

NOTICE  
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2012 IL App (4th) 110585-U

Filed 9/24/12

NO. 4-11-0585

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Woodford County
DAVID W. GAUF,	)	No. 10CF71
Defendant-Appellant.	)	
	)	Honorable
	)	John B. Huschen,
	)	Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.  
Justices Steigmann and Pope concur in the judgment.

**ORDER**

¶ 1 *Held:* (1) The trial court properly considered mitigating and aggravating factors and did not abuse its discretion in sentencing defendant.

(2) The appellate court remanded for the trial court to modify defendant's sentencing order to reflect a \$5 credit toward defendant's children's-advocacy-center fine.

¶ 2 In July 2010, the State charged defendant with theft, subsequent offense, a Class 4 felony (720 ILCS 5/16-1(a)(1)(A), (b)(2) (West 2010)). On November 3, 2010, defendant entered an open plea of guilty. In April 2011, the trial court sentenced defendant to five years' imprisonment, with one year of mandatory supervised release (MSR), awarded credit for nine days previously served, and imposed various fines and fees. In May 2011, defendant filed a motion to reconsider sentence; and in June 2011, the court denied the motion. Defendant appeals, arguing the trial court (1) abused its discretion in sentencing defendant, and (2) erred in

failing to give defendant a \$5-per-day credit against his children's-advocacy-center fine. We affirm as modified and remand with directions.

¶ 3

### I. BACKGROUND

¶ 4 Defendant entered an open plea of guilty to theft, subsequent offense. During his April 29, 2011, sentencing hearing, defendant admitted he took approximately seven gallons of gasoline from his employer, Roanoke Concrete. Defendant testified he "was falling on hard times. That's the reason [he] took the fuel." Defendant made a statement in allocution, explaining that he "plead[ed] guilty to this because [he] want[s] to admit [his] mistakes and go on with [his] life." Defendant apologized for his actions and asked he be allowed to pay restitution to his employer.

¶ 5 The State asked the trial court to impose a five-year sentence based upon defendant's criminal history. Defendant asked the court to sentence him to probation. The court sentenced defendant to five years' imprisonment, with one year of MSR, and credited him for nine days previously served. In imposing its sentence, the court focused on defendant's 20-year criminal history, which it described as "deplorable." The court found "probation would deprecate the seriousness" of the offense. The court emphasized defendant had "a disregard for people's property" and the only way to prevent defendant from engaging in future thefts was to incarcerate him.

¶ 6 On May 4, 2011, defendant filed a motion to reconsider sentence. On June 6, 2011, the trial court heard arguments from both parties. The trial court denied defendant's motion. Because of prior convictions, defendant subjected himself to a Class 4 felony and extended-term sentencing by taking a small amount of gasoline. The court maintained

defendant's actions warranted the sentence imposed.

¶ 7 This appeal followed.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant argues the trial court (1) abused its discretion in sentencing, and (2) erred in failing to give defendant a \$5-per-day credit against his children's-advocacy-center fine. The State argues the trial court properly sentenced defendant and concedes defendant should be given a \$5-per-day credit against his fine. We address each argument.

¶ 10 A. Defendant's Sentence

¶ 11 Defendant argues the trial court abused its discretion in sentencing because it failed to consider defendant's remorse and rehabilitative potential. The State argues the trial court properly considered all aggravating and mitigating factors and sentenced defendant appropriately.

¶ 12 In sentencing a defendant, the trial court "enjoys wide latitude in determining and weighing factors in mitigation or aggravation, and this court gives great deference and weight to the sentence the trial court thought appropriate in any given case." *People v. Nussbaum*, 251 Ill. App. 3d 779, 781, 623 N.E.2d 755, 757 (1993). "A sentence within statutory guidelines will only be disturbed on review if the trial court abused its discretion." *People v. Mitchell*, 395 Ill. App. 3d 161, 167, 916 N.E.2d 624, 630 (2009). "Where a defendant presents evidence in mitigation, it is presumed that the trial court considered said evidence." *People v. Newbill*, 374 Ill. App. 3d 847, 854, 873 N.E.2d 408, 414 (2007). This court presumes the trial court considered all the factors presented in mitigation where it specifically stated it did so. *People v. Givens*, 364 Ill. App. 3d 37, 47, 846 N.E.2d 951, 959 (2005).

¶ 13 Defendant pleaded guilty to theft, subsequent offense, a Class 4 felony (720 ILCS 5/16-1(a)(1)(A), (b)(2) (West 2010)). Defendant was eligible for extended-term sentencing (730 ILCS 5/5-8-2(a) (West 2010)), with the statutory minimum being three years and the statutory maximum being six years (730 ILCS 5/5-4.5-45(a) (West 2010)). The trial court sentenced defendant to five years' imprisonment. Defendant's sentence was within statutory guidelines.

¶ 14 At the sentencing hearing, the trial court found in "regard to the nature and circumstances of the offense, and to the history, character, and condition of the offender, the court is of the opinion that imprisonment is necessary." The court said it "considered each and every statutory relevant factor in aggravation and mitigation" and "the defendant's statement in allocution." The court focused on defendant's 20-year criminal history in determining a lesser sentence would not be appropriate. The record shows the court considered defendant's mitigating evidence. The trial court did not abuse its discretion in sentencing defendant.

¶ 15 B. Five-Dollar-Per-Day Sentencing Credit

¶ 16 The trial court imposed a \$5 children's-advocacy-center assessment when it sentenced defendant. The \$5 children's-advocacy-center assessment is a fine. *People v. Isaacson*, 409 Ill. App. 3d 1079, 1085, 950 N.E.2d 1183, 1190 (2011). Section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)) allows defendant to receive a credit of \$5 a day for each day he was incarcerated, to be credited toward the fines levied against him on conviction. The court gave defendant credit for nine days' time served. Thus, defendant should have received a \$5-per-day credit against his children's-advocacy-center fine. The record does not show defendant received such credit. We remand to the trial court to modify defendant's sentencing judgment to reflect a \$5 sentence credit.

¶ 17

### III. CONCLUSION

¶ 18           We affirm the trial court's judgment as modified and remand with directions for the trial court to amend defendant's sentencing judgment as stated. Since the State successfully defended part of this appeal, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 19           Affirmed as modified and cause remanded with directions.