2018 IL App (1st) 162938-U

No. 1-16-2938

SIXTH DIVISION
DECEMBER 28, 2018

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 22592
	)	
JALEN HOWARD,	)	Honorable
	)	Kenneth J. Wadas,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Pursuant to the one-act, one-crime rule, defendant's sentences for aggravated discharge of a firearm are vacated. The fines, fees, and costs order is corrected.

¶ 2 Following a bench trial, defendant Jalen Howard was found guilty of two counts of aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)) and two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). At sentencing, the court imposed consecutive six-year sentences for the two counts of aggravated battery and concurrent six-year

sentences for the two counts of aggravated discharge of a firearm, for a total of 12 years' imprisonment. 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 convictions for aggravated discharge of a firearm. He further challenges the imposed fines and fees. For the reasons that follow, we vacate defendant's sentences for aggravated discharge of a firearm, vacate one fee, and order correction of the fines, fees, and costs order.

¶ 3 BACKGROUND

¶ 4 Defendant's convictions arose from the October 3, 2013, shooting of James Morris and LaSalle Teague in Chicago. Following his arrest, defendant was charged with 10 counts of attempted first degree murder, two counts of aggravated battery, and three counts of aggravated discharge of a firearm. A bench trial commenced.

¶ 5 At trial, the State presented evidence that the night before the shooting, defendant's brother, and possibly defendant, were involved in a fight outside an apartment where Morris, Teague, and several other people were attending a party. The next morning, Morris, Teague, and a man named Dion Harris left the apartment and went to a residence across the street to return speakers that had been borrowed for the party. As Morris, Teague, and Harris walked back across the street toward the apartment, they were approached by defendant and defendant's brother. After a short conversation, defendant and his brother began to walk away, and Teague said something to them. At that point, defendant began shooting at Morris, Teague, and Harris. Morris was hit in the right hand and Teague was hit twice in each thigh. Police recovered six shell casings from the area, all of which were later determined to have been fired from the same weapon. Morris eventually had surgery for broken bones in his hand, which left a scar. Teague's

wounds were cleaned and "wrapped" on the day of the shooting, leaving him with "marks" on both thighs. After the State rested, defendant did not present any evidence.

¶ 6 Following closing arguments, the trial court acquitted defendant on all charges of attempted first degree murder and one charge of aggravated discharge of a firearm. The court found defendant guilty on the remaining four charges: aggravated battery based on an allegation that defendant shot and injured Morris (count 11), aggravated battery based on an allegation that defendant shot and injured Teague (count 12), aggravated discharge of a firearm based on an allegation that defendant shot in the direction of Morris (count 13), and aggravated discharge of a firearm based on an allegation that defendant shot in the direction of Teague (count 14). Defendant's motion for a new trial was denied.

¶ 7 At sentencing, the court imposed six-year sentences on all four counts. Based on a finding that both victims had suffered severe bodily injury, the court ordered the two sentences for aggravated battery to run consecutively. The court further indicated that the sentences for aggravated discharge of a firearm would run concurrently, so that defendant would serve a total of 12 years, followed by a three-year term of mandatory supervised release. Finally, the court stated that defendant would be credited with 1,066 days of presentence custody. Defendant filed a motion to reconsider sentence, challenging the imposition of consecutive sentences, which the trial court denied.

¶ 8 The written fines, fees, and costs order included in the record indicates that defendant was required to pay a total of $747 in fines, fees, and costs, and that he served 1,066 days in presentence custody. While the order includes a preprinted notation that "[a]llowable credit

toward fine will be calculated," it does not specify the amount of monetary credit defendant was to receive.

¶ 9 ANALYSIS

¶ 10 We note that we have jurisdiction to review the trial court's judgment, as defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013), R. 606 (eff. July 1, 2017).

¶ 11 On appeal, defendant first contends, and the State concedes, that pursuant to the one-act, one-crime rule of *People v. King*, 66 Ill. 2d 551 (1977), this court must vacate his two convictions for aggravated discharge of a firearm because they were based on the same physical act as his two convictions 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, which allows this court to review an otherwise forfeited issue. *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").

¶ 12 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. *Id*.

¶ 13 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. 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 instrument to determine whether offenses are based on the same act. *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 22. In addition, a reviewing court may look to "the way the State presented and argued the case." See *People v. Crespo*, 203 Ill. 2d 335, 342 (2001). Crimes committed against separate victims constitute separate criminal acts. *People v. Leach*, 2011 IL App (1st) 090339, ¶ 33.

¶ 14 Here, count 11 charged defendant with aggravated battery based on an allegation that he "knowingly discharged a firearm *** and caused any injury to another person, to wit: [defendant] shot James Morris about the body"; count 12 charged defendant with aggravated battery based on an allegation that he "knowingly discharged a firearm *** and caused any injury to another person, to wit: [defendant] shot LaSalle Teague about the body"; count 13 charged defendant with aggravated discharge of a firearm based on an allegation that he "knowingly discharged a firearm in the direction of another person, to wit: James Morris"; and count 14 charged defendant with aggravated discharge of a firearm based on an allegation that he "knowingly discharged a firearm in the direction of another person, to wit: LaSalle Teague."

¶ 15 We agree with the parties that the only "act" alleged in counts 11 and 13 is defendant's shooting of Morris, and that the only "act" alleged in counts 12 and 14 is his shooting of Teague. Moreover, at trial, the State treated the shooting as a single course of conduct and did not distinguish between the shots that struck the victims and the shots that were fired toward them. As such, the pairs of dual convictions in this case violate the one-act, one-crime rule.

¶ 16 When convictions violate the one-act, one-crime rule, the conviction for the less serious offense must be vacated. *Johnson*, 237 Ill. 2d 81, 97. Aggravated battery, as charged in this case, is a Class X felony. 720 ILCS 5/12-3.05(e)(1), (h) (West 2012). Aggravated discharge of a firearm, as charged, is a Class 1 felony. 720 ILCS 5/24-1.2(a)(2), (b) (West 2012). Because aggravated discharge of a firearm is a lower class offense than aggravated battery, we vacate the sentences imposed on counts 13 and 14. The trial court's guilty findings on counts 13 and 14 will merge with the convictions for aggravated battery on counts 11 and 12. See 730 ILCS 5/5-1-12 (West 2012) (a "conviction" requires both a finding of guilt and a sentence). We order the mittimus corrected to reflect only the two convictions for aggravated battery.

¶ 17 Defendant next challenges the fines and fees assessed against him. He acknowledges that he did not raise the issue of fines and fees in the trial court. Nevertheless, defendant argues that we may reach his arguments under the doctrine of plain error and because the issue of improper monetary credit for presentence incarceration may be raised at any time. The State has responded that defendant's claims regarding fines and fees are properly reviewed as plain error. 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.

¶ 18 First, defendant contends, and the State concedes, that the $5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2016)) must be vacated. We agree. The $5 Electronic Citation Fee does not apply to felonies. *Smith*, 2018 IL App (1st) 151402, ¶ 12. And here, defendant was convicted of felonies. We therefore vacate this assessment and order the fines, fees, and costs order to be corrected accordingly.

¶ 19 Next, defendant contends that he is entitled to *per diem* presentence custody credit against various fines. 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 2016). 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 1,066 days in presentence custody. Therefore, he is entitled to up to $5,330 in presentence custody credit against his fines.

¶ 20 Defendant argues that he is entitled to credit against five 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 fees are: the $190 Felony Complaint Filed, (Clerk) fee (705 ILCS 105/27.2a(w)(1)(A) (West 2016)); the $25 Automation (Clerk) fee, 705 ILCS 105/27.3a-1 (West 2016)); the $15 State Police Operations

Fee (705 ILCS 27.3a-1.5 (West 2016)); the $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(c) (West 2016)); and the $25 Document Storage (Clerk) fee (705 ILCS 105/27.3c (West 2016)).

¶ 21 The State agrees with defendant that he is entitled to presentence incarceration credit against one of these assessments: the $15 State Police Operations Fee. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (despite its label, this fee is also a fine). We accept the State's concession and hold that this assessment is a fine against which defendant can receive $5-per-day credit for the time he spent in presentence custody. We order the fines, fees, and costs order be corrected to reflect this credit.

¶ 22 However, the State does not concede defendant's claim for credit against the remaining four assessments he has identified: the $190 Felony Complaint fee, the $25 Automation (Clerk) fee, the $2 State's Attorney Records Automation Fee, and the $25 Document Storage (Clerk) fee. This court has previously considered challenges to these assessments and found them to be fees, not fines, and therefore not subject to offset by the $5-per-day presentence custody credit. *E.g.*, *Brown*, 2018 IL app (1st) 160924, ¶¶ 31, 32; *Smith*, 2018 IL App (1st) 151402, ¶¶ 15, 16. As for the $2 State's Attorney Records Automation fee, the overwhelming majority of legal authority holds that it is a fee not subject to offset. *E.g.*, *Brown*, 2018 Il App (1st) 160924, ¶ 31; *Smith*, 2018 IL App (1st) 151402, ¶ 16; *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38 (collecting cases); but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (finding that this

assessment is a fine, not a fee). In keeping with precedent, we conclude that these assessments are fees and, therefore, may not be offset by defendant's presentence custody credit.[1]

¶ 23 Finally, we note that defendant is entitled to credit against four assessments that are correctly designated on the fines, fees, and costs 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 2016)); the $5 Youth Diversion / Peer Court fine (55 ILCS 5/5-1101(e) (West 2016)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2016)); and the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2016)). We cannot discern from the fines, fees, and costs order whether defendant actually received credit against these fines. To ensure that he does, we order the fines, fees, and costs order be corrected 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).

¶ 24 CONCLUSION

¶ 25 For the reasons explained above, we vacate defendant's sentences for aggravated discharge of a firearm. Defendant's convictions for aggravated battery are affirmed, and the mittimus is corrected to reflect only the two convictions and sentences for aggravated battery. We vacate the $5 Electronic Citation Fee. In addition, we find that the $15 State Police Operations Fee, the $10 Mental Health Court fine, the $5 Youth Diversion / Peer Court fine, the

[1] We note that our supreme court has allowed appeal in a case where this court determined that these assessments are fees not subject to offset. *People v. Clark*, 2017 IL App (1st) 150740-U, ¶¶ 21-23, *appeal allowed*, No. 122495 (Sept. 27, 2017).

$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 $747 to $677. We order the fines, fees, and costs order to be corrected accordingly.

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