 credit toward the fines levied against him for each day he is incarcerated prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). The credit applies only to fines imposed pursuant to conviction and not to any other court costs or fees. *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). A fine is a part of the punishment for a conviction, whereas a fee or cost seeks to recoup expenses incurred by the State. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). Here, defendant accumulated 356 days of presentence custody credit, and, therefore, he is potentially entitled to as much as $1,780 of credit toward his eligible fines.

¶ 37 We agree with the parties that the $15 State Police operations fee and $50 court system fee are fines subject to presentence custody credit. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (State Police operations assessment is a fine); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (court system fee is a fine). Accordingly, defendant is entitled to offset the State Police operations fee and court system fee with presentence custody credit.

¶ 38 We agree with the State that the remaining assessments that defendant challenges are not fines subject to offset by presentence custody credit. Contrary to defendant's argument, this court has previously considered challenges to these assessments and found them to be fees, not fines. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the $190 felony complaint filing fee is not a

fine subject to offset by presentence incarceration credit); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 78 ($15 automation fee and $15 document storage fee are not fines); *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010) ($25 court services fee is a fee rather than a fine); *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (The "bulk of legal authority" has concluded that the $2 State's Attorney and $2 public defender records automation fees are not fines); *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56. Accordingly, the $190 felony complaint fee, $15 automation fee, the $15 document storage fee, the $25 court services fee, the $2 State's Attorney records automation fee, and the $2 public defender records automation fee are not subject to offset by defendant's presentence custody credit.

¶ 39 For the foregoing reasons, we vacate the $5 court system fee and $5 electronic citation fee. We direct the clerk of the circuit court to further amend that order to reflect a credit of $65 to offset the $15 State Police operations fee and $50 court system fee, which leaves a total of $729 in fines and fees due. We affirm defendant's conviction and sentence in all other respects.

¶ 40 Affirmed; fines and fees order modified.