2019 IL App (1st) 151997-U

No. 1-15-1997

Third Division
March 6, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. PEDRO BAHENA-MENDOZA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CR 17993 Honorable Joseph M. Claps, Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Pursuant to *People v. Bingham*, 2018 IL 122008, defendant cannot raise a constitutional challenge to the Illinois Sex Offender Registration Act on direct appeal from his criminal conviction for predatory criminal sexual assault.

¶ 2 This case is before us on remand from a supervisory order of our supreme court. Defendant, Pedro Bahena-Mendoza, filed a direct appeal of his convictions for predatory criminal sexual assault of a child. On appeal, defendant did not challenge his convictions. Instead, he challenged the constitutionality of the Illinois Sex Offender Registration Act, 730 ILCS 150/1 *et seq*. (West 2014), ("the Act") which he became subject to as a consequence of

his convictions. Defendant also called into question related provisions in the Illinois Criminal Code which penalize registrants who fail to abide by residence and presence restrictions. 720 ILCS 5/11-0.3(a)-(b-20); 5/11-9.3, 11-9.4-1 (West 2014). Defendant argued that these statutes are facially unconstitutional because they infringe upon a registrant's liberty interests without procedural and substantive due process. Additionally, defendant contested the fines, fees, and costs that were assessed against him.

¶ 3 In our initial decision, issued on May 2, 2018, we reviewed and rejected defendant's constitutional claims and directed the circuit clerk to modify the order assessing fines, fees, and costs. *People v. Bahena-Mendoza*, 2018 IL App (1st) 1519970-U. Defendant timely petitioned for leave to appeal this decision on May 30, 2018.

¶ 4 On November 28, 2018, our supreme court issued a supervisory order, in which it denied defendant's petition for leave to appeal but also directed this court to vacate our 2018 order. *People v. Bahena-Mendoza*, No.123641 (Nov. 28, 2018) (supervisory order). The supervisory order instructed us to consider the effect of *People v. Bingham*, 2018 IL 122008, in determining whether defendant may raise the constitutionality of the Act on direct appeal. Based on *Bingham*, we now find that we are without jurisdiction to consider the majority of defendant's arguments on appeal.

¶ 5 I. BACKGROUND

¶ 6 Defendant was charged in 2012 with three counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse of a child. In 2014, defendant chose to proceed with a bench trial and the State presented testimony from the victim, who was eleven at the time of his testimony. A video recording of an interview with the victim from 2012 was published to the court after authentication by the Chicago Children's

Advocacy Center's forensic interviewer. The investigating detective testified about defendant's arrest, interrogation, and written statement to the assistant State's attorney. The assistant State's attorney testified about obtaining defendant's statement which was also published to the court. Stipulations were entered regarding the victim's age, relation to the defendant, his disclosure to his mother, and the results of his medical examination. Bruising was documented on the victim's right shoulder, mid-neck, left neck, left clavicle, mid-back, and around his urethra consistent with victim's testimony about where defendant "bit" him. Defendant did not testify or present any evidence in response to the State's case-in-chief.

¶ 7 The trial court found that, despite discrepancies between defendant's written statement and the victim's testimony, the State proved two of the three counts of predatory criminal sexual assault beyond a reasonable doubt. The evidence was clear that defendant's penis came into contact with the victim's anus and mouth. It was unclear if defendant's mouth came into contact with the victim's penis. Although defendant acknowledged all three acts in his written statement, the victim's testimony only described two of the three acts. The court commented that the charge of aggravated criminal sexual abuse was not proven as a separate act of contact. The alleged contact with the victim's buttocks would likely be included in the contact of defendant's penis with the victim's anus and would merge with the charge of predatory criminal sexual assault."

¶ 8 Defendant was sentenced on May 8, 2015, to consecutive terms of eight years' imprisonment for each count of predatory criminal sexual assault of a child. He was not released on bail for any period of time between his arrest on August 28, 2012, and his sentencing hearing. The trial court ordered defendant to submit blood samples to the state police and required he be tested for sexually transmitted diseases. A separate order was

entered assessing defendant a total of $1,112.00 in fines, fees, and costs and recording that defendant served 938 days in custody.

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant challenged the constitutionality of the Illinois Sex Offender Registry Act on its face, arguing that it violated the due process clauses of the United States and Illinois Constitutions. U.S. Const. amend. XIV; Ill. Const.1970, art. I, § 2. Defendant asked this court to give fresh consideration to the Act's constitutionality in light of the increased restrictions on registrants from the numerous amendments since the Act's promulgation. He argued that the Act lacked procedural due process where no procedure existed for initial or future evaluation of the danger a registrant poses and the necessity of continual monitoring. Defendant maintained that the different goals an individual may have, as a criminal defendant or as a potential registrant, require different procedural safeguards. He correspondingly argued that the Act impacted a fundamental liberty interest and violated substantive due process because it is not narrowly tailored to consider an individual's risk of reoffending. Lastly, defendant argued that the nature of the Act is both overinclusive and underinclusive and has no rational relationship to the goal of protecting the public.

¶ 11 Defendant did not challenge his conviction and we followed the analysis of our colleagues in the Fifth District to address the merits of his constitutional claims. See *People v. Pollard*, 2016 IL App (5th) 130514. The defendant in *Pollard* was also convicted for predatory criminal sexual assault of a child and filed a direct appeal challenging the constitutionality of the statutes regulating sex offender registration and notification without challenging his conviction. *Id*. ¶¶ 1-2, 23-26. The Fifth District Appellate Court found that the defendant had standing to challenge the statutes because he would automatically suffer an

injury due to the restrictions imposed by the statutes and a favorable ruling from the court invalidating the restrictions would redress the injury. *Id*. ¶ 27.

¶ 12 The Illinois Supreme Court weighed in authoritatively in *People v. Bingham*, 2018 IL 122008, holding that a reviewing court does not have jurisdiction over a constitutional challenge to the Act on direct appeal of a criminal conviction that only collaterally triggers the registration requirements. *Bingham*, 2018 IL 122008, ¶ 19. In so finding, the court stated that the proper way to raise these constitutional issues would be either "(1) through a direct appeal from a case finding defendant guilty of violating the regulation he attempts to challenge as unconstitutional, or (2) by filing a civil suit seeking a declaration of unconstitutionality and relief from the classification as well as the burdens of sex offender registration." *Bingham*, 2018 IL 122008, ¶ 21. The court further noted that the standing analysis in *People v. Avila-Briones*, 2015 IL App (1st) 132221, which *Pollard* relied on, was not useful authority because it did not address the powers of the reviewing court. *Bingham*, 2018 IL 122008, ¶ 21.

¶ 13 In order to review the scope of the reviewing court's power, our supreme court turned to Illinois Supreme Court Rule 615(b) which states:

> "On appeal the reviewing court may: (1) reverse, affirm, or modify the judgment or order from which the appeal is taken; (2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken; (3) reduce the degree of offense of which the appellant was convicted; (4) reduce the punishment imposed by the trial court; or (5) order a new trial."

Ill. S. Ct. R. 615(b) (eff. Jan. 1, 1967). The court also considered that "'[a] notice of appeal confers jurisdiction on an appellate court to consider only the judgments or parts of judgments specified in the notice.'" (Emphasis omitted.) *Bingham*, 2018 IL 122008, ¶ 16 (quoting *People v. Lewis*, 234 Ill. 2d 32, 37 (2009)). With these principles in mind, the court turned to the defendant's case.

¶ 14 The defendant in *Bingham* was convicted for a felony theft charge in 2014 and subjected to the registration requirements of the Act due to a prior conviction for attempted criminal sexual assault in 1983. *Bingham*, 2018 IL 122008, ¶ 1. The 1983 conviction predated the adoption of the Illinois Sex Offender Registration Act in 1986 and he had been exempted from registration. *Id*. However, an amendment in 2011 imposed a new registration requirement on previously exempt offenders, if they were convicted of any new felony offenses after July 1, 2011. *Id*. Thus, the defendant's 2014 conviction for felony theft collaterally triggered the amended provision and he was required to register as a sex offender. *Id*.

¶ 15 The court found that "[s]ex offender registration is a matter controlled by statute and was not a requirement imposed by the trial court" and is therefore not a part of the trial court's judgment. *Id*. ¶¶ 1, 9. Rather, the obligation to register as a sex offender is implemented and enforced by the Illinois State Police. See *People v. Molnar*, 222 Ill. 2d 495, 500 (2006). Thus, the appellate court, in reviewing a direct appeal of the defendant's conviction for felony theft, was not addressing any part of the judgment in that case when it ruled on the constitutionality of the statutes challenged. *Id*. ¶ 17. It was inappropriate for a reviewing court to be put in the position of ruling on the validity of regulatory programs administered by state agencies and officials that were not parties to the action. *Id.* ¶ 19. Accordingly, the

court held that where the criminal conviction is for an offense that triggers the registration requirements of the Act, rather than a violation of the Act, a reviewing court has no power to order that a defendant be relieved of the obligation to register as a sex offender. *Id.* ¶ 18.

¶ 16 In light of our supreme court's decision in *Bingham*, it is clear that defendant has not properly raised his constitutional claims as he has not been convicted of violating the registration requirements of the Act nor is this a civil suit seeking a declaration of unconstitutionality. Instead, defendant here accepts his conviction for predatory criminal sexual assault and only challenges the fact that he has become collaterally subject to the Act's registration requirements without a chance to present an argument concerning his risk of recidivism and the need for future monitoring. Although neither party challenged the jurisdiction of this court to consider these claims, we have an independent duty to consider our jurisdiction. *People v. Smith*, 228 Ill. 2d 95, 106 (2008). Having found that we had no jurisdiction to address defendant's constitutional claims, we vacate our original unpublished order addressing the merits of his claims.

¶ 17 Upon our review of defendant's remaining non-constitutional contentions, we find no reason to depart from our prior analysis and include it below.

¶ 18 Defendant argued that the trial court erred in its assessment of certain fines and fees totalling $45 and its transcription of his presentencing custody credit. Although we found that defendant forfeited review of this issue by failing to object during sentencing, *People v. Hillier*, 237 Ill. 2d 539, 544 (2010), we are able to modify a fines and fees order without remand. Ill. S. Ct. R. 615(b)(1); see also *People v. McGee*, 2015 IL App (1st) 130367, ¶ 82 (ordering clerk of the circuit court to correct fines and fees order). As a matter of statutory

interpretation, we review the propriety of a trial court's imposition of fines and fees *de novo.* *McGee*, 2015 IL App (1st) 130367, ¶ 78.

¶ 19 The first assessment challenged by defendant was the probable cause hearing fee (55 ILCS 5/4-2002.1(a) (West 2014)), which applies in cases where a preliminary hearing is held to determine the existence of probable cause that the accused has committed an offense. Defendant contended, and the State correctly conceded, that fee should not have been imposed in this case because he was charged via indictment and no probable cause hearing was held. See *People v. Guja*, 2016 IL App (1st) 140046, ¶ 69 (citing *People v. Smith*, 236 Ill. 2d 162, 174 (2010)). Accordingly, we vacated this $20 fee.

¶ 20 Next, defendant argued that the state police operation charge (705 ILCS 105/27.3a (1.5) (West 2014) was actually a fine, not a fee, because it did not go towards defendant's prosecution and therefore should be subject to a $5 per day presentence incarceration credit. Although this assessment has been construed as a fine, *People v. Brown*, 2017 IL App (1st) 142877, ¶ 74, defendant overlooks the fact that the $5 per day credit does not apply to a person incarcerated for sexual assault. See 725 ILCS 5/110-14(b) (West 2014). Accordingly, we found that defendant would not be entitled to presentence incarceration credits against any fines as he was incarcerated on a sexual assault charge. 725 ILCS 5/110-14(b); 730 ILCS 5/5-9-1.7(a)(1) (West 2014); *People v. Rexroad*, 2013 IL App (4th) 110981, ¶¶ 49-51. Defendant argued only that credit should be applied toward this assessment but did not challenge the $15 assessment itself. Thus, we found that no modifications to this assessment were required.

¶ 21 Next, defendant argued, and the State correctly conceded, that both the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) and the $5 court system fee (55 ILCS 5/5-

1101(a) (West 2014)) should be vacated because they do not apply to felony cases. We found that predatory criminal sexual assault does not fall within the categories listed under either cited statute for which fees can be assessed. Accordingly, we vacated these two charges. The State argued that in lieu of these fees, the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) should have been assessed. We agreed that section 1101(c)(1) is applicable to defendant's case and the $50 court system fee should have been assessed. However, despite the State's concession that this fee has been construed as a fine and is subject to the $5 per day credit, we found that defendant is not entitled to any credit against this assessment for the same reasons cited above. See 55 ILCS 5/5-1101(c)(1) and 725 ILCS 5/110-14(b) (West 2014).

¶ 22 Finally, defendant highlighted a scrivener's error in the order assessing fines, fees, and costs. The trial court recorded the number of days served in presentencing custody as 938 and our review of the record indicates the correct number was 983 days. Accordingly, we directed the clerk of the circuit court to correct this number to accurately reflect the time defendant was incarcerated from his arrest on August 28, 2012, up to his sentencing hearing on May 8, 2015.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we dismiss the portions of defendant's appeal regarding the constitutionality of the Illinois Sex Offender Registration Act and related statutes. Our prior order to the clerk of the circuit court to modify the order assessing fines, fees, and costs remains unchanged.

¶ 25 Affirmed as modified.