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2013 IL App (3d) 120014-U

Order filed July 19, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Putnam County, Illinois,
)	
v.)	Appeal No. 3-12-0014
)	Circuit No. 11-CF-3
)	
RANDALL S. GORDON,)	Honorable
)	Kevin R. Galley,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court exercised its discretion in imposing an extended-term sentence; (2) defendant was entitled to one day's credit for time served in presentence custody; (3) the court's order requiring defendant to submit a DNA sample and pay a DNA fee is vacated.

¶ 2 Defendant was convicted by jury of theft (720 ILCS 5/16-1(a)(1)(A), (b)(4) (West 2010)).

The trial court imposed an extended-term sentence. The court awarded defendant no credit for time served in presentence custody. In addition, the court ordered that defendant submit a

belief that an extended-term sentence was mandatory rather than discretionary. Defendant failed to preserve this issue below. Therefore, we review defendant's claim for plain error. See *People v. Reed*, 177 Ill. 2d 389 (1997). The first step in plain error review is to determine whether error occurred at all. *People v. Thompson*, 238 Ill. 2d 598 (2010).

¶ 10 1. Standard of Review

¶ 11 Generally, a trial court's sentencing decision is reviewed for an abuse of discretion. See, e.g., *People v. Alexander*, 239 Ill. 2d 205 (2010). However, defendant claims the trial court failed to recognize and exercise *any* discretion in sentencing defendant, and, therefore, this court should review its sentencing decision *de novo*. In support of this proposition, defendant cites this court's holding in *People v. Newborn*, 379 Ill. App. 3d 240 (2008) (holding that *de novo* review of trial court's decision was appropriate where trial court failed to recognize and exercise its discretion); but see *People v. Gibson*, 136 Ill. 2d 362 (1990) (holding that abuse of discretion review was appropriate even where trial court failed to recognize and exercise its discretion).

¶ 12 In the present case, we find, *infra*, that the trial court recognized and exercised its discretion in sentencing defendant. Therefore, we need not stray from the general standard, and we review the trial court's sentencing decision for an abuse of discretion.

¶ 13 2. Whether the Sentencing Decision was an Abuse of Discretion

¶ 14 Defendant claims the trial court erred when it imposed an extended-term sentence, because, according to defendant, the trial court was under the mistaken impression that an extended-term sentence was mandatory rather than discretionary.

¶ 15 Defendant's argument is contradicted by the record. After discovering that defendant was eligible for an extended-term sentence, the trial court admonished defendant that *if* an extended-

term sentence were to be imposed, the sentencing range would be 5 to 10 years. The trial court never expressed a belief that an extended term sentence was mandatory. The record confirms the trial court's understanding that an extended-term sentence was discretionary. The trial court did not abuse its discretion when it sentenced defendant to an extended-term sentence of eight years' imprisonment.

¶ 16 B. Sentencing Credit

¶ 17 Defendant claims he is entitled to one day of sentencing credit (730 ILCS 5/5-4.5-100(b) (West 2010)) for time spent in presentence custody. On March 27, 2011, defendant was arrested and transferred to the Putnam County jail for questioning. He posted bond and was released the same day. A defendant is entitled to one day of credit against his sentence for any partial day spent in presentence custody. *People v. Quintana*, 332 Ill. App. 3d 96 (2002).

¶ 18 The State argues that defendant is not entitled to one day's credit because he was not "in custody," as required by statute. See *Id.* We do not find the State's argument compelling. Defendant was "in custody for" purposes of the statute (*Id.*) when he was arrested and then detained and questioned at the jail.

¶ 19 Defendant is entitled to one day's sentencing credit against his sentence.

¶ 20 C. DNA Analysis Fee

¶ 21 Defendant claims that we should vacate the trial court's order requiring defendant to provide a DNA sample and pay a \$200 DNA analysis fee, because defendant has previously provided a sample. The State concedes that the order should be vacated.

¶ 22 Any individual convicted of an offense classified as a felony under Illinois law after January 1, 1998, is required to submit a DNA sample and pay a DNA analysis fee. 730 ILCS

5/5-4-3(a), (j) (West 2010). However, a defendant is required to submit the sample and pay the fee only when she is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, the State concedes that defendant is already registered in the database.

¶ 23 We vacate the trial court's order.

¶ 24 CONCLUSION

¶ 25 The judgment of the circuit court of Putnam County is affirmed as modified and vacated in part. On remand, defendant should receive one day's credit against his sentence for time served in presentence custody. The trial court's order imposing DNA analysis and a DNA fee are vacated.

¶ 26 Affirmed as modified and vacated in part.