

2011 IL App (2d) 100304-U  
Nos. 2-10-0304 & 2-10-0305 cons.  
Order filed September 21, 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 Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-81
	)	
BRUNO R. ZACATENCO-MEJIA	)	Honorable
	)	Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CF-1699
	)	
BRUNO R. ZACATENCO-MEJIA	)	Honorable
	)	Theodore S. Potkonjak,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.  
Justices Hudson and Birkett concurred in the judgment.

**ORDER**

*Held:* (1) The trial court did not abuse its discretion in sentencing defendant to an aggregate of nine years' imprisonment (on an aggregate 4-to-10 range) for aggravated DUI and obstructing justice, given the seriousness of defendant's conduct and his minimal prospects for rehabilitation; (2) we vacated defendant's public defender reimbursement fee and remanded the cause because the trial court had not provided the required notice and hearing on defendant's ability to pay; (3) we vacated defendant's second (and thus unauthorized) DNA analysis fee but, because the remaining fee was not a fine, denied him credit against it for his time in presentencing custody.

¶ 1 Defendant, Bruno Zacatenco-Mejia, appeals from the trial court's judgment revoking his probation for obstructing justice (720 ILCS 5/31-4 (West 2006)) and aggravated driving under the influence (625 ILCS 5/11-501(c-1)(2) (West 2006)), and sentencing him to three-and six-year consecutive terms of incarceration. He contends that the sentences were excessive, that a public defender fee must be vacated, that the trial court lacked authority to order two DNA analysis fees, and that he is entitled to credit against one such fee for time spent in custody.

¶ 2 I. BACKGROUND

¶ 3 This appeal involves two consolidated cases. In case number 07-CF-1699, Zacatenco-Mejia was charged with two counts of aggravated driving under the influence and one count of obstructing justice by giving a false name connected with offenses that occurred on May 13, 2007. In case number 08-CF-81, Zacatenco-Mejia was charged with multiple counts, including obstructing justice by giving a false name to a police officer on January 5, 2008.

¶ 4 On February 29, 2008, Zacatenco-Mejia entered negotiated guilty pleas to aggravated driving under the influence in case number 07-CF-1699, a Class 2 felony, and obstructing justice in number 08-CH-81, a Class 4 felony. The factual basis for the plea provided that, on May 13, 2007, Zacatenco-Mejia drove with a blood-alcohol content of 0.08 or more and that, on January 5, 2008, he gave a false name to officers to avoid prosecution for aggravated driving under the influence.

Zacatenco-Mejia was sentenced to concurrent terms of 24 months' probation with conditions, fines, fees, and costs.

¶ 5 On June 2, 2008, the State filed a petition to revoke probation based on Zacatenco-Mejia's failure to report to probation on two dates, enroll in treatment as directed, and comply with DNA testing. At a court conference, the court explained through an interpreter that the State had offered to recommend a three-or four-year prison term in exchange for Zacatenco-Mejia's admission to the probation violations, but he refused the offer. The court admonished Zacatenco-Mejia that he was subject to mandatory consecutive sentencing because he was on bond in case number 07-CF-1699 when he was charged in the other case, meaning that Zacatenco-Mejia was subject to an aggregate term of 10 years' incarceration. The court observed that, during the intervening months since the initial sentencing, Zacatenco-Mejia had been charged yet again with aggravated driving under the influence. The court said that, should the matter go to a sentencing hearing, Zacatenco-Mejia would probably be sentenced to the full 10 years of incarceration. Zacatenco-Mejia rejected any further negotiation with the State.

¶ 6 A revocation hearing was held and evidence was presented about Zacatenco-Mejia's failures in regard to probation. The defense argued that the problems occurred because Zacatenco-Mejia did not speak English, and the State presented evidence about the presence of an interpreter when the conditions of probation were explained to him. Zacatenco-Mejia later rejected another offer that would have modified the charges so that the sentences would not be mandated as consecutive and would have included a recommendation of seven years' incarceration.

¶ 7 At the sentencing hearing, Zacatenco-Mejia told the court through an interpreter that his family was in Mexico and that they depended on him to support them. He apologized for his mistakes and asked the court to be merciful. A presentence report showed that Zacatenco-Mejia had

multiple previous convictions of driving under the influence and that he had a history of failures to appear and probation violations. The State asked for the maximum term of 10 years' aggregate incarceration, and the defense requested probation. The court found that the State's request was reasonable, noting that Zacatenco-Mejia had a criminal history and that his conduct threatened serious harm to others, but it also observed that Zacatenco-Mejia had taken English courses and earned his GED while in jail. The court also considered the effect of incarceration on Zacatenco-Mejia's family. The court imposed a six-year sentence in case number 07-CF-1699, to run consecutively to a three-year sentence in case number 08-CF-81. A \$500 public defender fee was imposed without a hearing on Zacatenco-Mejia's ability to pay, and he was assessed a second DNA analysis fee. Motions to withdraw the plea and to reconsider the sentences were denied, and Zacatenco-Mejia appeals.

¶ 8

## II. ANALYSIS

¶ 9

### A. Excessive Sentence

¶ 10 Zacatenco-Mejia contends that his sentences were excessive.

¶ 11 “[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant.” *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id.* at 209.

¶ 12 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* "The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002).

¶ 13 Here, there is no dispute that each sentence was within the applicable statutory range. The obstructing justice charge was a Class 4 felony that carried a range of one to three years. 720 ILCS 5/31-4(d)(1) (West 2006); 730 ILCS 5/5-8-1(a)(7) (West 2006). The aggravated driving under the influence charge was a Class 2 felony with a sentencing range of three to seven years. 625 ILCS 5/11-501(d)(2) (West 2006); 730 ILCS 5/5-8-1(a)(5) (West 2006). The sentences were mandated as consecutive because Zacatenco-Mejia was on bond in case number 07-CH-1699 when he was charged in case number 08-CH-81. 730 ILCS 5/5-8-4(i) (West 2006).

¶ 14 Zacatenco-Mejia concedes that he did not follow through on his conditions of probation and that he was charged with another offense during the interim. The court properly considered the serious nature of his conduct, and the record shows a history of repeat offenses and probation violations, thus indicating a poor outlook for rehabilitation. Nevertheless, the court reduced the maximum aggregate sentence by one year based on mitigating factors. The court's determinations were appropriate, and the sentences were not an abuse of discretion.

¶ 15 B. Public Defender Fee

¶ 16 Zacatenco-Mejia next contends, and the State agrees, that the public defender fee must be vacated because it was imposed under section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2008)) without a hearing on Zacatenco-Mejia's ability to pay.

¶ 17 Section 113-3.1(a) provides:

“Whenever under either Section 113-3 of this Code or Rule 607 of the Illinois Supreme Court the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level.” 725 ILCS 5/113-3.1(a) (West 2008).

¶ 18 “[S]ection 113-3.1 requires that the trial court conduct a hearing into a defendant's financial circumstances and find an ability to pay before it may order the defendant to pay reimbursement for appointed counsel.” *People v. Love*, 177 Ill. 2d 550, 563 (1997). The hearing is required even where a cash bail bond has been posted, because the existence of a bond is not conclusive evidence of an ability to pay. *Id.* at 560-63. “The hearing must focus on the foreseeable ability of the defendant to pay reimbursement as well as the costs of the representation provided.” *Id.* at 563.

¶ 19 “The hearing must, at a minimum, provide defendant with notice that the trial court is considering imposing a payment order and give defendant an opportunity to present evidence of his ability to pay and other relevant circumstances.” *People v. Spotts*, 305 Ill. App. 3d 702, 703-04

(1999). “Notice” includes informing the defendant of the court’s intention to hold such a hearing, the action the court may take as a result of the hearing, and the opportunity the defendant will have to present evidence and be heard. *Id.* at 704. “Such a hearing is necessary to assure that an order entered under section 113-3.1 complies with due process.” *Id.* Rules of forfeiture do not apply. *Love*, 177 Ill. 2d at 564.

¶ 20 In *Love*, despite the passage of 90 days, our supreme court remanded the matter for a hearing when one had not been held. *Id.* at 565. We have followed suit. See, e.g., *People v. Schneider*, 403 Ill. App. 3d 301, 304 (2010); *Spotts*, 305 Ill. App. 3d at 705. “We view the supreme court’s practice to remand such cases as binding.” *Schneider*, 403 Ill. App. 3d at 304.

¶ 21 Here, the fee could not be imposed without notice and a hearing before the trial court. Thus, we vacate the fee and remand for notice and a hearing on the matter.

¶ 22 C. DNA Analysis Fee

¶ 23 Relying on this court’s decision in *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009), Zacatenco-Mejia next argues that he was improperly assessed two DNA analysis fees. He further contends that he is entitled to credit against the one fee that should stand. The State asks that we reconsider *Evangelista*.

¶ 24 Our supreme court recently approved of the holding in *Evangelista* and determined that a DNA assessment may be imposed and collected only once. *People v. Marshall*, No. 110765, slip op. at 9-10 (Ill. May 19, 2011). The issue also is not subject to forfeiture. *Marshall*, No. 110765, slip op. at 14. However, pursuant to *Marshall*, the assessment is not a fine and is not subject to credit for time served. See *People v. Guadarrama*, 2011 IL App. (2d) 100072, ¶ 13.

¶ 25 Because the record establishes that Zacatenco-Mejia was assessed twice, we vacate the second assessment. However, we deny any credit against the first one.

¶ 26

III. CONCLUSION

¶ 27 We affirm the convictions and sentences of incarceration, vacate the second DNA analysis fee, and vacate the public defender fee and remand to the circuit court of Lake County for a hearing on Zacatenco-Mejia's ability to pay.

¶ 28 Affirmed in part and vacated in part; cause remanded.