2018 IL App (1st) 162566-U

No. 1-16-2566

Order filed on December 4, 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. 14 CR 13632
	)	
FOSTER MOORE,	)	The Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Pursuant to the one-act, one-crime rule, defendant's sentence for aggravated unlawful restraint is vacated. The fines, fees, and costs order is corrected.

¶ 2 Following a bench trial, defendant Foster Moore was found guilty of two counts of aggravated battery (720 ILCS 5/12-3.05(a)(1), (f)(1) (West 2014)) and one count of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2014)). At sentencing, the court merged the two counts of aggravated battery and imposed concurrent sentences of four years and six months in

prison for aggravated battery and four years and six months in prison for aggravated unlawful restraint. On appeal, defendant contends that pursuant to the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551 (1977), this court must vacate his conviction for aggravated unlawful restraint. He further challenges the imposed fines and fees.

¶ 3 For the reasons that follow, we vacate defendant's sentence for aggravated unlawful restraint, vacate two assessments, and order correction of the fines, fees, and costs order.

¶ 4 Defendant's conviction arose from the events of June 11, 2014, when Ayla Anderson was injured by a pit bull belonging to defendant. Following his arrest, defendant was charged by indictment with three counts of aggravated battery (all identifying Anderson as the victim), one count of aggravated unlawful restraint (identifying Anderson as the victim), and one count of dog fighting. Prior to trial, the State nol-prossed one of the three counts of aggravated battery.

¶ 5 At trial, the State presented evidence that in the early morning hours of the day in question, defendant, Anderson, and Dominique Easterling were hanging out at defendant's house. At some point, defendant and Easterling, who were dating, got into an argument and the two women decided to leave the house. Defendant grabbed Easterling's arm and then opened the door to the basement, where he kept his dog, and ordered it to "sic" the women. The dog bit Anderson's leg, dragged her down the basement stairs, and bit her face, injuring her lip and eye. Defendant ran out the back door during the attack, but Easterling beat the dog with a metal pole and Anderson was able to get away. At the hospital, Anderson received stitches for her wounds and a rod was implanted under her eye. A Chicago police officer who later went to the house to investigate a possible animal crime described the dog as an emaciated pit bull. The officer opined

that the dog's low weight, the presence of a bite stick in the basement, and the absence of dog food or water correlated with dog fighting.

¶ 6 The trial court granted defendant's motion for a directed finding as to the count charging dog fighting. In his defense, defendant admitted a certified copy of Anderson's prior conviction for aggravated driving under the influence. Following closing arguments, the trial court found defendant guilty of two counts of aggravated battery and one count of aggravated unlawful restraint. The court thereafter denied defendant's motion for a new trial, merged the two counts of aggravated battery, and imposed concurrent sentences of four years and six months in prison for aggravated battery and four years and six months in prison for aggravated unlawful restraint. The court also imposed $494 in fines, fees, and costs, and stated defendant would be credited with 304 days of presentence custody. Defendant's motion to reconsider sentence was denied.

¶ 7 On appeal, defendant first contends, and the State agrees, that pursuant to the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551 (1977), this court must vacate his conviction for aggravated unlawful restraint because it was based on the same act as his conviction for aggravated battery. Although defendant failed to preserve this issue by objecting at trial and addressing it in a posttrial motion, one-act, one-crime violations are recognized under the second prong of the plain error rule. *People v. Coats*, 2018 IL 121926, ¶ 10; *People v. Harvey*, 211 Ill. 2d 368, 389 (2004) ("an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule").

¶ 8 In *King*, 66 Ill. 2d at 566, our supreme court held that a defendant may not be convicted of multiple offenses when those offenses are all based on precisely the same physical act.

Whether a violation of this "one-act, one-crime" rule has occurred is a question of law that is reviewed *de novo*. *Coats*, 2018 IL 121926, ¶ 12. To determine whether a one-act, one-crime violation has occurred, courts follow a two-step analysis. *Id.* First, the court must determine whether the defendant's conduct consisted of a single physical act or separate acts. *Id.* If the convictions were based upon the same physical act, the conviction for the less serious offense must be vacated. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). If multiple acts were committed, then the court proceeds to the second step, *i.e.*, determining whether any of the offenses are lesser-included offenses. *Coats*, 2018 IL 121926, ¶ 12. If none of the offenses are lesser-included offenses, then multiple convictions are proper. *Coats*, 2018 IL 121926, ¶ 12.

¶ 9 As noted above, convictions for multiple offenses cannot stand when the offenses are all based on precisely the same physical act. *King*, 66 Ill. 2d at 566. It follows that the offense of unlawful restraint, which is often committed in conjunction with other offenses, is punishable as a separate crime only if the restraint is independent of the other offenses and arose from separate acts. *People v. Alvarado*, 235 Ill. App. 3d 116, 117 (1992). An "act," as defined in *King*, is "any overt or outward manifestation which will support a different offense." *Id.* at 566. We look to the charging instruments to determine whether offenses are based on the same act. *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 22.

¶ 10 Here, the trial court found defendant guilty of two counts of aggravated battery (which it merged prior to sentencing) and one count of aggravated unlawful restraint. One of the counts of aggravated battery alleged that defendant caused Anderson great bodily harm when he "had his dog bite Ayla Anderson about the face and body." The other count of aggravated battery alleged that defendant used a deadly weapon when he "ordered his dog to bite Ayla Anderson about the

face and body." The count charging aggravated unlawful restraint alleged that defendant "detained Ayla Anderson, while using a deadly weapon, to wit: a dog." We agree with the parties that the only "act" alleged in these three counts is defendant's act of using the dog against Anderson. As such, the dual convictions in this case violate the one-act, one-crime rule.

¶ 11 In general, when convictions violate the one-act, one-crime rule, the conviction for the less serious offense must be vacated (*People v. Lee*, 213 Ill. 2d 218, 226-27 (2004)), and when a reviewing court cannot determine which of two or more convictions is the more serious offense, the cause will be remanded to the trial court for that determination (*People v. Artis*, 232 Ill. 2d 156, 177 (2009)). Here, both aggravated unlawful restraint and aggravated battery, as charged, are Class 3 felonies that carry the same statutory penalties, and defendant received identical concurrent sentences. See 720 ILCS 5/10-3.1(a), (b), 12-3.05(a)(1), (f)(1), (h) (West 2014). In these circumstances, it is not apparent which count is the less serious offense.

¶ 12 Both defendant and the State assert that it is the conviction for aggravated unlawful restraint that should be vacated. Moreover, at least once, this court, when faced with convictions for aggravated battery and aggravated unlawful restraint that violated the one-act, one-crime rule, chose to vacate the conviction for aggravated unlawful restraint. *People v. King*, 2017 IL App (1st) 142297, ¶ 34. Given our decision in *King*, the parties' agreement, and the interests of judicial economy, we vacate defendant's sentence for aggravated unlawful restraint rather than remand. The trial court's guilty finding on the count charging aggravated unlawful restraint will merge with the conviction for aggravated battery. See 730 ILCS 5/5-1-12 (West 2014) (a "conviction" requires both a finding of guilt and a sentence). We order the mittimus corrected to reflect a single conviction for aggravated battery.

¶ 13 Defendant next challenges the fines and fees assessed against him. He acknowledges that he did not raise the issue of fines and fees in a postsentencing motion. Nevertheless, defendant argues that we may reach his arguments regarding fines and fees under the doctrine of plain error or via Illinois Supreme Court Rule 615(b). The State has responded that "errors in the fines, fees, and costs order may be corrected despite the forfeiture." By this statement, the State has waived any forfeiture argument. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 25; *People v. Smith*, 2018 IL App (1st) 151402, ¶ 7. As such, we will address defendant's claims. Our review of the propriety of the trial court's imposition of fines and fees is *de novo*. *Brown*, 2018 IL App (1st) 160924, ¶ 25; *Smith*, 2018 IL App (1st) 151402, ¶ 7.

¶ 14 First, defendant contends, and the State concedes, that the $20 Probable Cause Hearing fee (55 ILCS 5/4-2002.1(a) (West 2014)) and the $5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2014)) must be vacated. We agree. Because defendant was charged by indictment and no probable cause hearing was held in the instant case, the $20 Probable Cause Hearing fee does not apply. *People v. Smith*, 236 Ill. 2d 162, 174 (2010). In addition, the $5 Electronic Citation Fee does not apply to felonies (*Smith*, 2018 IL App (1st) 151402, ¶ 12) and here, defendant was convicted of a felony. We therefore vacate these two assessments and direct the clerk of the circuit court to correct the fines, fees, and costs order accordingly.

¶ 15 Next, defendant contends that he is entitled to $5-per-day presentence custody credit against two assessments that are designated on the fines, fees, and costs order as "FEES AND COSTS *NOT* OFFSET BY THE $5 PER-DAY PRE-SENTENCE INCARCERATION CREDIT." (Emphasis in original.) These two assessments are the $15 State Police Operations

Fee (705 ILCS 27.3a-1.5 (West 2014)) and the $50 Court System fee (55 ILCS 5/5-110(c) (West 2014)).

¶ 16 Under section 110-14(a) of the Code of Criminal Procedure of 1963, an offender who has been assessed one or more fines is entitled to a $5-per-day credit for time spent in presentence custody as a result of the offense for which the sentence was imposed. 725 ILCS 5/110-14(a) (West 2014). It is well-established that the presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A "fine" is punitive in nature, while a "fee" is assessed in order to compensate the State or recoup expenses incurred by the State in prosecuting a defendant. *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 21. Here, defendant spent 304 days in presentence custody. Therefore, he is entitled to up to $1,520 in presentence custody credit against his fines.

¶ 17 The State agrees with defendant that he is entitled to apply presentence incarceration credit against the $15 State Police Operations Fee (see *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31) and the $50 Court System fee (see *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30). We accept the State's concession and hold that these assessments are fines against which defendant may receive $5-per-day credit for the time he spent in presentence custody. We order the clerk of the circuit court to correct the fines, fees, and costs order to reflect this credit.

¶ 18 Finally, defendant contends that the fines, fees, and costs order should be corrected to reflect that he received *per diem* credit against four assessments that are designated on the order as "FINES OFFSET by the $5 per-day pre-sentence incarceration [credit]." These fines are: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2014)); the $5 Youth Diversion / Peer Court fine (55 ILCS 5/5-1101(e) (West 2014)); the $5 Drug Court fine (55 ILCS 5/5-

1101(f) (West 2014)); and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2014)). The States agrees that the fines, fees, and costs order does not indicate that these four fines were offset, and states that the total amount defendant owes should be reduced by $50 "to reflect that change."

¶ 19 We cannot discern from the fines, fees, and costs order whether defendant actually received credit against these four fines. To ensure that he does, we order the clerk of the circuit court to correct the fines, fees, and costs order to reflect this credit. See *Mullen*, 2018 IL App (1st) 152306, ¶ 58 (where this court was "unsure whether the presence or absence of a calculation [in the fines, fees, and costs order] affects whether a defendant receives the necessary credit," we ordered modification of the order to ensure the defendant received his due credit).

¶ 20 For the reasons explained above, we vacate defendant's sentence for aggravated unlawful restraint. Defendant's remaining conviction for aggravated battery is affirmed, and the mittimus is corrected to reflect a single conviction and sentence for aggravated battery. We vacate the $20 Probable Cause Hearing fee and the $5 Electronic Citation Fee. In addition, we find that the $15 State Police Operations Fee, the $50 Court System fee, the $10 Mental Health Court fine, the $5 Youth Diversion / Peer Court fine, the $5 Drug Court fine, and the $30 Children's Advocacy Center fine are offset by presentence custody credit. The total amount of fines, fees, and costs is reduced from $494 to $354. We order the clerk of the circuit court to correct the fines, fees, and costs order accordingly.

¶ 21 Affirmed in part, vacated in part; mittimus corrected; fines, fees, and costs order corrected.