

and the \$5 court system fee was vacated because defendant was not convicted under the Illinois Vehicle Code.

¶ 1 After a jury trial, defendant Larry Hutton was convicted of burglary and sentenced as a Class X offender to 16 years in prison. On appeal, defendant contends: (1) his sentence was excessive; (2) the mittimus must be corrected to reflect the correct number of days of presentence custody credit; and (3) various fines and fees must be vacated. We vacate three of the contested fees and affirm the judgment in all other respects.

¶ 2 Defendant and codefendant Michael Green, who is not party to this appeal, were charged by indictment with two counts of burglary. A plea conference was held on January 26, 2009. After, the trial court explained to defendant:

"You do have 10 prior felony convictions. This is a Class 2 offense. *** [B]ecause of your prior Class 2 convictions, if you are found guilty of the offense of burglary, your mandatory Class X sentence is 6 to 30 years in the Illinois Department of Corrections.

The offer today was for 8 and a half years. Do you choose to accept that offer?"

Defendant declined the offer and the trial commenced.

¶ 3 The evidence at trial established that around 12:30 a.m. on August 23, 2007, Jose Chavez saw defendant and Green going in and out of the back door of a residential building and parking

garage at 4646 North Winthrop Avenue. Chavez also saw defendant pick up a rock, wrap it in a rag and hand it to Green before both reentered the building, shortly after which Chavez heard the sound of something breaking. Chavez called the building manager, who called the police. The police arrived and arrested defendant and Green. The investigation revealed that a car that was parked in the garage had been broken into using a brick to shatter the rear windshield. Additionally, the front door to one of the unoccupied units in the building had been damaged and the glass portion of the unit's back door had been broken using a bike lock, which was found on the floor of the unit. The jury found defendant guilty of two counts of burglary.

¶ 4 Defendant's sentencing hearing was held on June 10, 2009. In aggravation, the State focused on defendant's criminal history and in particular, that defendant had received prison terms of 8 years for burglary in 2001, 10 years for aggravated battery and attempted armed robbery in 1988, and 3 years for burglary in 1985. Additionally, defendant had a retail theft conviction in 2004, 2005, 2006 and 2007. Finally, the State requested a substantial sentence.

¶ 5 In mitigation, defense counsel explained that much of defendant's criminal history was due to drug and alcohol abuse. He highlighted that defendant was 50 years old, had graduated from

high school, had earned an associate's degree and was a few hours short of completing a bachelor of science degree.

¶ 6 The trial court gave defendant an opportunity to speak, and defendant explained that he was trying to stop drinking. He said he was not the initiator of the crime and was just following along. Defendant also said he was suffering from poor health.

¶ 7 In sentencing defendant, the court observed that defendant had a significant criminal history and had been in a drug and alcohol treatment center just two weeks before he committed the current burglary. The court explained:

"You have been in the penitentiary for ten years, eight years, three years over and over through your whole life.

In less than two weeks that you get out of [the treatment center], you're back there committing another burglary. So you have been given opportunities to try to better yourself and you keep going back to crime.

You involve going into people's autos, into people's garages, into people's home, and you have aggravated batteries. You have crimes of violence. It's not just simple things. These

are very serious offenses. You have ten prior felony convictions.

You say that you have had a good childhood, that you did not have any abuse and neglect, that you have a great mother. *** You had an education. You got A's and graduated high school. You went onto [sic] get an associate's degree. Then you are just a few hours short of going to college. You made bad choices.

You have wasted your whole life. You could have had - used your education, used the brains that you had in a positive, contributing way instead of going into hurting people, taking people's property, committing crime after crime."

The trial court sentenced defendant as a Class X offender to two concurrent terms of 16 years in prison for two burglary convictions. Defendant was given 657 days of presentence custody credit and assessed various fines and fees.

¶ 8 On July 17, 2009, the trial court denied defendant's motion to reconsider his sentence.

¶ 9 On appeal, defendant first contends that his 16-year prison sentence is excessive. Specifically, defendant maintains that the trial court improperly punished him for exercising his right to a jury trial where the court originally offered a sentence of eight and a half years during pretrial plea negotiations and heard no additional aggravating evidence at trial.

¶ 10 Where the trial court imposes a sentence within the statutorily permissible range, a reviewing court will disturb the sentence only upon an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010); *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). However, a trial court may not punish a defendant for exercising his constitutional right to trial by imposing a heavier sentence. *People v. Carroll*, 260 Ill. App. 3d 319, 347-48, citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962). Nonetheless, the fact that a defendant received a greater sentence after trial than that which he was offered during plea bargaining is not sufficient to prove his sentence was imposed as a punishment; the evidence in the record must clearly show the trial court imposed the greater sentence as punishment for demanding a trial. *People v. Perry*, 47 Ill. 2d 402, 408-09 (1971); *Carroll*, 260 Ill. App. 3d at 348-49.

¶ 11 In this case, the record shows that just before trial began, defendant turned down a plea offer of eight and a half years in prison. At the sentencing hearing, the trial court heard the arguments in aggravation and mitigation and defendant was given the

opportunity to speak. In reaching its decision, the trial court clearly considered both the aggravating and mitigating factors presented. It observed that defendant had 10 prior felony convictions, including burglary and the violent offense of aggravated battery. The court then noted that despite defendant's good home life, educational background and his participation in a rehabilitation program, he continued to commit crimes. Defendant's criminal history qualified him as a Class X offender and his 16-year sentence was well within the permissible statutory range of 6 to 30 years. 730 ILCS 5/5-5-3(c)(8) (West 2006) (eligibility to be sentenced as a Class X offender); 730 ILCS 5/5-8-1(a)(3) (West 2006) (sentencing range for a Class X offender). Most importantly, the evidence in the record gives no indication that the trial court sentenced defendant to 16 years in order to punish him for exercising his right to trial. See *Carroll*, 260 Ill. App. 3d at 349 (where a defendant offered no evidence beyond the sentence itself that the trial court sentenced him to two and a half times greater a sentence than the pretrial plea offer in order to punish him for going to trial, there was no abuse of discretion); cf. *Moriarty*, 25 Ill. 2d at 566-67 (1962) (the trial court abused its discretion where it told the defendant that it added nine years to the pretrial plea offer because the defendant elected to go to trial). This court has observed:

"[T]here is nothing inherently unconstitutional in increasing a sentence after trial. *** [T]he disparity may simply reflect an inducement given to a defendant to plea bargain in exchange for a sentence less than that which is ordinarily warranted." *People v. Parsons*, 284 Ill. App. 3d 1049, 1064 (1996).

After reviewing the evidence in the record, we cannot find that the trial court abused its discretion in sentencing defendant.

¶ 12 Next, defendant asserts in his appellate brief that he is entitled to one additional day of presentence custody credit pursuant to section 5-8-7(b) of the Unified Code of Corrections (730 ILCS 5/5-8-7(b) (West 2006)), because the day of sentencing should have been counted as presentence credit. However, subsequent to defendant submitting his brief, and as defendant acknowledges in his reply brief, the Illinois Supreme Court held that the date of sentencing is not included in calculating presentence custody credit. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). Therefore, defendant correctly concedes that the mittimus accurately reflects 657 days of presentence credit.

¶ 13 Finally, defendant contends that he is entitled to have four fees vacated. First, defendant asserts, and the State correctly agrees, that he was erroneously assessed a \$20

preliminary examination fee (55 ILCS 5/4-2002.1(a) (West 2008)). Where, as here, no probable cause hearing takes place, a defendant need not pay the \$20 preliminary examination fee. *People v. Smith*, 236 Ill. 2d 162, 164 (2010).

¶ 14 Second, defendant contends that the \$200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) should be vacated because he previously submitted a DNA sample for a prior conviction and therefore he should not be required to submit another sample or pay the fee.

¶ 15 Recently, the Illinois Supreme Court held that section 5-4-3 of the Unified Code of Corrections (730 ILCS 5/5-4-3 (West 2008)) only gives the trial court the authority to order a defendant to submit a DNA sample and pay the DNA analysis fee once, when the defendant is not currently in the DNA database. *People v. Marshall*, No. 110765, slip op. at 15 (Ill. May 19, 2011). Further, in order to vacate the DNA analysis fee under *Marshall*, a defendant must show only that he was convicted of a felony after the DNA requirement went into effect on January 1, 1998. *People v. Leach*, No. 1-09-0339, slip op. at 14-15 (Ill. App. May 31, 2011). Here, the record shows that defendant was convicted of a felony on January 3, 2001. Therefore, the \$200 DNA analysis fee must be vacated. See *Marshall*, No. 110765, slip op. at 15.

¶ 16 Defendant next asserts that the \$25 court services fee (55 ILCS 5/5-1103 (West 2008)) was improperly imposed because he

was not convicted of one of the statute's enumerated offenses. The State contends that the plain language of the statute clearly intends for the fee to apply to all criminal cases. We agree with the State.

¶ 17 Section 5-1103 of the Counties Code provides that:

"A county board may enact by ordinance or resolution a court services fee dedicated to defraying court security expenses incurred by the sheriff in providing court services or for any other court services deemed necessary by the sheriff to provide for court security. *** Such fee shall be paid in civil cases by each party at the time of filing the first pleading, paper or other appearance. *** In criminal, local ordinance, county ordinance, traffic and conservation cases, such fee shall be assessed against the defendant upon *** findings of guilty, resulting in a judgment of conviction, or order of supervision, or sentence of probation without entry of judgment pursuant to [various enumerated criminal statutes.]" 55 ILCS 5/5-1103 (West 2008).

¶ 18 This court has interpreted this statute to mean that the court services fee can be assessed for any criminal conviction. *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010); *People v. Williams*, 405 Ill. App. 3d 958, 965 (2010). We reasoned that the clear purpose of the \$25 fee is to defray the costs of court security, and in light of the clear purpose, we have explicitly rejected defendant's interpretation of the wording. *Adair*, 406 Ill. App. 3d at 144-45. We see no reason to depart from the holdings in *Adair* and *Williams*, and find the \$25 court services fee was properly assessed against defendant.

¶ 19 Lastly, defendant contends, and the State agrees, that the \$5 court system fee (55 ILCS 5/5-1101(a) (West 2008)) should be vacated as it can only be assessed against defendants who violate the Illinois Vehicle Code or a similar municipal ordinance. Where, as here, defendant was not convicted of an Illinois Vehicle Code violation, he need not pay the \$5 court system fee. See *People v. Williams*, 394 Ill. App. 3d 480, 483 (2009).

¶ 20 For the foregoing reasons, we vacate the \$20 preliminary examination fee, the \$200 DNA analysis fee, the \$5 court system fee, and affirm the judgment of the trial court in all other respects.

¶ 21 Affirmed in part and vacated in part.