NOTICE
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2012 IL App (4th) 100913-U

Filed 7/16/12

NO. 4-10-0913

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
JAMES M. GOULD,	)	No. 09CF1860
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: Imposed sentence was not excessive.

¶ 2 On May 11, 2010, defendant, James M. Gould, pleaded guilty to theft with a prior theft conviction (720 ILCS 5/16-1(a)(1)(A), (b)(2) (West 2008)), a Class 4 felony offense (720 ILCS 5/16-1(b)(2) (West 2008)). On June 24, 2010, the trial court sentenced defendant to an extended term of 70 months in prison. On appeal, defendant argues he is entitled to a new sentencing hearing because the trial court failed to consider two statutory mitigating factors. We affirm.

¶ 3 On November 2, 2009, the State charged defendant with one count of theft alleging he knowingly exerted unauthorized control over property of Schnucks grocery store, having a total value of less than $300, intending to permanently deprive Schnucks grocery store

of the benefit of the property, and having been previously convicted of theft. 720 ILCS 5/16-1(a)(1)(A), (b)(2) (West 2008)). Based on a previous felony conviction, defendant was eligible for extended-term sentencing.

¶ 4 On May 11, 2010, defendant pleaded guilty in exchange for the State agreeing to dismiss another charge. The State's factual basis indicated that defendant took six boxes of candy from the Schnucks grocery store. Defendant placed two boxes in his pants and four boxes in a bag that he brought into the store. Defendant then proceeded past all points of sale where a loss prevention officer stopped him. The candy was valued at $119.94. Defendant did not provide an explanation for his actions. The trial court found defendant knowingly and voluntarily pleaded guilty to the charge.

¶ 5 On June 24, 2010, the trial court sentenced defendant to an extended term of 70 months in prison. On November 8, 2010, defendant filed an amended motion to reconsider sentence, arguing his sentence was excessive, which the trial court denied. This appeal followed.

¶ 6 Defendant argues that his extended-term, 70-month sentence is excessive. Typically, a person convicted of theft of property, not from the person and not exceeding $300 in value, who has been previously convicted of theft (or other prior convictions not applicable here), is guilty of a Class 4 felony, carrying a prison term of one to three years. 730 ILCS 5/5-8-1(a)(7) (West 2008). Because defendant had been convicted of a felony within the last 10 years, he was subject to an extended-term sentence. A defendant subject to an extended term as a Class 4 felon may be sentenced to a term of up to six years in prison. 730 ILCS 5/5-8-2(a)(6) (West 2008).

¶ 7 In sentencing defendant, the trial court noted defendant's 46-year criminal history, which included 15 criminal convictions and six misdemeanor traffic convictions. The court

observed that defendant had no rehabilitative potential at this point in his life. Defendant had been incarcerated in the Department of Corrections (DOC) on multiple occasions. The court concluded that this was the type of offense that could be deterred.

¶ 8 Defendant's specific argument on appeal is that the trial court erred in failing to consider two factors in mitigation: (1) "[t]he defendant's criminal conduct neither caused nor threatened serious physical harm to another" and (2) "[t]he defendant did not contemplate that his conduct would cause or threaten serious physical harm to another." 730 ILCS 5/5-5-3.1(a)(1), (a)(2) (West 2008). The State argues this issue is forfeited because defendant failed to file a posttrial motion setting forth his allegation of error. Defendant asks this court to review the issue as a matter of plain error.

¶ 9 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Lewis*, 234 Ill. 2d 32, 43, 912 N.E.2d 1220, 1227 (2009). As the first step

in the analysis, we must determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010).

This court will not disturb a sentence absent an abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 379, 583 N.E.2d 515, 526 (1991).

¶ 10 Defendant contends that the trial court's statement that "[t]here aren't any statutory mitigating factors that apply to this [d]efendant to this type of offense" is sufficient to rebut the presumption that the trial court considered evidence that (1) defendant's conduct neither threatened nor caused serious harm and (2) defendant did not contemplate that his conduct would cause or threaten serious harm. See *People v. Bailey*, 409 Ill. App. 3d 574, 594, 948 N.E.2d 690, 710 (2011) ("A trial court is presumed to have considered all of the relevant evidence of mitigation before it."). However, stating that no statutory factors in mitigation *apply* is different than stating that the trial court did not *consider* a mitigating factor. See *People v. Newbill*, 374 Ill. App. 3d 847, 855, 873 N.E.2d 408, 415 (2007). In this case, the court stated that it "considered the statutory factors in aggravation, as well as the statutory factors in mitigation." The court recognized that nothing in defendant's recent history indicated that defendant is dangerous. The court described the offense as trying to walk out of a Schnucks grocery store with six boxes of candy. The court further acknowledged "some mitigation in this record." The single comment relied on by defendant was made in the context of describing the court's consideration of all of the evidence presented and did not demonstrate that the trial court failed to consider factors in mitigation. The trial court's remarks as a whole reflect careful consideration of all of the statutory and nonstatutory factors offered by the parties. Implicit in the single, isolated comment is the court's conclusion that the mitigating factors were not sufficient to outweigh the aggravat-

ing factors. We find no plain error.

¶ 11 Defendant argues he (1) has struggled with drugs and alcohol and (2) admitted fault and expressed remorse for his actions. In considering defendant's argument, this court notes that drug addiction is not necessarily a mitigating factor (*People v. Whealon*, 185 Ill. App. 3d 570, 574, 541 N.E.2d 865, 867 (1989)), and the trial court was free to find defendant's remorse to be incredible. See generally *People v. Fern*, 189 Ill. 2d 48, 55-56, 723 N.E.2d 207, 211 (1999) (the trial court observes the defendant and the proceedings and is therefore in a far better position than a court of review to consider the relevant factors). The trial court did not abuse its discretion in sentencing defendant to an extended term.

¶ 12 Defendant next argues he is entitled to a $5 *per diem* credit against his $5 drug-court assessment under section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2008)).

¶ 13 In *People v. Swank*, 344 Ill. App. 3d 738, 747-48, 800 N.E.2d 864, 871 (2003), this court explained the proper roles of judicial and nonjudicial members in imposing statutory fines as follows:

> "The imposition of a fine is a judicial act. The clerk of a court is a nonjudicial member of the court and, as such, has no power to impose sentences or levy fines. [Citation.] Instead, the circuit clerk has authority only to collect judicially imposed fines. [Citation.]" (Internal quotation marks omitted.)

Regarding the $5 drug-court assessment, this court has found the fine mandatory. See *People v. Folks*, 406 Ill. App. 3d 300, 305, 943 N.E.2d 1128, 1132 (2010). Since the drug-

court assessment is a fine, the circuit clerk did not have authority to impose the fine. *Folks*, 406 Ill. App. 3d at 306, 943 N.E.2d at 1133. When presented with a mandatory fine assessed by the clerk, we may vacate the fine and reimpose the fine ourselves. See *People v. Evangelista*, 393 Ill. App. 3d 395, 401, 912 N.E.2d 1242, 1247 (2009). Thus, we vacate the $5 drug-court assessment and reimpose the fine ourselves. The State concedes defendant is entitled to a $5 credit against his drug court fine.

¶ 14 Defendant next argues he is entitled to reduction of the Violent Crime Victims Assistance Act fine from $20 to $4. The trial court did not order defendant to pay a Violent Crime Victims Assistance Act fine. The fine later appeared on a form by the circuit clerk. Under the Violent Crime Victims Assistance Act, if no other fines are imposed, the penalty to be collected is $25 for crimes of violence and $20 for any other felony. See 725 ILCS 240/10 (c)(1), (c)(2) (West 2008). If other fines are imposed, the penalty is "$4 for each $40, or fraction thereof, of fine imposed." 725 ILCS 240/10(b) (West 2008). Here, defendant's fines total less than $40, and thus his fine under section 10(b) of the Violent Crime Victims Assistance Act is $4. Because the fine is mandatory, we remand the cause for the court to expressly impose the amount of the fine. See *People v. Scott*, 152 Ill. App. 3d 868, 873, 916, 505 N.E.2d 42, 46 (1987). We note the Violent Crime Victims Assistance fine is not subject to the $5-per-day credit provision of section 110-14(a). 725 ILCS 240/10(c) (West 2008).

¶ 15 For the reasons stated, we affirm as modified the trial court's judgment and remand the cause to the Champaign County circuit court for the entry of an amended sentencing judgment that includes the $5 drug-court fine and the $4 Violent Crime Victims Assistance Act fine. As part of our judgment, we award the State its $50 statutory assessment against defendant

as costs of this appeal.

¶ 16 Affirmed as modified and remanded with directions.