

NOTICE
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2013 IL App (4th) 110944-U

NO. 4-11-0944

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 15, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
RICHARD M. GARRETT,)	No. 10CF526
Defendant-Appellant.)	
)	Honorable
)	Leo J. Zappa,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court held (1) the trial court did not abuse its discretion in sentencing defendant to 40 years' imprisonment for first degree murder, (2) defendant was entitled to apply a portion of the credit available as a result of his pretrial incarceration to his child-advocacy-center fine, and (3) defendant was entitled to a reduction of the Violent Crime Victims Assistance Act (VCVA) fine from \$25 to \$4.

¶ 2 On July 30, 2010, the State charged defendant, Richard M. Garrett, with three counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)). In December 2010, defendant entered an open plea of guilty to the three counts of first degree murder. In May 2011, the trial court sentenced defendant to 40 years' imprisonment, with credit for 286 days' time served and ordered him to pay several fines.

¶ 3 On appeal, defendant argues his sentence is excessive, he is entitled to presentencing credit, and the trial court improperly calculated a \$25 Violent Crime Victims

Assistance (VCVA) fund fine (725 ILCS 240/10(c)(1) (West 2010)). We (1) disagree the sentence is excessive, (2) hold defendant is entitled to apply a portion of the credit available as a result of his pretrial incarceration to his child-advocacy-center fine, and (3) find defendant is entitled to a reduction of the Violent Crime Victims Assistance Act (VCVA) fine from \$25 to \$4.

¶ 4

I. BACKGROUND

¶ 5 On July 30, 2010, the State charged defendant with three counts of first degree murder (720 ILCS 5/9-1(a)(1) (West 2010)).

¶ 6 In December 2010, the trial court accepted defendant's guilty plea to the three counts of first degree murder. Prior to accepting defendant's plea, the court admonished defendant in compliance with Illinois Supreme Court Rule 402(a) (eff. July 1, 1997). According to the factual basis, at approximately 8:30 a.m. on July 29, 2010, defendant and Louise Alexion were engaged in a struggle in an apartment building stairwell. Witnesses saw defendant stabbing Alexion. Defendant fled the scene with witnesses in pursuit and was eventually apprehended by Springfield police.

¶ 7 On May 10, 2011, the trial court held a sentencing hearing. The State introduced a presentence investigation report (PSI). The PSI stated defendant's date of birth was June 22, 1960, and he was 50 years old. The PSI showed a 1992 conviction for armed violence and two 2003 convictions in Iowa for "Assault No Intent Of Injury." The PSI indicated defendant and his wife divorced in 1991 after he attempted to kill her. It stated, "defendant claimed that he stabbed his wife while under the influence of crack cocaine and alcohol." According to The PSI, while in prison, defendant was "evaluated and diagnosed with situational anxiety and generalized psychosis after acute instances of hallucinations and delusions." Defendant was under mental

health care and taking medication from March 1992 to shortly before his release from prison in July 1995.

¶ 8 In mitigation, defendant introduced a report prepared by Dr. Terry Killian. During Dr. Killian's forensic psychiatric examination of defendant, defendant "described the stabbing as taking place because he was very angry at the victim" and "when he became that angry, he heard a voice that said 'kill.' " Defendant reported he "frequently hears the voice in his cell, especially at night." The report noted "that the only psychotic symptom [defendant] apparently had at the time [of the murder] was a single voice telling him to kill." Dr. Killian opined that at the time of the murder defendant "was depressed and was hearing a voice speak to him, but the principal reason for the stabbing was anger rather than mental illness."

¶ 9 Defendant made a statement in allocution, stating "I'm sorry for what I've done."

¶ 10 Before pronouncing sentence, the trial court stated it considered the PSI, Dr. Killian's report, and the factors in aggravation and mitigation. The court noted this was the second time defendant had stabbed and caused substantial injury to a woman with whom he was romantically involved. The court sentenced defendant to 40 years in the Illinois Department of Corrections.

¶ 11 On May 10, 2011, counsel for defendant filed a motion to reconsider defendant's sentence. The motion alleged the trial court failed to adequately consider the mitigating factors, particularly defendant's age, mental health history, and potential for rehabilitation. On May 24, 2011, defendant filed a *pro se* "Motion to Withdraw Plea of Guilt And Vacate Judgment" and "Motion for Substitution of Counsel." In July 2011, the trial court appointed new counsel for purposes of defendant's posttrial motions.

¶ 12 On October 14, 2011, the trial court heard the motion to reconsider defendant's sentence filed by counsel May 10, 2011. Prior to the start of the hearing, counsel informed the court defendant sought to withdraw his *pro se* "Motion to Withdraw Plea of Guilt And Vacate Judgment." Counsel argued defendant's sentence was excessive based on his age and mental health history. The court denied the motion.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. Defendant's Excessive-Sentence Claim

¶ 16 Defendant asserts his sentence is excessive. Defendant contends his sentence is excessive because (1) "the evidence demonstrated that 19 years prior to Ms. Alexion's death, [defendant] had documented mental health issues," (2) at the time of the murder defendant was "depressed and heard a voice that told him to 'kill,'" (3) defendant "expressed great remorse for his actions," and (4) defendant's "sentence is effectively a life sentence" and "a life sentence is excessive." The State argues (1) defendant forfeited his arguments regarding remorse and (2) the trial court did not abuse its discretion in considering the aggravating factors of the seriousness of the crime, the need to deter others, and defendant's prior criminal history.

¶ 17 1. *Standard of Review*

¶ 18 "A sentence which falls within the statutory guidelines is not an abuse of discretion unless it is manifestly disproportionate to the offense and cannot be justified by any reasonable review of the record." *People v. Mays*, 2012 IL App (4th) 090840, ¶ 66, 980 N.E.2d 166 (quoting *People v. Jackson*, 375 Ill. App. 3d 796, 800, 874 N.E.2d 592, 595 (2007)); *People v. Phippen*, 324 Ill. App. 3d 649, 651-52, 756 N.E.2d 474, 477 (2001). "A reviewing court must

afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, and habits than a reviewing court, which must rely on a 'cold' record." *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102.

¶ 19 "A trial court is presumed to have considered all of the relevant evidence of mitigation before it." *People v. Somers*, 2012 IL App (4th) 110180, ¶ 24, 970 N.E.2d 606 (quoting *People v. Bailey*, 409 Ill. App. 3d 574, 594, 948 N.E.2d 690, 710 (2011)).

"[I]nformation about a defendant's mental or psychological impairment is not inherently mitigating." *People v. Coleman*, 183 Ill. 2d 366, 406, 701 N.E.2d 1063, 1083 (1998) (quoting *People v. Tenner*, 175 Ill. 2d 372, 382, 677 N.E.2d 859, 864 (1997)). Recently, this court noted mental-health issues are not set forth in the list of mitigating factors in section 5-5-3.1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-5-3.1(a) (West 2010)), and the General Assembly's omission to amend the listed mitigating factors to include mental-health issues "is no oversight." *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 64, 976 N.E.2d 27. A court that examines a PSI is presumed to have considered the defendant's potential for rehabilitation. *People v. Babiarz*, 271 Ill. App. 3d 153, 164, 648 N.E.2d 137, 146 (1995). Rehabilitative potential is not entitled to greater weight than the seriousness of the offense (*People v. Coleman*, 166 Ill. 2d 247, 261, 652 N.E.2d 322, 329 (1995)), and the existence of mitigating factors does not require the court to reduce a sentence from the maximum allowed (*People v. Payne*, 294 Ill. App. 3d 254, 260, 689 N.E.2d 631, 635 (1998)).

¶ 20

2. *The Applicable Sentencing Range*

¶ 21

Section 5-4.5-20 of the Unified Code provides the trial court shall sentence a defendant to not less than 20 and not more than 60 years' imprisonment for first degree murder. 730 ILCS 5/5-4.5-20 (West 2010).

¶ 22

3. *The Sentence in This Case*

¶ 23

Here, defendant was eligible for a 60-year prison sentence for first degree murder. The trial court reviewed the PSI and considered the relevant sentencing factors in mitigation and aggravation. We need not decide whether defendant forfeited his argument concerning his remorse as this would not be a basis for remanding to the trial court. Assuming *arguendo* defendant did not forfeit this argument, we would presume the court considered defendant's statement in allocution expressing his remorse for the crime and must afford great deference to the trial court's evaluation and consideration of defendant's compunction.

¶ 24

Defendant argues his mental health history was mitigating but not that he was mentally ill at the time of the crime or unfit to stand trial. We see no reason to alter our views expressed in *Brunner*. Defendant's own expert stated, "the principal reason for the stabbing was anger rather than mental illness." Defendant concedes the most important sentencing factor is the seriousness of the offense. See *People v. Flores*, 404 Ill. App. 3d 155, 159, 935 N.E.2d 1151, 1155-56 (2010)). As the court noted, this was the second time defendant stabbed a woman with whom he was in a romantic relationship. In light of defendant's inability to conform his conduct to the requirements of the law, the court did not abuse its discretion when it weighed the evidence and factors and found a sentence of 40 years' imprisonment was appropriate for first degree murder.

¶ 25 B. Defendant's Statutory Credit and Assessments Claims

¶ 26 Defendant asserts (1) he is entitled to presentencing credit for time spent in custody from July 29, 2010, to May, 10, 2011, 286 days, and (2) the trial court improperly imposed a \$25 VCVA fund fine (725 ILCS 240/10(c)(1) (West 2010)) when it also imposed a \$5 child-advocacy-center assessment (55 ILCS 5/5-1101(f-5) (West 2010)). The State concedes defendant is entitled to presentencing credit and the VCVA fine must be reduced to \$4.

¶ 27 1. *Statutory Credit*

¶ 28 Pursuant to section 110-14 of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2010)), defendant is entitled to a statutory \$5-per-day credit for time spent in presentence custody toward certain creditable fines. See *People v. Vlahon*, 2012 IL App (4th) 110229, ¶ 33, 977 N.E.2d 327 ("Such credit may only be applied to offset eligible fines, not fees.").

¶ 29 Here, the record shows the trial court awarded defendant presentencing credit for 286 days. The State concedes defendant is entitled to a \$5-per-day credit for time spent in custody from July 29, 2010, to May, 10, 2011, 286 days. We accept the State's concession. Defendant is entitled to \$1,430 of available credit toward creditable fines.

¶ 30 2. *Child-Advocacy-Center and Violent Crimes Victims Assistance Fund Assessments*

¶ 31 Where authorized by county ordinance, the child-advocacy-center assessment is mandatory and a creditable fine. *People v. Folks*, 406 Ill. App. 3d 300, 305-07, 943 N.E.2d 1128, 1132-33 (2010); 55 ILCS 5/5-1101(f-5) (West 2010).

¶ 32 Pursuant to section 10(c) of the Violent Crimes Victims Assistance Act (Act), a \$25 VCVA fine is improper where another fine is imposed. 725 ILCS 240/10(c)(1) (West 2010).

Pursuant to section 10(b) of the Act, the VCVA fine is \$4 for each \$40 or fraction thereof of fine imposed. 725 ILCS 240/10(b) (West 2010); see *People v. Jake*, 2011 IL App (4th) 090779, ¶¶ 32, 34, 960 N.E.2d 45 (modifying \$25 VCVA fine to \$4 where other fine was imposed).

¶ 33 Here, the trial court imposed a \$5 child-advocacy-center fine and a \$25 VCVA fine. The State concedes defendant's VCVA fine should be \$4. We accept the State's concession. Accordingly, defendant's VCVA assessment should be modified to \$4 because the remaining fine totals less than \$40.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we remand for application of defendant's \$1,430 available credit toward the child-advocacy-center fine and a reduction of the VCVA assessment to \$4. We otherwise affirm the trial court's judgment. We award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 36 Affirmed as modified; cause remanded with directions.