2021 IL App (2d) 180809-U
No. 2-18-0809
Order filed October 20, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 16-CF-408
ISABEL ZARATE-GONZALEZ,	)	Honorable James S. Cowlin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Appeal dismissed pursuant to the fugitive dismissal rule.

¶ 2 On August 18, 2018, defendant, Isabel Zarate-Gonzalez, was convicted *in absentia* of domestic battery, aggravated domestic battery, and aggravated assault. The trial court found that defendant voluntarily fled the country "to perhaps avoid trial." On September 28, 2018, defendant was sentenced *in absentia* to four years' imprisonment in the Illinois Department of Corrections. The state appellate defender filed a timely notice of appeal on defendant's behalf. The notice of

appeal listed defendant's address as "unknown." To date, defendant's whereabouts are unknown, and he remains a fugitive from justice. We dismiss the appeal.

¶ 3 I. BACKGROUND

¶ 4 On April 28, 2016, defendant was charged with five counts stemming from an allegation of domestic violence against his wife occurring on April 25, 2016: (1) criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2016); (2) aggravated domestic battery (*id*. § 12-3.3(a-5)); (3) domestic battery (bodily harm) (*id*. § 12-3.2(a)(1)); (4) domestic battery (insulting or provoking contact) (*id*. § 12-3.2(a)(2)); and (5) aggravated assault (*id*. § 12-2(c)(1)). Defendant was represented by private counsel throughout the proceedings.

¶ 5 On March 20, 2018, defendant was present in court with counsel and a Spanish language interpreter. The parties agreed to schedule the jury trial for July 30, 2018. Defendant was admonished about trial *in absentia*. Specifically, the court informed defendant that if he failed to appear for trial, it "would constitute a waiver of your right to confront the witnesses against you and a trial and sentencing may be had in your absence." Defendant confirmed that he understood the admonition. The written order reflected that trial would occur on July 30, 2018, and that "[d]efendant [was] advised of trial and sentencing *in absentia*."

¶ 6 On July 5, 2018, which was the scheduled date for the court to hear pretrial motions, defendant failed to appear. Defendant's counsel informed the court that he had been unable to reach defendant for the past several weeks. Counsel also relayed that he was representing defendant in an immigration case, but that defendant failed to appear for the immigration proceedings, and an order of removal was entered. He stated that, "at this point, I do not know his whereabouts," and he did "not have any contact with [his] client." The court issued a bench warrant and set bond in the amount of $50,000.

¶ 7 On July 16, 2018, at the next court date, defendant again failed to appear. Defendant's counsel advised the court that he "had no contact with [defendant]."

¶ 8 On July 18, 2018, in accord with its motion to proceed to trial *in absentia*, the State asserted that it received a letter from a deportation officer indicating that defendant was in Mexico and had personally appeared on June 4, 2018, at the U.S. Embassy in Mexico City, Mexico, where he verified his departure from the United States. The State also asserted that the victim in this case received several text messages and phone calls from an unknown phone number in late May 2018, and that the text messages were sent from someone who identified himself as defendant and who stated that he was "back in Mexico." The State argued that defendant fled to Mexico of his own volition in order to avoid trial. Defendant's counsel stated that he did not know whether defendant was in Mexico, and he had no indication that federal immigration officials "actually removed him" from the country. Counsel acknowledged that his client's order of removal was entered *in absentia*.

¶ 9 The trial court granted the State's motion to try defendant *in absentia*. The court explained that it "was interested to know if [defendant] was removed by the actual deportation," and it stated that "everything that has been told to the court so far, although [defendant] was involved in immigration proceedings, he's left on his own accord." The judge stated that "[i]t appears that it's [defendant], himself, who has taken the action to perhaps avoid trial. He might show up on that day. That's the ultimate test, really." It continued that "if [defendant] does not show [at trial], I plan on allowing the State to proceed."

¶ 10 On July 30, 2018, defendant failed to appear for trial, and the case proceeded *in absentia*. The jury returned four guilty verdicts: aggravated domestic battery, domestic battery (bodily harm), domestic battery (insulting or provoking contact), and aggravated assault. On September

28, 2018, defendant was sentenced *in absentia* to four years' imprisonment in the Illinois Department of Corrections for aggravated domestic battery to be followed by four years of mandatory supervised release, and a concurrent term of 364 days for aggravated assault.

¶ 11 On October 3, 2018, the appellate defender filed a timely notice of appeal on defendant's behalf. The notice of appeal states that defendant's address is unknown.

¶ 12 II. ANALYSIS

¶ 13 Subsequent to the filing of an opening brief on defendant's behalf by an assistant appellate defender, the State moved to dismiss the appeal based upon the fugitive dismissal rule. The State requested that we exercise our discretion to dismiss the appeal unless and until defendant returns to the jurisdiction because defendant voluntarily fled the court's jurisdiction two months before trial, the warrant for defendant's arrest was still in effect, and defendant remained a fugitive throughout the appeal. The appellate defender filed an objection to the motion, arguing that (1) we have jurisdiction over the appeal, (2) we lack discretion to dismiss the appeal "notwithstanding [defendant's] flight" because he has a fundamental right to appeal under the Illinois Constitution, and (3) alternatively, if we find that we have discretion to dismiss the appeal, we should decline to exercise that discretion and resolve the appeal on its merits. We took the motion with the case. In its response brief, the State renews its request that we exercise our discretion to dismiss defendant's appeal unless and until he returns.

¶ 14 It is well established that an appellate court may dismiss the appeal of a criminal defendant who is a fugitive from justice during the pendency of the appeal. *People v. Wicklund*, 363 Ill. App. 3d 1045, 1047 (2006). This discretion has been called the "fugitive dismissal rule," and it was first exercised nearly 145 years ago by the United States Supreme Court in *Smith v. United States*, 94 U.S. 97 (1876). There, the defendant escaped from custody and was a fugitive when his petition

arose before the Court. The Court dismissed the petition "unless the plaintiff in error submit himself to the jurisdiction of the court below," reasoning that there was no assurance that any judgment it issued would be enforceable. *Id*. at 97-98; *People v. Parada*, 2020 IL App (1st) 161987, ¶ 24. The Court extended the rule to the states in *Allen v. Georgia*, 166 U.S. 138, 142 (1897). Illinois courts likewise "adhere to the century-old rule that an appellate court has the discretionary power to refuse to hear a fugitive's appeal unless and until the fugitive returns to the jurisdiction." *People v. Partee*, 125 Ill. 2d 24, 37 (1988).

¶ 15 Courts have supported the use of the fugitive dismissal rule based on several rationales, including: (1) the importance of an enforceable judgment, (2) the existence of waiver or abandonment based on flight, (3) the advancement of the efficient operation of courts by deterring escape, and (4) the avoidance of prejudice to the government. *Parada*, 2020 IL App (1st) 161987, ¶ 24 (citing *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239-42 (1993)). An additional rationale for dismissal of a fugitive defendant's appeal has been called the "disentitlement" theory, where a defendant's flight from the jurisdiction during the pendency of the appeal is construed as waiver or abandonment of his or her claims and "disentitles the defendant to call upon the resources of the Court for determination of his claims." *Wicklund*, 363 Ill. App. 3d at 1047-48 (quoting *Molinaro v. New Jersey*, 396 U.S. 365, 366 (1970)).

¶ 16 Dismissal under the fugitive dismissal rule is "a dismissal without prejudice, subject to reinstatement upon proper motion." *People v. Vasquez*, 338 Ill. App. 3d 546, 552 (2003). Where such dismissal is ordered, our jurisdiction is deferred, rather than terminated, until the fugitive defendant returns to the jurisdiction and petitions the appellate court for reinstatement of the appeal. *Id.*

¶ 17 We agree with the State that dismissal of defendant's appeal is appropriate. As noted, the report of proceedings from March 20, 2018, which was the last time defendant was present in court, demonstrates that the parties agreed to schedule trial for July 30, 2018, and the court admonished defendant that he could be tried *in absentia* if he failed to appear. The admonition was communicated to defendant through a Spanish interpreter, and defendant answered that he understood it. The court's written order from March 20, 2018, likewise, confirms that defendant was present in court on March 20, 2018, that the parties agreed to the trial date, and that defendant was admonished that trial and sentencing may occur if he failed to appear. Accordingly, there is no doubt that defendant was aware of the date of his jury trial and of the possibility that he could be tried and sentenced *in absentia*.

¶ 18 Thereafter, defendant vanished from the court proceedings. Defendant's trial counsel was unable to reach him from June 2018 onward, and he was absent from court beginning in July 2018 and beyond. Specifically, defendant failed to appear in court on July 5, 2018, for hearing on pretrial motions, when the court issued a bench warrant for his arrest for failure to appear. Defendant did not appear in court for other pretrial matters on July 16 and July 18, 2018. In granting the State's motion to try defendant *in absentia*, the circuit court stated that defendant voluntarily fled the court's jurisdiction "to perhaps avoid trial" and that, even though there was an immigration case pending against him, there was no indication that immigration authorities had removed defendant from the country. Rather, defendant fled "on his own accord." Defendant then failed to appear for his jury trial on July 30, 2018, where he was tried and convicted *in absentia*, as well as failed to appear for sentencing on September 28, 2018.

¶ 19 As the State notes in its motion to dismiss, defendant is not currently in the Illinois Department of Corrections or the McHenry County Jail, and the July 5, 2018, warrant for

defendant's arrest remains outstanding. Other than the period of time he spent in jail while he awaited trial, defendant has not served any portion of his four-year sentence for aggravated domestic battery and aggravated assault. The appellate defender, in its objection to the State's motion, acknowledges defendant's "apparent flight from this Court's jurisdiction" as well as defendant's "apparent absence during the course of the appeal." After we ordered that the State's motion to dismiss be taken with the case, to date, no document has been filed in the appellate court suggesting that defendant's counsel has spoken with defendant, that defendant has returned to the jurisdiction, or that defendant is aware of the outcome of his trial and wishes to pursue this appeal. Defendant's whereabouts are unknown, and he remains a fugitive during the pendency of the instant appeal. "Reviewing courts of Illinois have traditionally and consistently held that a defendant desirous of prosecuting a criminal appeal should be in actual control or custody of the court or in constructive control by virtue of bail." *People v. Bermundez*, 14 Ill. App. 3d 86, 87 (1973). This is so because "[p]ersons appealing to this court for redress should stand in an attitude to accept and abide the result, whatever that may be." *Id.* (quoting *People v. Estep*, 413 Ill. 437, 440 (1952)). Under these circumstances, the exercise of our discretionary authority to dismiss the appeal is warranted.

¶ 20 Defendant raises two primary arguments against dismissal, both of which are unpersuasive. First, he argues that we should decline to dismiss the appeal because we have jurisdiction to hear it. This point appears to be a strawman argument because the State offers no argument in its motion or response brief that defendant's flight from the jurisdiction deprives us of jurisdiction to consider the merits of the appeal. Indeed, the State makes clear in its response brief that it does "not contest that this Court has jurisdiction to hear defendant's appeal as his notice of appeal was timely filed by his trial counsel." See *Partee*, 125 Ill. 2d at 29-30 (noting that the appellate court

has jurisdiction over an absent defendant's timely filed appeal because a criminal appeal is perfected by filing a notice of appeal, and no other step is jurisdictional). Because defendant's counsel filed on his behalf a notice of appeal pursuant to Supreme Court Rule 606 (eff. July 1, 2017) within 30 days of the sentencing order, there is no dispute that we have jurisdiction over the appeal.

¶ 21 Defendant's second argument is that we lack discretion to dismiss the appeal because his notice of appeal complied with applicable supreme court rules, such that he has a fundamental right to appeal his conviction under the Illinois Constitution. He maintains that, absent waiver, "defendants cannot lose their constitutional right to appeal due to their fugitive status." This argument fails because it is contrary to Illinois law. As we have stated, our supreme court has made clear that Illinois courts adhere to the century-old rule that an appellate court has the discretionary power to refuse to hear a fugitive's appeal unless and until the fugitive returns to the jurisdiction. *Partee*, 125 Ill. 2d at 37; *People v. Taylor*, 247 Ill. App. 3d 321, 324 (1993). Indeed, relying on *Partee*, the appellate court recently observed that it is "well established that the appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Parada*, 2020 IL App (1st) 161987, ¶ 24. Following *Partee*, the appellate court has on many occasions dismissed the appeals of a fugitive defendant. See, *e.g.*, *Wicklund*, 363 Ill. App. 3d at 1047-48; *Taylor*, 247 Ill. App. 3d 321, 325 (1993). Defendant acknowledges that our supreme court, in *Partee*, expressly recognized our well-established discretion to dismiss the appeal of an absent defendant, but he argues that we "should carve a different path for Illinois" because the rule "is premised on federal law where defendants do not possess *** a constitutional right to appeal." Contrary to defendant's suggestion, our supreme court's comment in *Partee* effectively precludes us from "carv[ing] a different path for Illinois." See *Yakich v. Aulds*, 2019

IL 123667, ¶ 13 (observing that, although the appellate court is "free to question the continued validity" of supreme court precedent, "it lacks the authority to declare that precedent a dead letter"). In any event, nothing about our resolution of the instant appeal—dismissal without prejudice—deprives defendant of his right to appeal his conviction. Dismissal does not terminate our jurisdiction over the appeal, but rather, our jurisdiction is deferred until defendant returns and petitions the appellate court for reinstatement. "[A] defendant whose timely filed direct appeal is dismissed under the fugitive rule does not waive the right to a direct review, but may petition for reinstatement of his appeal upon his return." *Vasquez*, 339 Ill. App. 3d at 553. Defendant's right to appeal is well preserved because, if and when he returns to the jurisdiction, he may file a petition with this court for reinstatement of the appeal. See *id. at* 552 (holding that dismissal under the fugitive dismissal rule is without prejudice and subject to reinstatement upon motion).

¶ 22 In a related argument, defendant contends that we lack discretion to dismiss the appeal because "courts of review must reach fundamental constitutional issues effecting [*sic*] the defendant's right to a fair trial, even in instances where the defendant has apparently voluntarily absented himself." He principally relies on *People v. Dupree*, 339 Ill. App. 3d 512 (2003), to support his argument that, because his appeal raises fundamental constitutional issues, "defendant's absence is irrelevant, and the Appellate Court must reach the issue."

¶ 23 In *Dupree*, the appellate court considered whether a defendant tried *in absenti*a could, upon his return to the jurisdiction, obtain review of his underlying conviction and sentence through section 115-4.1(g) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(g) (West 2000)), when he failed to establish that his absence at trial was not his fault and due to circumstances beyond his control. *Dupree*, 339 Ill. App. 3d at 513.

¶ 24 Pursuant to section 115-4.1(e) of the Code (725 ILCS 5/15-4.1(e) (West 2018)), when a defendant sentenced or convicted *in absentia* later appears before the court and "establish[es] that his failure to appear in court was both without his fault and due to circumstances beyond his control," the circuit court must grant a new trial or new sentencing hearing. *Id*. Further, notice of the hearing requesting a new trial or sentencing hearing must be provided to the State's Attorney, and the State may present evidence at the proceeding. *Id*. If, after the hearing, the circuit court denies a defendant's section 115-4.1(e) motion, the defendant "may file a notice of appeal therefrom, [and] "[s]uch notice of appeal may also include a request for review of the judgment and sentence not vacated by the trial court." *Id*. § 115-4.1(g). A motion filed under section 115-4.1(e) of the Code is "akin to a collateral attack upon a final judgment" (*Partee*, 125 Ill. 2d at 35), and it is "independent of and has no effect on a direct appeal under Rule 606." *Dupree*, 339 Ill. App. 3d at 518.

¶ 25 In allowing the defendant to appeal his underlying conviction and sentence, the *Dupree* court concluded that section 115-4.1(g) provides the appellate court with discretion to decline to review the merits of the appeal "unless issues of fundamental fairness and due process are apparent." *Id.* at 518. In other words, "[t]he language [of section 115-4.1(g)] does not compel the appellate court to undertake such a review unless *** the defendant raises procedural issues that implicate fundamental fairness and due process." *Id*. at 519.

¶ 26 *Dupree* is distinguishable. Defendant has not, as was the case in *Dupree*, requested a hearing under section 115-4.1(e) of the Code, nor could he, because he has not "appear[ed] before the court" to do so. Because defendant voluntarily fled the jurisdiction prior to trial and remains a fugitive from justice even during the appellate process, the rationales that courts have used to support the dismissal of an absent defendant's appeal, as outlined above, apply to the instant

matter, and convince us that dismissal is appropriate unless and until defendant returns to the jurisdiction and petitions for reinstatement. *Dupree* offers no suggestion that we lack discretion to dismiss a direct appeal under Rule 606 from a fugitive defendant where his counsel raises an alleged constitutional error. Rather, the *Dupree* court aptly stated, "a timely direct notice of appeal may be filed on a fugitive defendant's behalf *** [b]ut the appellate court retains discretion not to grant relief if the defendant remains a fugitive." *Dupree*, 339 Ill. App. 3d at 518. Such is the case here, and we choose to exercise that well-established discretion. Because we dismiss defendant's appeal without prejudice, he may file a petition in the appellate court for reinstatement of the appeal if and when he returns to the jurisdiction. See *Vasquez*, 339 Ill. App. 3d at 552 (dismissal under the fugitive dismissal rule is without prejudice and subject to reinstatement upon motion).

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, and pursuant to the long-established fugitive dismissal rule, we dismiss without prejudice defendant's appeal.

¶ 29 Appeal dismissed.