

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).

NO. 4-09-0919

Filed 6/28/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
DAVID J. SEWARD,)	No. 07CF1563
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

Held: (1) Because no evidence shows that the trial court committed error in considering a factor inherent in the offense in aggravation at defendant’s resentencing on revocation of probation, we affirm the sentence imposed by the court.

(2) Defendant is entitled to a \$75 credit against his fines for time served; as the record fails to show if the clerk credited defendant's mandatory drug assessment as directed, we remand to the trial court to resolve that issue.

Defendant, David J. Seward, appeals the October 2009 judgment resentencing him on revocation of probation to six years in prison. Defendant appeals, arguing (1) the trial court impermissibly considered in aggravation conduct inherent in the offense and (2) he is due a \$75 credit for the 15 days he spent in custody prior to sentencing against his outstanding fines. We affirm and remand with directions.

In February 2008, defendant entered an open guilty plea to one count of unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS 570/401(c)(2) (West

2006)), a Class 1 felony. Pursuant to the plea, the trial court sentenced defendant to 30 months' probation, ordered him to pay various fines, and awarded credit for 14 days served. In July 2009, the State filed a petition to revoke defendant's probation and a supplemental petition to revoke his probation. At a hearing in August 2009, defendant admitted the allegations in the State's original petition to revoke that he failed to (1) provide a substance-abuse evaluation within the time frame allotted by court services and (2) abstain from the use of alcohol and illegal drugs. Defendant admitted using cannabis on March 14 through March 23, 2008; June 9, November 7, December 14, and December 31, 2008; and on February 17, March 14, and April 16, 2009. Defendant also admitted consuming alcohol on March 14 through March 23, 2008, June 9, 2008, and March 14, 2009. Defendant further admitted using ecstasy from March 14 through March 23, 2008. The trial court revoked his probation. In October 2009, at resentencing, the court sentenced him to six years in prison and referred him for impact incarceration if deemed eligible by the Department of Corrections (DOC). In November 2009, the court denied defendant's motion to reconsider sentence.

Defendant's presentence investigation report (PSI) showed that he had one prior misdemeanor conviction for possession of cannabis with intent to deliver (Champaign County case No. 07-CM-312). During argument at resentencing, the prosecutor asked the court to consider the nature of the offense, the harm that selling drugs does to society, and defendant's refusal to comply with basic requirements of his probation, specifically failing to refrain from using illegal drugs and alcohol. The prosecutor recommended defendant receive a sentence of eight years but be referred to the "boot camp" program administered by DOC.

Defense counsel stressed heavily defendant's age at the time of sentencing (21) as

well as when the offense was committed (19). Additionally, counsel pointed to defendant's rough childhood and asked for leniency, arguing that he was well adjusted for someone whose parents were drug addicts and who entered the foster-care system at age four. Counsel further argued that defendant only had a single misdemeanor conviction on his record and that a period of incarceration was not appropriate given his lack of a criminal history. Finally, defense counsel pointed to the fact that defendant had obtained his high school diploma and was enrolled in college courses as proof that he was attempting to better himself. During his allocution, defendant admitted guilt and expressed a desire to gain his sobriety and obtain his college degree in business. Following these arguments and defendant's allocution, the judge noted defendant committed the underlying offense a little over two months after he began serving probation in case No. 07-CM-312. Defendant was resentenced to six years' imprisonment but referred to the boot-camp program.

Defendant contends the trial court considered the fact he sold drugs for a profit, a factor inherent in the offense of unlawful possession with intent to deliver a controlled substance, as an aggravating factor during the resentencing hearing. Defendant's entire argument is based on statements made by the court during sentencing. While addressing defendant, the court stated:

"It is unfortunate that with [Mr. Seward's] background, he chose to become involved, perhaps understandably, in using drugs, but not understandably in becoming part of the problem of selling drugs.

It's for profit. The State is absolutely correct. He does not list cocaine as one of the substances that he's grappling with addic-

tion to. In fact, he never described using it. So, the court must then draw the conclusion that that is an entrepreneurial enterprise and that he is doing that for profit. Or he did it for profit originally when he was convicted."

The court later commented, "This wasn't just possession. It was with intent to deliver."

Defendant points to the above statements by the trial judge and claims that a new resentencing hearing must be held. However, defendant made no objection at the original hearing, nor did he include the argument raised in his motion to reconsider sentence, which argued the sentence was excessive. The argument advanced by defendant in his appeal is being raised by him for the first time. Generally, any objection to sentencing not raised in a postsentencing motion is forfeited by the defendant. See generally Ill. S. Ct. R. 605(b)(2), (b)(6) (eff. Oct. 1, 2001); *People v. Willis*, 361 Ill. App. 3d 527, 530-31, 838 N.E.2d 130, 132-33 (2005). Defendant does not dispute that he failed to raise the issue properly, but instead contends that the issue should be reviewed for plain error under Illinois Supreme Court Rule 615(a) (eff. Jan. 1, 1967).

Plain-error review allows a court to rule on an issue that was not properly preserved, and thus would be forfeited, in either of two circumstances: (1) where it may have affected the outcome of a closely balanced case or (2) where the error was so serious that it threatened the fairness of the outcome and the very integrity of the trial process. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010). However, "[t]he first step of plain-error review is determining whether any error occurred." *Thompson* 238 Ill. 2d at 613, 939 N.E.2d at 413. Thus, we first consider whether the trial court made an error in resentencing

defendant.

The imposition of a sentence is a matter of judicial discretion for the trial court, and this court may not disturb the trial court's sentencing determination absent an abuse of that discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). A proper sentence balances the seriousness of the offense with the defendant's rehabilitative potential. Ill. Const. 1970, art. I, §11. "The trial court may consider the nature of the offense, including the circumstances and extent of each element as committed, as a factor when imposing a sentence." *People v. Csaszar*, 375 Ill. App. 3d 929, 951, 874 N.E.2d 255, 273-74 (2007).

The Unified Code of Corrections permits the trial court to consider certain statutory factors in aggravation and mitigation when imposing a sentence of imprisonment. 730 ILCS 5/5-5-3.1 (West 2006); 730 ILCS 5/5-5-3.2 (West Supp. 2007). In addition to the statutory factors, the court may consider nonstatutory factors in aggravation and mitigation. *Csaszar*, 375 Ill. App. 3d at 948, 874 N.E.2d at 271. Those nonstatutory factors include the defendant's credibility, general moral character, mentality, social environment, habits, and age. *Perruquet*, 68 Ill. 2d at 154, 368 N.E.2d at 884. Because the trial court has observed the defendant throughout the proceedings, this court is highly deferential to its factual determinations at sentencing. *Perruquet*, 68 Ill. 2d at 154, 368 N.E.2d at 884.

It is well settled that the trial court may not consider elements inherent in a given offense as aggravating factors at sentencing. *People v. Thomas*, 171 Ill. 2d 207, 226, 664 N.E.2d 76, 86 (1996). The General Assembly has already considered factors inherent to an offense in setting the range of penalties provided by statute. *People v. McCain*, 248 Ill. App. 3d 844, 850, 617 N.E.2d 1294, 1299 (1993) (finding compensation is inherent in delivery-of-controlled-

substance cases). In *People v. Atwood*, 193 Ill. App. 3d 580, 592-93, 549 N.E.2d 1362, 1369-70 (1990), this court held that the trial court erred when, in a prosecution for unlawful delivery of a controlled substance, it considered the defendant's receipt of compensation and harm caused by the delivery as aggravating factors in the offense. This court reasoned that monetary compensation and serious harm to society were inherent in the offense of delivery of a controlled substance. *Atwood*, 193 Ill. App. 3d at 592-93, 549 N.E.2d at 1369-70; see also *McCain*, 248 Ill. App. 3d at 851-52, 617 N.E.2d at 1300 (stating compensation and harm to society are generally not proper aggravating factors in drug-transaction prosecutions); *People v. Garrett*, 152 Ill. App. 3d 212, 213-14, 504 N.E.2d 237, 238 (1987) (discussing compensation in drug cases).

The State argues that defendant has failed to carry his burden to show that the trial court actually considered monetary compensation as an aggravating factor at sentencing. We agree. As the State points out, this court indulges a strong presumption that the trial court based its sentencing decision upon proper considerations only. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43, 904 N.E.2d 1022, 1028 (2009). The defendant has the burden to show that the trial court based its sentencing judgment upon improper considerations. *Dowding*, 388 Ill. App. 3d at 943, 904 N.E.2d at 1028.

In making the statements cited by defendant, the trial court was merely responding to the parties' arguments. In arguing for probation, defendant's attorney placed the blame for defendant's legal troubles squarely on his problem with drug and alcohol abuse. In explaining why it found little merit to this argument for leniency, the court concurred with the State's argument that no evidence suggested defendant struggled with, or ever even used, cocaine. Consequently, defendant's current offense was not the result of any addiction to cocaine, but

rather was an "entrepreneurial enterprise" from which he profited. This statement, clearly, was a comment made while the court was summarizing all the evidence presented. This comment is not evidence the court placed substantial weight on an improper factor.

The transcript from the hearing contains over nine pages of discussion by the trial court, almost all of which focuses on defendant's various probation violations and perceived lack of interest in rehabilitation. The remarks cited by defendant, which comprise less than half of one of the nine pages, seek only to differentiate between defendant's acts of drug use and the act of selling drugs. No evidence in the record shows that the court in any way relied on any inherent aggravating factor in resentencing defendant. Accordingly, defendant has failed to show that the court found defendant's receipt of compensation as a factor in aggravation.

Defendant next argues that the circuit clerk's office failed to grant him the \$75 credit the trial court awarded him for the now 15 days the parties agree he was in custody prior to sentencing. The State concedes the error, and we accept the concession.

Pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2006)), any person sentenced to pay a fine upon conviction shall receive credit of \$5 per day against that fine for each day spent incarcerated prior to sentencing. Under the Illinois Controlled Substances Act (720 ILCS 570/100 through 603 (West 2006)), any person convicted of a Class 1 felony must pay a \$2,000 drug assessment. 720 ILCS 570/411.2(a)(2) (West 2006). The supreme court has held that the mandatory drug assessment is a fine, subject to reduction through presentence incarceration credit. *People v. Jones*, 223 Ill. 2d 569, 592, 861 N.E.2d 967, 981 (2006). In the present case, defendant was also assessed a \$300 street-value fine, a \$100 trauma-center-fund fee, and a \$5 spinal-cord-research fee.

The parties agree that defendant was granted a \$75 credit for time served by the trial court. The State was unable to determine from the record whether defendant has received proper credit against his fines. The State notes the court's original February 2008 judgment placing defendant on probation ordered a \$70 credit be applied against the \$2,000 mandatory assessments. Thus, we remand for either (1) a finding that the presentence credit has already been applied as ordered or (2) for proper application of the credit to determine whether or not the now \$75 credit has been applied to defendant's fines, and if it has not, we direct the court to apply it.

For the reasons stated, we affirm the sentence imposed and remand to the trial court with directions as to defendant's \$75 credit against fines for time served. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

Affirmed; cause remanded with directions.