2019 IL App (1st) 170025-U

No. 1-17-0025

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. 16 CR 4237
	)	
KENNETH ANDERSON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The circuit court erred in imposing an extended-term sentence for defendant's attempted robbery conviction. We reduce defendant's sentence; and correct his fines and fees order and mittimus.

¶ 2 Following a bench trial, the circuit court found defendant Kenneth Anderson guilty of vehicular invasion (720 ILCS 5/18-6(a) (West 2016)); attempted robbery (720 ILCS 5/18-1(a) (West 2016), 720 ILCS 5/8-4(a) (West 2016)); two counts of aggravated battery (720 ILCS 5/12-3.05(c) (West 2016)); and unlawful restraint (720 ILCS 5/10-3(a) (West 2016)). On appeal,

defendant contends that the circuit court erred when it sentenced him to an extended-term sentence for attempted robbery. He also contests the imposition of certain fines and fees, and asks that his mittimus be corrected to reflect that he was convicted of the Class 3 offense of attempted robbery. We affirm defendant's convictions, reduce his sentence for attempted robbery, and correct the fines and fees order and the mittimus.

¶ 3 Before trial, the State noted that the "charging instrument said robbery," but that the language of the citation was that of an attempted robbery, and, therefore the charge "should be attempt" robbery. The court asked trial counsel if there was "any objection to knocking down robbery to a Class 3," and there was no objection. The court ordered that the robbery charge be amended to attempted robbery. Before defendant's bench trial started, the State reminded the court that the charge was amended to attempted robbery, and the court stated that the change appeared "on the court sheet so that [it] is a Class 3" attempted robbery.

¶ 4 Chicago police officer Eric James testified that while on patrol shortly before midnight on March 6, 2016, he observed a person "halfway into the *** driver side window" of a white Honda. He identified defendant in court as that person. James heard defendant say "give me your money." He and his partner then investigated, and defendant was placed in handcuffs. James next approached the Honda. The man in the driver's seat, later identified as Mario Lituma, was "distraught," with a bloody laceration to the left eye and a "fat and bloody" lip. After the officers spoke with Lituma through an interpreter, defendant was arrested.

¶ 5 Mario Lituma testified through an interpreter that he was in the driver's seat of his Honda when a woman tapped on the window and asked for money. Lituma rolled down his window "a little bit" to decline, but the woman put her hand inside and hit the button to roll the window "all

the way" down. A man then demanded his money, phone, and wallet or else he would be killed. He identified defendant in court as this person. Defendant began to hit him through the open window and tried to grab his phone. Lituma's dentures were broken and the left side of his head was "opened up." He had never seen defendant before and had never sold him anything.

¶ 6 Lituma's 18-year old son, Alex, testified that he was on the street and observed a man hitting his father but only saw the man's back. He told this man, as well as a woman on the other side of the car, that he was going to call the police.

¶ 7 At the close of the State's case, the defense made a motion for a directed verdict, which the circuit court denied. Defendant, who acknowledged that he had two prior convictions for retail theft and one prior conviction for burglary, then testified that he was on the street with "Maria" when he came into contact with Lituma, whom he knew as "Al Chopo." Defendant, who sold drugs, had previous business dealings with Lituma, who also sold drugs. That evening, Lituma sold defendant $1500 of "dope rocks and cocaine." When Maria asked what happened to his face, Lituma said he was in a bar fight. Defendant was waiting for Lituma to get the drugs out of the trunk when the police arrived. Although defendant told the police that he was buying drugs, he was arrested for something that he "didn't even know that [he] did." Defendant did not hit Lituma or try to take anything from him. During cross-examination, defendant denied telling a police officer that he bought "three rocks for $25" from Lituma, began to smoke one, and then realized that it was "just soap." Defendant denied smoking rocks. He also denied telling the officer that a fight started when he tried to get his $25 back.

¶ 8 In rebuttal, the State presented the testimony of Detective Patrick Staunton, who testified that after apprising defendant of his *Miranda* rights, defendant stated that he bought three rocks

from Lituma for $25, but that when he started to smoke one, he learned that it was just soap. Defendant further stated that when he tried to get his money back, he and Lituma began to fight.

¶ 9 The court found defendant guilty of vehicular invasion, attempted robbery, both counts of aggravated battery, and unlawful restraint. At sentencing, the parties agreed that defendant was subject to sentencing as a Class X offender due to his criminal background. The State argued in aggravation that defendant was a "self-admitted drug dealer," who also took drugs and "had no problem trying to steal" from Lituma. The State asked for a significant sentence, as defendant was a "career thief" who needed "to be off the street for some time." The court asked whether defendant was "extendible on the Class 3s," and the State answered in the affirmative. The defense responded that defendant had previously been gainfully employed, had "many children who rely upon him," and suffered from an untreated substance abuse problem. The court asked defendant whether he wished to say anything, and defendant responded that he was not guilty and "didn't do shit."

¶ 10 The circuit court merged the aggravated battery counts into each other and also merged the unlawful restraint count into the attempted robbery count. The court then sentenced defendant to 12 years in prison for vehicular invasion, an 8-year extended-term sentence for attempted robbery, and a 5-year sentence for aggravated battery. All sentences were to run concurrently.

¶ 11 On appeal, defendant does not challenge his convictions; rather, he challenges the sentence imposed for attempted robbery and the imposition of certain fines and fees. He also seeks to correct an error on his mittimus.

¶ 12 Defendant first contends that the circuit court erred when it sentenced him to an extended-term sentence of eight years in prison for the Class 3 offense of attempted robbery because it was not the most serious offense of which he was convicted. Due to this error, he asks this court to remand the cause for resentencing, or in the alternative, to reduce his sentence for attempted robbery to the statutory maximum of five years in prison.

¶ 13 Defendant acknowledges he did not preserve this issue for review before the circuit court or in a postsentencing motion, and is therefore forfeited on appeal. The State does not argue that defendant has forfeited this issue; rather, it concedes that the eight-year sentence was improper and asks this court to reduce defendant's sentence for attempted robbery to the statutory maximum non-extended term of five years. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (the State may forfeit the claim that an issue defendant raises is forfeited if the State does not argue forfeiture on appeal).

¶ 14 "[W]hether the trial court has imposed an unauthorized sentence is a question of law which we will review *de novo*." *People v. Smith*, 345 Ill. App. 3d 179, 189 (2004). Section 5-8-2(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-2(a) (West 2016)), which governs the imposition of an extended-term sentence, states:

> "A judge shall not sentence an offender to a term of imprisonment in excess of the maximum sentence authorized by Article 4.5 of Chapter V for an offense or offenses within the class of the most serious offense of which the offender was convicted unless the factors in aggravation set forth Section 5-5-3.2 or clause (a)(1) (6) of Section 5-8-1 were found to be present."

¶ 15 In *People v. Jordan*, 103 Ill. 2d 192, 205-06 (1984), our supreme court explained that under section 5-8-2(a) of the Code, a defendant who is convicted of multiple offenses may be sentenced to an extended-term sentence only for those offenses that are within the most serious Class. In *People v. Coleman*, 166 Ill. 2d 247, 257 (1995), the court clarified that extended-term sentences may be imposed "on separately charged, differing Class offenses that arise from unrelated courses of conduct." In other words, when a defendant's convictions are part of a single course of conduct, an extended-term sentence may be imposed only on those convictions within the most serious Class. *People v. Bell*, 196 Ill. 2d 343, 355 (2001).

¶ 16 Here, defendant was convicted of attempted robbery, a Class 3 offense with a sentencing range of between two and five years in prison. See 720 ILCS 5/18-1(c) (West 2016) (robbery is a Class 2 offense); 720 ILCS 5/8-4(c)(4) (West 2016) (the sentence for an attempt to commit a Class 2 offense is the sentence for a Class 3 offense); 730 ILCS 5/5-4.5-40(a) (West 2016) (sentencing range for a Class 3 offense is between two and five years in prison). He was also convicted of the Class 1 offense of vehicular invasion (720 ILCS 5/18-6(b) (West 2016)), and the Class 3 offense of aggravated battery (720 ILCS 5/12-3.05(c), (h) (West 2016)). The parties do not dispute that defendant's convictions are part of a single course of conduct.

¶ 17 The record reflects that at sentencing, the circuit court asked the State whether defendant was "extendible" on the Class 3 offenses, and the State answered in the affirmative. It is unclear from the record why the State and the circuit court believed defendant to be subject to extended-term sentences on the Class 3 offenses. While defendant may have been eligible for an extended-term sentence because of his criminal history (730 ILCS 5/5-4.5-95(b) (West 2016)), section 5-8-2(a) of the Code prohibits the extended-term sentence on his attempted robbery conviction

because the circuit court was only authorized to impose an extended-tem sentence on the offense in the most serious Class (see *People v. Peacock*, 359 Ill. App. 3d 326, 337 (2005)), which in this case was vehicular invasion. Accordingly, we agree with defendant and the State that the circuit court erred in imposing an extended-term sentence on his Class 3 attempted robbery conviction when he had also been convicted of the Class 1 offense of vehicular invasion. See *Jordan*, 103 Ill. 2d at 205-06. That being said, we must determine what relief is appropriate in this case.

¶ 18 Defendant asks this court to either remand the cause for a new sentencing hearing or vacate the extended-term portion of his sentence for attempted robbery and enter a five-year sentence instead. The State contends that remand is unnecessary and asks this court to vacate the extended-term portion of defendant's sentence and enter the statutory maximum sentence for a Class 3 felony, that is, five years. In similar circumstances, this court has vacated the extended-term portion of a sentence and reduced it to the maximum non-extended statutory prison term. See *Peacock*, 359 Ill. App. 3d at 338; *People v. Simpson*, 178 Ill. App. 3d 1091, 1096 (1989); *People v. Phillips*, 159 Ill. App. 3d 483, 493 (1987) (overruled on other grounds by *People v. Ferguson*, 132 Ill. 2d 86, 99 (1989)). We therefore vacate the extended-term portion of defendant's sentence for attempted robbery and reduce the sentence to the maximum statutory prison term of five years (Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967)).

¶ 19 Defendant next contests the imposition of certain fines and fees and asks this court to correct his mittimus. He acknowledges not raising these claims in the trial court. 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.

¶ 20 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," the "application of *per diem* credit against fines" and "[c]lerical errors in the written sentencing order." Ill. S. Ct. R. 472 (a)(1), (2), (4) (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).

¶ 21 Defendant did not raise his challenges to the fines and fees order in the circuit court, but raises them for the first time on appeal. However, as defendant filed his notice of appeal before Rule 472 became effective, 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.

¶ 22 Defendant first contends, and the State agrees, that the $5 electronic citation fee must be vacated because defendant was not convicted of "any traffic, misdemeanor, municipal ordinance, or conservation" offense. 705 ILCS 105/27.3e (West 2016). We agree, as this assessment does not apply to felonies and is, therefore, inapplicable to defendant's convictions for vehicular

invasion, attempted robbery, and aggravated battery. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 12. As such, we vacate the $5 electronic citation fee.

¶ 23 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 2016). Here, defendant accumulated 271 days of presentence custody credit, and, therefore, he is potentially entitled to $1355 of credit toward his eligible fines.

¶ 24 Defendant first argues, and the State concedes that the $15 State Police Operations Assistance Fund assessment and the $50 court system fee imposed by the circuit 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.

¶ 25 Defendant next argues that his presentence incarceration credit should apply to the $2 Public Defender Automation Fund charge (55 ILCS 5/3-4012 (West 2016)), the $2 State's Attorney Records Automation Fund charge, (55 ILCS 5/4-2002.1(c) (West 2016)), the $190 "Felony Complaint Filed, (Clerk)" charge (705 ILCS 105/27.2a(w)(1)(A) (West 2016)), the $25 court automation charge (705 ILCS 105/27.3a(1) (West 2016)), and the $25 court document storage fund charge (705 ILCS 105/27.3c(a) (West 2016)). 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*.

¶ 26 Defendant further contends the $25 court services (sheriff) fee (55 ILCS 5/5-1103 (West 2016)), is a fine because it does not reimburse the State for a cost incurred in his prosecution but rather finances "a neutral service that benefits everyone in the courthouse." However, this court has found the charge is not a monetary penalty and, thus, is not a fine subject to offset. *People v. Adair*, 406 Ill. App. 3d 133, 144-45 (2010) (finding that the plain language of the statute indicates it is a fee to defray the costs of court security during a defendant's court proceedings).

¶ 27 Defendant finally notes, and the State concedes, that his mittimus incorrectly lists his conviction for attempted robbery as a Class 2 offense, rather than a Class 3 offense. The mittimus must accurately the offense of which a defendant is convicted. See *People v. DeWeese*, 298 Ill. App. 3d 4, 13 (1998). This court may correct the mittimus without remanding the case pursuant to Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967). We therefore correct defendant's mittimus to reflect that his conviction for attempted robbery is a Class 3 offense.

¶ 28 We reduce defendant's sentence for attempted robbery to five years in prison. We also correct defendant's fines and fees order to reflect the vacation of the $5 electronic citation fee, and the offset of the $15 State Police Operations Assistance Fund assessment and the $50 court system fee. We also correct defendant's mittimus to reflect that he was convicted of the Class 3 offense of attempted robbery. We affirm the judgment of the circuit court in all other aspects.

¶ 29 Affirmed as modified; fines and fees order corrected; mittimus corrected.