

No. 1-10-2357

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 4999
	)	
TRACY THOMAS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

¶ 1 *Held:* Judgment entered on defendant's convictions of aggravated battery and aggravated fleeing or attempting to elude a police officer affirmed over his claim that his aggravated battery sentence is excessive; extended-term sentence for aggravated fleeing of police officer reduced to maximum term for Class 4 felony; fines and fees order modified.

¶ 2 Following a bench trial, defendant Tracy Thomas was found guilty of three counts of aggravated battery and one count of aggravated fleeing or attempting to elude a police officer. At sentencing, the court merged defendant's aggravated battery convictions and sentenced him as a Class X offender to 15 years' imprisonment for aggravated battery. The court also sentenced him

to a concurrent, extended term of 6 years' imprisonment for aggravated fleeing of a police officer, and assessed him fines and fees totaling \$725. On appeal, defendant contends that his 15-year sentence for aggravated battery is excessive in light of certain mitigating evidence, that the trial court incorrectly found him eligible for an extended-term sentence for aggravated fleeing of a police officer, and that he is entitled to presentence incarceration credit to offset his fines.

¶ 3 The record shows, in relevant part, that about 7:40 p.m. on February 27, 2009, Chicago police were conducting a prostitution sting named "Operation Angels" at 81st Street and Ashland Avenue, in Chicago. Defendant pulled his minivan into a gas station there, motioned an officer posing as a prostitute to come over, and offered \$40 "for some head," *i.e.*, oral sex. Soon after the officer signaled that defendant had propositioned her for sex, enforcement officers pulled into the gas station with their lights and sirens engaged. Defendant began backing his car out of the pump area while Chicago police officer McCallum banged on his driver's side window, screaming, "Chicago police, stop the vehicle." Defendant, however, drove forward and struck Chicago police officer James Wynn, who was standing in front of the vehicle with his weapon drawn and announcing his office, then fled southbound on Ashland Avenue. A chase ensued before defendant crashed into a streetlight pole near 86th Street and Loomis Boulevard and was apprehended after a struggle. Officer Wynn suffered a right knee contusion and lower back strain as a result of the collision. The trial court ultimately found defendant guilty of three counts of aggravated battery against Officer Wynn and aggravated feeling or attempting to elude a police officer.

¶ 4 At sentencing, the trial court provided the parties with an opportunity to make corrections to defendant's presentence investigation report (PSI). Defense counsel amended the PSI to include a report from forensic clinical services indicating that defendant was taking Depakote, Risperidone, and Sertraline as of November 12, 2009, and the State corrected a case number and

the substantive offense in another case. The State then informed the court that defendant was mandatory Class X by background and introduced into evidence certified statements of his prior convictions for burglary (85-C-014552-01), possession of a controlled substance (87-CR-10351-01), and possession of a stolen motor vehicle (92-CR-22112-01).

¶ 5 In aggravation, the State called Officer Wynn who read a victim impact statement in which he noted, *inter alia*, that he had spent four weeks on medical leave after the incident and attended physical therapy three times per week to strengthen his knee and lower back. Officer Wynn later discovered that his hip was out of alignment and pinching his sciatic nerve, and now has daily pain in his lower back.

¶ 6 The State then argued that defendant should receive a "lengthy prison sentence," and reminded the court of the facts of the case. In addition, the State noted that defendant was on bond at the time of the offense for case No. 08-CR-10365, which involved charges of attempted first degree murder, kidnapping, aggravated battery, and unlawful restraint.

¶ 7 In mitigation, defense counsel argued, *inter alia*, that defendant's prior convictions did not involve physical violence, that he had previously worked many years as a truck driver for the City of Chicago, and that he has a history of mental problems, including manic depression and schizoid disorder. Counsel noted that defendant had not taken his medications for a few days prior to the incident in question, and asserted that "his perception was changed from what a reasonable person would have viewed because of his disorders and lack of the proper medication." Defendant then spoke in allocution and apologized to Officer Wynn, stating that he "wasn't in [his] right frame of thinking," and wished the officer "a healthy and prosperous future."

¶ 8 In announcing sentence, the trial court discussed the statutory factors in aggravation and mitigation, and noted that defendant's conduct caused serious harm to Officer Wynn, that he has

a history of prior criminal activity, and that a sentence was necessary to deter others from committing the same crime. The court also stated that it would consider that defendant did not have any contact with the law between 1995 and the incident in question, and acknowledged that his imprisonment would be a hardship to his family. The court then questioned "[w]hy [defendant] kept making the wrong choice which was to get out of there at any and all cost regardless of who [he] took down with [him]," and noted that while the officers' "job poses a threat to them every time they go out the door, it's unlikely they thought on this prostitution sting that anything exciting was going to happen, certainly not life threatening."

¶ 9 Ultimately, the court merged defendant's aggravated battery convictions and sentenced him as a Class X offender to 15 years' imprisonment for aggravated battery. The court also found defendant eligible for an extended-term sentence on the remaining count "based upon [his] background," and sentenced him to a concurrent, extended term of 6 years' imprisonment for aggravated fleeing of a police officer .

¶ 10 Thereafter, defendant filed a motion to reduce sentence. He claimed, *inter alia*, that he had a medical condition that impaired his judgment, *i.e.*, schizo affective disorder and paranoia, that he had been prescribed anti-psychotic and anti-depressant medication, and that his medical condition affected his "mental capacity regarding [his] contemplation of the risks his conduct posed to others, including Officer Wynn."

¶ 11 At the hearing on defendant's motion, defense counsel informed the court that "there was nothing detailed in the presentence investigation about [defendant's] medical condition," and he requested that the court review defendant's medical records. The court then instructed the State to pull any fitness examinations from 2009 so that they could be made part of the record and passed the case. When proceedings resumed, the court noted that two reports were prepared during the pendency of defendant's case. On November 12, 2009, a staff psychiatrist found

defendant fit to stand trial, but could not render an opinion as to his sanity at the time of the offense due to "inadequate data base." On December 3, 2009, the doctor found that defendant was legally sane at the time of the alleged offense, and that "there was no indication that he suffered from a mental disease or defect which would have caused him to lack substantial capacity to appreciate the criminality of his conduct at the time."

¶ 12 In arguing the motion, defense counsel noted that, at sentencing, the court stated that it did not have information on defendant's medical condition, and that defendant had made "choices." Counsel argued, to the contrary, that "there was some sufficient information there," and that defendant's "mental condition affected those choices and that should be a lenient mitigating factor." The State responded that the court "went over the factors appropriately and addressed them," and that it did not believe defendant's mental health should affect his sentencing.

¶ 13 Following argument, the court denied defendant's motion to reduce sentence. In doing so, the court noted that it had considered the statutory factors in aggravation and mitigation, and the information that it had put on the record regarding defendant's prior evaluations, and that it had taken into account "defendant's condition as it was at the time of the offense."

¶ 14 In this appeal from that judgment, defendant first contends that his 15-year sentence for aggravated battery is excessive in light of his serious mental illness and the substantial length of time since his prior convictions. The State responds that the trial court properly exercised its discretion when sentencing defendant.

¶ 15 It is well-settled that a reviewing court will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). Where, as here, the sentence falls within the prescribed statutory limits, it will not be disturbed unless it is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the

offense. *Cabrera*, 116 Ill. 2d at 493-94. A sentence will not be found disproportionate where it is commensurate with the seriousness of the crime, and adequate consideration was given to any relevant mitigating circumstances, including the rehabilitative potential of defendant. *People v. Perez*, 108 Ill. 2d 70, 93 (1985).

¶ 16 Defendant maintains that his sentence was excessive because the trial court placed too much emphasis on his ability to appreciate the consequences of his actions, and ignored that his paranoid perception of the night's events was different from the perception of a rational person. He also claims that the court failed to give enough weight to the fact that he had not been convicted of a crime for 14 years prior to the instant offense.

¶ 17 Contrary to defendant's claim, the record affirmatively shows that the trial court took into account "defendant's condition as it was at the time of the offense." The court nonetheless found a 15-year sentence for aggravated battery to be appropriate, and its determination is supported by medical reports indicating that defendant was legally sane at the time of the alleged offense, and that "there was no indication that he suffered from a mental disease or defect which would have caused him to lack substantial capacity to appreciate the criminality of his conduct at the time." Although defendant claims that the trial court placed too much emphasis on his ability to appreciate the consequences of his actions, and failed to give enough weight to the interval of time since his previous conviction, this argument amounts to a request that we re-balance the appropriate factors and independently conclude that his sentence is excessive, which is not our function. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987) (citing *People v. Cox*, 82 Ill. 2d 268, 280 (1980)).

¶ 18 In this case, defendant was convicted of the Class 2 felony of aggravated battery (720 ILCS 5/12-4(b)(18), (e)(2) (West 2008)), but subject to mandatory Class X sentencing because of his criminal history (730 ILCS 5/5-5-3(c)(8) (West 2008)). The 15-year sentence imposed by the

trial court fell within the prescribed range of 6 to 30 years' imprisonment (730 ILCS 5/5-8-1(a)(3) (West 2008)), and we cannot say that it was disproportionate to the offense considering that defendant brazenly ran down a police officer with his minivan to escape arrest for a prostitution charge, and led police on a car chase down city streets before crashing his van into a streetlight pole, thereby endangering the police and the public at large. Accordingly, we find no abuse of discretion in the term imposed to permit any modification by this court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 19 Defendant next contends that the trial court incorrectly found him eligible for an extended-term sentence for aggravated fleeing or eluding a police officer, and requests this court to reduce his sentence to the maximum non-extended-term sentence of three years. The State concedes that defendant was not eligible for an extended-term sentence and accepts the proposed remedy. We agree that defendant's sentence was not properly extendable under section 5-5-3.2(b)(1) of the Unified Code of Corrections (730 ILCS 5/5-3.2(b)(1) (West 2008)) because aggravated fleeing of a police officer was not the most serious offense of which he was convicted. *People v. Jordan*, 103 Ill. 2d 192, 204-06 (1984). Therefore, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we reduce defendant's sentence for aggravated fleeing of a peace officer to three years' imprisonment, the maximum term for a Class 4 felony (625 ILCS 5/11-204.1(a)(2), (b) (West 2008); 730 ILCS 5/5-8-1(a)(7) (West 2008)). *People v. Taylor*, 368 Ill. App. 3d 703, 709 (2006).

¶ 20 Defendant lastly contends that he is entitled to a \$5 *per diem* credit for the 446 days he spent in presentence custody for a total credit of \$2230 to offset his fines, namely, his \$200 DNA charge, \$10 mental health court fine, \$5 youth diversion/peer court fine, \$5 drug court fee, and \$30 children's advocacy center fine. The State concedes that defendant is entitled to credit to offset each of these fines except the \$200 DNA assessment, which, it notes, is not a fine under

*People v. Johnson*, 2011 IL 111817, ¶ 28. In reply, defendant acknowledges that he is not entitled credit to offset the \$200 DNA fee pursuant to *Johnson*.

¶ 21 We agree with the parties that defendant is entitled to \$5 of *per diem* credit for the time he spent in presentence custody (725 ILCS 5/110-14(a) (West 2010)), which may be used to offset the \$10 mental health court fine, \$5 youth diversion/peer court fine, \$5 drug court fine, and \$30 children's advocacy center fine (*People v. Graves*, 235 Ill. 2d 244, 255 (2009); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010); *People v. Jones*, 397 Ill. App. 3d 651, 660 (2009)). Given the supreme court's ruling that the \$200 DNA fee is not a fine (*Johnson*, 2011 IL 111817, ¶ 28), we agree that it is not subject to offset by presentence incarceration credit.

¶ 22 We therefore reduce defendant's sentence for aggravated fleeing of a peace officer to three years' imprisonment, modify his fines and fees order to reflect a credit of \$50, and affirm the judgment in all other respects.

¶ 23 Affirmed, as modified.