2019 IL App (1st) 163303-U

No. 1-16-3303

Order filed May 10, 2019

Sixth 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 19194
	)	
DONNIE WHITE,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction over his contention that the trial court improperly presumed that police officers were more credible simply because they were police officers. We correct the fines and fees order.

¶ 2 Following a bench trial, the circuit court found defendant Donnie White guilty of two counts of unlawful use or possession of a weapon by a felon (UUWF). The court merged the counts and sentenced him to four years in prison. On appeal, he contends that he was denied a fair trial because the court improperly presumed that the testimony of certain police officers was

more credible simply because they were police officers. He also challenges the imposition of certain fines and fees. We affirm, and correct the fines and fees order.

¶ 3 Defendant was charged with two counts of UUWF (720 ILCS 5/24-1.1(a) (West 2014)), and one count of reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2014)), following his November 7, 2015, arrest.

¶ 4 Chicago police officer Jeff Caribou testified that around 10:46 p.m. on November 7, 2015, he and his partner Officer Richard Mostowski responded to a call of "shots fired in the area" of 6900 South Dorchester. Caribou heard a gunshot and went through a gangway into a backyard. There, he observed a man, identified as defendant, on the back porch of a coach house with a gun. Defendant shot the gun once. Caribou heard the gunshot and observed a "spark" from the gun. Defendant then went into the coach house. Caribou shined his flashlight into the house and observed defendant. He then called for "more cars" and recovered four casings from the porch. The officers gained entry into the coach house and "secured" the five to six people, including defendant, who were inside. After speaking with Caribou, the homeowner opened a safe in a bedroom. Caribou recovered a .380 loaded semiautomatic handgun. Defendant was taken into custody and transported to a police station. Caribou was present when Mostowski informed defendant of the *Miranda* warnings, and when defendant stated that he shot the gun, but did not shoot it at anyone; rather, he shot in the air. This statement was not memorialized.

¶ 5 During cross-examination, Caribou testified that the original call of shots fired "was on the half block right across the street" and there was no lighting in the gangway. Although the backyard did not have lighting, there was "artificial light" coming from the alley. When he observed defendant, he viewed defendant's "[s]ide back." His view of defendant's face was

blocked by "dreads," so he only saw a "side profile." He could see that the person was a "[m]ale black" with "dark skin." He did not recall whether the person had facial hair or was wearing glasses. Defendant was the only person in the house with "dreds." During questioning by defense counsel and the court, Caribou testified that he heard a total of two shots, that is, one before he went in the backyard and another when he observed defendant fire the gun.

¶ 6 Chicago police officer Richard Mostowski testified that, after he heard what he believed was a gunshot, he followed Caribou through a gangway into a backyard. There, he observed defendant, whom he identified in court, standing on the porch of a coach house. Defendant fired a handgun. Mostowski explained that he saw a "muzzle flash" and heard what he believed was a gunshot. He testified consistently with Caribou that there was "[a]rtificial lighting" from the alley, that defendant entered the coach house, and that there were four "spent shell casings on the porch." After gaining entry into the house, Mostowski went upstairs and detained defendant. Defendant was the only person in the house with dreadlocks. Later, at a police station, Mostowski informed defendant of the *Miranda* rights. Defendant then stated that he was not shooting at anyone; rather, he shot in the air.

¶ 7 During cross-examination, Mostowski testified that he was about 30 feet away when he observed defendant on the porch. At that time, he only had a rear view of defendant. As he moved closer, he had "more of a side view." He observed a "mostly side profile" but disagreed that his view of defendant's face was blocked by dreadlocks. Mostowski did not recover any weapons or ammunition from a protective pat-down of defendant, did not obtain a signed waiver of *Miranda* rights from defendant, and did not memorialize or record defendant's statement.

¶ 8 Forensic scientist Marc Pomerance testified that tests indicated that one of the .380 caliber fired cartridge cases recovered in this case was fired from the firearm recovered in this case. The other three were fired from a different firearm.

¶ 9 The State then entered a certified statement of felony conviction for defendant in case number 11 CR 0781902 into evidence. The defense made a motion for a directed verdict, which the trial court denied.

¶ 10 Defendant testified that he arrived at his aunt's home around 10 or 10:15 p.m., and stood on the porch in order to enter the coach house. He denied having a firearm or firing one. He waited inside for his aunt, other relatives, and the "female [he] was talking to and her kids" to arrive. Defendant was in the bathroom when he "heard a loud noise" indicating that someone was entering the house. He then "heard the police running through the house" and "Freeze" and "hands up in the air." An officer removed him from the bathroom. Defendant had been on the porch "like 15, 30 minutes prior." He was arrested and taken to a police station. There, he told officers that he "did not want to talk," wanted an attorney, and needed a phone call. He denied stating that he shot a gun.

¶ 11 In finding defendant guilty, the court noted that the "two Chicago police officers that testified *** testified in a very, very credible manner." The court noted that, upon hearing a gunshot, the officers did "their duty" and went toward the gunfire, that is, did "what police officers do," and that they then observed a person on the porch of the coach house shoot a gun, but not at anyone. The officers observed that the person had dreadlocks and identified defendant as that person. The court also noted that defendant, who testified that he had been at the house "far longer than *** a couple of minutes," did not testify about hearing either of the gunshots

referred to by the officers. The court found this to be a "rather large omission." The court finally noted that, although defendant denied making a statement to officers, his testimony did corroborate the fact that the officers tried to speak to him. The fact that defendant's alleged statement was not memorialized was "something very seriously *** taken into consideration by this Court in determining whether or not this Court can rely on it."

¶ 12 The court then stated that:

> "the very credible testimony from the officers regarding their observations, the fact that their observations are corroborated by the recovery of the gun in the house that fired the shell casing on the porch; what they saw, what they did, I feel that they are far more credible as to the words that were spoken by the defendant at the time they interviewed him after he had been given his *Miranda* rights."

The court could "see" defendant "immediately trying to avoid any serious consequences for his actions by saying, I wasn't firing at anybody, I was just shooting down the alley." However, there were "other serious charges" regarding the possession of a firearm due to defendant's status as a convicted felon. The court therefore found defendant guilty of two counts of UUWF, but not guilty of reckless discharge of a firearm. Defendant filed a motion for a new trial, which the court denied. The court merged the two UUWF counts and sentenced defendant to four years in prison.

¶ 13 On appeal, defendant contends that he was denied a fair trial because, in weighing the credibility of defendant against that of the State's witnesses, the trial court improperly presumed that the officers were more credible simply because of their status as police officers.

¶ 14 Defendant acknowledges that he has forfeited this argument on appeal because he failed to object to the trial court's alleged pro-police bias when it rendered its guilty findings. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Defendant argues, however, that "a less rigid application of forfeiture applies when the judge's conduct is the reason for the error" because trial counsel is often "reluctant" to challenge the court. See, *e.g.*, *People v. Woolley*, 205 Ill. 2d 296, 301 (2002) (citing *People v. Sprinkle*, 27 Ill. 2d 398, 400 (1963) ("where the alleged error is an act of the trial judge, the making of a contemporaneous objection to questions or comments by the judge poses a practical problem for the trial lawyer")). In the alternative, he asks this court to review the issue pursuant to the plain error doctrine. See *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005) (a reviewing court may consider issues that have been forfeited "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence"). Defendant finally argues that he was denied the effective assistance of counsel by counsel's failure to object when the court applied a "presumption of truth" to the officers' testimony.

¶ 15 Our supreme court has explained that:

> "The making of an objection to questions or comments by a judge poses a practical problem for the trial lawyer. It can prove embarrassing to the lawyer, but, more importantly, assuming that most juries view most judges with some degree of respect, and accord to them a knowledge of law somewhat superior to that of the attorneys practicing before the judge, the lawyer who objects to a comment or question by the judge may find himself viewed with considerable suspicion and skepticism by the very

> group whom he is trying to convert to his client's view of the facts, thereby perhaps irreparably damaging his client's interests." *Sprinkle*, 27 Ill. 2d at 400-01.

¶ 16 The present case involved a bench trial, not a jury trial, and therefore the rationale for relaxing the forfeiture rule does not apply here. We note that our supreme court has occasionally applied *Sprinkle* and relaxed the forfeiture rule in cases where no jury was present. See *People v. McLaurin*, 235 Ill. 2d 478, 487-88 (2009) (citing cases). However, the court has not extended the *Sprinkle* doctrine beyond a narrow set of circumstances, because:

> "trial counsel has an obligation to raise contemporaneous objections and to properly preserve those objections for review. Failure to raise claims of error before the trial court denies the court the opportunity to correct the error immediately and grant a new trial if one is warranted, wasting time and judicial resources. [Citation.] This failure can be excused only under extraordinary circumstances, such as when a trial judge makes inappropriate remarks to a jury [citation] or relies on social commentary, rather than evidence, in sentencing a defendant to death [citation]. That we have seldom applied *Sprinkle* to noncapital cases further underscores the importance of uniform application of the forfeiture rule except in the most compelling of situations." *Id.* at 488.

¶ 17 In this case, defendant points to no such extraordinary circumstance warranting the relaxation of the forfeiture rule. However, even if we were to overlook defendant's forfeiture and review his claim pursuant to the plain error doctrine, we would find no reversible error. See *People v. Naylor*, 229 Ill. 2d 584, 602 (2008) ("Absent reversible error, there can be no plain error.").

¶ 18 It was the duty of the circuit court, as the trier of fact, to weigh the evidence and determine the credibility of the witnesses. *People v. Brown*, 2013 IL 114196, ¶ 48. We give great deference to the circuit court's credibility determinations and will not substitute our judgment for that of the circuit court (*id.*), because it was in the best position to evaluate the conduct and demeanor of the witnesses. See also *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007) (the "trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court *** that saw and heard the witnesses").

¶ 19 A review of the circuit court's comments when rendering its guilty findings shows that the court found the officers to be credible based upon their testimony regarding the events leading to defendant's arrest. There is no indication in the court's comments that it predetermined that the officers were more credible prior to their testimony or simply because they were police officers. Although defendant is correct that the court noted that the officers did "their duty" and went toward gunfire, rather than away from it as "most people would," the record reveals that this is an accurate recitation of the facts. Moreover, the court noted that defendant's testimony that he declined to speak to the officers actually corroborated the officers' testimony that a conversation was attempted.

¶ 20 To the extent that defendant contends that the court disbelieved his testimony solely because it conflicted with the testimony of the officers, we disagree. The court specifically found that the officers testified in a "very, very credible manner," and noted that their testimony was corroborated by the recovery of a gun in the house which matched a shell casing that was recovered on the porch on which defendant was standing when he fired the gun. The court also noted that, although defendant testified that he had been in the house for "longer than *** a

couple of minutes," defendant did not mention that he heard the gunshots referenced in the officers' testimony. The court concluded that this was a "rather large omission." Thus, the record reveals that the court considered the testimony of both defendant and the officers when making its guilty findings, and found the officers' testimony to be credible. In other words, the court discounted defendant's testimony to the extent that it conflicted with that of the officers because it found him to be an unbelievable witness. We find no cause on this record to substitute our judgment for the circuit court's credibility determinations. See *Brown*, 2013 IL 114196, ¶ 48 (a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses). Given we find no evidence that the court was biased in the officers' favor, there is no error in its credibility determination. Without error, there can be no plain error (*Naylor*, 229 Ill. 2d at 602), and we must honor defendant's forfeiture of this issue.

¶ 21 Moreover, because there was no error, defendant cannot demonstrate that he was prejudiced by his trial counsel's failure to raise this issue before the circuit court. To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was fundamentally deficient and that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). As we have determined that the court did not improperly find the officers more credible based upon their status as police officers, defendant's claim of ineffective assistance of counsel lacks merit. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel).

¶ 22 Defendant next contests the imposition of certain fines. He acknowledges that he did not raise these claims before the circuit court as required. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). However, the State agrees that we may review the forfeited claims and has thus forfeited the forfeiture issue. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 7.

¶ 23 We note that, on February 26, 2019, after this appeal was fully briefed, our Supreme Court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "imposition or calculation of fines, fees, and assessments or costs" and "application of *per diem* credit against fines." Ill. S. Ct. R. 472 (a)(1), (2) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during the pendency of an appeal. *People v. Barr*, 2019 IL App (1st) 163035, ¶¶ 5-6 (citing Ill. S. Ct. R. 472 (a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472 (c) (eff. Mar. 1, 2019).

¶ 24 Defendant here did not raise his challenges to the fines and fees order in the circuit court and, instead, raises them for the first time on appeal. However, as defendant filed his notice of appeal prior to the effective date of Rule 472 and this court has found the rule applies prospectively, we will address the merits of his claims. *Barr*, 2019 IL App (1st) 163035, ¶¶ 6, 8, 15. Our review is *de novo*. *Id.* ¶ 16.

¶ 25 Defendant first contends that the $5 court system fee should be vacated. We agree, as the court system fee does not apply because defendant violated neither the Illinois Vehicle Code nor a municipal ordinance. 55 ILCS 5/5-1101(a) (West 2014). Accordingly, we vacate this fee.

¶ 26 Defendant next contends that he is entitled to offset the fines assessed against him with his presentence custody credit. See 725 ILCS 5/110-14(a) (West 2014). Here, defendant accumulated 380 days of presentence custody credit, and, therefore, he is entitled to up to $1900 of credit toward his eligible fines.

¶ 27 Defendant argues, and the State concedes, that the $15 State Police Operations Assistance Fund assessment (705 ILCS 105/27.3a(1.5), (5) (West 2014)), and the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) imposed by the trial court are fines subject to offset by presentence custody credit. We agree. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 36 (finding the State Police Operations Assistance Fund assessment is a fine); *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17 (the $50 court system fee "is imposed upon every defendant who is found guilty in a felony case, regardless of what transpired in the defendant's case, *** and, as a penalty, it is subject to the $5-per-day credit"). Accordingly, these assessments are subject to offset by defendant's presentence custody credit.

¶ 28 Defendant also claims that his presentence incarceration credit should apply to the $2 Public Defender Automation Fund charge (55 ILCS 5/3-4012 (West 2014)), the $2 State's Attorney Records Automation Fund charge, (55 ILCS 5/4-2002.1(c) (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), (3) (West 2014)), and the $25 Court Document Storage Fund charge (705 ILCS 105/27.3c(a) (West 2014)). Our supreme court recently

determined that these assessments are fees intended to compensate the State for costs incurred in prosecuting defendants. *People v. Clark*, 2018 IL 122495, ¶ 51. Thus, defendant may not offset them using presentence custody credit. *Id*.

¶ 29 The parties finally dispute whether the $10 arrestee's medical costs fund fee (730 ILCS 125/17 (West 2014)), is subject to offset. However, we have already considered challenges to this assessment and determined that this assessment is a fee not subject to presentence incarceration credit. See *People v. Mullen*, 2018 IL App (1st) 152306, ¶¶ 51-52; *People v. Jones*, 397 Ill. App. 3d 651, 664 (2009). We decline defendant's invitation to revisit these previous rulings.

¶ 30 We affirm the judgment of the circuit court of Cook County. We correct defendant's fines and fees order to reflect that the $5 electronic citation fee is vacated and that the $15 State Police Operations Assistance Fund assessment and the $50 court system fee are offset by defendant's presentence custody credit.

¶ 31 Affirmed; fines and order corrected.