2018 IL App (1st) 152434-U

No. 1-15-2434

Order filed January 19, 2018

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 20294
	)	
JABRIL UNDERWOOD,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: We order defendant's fines and fees order be modified, but affirm the judgment in all other respects over defendant's contention that trial counsel was ineffective for failing to impeach the eyewitness.

¶ 2 Following a bench trial, defendant Jabril Underwood was convicted of one count of unlawful possession of a weapon by a felon ("UUWF") (720 ILCS 5/24-1.1(a)(West 2012)). The trial court sentenced defendant to six years' imprisonment, and assessed $559 in fines, fees, and costs. On appeal, defendant argues that his trial counsel was ineffective when he failed to

impeach a police officer with readily available evidence that undermined the State's case and that the proper amount of fines and fees should be $375. We affirm, but order the fines and fees order be modified.

¶ 3 At trial, Chicago police officer Andrew Scudella testified that he was on duty on October 30, 2014, driving a marked car with his partner Officer Mansell. At 10:25 p.m., they were parked at Lowe Avenue and 74th Street when Scudella saw a black Dodge SUV approach a stop sign without its headlights on. Scudella turned on his lights and siren and curbed the vehicle a block away. As Scudella approached the driver's side of the vehicle and Mansell approached the passenger side, the driver put the vehicle in drive and sped off. Scudella identified defendant as the driver of the vehicle.

¶ 4 The officers returned to their patrol car and pursued the vehicle. They briefly lost sight of the vehicle for four or five seconds but then saw it come to a stop at Normal Avenue and Winneconna Parkway. Defendant got out of the vehicle and ran while the two passengers, subsequently identified as Michael Nix and Othello Farrow, exited and put their hands up. By then, Officer Passarelli and his partner had arrived at the scene. They pursued defendant while Scudella and Mansell detained the passengers. Scudella placed the two passengers in handcuffs and made them stay by the car. Defendant was arrested by a nearby park which was illuminated by street lighting.

¶ 5 Scudella acknowledged he wrote the case report for the arrest in which he stated he chased defendant. The report did not state that he saw defendant drop a gun, because he did not see this happen.

¶ 6 Officer Passarelli testified he was on routine patrol on October 30, 2014, in an unmarked car with his partner, Officer McKendry. Around 10:20 to 10:30 p.m., they responded to a flash message providing a description of a black SUV fleeing from officers, and joined a marked car in the pursuit. The SUV came to a stop approximately at the intersection of Normal Avenue and Winneconna Parkway. Passarelli's vehicle was a few car lengths behind the marked car, and about 50 feet from the black SUV. He saw three people exit the vehicle, one of whom was defendant. Defendant fled and Passarelli and his partner pursued him on foot. Defendant ran and jumped over a fence on Winneconna Parkway and Normal Avenue.

¶ 7 Passarelli testified the area where defendant jumped the fence was illuminated by artificial lighting. Passarelli was approximately 10 feet from defendant when he saw defendant remove a handgun from his waistband while jumping the fence. The gun fell onto the grass. Defendant then fell, gave himself up, and was detained at 475 West Winneconna Parkway. Passarelli recovered the handgun approximately 10 feet from where defendant was detained. The handgun was a black, .40-caliber Ruger loaded with 10 live rounds and was inventoried by McKendry at the police station.

¶ 8 On cross-examination, Passarelli testified that the marked police car was closer to the SUV than his vehicle, but those officers did not pursue the driver because they were detaining the passengers. The officers communicated that Passarelli "would go after the driver" and "they would go after the passengers." Passarelli did not know how far the passengers ran as he "was watching the defendant at that time." Passarelli chased defendant approximately 50 yards before defendant jumped the fence of a parkway. Passarelli did not hear the gun hit the ground, but recovered the weapon "seconds" after defendant was arrested, 10 feet from the fence defendant

had jumped. Passarelli did not know why defendant fell, only that he saw defendant trying to jump the fence while removing the handgun and fell. Passarelli admitted that he had not checked the park for the handgun prior to defendant jumping the fence.

¶ 9 The State then admitted into evidence an Illinois State Police certification indicating that defendant had not been issued a FOID card or a concealed carry permit, a certified letter from the Illinois State Police Department, and a certified copy of defendant's Class 2 narcotics conviction from February 8, 2008.

¶ 10 Defendant made a motion for a directed finding, arguing that the story offered by the police was incredible. He questioned how defendant could jump over a fence while simultaneously pulling a gun from his waistband, fall and drop the gun, and have the gun found 10 feet away from the fence. He further argued that the story that Passarelli and his partner, rather than Scudella and his partner, chased the driver was unbelievable. He asserted the officers who had been led on a high speed chase would want to capture the driver who had put them in danger and it made no sense that they were more concerned with the passengers than with the driver who flouted their authority. The court denied the motion for directed finding.

¶ 11 Michael Nix testified for the defense. He testified that he, Othello Farrow, and defendant were sitting in a car, drinking, at the lagoon located at 78th Street and Normal Avenue on the night of October 30. They arrived at the lagoon around 10:00 p.m. About 20 to 30 minutes later, defendant walked off to relieve himself about 75 to 100 feet away from the car. An unmarked police car pulled up and the police detained Nix and Farrow, questioned them, and patted them down. More cars pulled up, but Nix did not see defendant arrested or running from the police. He testified that they had not been pulled over by the police earlier that evening.

¶ 12 On cross-examination, Nix testified that he was in a black Dodge SUV that night, defendant is his "cousin," and that he had met Farrow for the first time that night. He also stated he was "tipsy," was not wearing his eyeglasses, and did not see where defendant walked off to. The police that pulled up to them were in an unmarked car and not wearing uniforms. They cuffed him and placed him with his chest on the ground, so he could not look around. Nix did not know if defendant had a gun on him that night and did not see defendant run from police, because he could not see defendant.

¶ 13 Othello Farrow testified that he, defendant, and Nix were drinking at the lagoon "for while, like all day," and had not been pulled over by the police earlier in the day. He and Nix were outside the car when the police pulled up and told them to get on the ground. Defendant was off to his left "some yards away, probably going to the bathroom or something." He did not see defendant run or jump any fences. On cross-examination, Farrow testified that defendant picked him up near Wentworth and the Dan Ryan expressway driving a dark SUV, and he had known defendant and Nix for a few years. He stated he had five cups of Hennessy at the lagoon, and they had been drinking there for hours. The police officers handcuffed him and put him on his stomach. He was looking at the ground and could not see defendant. He did not know if defendant had a gun that night. He stated the police showed up five minutes after defendant walked away.

¶ 14 Defendant testified that, on October 30, he was driving with Nix around 9:30 p.m. when they picked up Farrow. They drove to the lagoon and were not stopped by police on their way. They had been at the lagoon for 30 minutes before he walked off to use the bathroom. He did not hear the police pull up; he just heard them say "freeze." Defendant testified that he did not run,

jump over a fence, remove a handgun from his waistband, or fall. Rather, he "froze" when the officers told him to and they searched him, finding nothing. He was questioned while lying on the ground and being pressured "to say I was doing something illegal." Twenty minutes later, the officers "came back talking about they had a gun." Defendant testified he did not see where they found the gun and it was not his.

¶ 15 On cross-examination, defendant stated that Nix picked him up in the black SUV, defendant started driving, and they picked up Farrow sometime between 9:30 and 10:00 p.m. He admitted they had been drinking prior to him driving, and then continued to drink at the lagoon. He walked "pretty far away" to use the bathroom by a tree. The police grabbed him about 50 feet away from the car and he had never seen these officers before.

¶ 16 The State introduced certified copies of defendant's three previous convictions, one of which was a Class IV possession of a controlled substance.

¶ 17 During closing argument, defense counsel argued that the police officers' version of events was "garbage." He challenged the veracity of their story because the assist unit officers chased defendant, rather than the officers who had engaged in a high speed chase caused by defendant. Counsel also claimed the officers' story was incredible because Passarelli wanted the court to believe that defendant could run and jump a fence while pulling a gun from his waistband, fall, and have the gun land 10 feet away. He further pointed out that the lagoon park was a dark area and it would be difficult to find a black handgun.

¶ 18 The court found defendant guilty of two counts of UUWF and six counts of aggravated unlawful use of a weapon, finding that defendant led Officer Scudella and his partner on a high speed chase that ultimately concluded in Officer Passarelli and his partner chasing defendant by

foot. Passarelli saw defendant jump a fence and drop a gun, which was recovered. The court found the State's case convincing and satisfied the burden of proof, and stated it did not place the same weight in defendant's case. The court denied defendant's motion for a new trial, merged the counts, sentenced defendant to 6 years' imprisonment for UUWF, and ordered him to pay $559 in fines and fees.

¶ 19 On appeal, defendant first contends that he received ineffective assistance of counsel when his defense attorney failed to impeach Officer Passarelli regarding a prior inconsistent statement in Passarelli's arrest report from the incident.

¶ 20 Criminal defendants have a constitutional right to the effective assistance of counsel. U.S. Const., amend. VI; Const. 1970, Art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, a criminal defendant must show that: (1) trial counsel's performance was objectively deficient; and (2) defendant was prejudiced, meaning "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88. The failure to show either deficient performance or prejudice defeats a claim of ineffective assistance. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). If a case may be disposed of based on lack of sufficient prejudice, we need not consider the quality of counsel's performance. *Strickland*, 466 U.S. at 697. Because the facts surrounding defendant's ineffective assistance of counsel claim are not in dispute our review is *de novo*. *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008). We find defendant has not shown he was prejudiced by counsel's alleged deficient performance and, therefore, need not review the quality of counsel's performance.

¶ 21 In order to establish sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome of the trial. *Id.*

¶ 22 In Passarelli's arrest report, he states: "Underwood stopped the vehicle at 7831 S. Normal and fled on foot. A foot chase ensued and PO Passarelli, McKendry, Scudella, Mansell gave chase. PO Passarelli and McKendry during the foot pursuit observed the subject remove from his waistband and drop the listed firearm onto the ground at approximately 475 W. Winneconna Parkway. The firearm was loaded with 10 rounds." Defendant argues trial counsel should have impeached Passarelli with the report because the second sentence from this excerpt establishes that all four officers chased defendant, thus impeaching Passarelli's testimony that only he and his partner, McKendry, chased defendant.

¶ 23 While this could have been a valid attack on Passarelli's credibility, it also could have resulted in Passarelli explaining that the other two officers ran to detain the passengers while he and McKendry followed defendant, thus resulting in just the two of them observing defendant dropping the firearm. In fact, at trial, Passarelli had testified that he "had some communication" with Scudella and his partner that Passarelli "would go after the driver" (defendant), and Scudella and his partner "would go after the passengers." Passarelli testified that he did not know how far the passengers ran because he was watching defendant. From Scudella's testimony, it appears the passengers did not run; but Passarelli's testimony shows he did not know this at the time. Thus his report that all officers gave chase reflects his testimony that all officers "[went]

after" someone: Passarelli and McKendry chased defendant and Scudella and his partner chased the passengers.

¶ 24 The arrest report does not mention any passengers in the vehicle, but it corroborates the crux of Passarelli's testimony: that defendant exited the vehicle and ran, Passarelli chased defendant, Passarelli observed defendant pull a firearm from his waistband and drop it on the ground approximately at 475 W. Winneconna Parkway, and it was loaded with 10 live rounds. *See People v. Jimerson*, 127 Ill.2d 12, 33 (1989) (when assessing the importance of counsel's failure to impeach under *Strickland*, the value of the potentially impeaching material must be put into perspective). Officer Scudella was impeached on a similar inconsistent statement in his incident report in which he stated he chased defendant, and the trial court still found him credible, while the three defense witnesses testified inconsistently with each other and were found not credible. Therefore, there is no reasonable probability that the impeachment would have resulted in the court finding Passarelli's testimony that he saw defendant drop the gun incredible, and thus, the outcome of the trial would have been any different.

¶ 25 Citing *People v. Skinner*, 220 Ill. App. 3d 479 (1991), defendant argues that counsel's failure to impeach Passarelli with the arrest report resulted in prejudice because Passrelli, the only eye witness to defendant's possession of the gun, received "significantly more credibility than he deserved." In *Skinner*, the court held that the failure to bring fruitful impeachment evidence in front of the jury gave the witness significantly more credibility. *Id.* at 485. However, *Skinner* continued: "[i]n our opinion, while this omission alone may not have affected the outcome of the proceedings, and thus not require reversal under *Strickland*, the combination of this error with the one we next address clearly operated to undermine the outcome of the

proceedings." *Id.* That additional error was trial counsel's failure to call two witnesses who would have corroborated the defendant's testimony and contradicted evidence regarding an alleged statement defendant made to the police. *Id.* Unlike in *Skinner*, this case only contained one alleged error by trial counsel, the failure to impeach Passarelli. And we find counsel's failure to impeach Passarelli with the arrest report, standing alone, would not have affected the outcome of the proceedings.

¶ 26 Defendant also contends that counsel's failure to impeach Passarelli, "raises at least a question about the fairness and reliability of [defendant's] trial." As defendant correctly points out, the prejudice prong of *Strickland* is not merely outcome-determinative; rather, it is a showing that the result of the proceedings was unreliable or fundamentally unfair. *See People v. Simms*, 192 Ill. 2d 348, 362 (2000). But, the *Strickland* standard requires actual prejudice be shown, not mere speculation as to prejudice. *People v. Bew*, 228 Ill. 2d 122, 135 (2008). As explained above, defendant has not established actual prejudice. Passarelli's arrest report is consistent with most of his testimony and, while he could have been impeached on his testimony regarding who chased the defendant, the inconsistency was easily explainable, given his testimony that all officers gave chase, albeit to separate individuals.

¶ 27 The fact that as a result of trial counsel's failure to impeach Passarelli with the report, the trial court had little reason to doubt Passarelli's credibility does not, standing alone, establish that the proceedings were unreliable or fundamentally unfair. The arrest report largely corroborates Passarelli's testimony of events, while the defense witnesses provided inconsistent testimony which the court did not deem credible. Defendant cannot establish that counsel's failure to impeach Officer Passarelli with his arrest report so prejudiced him that the result of the trial

would have been different. Defendant has failed to meet his burden to prove prejudice from counsel's alleged deficient performance therefore, his ineffective assistance of counsel claim fails.

¶ 28 Defendant also asserts that the trial court improperly imposed certain monetary assessments against him and failed to give him $5 per day of presentence custody credit against other monetary assessments which, he argues, qualified as fines. He requests that this Court order the clerk of the circuit court to modify the amount owed to $375.

¶ 29 As an initial matter, defendant did not raise these challenges in the trial court and they are forfeited. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant urges us to review his challenges to his fines subject to the $5 per diem under *People v. Woodard*, 175 Ill.2d 435 (1997), claiming that the credit cannot be forfeited. He asserts the remaining improper charges are reviewable under the plain error doctrine. The State acknowledges that defendant did not raise the issue in the trial court, but agrees errors in the fines, fees and costs order are reviewable under the plain error doctrine. As the State does not argue forfeiture and responded to defendant's arguments, it has waived any forfeiture argument. *People v. Whitfield*, 228 Ill. 2d 502, 508 (2000) (where the State does not argue forfeiture on appeal, it forfeits the claim that an argument by defendant is forfeited). The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 30 Defendant first contends, and the State concedes, that the $100 crime lab drug analysis fee (730 ILCS 5/5-9-1.4(b) (West 2014)) and the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) were erroneously assessed. He correctly argues that the crime lab drug analysis fee applies only to defendants who are convicted of certain enumerated drug offenses, and that the

electronic citation fee "does not apply to felonies." Defendant was convicted of UUWF, which is a felony and not a drug offense. Therefore, these fees should not have been imposed and should be vacated. *See People v. Nixon*, 2015 IL App (1st) 130132, ¶ 2 (vacating an erroneously imposed crime lab drug analysis fees), *see People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115, (vacating an erroneously imposed electronic citation fee, as it only applies to "traffic, misdemeanor, municipal ordinance, or conservation case[s]").

¶ 31 Defendant also argues that the trial court incorrectly assessed a $20 fine under the violent crime victim assistance fund. 725 ILCS 240/10(c)(2) (West 2014). This fine may be imposed only where "no other fine is imposed." 725 ILCS 240/10(c) (West 2014). We agree with defendant that, since the trial court did assess other fines including a drug court fine and children's advocacy center fine, the violent crime assistance fund fine should not have been assessed. However, the fines, fees, and costs order does not reflect that this fine was in fact assessed because the line on which to write the amount of the fine is blank. Therefore, the record does not support defendant's assertion that the $20 amount should be vacated.

¶ 32 Defendant also argues that a $5 fine under the spinal cord injury and paralysis cure research trust fund was incorrectly assessed because it only applies to persons adjudged guilty of a drug related offense involving cannabis, a controlled substance, or methamphetamine and persons convicted or receiving an order of supervision for driving under the influence of alcohol or drugs. 730 ILCS 5/5-9-1.1(c) (2012); 730 ILCS 5/5-9-1.1(c)(7) (2012). The State did not respond to defendant's argument regarding these fines and therefore concedes these issues. *In re Deborah S.*, 2015 IL App (1st) 123596, ¶ 27 (where the appellant raised several issues, but the state did not address or respond to the issues in its brief, this court noted that the State

"essentially conceded these issues on appeal"). Further, defendant was not found guilty of any of the enumerated offenses and this fine is, therefore, inapplicable and should be vacated.

¶ 33 Defendant next contends that the trial court failed to apply the $5-per-day credit to his $5 drug court fine, $30 children's advocacy center fine, $15 state police operations fee, $2 State's Attorney records automation fee and $2 public defender records automation fee.

¶ 34 Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)) permits the court to award a defendant presentence custody credit on "application of the defendant." A defendant is entitled to a $5 credit towards the fines levied against him or her for each day of incarceration before sentencing. 725 ILCS 5/110-14(a) (West 2014). The credit applies to fines, not fees. A "fine" is considered to be "part of the punishment for a conviction," and a "fee" is imposed to "recoup expenses incurred by the state—to 'compensat[e]' the state for some expenditure incurred in prosecuting the defendant." *People v. Jones*, 223 Ill. 2d 569, 582 (2006). When determining whether a charge is a fine or a fee, the "legislature's label is strong evidence, but it cannot overcome the actual attributes of the charge." *Id.*

¶ 35 The State correctly concedes that the drug court fine (55 ILCS 5/5-1101(f) (West 2014)), the children's advocacy center fine (55 ILCS 5/5-1101(f-5) West 2014)), and the state police operations fee (705 ILCS 105/27.3a-1 (West 2014)) should have been offset by presentence incarceration credit. *See People v. Unander*, 404 Ill. App. 3d 884, 886 (2010) (drug court assessment is a fine that can be offset); *People v. Butler*, 2013 IL App (5th) 110282, ¶ 7 (children's advocacy center fee is a fine that can be offset); *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (despite statutory label, state police operations fee is a fine). Thereby defendant is entitled to use his presentence incarceration credit to offset these assessments.

¶ 36 It is well settled that the $2 public defender records automation fee (55 ILCS 5/3-4012 West 2014)) and the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(a) (West 2014)) are fees, not fines, and thus not subject to presentence incarceration credit. *People v. Murphy*, 2017 IL App (1st) 142092, ¶¶19-20 (concluding both assessments are fees, not fines); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 78 (finding clerk automation assessment to be a fee not subject to offset by presentence incarceration credit); *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65 (both the State's Attorney records automation assessment and the public defender records automation assessment are fees); *but see contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (finding that automation assessments do not compensate the State for the costs associated with prosecuting a particular defendant and, therefore, cannot be considered fees). Following the weight of authority, we find these assessments are fees not subject to presentence custody credit.

¶ 37 In sum, we direct the clerk of the circuit court to correct the fines and fees order to reflect that we (1) vacate defendant's $100 crime lab drug analysis fee, $5 electronic citation fee, and $5 spinal cord injury and paralysis cure research trust fund fine and (2) award a total of $50 in presentence custody credit toward his $5 drug court fine, $30 children's advocacy center fine, and $15 state police operations fee. The judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 38 Affirmed as modified.