

**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).

2011 IL App (4th) 101020-U

Filed 10/3/11

NO. 4-10-1020

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
DESMOND TURNER,	)	No. 09CF1654
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court. Justices Pope and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* The court (1) rejected defendant's claim the trial court failed to consider the following as factors in mitigation when sentencing defendant: (a) mental retardation, where no direct evidence of defendant's mental retardation was introduced; (b) the strong provocation of defendant, where the victim was not the party who allegedly provoked defendant; and (c) defendant's history of mental-health issues, where the court specifically addressed defendant's history of treatment; and (2) agreed defendant is entitled to have his *per diem* credit applied to his \$5-drug-court fee. Affirmed as modified and cause remanded with directions.

¶ 2 In November 2009, defendant, Desmond Turner, entered a guilty plea to one count of aggravated battery (720 ILCS 5/12-4(b)(3), (e)(1) (West Supp. 2009)), a Class 3 felony. In January 2010, the trial court sentenced defendant to five years' imprisonment. In February 2010, the court denied defendant's motion to reconsider his sentence. Defendant appeals the court's sentence, arguing (1) the court failed to consider relevant factors in mitigation, and (2) he

is entitled to *per diem* credit against his drug-court fee. We affirm as modified and remand with directions.

¶ 3

## I. BACKGROUND

¶ 4 In September 2009, defendant was arrested in connection with an incident at the Pathways School (Pathways), where he was a student. In October 2009, the State charged defendant by indictment with three counts of aggravated battery (720 ILCS 5/12-4(b)(3), (e)(1) (West Supp. 2009)). In November 2009, defendant entered a partially negotiated plea. In return for defendant's pleading guilty to one count of aggravated battery, the State agreed to dismiss the two other pending counts of aggravated battery. The parties had no agreement as to the sentence defendant would receive. The trial court heard the following factual basis.

¶ 5

Pathways is a school for children with learning and behavioral problems. Defendant was a student at Pathways, and two of the victims taught there, while the third victim was the principal. On the day in question, defendant became involved in an altercation with another student during physical education class. The three victims attempted to separate defendant from the other student. At one point, defendant was successfully removed from the area, but he pushed his way past the victims and attempted to renew the altercation with the other student. The three victims finally forced defendant to the ground and were able to hold him there until police arrived to remove him from school property. During the course of the altercation, defendant made offensive physical contact with all three victims, by repeatedly pushing them.

¶ 6

After hearing the factual basis, defense counsel confirmed the events related to the trial court were substantially correct. Defendant persisted in his guilty plea, and the court

accepted it. A sentencing hearing was set for January 2010.

¶ 7 At sentencing, the State argued defendant should not receive a community-based sentence due to his criminal history, claiming a sentence of probation would deprecate the seriousness of the crime. Further, while defendant clearly needed help with his mental issues, the State believed he was a dangerous and angry young man who posed a threat of repeated violent outbursts.

¶ 8 The presentence report showed defendant had four juvenile convictions for aggravated battery, one of which involved a school employee, and one juvenile conviction for criminal damage to state-supported property. Defendant received a sentence of probation in connection with each of those charges. Court services also attached a copy of a psychological evaluation of defendant prepared in 2008 in connection with one of his juvenile charges and incorporated it into the presentence report.

¶ 9 Defendant's 2008 evaluation included a number of findings regarding defendant's verbal and reasoning skills and behavioral and emotional problems. The evaluation showed defendant (1) had verbal reasoning skills in the fifth percentile (borderline mentally impaired); (2) had nonverbal reasoning skills in the tenth percentile (low average); (3) had an intelligence quotient (IQ) of 75; (4) had reading, writing, and math skills comparable to those of a third-grade student; (5) had been diagnosed with attention deficit hyperactivity disorder (ADHD) and major depressive disorder with severe psychotic episodes; and (6) suffered from general depression and suicidal ideation. In addition, defendant claimed he had been abused by adults during his childhood but refused to discuss the issue any further or give specific information regarding the alleged abuse.

¶ 10 In addition, defense counsel offered testimony in mitigation from defendant's aunt, with whom he resided, and a human services worker familiar with defendant's history of treatment for various mental issues. Defense counsel argued defendant's age (18), acceptance of responsibility, and history of mental-health problems were all mitigating factors and asked the court to fashion a community-based sentence to allow him to continue receiving treatment under his current plan.

¶ 11 When sentencing defendant, the trial court stated the following:  
"I've considered the report prepared by Court Services. I've considered the testimony presented on behalf of the Defendant. I've considered the statutory factors in aggravation, the statutory factors in mitigation, [and] the comments of counsel.

When reviewing the presentence report, there aren't any statutory mitigating factors that apply to this Defendant, to this type of an offense. The mitigation in this record consists of the Defendant's age \*\*\* and [the fact] he plead[ed] guilty. Beyond that, there really isn't any mitigation in this record."

The court went on to state the importance of deterring batteries committed against school employees by students and found a community-based sentence would deprecate the seriousness of defendant's conduct.

¶ 12 In addressing defendant's criminal history and potential for rehabilitation through a community-based sentence, the trial court went on to state:

"The Defendant, starting with [Nos.] 03-JD-296 \*\*\* [and]

03-JD-404, two separate aggravated battery petitions, was ordered to serve a sentence of probation, complete mental health and anger management counseling, [and] attend school. \*\*\* Then in [No.] 05-0JD-376, another aggravated battery petition was filed. Same sentence of probation. Same order for anger management.

Then in [No.] 08-JD-82, again, aggravated battery, school employee. Attend school, complete anger management counseling, get substance abuse evaluation. And now, we have this offense, involving more school employees.

The Defendant has been given numerous opportunities to hopefully deal with his anger issues. As stated on page six [of the presentence report], he was diagnosed at age six with attention deficit hyperactivity disorder. A number of medications were prescribed. And, he reportedly received mental health diagnosis and services, and treatment sporadically since 1998, [and has] been hospitalized various times at the psychiatric unit.

\*\*\*

This young man is dangerous. He is literally a walking time bomb and nothing that has been tried through the Juvenile Court Act has deterred him at all."

The court then sentenced defendant to five years' imprisonment.

¶ 13 Defendant filed a motion to reconsider sentence, arguing the trial court's sentence

was excessive in light of his age, history of mental-health problems, and rehabilitative potential. In February 2010, the court denied defendant's motion.

¶ 14 Defendant appealed. This court remanded for strict compliance with Illinois Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Turner*, 403 Ill. App. 3d 753, 936 N.E.2d 700 (2010).

¶ 15 On remand, defense counsel filed an amended motion to reconsider sentence, arguing (1) the sentence was excessive; (2) the trial court gave too much weight to deterrence and defendant's criminal history; and (3) the court erred in giving too little weight to (a) defendant's acceptance of responsibility, (b) defendant's youth, (c) defendant's difficult upbringing, (d) the fact this is defendant's first adult conviction, (e) the fact defendant has no children to support, (f) defendant's low IQ (75), (g) the fact defendant has been receiving mental-health care as part of a long-term plan, and (h) defendant's low scores on several reasoning and emotional and behavioral tests. In December 2010, the court denied defendant's motion.

¶ 16 This appeal followed.

¶ 17 **II. ANALYSIS**

¶ 18 On appeal, defendant argues (1) the trial court erred in failing to consider as factors in mitigation (a) defendant's mental retardation, (b) the fact defendant was under strong provocation when he committed the underlying battery, and (c) defendant's history of psychological disorders and abuse; and (2) his \$5-drug-court fine should be offset by his *per diem* credit.

¶ 19 **A. Propriety of Factors Considered in Sentencing**

¶ 20 Defendant argues the trial court erroneously found no mitigating factors were present in this case. Specifically, defendant argues the court imposed sentence without considering "the overwhelming amount of mitigation in the appellate record" and seeks remand for a new sentencing hearing where the court will consider the mitigation evidence.

¶ 21 1. *Standard of Review*

¶ 22 Because trial courts have broad discretion in the imposition of sentence, this court will only disturb a sentence when the trial court abused its discretion. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1, 16 (2007). A court's ruling constitutes an abuse of discretion when it is " 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Sutherland*, 223 Ill. 2d 187, 272-73, 860 N.E.2d 178, 233 (2006) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)). Moreover, sentences imposed within the statutory guidelines are presumed to be proper and will not be overturned unless the sentence substantially departs from the spirit and purpose of the law and the nature of the offense. *Hauschild*, 226 Ill. 2d at 90, 871 N.E.2d at 16. Trial courts are given such deference because they are generally in the best position to determine an appropriate sentence, having observed defendant at trial. *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 629 (2000). A reviewing court must not substitute its judgment for the trial court's merely because it would have weighed certain factors differently. *Id.*

¶ 23 Though trial courts have wide discretion in imposing sentences, their discretion is not without limitations. *Id.* Certain statutory factors must be considered as evidence in mitigation. 730 ILCS 5/5-5-3.1 (West 2008); see *People v. Markiewicz*, 246 Ill. App. 3d 31, 55, 615 N.E.2d 869, 886 (1993) (trial court may not ignore relevant evidence offered in mitigation).

Though the court cannot ignore evidence in mitigation, it can determine the weight to be accorded such evidence. The existence of mitigating factors does not obligate the court to enter a sentence less than the maximum. *Id.* Among the statutory factors to be considered are whether the defendant was (1) mentally retarded (730 ILCS 5/5-5-3.1(a)(13) (West 2008)) and/or (2) acting under strong provocation (730 ILCS 5/5-5-3.1(a)(3) (West 2008)).

¶ 24 *2. Trial Court Did Not Abuse Its Discretion*

¶ 25 At the sentencing hearing, the trial court stated no statutory factors in mitigation applied in the present case. Defendant claims the court ignored substantial evidence showing (1) defendant was mentally retarded, (2) defendant was acting under strong provocation, and (3) defendant had received mental-health services and been subjected to abuse, thereby failing to consider mandatory statutory and nonstatutory factors in mitigation.

¶ 26 a. Failure To Consider Mental Retardation

¶ 27 Section 5-1-13 of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-1-13 (West 2008)) states:

" 'Mentally retarded and mental retardation' mean sub-average general intellectual functioning generally originating during the developmental period and associated with impairment in adaptive behavior reflected in delayed maturation or reduced learning ability or inadequate social adjustment."

Defendant claims the psychological evaluation establishes his mental retardation and we must remand for a new sentencing hearing. The State argues the evidence did not establish defendant's mental retardation so the trial court was not required to consider it as a statutory

factor in mitigation. We agree with the State.

¶ 28 In *People v. Young*, 250 Ill. App. 3d 55, 59, 619 N.E.2d 851, 854 (1993), the defendant's presentence report contained a psychiatric evaluation showing the defendant had an IQ of 76 and had performed below average on several intelligence and behavioral tests. The reviewing court rejected the defendant's claim the trial court erroneously failed to consider his mental retardation as a mitigating factor where the defendant "presented no definitive evidence of his mental retardation." *Young*, 250 Ill. App. 3d at 64-5, 619 N.E.2d at 858. The court went on to state the trial court "was in the best position to evaluate whether defendant was mentally retarded" as it interacted with the defendant during the proceedings. *Young*, 250 Ill. App. 3d at 65, 619 N.E.2d at 858.

¶ 29 In the present case, defendant's psychiatric evaluation was comparable to the evaluation at issue in *Young*. Nowhere in defendant's evaluation was he diagnosed as mentally retarded. At his sentencing hearing, defendant did not offer any substantive evidence he had been diagnosed as mentally retarded. The trial court stated it considered the presentence report, which contained the psychiatric evaluation, in crafting defendant's sentence. Mental retardation was not raised before the court, and evidently the court's assessment of defendant based on its interaction with him in the courtroom did not cause the court to *sua sponte* raise mental retardation as a possible factor in mitigation. We will not substitute our judgment for the trial court's judgment on this matter.

¶ 30 b. Failure To Consider Defendant Acted in Response to Strong Provocation

¶ 31 Defendant next claims the trial court erred in failing to consider he was acting in response to strong provocation when he committed the underlying aggravated battery, which

constitutes an abuse of the court's discretion.

¶ 32 Section 5-5-3.1(a)(3) of the Unified Code (730 ILCS 5/5-5-3.1(a)(3) (West 2008)) requires the trial court to consider whether defendant acted in response to strong provocation as a factor in mitigation. While the term "strong provocation" is not defined in the Unified Code, defendant argues the definition of "serious provocation" in the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-2(b) (West 2008)) should be applied. Section 9-2(b) of the Criminal Code (720 ILCS 5/9-2(b) (West 2008)) defines "serious provocation" as "conduct sufficient to excite an intense passion in a reasonable person." Serious provocation under section 9-2(b) is applicable as a mitigating factor when a defendant commits first degree murder but was seriously provoked by the person murdered or a person whom the defendant endeavored to murder. See 720 ILCS 5/9-2(a)(1) (West 2008). If serious provocation is found to apply, a charge of first degree murder will be reduced to second degree murder. See 720 ILCS 5/9-2(a)(1) (West 2008). We are not persuaded.

¶ 33 Under the definition of "serious provocation" urged by defendant, he would only be protected in retaliating against the party who provoked him. In this case, the battered party, the principal at Pathways, was not the provoking party. Further, no evidence offered at defendant's sentencing hearing showed defendant was provoked at all. The record only shows defendant was involved in an altercation; it does not show who initiated the argument. By the time defendant committed the battery in question, he had been separated from the other student and taken into another room. Defendant then reentered the gymnasium and attempted to reinitiate contact with the other student. The victim then attempted to restrain defendant and was shoved repeatedly, resulting in the underlying battery. The trial court was aware of the factual

basis and clearly did not believe defendant was provoked. No evidence in the record shows defendant was acting in response to strong provocation when he committed the underlying battery. The court was not required to consider provocation as a statutory factor in mitigation.

¶ 34 c. Failure To Consider Mental-Health Issues and Alleged Child Abuse

¶ 35 Finally, defendant argues the trial court erred in failing to consider his history of mental-health issues and alleged abuse as a mitigating factor. The State argues the record belies defendant's claims. We agree with the State.

¶ 36 The trial court expressly stated at defendant's sentencing hearing the only factors in mitigation present were defendant's age (18) and the fact he took responsibility for his actions by pleading guilty. Defendant points to this and claims the court's failure to consider his history of mental-health issues and alleged abuse as mitigating factors constituted an abuse of discretion.

¶ 37 While the Unified Code lists specific factors to be considered when imposing a sentence, the trial court can also consider nonstatutory factors. *People v. Csaszar*, 375 Ill. App. 3d 929, 948, 874 N.E.2d 255, 271 (2007). Those nonstatutory factors include the defendant's credibility, general moral character, mentality, social environment, habits, and age. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). Defendant's mental-health problems and alleged history of abuse are factors the trial court in this case was allowed to consider in mitigation. We conclude the record shows the court did consider defendant's history of mental-health issues and alleged abuse when it imposed his sentence.

¶ 38 Absent evidence to the contrary, other than the sentence imposed, we assume the trial court considered all the evidence presented to it. *Markiewicz*, 246 Ill. App. 3d at 45, 615 N.E.2d at 886. In this case, the court expressly stated it considered defendant's presence

report and defense counsel's arguments in mitigation when it imposed defendant's sentence. The court directly referenced defendant's treatment for mental-health issues later in its ruling. The weight accorded to defendant's mental-health issues and claims of prior abuse is within the discretion of the court. We will not disturb the trial court's judgment where it is clear from the record it considered the relevant factors in mitigation and simply gave them less weight than other factors.

¶ 39                    B. Defendant's *Per Diem* Credit Against His Drug-Court Fine

¶ 40                    Defendant argues, and the State concedes, he is due credit against his \$5-drug-court fine. We agree, modify his sentence to award the credit, and remand with directions.

¶ 41                    Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14 (West 2008)) requires anyone held on a bailable offense who is not released on bail and later has a fine levied against them be given a \$5-per-day credit for each day they are so incarcerated, upon application by the defendant. In *People v. Long*, 398 Ill. App. 3d 1028, 1031, 924 N.E.2d 511, 514 (2010), this court found where a drug-court fee was assessed and the defendant did not participate in drug court, the fee actually constituted a fine and was subject to offset by any *per diem* credit to which the defendant was entitled. In the present case, defendant was assessed a \$5-drug-court fee as part of his sentence. Defendant did not participate in drug court, making the \$5 "fee" a fine. Defendant was incarcerated for 64 days prior to being sentenced on the underlying offense, thus he is entitled to have his \$5-drug-court fee offset by his *per diem* credit. We note defendant failed to raise this issue before the trial court, and it would normally be subject to forfeiture. See Ill. S. Ct. R. 605(b)(6) (eff. Oct. 1, 2001). However, as the statutory right to *per diem* credit is conferred in mandatory terms upon application of the defendant, the

normal rules of forfeiture do not apply, and defendant's request is reviewable on appeal. *People v. Woodard*, 175 Ill. 2d 435, 457-58, 677 N.E.2d 935, 945-46 (1997).

¶ 42

### III. CONCLUSION

¶ 43 For the foregoing reasons, we affirm the judgment of the trial court as modified and remand with directions to apply defendant's 64-day *per diem* credit toward his \$5-drug-court fee and to issue an amended sentencing judgment so reflecting. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 44

Affirmed as modified and cause remanded with directions.