2018 IL App (4th) 141010-U

NO. 4-14-1010

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 13, 2018
Carla Bender
4th District Appellate
Court, IL

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
HARRY R. KOULAKES,	)	No. 13TR3511
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court complied with Illinois Supreme Court Rule 431(b) when asking if the jurors understood and accepted the *Zehr* principles and defendant's speeding conviction and fleeing/eluding a police officer conviction do not violate the one-act, one-crime doctrine.

¶ 2 Defendant argues the trial court failed to comply with Illinois Supreme Court Rule 431(b) when asking if the jurors understood and accepted the *Zehr* principles. Defendant argues defendant's conviction for speeding and fleeing/eluding a police officer violates the one-act, one-crime doctrine. We hold the trial court complied with Illinois Supreme Court Rule 431(b) when asking if the jurors understood and accepted the *Zehr* principles and defendant's speeding conviction and fleeing/eluding a police officer conviction do not violate the one-act, one-crime doctrine.

¶ 3 I. BACKGROUND

¶ 4 On September 13, 2013, defendant, Harry R. Koulakes, was charged by citation with speeding 120 miles per hour in a 55 mile per hour zone, a Class A misdemeanor (625 ILCS 5/11-601.5(b) (West Supp. 2013)), and aggravated fleeing or attempting to elude a police officer at a rate of speed of at least 21 miles per hour over the speed limit, a Class 4 felony (625 ILCS 5/11-204.1(a)(1) (West 2012)). Defendant pled not guilty.

¶ 5 During *voir dire*, the trial judge read the *Zehr* principles, pursuant to *People v. Zehr*, 103 Ill. 2d 472 (1984), to prospective jurors. The trial judge stated, "I'm going to give you four propositions; and then I'm going to ask you each one of you individually if you agree with all of those propositions." The trial judge continued,

> "I want to ask all of you, do you understand and accept the following principles: First, that the defendant is presumed innocent of the charges against him; second, that before the defendant can be convicted, the State must prove the defendant guilty beyond a reasonable doubt; third, that the defendant is not required to offer any evidence on his own behalf; and fourth, that if the defendant does not testify, it cannot be held against him?"

The judge then asked each prospective juror, "do you agree with those propositions?"

¶ 6 At trial, the following evidence was presented. On the evening of September 13, 2013, defendant drove his red, black, and silver motorcycle to pick up his 19-year-old son, Robert Koulakes, from a University of Illinois in Champaign-Urbana dorm to drive him home for a weekend visit. Defendant wore a black jacket and helmet. Robert wore a cream-colored sweater and black helmet. Defendant and Robert traveled north on Route 47 on defendant's motorcycle.

¶ 7 At 8:15 p.m., Dwight police officer Mark Scott sat in an unmarked squad car

behind a tree patch west of Route 47, which had a posted speed limit of 55 miles per hour. Scott observed a motorcycle traveling north at a high rate of speed on Route 47. Scott radar-clocked the motorcycle traveling 78 miles per hour. Scott turned on his car's headlights, approached Route 47, and perceived the motorcycle was a "red crotch-rocket" with two riders. Scott observed the driver wore a black jacket and helmet and passenger wore a silver or grey jacket and helmet. Scott pursued the motorcycle. Scott reached a speed of 120 miles per hour but did not reach the motorcycle. Scott did not activate his car's siren or emergency lights because Scott was attempting to catch up to the motorcycle.

¶ 8 Dwight police officer John Hoy was dispatched to locate a red, crotch-rocket motorcycle with two people. At 8:20 p.m., Hoy saw a red, crotch-rocket motorcycle with two people traveling north on Route 47. Hoy turned on his marked squad car's emergency lights and conducted a traffic stop of the motorcycle past 3100 North Road. Defendant was the driver and wore a black jacket and helmet. Robert was the passenger and wore a grey jacket and helmet.

¶ 9 Livingston County sheriff's deputy Ryan Donovan testified he saw Scott in pursuit of a motorcycle traveling north on Route 47 while Donovan was writing a warning ticket during a traffic stop at approximately 2300 North Road on September 13, 2013. The fast speed the motorcycle was traveling caught Donovan's attention. After Scott passed Donovan, Scott turned on his red emergency lights and sirens, but the motorcycle kept pulling away. Donovan hurried to complete the writing of the warning ticket and returned to his car to assist Scott. Donovan caught up to Scott because Scott's car engine had malfunctioned due to the pursuit of the motorcycle.

¶ 10 Another officer gave Scott a ride from his car to Hoy's location. Scott saw defendant's motorcycle and believed the motorcycle was the same one he pursued. The police

saw no other motorcycles that night. Donovan went to the location of Hoy's traffic stop of the motorcycle and discovered the motorcycle Hoy stopped was the same motorcycle Scott pursued.

¶ 11 Defendant alleged he drove his motorcycle, which was not designed for racing, to save on gas while picking up Robert. Defendant claimed he was unfamiliar with the route back home. Defendant drove north on Route 47, stopping at least twice. During one stop, defendant made a wrong turn, went to a truck stop to ask for directions, and proceeded north on Route 47 when defendant claimed to see a motorcycle fly past him in the opposite direction.

¶ 12 A few minutes later, defendant saw Hoy switch on his squad car's emergency lights. Defendant pulled over and cooperated with Hoy. Defendant alleged he heard no sirens, saw no emergency lights prior to Hoy's emergency lights, and did not drive more than 70 miles per hour on the way back home.

¶ 13 Robert claimed he was half-asleep during the drive and did not pay attention to the route defendant drove. Defendant knocked Robert on the helmet every so often to ensure Robert was awake. Although Robert could not see the speedometer, Robert claimed defendant drove at a constant rate of 50 to 55 miles per hour. Robert alleged defendant did not accelerate much because Robert did not need to tighten his grip around defendant. Had defendant driven faster, Robert alleged he could not have held on.

¶ 14 Robert alleged defendant stopped at least once, which was at a truck stop, and made additional turns. When Hoy activated his car's emergency lights, Robert claimed defendant pulled over immediately. Robert claims not to have heard sirens or seen emergency lights prior to Hoy pulling defendant over.

¶ 15 After closing arguments, The jury found defendant guilty of speeding 120 miles per hour in a 55 mile per hour zone and aggravated fleeing or attempting to elude a police

officer.

¶ 16 On October 21, 2014, defendant filed a motion for a new trial, arguing the State failed to prove beyond a reasonable doubt: 1) Scott activated his car's siren or emergency lights when pursuing defendant; 2) defendant exceeded the speed limit by 21 miles per hour or more while fleeing/eluding Scott; 3) Scott's car was near enough for defendant to perceive the car's siren or emergency lights; or 4) defendant was the motorcyclist Scott pursued.

¶ 17 On November 17, 2014, the trial court denied defendant's motion for a new trial after hearing argument. On that same day, the trial court sentenced defendant to mandatory costs on the speeding charge and 2 years of probation, 60 days in jail, and fines and fees on the fleeing/eluding a police officer charge. On that day, the office of State Appellate Defender was appointed to represent defendant on appeal.

¶ 18 Defendant's appeal was split into an appeal from defendant's conviction of and sentence for aggravated fleeing or attempting to elude a police officer and an appeal from defendant's conviction of and sentence for speeding 120 miles per hour in a 55 mile per hour zone. In defendant's felony fleeing appeal, this court held the evidence was sufficient to support the finding defendant was guilty of aggravated fleeing or attempting to elude a police officer beyond a reasonable doubt and affirmed defendant's conviction of and sentence for felony fleeing. *People v. Koulakes*, 2017 IL App (4th) 141009-U, ¶¶ 37-39.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 A. The Trial Court Complied With Illinois Supreme Court Rule 431(b) When Asking if the Jurors Understood and Accepted the *Zehr* Principles

¶ 22 On appeal, defendant argues the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. July 1, 2012)) by only asking if the jurors agreed with the *Zehr*

principles, pursuant to *People v. Zehr*, 103 Ill. 2d 472 (1984). Defendant contends under the first prong of the plain-error analysis, the trial court's Rule 431(b) error was reversible error and this court should remand for a new trial on the speeding offense. We disagree with defendant and affirm defendant's speeding conviction.

¶ 23 Rule 431(b) guides the trial court's *voir dire* method and ensures compliance with *Zehr*. During *voir dire*, four principles are essential to the qualification of jurors in a criminal case: (1) prospective jurors know a defendant is presumed innocent, (2) defendant is not required to offer any evidence on defendant's own behalf, (3) defendant must be proved guilty beyond a reasonable doubt, and (4) defendant's failure to testify on defendant's own behalf cannot be held against defendant. *Zehr*, 103 Ill. 2d at 477. The trial court must ask each prospective juror, individually or in a group, whether each understands and accepts the four *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012). The trial court's *voir dire* examination must provide each juror an opportunity to respond to specific questions concerning the *Zehr* principles. Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 24 To preserve an alleged Rule 431(b) error for appellate review, a defendant must object to the error at trial and raise the alleged error in a posttrial motion. *People v. Sebby*, 2017 IL 119445, ¶ 48; *People v. Belknap*, 2014 IL 117094, ¶ 66; *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). "Failure to do either results in forfeiture." *Sebby*, 2017 IL 119445, ¶ 48.

¶ 25 "[D]espite defendant's insistence, plain-error analysis does not apply to this case." *People v. Bowens*, 407 Ill. App. 3d 1094, 1101 (2011). This court holds plain-error analysis applies to cases involving procedural default, not affirmative acquiescence. *People v. Dunlap*, 2013 IL App (4th) 110892, ¶ 12; *People v. Townsell*, 209 Ill. 2d 543, 547-48 (2004); *Bowens*, 407 Ill. App. 3d at 1101. The plain-error rule cannot be applied in this case because defense

counsel acquiesced in and agreed to the trial court's *voir dire* method.

¶ 26 The trial judge provided instructions to the prospective jurors regarding the *Zehr* principles three times. First, the trial judge told prospective jurors, "I'm going to give you four propositions; and then I'm going to ask you each one of you individually if you agree with all of those propositions." Second, the trial judge asked prospective jurors if they understood and accepted the four *Zehr* principles,

> "I want to ask all of you, do you understand and accept the following principles: First, that the defendant is presumed innocent of the charges against him; second, that before the defendant can be convicted, the State must prove the defendant guilty beyond a reasonable doubt; third, that the defendant is not required to offer any evidence on his own behalf; and fourth, that if the defendant does not testify, it cannot be held against him?"

¶ 27 Third, the trial judge asked each prospective juror individually, "do you agree with those propositions?"

¶ 28 Following *voir dire*, the trial judge asked defense counsel if defense counsel would like to make anything of record in relation to the selection of the jury or the alternates. Defense counsel expressly said no. Defendant failed to object during *voir dire* to the alleged Rule 431(b) error. Instead, defendant agreed to the trial court's *voir dire* method. Acquiescence by defense counsel to the trial court's *voir dire* method prevents defendant from arguing the 431(b) error on appeal. *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 32. When defense counsel affirmatively acquiesces to the trial court's actions, any potential claim of error on appeal is waived and defendant's only available challenge is to claim ineffective assistance of counsel. *People v. Young*, 2013 IL App (4th) 120228, ¶¶ 25-26.

¶ 29 Defendant also failed to object during his posttrial motion to the alleged Rule 431(b) error. Because defendant failed to object to the error at trial, defense counsel affirmatively acquiesced to the trial court's *voir dire* method, and defendant failed to raise the error in a posttrial motion, defendant forfeited the alleged Rule 431(b) error for appellate review and we affirm defendant's speeding conviction.

¶ 30 B. Defendant's Speeding Conviction and Fleeing/Eluding a Police Officer Conviction Do Not Violate the One-Act, One-Crime Doctrine

¶ 31 Defendant contends defendant's conviction for speeding violates the one-act one-crime doctrine in light of his conviction for fleeing/eluding a police officer and requests this court vacate defendant's speeding conviction. We disagree and hold defendant's speeding conviction and fleeing/eluding a police officer conviction do not violate the one-act, one-crime doctrine.

¶ 32 The one-act, one-crime doctrine is a two-step test where the court first determines whether a defendant's conduct consisted of separate physical acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996). Multiple convictions are impermissible if based on the same physical act. *Rodriguez*, 169 Ill. 2d at 186. A physical act is any overt or outward manifestation that will support a different offense. *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 33 If, by examining the charging instrument, the court determines defendant committed multiple physical acts, analysis proceeds to step two where the court determines whether any of the charged offenses are lesser included offenses. *Rodriguez*, 169 Ill. 2d at 186. If any of the offenses are lesser included offenses, multiple convictions are impermissible. *Id.* If there are no lesser included offenses, multiple convictions may stand. *Id.*

¶ 34 Based on the charging instrument, defendant's conduct consisted of separate

physical acts. To prove defendant guilty of driving 120 miles per hour in a 55 mile per hour zone, the State was required to prove defendant was:

> Driving 26 miles per hour or more in excess of applicable limit.
>
> > "(b) A person who drives a vehicle upon any highway of this State at a speed that is 35 miles per hour or more in excess of the applicable maximum speed limit established under this Chapter or a local ordinance commits a Class A misdemeanor." 625 ILCS 5/11-601.5(b) (West Supp. 2013).

To prove defendant guilty of fleeing/eluding a police officer, the State was required to prove:

> "(a) The offense of aggravated fleeing or attempting to elude a peace officer is committed by any driver or operator of a motor vehicle who flees or attempts to elude a peace officer, after being given a visual or audible signal by a peace officer in the manner prescribed in subsection (a) of Section 11-204 of this Code, and such flight or attempt to elude:
>
> > (1) is at a rate of speed at least 21 miles per hour over the legal speed limit." 625 ILCS 5/11-204.1(a)(1) (West 2012).

Although driving 120 miles per hour in a 55 mile per hour zone and fleeing/eluding a police officer required speeding, fleeing/eluding a police officer was a separate act from speeding because fleeing/eluding required proving defendant failed to stop after being given a visual or audible signal by a police officer, which occurred when defendant failed to stop when Scott operated his red emergency lights and sirens. We hold defendant's speeding conviction and fleeing/eluding a police officer conviction do not violate the one-act, one-crime doctrine.

¶ 35 III. CONCLUSION

¶ 36 We hold the trial court complied with Illinois Supreme Court Rule 431(b) when asking if the jurors understood and accepted the *Zehr* principles and defendant's speeding conviction and fleeing/eluding a police officer conviction do not violate the one-act, one-crime doctrine. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 37 Affirmed.