

No. 1-10-3307

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	
)	No. 09 CR 13933
WINONA NELSON,)	
)	
)	Honorable
Defendant-Appellant.)	Thomas P. Fecarotta, Jr.,
)	Judge Presiding.

ORDER

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Steele and Justice Neville concurred in the judgment.

HELD: The trial court's error in using an improper factor in aggravation did not rise to the level of plain error and thus did not deny defendant a fair sentencing hearing; restitution award which did not reflect funds recovered by the victim is reversed and remand for proper calculation of restitution; mittimus corrected to reflect presentence incarceration credit of \$60 against defendant's fines.

¶ 1 This appeal arises from an order of the circuit court that denied defendant Winona

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Nelson's *pro se* post-sentencing motion to reduce sentence. Defendant was convicted of four counts of aggravated identity theft, one count of theft and she was sentenced to a five-year prison term following a bench trial. On appeal, defendant challenges several aspects of her sentencing hearing. For the reasons that follow, we affirm in part, reverse in part and correct the mittimus.

¶ 2 BACKGROUND

¶ 3 Because defendant is not challenging the sufficiency of the evidence, we shall confine the facts to those necessary for the disposition of this appeal.

¶ 4 Defendant was convicted of aggravated identity theft for using the identity of an elderly and disabled person, Charlotte Schultz, to fraudulently obtain money and exert unauthorized control over it. Although found eligible for an extended term based on her background, defendant was subsequently sentenced to a five-year prison term. Defendant's *pro se* post-sentencing motion to reduce sentence was denied and this appeal followed.

¶ 5 DISCUSSION

¶ 6 On appeal, defendant contends that: (1) she was denied a fair sentencing hearing when the State asserted, without evidentiary support, that she was not a certified nursing assistant, she lied on her job application, and that she admitted as much in the presentence investigation report, which the trial court relied upon in setting defendant's sentence; (2) the trial court did not have statutory authority to impose a restitution order that exceeded the victim's out-of-pocket losses; and (3) the trial court failed to credit defendant \$5 per day presentence credit against the fines imposed.

¶ 7 As a preliminary matter, the State asserts in its brief that defendant's appeal is untimely.

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Our review of the record reveals that defendant was sentenced on June 9, 2010. She subsequently filed a *pro se* motion to reduce sentence and a *pro se* notice of appeal. The motion to reduce sentence was file stamped by the trial court on July 2, 2010, and the notice of appeal was file stamped by the trial court on July 7, 2010. As defendant still had a pending post-trial motion at the time the *pro se* notice of appeal was filed, it was premature. Illinois Supreme Court Rule 606(b) (Ill. S. Ct. R. 606(b) (eff. Mar. 20, 2009)) requires that a notice of appeal must be filed within 30 days after the entry of the order disposing of a timely post-trial motion. Thus, defendant's *pro se* notice of appeal had no effect. Defendant's motion to reduce sentence was subsequently denied on October 20, 2010, and appointed counsel filed a notice of appeal on November 4, 2010. As defendant's notice of appeal was filed within 30 days following entry of the order denying her post-sentencing motion, it was not untimely. We turn now to the merits of defendant's appeal.

¶ 8 Fair Sentencing Hearing

¶ 9 Defendant first contends that she was denied a fair sentencing hearing when the State asserted, without evidentiary support, that she was not a certified nursing assistant, she lied on her job application, and that she admitted as much in the presentence investigation report, which the trial court relied upon in setting defendant's sentence. Defendant admits that she failed to preserve this issue for review as she did not include it in her motion to reconsider sentence. However, she contends that it is reviewable under the second prong of plain error because reliance on an improper factor in sentencing impinges upon a defendant's fundamental right to liberty.

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¶ 10 Section 5-8-1(c) of the Unified Code of Corrections (730 ILCS 5/5-8-1(c) (West 2010)) makes the filing of a post-sentencing motion a mandatory requirement to challenging sentencing issues on appeal. However, the mandatory post-sentencing motion requirement of section 5-8-1 is subject to Illinois Supreme Court Rule 615(a) (Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999)); namely that sentencing errors which affect substantial rights may be analyzed under the doctrine of plain error regardless of a defendant's failure to file a post-sentencing motion. *People v. Whitney*, 297 Ill. App. 3d 965, 967 (1998).

¶ 11 In order to invoke application of the plain error doctrine, we must first determine whether any error occurred. *People v. Magallanes*, 409 Ill. App. 3d 720, 750-51 (2011). If there was error, we must then consider whether the evidence was closely balanced or whether the error was "sufficiently grave" that the defendant was deprived of a fair sentencing hearing. *People v. Rathbone*, 345 Ill. App. 3d 305, 339 (2003), (citing *People v. Fuller*, 205 Ill. 2d 308, 343 (2002)). Prejudice to the defendant is presumed because of the importance of the right involved. *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 12 Under both prongs of plain error, the burden of persuasion rests with defendant. *People v. Ahlers*, 402 Ill. App. 3d 726, 734 (2010). However, the plain error doctrine is not a general savings clause and does not preserve all errors affecting substantial rights that have not been brought to the trial court's attention. *Herron*, 215 Ill. 2d at 177. When the defendant fails to establish plain error, the procedural default must be honored. *Ahlers*, 402 Ill. App. 3d at 734.

¶ 13 Here, defendant is challenging the fairness of her sentencing hearing, arguing that because the trial court specifically stated that it found defendant's dishonesty in applying for the job to be an aggravating factor, her sentence was clearly tainted by the trial court's reliance on

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this improper factor. We disagree. Our review of defendant's sentencing hearing reveals that it was not fundamentally unfair, thus a plain error did not occur.

¶ 14 Aggravated identity theft of credit, money, goods, services, or other property exceeding \$300 and not exceeding \$10,000 in value is a Class 2 felony. 720 ILCS 5/16G-20(e)(2)(B) (West 2010). A Class 2 felony has a sentencing range of between three and seven years. 730 ILCS 5/5-4.5-35 (West 2010). Because defendant had a prior Class 2 felony conviction within a 10-year period, she was eligible for an extended term sentence of between 7 and 14 years (730 ILCS 5/5-8-2(a); 730 ILCS 5/5-4.5-35(a) (West 2010)), which the State actively sought in this case. However, the trial court decided not to sentence defendant to an extended term, and instead sentenced her to a five-year term after hearing and reviewing evidence in aggravation and mitigation.

¶ 15 In sentencing defendant, the trial court stated:

“Let the record reflect that I reviewed the PSI, and reread it. I'm not going to consider it. Makes no sense if she wants to take back what she wrote in the narrative section, and for the record that is the section that deals with a Summary of Offense starting on page two, continuing through page four. I won't consider the statements made by the Defendant there, but I have read and reread the PSI in consideration of all those paragraphs. I mean, one, it's not that I am giving one greater weight than the other.

I have also considered the statutory provisions for mitigation and aggravation under 730 ILCS /55-3 [sic].

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Specifically 3.1, factors in mitigation and 3.2, factors in aggravation. Mitigation, this is not a crime that caused physical harm to someone and the Court takes that always in consideration and it's because of that particular statutory section that I don't think an extended term is warranted in this case, even though the law allows it. I also note that under subsection 11 that any imprisonment of this Defendant is a hardship to her dependents and I'm considering that.

I am also considering the defendant's ability to be rehabilitated, which I think is very slim. Prison hasn't helped her before and I don't think it's going to help her this time either.

Factors in aggravation, obviously she did receive compensation for her crime, she received money. I believe she was caught with over \$4,000.00 if I remember the facts correctly in reviewing my notes, or there was \$4,000 that was taken.

I wouldn't call it specifically a position of trust but here our society is such that we have so many facilities now open and opening for seniors and for families that place their loved ones under a type of situation where they're cared for by professionals. And when they're placed in these homes or these rehabilitation homes the families who many times pay for it, rely on the people that work there to provide them not only care but they're in a

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position of trust. Not just to care for their physical well-being but everything about their life.

In this case I have a situation where I have a defendant who not only has previous felony convictions but went to the penitentiary, who gets a job in one of these places and makes off as if she's a CNA, which is not and gets herself in a position to get hired in a position of trust over these people. And the Court can only conclude that she did this to be in a position to find a target and she picked her target well. So in my opinion this was planned, otherwise she wouldn't have lied on her application, she wouldn't have lied as to her credentials. This isn't a matter of trying to get a job, her history I note for the record is a forgery and a burglary in less than ten years, so I find that to be pretty aggravating. Not aggravating enough to extend her, but pretty aggravating.

Counsel argues she's pregnant, I'm taking that into consideration. The problem is we can't use pregnancies to stop - - to not send someone to the penitentiary because obviously then people would get pregnant to just avoid the penitentiary.

I do find she's remorseful, I believe she's remorseful, I believe that because quite frankly I read the narrative of her version of events and then she wanted them taken away and I'm not considering it but by taking away, she tells me she's remorseful

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because she gave herself all kinds of excuses in that area. So in any event I think by saying she does not want that version of the events in, and by her saying she is sorry, I believe she truly is.

I believe a fair sentence in this case would - - I realize she extendable and I realize that she has a prior Class 2 offense for the burglary and she has a prior Class 3 for felony conviction for the forgery, I think a fair sentence is five years in the Illinois Department of Corrections. She will be remanded to the Department of Corrections for five years, will receive credit for all days in custody * * *."

¶ 16 Thus, the record clearly shows that the trial court considered the fact that defendant lied on her job application to be an aggravating factor. However, our review of the presentence investigation report reveals that defendant never stated that she was or was not a certified nursing assistant, only that she had completed some of the requirements to be a licensed practical nurse, nor was the reason for her discharge listed in the report, contrary to the State's assertion during the sentencing hearing and the trial court's statement during defendant's sentencing hearing. Further, the record does not reflect that this information was presented during trial. We accordingly conclude that use of this information as an aggravating factor was error. However, that does not end our inquiry. We must determine whether the error rose to the level of plain error which jeopardized the integrity of defendant's sentencing hearing.

¶ 17 Reliance on improper information as a factor in aggravation does not always necessitate remandment for resentencing. *People v. Curtis*, 354 Ill. App. 3d 312, 326 (2004). When this

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court is unable to determine the weight to be given to an improperly considered factor, the cause must be remanded for resentencing. *Curtis*, 354 Ill. App. 3d at 326. However, a reviewing court should not focus on a few words or statements of the trial court, but should make its decision based on the record as a whole. *Curtis*, 354 Ill. App. 3d at 326. Where it can be determined from the record 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. *Curtis*, 354 Ill. App. 3d at 326.

¶ 18 In the case at bar, a review of the record from the sentencing hearing shows that the trial court took great care in considering all factors before it, both in aggravation and mitigation, prior to imposing a five-year sentence. The trial court stated clearly in the record that the information contained in defendant's presentence investigation report would not be given greater weight. Additionally, although the trial court made mention of the improper factor as an aggravating factor, it is clear from the record that mitigating evidence including defendant's pregnancy and remorse were heavily considered and weighed strongly in the court's decision not to sentence defendant to an extended term and to only sentence her to a five-year term, which was the midpoint of the sentencing range available for a Class 2 felony. We find that the sentence follows the spirit of the law and is not disproportionate to the nature of the offense (*People v. Pearson*, 331 Ill. App. 3d 312, 321 (2002)), and thus conclude that the weight given the improper aggravation factor did not result in a greater sentence for defendant. As such, we conclude that the error did not rise to the level of plain error and that defendant's sentencing hearing was not fundamentally unfair.

¶ 19 Restitution Order

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¶ 20 Defendant next contends that the trial court was not statutorily authorized to impose a restitution order for \$6,070.49 because it exceeded the victim's actual out-of-pocket losses.

Specifically, defendant contends that the amount of the restitution order was error when the bank records entered into evidence at her trial plainly show that at least \$3,940.49 of the money withdrawn from the victim's accounts was later refunded.

¶ 21 We review *de novo* whether a restitution order is statutorily authorized. *People v. Felton*, 385 Ill. App. 3d 802, 805 (2008). The restitution statute authorizes restitution for "actual out-of-pocket expenses, losses, damages and injuries suffered by the victim named in the charge." 730 ILCS 5/5-5-6(b) (West 2010).

¶ 22 Any portion of a sentence which is not authorized by statute is void. *People v. Day*, 2011 IL App (2nd) 091358, ¶48. A void order may be attacked at any time and is not subject to procedural default. *Day*, 2011 IL App (2nd) 091358, ¶48. If, however, an order is improper because of a mistake of law or fact, it is voidable and the error can be forfeited. *Day*, 2011 IL App (2nd) 091358, ¶48, (citing *People v. Fouts*, 319 Ill. App. 3d 550, 552 (2001)). Here, the restitution order was entered without objection, and defendant did not include this issue in her post-sentencing motion. As such defendant cannot now complain of an error in which she acquiesced or invited. See *People v. Early*, 158 Ill. App. 3d 232, 241 (1987).

¶ 23 However, defendant was entitled to have the amount of restitution reduced by any amount recovered as it would have reduced the actual out-of-pocket losses of the victim, and that amount should have been taken into consideration. *People v. Wiesneske*, 234 Ill. App. 3d 29, 47-48 (1992). The record indicates that some portion of the funds at issue were either returned to the victim or never received by defendant, and further that this amount was never calculated or

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considered by the trial court in setting restitution. We find that the restitution amount must be reduced to the amount of actual out-of-pocket losses suffered by the victim; accordingly we reverse the restitution order and remand to the trial court for a hearing to determine the proper amount of restitution. See *Wiesneske*, 234 Ill. App. 3d at 48; *Early*, 158 Ill. App. 3d at 241.

¶ 24 Credit for Presentence Detention

¶ 25 Finally, defendant contends that the trial court failed to credit her \$5 per day for time served in presentence detention against the fines imposed at sentencing. Specifically, defendant argues in her opening brief that she was entitled to \$255 credit for her 51 days of presentence detention, and that amount should have been credited against the \$260 she was assessed in fines.

¶ 26 The State concedes that defendant should have received \$60 credit against her fines, but argues that the \$200 DNA testing fee is not considered a fine and is therefore not subject to offset by the presentence incarceration credit. The State concludes that defendant is entitled to have her assessments reduced to \$580. Defendant has since conceded to the State's argument in her reply brief.

¶ 27 As our supreme court has recently held that the DNA analysis fee is not a punitive fine for purposes of applying a defendant's presentence incarceration credit (*People v. Johnson*, 2011 IL 111817, ¶28), we find that defendant is entitled to receive \$60 credit against her fines.

Because we have the authority to correct the mittimus at any time without remanding the matter to the trial court (*People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)), we order the correction of the mittimus to reflect a reduction in the amount of defendant's assessments by \$60 for a new total of \$580.

¶ 28 CONCLUSION

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¶ 29 For the foregoing reasons, the judgment of the circuit court is affirmed in part, the restitution order is reversed and remanded for calculation of the proper restitution amount; mittimus corrected.

¶ 30 Affirmed in part; reversed in part; mittimus corrected.