

NOTICE
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2011 IL App (4th) 100379-U

Filed 8/4/11

NO. 4-10-0379

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ROY JENKINS, JR.,)	No. 09CF263
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Where defendant's sentence was not excessive, we find the trial court did not abuse its discretion;
- ¶ 2 (2) Where defendant's deoxyribonucleic-acid (DNA) analysis assessment constituted a fine, he was entitled to full credit based on his time spent in custody; and
- ¶ 3 (3) Where the trial court failed to give defendant notice and an opportunity to present evidence on the issue of the public-defender reimbursement, the \$200 charge must be vacated and the cause remanded for a new hearing.
- ¶ 4 In January 2010, the trial court found defendant, Roy Jenkins, Jr., guilty of theft (subsequent offense). In March 2010, the court sentenced him to 4.5 years in prison and assessed various fines, fees, and assessments.
- ¶ 5 On appeal, defendant argues (1) his sentence was excessive, (2) he is entitled to

full credit against his DNA-analysis assessment, and (3) the trial court erred in ordering him to reimburse the public defender without notice and an opportunity to present evidence. We affirm in part, vacate in part, and remand with directions.

¶ 6

I. BACKGROUND

In October 2009, the State charged defendant by information with two counts of theft (720 ILCS 5/16-1(a)(1)(A) (West 2008)). In count I, the State alleged defendant committed the offense of theft (over \$300) in that he knowingly obtained unauthorized control over power tools owned by Mark Warren with the intent to deprive the owner permanently of the benefit of the property. In count II, the State alleged defendant committed the offense of theft (subsequent offense) in that he knowingly obtained unauthorized control over Warren's property with the intent to deprive him of that property and he had a prior conviction for residential burglary. Defendant pleaded not guilty.

¶ 7

In January 2010, defendant's bench trial commenced. Mark Warren testified he is a general contractor and was replacing a picture window on October 7, 2009, at a house in Pontiac. He arrived at approximately 9 a.m. and brought with him various tools that he placed on the front porch. Warren then left for a couple of hours. When he returned, he noticed a pneumatic pin nail gun, a cordless drill, two batteries, and a battery charger were missing. Warren testified he bought the drill for \$329.99 and the nail gun for \$225. Thinking someone had taken the tools, Warren went to a local pawn shop and noticed his tools. Warren contacted the police and his tools were eventually returned to him.

¶ 8

Joel Mays testified he works as a salesman at the Pontiac Exchange, a pawn shop. On October 7, 2009, a man came into the shop to sell a cordless drill and a nail gun. Mays

identified the seller as defendant. Mays filled out paperwork for the sale and paid defendant \$125 for the tools. Mays stated he would have sold the drill for \$75 to \$100 and the nail gun for \$125.

¶ 9 Defendant did not testify. Following closing arguments, the trial court found defendant guilty on count II and not guilty on count I. In March 2010, the court conducted the sentencing hearing. In his statement of allocution, defendant stated, in part, as follows:

"I stand here in front of you today to be sentenced for a theft under 300 case. I've been here before in my past when I was young. It's been—I put myself in some really bad situations and made some really poor decisions due to my addiction to drugs.

I do accept responsibility for my actions, and I am truly sorry for those lives I've interrupted and hurt. I have been incarcerated five months now, and looking back I can see I need to be here. I needed to dry out, but now I see how bad I really need treatment. I just hope the [c]ourt can see this, too, and not punish me any further."

The court sentenced defendant to 4.5 years in prison, ordered various fines and fees, including a \$200 DNA-analysis assessment, and credited him with 148 days spent in custody. The court also ordered defendant to pay \$200 as reimbursement for his public defender. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 10

II. ANALYSIS

¶ 11

A. Sentence

¶ 12 Defendant argues his 4.5-year prison sentence was excessive considering he accepted responsibility for his actions, apologized, expressed a desire to improve himself, was capable of employment, and had a high potential for rehabilitation. We disagree.

¶ 13 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. "In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed." *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)).

¶ 14 A trial court has broad discretion in imposing a sentence. *People v. Patterson*, 217 Ill. 2d 407, 448, 841 N.E.2d 889, 912 (2005). "A reviewing court gives great deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the cold record." *People v. Evangelista*, 393 Ill. App. 3d 395, 398, 912 N.E.2d 1242, 1245 (2009). Thus, the court's decision as to the appropriate sentence will not be overturned on appeal "unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008).

¶ 15 In the case *sub judice*, the trial court found defendant guilty of theft (subsequent offense), a Class 4 felony due to defendant's previous residential-burglary conviction. 720 ILCS 5/16-1(b)(2) (West 2008). A defendant convicted of a Class 4 felony is subject to a sentencing

range of one to three years in prison. 730 ILCS 5/5-4.5-45(a) (West 2008). Due to his prior forgery conviction, defendant was subject to an extended-term sentence between three and six years. 730 ILCS 5/5-4.5-45(a) (West 2008). As the trial court's sentence of 4.5 years was within the relevant extended-term sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 16 In arguing his sentence was excessive, defendant points out he accepted responsibility for his actions, apologized, and expressed a desire to improve himself. Based on these reasons, defendant claims he had "a high potential for rehabilitation." While defendant's statement at sentencing was admirable, "the existence of mitigating factors does not obligate the trial court to reduce a sentence from the maximum allowable." *People v. Williams*, 317 Ill. App. 3d 945, 955-56, 742 N.E.2d 774, 783 (2000). Moreover, a trial court is not required to give greater weight to a defendant's rehabilitative potential or other mitigating factors over the seriousness of the offense. *People v. Shaw*, 351 Ill. App. 3d 1087, 1093-94, 815 N.E.2d 469, 474 (2004). While defendant may believe he has a high potential for rehabilitation, his actions speak louder than his words.

¶ 17 At sentencing, the trial court noted defendant's criminal record was "replete with offenses against the public." His misdemeanor criminal history included convictions for domestic battery (one), possession of cannabis (two), retail theft, battery, criminal trespass to land, criminal trespass to state-supported property (three), possession of drug paraphernalia (four), unlawful possession/consumption of alcohol by a minor (three), disorderly conduct, and aggravated assault with a deadly weapon. He had two felony convictions for forgery and one for residential burglary. Although defendant stated he realized he needed treatment, the court noted

defendant had recently declined the opportunity for drug treatment.

¶ 18 The presentence report indicates defendant was unemployed, had a drug problem, and a long criminal history as an adult that spanned the years 1996 through 2009. His claim that he had a high potential for rehabilitation is belied by the record. We find no abuse of discretion in the trial court's sentence.

¶ 19 **B. Sentence Credit**

¶ 20 Defendant argues he is entitled to a full offset against his \$200 DNA-analysis assessment for time spent in custody prior to sentencing. We agree, and the State concedes.

¶ 21 Section 110–14(a) of the Code of Criminal Procedure of 1963 (Code) states, "[a]ny person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of \$5 for each day so incarcerated upon application of the defendant." 725 ILCS 5/110–14(a) (West 2008). A "defendant is entitled to one day of credit for each day (or portion thereof) that he spends in custody prior to sentencing, including the day he was taken into custody." *People v. Ligons*, 325 Ill. App. 3d 753, 759, 759 N.E.2d 169, 174 (2001). A defendant will not receive credit for the day of sentencing on which he is remanded to the custody of the Department of Corrections. *People v. Leach*, 385 Ill. App. 3d 215, 223, 898 N.E.2d 696, 702-03 (2008).

¶ 22 In this case, the trial court awarded defendant credit for time spent in custody from October 7, 2009, until March 3, 2010, the date of sentencing. Excluding the day of sentencing, defendant was in custody for 147 days. Thus, he is entitled to a credit up to \$735, which may be applied to any fines assessed against him. See *People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006) (section 110–14 only applies to fines, not fees).

¶ 23 Here, the trial court ordered defendant to pay a \$200 DNA-analysis fee. Section 5–4–3(a) of the Unified Code of Corrections (730 ILCS 5/5–4–3(a) (West 2008)) requires anyone convicted of a felony to submit blood, saliva, or tissue specimens to the Illinois State Police. If a defendant must submit a specimen under section 5–4–3(a), the trial court must impose "an analysis fee" of \$200. 730 ILCS 5/5–4–3(j) (West 2008).

¶ 24 A "'fine" is a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense.' " *Jones*, 223 Ill. 2d at 581, 861 N.E.2d at 975 (quoting *People v. White*, 333 Ill. App. 3d 777, 781, 776 N.E.2d 836, 839 (2002)). A "fee" is "a charge that 'seeks to recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *People v. Graves*, 235 Ill. 2d 244, 250, 919 N.E.2d 906, 909 (2009) (quoting *Jones*, 223 Ill. 2d at 582, 861 N.E.2d at 975).

¶ 25 Here, the record contains no evidence DNA testing was used in the prosecution of defendant. Thus, although labeled a fee, the \$200 DNA-analysis assessment constituted a fine. See *People v. Long*, 398 Ill. App. 3d 1028, 1034, 924 N.E.2d 511, 516 (2010). As such, the \$200 fine is completely satisfied by defendant's credit for time served in presentence custody. See *People v. Mingo*, 403 Ill. App. 3d 968, 973, 936 N.E.2d 1156, 1160 (2010). Accordingly, we remand this matter to the trial court for the issuance of an amended sentencing judgment reflecting full credit against defendant's \$200 DNA-analysis assessment.

¶ 26 C. Public-Defender Fee

¶ 27 Defendant argues the trial court erred in ordering him to pay \$200 to reimburse the public defender without notice and without giving him the opportunity to present evidence of his ability to pay. We agree, and the State concedes.

¶ 28

Section 113–3.1(a) of the Code provides, in part, as follows:

"Whenever *** 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 [s]ection 113–3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113–3.1(a) (West 2008).

Section 113–3.1 requires the trial court to conduct a hearing into a defendant's financial circumstances and find an ability to pay before ordering him to pay reimbursement for his appointed counsel. *People v. Love*, 177 Ill. 2d 550, 555, 687 N.E.2d 32, 35 (1997). "[T]he defendant must (1) have notice that the trial court is considering imposing a payment order under section 113–3.1 of the Code and (2) be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Barbosa*, 365 Ill. App. 3d 297, 301, 849 N.E.2d 152, 154 (2006).

¶ 29

In this case, the record contains no evidence defendant received notice of the trial court's intent to hold a hearing on his ability to reimburse the public defender. At the sentencing hearing, the court noted defendant's affidavit of assets and liabilities and found he had the ability to work and pay his fines, costs, and assessments. The court then imposed the \$200 public-defender fee. However, the court did not question defendant regarding the affidavit or his ability

to pay. Moreover, the court did not allow defendant an opportunity to present evidence or otherwise contest the imposition of the reimbursement order. The court's failure to follow the procedures required by section 113–3.1 requires us to vacate the reimbursement order and remand for a hearing on the matter. See *Barbosa*, 365 Ill. App. 3d at 302, 849 N.E.2d at 155.

¶ 30

III. CONCLUSION

¶ 31 For the reasons stated, we affirm defendant's conviction and sentence, vacate that portion of the trial court's sentencing order imposing the \$200 public-defender fee, and remand for a hearing in conformity with section 113–3.1 of the Code and for an amended sentencing judgment reflecting full credit for the DNA-analysis assessment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 32

Affirmed in part and vacated in part; cause remanded with directions.