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2012 IL App (3d) 100671-U

Order filed March 16, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 10th Judicial Circuit,
Plaintiff-Appellee,	) Peoria County, Illinois,
	)
v.	) Appeal No. 3-10-0671
	) Circuit No. 10-CF-266
CHRISTOPHER D. TIMOTHY,	)
	) Honorable
Defendant-Appellant.	) James E. Shadid,
	) Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Schmidt and Justice Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 24 years' imprisonment. The portion of the sentencing order requiring defendant to pay a \$200 DNA analysis fee should be vacated because defendant had a DNA sample on file at the time of sentencing.

¶ 2 Following a jury trial, defendant, Christopher D. Timothy, was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)) and sentenced to 24 years' imprisonment. On appeal, defendant argues that: (1) his sentence was excessive; and (2) the

portion of the trial court's sentencing order requiring him to pay a \$200 deoxyribonucleic acid (DNA) fee should be vacated because he already had a DNA sample on file at the time of sentencing. We affirm defendant's sentence, and vacate the portion of the judgment ordering him to pay the \$200 DNA analysis fee.

¶ 3

### FACTS

¶ 4 The evidence at trial established that on March 1, 2010, both defendant and Deandra Franklin were at a nightclub. Franklin left the club sometime before 4 a.m. and before leaving the area was shot three times in his legs. The State presented evidence that defendant encountered Franklin outside the nightclub, they exchanged words, and defendant pulled out a handgun and shot Franklin in his legs three times. The defense presented evidence to undermine the credibility of Franklin's testimony. In part, the defense's evidence highlighted that Franklin and defendant had prior animosity toward each other, and that this motivated Franklin, as the only eyewitness to the shooting, to identify defendant as his shooter.

¶ 5 Defendant was found guilty of multiple counts, but these were eventually merged into a single conviction for aggravated battery with a firearm. At defendant's sentencing hearing, the State presented evidence of defendant's history of criminality. According to defendant's presentence investigation report (PSI), defendant was adjudicated a delinquent for attempted theft from a person and unlawful possession of a controlled substance. Defendant's adult criminal record included two convictions for each of the following: resisting a peace officer, unlawful possession of a controlled substance, and unlawful possession of cannabis. Defendant was also convicted of domestic battery, robbery, ordinance violations, and traffic violations. The PSI showed that during defendant's stay at a juvenile detention facility, defendant was involved in

incidents of violence against his peers. Defendant was 24 years old and had never been employed. He was a high school dropout and had several children. Defendant was on parole when he committed the offense and also had other probation violations.

¶ 6 After the trial court reviewed the evidence, defendant was sentenced to 24 years' imprisonment. In making its determination, the court noted that it considered the PSI, arguments of counsel, and statutory factors in aggravation and mitigation. As to statutory factors in aggravation, the court found that defendant had a history of criminal delinquency and criminal activity, and that a sentence was necessary to deter others. The court noted that defendant's conduct caused serious harm, but that this factor was inherent in the offense itself. The court commented on defendant's young age, but noted that instead of becoming a productive member of society, defendant participated in criminal activity and used drugs. The court found no statutory factors in mitigation.

¶ 7 Following sentencing, defendant filed a motion to reconsider sentence, which the trial court denied. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 On appeal, defendant first argues that his sentence of 24 years' imprisonment was excessive in light of the nature and circumstances of the offense, defendant's age and social history, and the current problem of overcrowding in Illinois prisons.

¶ 10 The Illinois Constitution mandates that all penalties 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. However, the determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find

that the court abused its discretion. *People v. La Pointe*, 88 Ill. 2d 482 (1981). A trial court is in a far better position than an appellate court to fashion an appropriate sentence based upon firsthand consideration of factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13 (1991). Therefore, we will not substitute our judgment for that of the trial court just because we may have balanced the sentencing factors differently. *Id.* Furthermore, a sentence that is within the statutory range will not be deemed excessive unless it either departed greatly from the spirit and purpose of the law, or it was manifestly disproportionate to the nature of the offense. *People v. Spencer*, 303 Ill. App. 3d 861 (1999). Aggravated battery with a firearm, a Class X felony, has a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 11 Here, we find that the trial court did not abuse its discretion in sentencing defendant to 24 years' imprisonment. The record in this case demonstrates that at defendant's sentencing hearing, the trial court was presented with all the mitigating and aggravating factors. Defendant argues that the trial court did not give proper weight to mitigating factors, such as the circumstances of the offense, defendant's age and social history, and the current problem of overcrowding in Illinois prisons. However, unless the record affirmatively shows otherwise, the trial court is presumed to have considered all relevant factors, including any mitigating evidence. *People v. Hernandez*, 319 Ill. App. 3d 520 (2001). Furthermore, the trial court specifically stated that it considered all the evidence presented at sentencing. In light of defendant's lengthy criminal history and the need to deter others, we cannot say that an abuse of discretion occurred when the court weighed the factors and found that a sentence at the high end of the range was appropriate.

¶ 12 Moreover, despite defendant's emphasis on his potential for rehabilitation, the trial court

was not required to give greater weight to defendant's rehabilitative potential than to the circumstances of the offense. See *People v. Brown*, 218 Ill. App. 3d 890 (1991). In light of the record, his sentence was not manifestly disproportionate to the nature of the offense; therefore, we hold that the trial court did not abuse its discretion in imposing defendant's sentence. See *Spencer*, 303 Ill. App. 3d 861.

¶ 13 There is some logical appeal to defendant's argument relating to prison overcrowding. It is, however, the function of the courts to determine where the sentence of each convicted defendant falls within the statutorily-defined sentencing range on the basis of factors specific to that defendant, the nature and severity of his or her crimes, and the goal of deterrence. *Supra*, ¶ 10 Concerns about prison overcrowding that do not rise to constitutional dimension, including the impact of extended sentencing ranges, fall within the purview of the legislature and not the courts. We cannot fault the trial court for failing to take such concerns into consideration in sentencing this defendant.

¶ 14 Defendant next contends that this court should vacate the defendant's \$200 DNA assessment fee because he provided a DNA sample following a previous conviction. Any individual convicted of an offense that is classified as a felony under Illinois law after January 1, 1998, is required to submit to the taking, analysis, and indexing of the offender's DNA, and the payment of an analysis fee. 730 ILCS 5/5-4-3(a), (j) (West 2010). However, a defendant is only required to submit and pay for a DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 15 Here, defendant has submitted documentation indicating that his DNA profile was on file since 2005. The State agrees. We therefore vacate the defendant's DNA analysis fee, and order

that if the defendant has already paid this fee that the money be refunded to him.

¶ 16

#### CONCLUSION

¶ 17 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed as modified.

¶ 18 Affirmed as modified.