

Office of the State Appellate Defender
Illinois Criminal Law Digest

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APPEAL

§§2-2(a), 2-6(a)

People v. Shaw, 2016 IL App (4th) 150444 (No. 4-15-0444, 4/29/16)

725 ILCS 5/113-3.1 authorizes the trial court to order the defendant to pay a reasonable sum to reimburse the county or State for the cost of court-appointed counsel. On appeal, defendant argued that the trial court erred by ordering a public defender fee without providing notice or conducting a hearing to determine defendant's ability to pay. The State conceded the issue and argued that the cause should be remanded for a hearing on the appropriateness of a public defender fee.

Although neither party raised the issue, the court found on its own motion that it lacked jurisdiction to consider the issue. Defendant filed the notice of appeal December 19, 2012, and indicated that he was appealing the judgement that was entered December 17, 2012. Because the public defender fee was not ordered until nearly two months later, and defendant failed to file an amended notice of appeal, the court concluded that it lacked jurisdiction to consider the public defender fee.

A notice of appeal confers jurisdiction to review only the judgments or parts thereof that are specified in the notice of appeal. Although notices of appeal are to be construed liberally, the notice of appeal here did not fairly and adequately set out the assessment of a public defender fee as a ground for the appeal.

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

§2-6(c)

People v. Hible, 2016 IL App (4th) 131096 (No. 4-13-1096, 4/26/16)

Under 55 ILCS 5/4-2002, the State is entitled to collect a statutory fee where it defends an appeal. Thus, if on appeal any part of the judgment is in favor of the State, the reviewing court can assess the statutory fee directly against the defendant. To avoid having the statutory fee assessed, the defendant must be successful in every aspect of relief he seeks.

Where all of the parties agreed that the issues raised by defendant were meritorious, so that the State was not "defending" any claims, the statute did not permit imposition of the State's Attorney's fee. "[T]he State has failed to successfully 'defend' any issue before this court and we deny its request for the statutory fee as costs."

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

BAIL

§6-3

People v. Casas, 2016 IL App (2d) 150456 (No. 2-15-0456, 4/14/16)

720 ILCS 5/32-10(a) provides that the offense of violation of bail bond occurs where a person who has been admitted to bail forfeits that bail and knowingly fails to surrender within 30 days. The Appellate Court held that because violation of bail bond is a continuing offense, the statute of limitations began to run the day the accused is arrested or surrenders.

1. Generally, felony offenses must be charged within three years after the commission of the offense. In most cases, the statute of limitations begins to run when the final element of the offense is complete. In the case of continuing offenses, however, the statute of limitations starts to run only when the perpetrator ceases to satisfy the elements of the crime. At that point, the whole “arc of criminal conduct” is aggregated into a single criminal violation.

2. The court concluded that the offense of violation of bail bond constitutes a continuing offense which extends beyond the initial act of violating bail. (Rejecting *People v. Grogan*, 197 Ill. App. 3d 18, 554 N.E.2d. 665 (1st Dist. 1990)). Thus, the statute of limitations does not begin to run until the defendant is apprehended. The court noted that if the statute of limitations began to run once the defendant failed to surrender within 30 days after defaulting on bail, a defendant could escape prosecution by going into hiding for three years.

Because the defendant was tried for the offense of violation of bail bond within three years after his apprehension, the statute of limitations was not violated.

BURGLARY

§8-1(a)

People v. Gharrett, 2016 IL App (4th) 140315 (No. 4-14-0315, 4/27/16)

Under 720 ILCS 5/19-1(a), the offense of burglary occurs where, without authority, the defendant knowingly enters or remains in a building “or any part thereof, with intent to commit therein a felony or theft.” The court concluded that the plain language of the statute applies where a person with authority to be in part of a building leaves that part and enters a separate area which he does not have authority to enter.

The evidence was sufficient to show that defendant committed burglary where he accompanied his recently-married wife to the public area of a Secretary of State facility so his spouse could change her name, and subsequently entered a separate area which

contained an office in which the facility stored cash receipts. An employee of the facility testified that the office area was not open to the public and that in the ten years she worked at the site no member of the public had ever entered that area. Furthermore, video from a surveillance camera showed that defendant entered the office twice. The first time was to retrieve his two-year-old daughter, who had run into the office. The second time, defendant reached toward the desk and then left carrying something in his hand. A short time later, currency and checks were found to be missing.

The court concluded that there was sufficient evidence to permit a rational jury to infer that the defendant noticed the cash and checks during the first entry, and entered the office a second time with intent to steal the items.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

§8-1(b)

People v. Sanderson, 2016 IL App (1st) 141381 (No. 1-14-1381, 4/20/16)

A defendant is guilty of armed habitual criminal if he possesses a firearm and has been previously convicted of two or more forcible felonies. As defined by the Criminal Code, a forcible felony includes several specifically enumerated offenses, including residential burglary, or any other felony involving “the use or threat of physical force or violence.” 720 ILCS 5/2-8.

An unenumerated felony falls within the residual clause if the defendant contemplated and was willing to use force or violence, but he does not need to actually use violence. Crimes may fall within the residual clause in two ways: (1) one of the crime’s elements is a specific intent to carry out a violent act; or (2) the particular facts of the case show that the defendant contemplated and was willing to use force.

Defendant was convicted of armed habitual criminal based on having a prior conviction for attempted residential burglary. The only evidence of the prior conviction was a certified copy of conviction which provided no details about the circumstances of the prior offense.

The court held that defendant’s conviction for attempted residential burglary, which was not a specifically enumerated forcible felony, also did not fall within the residual clause since it was “neither by definition nor by circumstance a forcible felony.”

First, the elements of the offense do not include a specific intent to carry out a violent act. Residential burglary is defined as entering or remaining within a dwelling place with the intent to commit a felony or theft. 720 ILCS 5/1903(a). A defendant could be guilty of attempted residential burglary by simply testing the window of a home that he knew was vacant, or by casing a home, finding it unexpectedly occupied and leaving

precisely to avoid a violent confrontation. In both examples, the defendant did not contemplate using force or violence, and yet would still be guilty.

Second, since the State presented no evidence about the circumstances of defendant's prior conviction, there was no showing that defendant contemplated the use of force in this particular offense.

The court reversed defendant's conviction for armed habitual criminal.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

COLLATERAL REMEDIES

§9-1(j)(2)

People v. Russell, 2016 IL App (3d) 140386 (No. 3-14-0386, 4/20/16)

1. There is no constitutional right to the assistance of counsel in post-conviction proceedings. Instead, the right to post-conviction counsel is wholly statutory and affords only a reasonable level of assistance. Supreme Court Rule 651(c) requires that counsel: (1) consult with the petitioner to ascertain any contentions of deprivation of constitutional right; (2) examine the record of the proceedings at the trial; and (3) make any amendments to the *pro se* petition that are necessary for adequate presentation of the petitioner's contentions.

Post-conviction counsel is required to investigate and present only claims which the petitioner makes in the *pro se* petition, but must make any amendments that are necessary to adequately present those claims. However, counsel need not make amendments to a *pro se* petition which would merely further a frivolous or patently nonmeritorious claim.

Filing a certificate of compliance with Rule 651(c) creates a presumption that the petitioner received reasonable representation, but that presumption may be rebutted by the record. Whether post-conviction counsel provided a reasonable level of assistance is reviewed *de novo*.

2. Here, the *pro se* petition alleged that the trial court erred by admitting evidence of other crimes. That issue had been preserved at trial, but was forfeited for post-conviction because appellate counsel did not raise it on direct appeal. The Appellate Court concluded that post-conviction counsel failed to provide reasonable assistance by failing to amend the *pro se* petition to allege ineffective assistance of appellate counsel. "[P]ostconviction counsel's failure to amend the post-conviction petition to allege ineffective assistance of counsel . . . contributed directly to the dismissal of the petition

without an evidentiary hearing [and] rebutted the presumption of reasonable assistance created by the filing of the certificate of compliance with Rule 651(c).”

3. The court rejected the State’s argument that the claim concerning the admission of other crimes was meritless, and that counsel therefore did not act unreasonably by failing to amend the pro se petition to allege ineffective assistance of appellate counsel. “[A] defendant is not required to make a positive showing that his counsel's failure to comply with Rule 651(c) caused prejudice.” Instead, remand is required if post-conviction counsel failed to fulfill the duties of Rule 651(c).

The order dismissing the post-conviction petition was reversed and the cause remanded with directions to allow the petitioner an opportunity to replead his post-conviction petition with the assistance of new counsel.

(Defendant was represented by Assistant Defender Thomas Karalis, Ottawa.)

§9-5(d)

Welch v. United States, 578 U.S. ___, (No. 15-6418, 4/18/16)

Under **Teague**, new constitutional rules of criminal procedure do not as a general matter apply retroactively to cases that are on collateral review when the new rules were announced. New substantive rules, however, do generally apply retroactively. “A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes.” This includes rules that narrow the scope of a criminal statute or that place particular conduct or persons beyond the State’s power to punish. A procedural rule, by contrast, alters the permissible methods for determining whether a defendant’s conduct is punishable.

In **Johnson v. United States**, 576 U.S. ___ (2015), the court held that certain provisions of the Armed Career Criminal Act, under which a defendant could receive a much longer sentence, were unconstitutionally void for vagueness. Defendant was sentenced under those provisions, but his conviction became final before **Johnson** was decided, forcing defendant to attack his sentence in a collateral proceeding.

The court held that **Johnson** applied retroactively to defendant’s case. By striking down the relevant provisions of the act, **Johnson** changed the substantive reach of the act. Before **Johnson**, a defendant who violated the relevant provisions of the act faced a sentence of 15 years to life. After **Johnson**, a defendant guilty of the same conduct would only face up to 10 years in prison. Even with the use of impeccable fact-finding procedures, the greater sentence could no longer be imposed. **Johnson** thus involved a new substantive rule, and as such applies retroactively to cases on collateral review.

COUNSEL

§13-3(c)

People v. Shaw, 2016 IL App (4th) 150444 (No. 4-15-0444, 4/29/16)

725 ILCS 5/113-3.1 authorizes the trial court to order the defendant to pay a reasonable sum to reimburse the county or State for the cost of court-appointed counsel. Before ordering such payment, the court must conduct a hearing on the courts own motion or on the motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of the final order disposing of the case at the trial level. In that hearing, the trial court must consider the affidavit prepared by the defendant concerning his assets and liabilities and any other information pertaining to the defendant's financial circumstances.

On appeal, defendant argued that the trial court erred by ordering a public defender fee without providing notice or conducting a hearing to determine defendant's ability to pay. The State conceded the issue and argued that the cause should be remanded for a hearing on the appropriateness of a public defender fee.

Although neither party raised the issue, the court found on its own motion that it lacked jurisdiction to consider the issue. Defendant filed the notice of appeal December 19, 2012, and indicated that he was appealing the judgement that was entered December 17, 2012. Because the public defender fee was not ordered until nearly two months later, and defendant failed to file an amended notice of appeal, the court concluded that it lacked jurisdiction to consider the public defender fee.

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

DISORDERLY, ESCAPE, RESISTING & OBSTRUCTING OFFENSES

§16-1(a)

People v. Gharrett, 2016 IL App (4th) 140315 (No. 4-14-0315, 4/27/16)

720 ILCS 5/12C-30(b)(i) provides that a person who is 21 or older commits the offense of contributing to the criminal delinquency of a minor where, with intent to promote or facilitate the commission of an offense, he or she solicits, compels or directs a minor who is under the age of 17 in the commission of a felony. The court concluded that video evidence did not establish that the defendant told a two-year-old child to run into an office from which items were subsequently found to be missing where the video showed only that defendant leaned toward the child before she ran into the office.

The court noted that the child had previously wandered around the building, which was a Secretary of State facility, without any prompting from the defendant. In fact, the child “seemed to defy any commands to stay near” her parents. Under these circumstances, the evidence was insufficient to prove beyond a reasonable doubt that the child ran to the office area at defendant’s direction.

Defendant’s conviction for contributing to the criminal delinquency of a minor was reversed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

REASONABLE DOUBT

§42-1

People v. Gharrett, 2016 IL App (4th) 140315 (No. 4-14-0315, 4/27/16)

1. When reviewing a challenge to the sufficiency of the evidence, the reviewing court determines whether, considering the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The trier of fact is in the best position to judge the credibility of witnesses, and the reviewing court must follow any reasonable inferences from the record which favor the prosecution. A conviction will be reversed only when the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of guilt.

2. 720 ILCS 5/12C-30(b)(i) provides that a person who is 21 or older commits the offense of contributing to the criminal delinquency of a minor where, with intent to promote or facilitate the commission of an offense, he or she solicits, compels or directs a minor who is under the age of 17 in the commission of a felony. The court concluded that video evidence did not establish that the defendant told a two-year-old child to run into an office from which items were subsequently found to be missing where the video showed only that defendant leaned toward the child before she ran into the office.

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Defendant’s conviction for contributing to the criminal delinquency of a minor was reversed.

(Defendant was represented by Assistant Defender Ryan Wilson, Springfield.)

SENTENCING

§45-7(b)

People v. Hible, 2016 IL App (4th) 131096 (No. 4-13-1096, 4/26/16)

1. Under Illinois statutory law, fines levied by the circuit clerk are void. In **People v. Castleberry**, 2015 IL 116916, the Supreme Court abolished the “void sentence rule,” which held that any judgment which failed to conform to a statutory requirement had been entered without jurisdiction and was therefore void.

Here, the court concluded that **Castleberry** has no effect on the rule that fines imposed by the circuit clerk are void. The rule concerning circuit clerks is based on the clerk’s lack of statutory authority, and not the issue of court jurisdiction that was at issue in **Castleberry**. In other words, the circuit clerk’s authority, or lack thereof, is not based on the Illinois Constitution’s grant of jurisdiction to courts.

2. Thus, the clerk’s entry of fines is void even after **Castleberry**. Because void judgments can be challenged in a §2-1401 petition beyond the two-year-statute of limitations during which such petitions generally must be filed, the court had jurisdiction to reach the improper imposition of fines although the issue was raised for the first time on appeal from the denial of a §2-1401 petition.

(Defendant was represented by Assistant Defender Erica Nichols Cook, Springfield.)

§45-10(b)

People v. Sanderson, 2016 IL App (1st) 141381 (No. 1-14-1381, 4/20/16)

A defendant is guilty of armed habitual criminal if he possesses a firearm and has been previously convicted of two or more forcible felonies. As defined by the Criminal Code, a forcible felony includes several specifically enumerated offenses, including residential burglary, or any other felony involving “the use or threat of physical force or violence.” 720 ILCS 5/2-8.

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Second, since the State presented no evidence about the circumstances of defendant's prior conviction, there was no showing that defendant contemplated the use of force in this particular offense.

The court reversed defendant's conviction for armed habitual criminal.

(Defendant was represented by Assistant Defender Ben Wimmer, Chicago.)

TRIAL PROCEDURES

§52-3

People v. Williams, 2016 IL App (3d) 130901 (No. 3-13-0901, 4/26/16)

1. In general, the accused should not be shackled during court proceedings. **People v. Boose**, 66 Ill. 2d 261, 265, 362 N.E.2d 303 (1977). However, a defendant may be shackled where there is reason to believe that he may try to escape or that he might pose a threat to the safety of people in the courtroom, or if shackling is necessary to maintain order during the trial. Whether shackling is necessary is left to the discretion of the trial court, which should state the reasons for its decision on the record and give defense counsel a chance to respond. Although the possibility of prejudicing the jury is one factor to be considered, the reasons for forbidding shackling are not limited to trials by jury.

2. The court concluded that due process was violated where there was no indication that the trial court conducted a **Boose** analysis before ordering defendant to remain in shackles during trial. Where the evidence was closely balanced because the case was essentially a credibility contest between defendant and the complainant, the improper shackling constituted plain error.

3. The court noted a conflict in authority concerning the appropriate remedy where the defendant is improperly shackled during trial, and that some courts have approved holding a retrospective **Boose** hearing. The court found that such a hearing would be inappropriate here, however, because the court failed to conduct any analysis of the necessity for shackling and appeared to have a blanket policy of shackling. In addition, by granting defendant's motion to remove his shackles while testifying, the trial court impliedly decided that the shackles were unnecessary.

(Defendant was represented by Assistant Defender Sean Conley, Ottawa.)