2018 IL App (4th) 160128-U

NO. 4-16-0128

FILED
July 10, 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 the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Ford County
JESUS ALVA,	)	No. 04CF100
Defendant-Appellant.	)	
	)	Honorable
	)	Mark Fellheimer,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant argues (1) a judge "practiced law" when the State adopted a motion to dismiss that the judge filed while he was a prosecutor and (2) his presentence monetary credit should be applied toward his $50 court fine. We conclude that the judge did not practice law, and we accept the State's concession that defendant is entitled to offset his $50 court fine from his presentence monetary credit.

¶ 2 In May 2005, defendant, Jesus Alva, was found guilty of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2004). In March 2012, after his conviction was affirmed on appeal, defendant filed a petition for relief from judgment. 735 ILCS 5/2-1401 (West 2012). In August 2012, Matthew Fitton, then the Ford County State's Attorney, filed a motion to dismiss. In 2014, Fitton was appointed as a resident circuit judge of Ford County.

¶ 3 In January 2016, the trial court conducted a hearing on defendant's motion. The State had not filed a new motion to dismiss for that hearing. Instead, the State adopted the original motion to dismiss filed by Fitton. The trial court granted the State's motion to dismiss.

¶ 4 Defendant appeals, arguing the trial court's judgment is void because "the trial court granted a motion to dismiss that was filed and signed by someone *** not permitted to practice law." We reject this argument, concluding that Judge Fitton was not practicing law in 2015 when the State adopted his motion to dismiss.

¶ 5 Defendant also argues that his presentence monetary credit should be applied toward his $50 court fine. The State concedes this issue, and we accept its concession. Accordingly, we affirm the trial court's order and accept the State's concession that defendant is entitled to offset his $50 court fine against his presentence monetary credit.

¶ 6 I. BACKGROUND

¶ 7 A. The Defendant's Prior Conviction and Appeal

¶ 8 In May 2005, defendant was found guilty of first degree murder. 720 ILCS 5/9-1(a)(1) (West 2004). The trial court sentenced defendant to 40 years in prison. The court also assessed a $50 court charge against defendant.

¶ 9 Defendant appealed his conviction, arguing (1) the State failed to prove him guilty beyond a reasonable doubt and (2) the trial court abused its discretion by sentencing him to 40 years in prison. In April 2007, this court rejected defendant's arguments and affirmed his conviction. *People v. Alva*, 371 Ill. App. 3d 1223, 936 N.E.2d 1236 (Apr. 5, 2007) (unpublished order pursuant to Supreme Court Rule 23).

¶ 10 In May 2008, defendant *pro se* filed a postconviction petition, and in June 2018, the trial court summarily dismissed it. Defendant appealed and this court affirmed. *People v. Alva*, No. 4-08-0580 (Aug. 18, 2009) (unpublished summary order under Supreme Court Rule 23(c)(2)).

¶ 11 B. The Relevant Procedural History

¶ 12 1. *The Petition for Relief from Judgment*

¶ 13 In March 2012, defendant filed a petition for relief from judgment (735 ILCS 5/2-1401 (West 2012)), in which he argued that the trial court erred by (1) not giving a *sua sponte* jury instruction on involuntary manslaughter, (2) allowing hearsay testimony, (3) entering judgment against defendant despite the fact that the evidence did not prove him guilty beyond a reasonable doubt, and (4) denying defendant a fair trial through cumulative error. In April 2012, the trial court dismissed the petition. Defendant's May 2012 appeal was resolved by summary remand. *People v. Alva,* No. 4-12-0479 (July 25, 2012) (summary remand on defendant's motion, citing *People v. Laugharn*, 233 Ill 2d 318, N.E.2d 802 (2009).

¶ 14 2. *The Motion To Dismiss*

¶ 15 In August 2012, Fitton, then the Ford County State's Attorney, filed a motion to dismiss, arguing that defendant had forfeited these arguments by not raising them on direct appeal. Likewise, Fitton argued that the doctrine of *res judicata* barred defendant's arguments.

¶ 16 3. *Fitton's Appointment and the Motion To Compel*

¶ 17 In 2014, the Illinois Supreme Court appointed Fitton as a resident circuit judge of Ford County. In April 2015, defendant filed a motion to compel, requesting a hearing on his petition for relief from judgment. In June 2015, the matter was referred to now-Judge Fitton. In November 2015, Judge Fitton recused himself, noting that he had filed the State's motion to dismiss.

¶ 18 4. *The Hearing on the Petition for Relief from Judgment*

¶ 19 In January 2016, a different judge, Judge Mark Fellheimer, conducted a hearing on defendant's motion for relief from judgment. The State did not file a new motion to dismiss. Instead, at the hearing, the State adopted the original motion to dismiss filed by Fitton. The State

noted that "[w]e would adopt what Judge—now Judge Fitton, and State's Attorney Fitton filed in terms of his argument[.]" The trial court granted the State's motion to dismiss, concluding that defendant's claims were barred by the doctrine of *res judicata*.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 Defendant appeals, arguing that (1) the trial court's judgment is void and (2) his presentence monetary credit should be applied toward his $50 court fine. We address these issues in turn.

¶ 23 A. No Unauthorized Practice of Law Occurred

¶ 24 Defendant argues that the trial court's judgment is void because Judge Fitton was "practicing law" when the State adopted his motion to dismiss. We reject this contention as completely baseless.

¶ 25 1. *The Applicable Law*

¶ 26 Judges "shall not practice law[.]" Ill. Const. 1970, art. VI, § 13(b). There is no precise formula to define the practice of law. *Downtown Disposal Services, Inc. v. City of Chicago*, 2012 IL 112040, ¶ 15, 979 N.E.2d 50. Instead, courts examine the character of the acts themselves to determine if the conduct is the practice of law, and each case is largely controlled by its own peculiar facts. *Id.* The character of the act, not the place where the act is committed, is the decisive factor in determining whether the act constitutes the practice of law. *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 357, 8 N.E.2d 941, 947 (1937).

¶ 27 In *People v. Dunson*, 316 Ill. App. 3d 760, 761, 737 N.E.2d 699, 700 (2000), the prosecutor was not licensed to practice law in the State of Illinois. The defendant, who represented himself *pro se*, was eventually convicted of various crimes. *Id.* Counsel later appeared

for the defendant and filed a motion to vacate the convictions because they were procured by a prosecutor not licensed to practice law. *Id.* The trial court agreed and vacated the convictions. *Id.* The Second District affirmed, reasoning that "the participation in the trial by a prosecuting assistant State's Attorney who was not licensed to practice law under the laws of Illinois requires that the trial be deemed null and void *** and that the resulting final judgment is also void." *Id.* at 770.

¶ 28 In *People v. Munson*, 319 Ill. 596, 596, 150 N.E. 280, 280-81 (1925), the grand jury indicted the defendant on various felony charges. The defendant filed a motion to quash the indictment because the Moultrie County State's Attorney, who examined witnesses before the grand jury and aided in the drafting of indictments, was not a licensed attorney. *Id.* The trial court denied the motion to quash the indictment. *Id.* at 597. The Illinois Supreme Court reversed, concluding that because the prosecutor "was not a licensed attorney, the indictment returned by the grand jury was void and should have been quashed on motion." *Id.* at 597.

¶ 29 2. *This Case*

¶ 30 Defendant argues his case is similar to *Dunson* and *Munson* because Judge Fitton "practiced law" when the State adopted his 2012 motion to dismiss. Defendant asserts that "although Judge Fitton did not personally appear for the State, he nevertheless participated (albeit unwittingly) when the State adopted his motion to dismiss." Defendant therefore argues that the trial court's dismissal of his motion was void because "the trial court granted a motion to dismiss that was filed and signed by someone *** not permitted to practice law."

¶ 31 However, defendant's argument overlooks the basic fact that the prosecutor in 2015 affirmatively adopted Fitton's 2012 motion to dismiss, which was an entirely appropriate action. Accordingly, the trial court granted a motion to dismiss that was adopted by someone

authorized to practice law.

¶ 32 Likewise, Judge Fitton did not practice law merely because a prosecutor adopted his 2012 motion to dismiss. Defendant concedes that Judge Fitton did not personally appear for the State during 2015. Further, defendant does not allege that Judge Fitton otherwise assisted the State after his elevation to the bench. Defendant even notes that Judge Fitton did not have personal knowledge that the State adopted his 2012 motion to dismiss.

¶ 33 Finally, in 2012, it is undisputed that Fitton was serving as the Ford County State's Attorney and was authorized to practice law. Likewise, in 2015, it is undisputed that the prosecutor was authorized to practice law when he adopted Fitton's motion to dismiss. Accordingly, *Dunson* and *Munson* are easily distinguishable because all of the prosecutors in this case were authorized to practice law during the pertinent times. See *Dunson*, 316 Ill. App. 3d at 760; see *Munson*, 319 Ill. at 596. Accordingly, defendant's argument that the judgment is void is absolutely without merit.

¶ 34 B. We Accept the State's Concession

¶ 35 The trial court, when sentencing defendant, also assessed a $50 court charge against defendant. The court credited defendant with 227 days for time spent in presentence custody. A person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of the offense shall be allowed a credit of $5 for each day he is incarcerated. 725 ILCS 5/110-14 (West 2016).

¶ 36 Defendant argues he is entitled to offset his $50 court fine against his presentence monetary credit. The State concedes that defendant is entitled to offset his $50 court fine against his presentence monetary credit. We accept the State's concession.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm the trial court's order. We likewise accept the State's concession that defendant is entitled to offset his $50 court fine against his presentence monetary credit. As part of our judgment, we award the State its $50 statutory assessment against defendant as the costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 39 Affirmed.