2019 IL App (1st) 160921-U

FIRST DIVISION
May 6, 2019
Modified upon denial of rehearing June 10, 2019

No. 1-16-0921

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. 14 CR 05934
	)	
RAFEL JOHNSON	)	The Honorable
	)	Alfredo Maldonado,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's failure to remember evidence in denying defendant's posttrial motion was harmless error. The trial court did not err in failing to admonish defendant about TASC eligibility. Remanded in accord with Rule 472(e).

¶ 2 Following a bench trial, defendant Rafel Johnson was found guilty of armed habitual criminal, unlawful use of weapon by a felon, and aggravated unlawful use of a weapon. The trial court merged the charges into a single count of armed habitual criminal, and sentenced defendant to 10 years in prison. He appeals, arguing that the trial court violated his right to due process by failing to consider all the evidence before ruling on his posttrial motion to reconsider its findings

of guilt. He also contends that the trial court erred at sentencing in failing to admonish him about his eligibility for Treatment Alternatives to Street Crimes (TASC) probation, and that his mittimus and fines and fees order should be corrected in various ways. We affirm, and remand to the circuit court to permit defendant to file a motion in accord with Illinois Supreme Court Rule 472(e) (eff. May 17, 2019).

¶ 3 Defendant was charged by information with one count of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2014)), two counts of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2014)), and four counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (3)(A-5); (a)(1), (3)(c); (a)(2), (3)(A-5); (a)(2), (3)(c) (West 2014)). All charges stemmed from a March 11, 2014 incident, during which defendant allegedly possessed a handgun.

¶ 4 The first day of trial was held on January 27, 2016. Chicago police sergeant Cavanaugh testified that, on March 11, 2014, he and his partner, Officer Feiser,[1] were on duty in a marked squad car. At approximately 12:47 a.m., near the intersection of 79th Street and Vincennes Avenue, Cavanaugh heard four or five gunshots and saw the reflection of a muzzle flash in the window of a nearby currency exchange. He and Feiser stayed in their car and searched the area for the gunman. Less than one minute later, Cavanaugh observed a black man with dreads wearing a "white top" and blue jeans, whom he identified in court as defendant, running southbound on the 8000 block of South Stewart Avenue. Defendant was about half a block away and was running in the opposite direction of the squad car. Cavanaugh drove toward defendant, and observed him holding a revolver from "less than 10 feet" away. Although it was night, the area was illuminated by streetlights and the headlights of the squad car.

[1]The transcript does not contain Cavanaugh's and Feiser's first names.

¶ 5 Cavanaugh exited his vehicle and attempted to stop defendant, but defendant continued running southbound. During the foot chase, Cavanaugh was "six to eight feet" behind defendant, and could still see the revolver in his hand. He followed defendant into a gangway, announced his office, and ordered him to drop the gun. Instead, defendant ran inside the house at 8023 South Stewart, "forced the door closed," and locked it behind him. Cavanaugh did not see anybody else outside the house.

¶ 6 Cavanaugh kicked in the back door and entered the house about 1½ minutes later. Inside, he observed defendant coming up the basement stairs, "out of breath sweating." Cavanaugh arrested him, and then went upstairs to see if there were others in the home. Upstairs, he found three "small children" and an "elderly woman," who told him that defendant lived in the basement. He did not see anybody else in the house. Cavanaugh returned to the kitchen and informed Officer Sus,[2] who had arrived on the scene, that he had observed defendant ascending the basement stairs. Sus recovered a "six-shot Smith and Wesson revolver blue steel handgun" loaded with six rounds and a bag of ammunition from beneath a mattress in the basement. Cavanaugh testified that the gun Sus recovered was the same one that defendant was holding on the street earlier. Approximately two minutes had passed from the time Cavanaugh saw defendant running with the gun, to the time Sus recovered it and showed it to Cavanaugh.

¶ 7 On cross-examination, Cavanaugh acknowledged that, "[a]ccording to the P-CAD," he described the person he chased as "six foot tall" in a radio message. Defendant, whom he did not know at the time, was the only person he chased that night. Cavanaugh agreed that his arrest report described the firearm as "a 32 steel long blue 3-inch barrel, 6-shot revolver." He reiterated that he saw defendant's gun from six feet away, and that it was the same gun recovered from

[2] The transcript does not contain Sus's first name.

defendant's basement. The parties stipulated that Cavanaugh testified at a preliminary hearing that there was another woman and man on the second story in addition to the "older lady" and "three young children."

¶ 8 Sus testified that he responded to 8023 South Stewart on March 11, 2014. After speaking to Cavanaugh at the scene, Sus recovered a bag of ammunition and a loaded "Smith and Wesson blue steel revolver" that was protruding from beneath a mattress in the basement. Defendant, whom Sus identified in court, was the only nonpolice officer that he saw in the house. On cross-examination, Sus explained that he did not go to the second story or into the living room on the first story.

¶ 9 The trial was then continued until February 10, 2016. On this second day of trial, the State introduced a document from the Illinois State Police certifying that defendant had not been issued a Firearm Owner's Identification card or a concealed carry license as of January 28, 2016. The State also entered into evidence certified copies of defendant's two burglary convictions from 2012, and rested.

¶ 10 The defense moved for a directed finding on the basis that Cavanaugh's testimony was not credible. In arguing the motion, defense counsel noted that Cavanaugh originally described the suspect as six feet tall, and requested the court's permission to allow defendant to stand up. The court responded, "No. You're arguing a motion at this moment in time," to which defense counsel replied, "Your honor, the point is, my client is 5'2" and that identification was inaccurate." The court sustained the State's objection to defense counsel's comment, and ultimately denied defendant's motion.

¶ 11 The defense called Kelly Montgomery, the mother of defendant's child. She testified that defendant's bedroom was on the second story of 8023 South Stewart. Defendant's brother,

Rakeem, was the only person who slept in the basement. On March 11, 2014, Montgomery and defendant were at his house from 10 p.m. until midnight. Her two children, her "brother-in-law," and defendant's grandmother, Benila Jones, were also there. Defendant, Montgomery, and the children were upstairs when they heard "[l]oud knocks at the door." She took the children to Jones' second-story bedroom, which Montgomery stated was "[n]ext to our room." After defendant went to investigate the knocking, Montgomery heard police officers "downstairs throughout the house." Approximately seven officers came upstairs, and she showed them the bedroom where she and defendant slept. The police "ramshacked [*sic*] it" and the two other rooms on the second story. When an officer took her downstairs, Montgomery saw that the house was "messed up," and that another man, Mekhil Mables, was in handcuffs on the living room couch.

¶ 12 On cross-examination, Montgomery testified that she had dated defendant for seven years, but was not dating him at the time of trial. Defendant's mother drove her to the courthouse, and she had spent the day with her, Rakeem, and Mables. Montgomery explained that she never "completely lived" at defendant's house, but she "basically" shared an upstairs bedroom with him for a time. Defendant's nephew was also in Jones' room when the police arrived. Montgomery acknowledged that she did not mention taking her children to Jones' bedroom when she was interviewed by an investigator in November 2015. She also acknowledged that she told the investigator that the basement was a "spare bedroom," which she explained during trial was accurate at the time she was interviewed. On redirect examination, she reiterated that Rakeem was living in the basement on the day of defendant's arrest.

¶ 13 Mables testified that he was 18 years old and six feet, one inch tall. Mables left defendant's house with Rakeem between midnight and 1 a.m. on March 11, 2014, and went to a

restaurant at 79th and Vincennes. As they walked into the restaurant, he noticed four or five people in a van. When he and Rakeem left, the group lowered their windows and yelled "hateful words" at them. The van door slid open and there were "a couple shots fired." Mables ran toward 80th Street and Stewart, a block he described as "very dark at night." He observed a police car drive across 79th and Vincennes and pull into a nearby car wash. He kept running until he got to defendant's house. He was not being chased by anybody when he arrived. Mables entered defendant's house through the back door and went upstairs, where he found defendant with "his girl, his two kids, and their granny." Soon thereafter, Mables heard "severe banging" on the door. He watched TV upstairs while defendant went downstairs to investigate the noise. Several police officers entered the house, handcuffed Mables, and took him into the living room. As he was escorted down to the living room, he saw defendant handcuffed in the kitchen.

¶ 14 On cross-examination, Mables stated that he did not have dreads or facial hair on the day of defendant's arrest. He and Rakeem ran from the restaurant together, but split up around 80th and Stewart. They did not call the police, and Mables did not attempt to communicate with the police car that he saw while running away. He did not see the police chasing him. When he reached defendant's house, he entered through the open back door. He did not recall seeing Montgomery in the house. Mables "estimate[d]" that he was upstairs for 10 to 20 minutes before the police arrived. On redirect examination, Mables stated that he wore a "light gray hoodie" and blue jeans that night. His hood was up as he ran to defendant's house. Mables explained that he had never called the police, and agreed that the police were not "your friends" in defendant's neighborhood. He agreed that he could have been in defendant's house for less than 10 to 20 minutes before the police arrived.

¶ 15 Rakeem Johnson testified that his bedroom was in the basement of 8023 South Stewart, while his mother, grandmother, and defendant had bedrooms upstairs. On March 11, 2014, he and Mables left his house "no later than" 11 p.m. or midnight, and went to a restaurant at 79th and Vincennes. Rakeem was wearing a green jacket and jeans, and had his hair in dreads. On the way to the restaurant, he and Mables "ran into" three or four people in a van. As they exited the restaurant, the people in the van lowered their windows and spouted "negativity" towards them. They then slid the van door open and fired gunshots, causing Rakeem and Mables to run away together. When Rakeem crossed the street at 79th and Vincennes, he saw a police car pulled over at a car wash. The officers turned on their siren and drove toward Rakeem as he crossed 80th and Stewart. He stopped, but the police drove past him toward Mables, who had already turned into a gangway ahead of him. More police cars arrived two or three minutes later, and a team of officers approached the back of 8023 South Stewart "as if they were going to break [into] the house." Rakeem could not see what happened next because he stayed in front of the house.

¶ 16 On cross-examination, Rakeem stated that he never told the police that he had been shot at. The police did not allow him to enter the house, but he knew that defendant, his "baby mama," his children, and his grandmother were inside. On November 2, 2015, investigators called Rakeem, and he "referred them to [defendant's] lawyer." He acknowledged that he was "sitting out there in the gallery" with his mother, Montgomery, and Mables during trial.

¶ 17 Prior to defendant's testimony, the trial court stated that it would consider his credibility in light of his two burglary convictions that the State introduced into evidence. Defendant testified that his bedroom was upstairs and that Rakeem slept in the basement. On March 11, 2014, defendant was at home "all day" with Montgomery, his two children, his grandmother, his nephew, and Rakeem. Sometime after midnight, he heard banging on the door. He looked out the

window, and saw that it was the police. He told Montgomery to take the children into his grandmother's room. Mables ran up the stairs, and defendant "asked him what he d[id]." Defendant then went downstairs to open the door because he did not want the police to break it down. He told the police that he was going to open the door, but they kicked in the front door anyway. He did not see any officers enter through the back door. Once inside, the police arrested defendant. He told them that he did not know who ran into the house earlier because he had been upstairs. Officers took him outside through the back door and searched the house.

¶ 18 On cross-examination, defendant testified that he was taken to a police station and photographed on the night of his arrest. He stated that the photograph, which the State entered into evidence, accurately depicted the way he looked that night. The photograph, which is included in the record on appeal, shows a black man with dreads and a goatee wearing a white V-neck shirt. It does not show defendant's height.

¶ 19 On redirect-examination, defendant testified that he is five feet, three inches tall. Although it was "pretty cold" outside, he was wearing a white V-neck shirt and blue pants when police arrested him. Rakeem had been downstairs earlier that night, but defendant did not know what time he left or if he locked the back door behind him.

¶ 20 At closing arguments, defense counsel "incorporate[d]" his argument from his previous motion for a directed verdict. Defense counsel added that credible testimony now established that defendant was at home during the shooting and was not the person that Cavanaugh saw with a gun. Defense counsel also noted that the recovered gun was not in evidence, and that there was "controverted testimony" regarding the gun and who had access to the basement. The State responded by emphasizing the "obvious bias" and inconsistencies of the defense witnesses.

¶ 21 The trial court found defendant guilty on all counts. In announcing its findings, the court stated that "I do not find the defense witnesses credible" because "[t]he stories were not consistent," both internally and with each other. On the other hand, the court found the testimony from Cavanaugh and Sus to be "credible" and "consistent" with respect to the chase and subsequent recovery of the gun.

¶ 22 At a posttrial hearing on March 11, 2016, the court heard arguments on defendant's motion to reconsider the findings of guilt or grant a new trial. Defense counsel argued that this was a "close case of misidentification" in which Cavanaugh mistook Mables for defendant. To support this theory, defense counsel emphasized that Cavanaugh radioed a description of a six-feet-tall suspect, whereas "it has been noted that [defendant] is five-two," and that Mables "was six feet tall and was also outside at the time of this incident." In response, the State asserted in part that "there was no evidence put in as to the height of the defendant, nor the height of *** Mables that testified that I am aware of." The court replied that, "There was a question on cross-examination on the first date of trial, January 27th, that counsel elicited that question. But other than that, I don't recall anything else." The court continued that, "looking at my notes and my own recollection of this trial, I remember *** expressing doubts as to the credibility of the defense witnesses," and "I did not find on balance the credibility of Sergeant Cavanaugh to have been impeached." The court denied defendant's motion.

¶ 23 The case proceeded to a sentencing hearing, where the court acknowledged receipt of defendant's presentence investigation (PSI) report and merged all counts into a single count of armed habitual criminal. According to the PSI, defendant last drank alcohol when he had "a couple of shots of whiskey" two years prior to sentencing. He denied experiencing any "negative consequences" from his alcohol use, although he acknowledged that he attended Alcoholics

Anonymous meetings "every day" as a condition of his probation on an unrelated matter. The PSI also states that defendant "previously smoked marijuana 'every day,' " but had last smoked marijuana two years ago. He claimed that he had never been evaluated or treated for substance abuse, and that, aside from drug-related arrests, he has not experienced any "negative consequences" from his drug use.

¶ 24 In aggravation, the State argued, *inter alia*, that defendant "doesn't have any substance abuse or any other emotional problems that would prevent him from working." Defense counsel did not mention defendant's substance use in mitigation. The court sentenced defendant to 10 years in prison, and imposed various assessments. He was credited for 730 days of presentence custody.

¶ 25 Defendant now appeals, arguing that his right to due process was violated because the trial court denied his motion to reconsider its guilty findings without having recalled the testimony about Mables's and defendant's heights. Defendant contends that the testimony was crucial to his case because it both established his alibi and undermined Cavanaugh's credibility. Specifically, defendant maintains that the evidence of their respective heights showed that Mables, not him, was the man Cavanaugh saw with a gun.

¶ 26 Every criminal defendant has a fundamental due process right to a fair trial. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Consequently, the trier of fact in a criminal trial is required to consider all the evidence before announcing its decision. *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. In a bench trial, the trial court, as trier of fact, is presumed to have considered the competent evidence. *People v. Gilbert*, 68 Ill. 2d 252, 258 (1977); *People v. Simon*, 2011 IL App (1st) 091197, ¶ 91. However, when the record affirmatively shows that the trial court did not consider crucial evidence before rendering judgment, a defendant has been

deprived of a fair trial in violation of due process. *People v. Mitchell*, 152 Ill. 2d 274, 323 (1992); *People v. Williams*, 2013 IL App (1st) 111116, ¶ 75. Even when a reviewing court finds a due process violation, a conviction will nevertheless be affirmed if the violation was harmless. *Mitchell*, 152 Ill. 2d at 236. An error is deemed harmless when the State demonstrates beyond a reasonable doubt that the error did not contribute to the court's decision. *Williams*, 2013 IL App (1st) 111116, ¶ 93. Whether a defendant's due process rights were violated, and if so, whether the violation was sufficiently prejudicial to require reversal are reviewed *de novo*. *People v. Stapinski*, 2015 IL 118278, ¶ 35.

¶ 27 Turning to the present case, the record affirmatively shows that the trial court failed to remember testimony when considering defendant's motion to reconsider the findings of guilt. At the motion hearing, the State asserted, incorrectly, that "there was no evidence put in as to the height of the defendant, nor the height of *** Mables." The trial court essentially agreed, responding that, "There was a question on cross-examination on the first date of trial, January 27th, that counsel elicited that question. But other than that, I don't recall anything else." In fact, on February 10th, the second day of trial, Mables testified that he was six feet, one inch tall, and defendant testified that he was five feet, three inches tall. Thus, the trial court clearly misremembered the testimony that defendant relied upon to support his misidentification theory.

¶ 28 Defendant, citing *Williams*, 2013 IL App (1st) 111116, *People v. Bowie*, 36 Ill. App. 3d 177 (1976), and *Mitchell*, 152 Ill. 2d 274 (1992), contends that his conviction must be reversed and the cause remanded for a new trial. However, none of those cases provide support for that argument. All three cases involve a trial court's misapprehension of the evidence *before* finding defendant guilty at trial. See *Mitchell*, 152 Ill. 2d at 321-26 (the court incorrectly recalled the defendant's testimony before denying his pretrial motion to suppress); *Williams*, 2013 IL

111116, ¶ 85 (the court incorrectly recalled an expert witness's testimony before finding the defendant guilty); *Bowie*, 36 Ill. App. 3d at 179-80 (the court misstated the defendant's testimony during defense counsel's closing argument). Thus, in those cases, unlike here, the trial court did not make its findings of guilt based on all the evidence presented at trial.

¶ 29 Our decision in *People v. Burnette*, 325 Ill. App. 3d 792 (2001), is more applicable to the present case. In *Burnette*, the trial court misstated the defendant's trial testimony before denying his posttrial motion for reconsideration and a new trial. *Id.* at 802. However, there was no evidence that the court misstated the evidence before finding the defendant guilty at trial. In distinguishing *Mitchell* and *Bowie*, we noted that it was "critical to understand" that the trial court only misstated the evidence well after considering it for the first time at trial and rendering judgement. *Id.* We therefore held that the trial court's error was not of "sufficient magnitude to merit vacating [the defendant's] conviction" and did not "vitiate the court's initial finding of guilt," which was made when "the evidence was necessarily fresher in the court's mind." *Id.* at 803. Here, as in *Burnette*, the court's original findings of guilt were not tainted by its failure to accurately recall the evidence. At trial, with the evidence fresh in its mind, the court expressly found that the State's witnesses were credible and the defendant's witnesses were not. Importantly, the court found defendant guilty on all counts despite having recently heard the height testimony and defense counsel's misidentification theory. Approximately one month later, the trial judge consulted his trial notes on his credibility determinations, and denied defendant's motion to reconsider that was based on the same argument the court already rejected at trial. There is no reason to believe that the result would have been different had the court considered the height testimony for a second time.

¶ 30 We recognize that the misremembered testimony was relevant to the central issue of this case, the identity of the man Cavanaugh chased into defendant's house. However, not every case that lacks physical evidence is a close call merely because defense witnesses contradicted the testimony of police officers. See *People v. Gray*, 2017 IL 120958, ¶ 36 (testimony of a single credible witness is sufficient to convict). Here, the evidence against defendant was overwhelming. Although Cavanaugh radioed that the suspect was six feet tall, he originally viewed defendant running away from him at night from half a block away. Cavanaugh later had a far stronger opportunity to view defendant from less than 10 feet away while he and his gun were illuminated by streetlights and the headlights on Cavanaugh's squad car. Additionally, Cavanaugh remained less than 10 feet behind defendant during a foot chase, which ended when defendant entered his house and struggled with Cavanaugh to force the door closed. Less than two minutes later, Cavanaugh entered the house and saw defendant, the only person on the first story, coming up from the basement. Defendant was "sweating" and "out of breath," which supports the inference that he had just been running. Soon thereafter, Sus recovered defendant's gun from the basement.

¶ 31 Although defendant argues that Cavanaugh mistook Mables for him, the evidence showed that the two had vastly different appearances. Cavanaugh described the suspect as having dreads and a "white top," which is consistent with the photograph taken of defendant on the day of his arrest. Mables, although closer to the height that Cavanaugh originally reported, did not have dreads and wore a "light gray hoodie" with the hood over his head. Additionally, Cavanaugh positively identified defendant at trial. Despite having recently heard defense counsel's misidentification argument twice, the trial court expressly found Cavanaugh to be

credible. Based on this evidence, we cannot say that on reconsideration, the trial court would have decided differently.

¶ 32 We also note that the inconsistencies between the defense witnesses and Cavanaugh's testimony undermine defendant's theory of misidentification. Mables testified that he did not notice the police chasing him, and that he was in defendant's house for approximately 10 to 20 before police arrived. Cavanaugh, on the other hand, testified that he alerted the suspect of his office, was just six to eight feet behind him during the chase, struggled with him to keep the door open, and ultimately entered defendant's house about 1½ minutes after him. Cavanaugh further stated that he arrested defendant, who was sweating and "out of breath," after he observed him coming up the basement stairs. Defendant, however, testified that he had been upstairs with Montgomery and only came to the first story in response to the police knocking on his door. Thus, this cannot be a simple case of misidentification because both sides gave conflicting versions of events. In this respect, the trial judge had already determined that he believed Cavanaugh and disbelieved the defense witnesses at the close of trial, before he misremembered any evidence at the hearing on defendant's motion to reconsider. The court accurately recalled its credibility determinations at the motion hearing, and relied on them to reach the same conclusion it did at trial. Thus, the failure to recall the height testimony was harmless, and we affirm the trial court's findings of guilt.

¶ 33 Defendant next contends that the trial court erred by failing to admonish him on his eligibility for TASC probation where, based on his PSI, the court had reason to believe that he was a drug addict.[3]

[3] Although the PSI states that defendant attended Alcoholic Anonymous meetings "every day" as a condition of his probation on an unrelated matter, his argument that he was entitled to a TASC admonishment is predicated solely on his marijuana use.

¶ 34 As an initial matter, defendant concedes that he failed to raise the issue in the trial court, but argues that he has not forfeited the issue in light of *People v. Whitfield*, 217 Ill. 2d 177 (2005). To preserve a claim of sentencing error, a defendant must generally raise a contemporaneous objection at the sentencing hearing and include the issue in a written postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Defendant did not do either, and has therefore forfeited the issue. *Whitfield* does nothing to change this result. In *Whitfield*, the trial court accepted the defendant's negotiated guilty plea and, per the plea agreement, sentenced defendant to 25 years in prison. *Whitfield*, 217 Ill. 2d at 190. However, the trial court also imposed a term of mandatory supervised release without having admonished defendant that it would be part of his sentence. *Id.* In determining that the trial court's unilateral addition to the plea agreement was fundamentally unfair, our supreme court held that "[u]nder the circumstances, it would be incongruous to hold that defendant forfeited the right to bring a postconviction claim because he did not object to the circuit court's failure to admonish him." *Id.* at 188. The *Whitfield* court went on to analyze Illinois Supreme Court Rule 402(a)(2), and concluded that it required a trial court to admonish defendants who enter into plea agreements about any term of mandatory supervised release. *Id.* This is inapposite to the facts here, where defendant did not enter into a plea agreement and is challenging his sentence based on terms not actually imposed. Thus, the supreme court's Rule 402(a)(2) analysis has no bearing on the present case, and we conclude that *Whitfield* does not prevent us from finding that defendant forfeited his sentencing challenge.

¶ 35 Alternatively, defendant argues that we may review his sentence for plain error. The plain-error doctrine is a "narrow and limited exception" to the general forfeiture rule that allows a reviewing court to consider a forfeited issue if a defendant can show that a "clear and obvious"

error occurred. *Hillier*, 237 Ill. 2d at 545. If a defendant makes this preliminary showing, he must also then demonstrate that either (1) the evidence at the sentencing hearing was "closely balanced," or (2) the error was so egregious as to deprive him of a fair sentencing hearing. *Id.*

¶ 36 Pursuant to the Alcoholism and Other Drug Abuse and Dependency Act (Act) (20 ILCS 301/1-1 *et seq.* (West 2014)), and absent various exceptions not relevant here, "[a]n addict or alcoholic who is charged with or convicted of a crime" may request treatment, commonly known as TASC probation, in lieu of traditional sentencing. 20 ILCS 301/40-5 (West 2012). The Act provides that the court "shall" inform the defendant about his eligibility for TASC probation if it "has reason to believe" that the defendant "suffers from alcoholism or other drug addiction," and if the court finds that he is eligible to elect treatment under the Act. 20 ILCS 301/40-10(a) (West 2014).

¶ 37 Here, the trial court had no "reason to believe" that defendant suffered from a substance abuse problem, and was thus not required to admonish him on his TASC eligibility. The only mention of defendant's drug use at the sentencing hearing was the State's unchallenged assertion that he "doesn't have any substance abuse or any other emotional problems that would prevent him from working." Defense counsel did not object to the State's claim in any way, and did not address defendant's alleged drug use in mitigation or in a postsentencing motion.

¶ 38 Defendant nevertheless contends that the court had reason to believe he was a drug addict because the PSI indicates that he is, in his words, "a daily marijuana user." However, the PSI actually states that "he previously smoked marijuana 'every day,' " at some unspecified time in the past, and that he had not smoked marijuana at all in two years. According to the PSI, defendant also claimed to have never been treated or evaluated for substance abuse, and that, aside from drug-related arrests, defendant believed that he has not experienced any "negative

consequences" from his drug use. Nothing in these facts suggests that defendant was a drug addict. See *People v. Barry*, 152 Ill. App. 3d 915, 918 (1987) ("even if the defendant" had regularly used marijuana, amphetamines, barbiturates, and LSD, "mere use does not make a person an addict.").

¶ 39 We are unpersuaded by defendant's argument that he was entitled to TASC admonishments because his two-year hiatus from marijuana use was due only to his presentence incarceration. *People v. Henry*, 203 Ill. App. 3d 278 (1990), on which defendant relies, is readily distinguishable from the present case. In *Henry*, we held that "[i]n view of the other indications in the record of defendant's possible addiction to drugs," his sobriety while in presentence incarceration did not support a finding that there was no reason to believe he had a substance abuse disorder. *Id.* at 287. However, there, the defendant had previously been treated for a drug overdose, and admitted to using Valium, cocaine, and PCP for years until his arrest. *Id.* at 285. Moreover, defense counsel expressly requested that the court order a substance abuse evaluation because the defendant believed that despite his involuntary sobriety, he still had a " 'dependency on drugs.' " *Id.* This is in stark contrast to the present case, where the record at best showed that defendant had only used marijuana, reported no "negative consequences" from that use, and made no mention of his substance abuse at the sentencing hearing. Consequently, we find that the trial court did not err in failing to inform defendant about TASC probation, and we need not proceed any further with our plain-error analysis.

¶ 40 Defendant next argues that the mittimus should be corrected to reflect that he spent a total of 731 days in presentence custody, and he argues that his fines and fees order should be corrected in several respects. Defendant did not raise his challenges to the mittimus or fines and fees order in the circuit court.

¶ 41 We cannot provide defendant any relief on his challenges to the mittimus or fees and fines order.

> "Illinois Supreme Court Rule 472(a) (eff. May 17, 2019), provides that the circuit court retains jurisdiction to correct—at any time following judgment—errors in the imposition or calculation of fees, fines, assessments, or costs; the application of *per diem* credit against fines; the calculation of presentence custody credit; and clerical errors in the circuit court's written sentencing order or written record resulting in a discrepancy between the record and the judgment. Rule 472(e) provides
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> > 'In all criminal cases pending on appeal as of March 1, 2019, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule.' *Id.*" *People v. Whittenburg*, 2019 IL App (1st) 163267, ¶ 3.

¶ 42 Defendant must first file a motion in the circuit court requesting the correction of any sentencing errors specified in Rule 472(a). *Id.* ¶ 4. Therefore, "[w]e remand to the circuit court for that limited purpose." *People v. Loggins*, 2019 IL App (1st) 160482, ¶ 131.

¶ 43 For the foregoing reasons, we affirm the judgment of the circuit court, and remand this matter to the circuit court of Cook County.

¶ 44 Affirmed and remanded.