

No. 1-12-0946

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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 C5 50429
	)	
FOSTER JOHNSON,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PALMER delivered the judgment of the court.  
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

**ORDER**

¶1 *Held:* Affirming the judgment and sentence of the circuit court of Cook County because the trial court did not abuse its discretion where defendant was not eligible for the veterans program as he never obtained the consent of the State. Defendant's mittimus ordered to be corrected.

¶2 Following a bench trial, defendant Foster Johnson was found guilty of one count of retail theft of less than \$300.00. Defendant was sentenced to five years' imprisonment. On appeal, defendant contends that the trial court abused its discretion in failing to consider whether to approve defendant for veterans and servicemembers court and in levying a \$5 electronic citation

fee.

¶3

### BACKGROUND

¶4 Village of Tinley Park police officer David Walker testified that on July 3, 2011, at about 4:40 p.m., he and another officer were dispatched to Burlington Coat Factory located on 159th Street in Tinley Park, Illinois. Walker was informed that the suspect was a black male wearing black pants, a black shirt, and black jacket, and carrying a brown backpack. When they arrived at the store in Walker's marked police car, Walker saw an individual matching this description at the bus stop at 159th Street and Harlem Avenue, and identified this person as defendant.

¶5 Observing that defendant had a brown backpack, Walker asked defendant whether he had been in Burlington Coat Factory. Defendant stated, "Yes." Walker asked defendant if he had purchased any merchandise from the store, but defendant answered in the negative. Walker asked if he could look inside the backpack, and defendant opened it. Inside, Walker saw a green shirt with a Burlington Coat Factory tag for \$9.99. On cross-examination, Walker testified that in his police report, he wrote that defendant told him he got the green shirt from the dumpster outside of Burlington Coat Factory.

¶6 Walker asked defendant if the bag contained more merchandise, but defendant stated that it was his personal clothing. Walker asked him to open the other compartment of the backpack, which defendant did. Inside this compartment, Walker observed several pieces of clothing bearing tags from Burlington Coat Factory. He then took defendant into custody. While patting defendant down, Walker's partner found a pair of wire cutters on defendant. No receipts for the items were found on defendant.

¶7 The officers brought defendant back to Burlington Coat Factory for a showup identification, and two Burlington Coat Factory employees identified defendant. Walker also

testified that the Burlington Coat Factory loss prevention agent, Patrick Messer, scanned the items recovered from defendant's bag. The cost of the items totaled approximately \$295. 81.

¶8 Herbert Amaya was shopping with his family in Burlington Coat Factory at the same time as defendant that day. Upon entering the store, he saw defendant near the infant and stroller section, and then later near the men's section. Amaya testified that as defendant walked through the men's section, defendant had a shopping cart and was grabbing clothes and putting them into the cart. Amaya and his family then went over to the boy's section, and defendant also went over there and again grabbed some clothes. Amaya, who was an assistant store manager for Wal-Mart and had worked in retail since 1983, testified that he thought defendant was following him and, based on his experience working in retail, "I kn[e]w he was up to something not good."

¶9 Amaya looked for a loss prevention agent while defendant returned to the infant's section with the cart. Amaya testified that he then saw defendant taking the hangers and security tags off of the clothing and putting the clothes into his pants. He saw defendant put the security tags back into the cart. Amaya testified that once defendant noticed that Amaya was watching him, defendant walked by him and then started walking faster. Amaya saw that the cart no longer had any clothing in it, and instead had empty hangers and security tags.

¶10 Amaya testified that he turned around and saw defendant leave the store. Amaya found a loss prevention agent and told him that "the person going over there right now, he's walking out of the store with your items." Amaya never lost sight of defendant inside the store, and he did not see defendant pass a cash register or attempt to pay for the items.

¶11 Amaya testified that when the police brought defendant back to the store, he recognized some of the clothing in the backpack because of the colors. Amaya recalled red and green clothing and boy's and men's jeans being in defendant's cart. He was about 15 to 20 feet from

defendant when defendant was trying to conceal these items. Amaya testified that he did not go outside to identify defendant after police brought defendant back to the store because Amaya had his children with him and could not leave the store. He described defendant as wearing black clothing and a longer black jacket.

¶12 Rina Keasler, who worked at Burlington Coat Factory, was outside the store taking her break that day when Keasler noticed a man run out of the store and go up to a garbage can near an adjacent building. She identified him as defendant. Defendant lifted the lid to the garbage can and pulled out a backpack. Keasler was about 50 feet from the garbage can. Defendant then started pulling items out from his waistband and putting them into the backpack. Keasler could see that the items were clothing items or cloth. Defendant did this for about five minutes, then replaced the lid to the garbage can and walked through the parking lot to 159th Street and Harlem. Keasler notified the loss prevention agent in the store and the police were called. Keasler saw defendant when the police brought him back to the store about 10 to 15 minutes later, and she identified him while he sat in the police car.

¶13 The State entered into evidence the receipt generated by Messer, photographs of the clothing that was taken from defendant's bag, a photograph of the wire cutters, and a certified copy of defendant's prior conviction for retail theft.

¶14 Defendant moved for a directed finding, but the court denied the motion. Following closing arguments, the trial court found defendant guilty of retail theft.<sup>1</sup>

¶15 Defendant moved for a new trial. After several adjournments of the sentencing hearing, the court considered the motion at the sentencing hearing on March 2, 2012, and denied it. The parties then proceeded to the sentencing, and defense counsel and the State presented evidence in

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<sup>1</sup> Defendant was initially charged by information with two counts of retail theft, but prior to trial, the State dismissed count one, *nolle prosequi*.

mitigation and aggravation. The State requested that defendant receive an extended term sentence, noting that defendant had nine prior felony convictions from the past 11 years, including 7 retail theft convictions, and defendant was on parole at the time he committed the sentencing offense.

¶16 The trial court stated that it considered the evidence in aggravation and mitigation, and it then sentenced defendant to five years' imprisonment with credit for 244 days' served. The court indicated that the mandatory fees and costs imposed totaled \$450.

¶17 Defendant filed a motion to reconsider sentence, arguing that the sentence was excessive, but the trial court denied the motion. This appeal followed.

¶18 ANALYSIS

¶19 We review a sentence that falls within the applicable statutory limits for an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶36. The trial court is in a superior position to evaluate and weigh a defendant's credibility, age, and other characteristics, along with the other evidence presented, and this court will not substitute its judgment for that of the trial court merely because we would have weighed those factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Generally, the trial court is given wide latitude in determining a defendant's sentence within the statutory range, as long as it does not consider improper aggravating factors or ignore mitigating factors. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). "The trial court is not required to detail precisely for the record the exact process by which the penalty was determined or articulate its consideration of mitigating factors. [Citation.] The presumption is that the trial court properly considered all mitigating factors before it, and the burden is on the defendant to show otherwise. [Citation.]" *People v. Powell*, 2013 IL App (1st) 111645, ¶ 32.

¶20 Defendant argues that the trial court abused its discretion in failing to consider his

eligibility for a veterans' court program pursuant to the Veterans and Servicemembers Court Treatment Act (the Act) (730 ILCS 167/5 (West 2010)). Defendant argues that he would have qualified for a "post-adjudicatory veterans and servicemembers court program," and the trial court abused its discretion in failing to consider the possibility of placing defendant into the program.

¶21 The State counters that defendant was not eligible for participation in the program because the record contains no indication that the prosecutor or the trial court would have agreed to his placement in the program, which was required for eligibility, and the record also shows that both the prosecutor and the trial judge believed defendant deserved an extended term of imprisonment. The State also contends that the State's decision whether to agree to a defendant's participation in the program is not subject to judicial review.

¶22 "A court's primary objective when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature, and the most reliable indicator of that intent is the language of the statute itself." *People v. McKinney*, 2012 IL App (1st) 103364, ¶ 8.

¶23 The Act, which became effective on June 14, 2010, "provides for the establishment of a veterans court and corresponding programs whereby a defendant who is a veteran can complete an agreed-upon program, which may include substance abuse, mental health, or other treatment, in exchange for the dismissal of the charges against him, the termination of his sentence, or his discharge from further proceedings." *McKinney*, 2012 IL App (1st) 103364, ¶ 8 (citing 730 ILCS 167/15, 25, 35 (West 2010)).

¶24 At the time the instant offenses were committed in 2011, the Act provided that "[a] defendant may only be admitted into a veterans court program upon the agreement of the prosecutor and the defendant and with the approval of the veterans court." *Id.* (citing 730 ILCS

167/20(a) (West 2010)).<sup>2</sup> Additionally, at the time the instant offenses were committed, the Act provided that a defendant was excluded from the veterans court program if he: "(1) [was] charged with a crime of violence; (2) does not demonstrate a willingness to participate in the program; (3) has committed a crime of violence in the past 10 years, excluding incarceration time; or (4) has previously completed or been discharged from such a program." *Id.* (citing 730 ILCS 167/20(b) (West 2010)).<sup>3</sup>

¶25 Here, the record reflects that, at the sentencing hearing, defendant's counsel did in fact advocate for placement in a veterans program. Counsel provided information to the trial court indicating that defendant had a military background and that he participated in a veterans program while incarcerated.<sup>4</sup> She provided the court with three letters from his teachers in the program, another letter verifying his participation in the veterans' program, a letter from the dean of the program verifying defendant's completion of the veterans' program, certificates from the program, and a progress report indicating his continuing participation in the program. In addition, the presentence investigation report noted that defendant was participating in the Veterans Program in the county jail since being incarcerated for the present offense. The report also noted defendant reported enlisting in the army in 1981 and being discharged in 1983 with an "Other th[an] Honorable distinction." As the sentencing hearing, counsel asked the trial court for a "reasonable sentence and, perhaps, consider putting him in some kind of a Veterans' program."

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<sup>2</sup> Subsection (a) was amended in 2013 and now provides: "A defendant, who is eligible for probation based on the nature of the crime convicted of and in consideration of his or her criminal background, if any, may be admitted into a Veterans and Servicemembers Court program only upon the agreement of the prosecutor and the defendant and with the approval of the Court." 730 ILCS 167/20(a) (West 2013).

<sup>3</sup> We note that the statute was amended in 2012 to delete the exclusion if a defendant had been discharged from a veterans program within three years 730 ILCS 167/20(b) (West 2012), and it was amended again in 2013. It currently provides that a defendant is excluded from the program if he (1) is charged with a crime of violence, (2) failed to demonstrate a willingness to participate in the program, (3) was convicted of a crime of violence within the previous 10 years, (4) is convicted of a non-probationable offense, or (6) the sentenced imposed renders the defendant ineligible for probation. 730 ILCS 167/20(b) (West 2014).

<sup>4</sup> Counsel indicated the program was Roosevelt University Veterans' Equity Transition Clean Start Program.

¶26 Thus, contrary to defendant's contention on appeal, the suggestion of placement in a veterans program was presented for the trial court's consideration. Although the trial court did not specifically state that it had considered this option, the trial court specifically noted that it had considered the evidence in mitigation. Moreover, the trial court was not required to "detail precisely" its findings and reasoning supporting its sentencing disposition; we presume that the trial court considered all the mitigating information before it, and defendant has not demonstrated otherwise. *Powell*, 2013 IL App (1st) 111645, ¶ 32.

¶27 Further, defendant has also failed to establish on appeal that he was actually eligible for the veterans program. As a condition for eligibility for participating in the program, the prosecutor must agree to defendant's admission into the program, and the trial court must approve of the veterans court. *McKinney*, 2012 IL App (1st) 103364, ¶ 8; 730 ILCS 167/20(a) (West 2010). The record is devoid of any evidence that defendant had ever secured the agreement of the State for defendant's placement in the veterans program. In fact, the record supports the opposite conclusion—that the State would have refused to agree and vigorously objected based on defendant's extensive criminal history and, significantly, his numerous prior retail theft convictions. The State noted that defendant had 9 prior felony convictions from the past 11 years, including 7 retail theft convictions, and that defendant was on parole at the time he committed the sentencing offense. Indeed, the State advocated that defendant receive an extended term sentence.

¶28 We similarly conclude that defendant is also unable to show that he would have met the eligibility requirements for the program because the trial court did not, and would not have, approved. In sentencing defendant to an extended term, it noted that defendant had a total of 27 convictions, both misdemeanors and felonies, primarily for theft, dating back to 1983. The court

also observed that defendant had received probation in the past, but had violated it and been sent back to prison, and then committed the felony at issue. Further, as the State points out, the Act contains very specific provisions at its core providing the opportunity for mental health and substance abuse treatment. The stated purpose of the Act is to help veterans who "suffer the effects of, including but not limited to, post traumatic stress disorder, traumatic brain injury, depression and may also suffer drug and alcohol dependency or addition and co-occurring mental illness and substance abuse problems." 730 ILCS 167/5 (2011). Tellingly, the presentence investigation shows that defendant had no such needs, and was not in need of psychological care or treatment for substance abuse.

¶29 Accordingly, we find that defendant was never eligible for the veterans program because the State never consented to it, and there was therefore no discretion for the trial court to exercise in determining whether to approve of defendant's participation in the program. Moreover, the State's vigorous defense of this appeal demonstrates that the State still does not consent to such an option. As defendant never obtained the consent of the State for the veterans' court program option, we conclude that the trial court did not abuse its discretion.

¶30 Defendant also contends on appeal that the \$5 electronic citation fee should not have been assessed because he was not involved in "any traffic, misdemeanor, municipal ordinance, or conservation case." 705 ILCS 105/27.3e (West 2010). The State agrees with defendant's position. We also agree with defendant's contention. This court has the authority to order a correction of a mittimus. See Ill. S.Ct. R. 615(b)(1). Accordingly, we order the clerk of the circuit court to correct defendant's mittimus by deleting from it the \$5 electronic citation fee. See *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("Remandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary

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corrections.").

¶31

### CONCLUSION

¶32 For the reasons stated, we affirm the judgment of the circuit court of Cook County and order that defendant's mittimus be corrected.

¶33 Affirmed; mittimus corrected.