2018 IL App (4th) 150917-U

NO. 4-15-0917

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

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
MATTHEW A. COOLEY,	)	No. 14CF812
Defendant-Appellant.	)	
	)	Honorable
	)	Rudolph M. Braud, Jr.,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed in part as modified and vacated in part, concluding (1) the trial court's questions during *voir dire* did not constitute plain error, (2) defendant failed to show that the failure to suppress or redact portions of a squad-car recording constituted ineffective assistance of counsel, (3) the court did not abuse its discretion in sentencing defendant, (4) the written sentencing order must be amended to reflect the oral pronouncement of defendant's sentence, and (5) the clerk-imposed fines must be vacated.

¶ 2 In July 2014, defendant, Matthew A. Cooley, was arrested following a traffic stop for driving under the influence of alcohol (DUI) and for driving on a revoked license. During the traffic stop, the police recorded defendant's field sobriety testing as well as statements he made while inside the squad car. Following a trial, a jury found defendant guilty, and the trial court sentenced defendant to serve 10 years' imprisonment. The circuit clerk later imposed numerous fines and fees.

¶ 3 Defendant appeals, asserting (1) the trial court committed reversible error when questioning prospective jurors, (2) he received ineffective assistance of counsel where counsel failed to suppress or seek redaction of his recorded statements, (3) the court considered inappropriate factors during sentencing, (4) the written sentencing judgment inaccurately reflected his sentence, and (5) clerk-imposed fines should be vacated. For the following reasons, we correct the written sentencing order and vacate the clerk-imposed fines. We otherwise affirm as modified.

¶ 4 I. BACKGROUND

¶ 5 A. The Information

¶ 6 In July 2014, the State charged defendant by information with three driving offenses related to a July 31, 2014, traffic stop. Count I alleged defendant committed an aggravated DUI, a Class 1 felony, by operating a motorcycle while under the influence of alcohol and where this was his fifth or subsequent violation. 625 ILCS 5/11-501(a)(2), (d)(1)(A) (West 2014). Count II alleged defendant committed an aggravated DUI, a Class 4 felony, by operating a motorcycle while under the influence of alcohol and while his license was suspended or revoked. 625 ILCS 5/11-501(a)(2), (d)(1)(G) (West 2014). Count III alleged defendant committed the offense of aggravated driving while license revoked, a Class 4 felony, where he operated his motorcycle while his license was revoked and he had been previously convicted of driving on a suspended or revoked license on at least four prior occasions. 625 ILCS 5/6-303(a) (West 2014).

¶ 7 B. *Voir Dire*

¶ 8 Defendant's jury trial commenced in September 2015. We begin by briefly outlining some of the exchanges during *voir dire* that defendant now challenges on appeal.

¶ 9 The trial court asked prospective jurors if they or a member of their immediate family had ever been convicted of a crime. Four members of the venire who were later chosen for the jury indicated that they or a family member had been convicted of a DUI.

¶ 10 When juror Long indicated a family member entered into a plea agreement regarding a DUI, the court responded, "so he accepted responsibility?" When juror Unsbee said he entered a plea agreement on a DUI in 1995, the court asked, "You accepted responsibility?" When juror Olvera said he entered into a plea agreement on a 2001 DUI, the court asked, "So, you accepted responsibility[?]" Juror Hermes told the court he had a DUI 20 years ago, but he "accepted responsibility" for it.

¶ 11 The trial court then admonished the panelists regarding the principles outlined in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012): "A person accused of a crime is presumed to be innocent of the charges against him. Before a [d]efendant can be convicted, the State must prove the [d]efendant's guilt beyond a reasonable doubt. The [d]efendant does not have to prove his innocence. The [d]efendant does not have to present any evidence on his own behalf, and if the [d]efendant chooses not to testify, you cannot hold the [d]efendant's failure to testify against him." The court then asked the prospective jurors individually whether they "understand and accept these principles." All jurors answered in the affirmative.

¶ 12 C. Jury Trial

¶ 13 Following *voir dire*, the trial commenced. The parties presented the following evidence.

¶ 14 1. *Officer Tuxhorn*

¶ 15 Officer Glenn Tuxhorn, with the Jerome police department, testified he was on duty on July 31, 2014, at approximately 3:20 a.m. While writing a report in a parking lot,

Officer Tuxhorn heard a loud motorcycle engine. He observed a motorcyclist approach the intersection of Lenox and MacArthur streets. According to Officer Tuxhorn, the driver appeared to have difficulty stopping the motorcycle and balancing himself while stopped.

¶ 16 Officer Tuxhorn pulled out behind the driver and ran the license plates, which showed the vehicle belonged to Daniel Dombrowski, who did not have a valid motorcycle license. Officer Tuxhorn continued following the motorcycle and observed the motorcyclist drive on—but not cross—the centerline dividing the lanes of traffic. Officer Tuxhorn enabled his emergency lights and sirens in an attempt to initiate a traffic stop, but the motorcyclist continued driving for a few blocks before stopping at a red traffic light. After using his public address system to tell the defendant not to go and to turn off the motorcycle, Officer Tuxhorn approached the motorcyclist and conducted the traffic stop.

¶ 17 During the traffic stop, Officer Tuxhorn learned the driver was not Dumbrowksi, but defendant. Officer Tuxhorn detected a strong smell of alcohol coming from defendant's breath and person, defendant's eyes were dazed and bloodshot, his speech was slurred, and he swayed while walking. Based on his training and experience, Officer Tuxhorn had reason to believe defendant was possibly under the influence of alcohol. However, Officer Tuxhorn also acknowledged this was his first encounter with defendant, so he did not know defendant's typical gait, speech patterns, or mental functioning. Officer Tuxhorn also discovered defendant's driver's license was revoked.

¶ 18 Officer Tuxhorn then took defendant through field-sobriety testing. Officer Tuxhorn testified he asked defendant whether any physical impairments would impact his ability to complete the test; however, he did not include that information in his report. After learning defendant was a painter, Officer Tuxhorn did not ask defendant if he was sleep-deprived or if

inhaling paint fumes impaired his ability to perform the tests. He also did not ask about the last time defendant had eaten or drank anything.

¶ 19 Officer Tuxhorn asked defendant to recite the alphabet, which defendant successfully completed. Although Officer Tuxhorn testified he gave defendant the horizontal gaze nystagmus (HGN) test, the trial court struck that portion of his testimony and issued a curative jury instruction, because Officer Tuxhorn failed to use the correct testing procedures. Officer Tuxhorn then administered the one-legged-stand test, where a defendant must stand on one leg while counting to 30. During the test, defendant put his foot down more than three times, swayed, and held his arms out for balance, which led to defendant failing the test. Officer Tuxhorn administered the walk-and-turn test, which required defendant to walk heel-to-toe in a straight line for nine steps, then pivot and return in the same manner. Officer Tuxhorn testified defendant repeatedly stepped off of the "line," did not touch his heel to his toes when walking, and had difficulty maintaining his balance. Defendant's multiple attempts to complete this test failed. According to Officer Tuxhorn, defendant admitted he was "too drunk" to complete to complete the test and requested an attorney. Because of malfunctioning equipment, the State was unable to produce any audio from the field-sobriety testing, including defendant's statement to Office Tuxhorn. Officer Tuxhorn arrested defendant and placed him in the squad car.

¶ 20 Defendant refused to submit to a Breathalyzer test to measure his blood-alcohol concentration (BAC). Officer Tuxhorn did not seek a warrant to have defendant's blood drawn to determine his BAC. Due to the lack of a BAC test, Officer Tuxhorn acknowledged he was unaware as to whether defendant had any illegal drugs, medications, or inhalants in his system that may have caused an impairment.

¶ 21 2. *Recording of the Traffic Stop*

¶ 22 While Officer Tuxhorn was still on the witness stand, the State introduced the recording of the traffic stop and defendant's arrest. The first part of the recording, which contained no audio, reflected defendant's attempts to complete the field sobriety testing.

¶ 23 After Officer Tuxhorn identified the portion of the recording in which defendant requested at attorney, defense counsel argued the remaining portion of the video—which did contain audio—should be suppressed, as the officer continued asking defendant questions despite defendant's request for counsel and the failure to read defendant his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). The State argued the majority of statements made by defendant were spontaneous utterances, and any portions that consisted of a custodial interrogation had been redacted. During a recess, the parties reviewed the recording and agreed to certain redactions.

¶ 24 The State then played the remainder of the recording for the jury. During the recording, many of defendant's comments were made without prompting from Officer Tuxhorn, but some of his statements were in direct response to Officer Tuxhorn's questions. Defendant admitted he had no driver's license and spoke repeatedly about his lawyer. He also called his father to arrange for bond money. When speaking with Officer Tuxhorn, he both admitted and denied driving the motorcycle.

¶ 25 Defendant made a mumbled statement that he did not mean to be "dru—," and Officer Tuxhorn responded that he understood defendant did not intend to be drunk. Defendant did not correct the officer's interpretation of his statement. Defendant also refused the Breathalyzer test because the result would be "awful," though he implied he would pass. Throughout the recording, defendant's speech was slurred and he repeated his questions multiple times.

¶ 26 3. *Christopher Bax*

¶ 27 Christopher Bax, an employee with the Illinois Secretary of State's Office, provided a certified copy of defendant's driving abstract, which demonstrated defendant's license was revoked at the time he was arrested.

¶ 28 4. *Jury Verdict*

¶ 29 Following the presentation of the State's evidence, defendant moved for a directed verdict, which the trial court denied. Defendant elected not to testify and presented no evidence. After deliberations, the jury found defendant guilty of all three counts.

¶ 30 C. Posttrial Proceedings and Sentencing

¶ 31 In October 2015, defendant filed a posttrial motion, arguing (1) the State presented insufficient evidence to support the verdicts, and (2) the trial court erred by admitting the portion of the recording after defendant's arrest and request for an attorney. Later that month, prior to the sentencing hearing, the court denied the motion.

¶ 32 At the sentencing hearing, the State relied on the presentence investigation report (PSI). The PSI reflected defendant's extensive criminal history, which included (1) misdemeanor DUI convictions in 1996, 2002, a second conviction in 2002, and 2003; (2) 1996 misdemeanor convictions for retail theft and aggravated assault of a police officer; (3) four drug-related convictions, one a felony; (4) a 1998 felony escape conviction; (5) misdemeanor convictions in 2012 and 2014 for resisting a peace officer; (6) three convictions related to transportation of an open liquor bottle and possession of liquor by a minor; and (7) misdemeanor convictions for driving on a revoked license in 1997, 2003, 2004, and 2014. After his 2006 conviction for unlawful possession of a controlled substance, defendant received a two-year prison sentence. The PSI also reflected defendant had a pending aggravated DUI case that arose

during the pendency of the present case. The case had not yet proceeded beyond the pretrial phase.

¶ 33 According to the PSI, defendant was single with no children. Defendant told the investigator he had been employed part-time by a catering service since 2013 until his incarceration. He also worked part time as an appraiser until his incarceration. He intended to return to those jobs upon his release. Defendant graduated high school and later, in 2009, obtained his associate's degree. He disclosed no physical- or mental-health problems.

¶ 34 Defendant told the investigator he first started drinking at age 14. He denied heavy alcohol usage, stating he drank "once every six months to a year." He reported no prior drug or alcohol treatment.

¶ 35 Defendant offered no evidence in mitigation. Counsel did argue that there was no evidence defendant contemplated that his actions threatened serious harm or that serious harm occurred. Defendant declined to make a statement in allocution.

¶ 36 The trial court stated that it reviewed the PSI in depth. The court then stated, "[I] [c]ertainly cannot ignore the fact that you are still currently charged with a case that's pending before the court. Nothing has been proven. [The] State hasn't met at least their trial burden with respect to that matter, but again, it's still pending." The court then emphasized the need for deterrence. After finding count II merged with count I, the court sentenced defendant to 10 years' imprisonment on count I and imposed a concurrent 3-year sentence on count III. The circuit clerk later imposed certain fines and fees.

¶ 37 This appeal followed.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendant argues (1) the trial court committed reversible error when questioning prospective jurors, (2) he received ineffective assistance of counsel where counsel failed to suppress or seek redaction of his recorded statements, (3) the court considered inappropriate factors during sentencing, (4) the written sentencing judgment inaccurately reflected his sentence, and (5) clerk-imposed fines should be vacated. We address these arguments in turn.

¶ 40 A. *Voir Dire*

¶ 41 Defendant first asserts the trial court committed reversible errors during *voir dire*. According to defendant, the court failed to properly frame the legal principles set forth in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Second, defendant contends the court violated defendant's right to a fair trial and undermined the presumption of innocence by asking four prospective jurors with DUI backgrounds if they had "accepted responsibility" for their actions. Defendant failed to raise these issues before the trial court, thus rendering the issues forfeited. *People v. Kitch*, 239 Ill. 2d 452, 460, 942 N.E.2d 1235, 1240 (2011). However, we may consider a forfeited claim where the defendant demonstrates plain error occurred. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). If an error occurred, we will only reverse where (1) "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) the "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.*

¶ 42 1. *Rule 431(b)*

¶ 43 Defendant argues the trial court violated Rule 431(b) by failing to question prospective jurors regarding each legal principle separately. In considering whether the court committed a clear and obvious error with respect to its compliance with Rule 431(b), our review is *de novo*. *People v. Belknap*, 2014 IL 117094, ¶ 41, 23 N.E.3d 325.

¶ 44 Under Rule 431(b),

> "The court shall ask each potential juror, individually or in a group, whether that juror understands and accepts the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that if a defendant does not testify it cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's decision not to testify when the defendant objects.
>
> The court's method of inquiry shall provide each juror an opportunity to respond to specific questions concerning the principles set out in this section." Ill. S. Ct. R. 431(b) (eff. July 1, 2012).

¶ 45 Defendant contends each of these principles must be addressed one at a time, rather than in a compound form. However, in *People v. Willhite*, 399 Ill. App. 3d 1191, 1196-97, 927 N.E.2d 1265, 1270 (2010), this court held "Rule 431(b) has no requirement that the trial court ask separate questions of the jurors about each individual principle. [Citation.] Nor does

the rule require separate, individual answers from each juror." See also *People v. Wallace*, 402 Ill. App. 3d 774, 777, 932 N.E.2d 635, 637 (2010) ("Rule 431(b) does not require that the trial court ask separate questions of the jurors about each individual principle.").

¶ 46 Defendant acknowledges our prior decision in *Willhite*, but asks us to reconsider our decision in light of the Illinois Supreme Court's decision in *People v. Thompson*, 238 Ill. 2d 598, 939 N.E.2d 403 (2010), which followed our decision in *Willhite*. Because we find *Thompson* consistent with *Willhite*, we decline to reconsider our holding in *Willhite*.

¶ 47 In *Thompson*, the supreme court examined the question of whether the trial court must ask the venire if it both understands and accepts each Rule 431(b) principle. The supreme court found the trial court erred in its application of Rule 431(b) when it failed to ask prospective jurors whether they accepted and understood all of the legal principles. *Id.* at 607. However, the *Thompson* court did not directly address whether the trial court could present the principles in compound form. Conversely, in *Willhite*, this court specifically considered the question of whether a trial court may inform the venire of the Rule 431(b) principles in compound form or must present one principle at a time and ask prospective jurors if they understand and accept each principle separately. *Willhite*, 399 Ill. App. 3d at 1196-97. The *Willhite* court determined the trial court had not erred in its application of Rule 431(b) when it recited the legal principles in compound form and asked for a group response regarding whether the venire understood and agreed with the principles. *Id.*

¶ 48 As the supreme court explained in *Thompson*, "The trial court must ask each potential juror whether he or she understands and accepts each of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of

those principles." *Thompson*, 238 Ill. 2d at 607. Thus, the supreme court placed its emphasis on whether the prospective jurors both understood and accepted the Rule 431(b) principles. Just as in *Willhite*, in the present case, the prospective jurors were appropriately asked whether they understood and accepted the principles outlined in Rule 431(b).

¶ 49 Consistent with *Willhite*, we conclude the trial court committed no error in reciting the Rule 431(b) principles to the venire and inquiring about its understanding and acceptance of those principles in compound form. Because we have determined the trial court committed no error with respect to its Rule 431(b) questions, we need not consider defendant's contention under plain-error analysis.

¶ 50 2. *Improper Questions*

¶ 51 Defendant contends the trial court denied his right to a fair trial and an impartial jury during the *voir dire* of four prospective jurors regarding their criminal backgrounds. All four jurors disclosed that they or members of their immediate family had entered guilty pleas on DUI charges. The court then followed up by asking whether those jurors or their family member had "accepted responsibility" for their actions. According to defendant, this question denied defendant his right to a fair trial and an impartial jury because it implied defendant refused to take responsibility for his actions.

¶ 52 During *voir dire*, the trial court's responsibility is to oversee the selection of an impartial panel of jurors who are free from prejudice or bias. *People v. Metcalfe*, 202 Ill. 2d 544, 552, 782 N.E.2d 263, 269 (2002). "[T]he manner and scope of the *voir dire* examination lies within the discretion of the trial court." *Id.* at 553. The court abuses its discretion when the conduct of the court thwarts the selection of an impartial jury. *Id.* "For the comments or questioning by a trial judge to constitute reversible error, the defendant must demonstrate that

they were a material factor in the conviction or that prejudice appears to have been the probable result." *People v. Anderson*, 250 Ill. App. 3d 439, 463, 620 N.E.2d 1281, 1297 (1993).

¶ 53 Setting aside whether the trial court's question was appropriate, defendant cannot demonstrate that either prong of plain error applies. First, despite defendant's argument to the contrary, the evidence in this case was not closely balanced. Officer Tuxhorn testified he smelled the odor of alcohol on defendant's breath, and observed defendant's glassy eyes, slurred speech, and difficulty maintaining his balance. Officer Tuxhorn's testimony that defendant failed his field sobriety testing was corroborated by the recording of the traffic stop. Further, according to Officer Tuxhorn, defendant explained he could not complete the field sobriety tests because he was intoxicated. The testimony of a single eyewitness is sufficient to support a conviction where that person's testimony is credible. See *People v. Mister*, 2016 IL App (4th) 130180-B, ¶ 104, 58 N.E.3d 1242. Thus, the evidence in this case was not closely balanced.

¶ 54 Moreover, defendant has failed to establish that the alleged error was so serious that it affected the fairness of his trial or challenged the integrity of the judicial process. The trial court instructed the jury about the State's obligation to prove defendant guilty beyond a reasonable doubt, as well as its duty to hold the State to that burden. Moreover, the jury received instructions requiring it to return a verdict of not guilty in the event the State failed to meet its burden. Nothing in the record demonstrates the trial court's question was either a material factor in his conviction or otherwise prejudiced his case.

¶ 55 Accordingly, we conclude defendant has failed to demonstrate the trial court's question about "accepting responsibility" is suitable for plain-error review.

¶ 56 B. The Squad-Car Recording

¶ 57 Defendant next asserts he received ineffective assistance of counsel where defense counsel failed to file a motion to suppress or move to redact portions of the squad-car recording. During the trial, the State provided a recording of the traffic stop that included two parts: (1) defendant outside of the squad car as he performed field-sobriety testing and (2) defendant inside the squad car as Officer Tuxhorn completed paperwork. It is the second portion of the video—where defendant was inside the squad car—that is at issue here.

¶ 58 To demonstrate ineffective assistance of counsel, defendant must show counsel's (1) performance fell below an objective standard of reasonableness; and (2) deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d 1199, 1208 (1996). Because we find it dispositive, we begin by addressing the second prong.

¶ 59 Assuming, *arguendo*, that defense counsel's performance fell below an objective standard of reasonableness, defendant cannot demonstrate the trial's outcome would have been different if the squad-car recording had been suppressed or redacted. To demonstrate prejudice under the second prong of *Strickland*, the defendant must show a reasonable probability exists that the outcome of the trial would have been different had the squad-car recording been suppressed or redacted. See *People v. Henderson*, 2013 IL 114040, ¶ 15, 989 N.E.2d 192.

¶ 60 Prior to watching the recording, the jury heard evidence that defendant had been weaving in his lane of traffic and appeared to have some difficulty controlling his motorcycle. Upon initiating a traffic stop, Officer Tuxhorn detected the odor of alcohol on defendant's breath and noticed defendant had glassy eyes, difficulty maintaining his balance, and slurred speech.

Defendant also failed the one-legged-stand and walk-and-turn tests. Moreover, according to Officer Tuxhorn, defendant admitted he did not have a driver's license and could not complete the field-sobriety testing because he was intoxicated. Bax, from the Secretary of State's Office, confirmed defendant's license was revoked on the date of the traffic stop. This evidence offered provided more than a sufficient basis for the jury to return guilty verdicts on all counts.

¶ 61 Defendant argues it was reasonably likely the outcome of the case may have been different had the squad-car recording been suppressed or redacted, as the case hinged on the credibility of Officer Tuxhorn. However, the testimony of a single eyewitness is sufficient to support a conviction where that person's testimony is credible. See *Mister*, 2016 IL App (4th) 130180-B, ¶ 104. Other than minor inconsistencies, Officer Tuxhorn's testimony was uncontradicted and corroborated by the recording of the field-sobriety testing, which overwhelmingly demonstrated defendant's difficulty performing the tests and maintaining his balance. Thus, we conclude defendant has failed to demonstrate that, absent counsel's alleged errors, a reasonable probability existed that the outcome of the trial would have been different.

¶ 62 C. Excessive Sentence

¶ 63 Defendant argues his case should be remanded for a new sentencing hearing where the trial court (1) improperly relied on the State's representations about his pending charge, and (2) imposed an excessive sentence in light of the mitigating evidence. Because defendant failed to file a motion to reconsider his sentence, any sentencing issues have been forfeited. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010). However, as noted above, we may address an otherwise forfeited issue if the defendant can establish plain error. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). To prove plain error, a defendant must first demonstrate a clear or obvious error occurred. *Piatkowski*, 225 Ill. 2d at 565. A defendant

demonstrates a clear or obvious error when the trial court abuses its discretion by relying on improper factors in aggravation. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147, 37 N.E.3d 238.

¶ 64 Defendant first argues the trial court erred by considering his pending charges based on the State's representation rather than the presentation of reliable evidence to support those allegations. See *People v. Gomez*, 247 Ill. App. 3d 68, 74, 617 N.E.2d 320, 324 (1st Dist. 1993). "The trial court may not rely on bare arrests or pending charges in aggravation of a sentence." *Minter*, 2015 IL App (1st) 120958, ¶ 148. The court should not consider "a mere list of arrests or charges" contained in a PSI. *Id.*

¶ 65 Here, the trial court relied, at least in part, on defendant's pending DUI charge in imposing sentence. Although the court emphasized the charges were still pending and the State had yet to meet its trial burden, the court also added it could not ignore the pending case. The court then went on to discuss the need for deterrence. Thus, there is evidence the court placed at least some weight on defendant's pending DUI charge, which constitutes an abuse of discretion and a clear or obvious error.

¶ 66 Having found a clear or obvious error, the defendant must now demonstrate either that "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545.

¶ 67 The evidence at the sentencing hearing was not closely balanced and strongly favored a lengthy sentence. As noted above, defendant had a lengthy criminal history that included multiple drug- and alcohol-related offenses outside his four prior DUI and driving while revoked convictions. He also had a prior felony drug conviction, for which he received a two-year prison sentence. Additionally, he had a history of resisting peace officers and escape. In

all, defendant had 14 prior misdemeanor and two prior felony convictions. The court emphasized the need for deterrence in imposing a mid-range sentence of 10 years on the DUI charge.

¶ 68 Insofar as defendant argues the trial court failed to properly weigh his alcoholism as mitigating evidence, the PSI demonstrates defendant fails to acknowledge any issue with substance abuse or alcohol. Rather, he denies heavy alcohol usage and describes his usage as "once every six months to a year." Thus, although his alcoholism may have been obvious to others, defendant's failure to acknowledge his problem diminishes the strength of his alcoholism as mitigating evidence. We therefore conclude the evidence was not closely balanced at sentencing and favored a lengthy sentence.

¶ 69 We also do not find the error was so serious that it denied defendant a fair sentencing hearing. In imposing sentence, the trial court noted that defendant had not been convicted of the pending DUI, thus implying the court placed little emphasis on the pending case. See *Minter*, 2015 IL App (1st) 120958, ¶ 152 ("[W]here the trial court appears to place minimal emphasis upon an improper factor, a new sentencing hearing is not required."). This is further demonstrated by the court imposing a mid-range sentence for the offense as a means of deterrence rather than a maximum sentence.

¶ 70 We therefore conclude defendant has failed to demonstrate plain error with respect to his sentencing hearing.

¶ 71 D. Sentencing Judgment

¶ 72 Next, defendant contends the written sentencing judgment should be corrected to reflect the trial court's oral pronouncement of defendant's sentence. The State concedes this issue and we accept the State's concession.

¶ 73 "When an oral pronouncement of judgment and a trial court's written judgment are in conflict, it is the oral pronouncement that is controlling." *People v. Savage*, 361 Ill. App. 3d 750, 762, 838 N.E.2d 247, 257 (2005). Whether the sentencing order should be corrected is a legal question subject to *de novo* review. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 86, 35 N.E.3d 649.

¶ 74 In this case, the written sentencing judgment reflects that defendant received a sentence of 10 years' imprisonment on all three counts. However, the written sentencing judgment conflicts with the court's oral pronouncement that defendant would receive 10 years' imprisonment on count I and 3 years' imprisonment on count III. The court found count II merged with count I, as both were DUI charges.

¶ 75 We therefore correct the sentencing judgment to reflect defendant received (1) a 10-year sentence with a 2-year period of mandatory supervised release on count I, and (2) a 3-year sentence with a 1-year period of mandatory supervised release on count III. The sentences will run concurrently. The sentencing judgment will further reflect that count II merged with count I and, therefore, defendant received no sentence regarding count II.

¶ 76 E. Clerk-Imposed Fines

¶ 77 Defendant argues the fines imposed by the circuit clerk must be vacated. Circuit clerks lack the authority to impose fines, and therefore, any fines imposed by the circuit clerk are void from their inception. *People v. Daily*, 2016 IL App (4th) 150588, ¶ 28, 74 N.E.3d 15. A void judgment may be challenged at any time, either directly or collaterally. *Id.* ¶ 29. "The propriety of the imposition of fines and fees presents a question of law, which this court reviews *de novo*." *Id.* ¶ 27.

¶ 78 The State concedes the following fines were improperly imposed by the circuit clerk: (1) $15 State Police Operations fine (705 ILCS 105/27.3a(1.5) (West 2016)), (2) a $5 drug-court fine (55 ILCS 5/5-1101(d-5) (West 2016)), (3) a $10 child advocacy center fine (55 ILCS 5/5-1101(f-5) (West 2016)), (4) a $100 Violent Crime Victims Assistance Act fine (725 ILCS 240/10(b) (West 2016)), and (5) the $50 court-systems fine (55 ILCS 5/1101(c) (West 2016)). See *Daily*, 2016 IL App (4th) 150588, ¶ 30 (concluding the State Police operations assessment, child advocacy center fee, and the court-systems assessment are fines); *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 137, 142, 55 N.E.3d 117 (holding the Violent Crime Victims Assistance assessment and drug-court fee are fines). We accept the State's concession and vacate these improperly imposed fines.

¶ 79 Defendant also argues the $2 State's Attorney Automation assessment constitutes a fine. In so arguing, defendant asks us to reconsider our prior holding that the assessment is a fee because it is a form of reimbursement. See *Warren*, 2016 IL App (4th) 120721-B, ¶ 115. Instead, defendant asks us to rely on *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, 64 N.E.3d 647, which held the State's Attorney Automation assessment was a fine. We rejected a similar argument in *People v. Maggio*, 2017 IL App (4th) 150287, 80 N.E.3d 72, where this court reaffirmed our holding in *Warren* despite the defendant's request for reconsideration in light of *Camacho*. We therefore decline to reconsider our decision in *Warren* and *Maggio* and continued to hold the $2 State's Attorney Automation assessment is a fee that may be imposed by the circuit clerk.

¶ 80 III. CONCLUSION

¶ 81 Based on the foregoing, we correct the written sentencing judgment to reflect defendant received (1) a 10-year sentence with a 2-year period of mandatory supervised release

on count I, (2) a 3-year sentence with a 1-year period of mandatory supervised release on count III, and (3) no sentence on count II because count II merged with count I. The sentences will run concurrently. We vacate the (1) $15 State Police Operations fine, (2) $5 drug-court fine, (3) $10 child advocacy center fine, (4) $100 Violent Crime Victims Assistance Act fine, and (5) $50 court-systems fine. We otherwise affirm.

¶ 82 As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 83 Affirmed in part as modified and vacated in part.