2019 IL App (1st) 161719-U

No. 1-16-1719

Order filed January 24, 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 13792
	)	
MAIKOL GALVEZ-ZELAYA,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's constitutional rights were not violated and the trial court did not err when it accepted his jury waiver as knowing and voluntary. Two of defendant's sentences are vacated under the one-act, one-crime rule. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Maikol Galvez-Zelaya was found guilty of three counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2), (d)(1)(G), (d)(1)(H) (West 2014)) and sentenced to three concurrent terms of two years'

incarceration. On appeal, defendant contends: (1) the trial court erred when it accepted his jury waiver without sufficient admonitions regarding his right to a jury trial; (2) his multiple convictions for aggravated DUI violate the one-act, one-crime rule; and (3) his fines and fees order must be corrected to vacate an improperly imposed fee and reflect a $5 per day credit against other fines. We affirm defendant's convictions for aggravated DUI, but vacate the sentences on two of the counts under the one-act, one-crime rule, and correct the fines and fees order.

¶ 3 Defendant was charged by information with three counts of aggravated DUI premised on operating a motor vehicle on May 15, 2015, while under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2014)) and aggravated by the fact that: (1) his driving privileges were revoked (625 ILCS 5/11-501(d)(1)(G) (West 2014)); (2) his driving privileges were suspended (625 ILCS 5/11-501(d)(1)(G) (West 2014)); and (3) he did not possess a driver's license (625 ILCS 5/11-501(d)(1)(H) (West 2014)).

¶ 4 At a September 4, 2015, pretrial appearance, with no interpreter appearing on the record, the trial court admonished defendant about trial *in abstentia*, as follows:

> "THE COURT: Sir, I am going to advise you or your trial rights *in absentia*, which means, sir, if you fail to come to court, this case will go forward, sir. Do you understand that, yes or no?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Twelve jurors would be selected by your attorney and the State's Attorneys. Those 12 jurors would hear the evidence, assess the credibility of the

witnesses, apply the law, then deliberate and determine whether or not the State has met their burden of proof, sir. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Twelve jurors would be picked. They will hear all the evidence. I will instruct them on the law and they will determine whether or not the State proved you guilty beyond a reasonable doubt. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Sir, if you are found guilty, a judge would sentence you. And when you are eventually detained, you would serve out that sentence and it would not be a basis for appeal that you were not in court, sir. Do you understand that?

THE DEFENDANT: Yes."

During a discussion of defendant's bond at the same appearance, defendant interjected in English that "Your Honor, I have a paid receipt for $300."

¶ 5 At the February 9, 2016, trial date, with an interpreter present, the trial court admonished defendant regarding his right to a jury trial as follows:

"THE COURT: Sir, you have the right to plead not guilty and the right to require the State to prove you guilty beyond a reasonable doubt, sir. Do you understand that?

[THE DEFENDANT:] Yes.

THE COURT: How do you plead? Guilty or not guilty?

[THE DEFENDANT:] Not guilty.

THE COURT: Sir, you're entitled to a jury trial in which 12 individuals would be picked by your attorney and the State's Attorney. Those 12 jurors would hear the

evidence, assess the credibility of the witnesses, apply the law, then deliberate and decide whether or not the State has met their burden of proof, sir. Do you understand that?

[THE DEFENDANT:] Yes.

THE COURT: Sir, do you know what a jury trial is?

[THE DEFENDANT:] No.

THE COURT: That's where 12 jurors are picked by your attorney and the State's Attorney. They hear all the evidence and then they decide whether or not the State has met their burden of proof, what I just explained. Do you understand that?

[THE DEFENDANT:] Okay, yes.

THE COURT: Is this your signature in the middle of the document?

[THE DEFENDANT:] Yes.

THE COURT: By signing that document you are waiving your right to that jury trial; do you understand that? Yes or no?

[THE DEFENDANT:] Yes.

THE COURT: Plead not guilty, jury waiver."

The record contains a written document entitled "Jury Waiver" which states: "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing." The document is signed with defendant's name below that statement.

¶ 6 At trial, Chicago police officer Martinez testified that, in the early morning hours of May 15, 2015, he was on patrol with two other officers.[1] Just after midnight, he and the other officers were driving on Grand Avenue in a marked squad car. Near the 5500 block of Grand Avenue, he

[1] Officer Martinez's first name does not appear in the record.

observed a four-door red Chevy pull out of a parking spot without signaling. The vehicle failed to stay in its lane, crossing the center line multiple times and almost striking a parked vehicle. The officers activated their emergency lights and the vehicle pulled over in the 5800 block of Grand Avenue.

¶ 7 Martinez approached the driver's side of the vehicle and spoke to the driver, whom he identified in court as defendant. Martinez asked for defendant's license and proof of insurance. Defendant responded by handing Martinez a Honduran passport. As Martinez was speaking with defendant, he noticed 12-ounce beer bottles "throughout" the car, on the seat and the floorboards. Some bottles were full, others empty, and some "half and half." Defendant's eyes were red and bloodshot, his breath smelled of alcohol, and his speech was slurred and heavy. During the traffic stop, Martinez spoke to defendant in English and he seemed to understand.

¶ 8 Martinez used defendant's passport to "run" his name through "LEADS" and learned that he had a "revoked driver's license and he was issued a driver's license by the State of Illinois." Martinez returned to the vehicle and ordered defendant out of the vehicle. Defendant had trouble getting out of the vehicle, used the door for support, and could not keep his balance. Defendant had also urinated on himself. Another squad car transported defendant to a police station.

¶ 9 At the station, defendant was "very hostile." He swore at the officers in English and Spanish, refused to take field sobriety tests, and refused to take a Breathalyzer. Martinez contacted an officer who was more fluent in Spanish to talk to defendant, but he continued to refuse to cooperate. Martinez could still smell a strong odor of alcohol emanating from defendant's breath. He was unable to stand on his own, and spoke with a thick, heavy tongue and

slurred speech. Defendant was "on and off" falling asleep at the station. Martinez opined that defendant was under the influence of alcohol.

¶ 10 The parties stipulated to the admission of defendant's certified driving abstract which indicated "revocation was in effect on 05-15-2015" and a vehicle record showing the car he was driving was registered to him. The trial court found defendant guilty beyond a reasonable doubt, but did not specify to which charges its finding applied. Defendant filed a posttrial motion that did not allege error in the jury waiver. The trial court denied defendant's motion and subsequently sentenced him to two years' incarceration. The trial court did not verbally reference three sentences or state that the sentences would be concurrent. However, the mittimus reflects three convictions with concurrent sentences. The trial court also imposed fines and fees totaling $1429 and awarded presentence custody credit of 113 days. Defendant moved to reconsider the sentence, and the trial court denied the motion. Defendant timely appealed.

¶ 11 Defendant contends that the trial court erred when it accepted his jury waiver without "undertaking adequate steps to determine that [defendant] understood the ramifications of the waiver." The right to a jury trial is a fundamental right guaranteed by our federal and state constitutions. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004).

¶ 12 Initially, defendant acknowledges that he failed to preserve the error because he neither objected during trial nor raised the issue in his posttrial motion. See *People v. Reed*, 2016 IL App (1st) 140498, ¶ 6. However, we may reach an unpreserved error as plain error where either (1) the evidence is closely balanced, or (2) the error is of such magnitude that defendant was denied a fair and impartial trial and remedying the error is necessary to preserve the integrity of the judicial process. *Id.* Whether a defendant's fundamental right to a jury trial has been violated is

an error that may be considered under the second prong of plain error. See *People v. Rincon*, 387 Ill. App. 3d 708, 717 (2008) (citing *Bracey*, 213 Ill. 2d at 270). The first step of a plain-error analysis is to determine whether error occurred at all. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 13 Although the right to a jury trial is fundamental, a defendant remains free to waive that right. *Bracey*, 213 Ill. 2d at 269. Any such waiver must be knowingly and understandingly made in open court. See *id.*; 725 ILCS 5/103-6 (West 2014). A written waiver as required by section 115-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-1 (West 2014)) is one means of establishing a defendant's intent, although not dispositive of a valid waiver. *Bracey*, 213 Ill. 2d at 269-70. Generally, a jury waiver is valid if it is made by defense counsel in open court in the defendant's presence, without objection by the defendant. *Id.* at 270. "For a waiver to be effective, the court need not impart to defendant any set admonition or advice." *Id.* (citing *People v. Smith*, 106 Ill. 2d 327, 334 (1985)). The court's admonishments must be reviewed in light of the facts and circumstances of each particular case. See *Reed*, 2016 IL App (1st) 140498, ¶ 7 (citing *People v. Bannister*, 232 Ill. 2d 52, 66 (2008)). Because the facts here are not in dispute, we determine *de novo* whether defendant's jury waiver was valid. See *Bannister*, 232 Ill. 2d at 66.

¶ 14 Here, we find that the trial court adequately admonished defendant regarding his right to a jury trial. The court explained that a jury is composed of 12 individuals and that they would judge witness credibility and decide whether the State had met its burden. This description of the function of a jury is succinct but entirely accurate. When defendant indicated, despite this explanation, that he still did not know what a jury trial was, the trial court explained again and

defendant admitted he understood. This was not a perfunctory attempt by the court to elicit a response; rather, it was a directed effort to ensure that defendant's waiver was knowing. Moreover, we note that defendant's oral waiver was accompanied by a signed written waiver. Therefore, we conclude that the trial court did not err when it found that defendant's jury waiver was knowing and voluntary.

¶ 15 Defendant argues that the trial court should have ensured that he understood he was "constitutionally entitled" to demand a jury trial, and directs our attention to *People v. Murff*, 69 Ill. App. 3d 560 (1979), to support his argument. First, we note that the trial court did admonish defendant that he was "entitled to a jury trial." We do not believe the absence of the word "constitutionally" detracts from the efficacy of this admonition. Moreover, we find that *Murff* fails to guide our decision, because each case must be decided on its own facts (see *Reed*, 2016 IL App (1st) 140498, ¶ 7) and key facts in *Murff*, the defendant's paranoid schizophrenia and his failure to appropriately respond to the court's admonishments, are missing here.

¶ 16 Defendant also argues, relying on *People v. Tooles*, 177 Ill. 2d 462, 469-72 (1997), that the jury waiver was invalid because the trial court failed to ask whether defendant's jury waiver was the result of threats or promises. We find no support for this argument in *Tooles*. Although, in one of the three consolidated appeals in *Tooles*, the trial court did question the defendant about threats and promises, in two of the cases the trial court did not. *Id.* Despite the lack of what defendant views as a required question in two of the three cases, the supreme court found the jury waivers valid in all three cases. *Id.* Therefore, we reject defendant's argument.

¶ 17 Defendant argues that his jury waiver was invalid in part because he required the assistance of a Spanish language interpreter. Previously this court has stated: "The trial court is

warned to be particularly careful to ascertain whether a jury waiver is made knowingly where a defendant does not speak English." *People v. Phuong*, 287 Ill. App. 3d 988, 995-96 (1997). Here, the record shows defendant understood English well enough to respond to Officer Martinez's request for his license, to curse in English at the police station, and to address the court, in English and without an interpreter, regarding his bond. Further, an interpreter was, in fact, present to assist defendant when the court admonished him on the day of trial. Moreover, as detailed above, the trial court demonstrated sufficient care when taking defendant's jury waiver. The court explained in detail the concept of a jury trial and repeated its explanation when defendant responded that he did not understand. Therefore, we do not find that the jury waiver was invalid because defendant required the assistance of an interpreter.

¶ 18 Finally, defendant argues that this case is somehow analogous to *People v. Scott*, 186 Ill. 2d 283 (1999), in which no discussion of the defendant's jury waiver ever occurred in open court. Defendant argues "despite counsel's request for a bench trial, the trial court was still obligated to ensure [defendant] understood his right to a jury trial, and that his waiver of that right was voluntary." However, the trial court here did just that. As we discussed above, the trial court carefully and thoroughly admonished defendant in open court and confirmed with him that he had signed the written waiver. Thus, unlike *Scott*, this was not a case where the trial court accepted a written waiver without admonishing defendant in open court. See *Scott*, 186 Ill. 2d at 284.

¶ 19 Therefore, we conclude that because the trial court did not err when it found that defendant's jury waiver was knowing and voluntary, there can be no plain error, and we must

honor defendant's procedural default. Accordingly we affirm defendant's conviction for aggravated DUI.

¶ 20 Defendant next contends, and the State rightly concedes, that two of his three aggravated DUI convictions cannot stand under the one-act, one-crime doctrine. Prejudice results to a defendant when more than one offense is carved from the same physical act. See *People v. King*, 66 Ill. 2d 551, 566 (1977). Where there is a violation of the one-act, one-crime doctrine, the court should impose sentence on the more serious offense and vacate the less serious offense. *People v. Artis*, 232 Ill. 2d 156, 170 (2009). However, determining which of two convictions with the same penalties is more serious can constitute an impossible task, and remand is unnecessary where the parties agree which conviction should stand. See *In re Tyreke H.*, 2017 IL App (1st) 170406, ¶ 123. All three of defendant's DUI convictions are based on the same physical act of driving under the influence of alcohol and are Class 4 offenses with the same punishment. The State argues that, as all three offenses are equally serious, count 1 should be retained and the remaining sentences should be vacated. Defendant does not object in his reply brief. Accordingly, the sentences imposed on counts 2 and 3 are vacated and counts 2 and 3 are merged into count 1. See *People v. Gordon*, 378 Ill. App. 3d 626, 642 (2007). We order the clerk of the circuit court to correct the mittimus to reflect a single conviction and two-year sentence on count 1 and to indicate that counts 2 and 3 merge into count 1.

¶ 21 Defendant next contends that several corrections should be made to the fines, fees, and costs order. The State agrees, in part. We will address each argument in turn.

¶ 22 Initially, defendant acknowledges that he failed to preserve the fines and fees issue by objecting at the trial level. Defendant argues we can address the issues under plain error. See

People v. Hillier, 237 Ill. 2d 539, 545 (2010) (discussing plain error). However, the rules of waiver and forfeiture are also applicable to the State. *Reed*, 2016 IL App (1st) 140498, ¶ 13. The State agrees that defendant is entitled to review of these issues, and has therefore waived the issue of forfeiture. *Id.*

¶ 23 The parties correctly agree that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) should be vacated. The $5 electronic citation fee was improperly assessed as defendant was not convicted of a traffic, misdemeanor, municipal ordinance, or conservation offense. See 705 ILCS 105/27.3e (West 2014). Accordingly, we vacate the fee.

¶ 24 Defendant next claims he is entitled to presentence custody credit against certain fines that have been incorrectly labeled as fees. Under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2014)), any person incarcerated on a bailable offense is entitled to a credit of $5 per day against his or her fines. The court awarded defendant 113 days of presentence custody credit, entitling him to up to $565 in monetary credit toward his fines. The $5 per day credit of section 110-14(a) applies, however, only to fines, not fees. See *People v. Jones*, 397 Ill. App. 3d 651, 663 (2009). The central characteristic that separates a fee from a fine is whether the assessment is intended to reimburse the State for some cost incurred in prosecution or whether it is punitive in nature and intended to punish. *People v. Clark*, 2018 IL 122495, ¶ 11 ("Fines and fees are distinguished by their purpose."); see also *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63. A fee reimburses the State and a fine punishes the defendant. *Id.* We review *de novo* whether an assessment constitutes a fine or fee. *Clark*, 2018 IL 122495, ¶ 8.

¶ 25 The parties agree that the $10 mental health court assessment (55 ILCS 5/5-1101(d-5) (West 2014)) and the $5 youth diversion/peer court assessment (55 ILCS 5/5-1101(e) (West

2014)) are fines to which the $5 *per diem* offset applies. See *People v. Price*, 375 Ill. App. 3d 684, 700-702 (2007). The parties likewise agree that the $5 drug court assessment (55 ILCS 5/5-1101(f) (West 2014)) and the $30 children's advocacy center assessment (55 ILCS 5/5-1101(f-5) (West 2014)) are fines. See *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010); *Jones*, 397 Ill. App. 3d at 660-61. We accept the parties' agreement that these four assessments are fines. In doing so, we note that there is little controversy, and the fines and fees order already correctly indicates that these assessments are fines subject to offset. We address the issue here only to the extent necessary to make a calculation of the adjusted total due from defendant. See *People v. Mullen*, 2018 IL App (1st) 152306, ¶ 58. These four fines total $50, which should be offset by the credit.

¶ 26 The parties also agree that $200 of the $800 DUI law enforcement assessment (625 ILCS 5/11-501.01 (West 2014)) should be treated as a fine for purposes of the *per diem* credit. We do not accept the parties' agreement on this issue. The relevant statute, section 11-501.01 of the Illinois Vehicle Code (625 ILCS 5/11-501.01 (West 2014)) authorizes an assessment of $1000. Of the $1000, $200 is distributed to the law enforcement agency that made the arrest and $800 is distributed to the state police for the purchase of equipment to assist in the prevention of alcohol related violence throughout the state. 625 ILCS 5/11-501.01(f) (West 2014). The fines and fees order lists these two portions of the $1000 amount separately and states: "$200 is fine subject to credit, $800 is fee." Here, the fines and fees order shows the trial court ordered payment of only the $800 portion of the assessment. The parties have not identified anything in the language of the order or the statute or any other reasoned basis for subdividing this $800 amount into part fee

and part fine. Therefore, we conclude that the full $800 assessment is a fee, because it is used to reimburse the State for the costs of prosecuting alcohol related offenses.

¶ 27 The parties correctly agree that the $15 state police operations fee (705 ILCS 105/27.3a(1.5) (West 2014)) is, in fact, a fine subject to offset because it does not reimburse the State for a cost of prosecuting defendant. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. We order the clerk of the circuit court to modify the fines, fees, and costs order accordingly.

¶ 28 Defendant also argues that the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) and the $2 public defender records automation fee (55 ILCS 5/3-4012 (West 2014)) are, in fact fines. Defendant relies on *People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56, which held that these assessments do not compensate the State for costs associated in prosecuting a particular defendant. However, our supreme court has recently overruled *Camacho* and held that both assessments are fees not subject to offset. *Clark*, 2018 IL 122495, ¶¶ 22, 27.

¶ 29 Defendant argues that the $190 felony complaint filed fee (705 ILCS 105/27.2a(w)(1)(A) West 2014)), the $25 automation (clerk) fee (705 ILCS 105/27.3a(1) (West 2014)), and the $25 document storage fee (705 ILCS 105/27.3c(a) (West 2014)) are all, in fact, fines.[2] We disagree. This court has long held that these assessments are fees because they reimburse the State, in part, for costs incurred in prosecuting defendant. See *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006); see also *People v. Smith*, 2018 IL App (1st) 151402, ¶ 15. The supreme court has recently reached the same conclusion. *Clark*, 2018 IL 122495, ¶¶ 34, 41, 49. Therefore, we find that these assessments are fees not subject to offset.

[2] Although defendant's brief refers to a $15 automation (clerk) fee and a $15 document storage fee, the fines and fees order indicates the trial court actually imposed $25 assessments for each.

¶ 30 There appears to be some confusion between the parties regarding the court system fees. Defendant asserts that he was assessed a $30 court system fee under section 5-1101(a) of the Counties Code (55 ILCS 5/5-1101(a) (West 2014)) and a $50 court system fee under section 5-1101(c)(1) (55 ILCS 5/5-1101(c)(1) (West 2014)). The State asserts that defendant was assessed a $5 court system fee under section 5-1101(a) and a $50 court system fee under section 5-1101(c). In fact, defendant was assessed all three fees.

¶ 31 The $5 fee is to be assessed only for violations of the vehicle code other than section 11-501 (625 ILCS 5/11-501 (West 2014)) while the $30 fee is assessed for violation of section 11-501. Here defendant was convicted only of section 11-501. Therefore, the court improperly assessed the $5 court services fee, and we vacate the fee.

¶ 32 The parties are correct that the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) is indeed a fine because its stated purpose is to finance the court system. See *People v. Smith*, 2013 IL App (2d) 120691, ¶ 21. Similarly, we find that the $30 court system fee (55 ILCS 5/5-1101(a) (West 2014)) is a fine, because it serves the same purpose. Defendant is entitled to *per diem* credit against both assessments and we direct the clerk of the circuit court to correct the fines and fees order accordingly.

¶ 33 In conclusion, there was no plain error because the trial court did not err when it found that defendant's jury waiver was knowing and voluntary and we affirm his conviction for aggravated driving under the influence of alcohol on count 1. As defendant's convictions on counts 2 and 3 cannot stand under the one-act, one-crime doctrine, we vacate the concurrent sentences, and merge those counts into count 1. We direct the clerk of the circuit court to correct the mittimus accordingly.

¶ 34 Finally, we conclude that the trial court improperly imposed the $5 electronic citation fee and the $5 court system fee, and we vacate those assessments. We further conclude that the $15 state police operation fund assessment, the $50 court system fee, and the $30 court system fee are, in fact, fines subject to the $5 per day credit. The remaining assessments are properly categorized on the fines, fees and costs order. We direct clerk of the circuit court to modify the fines, fees, and costs order accordingly for a total amount due from defendant of $1274.

¶ 35 Affirmed in part and vacated in part; fines, fees, and costs order corrected.