

2011 IL App (2d) 100557-U  
No. 2-10-0557  
Order filed December 30, 2011

**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  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-2222
	)	
TIYON E. TYSON,	)	Honorable
	)	Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

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

**ORDER**

*Held:* Defendant was not entitled to a new sentencing hearing where trial court erroneously referred to the possibility of an extended term sentence at the plea hearing, but sentenced defendant to a non-extended term and did not consider any improper factors in aggravation; defendant was entitled to a modification/reduction in the Crime Victims Assistance fine and credit against the entire amount of his fines, where the State confessed error.

¶ 1 Defendant, Tiyon E. Tyson, pleaded guilty to one count of aggravated battery of a child (720 ILCS 5/12-4.3(a),(b)(1) (West 2008)), a Class X felony. At the plea hearing, the trial court admonished him that he was eligible for an extended-term sentence of up to 60 years in prison. However, the court later sentenced him to a nonextended term of 18 years' imprisonment and

imposed various fines. Defendant appeals, contending that (1) he is entitled to a new sentencing hearing because the trial court wrongly believed that he was eligible for an extended-term sentence and this belief may have influenced his sentence; and (2) alternatively, he is entitled to a credit of \$5 per day against his fines and that we should remand the cause for the circuit clerk to recalculate the collection fee. We affirm as modified and remand.

¶2 Defendant was charged with attempted murder (720 ILCS 5/8-4(a), 9-1(a) (West 2008)) and other offenses arising from an incident on August 3, 2008. On September 15, 2009, defendant agreed to plead guilty to one count of aggravated battery of a child, in exchange for the State dismissing the other charges. There was no agreement about a sentence. The trial court told defendant that he was eligible for an extended-term sentence of up to 60 years based on the fact that the victim was less than 12 years old at the time of the offense. Defendant stated that he understood the charge and possible sentences, and was pleading guilty voluntarily.

¶3 The factual basis for the charge was that, on August 3, 2008, defendant, Dawn Sanders, and J.L. were at a bowling alley. J.L. is Sanders's son. After they left the bowling alley, defendant and Sanders got into an altercation. Defendant got into his car and drove up to Sanders and J.L., where he and Sanders continued to argue. As Sanders and J.L. walked away, defendant drove his vehicle in reverse and maneuvered into their path. Defendant's vehicle struck J.L. and Sanders, and J.L. was dragged under the vehicle. Defendant drove away. J.L. suffered three broken ribs, abrasions and contusions on his face and the side of his head, a lacerated spleen, and a laceration to his ear. He underwent surgery to remove his spleen. J.L. was 11 years old at the time of the offense.

¶4 On December 4, 2009, the trial court held a sentencing hearing. The presentence report showed that defendant had been convicted of battery and a cannabis charge, receiving conditional discharge each time.

¶ 5 Three police officers testified about domestic violence calls involving defendant. In mitigation, defendant's parents testified that they had a good relationship with their son. Diane Carrillo, defendant's mother, said that defendant, despite being diagnosed with a learning disability, was able to graduate high school and had taken classes at Triton College. Defendant was remorseful and had taken anger management and Bible study classes in jail. Defendant's father testified that defendant was taken away from his mother due to her addiction. Defendant had moved out on his own and gotten a job. He was concerned about caring for his own sons, ages three and eight.

¶ 6 Defendant's fiancée, Bithia Judah, testified that defendant had realized that what he did was wrong and that, even if he did not intend to do it, he was willing to accept responsibility. She believed that, "with the right help," he could be rehabilitated. Keva Brown, the mother of defendant's children, testified that he was a good father. He spent time with his children, provided for them financially, and attended their school activities. She admitted that defendant had hit her before, but she insisted that he had changed since his arrest.

¶ 7 Defendant also submitted letters that Sanders had written to him while he was in jail. Other family members submitted letters in mitigation as well. Documents showed that, while in jail, defendant had completed classes in anger management, relapse prevention, and Christian living. In arguing for a 20-year sentence, the prosecutor stated, "Certainly, your Honor, you can't take into consideration the child's age." The court continued the hearing for several days.

¶ 8 In the interim, defendant wrote the court a letter stating that he did not "know whether to withdraw" his plea. When the hearing resumed, the court ascertained that defendant did not actually wish to withdraw the plea. The court then sentenced him to 18 years' imprisonment. In mitigation, the court acknowledged that defendant accepted responsibility by pleading guilty, had some college education, had provided for his children, and had some difficulties growing up due to his mother's

drug addiction. In aggravation, the court noted defendant's intoxication and flight from the scene as well as his history of domestic violence.

¶ 9 Defendant moved to withdraw the plea. The court appointed the public defender, who filed a new motion to withdraw the plea or to reconsider the sentence. Private counsel then filed an appearance. He adopted the previously filed motion but filed his own certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). The trial court denied the motion and defendant appeals.

¶ 10 Defendant contends that he must receive a new sentencing hearing. He argues that the trial court's statement at the plea hearing that he was eligible for an extended-term sentence was incorrect, because the victim's age is inherent in the offense of aggravated battery of a child. While defendant acknowledges that the trial court did not actually impose an extended-term sentence, he contends that the court's incorrect belief that he was eligible for an extended term may nonetheless have affected his sentence.

¶ 11 Initially, the parties disagree about the standard of review. Defendant asserts that whether the trial court wrongly found him eligible for an extended-term sentence is a legal question that we should review *de novo*. The State responds that the ultimate question is whether defendant's sentence was proper, an issue that we traditionally review for an abuse of discretion. The State contends that, even where the trial court is alleged to have considered an improper aggravating factor, the ultimate issue is still whether the court abused its discretion in sentencing. We agree with the State.

¶ 12 In *People v. Bailey*, 409 Ill. App. 3d 574 (2011), the court rejected an argument nearly identical to defendant's here. The court held that, where a sentencing court is alleged to have considered improper factors, the ultimate issue is whether the court abused its discretion in

sentencing. *Id.* at 591. Thus, we consider whether the trial court abused its discretion in sentencing defendant to 18 years' imprisonment.

¶ 13 “It is well settled that the trial court has broad discretionary powers in imposing a sentence.” *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Thus, “the trial court’s sentencing decision is entitled to great deference.” *Id.* The trial court is granted such deference because it is generally in a better position than the reviewing court to decide on an appropriate sentence. *People v. Aleman*, 355 Ill. App. 3d 619, 626 (2005). “The trial judge has the opportunity to weigh such factors as the defendant’s credibility, demeanor, general moral character, mentality, social environment, habits, and age.” *Stacey*, 193 Ill. 2d at 209. “Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.” *Id.*

¶ 14 Defendant initially contends that an extended-term sentence would have been improper. He notes that the victim’s age is an element of aggravated battery of a child and, thus, an extended-term sentence based on the fact that the victim was less than 12 years old would be an improper double-enhancement. The State agrees that an extended-term sentence was impermissible. However, the State maintains that the record shows that the trial court considered only proper aggravating factors and, thus, remand for resentencing is not required.

¶ 15 One element of aggravated battery of a child is that the victim is under the age of 13. 720 ILCS 5/12-4.3(a) (West 2008). Aggravated battery is generally a Class 3 felony (720 ILCS 5/12-4(e)(1) (West 2008)), but aggravated battery of a child is a Class X felony (720 ILCS 5/12-4.3(b)(1) (West 2008)). Thus, the legislature provided for a higher range of penalties for a defendant who commits aggravated battery against a victim under the age of 13. The Unified Code of Corrections provides for an extended-term sentence if a defendant is convicted of a felony committed against

a person less than 12 years old. 730 ILCS 5/5-5-3.2(b)(4)(i) (West 2008). However, in *People v. White*, 114 Ill. 2d 61, 65-66 (1986), the court held that, because the legislature provided a higher penalty for persons who commit aggravated battery against a child, it is improper for the trial court to consider the victim's age as an aggravating factor in sentencing. Thus, we agree with the parties that an extended-term sentence based on the victim's age would have been improper. However, although the trial court referred to the possibility of an extended-term sentence at the plea hearing, the court did not ultimately impose an extended-term sentence. In fact, the sentence is at the exact midpoint of the 6- to-30-year nonextended range for a Class X felony. 730 ILCS 5/5-4.5-25(a) (West 2008).

¶ 16 Defendant contends that we should nevertheless remand the matter because we cannot tell from the record that the trial court did not consider the improper factor in aggravation. We disagree.

¶ 17 In *People v. Longoria*, 117 Ill. App. 3d 241 (1983), this court upheld the trial court's imposition of the maximum nonextended-term sentence where nothing in the record showed that the sentence resulted from anything other than proper consideration of the aggravating and mitigating factors. We thus did not consider the defendant's argument that the trial court might have mistakenly believed that the defendant was eligible for an extended term. *Id.* at 256; see also *People v. Bryan*, 159 Ill. App. 3d 46, 55-56 (1987); *People v. Rush*, 91 Ill. App. 3d 366, 370-71 (1980) (same). Similarly, in *People v. Kunze*, 193 Ill. App. 3d 708 (1990), the reviewing court held that resentencing was not required where the trial court mistakenly stated that the defendant was eligible for an extended-term sentence and where the prosecutor specifically corrected the court's mistake prior to sentencing. *Id.* at 727-28.

¶ 18 Here, the court explained the aggravating factors it considered, and it never mentioned the victim's age. The court specifically mentioned defendant's intoxication, his flight from the scene,

and his history of domestic violence. Defendant does not contend that any of these factors was improper. See *People v. Klinier*, 185 Ill. 2d 81, 172 (1998) (court may consider evidence of uncharged conduct if evidence is sufficiently reliable). Where the record shows “that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required.” *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). Here, nothing shows that the court considered the improper factor at all. Indeed, the court’s only reference to an extended-term sentence came at the plea hearing more than two months earlier.

¶ 19 Defendant cites *People v. Myrieckes*, 315 Ill. App. 3d 478 (2000), and *People v. Owens*, 377 Ill. App. 3d 302 (2007), but those cases are distinguishable. In *Myrieckes*, both the prosecutor and defense counsel, as well as the trial court, referred to the victims’ ages at the sentencing hearing. The prosecutor expressly argued that an extended term was available if a victim was under the age of 12. Moreover, this was factually incorrect because none of the victims was less than 12 years old (two victims were 12 years old and the other was older). *Myrieckes*, 315 Ill. App. 3d at 483. None of these factors was present here. At sentencing, the prosecutor specifically stated that the court could not consider the victim’s age. Defendant relies solely on the trial court’s statement two months before that he could have been eligible for an extended term.

¶ 20 In *Owens*, the defendant was convicted of unlawful use of a weapon. The offense was aggravated to a Class 2 felony—rather than a Class 4—because the defendant had a prior conviction of delivery of a controlled substance. At sentencing, the trial court stated that the defendant was eligible for a Class X sentence because he had been convicted of two Class 2 or greater felonies. However, one of those convictions was the same unlawful-delivery conviction that elevated the offense to a Class 2 felony. The first district held that this was an improper double-enhancement. Moreover, although the seven-year sentence that the court imposed was proper for a Class 2 felony,

the reviewing court held that remand was necessary. *Id.* at 305-06. The court relied on a prior case from that district holding that resentencing was required where the trial court relied on the wrong sentencing range. *Id.* at 305-06 (citing *People v. Brooks*, 202 Ill. App. 3d 164, 172 (1990)).

¶ 21 *Owens* involved the class of the felony for which the defendant would be sentenced (Class X versus Class 2). The present case, like *Longoria*, involves whether defendant was eligible for an extended-term sentence. Cases of the former type have tended to more readily remand for resentencing (see *People v. Wilkins*, 343 Ill. App. 3d 147, 150 (2003); *People v. Kang*, 269 Ill. App. 3d 546, 553 (1995)), even though the sentence actually imposed was in the range for the lesser-class felony (see *People v. Carmichael*, 343 Ill. App. 3d 855 (2003); *People v. Zozak*, 101 Ill. App. 3d 590, 595 (1981)). Arguably, the distinction is relevant, as a mistake about the class of the felony for which a defendant is being sentenced is more significant than a mistaken belief that a defendant is eligible for an extended term, especially where the court does not actually impose an extended term. In any event, as noted above, we are confident that the trial court's mistaken statement that defendant was eligible for an extended term did not affect the sentence it ultimately imposed.

¶ 22 Defendant next contends that he is entitled to full credit against various fines that the trial court imposed. The State confesses error.

¶ 23 A defendant incarcerated on a bailable offense is entitled to a \$5 credit toward his or her fines for each day of incarceration. 725 ILCS 5/110-14(a) (West 2008). Here, defendant was in custody for 490 days. Thus, he potentially has enough credit to satisfy \$2,450 in fines.

¶ 24 Defendant was assessed a \$10 drug court-mental health court charge. See 55 ILCS 5/5-1101(d-5) (West 2008). Although denominated a fee, this charge is actually a fine to which the \$5-per-day credit applies. *People v. Maldonado*, 402 Ill. App. 3d 411, 435-36 (2010). Defendant was also assessed \$30 for the Children's Advocacy Center. See 55 ILCS 5-1101(f-5) (West 2008). This

charge, too, is a fine subject to the credit. *People v. Jones*, 397 Ill. App. 3d 651, 660-61 (2009).

Defendant has ample credit to satisfy both fines.

¶ 25 Moreover, because defendant was assessed \$40 in fines, defendant's Violent Crime Victims Assistance Fund fine must be reduced from \$25 to \$4. The statute authorizes a \$25 fine only where no other fine is imposed. 725 ILCS 240/10(c)(1) (West 2008). Where other fines are assessed, the statute authorizes an additional fine of \$4 for each \$40 or fraction thereof assessed. 725 ILCS 240/10(b) (West 2008). Here, because defendant was assessed \$40 in other fines, the Violent Crime Victims Assistance Fund fine should have been \$4. In any event, the State confesses that the \$4 fine is completely satisfied by defendant's section 110-14 credit. Thus, we modify the judgment to reduce the Violent Crime Victims Assistance Fund fine to \$4, and we grant defendant full credit against his fines.

¶ 26 Finally, defendant notes that the circuit clerk imposed a \$160.50 collection fee. The circuit clerk may impose a delinquency charge based on the amount of unpaid assessments. 705 ILCS 105/27-2(gg) (West 2008). Given that we have reduced the amount of defendant's fines, we remand the cause to allow the circuit clerk to recalculate defendant's delinquency fee.

¶ 27 The judgment of the circuit court of Du Page County is affirmed as modified, and the cause is remanded.

¶ 28 Affirmed as modified and remanded.