2019 IL App (1st) 162839-U

No. 1-16-2839

SIXTH DIVISION
JANUARY 25, 2019

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 16 CR 3778
	)	
JAMAR WILSON,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The record sufficiently established that defendant knowingly and intelligently waived his right to a jury trial. We remand to the trial court for the sole purpose of imposing a sentence for the possession of a controlled substance.

¶ 2 Following a bench trial, defendant Jamar Wilson was found guilty of armed robbery (720 ILCS 5/18-2(a)(1) (West 2016)) and possession of a controlled substance (720 ILCS 570/402(c) (West 2016)) and sentenced to seven years in prison. On appeal, defendant contends that his due process rights were violated because the trial court failed to ensure that he knowingly and

intelligently waived his right to a jury trial. Defendant also challenges various assessed costs. We affirm the judgment of the circuit court of Cook County.

¶ 3 The State charged defendant and codefendant, Devontae Smith (Smith), with armed robbery with a dangerous weapon in that they knowingly took property from Chicago police officer Janelle Hamilton by the use of force or by threatening the imminent use of force.[1] Defendant was also charged with possession of a controlled substance and aggravated unlawful restraint.

¶ 4 At a pretrial status date on May 3, 2016, defendant was present and defense counsel asked the court if they could set the case "for a bench trial." After discussing possible trial dates, the court stated, "Mr. Wilson, I am going to set your case for a bench trial — you did say bench, right?" Defense counsel responded, "Yes, sir." At a pretrial status date on June 9, 2016, the court informed defendant that the case was set for a "bench trial on July 12." On the July 12, 2016, court date, defendant was present and defense counsel informed the court that the case had been set for a bench trial and the court continued the case to July 25, 2016.

¶ 5 On the day of trial, July 25, 2016, the court engaged in a colloquy with defendant and Smith regarding their jury waivers:

> "THE COURT: Gentleman, when you plead not guilty, you have the right to have a trial. Specifically you have the right to have a trial by jury. What I have in front of me are two separate jury waivers. Does this document contain your signature, Mr. Wilson?

[1] Defendant and Smith, who is not a party to this appeal, had separate but simultaneous bench trials.

[DEFENDANT]: Yes, sir.

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THE COURT: Do you understand by signing those documents, you're giving up the right to have a trial by a jury. Do you understand that, Mr. Smith?

[SMITH]: Yes, sir.

THE COURT: And Mr. Wilson?

[DEFENDANT]: Yes, sir.

THE COURT: The legal effect of signing that document is I'm going to decide today whether you're guilty or not guilty based on the evidence presented in court. Do you understand that, Mr. Smith?

[SMITH]: Yes, sir.

THE COURT: Mr. Wilson?

[DEFENDANT]: Yes, sir.

THE COURT: Do you want me to hear this case, or do you want a jury to hear this case, Mr. Smith?

[SMITH]: You, sir.

THE COURT: Mr. Wilson?

[DEFENDANT]: You.

> THE COURT: And did you have an opportunity to discuss that decision whether to take a bench or jury trial with your attorney, Mr. Wilson? Did you talk to your attorney about that?
>
> [DEFENDANT]: Yes, sir.
>
> ***
>
> THE COURT: All right, let the record reflect I find the jury waivers to be knowing and voluntarily [*sic*]. They have been intelligently waived. They'll be accepted and made a part of the court file."

The record contains a preprinted form entitled "Jury Waiver," which was signed by defendant on July 25, 2016, and states "I, the undersigned, do hereby waive jury trial and submit the above entitled cause to the Court for hearing."

¶ 6 Chicago police officer Janelle Hamilton testified that, on February 19, 2016, she was an undercover officer and Smith agreed to sell her four bags of heroin for $40, after which defendant approached and Smith said to him, "come with me, we got one." Hamilton and Smith walked down the sidewalk and defendant rode a bicycle next to them. Smith told defendant to "watch her, watch my back" and defendant responded, "I got you." Defendant pulled the handle of a weapon from his pocket and said, "Police like to f*** with you, and you know I got this piece on me."

¶ 7 At one point when they were walking, Smith told Hamilton to wait there so he could retrieve the narcotics. Smith told defendant to "watch her." When Smith returned, he handed Hamilton an empty plastic bag, forcefully took her money from her hands, and ran. Defendant,

who was about 10 feet away, put his hand into his pocket with the weapon, and said to Hamilton "you know what it is, keep walking." Hamilton walked away and communicated to her team.

¶ 8 Chicago police officer Raphael Mitchem testified that he arrested defendant and another officer removed a weapon from defendant's pocket. At the police station, Mitchem recovered suspect Xanax from defendant. Mitchem testified that the recovered weapon was a metal pellet gun that was a replica of a semi-automatic pistol with a functioning trigger.

¶ 9 The State entered a stipulation between the parties that a forensic chemist would testify that the suspect Xanax found on defendant was positive for 0.8 grams of Alprazolam (Xanax).

¶ 10 The court found defendant guilty of possession of a controlled substance and armed robbery but not guilty of aggravated unlawful restraint. The court subsequently denied defendant's motions to reconsider and for a new trial. Defendant was sentenced to seven years in prison, and $559 in costs were imposed.

¶ 11 Defendant contends on appeal that the trial court violated his due process rights because it failed to ensure that he knowingly and intelligently waived his right to a jury trial. Defendant claims that the record does not establish that he knew or understood that he was waiving his right to a jury trial or the implications for doing so.

¶ 12 As an initial matter, defendant acknowledges he did not preserve his claim for review because he did not properly raise the issue in the trial court. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010) (to preserve a claim for review, a defendant must object at trial and include the issue in a posttrial motion). Defendant however argues that we may review his challenge under the plain error doctrine. We agree that we may review defendant's jury waiver challenge under the plain error doctrine. See *People v. Gatlin*, 2017 IL App (1st) 143644, ¶ 32 ("when a

defendant's right to a jury trial has been violated, such an error may be deemed a plain error under the second prong of the plain-error doctrine"). However, before we apply the plain error doctrine, we must first determine whether any error occurred at all. See *People v. West*, 2017 IL App (1st) 143632, ¶ 11.

¶ 13 The right to a jury trial is a fundamental constitutional right. *People v. Bracey*, 213 Ill. 2d 265, 269 (2004). A defendant may waive this right, but the waiver must be made knowingly and understandingly in open court. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 7 (citing 725 ILCS 5/103-6 (West 2012)). A signed jury waiver is evidence that a defendant's waiver was made knowingly. *Reed*, 2016 IL App (1st) 140498, ¶ 7. The trial court is not required to give any specific admonishments or advice before it accepts a jury waiver. *Id*. The determination of whether a jury trial is valid depends on the facts and circumstances of each case and there is no precise formula to apply. *West*, 2017 IL App (1st) 143632, ¶ 10. The crucial determination is whether the defendant understood that a judge, not a jury, would decide the case. *Reed*, 2016 IL App (1st) 140498, ¶ 7. It is a defendant's burden to establish that a jury waiver was invalid. *Id*. When, as here, the facts are not in dispute, we review the issue of whether defendant knowingly and understandingly waived his right to a jury trial *de novo*. See *Bracey*, 213 Ill. 2d at 270.

¶ 14 The facts and circumstances in this case, show that defendant knowingly and understandingly waived his right to a jury trial. Defendant signed a written jury waiver on the day of trial, which is evidence that he knowingly waived his right to a jury trial. See *Reed*, 2016 IL App (1st) 140498, ¶ 7.

¶ 15 Further, before opening statements, the court engaged in a colloquy with defendant about his jury waiver, in which defendant acknowledged it was his signature on the waiver and that he

understood that, by signing it, he was giving up his right to a jury trial and that the court would decide whether he was guilty or not guilty. Defendant acknowledged that he had the opportunity to discuss his decision about whether he wanted a bench or jury trial with his attorney. When asked by the court, whether he wanted the court or a jury to hear the case, defendant responded to the court, "You." Accordingly, the record demonstrates that defendant affirmatively indicated that he understood that he was waiving his right to a jury trial and that he wanted the court to decide his case. See *West*, 2017 IL App (1st) 143632, ¶ 12 (finding a valid jury waiver where the court admonished the defendant that, by signing the waiver form and tendering it to the court, he was waiving his right to a jury trial and that the court, not a jury, would hear the case, noting that the defendant never objected to proceeding to a bench trial but affirmatively indicated he understood he was waiving his right for a jury to hear the case).

¶ 16 In addition, at a pretrial status date on May 3, 2016, defense counsel requested, in defendant's presence, that the case be set for a bench trial. At a pretrial status date on June 9, 2016, the court expressly informed defendant that the case was set for a bench trial and, on the July 12, 2016, pretrial status date, defense counsel informed the court in defendant's presence that the case had been sent for a bench trial. Defendant never objected or asked questions when defense counsel requested a bench trial and when the court and defense counsel discussed that the case was set for a bench trial, providing further support that the jury waiver is valid. See *Reed*, 2016 IL App (1st) 140498, ¶¶ 7-8 ("a present defendant's silence while his or her attorney requests a bench trial provides evidence that the waiver is valid").

¶ 17 Defendant nevertheless argues that the trial court failed to explain his right to a jury trial and the concept of a jury trial. He claims the court did not explain the constitutional nature of a

jury trial, who sits on a jury, how a jury is selected, the roles of a jury and a judge during a jury trial, the requirement that the jury reach a unanimous verdict, the difference between a jury and bench trial, or that the court would decide the facts rather than a jury. However, the trial court was not required to give any specific admonishment or advice to defendant to make his waiver effective. See *West*, 2017 IL App (1st) 143632, ¶¶ 12, 14 (where the defendant argued that the trial court did not explain the difference between a jury and bench trial and failed to adequately admonish him about his right to a jury trial, the court found he understandingly waived his right to a jury trial, noting that he never objected to his case proceeding to a bench trial). Thus, we are unpersuaded by defendant's argument that he did not knowingly or intelligently waive his right to a jury trial because the court failed to adequately explain his right to, or concept of, a jury trial.

¶ 18 Accordingly, under the facts and circumstances of this case, we conclude that defendant knowingly and intelligently waived his right to a jury trial. Defendant has not met his burden of demonstrating that his jury waiver was invalid. Thus, no error occurred here and the plain error doctrine does not apply.

¶ 19 Defendant next contends that the $595 assessed in fines, fees, and costs should be reduced to $476. He argues that he was assessed five fees that are actually considered "fines" and therefore, subject to presentence custody credit. We note that the State correctly acknowledges that the record shows defendant was assessed a total of $559, not $595, in costs.

¶ 20 Defendant acknowledges he did not properly preserve this challenge by raising the issue in the trial court. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. He however argues that we may review his challenge to the improperly assessed costs under the plain error doctrine. We disagree that we may review defendant's challenge to the assessed fines and fees under the

plain error doctrine. See *People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9. Nevertheless, because the State does not argue that we do not have authority to review defendant's challenge, it has forfeited any forfeiture argument. See *Bridgeforth,* 2017 IL App (1st) 143637, ¶ 46 (rules of waiver and forfeiture also apply to the State). Thus, we will review defendant's claims. The propriety of court-ordered fines and fees is reviewed *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 21 Defendant contends that he is entitled to presentence custody credit against various "fees" that are actually "fines." Under section 110-14(a) of the Code of Criminal Procedure of 1963, a defendant is entitled to a $5 credit against his fines for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2016); *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Presentence credit is only applied to fines imposed after a conviction and does not apply to other costs. *Tolliver*, 363 Ill. App. 3d at 96. A fine is considered to be part of a defendant's punishment for a conviction. *People v. Jones*, 223 Ill. 2d 569, 582 (2006). A fee is a charge for labor or services and is a "collateral consequence" of a conviction which is compensatory, not punitive. *Tolliver,* 363 Ill. App. 3d at 97. Even when a charge is labeled a fee, it still may be considered a fine. *Jones*, 223 Ill. 2d at 599. To determine whether a charge is a fine or a fee, "the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Here, defendant accumulated 295 days of presentence custody credit and is therefore entitled to up to $1475 of credit to be applied toward his fines.

¶ 22 Defendant argues he is entitled to presentence custody credit to be applied toward five assessments: the $15 State Police operations fee (705 ILCS 105/27.3a(1.5) (West 2016)), the $25

automation fee (705 ILCS 105/27.3a(1) (West 2016)), the $25 document storage fee (705 ILCS 105/27.3c(a) (West 2016)), $2 public defender records automation fee (55 ILCS 5/3-4012 (West 2016)), and $2 State's attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2016)). The State correctly concedes that the $15 State Police operations charge is a fine that must be offset by defendant's presentence custody credit. The State Police operations fee does not reimburse the State for the cost of defendant's prosecution. It is in essence a fine that is imposed upon all defendants who are convicted of any felony, traffic, misdemeanor or local ordinance violation. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31.

¶ 23 With respect to the remaining four disputed assessments, the issue is governed by our supreme court's recent decision in *People v. Clark*, 2018 IL 122495, issued after the parties submitted their briefs in this appeal. As explained below, *Clark* determined that each of these assessments is a fee, not a fine subject to presentence custody credit.

¶ 24 First, *Clark* expressly determined that a court automation charge under section 27.3a of the Clerks of Courts Act (705 ILCS 105/27.3a (West 2016)) is a fee, and thus not subject to the presentence incarceration credit. *Clark*, 2018 IL 122495, ¶¶ 36-41 ("This fee compensates for a cost that is necessary, the automation of records, including a system with which to do so."). Thus, defendant is not entitled to presentence credit for the $25 automation fee assessed against him.

¶ 25 *Clark* reached the same conclusion with respect to a document storage charge imposed under section 27.3c of the Clerks of Courts Act (705 ILCS 105/27.3c(a),(c) (West 2016)). *Clark*, 2018 IL 122495, ¶¶ 43-49 (explaining that "establishing and maintaining a document storage system is a cost related to the prosecution of criminal defendants" and "[t]his fee compensates

the clerk for a cost related to defendant's prosecution."). Thus, defendant is also not entitled to presentence credit for the $25 document storage charge.

¶ 26 Our supreme court in *Clark* also found that the $2 State's attorney records automation charge imposed under section 4-2002.1(c) of the Counties Code (55 ILCS 5/4-2002.1 (West 2016)) is a fee, not a fine. *Clark*, 2018 IL 122495, ¶¶ 24-27 (explaining that "automating the state's attorney's record keeping system is a cost related to prosecuting defendants, and this charge is a compensatory fee."). Thus, defendant is not entitled to a presentence credit for this $2 fee.

¶ 27 Finally, *Clark* likewise determined that the $2 public defender records automation charge under section 3-4012 of the Counties Code (55 ILCS 5/3-4012 (West 2016)) is a compensatory fee, not a fine subject to presentence credit. *Clark*, 2018 IL 122495, ¶¶ 18-22. However, this fee is inapplicable where, as in this case, defendant was represented by private counsel, not the public defender. See, *e.g.*, *People v. Brown*, 2017 IL App (1st) 142877, ¶ 78; *People v. Taylor*, 2016 IL App (1st) 141251, ¶ 30. For that reason, we vacate this $2 assessment.

¶ 28 In sum, the $15 State Police operations assessment is offset by defendant's presentence custody credit, and we vacate the $2 public defender records automation fee. The defendant is not entitled to presentence custody credit for the remaining fees discussed above. We order the clerk of the circuit court to correct the fines, fees, and costs order accordingly.

¶ 29 Finally, we note that the parties agree that the court found defendant guilty of armed robbery and possession of a controlled substance. The record shows that the court orally stated that it found defendant guilty of possession of a controlled substance, but the mittimus does not reflect this finding. When a court's oral pronouncement is in conflict with the written order, the

oral pronouncement controls. *People v. Jones,* 376 Ill. App. 3d 372, 395 (2007). In addition, the court did not orally impose sentence on the conviction for possession of a controlled substance. Additionally, the mittimus does not show that defendant was sentenced for his conviction on that count. We therefore remand the case to the trial court for the sole purpose of imposing a sentence for the possession of a controlled substance, for which defendant was found guilty, but not sentenced. See *People v. Scott*, 69 Ill. 2d 85, 88 (1977) (noting that the appellate court acted within the scope of its powers when it remanded the case to the circuit court for entry of a sentence on an unsentenced count).

¶ 30 For the reasons explained above, we order modification of the fines and fees order, by the circuit court of Cook County and remand the case to that court for the sole purpose of requiring the circuit court to impose sentence for the conviction of possession of a controlled substance. We affirm the circuit court's judgment in all other respects.

¶ 31 Affirmed; remanded for sentencing; fines, fees, and costs order corrected.