2018 IL App (1st) 160043-U

No. 1-16-0043

Order filed February 27, 2018

Second 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 18122
	)	
ANTHONY SANGSTER,	)	Honorable
	)	Carol M. Howard,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for driving while his license was revoked affirmed. Prosecutor's elicitation of officers' testimony regarding defendant's post-arrest silence did not constitute second-prong plain error. Fines, fees, and costs order modified.

¶ 2 Following a jury trial during which he represented himself, defendant Anthony Sangster was found guilty of five counts of driving while his license was revoked (DWLR) (625 ILCS 5/6-303(A) (West 2012)), and the trial court sentenced him to five years' imprisonment. On

appeal, Sangster argues that plain error occurred where the State used his post-arrest silence as evidence against him when it questioned police officers about whether or not Sangster informed them of a toothache or being on medication when he was arrested. Sangster also argues that a $2 public defender records automation fee imposed against him should be vacated and that his fines, fees, and costs order should be modified to reflect credit for presentence custody against the fines imposed by the trial court. For the following reasons, we affirm.

¶ 3 Sangster was charged with 10 counts of DWLR after police officers found him unconscious at the wheel of a running vehicle at a stoplight. Before trial, the State dismissed 5 of the 10 counts that were premised on Sangster's license being suspended, rather than revoked, as alleged in the 5 remaining DWLR counts. Those counts were charged as Class 2 felonies pursuant to section 6-303(d-5) of the Illinois Vehicle Code (Code) (625 ILCS 5/6-303(d-5) (West 2012)).

¶ 4 At trial, Sangster proceeded *pro se* with the assistance of his privately retained attorney as "standby counsel." Sangster addressed the jury in his opening statement:

> "My situation is that what the prosecutor just said, I agree to. But the prosecutor, they never look at the fact that I had extenuating circumstances. I was blacked out and did not know that I was there in the car and what I was doing at that time. *** That is one of the reasons why I asked you why I asked you [during jury selection] had anybody had a severe toothache because I had taken, well, just a lot of painkillers and, at best, I thought they would black me out—or knock me out, but they blacked me out.

> Now, I used to teach driving. I used to have a driving school for several years and I've taught a thousand people to drive. And one of the things I've always said is I can really drive in my sleep. I never thought I would do it. But I think this was just a situation where I was blacked out and my subconscious was taking over. But anyway, this is what I'm going to be trying to prove to you today."

¶ 5 The evidence presented during trial showed that on August 31, 2013, Chicago police officer Ginger Jones and her partner Brandy Smith were on patrol in a marked vehicle. Around midnight, the officers were driving east on 79th Street. At the intersection of "79th and Rockwell, 79th and Talman Streets," a car was stopped at a green light and traffic was going around it. The officers observed the car for about two minutes before pulling behind it. The light was green and the car was stopped in the right-hand lane of travel. The car was running and its brake lights were on.

¶ 6 The officers exited and Jones approached the driver's side. The car was occupied by a single person, a man, identified in court as Sangster, who was seated in the driver's seat. Sangster was "kind of slumped down, not moving at all." Jones attempted to wake Sangster by knocking on the window, but eventually opened the car door and physically shook him awake. He fell back to sleep and Jones woke him again. The officers told Sangster to place the vehicle in park and exit. Sangster was unable to produce proof of insurance or a driver's license, but gave his name and birth date. The officers used that information to "run his history" and, after doing so, arrested Sangster for DWLR.

¶ 7 During the State's direct examination of Jones, the following colloquy occurred:

"Q. Did [Sangster] make any statements other than giving his name or date of birth *** ?

A. No.

Q. Did he ever complain of any pain or injuries?

A. No.

Q. *** Was he transported back to the 8th District?

A. Yes.

Q. And at any point did he ever ask to see a doctor or go to a hospital or anything?

A. No.

Q. Did he seek any type of medical treatment in any way?

A. No."

¶ 8 On cross-examination, the following exchange occurred:

"Q. Did I tell you I was taking any medication?

A. No."

¶ 9 Sangster presented Jones with the police report, which she confirmed indicated he had been "taking medication that day." On redirect examination, Jones testified that she recorded in her arrest report that "defendant was in good health and takes medication for high blood pressure."

¶ 10 Officer Smith's testimony was consistent with Jones's. Smith denied that in the hour she spent with Sangster, Sangster ever told the officers he was ill, had a toothache, or "took a lot of medicine."

¶ 11 Before the State rested its case, it submitted a certified document from the Illinois Secretary of State's Office that reflected that Sangster's license had been revoked at the time of his arrest in August 2013.

¶ 12 After the trial court denied Sangster's motion for a directed finding, Sangster told the jury that on August 29, 2013, he had a "super severe toothache." He took "a bunch" of pills, approximately 30, of an over-the-counter pain medication. Ten minutes later, the "pills were gnawing at [his] chest," so he asked a friend to drive his car to get Chinese food. Sangster did not have a license, but kept a car for others to drive. His friend drove him to Chinatown and Sangster purchased food. They stopped at the friend's house on the way back and Sangster waited in the car, seated in the passenger seat. He next remembered "coming out of the stupor" and discovered he was in jail.

¶ 13 The jury found Sangster guilty. Sangster filed a motion for new trial, which the trial court denied. The court merged the counts and sentenced him to five years' imprisonment. This timely appeal followed.

¶ 14 On appeal, Sangster first argues that the prosecutor improperly elicited testimony regarding his postarrest silence as evidence against him. Sangster contends that the State violated his right to a fair trial when it elicited testimony about his postarrest silence. Sangster argues that it was improper for the State to inquire whether, during his interaction with the police, he made any statement about having a toothache or taking a medication. Sangster acknowledges that he failed to preserve this error at the trial level, but urges us to consider it as second-prong plain error. The State responds that no error occurred because the questions were directed to

Sangster's silence prior to arrest. The State further contends that the error, if any, did not rise to the level of plain error.

¶ 15 Our supreme court has held that a "defendant must both specifically object at trial and raise the specific issue again in a posttrial motion to preserve any alleged error for review." *People v. Woods*, 214 Ill. 2d 455, 470 (2005); *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). Generally, the failure to preserve an error for appeal results in forfeiture. *People v. Sebby*, 2017 IL 119445, ¶ 48. But we may still review for plain error even when a defendant has failed to preserve an error for review. *Piatkowski*, 225 Ill. 2d at 562-63 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.").

¶ 16 The plain-error doctrine "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Id.* at 565. But the plain-error doctrine "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *People v. Herron*, 215 Ill. 2d 167, 177 (2005) (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, our supreme court has held that the plain-error doctrine is a narrow and limited exception to the general rules of forfeiture. *Id.* Defendant carries the burden of persuasion under both prongs of the plain-error doctrine. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). In a plain error analysis, this court must first consider whether

any error occurred. *People v. Boston*, 2016 IL App (1st) 133497, ¶ 56 (citing *Herron*, 215 Ill. 2d at 181-82).

¶ 17 Federal constitutional concerns do not prohibit the use of pre-*Miranda* silence, including silence after arrest but before receiving *Miranda* warnings. *People v. Quinonez*, 2011 IL App (1st) 092333, ¶ 25. However, the states remain free to impose stricter prohibitions, and Illinois evidentiary law prohibited the use of a postarrest silence long before the Supreme Court announced its decision in *Miranda v. Arizona*, 284 U.S. 436 (1966). See *Quinonez*, 2011 IL App (1st) 092333, ¶ 26 (citing *People v. Lewerenz*, 24 Ill. 2d 295, 299 (1962) and *People v. Rothe*, 358 Ill. 52, 57 (1934)).

¶ 18 The parties disagree about whether the State's questions regarding Sangster's failure to disclose his toothache and painkiller use constitute a violation of his right to postarrest silence. The State argues that Sangster's statements were made before he was arrested. Sangster argues in his reply brief that arrest has the same meaning as seizure and that he was arrested when the police ordered him to put his car in park and exit the vehicle. Because this issue was never raised at trial, the circuit court made no finding regarding when Sangster was arrested or which questions implicated his postarrest silence. However, we find it unnecessary to further address this issue because even if we accept Sangster's definition of arrest and find the questions asked at trial violated his right to postarrest silence, we conclude that the questions do not amount to plain error.

¶ 19 Sangster argues that we should find second-prong plain error. He does not argue that the evidence was closely balanced as required for first-prong plain error. Although our supreme court has previously equated second-prong plain error with structural error, it has not restricted it

to the six types of structural error recognized by the United States Supreme Court. *People v. Clark*, 2016 IL 118845, ¶ 46. Yet, as the second district of this court has recognized, "it does mean that the error nevertheless must be of a similar kind: an error ' "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself" ' ." *People v. Johnson*, 2017 IL App (2d) 141241, ¶ 51 (quoting *Neder v. United States*, 527 U.S. 1, 8 (1999) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991))).

¶ 20 The claimed error here did not affect the framework within which Sangster's trial proceeded. Instead, it merely resulted in the admission of arguably irrelevant and immaterial evidence. Sangster argues that the alleged error implicated his substantial right to be tried only by competent evidence. But if we accept Sangster's formulation of second-prong plain error, virtually every evidentiary error would be subject to second-prong review and first prong plain error (which asks whether the evidence was closely balanced) would be largely superfluous. Clearly, this is not what our supreme court intended in *Clark*. See *Johnson*, 2017 IL App (2d) 141241, ¶ 51.

¶ 21 Sangster argues that *People v. Moody*, 199 Ill. 3d 455 (1990), is controlling and that we should conclude that every violation of defendant's right to postarrest silence should be treated as second-prong plain error. We note that *Moody* was decided before *Clark* and other more recent plain-error cases. Additionally, the facts of *Moody* clearly distinguish it from this case. In *Moody*, the defendant was charged with murder and, at trial, testified to an alibi. The State responded by cross-examining the defendant regarding his postarrest silence. The reviewing court found that the State's questioning inflicted serious damage to the defendant's credibility and undermined his alibi. *Moody*, 199 Ill. App. 3d at 465. Here, Sangster provided an account of

blacking out from a large quantity of nonprescription painkillers. But even taking Sangster's story as true, it does not constitute a defense to the crime with which he was charged. Driving on a revoked license is a strict liability offense, and voluntary intoxication with painkillers is no defense. See *People v. Ciechanowski*, 379 Ill. App. 3d 506, 511 (2008) ("Driving on a suspended or revoked license is *** a strict liability offense."). Therefore, unlike *Moody*, Sangster's credibility was not central to his defense.

¶ 22 We conclude that Sangster has failed to meet his burden of persuasion and has not shown that the alleged error rises to the level of second-prong plain error. Accordingly, we honor his procedural default and affirm his conviction.

¶ 23 Sangster next argues that the trial court improperly assessed the $2 public defender records automation fee against him and that it failed to give him $5 per day of presentence custody credit against other monetary assessments that, despite their denomination as fees, are really fines. The State agrees that the $2 public defender records automation 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 Sangster is entitled to presentence credit against the remaining assessments he challenges, including a $190 felony complaint fee, a $15 automation fee, a $15 document storage fee, and a $25 court services (sheriff) fee, which it argues are not fines.

¶ 24 Sangster 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. The State agrees with Sangster 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.

¶ 25 We disagree that Sangster'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). Nevertheless, because the State does not argue forfeiture in this direct appeal, it has forfeited that argument and we will address the merits of Sangster'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.

¶ 26 Sangster first claims, and the State properly concedes, that the $2 public defender records automation fee was improperly assessed and must be vacated because it only applies in cases where a defendant is represented by counsel by the public defender. See *People v. Jackson*, 2016 IL App (1st) 141448, ¶ 36 (vacating $2 public defender records automation fee where the defendant was represented by private counsel and the State conceded that this fee was improperly assessed). As Sangster proceeded *pro se* with the assistance of private counsel, this fee was improperly assessed. Accordingly, we vacate the $2 public defender records automation fee.

¶ 27 Sangster 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 2012)), a $50 court system fee (55 ILCS 5/5-1101(c) (West 2012)), a $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2012)), a $15 automation fee (705 ILCS 105/27.3a-1 (West 2012)), a $15 document

storage fee (705 ILCS 105/27.3c (West 2012)), and a $25 court services fee (55 ILCS 5/5-1103 (West 2012)). The State agrees that Sangster is owed presentence custody credit against the $15 State Police operations fee and the $50 court system fee, but argues that the remaining assessments Sangster challenges as fines are not fines and, thus, are not subject to offset by presentence custody credit.

¶ 28 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 2012). 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, Sangster accumulated 101 days of presentence custody credit, and is therefore potentially entitled to up to $505 of credit toward his eligible fines.

¶ 29 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 fee is a fine); *People v. Reed*, 2016 IL App (1st) 140498, ¶ 15 (court system fee is a fine). Accordingly, Sangster is entitled to offset the State Police operations fee and court system fee with presentence custody credit.

¶ 30 We agree with the State that the remaining assessments that Sangster challenges are not fines subject to offset by presentence custody credit. In numerous cases, we have 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). Accordingly, these fees are not offset by Sangster's presentence custody credit.

¶ 31 For the foregoing reasons, we vacate the $2 public defender records automation fee and direct the circuit court to correct the fines and fees order to reflect a credit of $65 to offset the $15 State Police operations fee and $50 court system fee. We affirm Sangster's conviction and sentence in all other respects.

¶ 32 Affirmed; fines and fees order modified.