

THIRD DIVISION  
July 13, 2011

2011 IL App (1st) 091536-U  
No. 1-09-1536

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 252
	)	
TOMMY JOHNSON,	)	Honorable
	)	Arthur Hill,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE STEELE delivered the judgment of the court.  
Presiding Justice Quinn and Justice Neville concurred in the judgment.

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**O R D E R**

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*HELD:* The trial court did not abuse its discretion in sentencing defendant when the court relied on the proper factors in mitigation and aggravation and the sentence was within the statutory range. Defendant is entitled to presentence custody credit; the DNA analysis fee may be imposed only upon unregistered defendants.

¶ 1 After a jury trial, defendant Tommy Johnson was convicted of the possession of a controlled substance and sentenced to six years in prison. On appeal, he contends that his sentence is

excessive because the trial court improperly relied on its personal belief that he had been selling narcotics. He also contends the court failed to award him presentence custody credit and improperly imposed the \$200 DNA analysis fee. We affirm defendant's sentence and correct the fines and fees order.<sup>1</sup>

¶ 2 Defendant was charged by indictment with the possession of a controlled substance with the intent to deliver. At trial, Officer Daniel Warren testified that the 700 block of North Christina in Chicago was known for "open air drug markets." Warren explained that "open air drug markets" are those areas in the city where drugs are sold openly on the public way.

¶ 3 Warren saw defendant standing in a semicircle facing approximately eight people. On the right side of defendant, two people were holding money in their outstretched hands. Although it appeared that defendant was handing out objects, Warren did not see him receive any cash. As Warren drove up, the people facing him began to walk away. When defendant looked over his shoulder, Warren made eye contact with him. Defendant then "took off" and Warren chased him on foot. During the chase, Warren saw

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<sup>1</sup>Although defendant initially contended that the trial court failed to strictly comply with Supreme Court Rule 431(b) (eff. May 1, 2007), he acknowledges in his reply brief that his arguments on appeal are foreclosed by *People v. Thompson*, 238 Ill. 2d 598 (2010), and withdraws that issue.

defendant drop two metallic objects, lost sight of defendant twice, and observed defendant reach over a fence. Ultimately, defendant complied with Warren's instructions to lie on the ground.

¶ 4 As Warren handcuffed defendant, defendant released another metallic object from his right hand. Warren believed this object contained narcotics. Warren subsequently inventoried this item as well as the two metallic objects from the sidewalk.

¶ 5 Officer Caro testified that he recovered 13 tinfoil packages from the area where Warren indicated defendant had reached over a fence. These items were inventoried.

¶ 6 Lenetta Watson, from the Police Crime Lab, testified that the items inventoried in this case tested positive for heroin.

¶ 7 At the conclusion of the State's case the defense made a motion for a directed verdict, which was denied. The defense then rested. The jury found defendant guilty of the lesser-included charge of the possession of a controlled substance.

¶ 8 At sentencing, the court reviewed defendant's criminal history and stated that defendant had "spent a good amount of time behind bars" since 1988. Defendant had been convicted of, *inter alia*, burglary, aggravated criminal sexual assault, and the possession of a controlled substance. The most recent possession convictions in September 2004, and November 2006, made him eligible for an extended term of imprisonment. The court noted

that even after his previous convictions, defendant was still "participating in selling in an open air drug market." In sentencing defendant to an extended term of six years in prison, the court indicated it had considered all the factors in aggravation and mitigation.

¶ 9 The defense immediately made an oral motion to reconsider, as defendant was not observed exchanging money with anyone. The court responded that its comments regarding the drug market "were conceptual in nature." In denying the motion, the court stated that although no one saw "items exchanging hands," defendant was at the drug market taking part in some sort of transaction.

¶ 10 On appeal, defendant first contends that his six-year sentence is excessive because the trial court improperly relied on its own conclusion that defendant was selling narcotics when he was only convicted of the possession of a controlled substance.

¶ 11 A trial court has broad discretion in determining an appropriate sentence and a reviewing court will disturb its determination only when the court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 447-48 (2005); *People v. Snyder*, 403 Ill. App. 3d 637, 640 (2010), *petition for leave to appeal allowed*, No. 111382 (Ill. Jan. 26, 2011) (the trial court is in the best position to create a sentence that balances the protection of society with a defendant's rehabilitation). A

sentence within the statutory range will not be found excessive unless it varies greatly with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Snyder*, 403 Ill. App. 3d at 640. The trial court must base its sentencing decision on the circumstances of a particular case and may consider, among other factors, the defendant's credibility, demeanor, and habits. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). ¶ 12 When reviewing the propriety of a particular sentence, this court cannot substitute its judgment for that of the trial court simply because we would weigh the sentencing factors differently. *Fern*, 189 Ill. 2d at 53. We consider the record as a whole, rather than a few words or phrases, when determining whether the trial court relied on the proper factors in aggravation and mitigation when sentencing a defendant. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 13 Here, defendant was convicted of a Class 4 felony and sentenced to an extended term of six years in prison (see 730 ILCS 5/5-8-2(a)(6) (West 2006)). During the hearing, the court stated that it had reviewed defendant's criminal history, which dated to 1988, and contained convictions for, among other felonies, burglary, aggravated criminal sexual assault, and possession of a controlled substance. See 730 ILCS 5/5-5-3.2(a)(3) (West 2006) (defendant's history of prior criminal activity is a statutory aggravating factor that can be used to

determine a prison term). The court also considered the presentence report and defendant's statement. Ultimately, the court determined that because defendant's most recent convictions were drug related and in this case he was "participating in selling in an open air drug market," a substantial sentence was required to protect the community.

¶ 14 This court rejects defendant's argument that the court made a finding at sentencing, that defendant actually sold narcotics, which was unsupported by the jury's verdict. While the trial court initially made a comment regarding defendant's participation in sales at the open air drug market, it immediately clarified its remarks by stating that although no items changed hands, defendant was present at a drug market, some sort of transaction took place, and defendant was ultimately convicted of possession. Here, the trial court's comments, taken as a whole (*Dowding*, 388 Ill. App. 3d at 943), indicate that the court did not make a finding contrary to the jury's verdict and was aware that defendant had been convicted of possession. Accordingly, there was no abuse of discretion when the court, relying on defendant's criminal history and a desire to protect the community, sentenced defendant to six years in prison (see *Snyder*, 403 Ill. App. 3d at 640).

¶ 15 Defendant next contends that the trial court failed to award him presentence custody credit and improperly imposed the \$200

DNA analysis fee. This court reviews the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). ¶ 16 Defendant contends, and the State concedes, that he is entitled to a \$5 per day credit for each of the 548 days he was in custody before sentencing, for a total of \$2,740. See 725 ILCS 5/110-14(a) (West 2006). Here, defendant was subject to a \$500 assessment pursuant to section 411.2 of the Controlled Substances Act (see 720 ILCS 570/411.2 (West 2006)). This assessment may be satisfied by the \$5 per day presentence custody credit. See *People v. Winford*, 383 Ill. App. 3d 1, 7 (2008). This court therefore orders that the \$500 Controlled Substances Assessment be offset by defendant's presentence custody credit. See 725 ILCS 5/110-14(a) (West 2006) (in no case shall the amount credited exceed the amount of the fine).

¶ 17 Defendant next argues that the trial court improperly imposed a \$200 DNA analysis fee when he had previously submitted DNA for analysis. Defendant attached a State Police DNA Indexing Lab Report dated November 15, 1995, to his brief and asks this court to take judicial notice of this document. See *People v. Mann*, 341 Ill. App. 3d 832, 835 (2003) (a reviewing court may take judicial notice of factual evidence when those facts are capable of immediate and accurate demonstration by a review of easily accessible sources of indisputable accuracy); *People v. Peterson*, 372 Ill. App. 3d 1010, 1019 (2007) (taking judicial

notice of Department of Corrections records because they are public documents). Accordingly, this court takes judicial notice that defendant has previously submitted a DNA sample and is registered in the database.

¶ 18 Although the State argues that defendant has forfeited this issue by failing to raise it in a postsentencing motion, "[a] challenge to an alleged void order is not subject to forfeiture." *People v. Marshall*, No. 110765, slip op. at 14 (Ill. May 19, 2011).

¶ 19 Our supreme court's decision in *People v. Marshall*, No. 110765 (Ill. May 19, 2011), is controlling. In *Marshall*, the court held that section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)), "authorizes a trial court to order the taking, analysis and indexing of a qualifying offender's DNA, and the payment of the analysis fee only where that defendant is not currently registered in the DNA database." *Marshall*, slip op. at 15.

¶ 20 Here, because defendant is currently registered in the DNA database, the trial court was not authorized to order another sample taken and another fee assessed. *Marshall*, slip op. at 15. Thus, the \$200 DNA analysis fee must be vacated.

¶ 21 Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we order that the fines and fees order be corrected to reflect \$2,740 in presentence custody credit limited to

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offsetting the \$500 Controlled Substances Assessment and the vacation of the \$200 DNA analysis fee. We affirm the judgment of the trial court in all other aspects.

¶ 22 Affirmed; fines and fees order corrected.