2019 IL App (1st) 160898-U

No. 1-16-0898

Order filed March 21, 2019

Fourth Division

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. 15 CR 27
	)	
KALVIN JOHNSON,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction for violating the armed habitual criminal statute over his contention that counsel was ineffective. The fines, fees, and costs order is modified.

¶ 2 Following a bench trial, defendant Kalvin Johnson was convicted of violating the armed habitual criminal (AHC) statute (720 ILCS 5/24-1.7(a) (West 2014)) and sentenced to 10 years' imprisonment. On appeal, he contends counsel was ineffective for failing to object to the admission of hearsay testimony and preserve the trial court's error in excluding a purportedly

exculpatory statement from a witness at the scene of the crime. Defendant also contests various fines and fees imposed by the trial court. For the following reasons, we affirm and modify the fines, fees, and costs order.

¶ 3 Defendant, a convicted felon, was arrested after police recovered a firearm from a car that he had been driving. Following a preliminary hearing, the trial court found no probable cause existed to support various gun charges. The State subsequently presented the case to the grand jury, and defendant was charged with violating the AHC statute, along with three counts of unlawful use of a weapon by a felon (UUWF), and three counts of aggravated unlawful use of a weapon (AUUW). Under all three AUUW counts, the State sought to enhance the charges to Class 2 felonies because defendant had been previously convicted of AUUW.

¶ 4 At trial, Chicago police officer Ronald Mero testified that, on November 5, 2014, he was on patrol with his partner in a marked police vehicle. While driving in an alley east of Cicero Avenue, he observed a Chevy enter the alley. The driver, whom Mero later identified as defendant, was not wearing a seatbelt and used the alley as a through street. After witnessing those traffic violations, Mero activated his emergency equipment to pull the vehicle over and conduct a field interview.

¶ 5 Once stopped, Mero approached the vehicle's driver's side and his partner approached the passenger side. There were four occupants in the vehicle, including defendant. As he neared the trunk of the Chevy, Mero observed defendant lift his arm and toss what appeared to be a weapon to the passenger seat. When defendant had extended his arm, Mero saw his hand holding an object. In his experience, Mero believed the item looked like a handgun. He could see "the slide part of the handgun" and defendant was holding the item "as if he was holding a handgun."

Mero knew the item was not a cell phone because it was too large. He had experience with making gun-related arrests, had previously recovered firearms following arrests, and was familiar with various firearms and their appearances.

¶ 6 As soon as defendant tossed the item, he opened his door and stepped out of the vehicle. The other three occupants also stepped out of the vehicle, although neither officer instructed the occupants to exit. Without prompting from the officers, defendant pointed at the front seat passenger and said, " '[T]his dude has a gun, this dude has a gun. Officer I will even sign statements if you need me to.' " Mero emphasized that defendant's statement was contrary to his observation of defendant tossing the item that looked like a firearm.

¶ 7 After detaining the occupants, Mero went to the passenger area of the vehicle and recovered a blue steel semiautomatic Colt .45 caliber handgun, which was in plain sight. The gun was not loaded, but it was uncased. Mero and his partner then seized the vehicle and conducted a custodial search, which did not yield any other items that resembled a firearm. Mero secured the firearm and later inventoried it.

¶ 8 Mero spoke with the front seat passenger, Demetrius Little. The State asked Mero the following questions:

> "[STATE]: Also, without going into the content of the conversation with [Little], did you learn what his observations were as he was sitting in the front seat and the defendant extended his arm and dropped the firearm in his lap?
>
> [MERO]: Yes.
>
> [STATE]: After your conversation with Demetrius Little, was he ever arrested for being in possession of a firearm?

[MERO]: I don't recall, but I believe not.

[STATE]: Was the defendant arrested for being in possession of the firearm?

[MERO]: Yes."

¶ 9 After learning defendant's name and birth date, Mero ran his criminal history. Based on defendant's criminal history, defendant was charged with UUWF.

¶ 10 On cross-examination, Mero testified that Little said "something" at the scene of the crime that was not consistent with what he said at the station. The following colloquy occurred on the record.

"[DEFENSE COUNSEL]: In fact, at the scene, he told you the gun was his?

[STATE]: Objection. Hearsay.

[THE COURT]: Counsel?

[DEFENSE COUNSEL]: Judge, it's not an in-custody statement. It's not offered for the proof of which. It just goes to show he made inconsistent statements to the police and still got released.

[THE COURT]: The objection is sustained."

¶ 11 The State introduced into evidence certified copies of two of defendant's prior convictions for aggravated unlawful use of a weapon and possession of a controlled substance with intent to deliver. The State also introduced a certification from the Illinois State Police showing defendant had not been issued a Firearm Owners Identification (FOID) card. The State rested and defendant did not present any evidence.

¶ 12 Following arguments, the court found defendant guilty of all counts. In doing so, the court noted that Mero observed what appeared to be a weapon in defendant's hand and that,

aside from the firearm found, there were no other items recovered from the vehicle that resembled a gun. Counsel requested an extension of time to file a posttrial motion, and the court denied the request. At a later hearing, counsel informed the court that co-counsel was on his way with a posttrial motion to file and the court stated, "With respect to post-trial motion, there is no extension of time."

¶ 13 At the sentencing hearing, the court merged the six counts into the AHC count and sentenced defendant to 10 years' imprisonment. Both defendant and defense counsel filed separate motions to reconsider sentence. At the hearing on the postsentencing motions, defendant told the court he wished to proceed with counsel. During arguments on the motion, counsel acknowledged that the court did not allow him to file a posttrial motion because it was not timely. Nevertheless, counsel argued defendant's sentence was excessive in light of the circumstances of the case. In pertinent part, counsel argued that the evidence did not prove defendant guilty beyond a reasonable doubt because Little had claimed ownership of the gun. The prosecutor noted that testimony regarding Little's alleged ownership of the gun was not admitted because it was hearsay, and the court stated,

> "Just because someone else claims ownership trying to -- perhaps trying to take the rap for someone else or perhaps trying to own up to it, but that doesn't change the fact as to whether or not defendant had actually possessed it.
>
> So even if the testimony came in that the gun belonged to the passenger, it doesn't change the actions that the officer witnessed of the defendant having the gun also. Because possession can be joint and ownership is not dispositive of possession.
>
> Even if that testimony had come in the result would be the same."

¶ 14 The court further noted it found Mero's testimony regarding what he observed credible. It thereafter denied defendant's motion to reconsider, and this appeal followed.

¶ 15 On appeal, defendant first contends trial counsel was ineffective for failing to (1) object to inadmissible hearsay statements made by Little at the police station, and (2) preserve the trial court's error in excluding Little's admission at the scene that the gun belonged to him.

¶ 16 To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 17 Defendant alleges the State elicited improper hearsay testimony by asking Mero, "[W]ithout going into the content of the conversation with [Little], did you learn what his observations were as he was sitting in the front seat and the defendant extended his arm and dropped the firearm in his lap?" Defendant contends that by answering, "Yes," Mero adopted the question as his testimony. Further, he argues that the question itself revealed the substance of Little's statement and, therefore, counsel should have objected.

¶ 18 Here, we do not find that counsel was deficient for failing to object because the State's question did not constitute hearsay. Hearsay is an out-of-court statement offered to establish the truth of the matter asserted. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). In this instance, there was no out-of-court statement elicited by the State's question. Although Mero answered the question affirmatively, the question did not reveal the substance of Little's purported

observations or statements. Contrary to defendant's assertions, nothing in the trial transcript shows what Little's observations were or what statements he gave to Mero at the police station. Rather, the question pertained to Mero's own observations to which he had previously testified; namely, that he observed defendant extend his arm holding an item that looked like a gun and toss or drop the item into the passenger area of the car, where Little had been seated. Because the question did not elicit improper hearsay testimony, counsel could not be ineffective for failing to object to it. *People v. Smith*, 2014 IL App (1st) 103436, ¶ 64 (defense counsel is not required to engage in futile actions to provide effective assistance).

¶ 19 In reaching this conclusion, we reject defendant's contention that the State's question "assume[d]" that Little "agreed" with Mero's observations. This conjecture is not reflected in the record. We also do not agree with defendant's assertion that defense counsel's attempt to elicit Little's statement at the scene was an "attempt to counteract" the admission of the purported hearsay. The record shows counsel attempted to introduce Little's statement at the scene as part of the defense theory that the gun did not belong to defendant. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (noting that decisions regarding what matters to object to are matters of trial strategy and a court of review must be highly deferential to trial counsel on such matters).

¶ 20 Defendant next contends counsel was ineffective for failing to preserve the trial court's error of excluding Little's purported statement that the gun belonged to him. Defendant relies on Mero's testimony at the preliminary hearing in which Mero testified that Little claimed the firearm was his at the scene after defendant jumped out of the vehicle and spontaneously told the officers that Little had a gun. When defense counsel attempted to elicit Little's statement from Mero at trial, the State objected on hearsay grounds. In response, defense counsel argued,

"Judge, it's not an in-custody statement. It's not offered for the proof of which [*sic*]. It just goes to show he made inconsistent statements to the police and still got released."

¶ 21 We are again unpersuaded by defendant's contention. Regardless of whether the statement was admissible under a different hearsay exception than that offered by defense counsel, as defendant claims, we find that defendant cannot demonstrate the requisite prejudice to support his ineffectiveness claim. See *Strickland*, 466 U.S. at 697 (where a defendant fails to satisfy the prejudice prong, a reviewing court need not determine whether counsel's performance was deficient). That is to say that, even if this statement was admitted at trial, there is not a reasonable probability that the outcome of the proceeding would have been different.

¶ 22 As the trial court pointed out, regardless of who owned the recovered firearm, Mero independently observed defendant holding an object that resembled a gun and tossing it to the passenger seat, where the gun was recovered moments later. The trial court found Mero's testimony credible and reasonably inferred that the item defendant was seen holding was the recovered gun because nothing else was recovered from the vehicle that resembled a weapon. See *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (it is within the province of the trier of fact to draw reasonable inferences from the evidence). Thus, even if Little owned the gun and his statement had been admitted, the evidence showed that defendant had possession of it when he tossed it to the passenger side and was prohibited from possessing a gun because he did not have a FOID card and had two prior felony convictions. Because there is no reasonable probability that the outcome of the proceeding would have been different had Little's statement been admitted, defendant cannot show that he was prejudiced by counsel's conduct. Accordingly, his ineffectiveness claim fails.

¶ 23 Defendant next challenges various fines and fees imposed by the trial court. He argues his fines, fees and costs order should be reduced by $10 and that his presentence incarceration credit should apply to $237 of fines that are erroneously labeled as fees.

¶ 24 Defendant acknowledges that he failed to preserve these issues, but argues they are reviewable under Supreme Court Rule 615(b) and the plain error doctrine. The State concedes the fines, fees and costs order is incorrect and agrees it should be modified. The State has therefore forfeited any argument regarding defendant's forfeiture, and we will consider defendant's claims. See *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000) (the rules of waiver and forfeiture apply to the State). We review *de novo* the propriety of the imposition of fines and fees. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 25 The parties agree that the $5 Electronic Citation fee and $5 Court System fee should be vacated. We agree. We vacate the $5 Electronic Citation fee because defendant was not convicted in "any traffic, misdemeanor, municipal ordinance, or conservation case." See 705 ILCS 105/27.3e (West 2014). We also vacate the $5 Court System fine because defendant was not convicted of a violation of the Illinois Vehicle Code or a similar municipal ordinance. See 55 ILCS 5/5-1101(a) (West 2014).

¶ 26 Next, defendant contends several imposed fees are fines subject to offset by his presentence incarceration credit. Section 110-14 of the Code of Criminal Procedure of 1963 provides that a defendant is entitled to a credit of $5 toward his fines for each day he was incarcerated on a bailable offense prior to sentencing. 725 ILCS 5/110-14(a) (West 2014). This credit applies only to fines, not fees or other costs. *People v. Tolliver*, 363 Ill. App. 3d 94, 96

(2006). In this case, defendant was entitled to a credit of $1,290 toward applicable fines for the 258 days he spent in presentence custody.

¶ 27 Whether an assessment is a fine or a fee depends on its purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Fees reimburse the State for costs incurred in prosecuting the defendant, whereas fines are punitive in nature and "part of the punishment for a conviction." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63 (citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006)).

¶ 28 The parties agree that defendant is entitled to use his presentence credit to offset the $15 State Police operations (705 ILCS 105/27.3a(1.5) (West 2014)) assessment. We agree. This court has previously determined that the State Police operations assessment is a fine because it does not reimburse the State for expenses incurred in defendant's prosecution and is incorrectly designated as a fee on the fines, fees, and costs order. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (concluding "the State Police Operations Assistance fee does not reimburse the State for costs incurred in defendant's prosecution"). Thus, defendant is entitled offset that fine with his presentence incarceration credit.

¶ 29 Finally, defendant alleges that his presentence incarceration credit should apply to the $2 Public Defender Records Automation Fund charge (55 ILCS 5/3-4012 (West 2014)), the $190 "Felony Complaint Filed, (Clerk)" charge (705 ILCS 105/27.2a(w)(1)(A) (West 2014)), the $25 court automation charge (705 ILCS 105/27.3a(1) (West 2014)), and the $25 Court Document Storage Fund charge (705 ILCS 105/27.3c(a) (West 2014)). While this appeal was pending, our supreme court decided in *People v. Clark*, 2018 IL 122495, ¶ 51, that these assessments are fees intended to compensate the State for costs incurred in prosecuting defendants. Therefore, defendant may not offset these assessments with his presentence incarceration credit.

¶ 30 In sum, we vacate the $5 electronic citation fee and the $5 court system fee and find the $15 State Police operations is a fine that defendant is entitled to offset with his presentence incarceration credit. We order the clerk of the circuit court to modify the fines, fees and costs order accordingly. The judgment of the circuit court is affirmed in all other respects.

¶ 31 Affirmed; fines, fees, and costs order modified.