

No. 1-12-0775

**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. 11 CR 5880
	)	
JONATHAN PARKER,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PUCINSKI delivered the judgment of the court.  
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Trial court did not abuse discretion in sentencing defendant to 10 years' imprisonment; mitigating factors were given proper consideration. Various errors in the order assessing fines and fees are corrected.
- ¶ 2 Following a bench trial, defendant Jonathan Parker was convicted of delivery of a controlled substance (less than one gram of cocaine) and sentenced as a mandatory Class X offender to 10 years' imprisonment. On appeal, he contends that his sentence was excessive in light of the mitigating factors, including his allocution expressing remorse and accepting

responsibility and that his offenses were related to his substance abuse. Defendant also contends, and the State concedes, that various errors in the order assessing fines and fees must be corrected.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance (less than one gram of cocaine) allegedly committed on or about March 29, 2011. The evidence at trial was that a police officer saw defendant engage in three separate transactions where a person gave him money in exchange for small items defendant produced from a bag he kept in one of his pockets. As the officer suspected that defendant was selling narcotics, another officer in plainclothes went to defendant and paid him \$20 in "marked" or recorded money for four small clear plastic baggies of what appeared to be cocaine, which defendant produced from a bag in his pocket. Defendant interacted with a woman between this transaction and his arrest. When officers approached him to arrest him, he fled and the officers briefly lost sight of him before finding him in a backyard. Upon his arrest, he had no narcotics nor the marked \$20. The baggies and their contents were inventoried, and the parties stipulated to the effect that the contents of one baggie tested positive for less than 0.1 gram of cocaine. For the defense, defendant's mother testified that she met him just before his arrest and that he made no narcotics sales. However, she corroborated that he fled before being arrested, and she admitted to having multiple felony convictions. On this evidence, the court found defendant guilty as charged.

¶ 4 The pre-sentencing investigation report (PSI) showed that defendant had been found to be a juvenile delinquent in 2000 for armed robbery and in 2002 for possession of a controlled substance. Defendant had three criminal convictions: in March 2007 for possession of a controlled substance with intent to deliver punished by 18 months' probation, in October 2007 for manufacture or delivery of a controlled substance punished by two years' probation, and in January 2008 for possession of a controlled substance with intent to deliver punished by six years' imprisonment. His parents neglected but did not abuse him in childhood, he reported, and

he was raised by his maternal grandmother. He is unmarried and has one child, a son who lives with his mother out-of-state and with whom defendant admitted "he does not have a relationship." He did not complete school "due to being shot" and "does not have a history of employment." He reported no physical or mental illness. He admitted to drinking a half-pint of whiskey every other day and to using marijuana, "ecstasy," and "lean"<sup>1</sup> since childhood, including that he was "under the influence of drugs at the time of this offense." He admitted to being a member of the Black Stones street gang.

¶ 5 At sentencing, the parties accepted the PSI without amendment. The State argued defendant's juvenile delinquency and criminal record in aggravation, but the court stated that it would not consider the juvenile offenses. In mitigation, defense counsel argued that defendant is a young man with a son, that his father and brother were in court to support him, and that while in jail he was studying for his GED and was in drug treatment. Counsel pointed to the report from the drug treatment program: defendant successfully completed the 120-day program, but the report also indicates that his participation was "attentive but not active" and was "good" in some categories, "poor" in others, and "very good" in none, so that further treatment was recommended.

¶ 6 Defendant addressed the court to the effect that he made bad choices in his life due to his drug use and his "way of thinking," was trying to learn from his mistakes, and did "accept responsibility" and was "very sorry."

¶ 7 The court stated that it considered:

"the evidence, the gravity of the offense, the [PSI], financial impact of incarceration, evidence and information in aggravation and

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<sup>1</sup>"Lean" is apparently a liquid drug based upon prescription cough syrup containing codeine and promethazine.

mitigation, substance abuse issues and treatment, potential for rehabilitation, the possibility of sentencing alternatives, the statement of the Defendant, and all hearsay considered at this hearing deemed reliable and relevant."

The court considered a prison sentence of 12 years appropriate but deducted "one year for your progress in" drug treatment "and another year for your statement admitting your responsibility and conduct," and thus sentenced defendant to 10 years' imprisonment. The mittimus declared defendant a mandatory Class X offender, included 291 days of credit for pre-sentencing detention, and recommended drug treatment. The order assessing fines and fees totaled \$3,595 with no indication of a pre-sentencing detention credit, and it included a \$3,000 controlled substance assessment, \$35 serious traffic violation fee, and \$20 "probable cause hearing" fee. No post-sentencing motion was made, and this appeal followed.

¶ 8 On appeal, defendant first contends that his sentence was excessive in light of the mitigating factors demonstrating rehabilitative potential, including his allocution expressing remorse and accepting responsibility and that his offenses were related to his substance abuse for which he was receiving treatment.

¶ 9 The State notes that defendant did not file a post-sentencing motion and argues that this contention is forfeited as unpreserved. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 29. However, defendant anticipated this argument and contends in the alternative to his primary contention that trial counsel rendered ineffective assistance by not filing such a motion. As the key question in determining both whether counsel acted unreasonably and whether defendant was prejudiced thereby (*People v. Henderson*, 2013 IL 114040, ¶ 11) is whether the unpreserved claim had a reasonable prospect of success, we shall consider the claim on that basis.

¶ 10 The delivery of less than one gram of cocaine is a Class 2 felony. 720 ILCS 570/401(d) (West 2010). However, a defendant over the age of 21 convicted of a Class 1 or Class 2 felony must be sentenced as a Class X offender if he has prior convictions for two Class 2 or higher felonies arising out of a different series of acts and he committed each felony after his conviction on the prior felony. 730 ILCS 5/5-4.5-95(b) (West 2010). A Class X felony is punishable by 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 11 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider incompetent evidence or improper aggravating factors, nor ignore pertinent mitigating factors, it has wide latitude to sentence a defendant to any term within the applicable statutory range. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Alexander*, 239 Ill. 2d at 213. In doing so, the trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that it considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Perkins*, 408 Ill. App. 3d at 763. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating

factors either require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214; *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 57.

¶ 12 Here, defendant's sentence of 10 years' imprisonment is well within the applicable statutory limits of 6 to 30 years. Delivery of a controlled substance is a serious offense, and defendant's criminal history – three controlled-substance offenses, none mere possession, in fairly rapid succession – demonstrates that prior convictions had no deterrent effect. Against these aggravating factors, the court was fully apprised of his history of substance abuse and of his successful drug treatment, and the court heard his expression of remorse and responsibility. Far from ignoring these mitigating factors, the court expressly gave them weight in its decision. As it is not our role as a court of review to resentence defendant and impose our own weighing of factors so long as they were properly considered, we cannot conclude that the trial court abused its sound sentencing discretion.

¶ 13 Defendant also contends, and the State concedes, that various errors in the order assessing fines and fees must be corrected. We agree. Defendant was levied the \$3,000 controlled substance assessment for a Class X offense when only a \$1,000 assessment is authorized for his Class 2 offense. 720 ILCS 570/411.2(a)(1), (3) (West 2010); see *People v. Olivo*, 183 Ill. 2d 339 (1998)(mandatory Class X offender statute elevates felony class of the sentence rather than the underlying conviction). His controlled substance assessment and his \$30 children's advocacy center fee, \$10 mental health court fee, \$5 youth diversion/peer court fee, and \$5 drug court fee (55 ILCS 5/5-1101(d-5) to (f-5) (West 2010)) are all fines subject to a \$5 credit for each day of pre-sentencing detention. 725 ILCS 5/110-14(a) (West 2010); *People v. Graves*, 235 Ill. 2d 244 (2009); *People v. Jones*, 223 Ill. 2d 569 (2006); *People v. Unander*, 404 Ill. App. 3d 884, 886 (2010); *People v. Jones*, 397 Ill. App. 3d 651, 660, 664 (2009). Defendant's available credit exceeds these \$1,050 in fines and thus they must be credited in full. Lastly, defendant was

assessed a \$35 serious traffic violation fee (625 ILCS 5/16-104d (West 2010)) and \$20 preliminary examination or "probable cause hearing" fee (55 ILCS 5/4-2002.1(a) (West 2010)) though he committed no traffic violation and was indicted rather than having a preliminary examination. *People v. Smith*, 236 Ill. 2d 162 (2010).

¶ 14 Accordingly, we vacate the \$35 serious traffic violation fee and \$20 preliminary examination or "probable cause hearing" fee. Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), the clerk of the circuit court is directed to correct the order assessing fines and fees to reflect (1) said vacatur, (2) a \$1,000 controlled substance assessment rather than \$3,000 as now stated, and (3) \$1,050 pre-sentencing detention credit against fines, so that defendant's total fees are \$540. The judgment of the circuit court is otherwise affirmed.

¶ 15 Affirmed in part, vacated in part, and order corrected.