2015 IL App (1st) 132043-U

FIRST DIVISION
OCTOBER 13, 2015

Nos. 1-13-2043 & 1-14-0650, Consolidated

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 15314
	)	
EDWARD GREEN,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Evidence was sufficient to establish defendant as an armed habitual criminal; trial court did not err in denying defense counsel's motion to reconsider the sentence; defense counsel was not ineffective for failing to seek the court's ruling on the motion to reconsider the sentence earlier, where defendant cannot establish prejudice; defendant's 10-year sentence was not excessive; fines and fees order should be modified to reflect the correct amount owed by defendant; and trial court properly dismissed defendant's section 2-1401 petition.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Edward Green was convicted of being an armed habitual criminal and sentenced to 10 years of imprisonment. The

defendant also filed a *pro se* petition for postjudgment relief under section 2-1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-1401 (West 2012)) (the section 2-1401 petition), which was denied by the trial court. On consolidated appeal, the defendant appeals his conviction and sentence, as well as the trial court's denial of his section 2-1401 petition. Specifically, he argues that: (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court erred in denying defense counsel's motion to reconsider the sentence without a hearing on the merits; alternatively, defense counsel was ineffective for failing to exercise due diligence in seeking a determination on the motion in a timely manner; (3) his 10-year sentence was excessive; (4) certain fines and fees should be vacated or modified; and (5) the trial court erred in dismissing his section 2-1401 petition. For the following reasons, we affirm the judgment of the circuit court of Cook County, and order that the mittimus be modified to reflect the correct amount of fines and fees owed by the defendant.

¶ 3 BACKGROUND

¶ 4 In August 2010, the defendant was charged with the offense of being an armed habitual criminal; unlawful use or possession of a weapon by a felon; and aggravated unlawful use of a weapon. Prior to trial, the State *nolle prossed* all counts except the armed habitual criminal charge.

¶ 5 On August 29, 2012, a jury trial commenced at which the State presented the testimony of three witnesses. Officer Shane Jones (Officer Jones) testified that at about 4:20 p.m. on July 16, 2010, he was on patrol with Officers Brownfield and Fahey in an unmarked vehicle on the 8000 block of Manistee Avenue in Chicago, Illinois. Officer Jones, who was wearing plainclothes with a bulletproof vest over them, sat behind the driver's seat in the vehicle. The

officers were driving northbound on Manistee Avenue near 79th Street in normal daylight conditions when Officer Jones observed an individual riding a bicycle northbound on the sidewalk. The individual was wearing a T-shirt, jean shorts, and gym shoes. As the police vehicle continued on Manistee Avenue parallel to the individual, the individual looked over his right shoulder in the direction of the police. At that moment, Officer Jones recognized the individual as the defendant. Officer Jones testified that he recognized the defendant from previous encounters while performing his police duties in the area, and estimated that he saw the defendant about once or twice a month in the same area. Officer Jones then directed Officer Brownfield to stop the vehicle, after which Officer Jones exited, told the defendant to stop, and announced his office. However, the defendant continued to ride his bicycle and pedaled faster away from Officer Jones. Officer Jones then chased him on foot, and the defendant jumped off his bicycle and fled westbound through a gangway near 7916 Manistee Avenue. Officer Jones was approximately 15 to 20 feet behind the defendant during the foot chase. As the defendant ran, he held the waistband on the right side of his pants and ran with a "one arm motion." The defendant then fled through the gangway to an alleyway between Manistee Avenue and Marquette Avenue, headed southbound in the alleyway, and then turned eastbound into a gangway near 7932 Manistee Avenue. At that point, Officer Jones did not know where Officers Brownfield and Fahey were located. As Officer Jones chased the defendant into the gangway near 7932 Manistee Avenue, Officer Jones allowed some distance to form between them for his own safety because he believed the defendant to be armed. The defendant never let go of his waistband as he fled. Officer Jones then observed the defendant take a handgun from his waistband and throw it onto the ground. As the pursuit continued through the gangway, Officer

Jones heard Officer Fahey's voice behind him. Officer Jones then directed Officer Fahey's attention to the area where the defendant had discarded the handgun. Officer Fahey then recovered the handgun while Officer Jones continued to pursue the defendant eastbound out of the gangway, where he then lost sight of the defendant. Officer Fahey then showed Officer Jones the recovered handgun, which Officer Jones testified was the same weapon he had observed the defendant discard. At trial, Officer Jones made an in-court identification of the handgun as the same one he saw the defendant discard and Officer Fahey recover. After Officer Jones lost sight of the defendant, the police officers, to no avail, spent about 20 minutes looking for him. Officer Jones testified that during the pursuit, he used his police radio to contact the Office of Emergency Management Communications (OEMC). He provided his location, a physical description of the defendant, and the direction in which Officer Jones was running. Officer Jones testified that he initially stated the wrong street name because he was "caught up in pursuing" the defendant, but that he corrected that error later in the same radio communication. Officer Jones testified that he communicated over the radio that the defendant was a black male, and that he gave the height and weight description of the defendant. When the police officers were unsuccessful in locating the defendant after the foot pursuit, Officers Jones, Brownfield, and Fahey returned to the police station, where Officer Jones prepared a general offense case report (case report) and Officer Fahey inventoried the recovered handgun. Officer Jones prepared the case report using a relatively new computer system, and he accidentally and incorrectly clicked the drop-down box for "blue eyes" for the defendant's description and indicated his birth month as October rather than September.

¶ 6 On cross-examination, Officer Jones stated that the case report he had prepared after the incident was a summary of events. He did not include the defendant's name or mention the bicycle in the narrative portion of the case report. However, Officer Jones included the defendant's nickname—"48." The narrative portion of the case report also did not state that Officer Jones stopped the defendant because he was riding a bicycle on the sidewalk illegally. Officer Jones further testified that he did not observe the defendant with a weapon either when the defendant was still on his bicycle or when the defendant first stepped off the bicycle. He testified that at the time of the incident, he did not know where the defendant lived. Officer Jones recalled that during the foot pursuit, he informed his colleagues over the police radio that the suspect was 18 years old, 5 feet 11 inches tall, weighed between 230 and 240 pounds, and was known by the nickname of "50." However, in the narrative portion of the case report, Officer Jones indicated that the defendant was 200 pounds, 5 feet 7 inches tall, and was known by the nickname of "48."

¶ 7 On redirect, Officer Jones testified to including other identifying information about the defendant in other sections of the case report. On page one of the case report, he listed the defendant's name and included a description of the defendant as a 28-year-old with a dark complexion and braided hair. Officer Jones explained that during the OEMC radio communications, he misspoke that the defendant's nickname was "50" because he was under stress while chasing the defendant. Officer Jones also stated that he did not know the defendant's exact birth date or age at the time of the pursuit, but that he gave a rough estimate of the defendant's age, height, and weight during the radio communications. During the radio communications, Officer Jones also described the defendant as having a dark complexion and

braided hair. Officer Jones noted that, unlike arrest reports, case reports only include a summary of events and do not contain every single detail of what occurred. Officer Jones clarified that despite the mistakes he made in his radio communications or the case report, he was not mistaken as to the identity of the person he chased on the day of the incident. On recross, Officer Jones testified that he tried to be as thorough as possible while relaying information on the police radio during the pursuit, but that he was affected by the stress of the situation. On further direct examination, Officer Jones testified that he and his fellow officers were pursuing only the defendant at the time of the incident.

¶ 8 Officer Patrick Fahey (Officer Fahey) testified that at about 4:20 p.m. on July 16, 2010, he was on routine street patrol with Officers Jones and Brownfield. As the officers drove northbound on the 7900 block of Manistee Avenue, Officer Fahey saw an individual riding his bicycle on the sidewalk. At trial, Officer Fahey made an in-court identification of the defendant as the person he saw riding the bicycle. As Officer Brownfield sped up the police vehicle, the defendant turned and looked in Officer Fahey's direction and Officer Fahey recognized him from previous contacts with the defendant. At that time, Officer Fahey knew the defendant's last name to be "Green" and his nickname to be "48." Once the defendant saw the police officers, he began pedaling faster. Officer Brownfield then stopped the police vehicle, while Officer Jones exited it to pursue the defendant. The defendant jumped off his bicycle and fled on foot westbound through a gangway near 7916 Manistee Avenue. As Officer Jones pursued the defendant, Officer Fahey exited the vehicle and ran westbound into the T-shaped alley. From a distance of three to four houses, Officer Fahey saw Officer Jones chase the defendant southbound through the alley. No one else was in the alley at that time. Officer Fahey then ran southbound through

the alley toward Officer Jones and the defendant, but lost sight of them as they ran onto a lot. At some point, Officer Fahey regained sight of them as he ran through a gangway near 7932 Manistee Avenue into a rear yard. Officer Jones then directed Officer Fahey's attention to an area by a fence, where Officer Fahey recovered a 9-millimeter handgun, unloaded it, and kept it in his custody and control until he and Officer Brownfield later inventoried the weapon at the police station. The handgun was loaded with one live round of ammunition in the chamber and 10 live rounds in the magazine. At trial, Officer Fahey identified the handgun, magazine, and the live rounds of ammunition in open court as those that he had recovered. On cross-examination, Officer Fahey testified that he never saw the defendant in possession of the handgun on the date of the incident, that he never submitted the recovered handgun for fingerprint or DNA analysis, and that he heard portions of Officer Jones' radio description of the defendant during the pursuit. On redirect, Officer Fahey clarified that the police performed no fingerprint analysis on the handgun because they knew the defendant had discarded it.

¶ 9 Officer William Doolin (Officer Doolin) testified that at about 1:30 p.m. on July 31, 2010, he arrested the defendant at 8048 South Burnham Avenue in Chicago, Illinois. At trial, Officer Doolin made an in-court identification of the defendant as the individual who was taken into police custody. Officer Doolin testified that he and Officer Hanrahan spoke with the defendant at the police station about the July 16, 2010 incident. After Officer Doolin asked the defendant whether he wanted to talk about the incident and advised him of his rights, the defendant responded that "he ran because he thought he had a warrant." However, the defendant did not admit that he had a firearm at the time he fled.

¶ 10 The parties then stipulated that the defendant had previously been convicted of two qualifying felonies. After the State rested, the trial court denied the defendant's motion for a directed verdict. The defense rested without presenting any evidence.

¶ 11 During deliberations, the jury sent out several notes, to which the trial court responded in writing. The jury then found the defendant guilty of the offense of being an armed habitual criminal.

¶ 12 On October 18, 2012, defense counsel filed a posttrial motion for a judgment notwithstanding the verdict or for a new trial (motion for a new trial), which the trial court denied. Following a sentencing hearing on that same day, the trial court sentenced the defendant to 10 years of imprisonment with three years of mandatory supervised release (MSR), and imposed $634 in mandatory fines, fees, and costs.

¶ 13 On November 16, 2012, defense counsel filed a motion to reconsider the sentence. The motion was file stamped by the circuit court clerk's office and filed along with a notice of filing, but no notice of motion.[1] Defense counsel never moved for a hearing on the motion.

¶ 14 On December 7, 2012, the defendant filed a *pro se* motion to reduce the sentence. On December 14, 2012, the trial court noted that it would classify the *pro se* motion to reduce the sentence as a motion to reconsider the sentence. On February 8, 2013, the trial court denied the *pro se* motion as untimely.

¶ 15 Meanwhile, on January 22, 2013, while the trial court's February 8, 2013 ruling was pending, the defendant filed a *pro se* section 2-1401 petition, alleging that his 3-year MSR term should be counted as part of, not in addition to, his 10-year prison term. The notice of filing

[1] The November 16, 2012 motion to reconsider the sentence never appeared on the court's half sheet.

indicated that two copies of the section 2-1401 petition were sent to the circuit court clerk's office via U.S. first-class mail. However, the section 2-1401 petition was not served upon the assistant State's Attorney. On February 21, 2013, during an in-court proceeding, the trial court noted that the defendant had filed a *pro se* section 2-1401 petition seeking relief from judgment and the court continued the matter to April 23, 2013. The front page of the transcript of the February 21, 2013 proceedings indicates the presence of "Ms. Teresa Guerrero, [a]ssistant State's Attorney" (ASA Guerrero). ASA Guerrero remained silent during the brief proceedings[2] and the trial court did not address her. On April 23, 2013, the trial court denied the 2-1401 petition, finding the defendant's arguments to be without merit and holding that the MSR statutory provisions were constitutional on their face and as applied to the defendant. The front page of the transcript of the April 23, 2013 proceedings indicates that assistant State's Attorneys Suzanne Collins (ASA Collins) and Marina Para (ASA Para) were present at the proceedings. On May 23, 2013, the defendant filed a *pro se* notice of appeal, appealing from the trial court's April 23, 2013 denial of his section 2-1401 petition.

¶ 16 On November 6, 2013, defense counsel filed another motion to reconsider the sentence, which appeared to contain the exact arguments made in his original November 16, 2012 motion to reconsider the sentence.[3] The November 6, 2013 motion to reconsider the sentence was filed along with a notice of motion.

[2] The totality of the February 21, 2013 proceedings consists of 8 lines in the transcripts.

[3] No notice of motion was filed with the original November 16, 2012 motion to reconsider the sentence, which never appeared on the court's half sheet, and the trial court never ruled on it.

¶ 17 On December 20, 2013, the trial court granted defense counsel's request for a hearing on the motion to reconsider the sentence to be held on January 24, 2014.[4]

¶ 18 On January 21, 2014, the defendant filed a *pro se* "motion to reconsider the motion for a new trial, and for the appointment of investigator and a subsequent Krankel inquiry," alleging that he was denied his right to effective assistance of counsel.

¶ 19 On January 24, 2014, at a hearing on the motion to reconsider the sentence, defense counsel initially presented to the court a non-file-stamped copy of the motion to reconsider the sentence. The trial court directed defense counsel to show the court "a motion that was filed within thirty days" of sentencing on October 18, 2012. Defense counsel informed the trial court that he had filed a timely motion to reconsider the sentence on November 16, 2012, but that he had refiled the same motion almost a year later on November 6, 2013. The trial court, however, directed defense counsel to find the original November 16, 2012 motion to reconsider the sentence. After searching unsuccessfully for the original November 16, 2012 motion to reconsider the sentence, defense counsel only produced a file-stamped copy of the November 6, 2013 motion, which the trial court denied as untimely. The trial court further denied as untimely, leave to file the defendant's *pro se* January 21, 2014 motion, and denied as moot, the defendant's request for the appointment of counsel.

¶ 20 On February 21, 2014, the defendant filed a *pro se* notice of appeal.[5] On August 27, 2014, this court consolidated the two appeals.

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[4] The record shows that defense counsel was not present for the December 20, 2013 proceedings. The State informed the trial court that defense counsel was unable to attend that day's proceedings, but relayed to the court defense counsel's request for the motion to reconsider the sentence to be heard on January 24, 2014.

[5] As noted, the defendant had filed an earlier notice of appeal on May 23, 2013 appealing

¶ 21 ANALYSIS

¶ 22 We determine the following issues on appeal: (1) whether the evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt; (2) whether the trial court erred in denying defense counsel's motion to reconsider the sentence without a hearing on the merits; in the alternative, whether defense counsel was ineffective for failing to exercise due diligence in seeking a determination on the motion in a timely manner; (3) whether the defendant's 10-year sentence was excessive; (4) whether the imposition of certain fines and fees should be vacated or modified; and (5) whether the trial court erred in dismissing his section 2-1401 petition.

¶ 23 As a threshold matter, we address the issue of jurisdiction. The State argues that this court lacks jurisdiction over the direct appeal, arguing that the defendant's brief on appeal raises issues beyond the scope of the February 21, 2014 notice of appeal. Although unclear, the essence of the State's arguments is that the defendant cannot raise issues relating to his conviction and sentence on appeal because the February 21, 2014 notice of appeal was untimely with regard to those issues. The State is mistaken. A notice of appeal should be liberally construed and considered as a whole. *People v. Decaluwe*, 405 Ill. App. 3d 256, 263 (2010). The notice of appeal will be "deemed sufficient to confer jurisdiction on an appellate court when it fairly and adequately sets out the judgment complained of and the relief sought, thus advising the successful litigant of the nature of the appeal." (Internal quotation marks omitted.) *Id.* (quoting *Lang v. Consumers Insurance Service, Inc.*, 222 Ill. App. 3d 226, 229 (1991)). Supreme Court Rule 606(b) provides that "[e]xcept as provided in Rule 604(d), the notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final

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from the trial court's April 23, 2013 denial of his section 2-1401 petition.

judgment appealed from or if a motion directed against the judgment is timely filed, within 30 days after the entry of the order disposing of the motion." Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013).

¶ 24 Here, the defendant was sentenced on October 18, 2012. Less than 30 days later, defense counsel submitted a motion to reconsider the sentence that was file-stamped as "November 16, 2012" by the circuit court clerk's office.[6] See 730 ILCS 5/5-4.5-50 (d) (West 2012) ("[a] motion to reduce a sentence may be made *** within 30 days after sentence is imposed"). The trial court did not rule on the motion to reconsider sentence until January 24, 2014, after defense counsel had refiled the same exact motion on November 6, 2013 and moved for a hearing on the motion. Thus, for the purposes of perfecting this appeal, we find that the filing of the February 21, 2014 notice of appeal appealing from the denial of the motion to reconsider the sentence was timely, where it was filed within 30 days of the entry of the final judgment. See 730 ILCS 5/5-4.5-50(d) (West 2012) ("for the purposes of perfecting an appeal, a final judgment is not considered to have been entered until the motion to reduce the sentence has been decided by order entered by the trial court"). Nevertheless, the State takes issue with the fact that the February 21, 2014 notice of appeal from the trial court's January 24, 2014 ruling was filed *pro se* by the defendant, rather than by defense counsel himself. However, nothing in Rule 606(a) of our supreme court rules makes a distinction between notices of appeal filed by defense counsel and those filed *pro se* by a defendant. See Ill. S. Ct. R. 606(a) (eff. Feb. 6, 2013) ("[t]he notice may be signed by the appellant or his attorney").

[6] Although defense counsel was unable to produce the original filed-stamped November 16, 2012 motion to reconsider the sentence at the January 24, 2014 hearing, our examination of the record shows that it *does* contain a copy of the original file-stamped November 16, 2012 motion.

¶ 25 Further, we find that the defendant could not have properly filed a notice of appeal *before* the trial court had ruled on the motion to reconsider the sentence on January 24, 2014. According to Rule 606(b), "[w]hen a timely posttrial or postsentencing motion directed against the judgment has been filed by counsel *** any notice of appeal filed before the entry of the order disposing of all pending postjudgment motions shall have no effect and shall be stricken by the trial court." Ill. S. Ct. R. 606(b) (eff. Feb. 6, 2013). Thus, although the trial court denied the defendant's motion for a new trial on October 18, 2012, no notice of appeal appealing from that judgment could have been filed until after the trial court disposed of all pending postjudgment motions on January 24, 2014.

¶ 26 Therefore, we find that the February 21, 2014 notice of appeal, which specifies that the defendant appeals "his conviction and sentence for the offense of armed habitual criminal" and "also specifically appeals the denials of his motion for new trial; motion to reconsider sentence; motion to reconsider the motion for new trial and for the appointment of investigator and for a subsequent *Krankel* inquiry,[7]" properly conferred jurisdiction on this court. Accordingly, we have jurisdiction over this consolidated appeal.[8]

¶ 27 Turning to the merits of the appeal, we first determine whether the evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt for the offense of being an armed habitual criminal.

[7] The defendant makes no arguments regarding this specific motion on appeal; thus, it is forfeited.

[8] The State does not contest that we have proper jurisdiction over the trial court's April 23, 2013 ruling on the defendant's section 2-1401 petition, for which a separate timely *pro se* notice of appeal was filed on May 23, 2013.

¶ 28 "A person commits the offense of being an armed habitual criminal if he or she receives, sells, possesses, or transfers any firearm after having been convicted of a total of 2 or more ***" qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2008).

¶ 29 At trial, the parties stipulated that at the time of the July 16, 2010 incident, the defendant had previously been convicted of two qualifying felonies. The parties also do not dispute that the defendant neither sold nor transferred firearms in the case at bar. Thus, the sole inquiry is whether the State proved beyond a reasonable doubt that the defendant *possessed* a firearm on July 16, 2010.

¶ 30 When the sufficiency of the evidence is challenged on appeal, we must determine "'whether, after viewing the evidence in the light most favorable to the [State], *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis in original.) *People v. Graham*, 392 Ill. App. 3d 1001, 1008-09 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). A reviewing court affords great deference to the trier of fact and does not retry the defendant on appeal. *People v. Smith*, 318 Ill. App. 3d 64, 73 (2000). It is within the province of the trier of fact "to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence." *Graham*, 392 Ill. App. 3d at 1009. The trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 219 (2009). A reviewing court will not substitute its judgment for that of the trier of fact. *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A reviewing court must allow all reasonable inferences from the record in favor of the State. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). A criminal conviction will not be

reversed "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt." *Graham*, 392 Ill. App. 3d at 1009.

¶ 31 The defendant first argues that the evidence at trial failed to establish beyond a reasonable doubt his identity as the offender, because he did not match the physical description of the suspect Officer Jones gave over the police radio during the foot pursuit and the officers failed to name the defendant as the suspect in the radio communications despite knowing his name and nickname at that time. He further argues that because Officer Jones' physical description of the suspect given over the police radio differed from that in the written case report, Officer Jones' changing description of the suspect lessened his credibility and reliability in identifying the defendant as the offender.

¶ 32 The State counters that the evidence sufficiently established the defendant's guilt, arguing that the defendant's attacks on the officers' testimony pertained only to the weight of the evidence, which was within the province of the jury. The State argues that the evidence established the defendant's identity as the man who fled from the police and discarded the handgun, where the officers recognized him from prior encounters and knew his name and nickname before the foot chase; Officer Jones positively identified the defendant as the person who discarded the gun; Officer Fahey recovered the handgun which Officer Jones had witnessed the defendant discard; and Officers Jones and Fahey made an in-court identification of the handgun as the same one that was recovered by Officer Fahey at the scene.

¶ 33 The prosecution has the burden of proving beyond a reasonable doubt the identity of the person who committed the crime. *People v. Slim*, 127 Ill. 2d 302, 307 (1989). An identification will not be deemed sufficient to support a conviction if it is vague or doubtful. *Id.* A single

witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification. *Id.* The reliability of a witness' identification of a defendant is a question of fact for the jury. *People v. Cox*, 377 Ill. App. 3d 690, 697 (2007). Factors used to assess the reliability of an identification include: (1) the opportunity the witness had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Slim*, 127 Ill. 2d at 307-08.

¶ 34 Viewing the evidence in the light most favorable to the State, we find that the jury could reasonably have found that the defendant was the offender who led the police on the foot pursuit and discarded the handgun as he fled. At trial, the jury heard both Officers Jones and Fahey testify that, based on previous encounters they had with the defendant while performing police duties, they immediately recognized the defendant as the person riding the bicycle on the sidewalk during the incident in the instant case. Evidence was also presented to the jury that the officers were driving in normal daylight conditions at the time they spotted the defendant on the bicycle, that their degree of attention was high as they were focused solely on the defendant prior to and during the foot pursuit, that Officer Jones was only about 15 to 20 feet behind the defendant during the chase, that the officers were pursuing only the defendant during the incident, and that they had ample opportunity to observe the defendant. The jury also heard Officer Jones testify that despite mistakes he made in his radio communications or the case report, he was not mistaken about the identity of the person he chased on the day of the incident. Both Officers Jones and Fahey made unequivocal in-court identifications of the defendant as the

individual they saw on the sidewalk and chased on July 16, 2010. Officer Doolin also testified that when he questioned the defendant in police custody about two weeks after the incident, the defendant responded that "he ran because he thought he had a warrant" for his arrest. It could reasonably be inferred from the defendant's statement as to his reason for fleeing that he was the individual who initially rode his bicycle and led the police on a foot pursuit.

¶ 35 The defendant makes various arguments attacking the physical description of the suspect that was given over the police radio during the chase; thus challenging the reliability of the officers' identification under factor (3)—the accuracy of the witness' prior description of the criminal. The defendant argues that he did not match the physical description provided by Officer Jones over the police radio during the pursuit; that, despite knowing his name and nickname during the incident, the police officers did not name him as a suspect in the radio communications. The defendant further argues that discrepancies between the physical descriptions of the suspect provided over the police radio and in the case report, lessened Officer Jones' credibility and reliability in identifying him as the offender. Specifically, the defendant argues that during the pursuit, Officer Jones described the suspect over the police radio as an 18-year-old who was 5 feet 11 inches tall, 230 to 240 pounds, and was known as "50." However, in the case report, Officer Jones included the defendant's name and described him as a 28-year-old who was 5 feet 7 inches tall, 200 pounds, and was known by the nickname "48." We reject the defendant's contention. The crux of the defendant's arguments essentially asks this court to improperly retry him by reweighing all of the evidence, assessing the credibility of the officers' testimony, and substituting our judgment for that of the trier of fact—which we decline to do. See *Graham*, 392 Ill. App. 3d at 1009; *Sutherland*, 223 Ill. 2d at 242. At trial, the jury heard all

of the evidence, including Officers Jones and Fahey's testimony that they recognized the defendant before he fled, Officer Jones' physical description of the suspect in the radio communications and in the case report, as well as the extensive cross-examination of Officer Jones regarding the discrepancies in those physical descriptions. The jury heard Officer Jones testify that he only gave a *rough* estimate of the defendant's age, height, and weight during the radio communications. Officer Jones also testified to providing a general description of the suspect—a black male with dark complexion and braided hair over the police radio—which matched the defendant's photograph and physical description in his arrest report and which defense counsel did not argue was inaccurate at trial. At trial, Officer Jones also explained how he misspoke the defendant's nickname as "50" instead of "48" during the radio communications because he was under stress while chasing the defendant. Officer Jones also clarified that, in preparing the case report, he accidentally clicked "blue eyes" for the defendant's description and incorrectly indicated October as the defendant's birth month because he was not familiar with the new computer system. Officer Jones further testified that, despite the mistakes he made in the radio communications and the case report, he was not mistaken about the identity of the person he chased on the day of the incident. It was within the jury's province, having heard all the evidence, to assess the credibility of the officers' testimony, determine the appropriate weight of the testimony, and resolve conflicts and inconsistencies in the evidence.

¶ 36 The defendant, citing three cases involving identification by civilian witnesses, claims that the omission of his name and nickname in the radio communications greatly detracted from the strength of the officers' identification of him as the person they were chasing. See *People v. Johnson*, 2012 IL App (1st) 091730; *People v. Jackson*, 348 Ill. App. 3d 719 (2004); and *People*

v. Lonzo, 20 Ill. App. 3d 721 (1974). However, those cases are distinguishable from the facts here because they do not involve officers in pursuit of a suspect whom they knew from previous encounters; do not involve officers who provided a general description of the suspect at the time of the offense; and do not involve officers who provided a more detailed account of the defendant's physical description later that same day in a case report. Nor do they involve an incriminating statement by the defendant, as in the case at bar, in which he explained why he fled from the police during the incident. In support of his claim for reversal, the defendant also cites *People v. Charleston*, 47 Ill. 2d 19 (1970), *People v. Hughes*, 17 Ill. App. 3d 404 (1974), and *People v. Roe*, 63 Ill. App. 3d 452 (1965), in which the defendant's convictions were overturned because the witnesses in those cases knew the defendants, yet did not give the police the name of the defendants until much later. We find the defendant's reliance on *Charleston*, *Hughes*, and *Roe* to be misplaced, where, here, neither Officer Jones nor Officer Fahey concealed the fact that they recognized and knew the defendant's identity, and Officer Jones clearly identified the defendant by name and nickname in the case report later that same day. Therefore, based on the totality of the evidence, we find that the jury could reasonably have concluded that the State proved beyond a reasonable doubt that Officers Jones and Fahey's identification of the defendant was reliable, and that the defendant was the individual whom they chased on foot during the July 16, 2010 incident. We will not usurp the jury's function as the trier of fact.

¶ 37 Likewise, we reject the defendant's contention that the State failed to prove beyond a reasonable doubt that he possessed a handgun, based on his claim that Officers Jones and Fahey's testimony about the circumstances surrounding the defendant's discard of the handgun was incredible. The defendant argues that Officer Jones' account that the defendant discarded the

handgun in plain view of the officer typifies the type of "dropsy" case that is inherently suspicious, where neither Officer Jones nor Officer Fahey testified that they saw the defendant engage in any behavior that could have led to an arrest. See *People v. Ash*, 346 Ill. App. 3d 809, 816 (2004) (a "dropsy case" is one in which a police officer, to avoid the exclusion of evidence on fourth amendment grounds, falsely testifies that the defendant dropped the contraband in plain view). However, as noted, the jury heard evidence at trial that the officers recognized the defendant before he fled from the police, that Officer Jones saw the defendant holding his waistband and running with a "one arm motion" before eventually tossing the handgun to the ground, and that the defendant admitted to the police that he ran because he thought there was a warrant for his arrest. The jury was in the best position to view the demeanor of the witnesses at trial, assess their credibility, and weigh their testimony. We will not substitute our judgment for that of the jury.

¶ 38 Finally, the defendant argues that the State failed to prove his guilt beyond a reasonable doubt, where the "lengthy jury deliberations" and the fact that the jury sent out several jury notes to the trial court during deliberations, showed that the jury "had difficulty believing the officers' testimony" and the State's evidence was weak. The State urges this court to reject the defendant's arguments, noting that none of the cases cited by the defendant supports his arguments and that the jury engaged in careful deliberations and ultimately found the evidence sufficient to establish his guilt beyond a reasonable doubt.

¶ 39 During deliberations, the jury sent out seven notes, to which the trial court responded in writing. The first note asked, "can we get a transcript of all the testimony given in the

courtroom? Answer: No." The second note asked, "what happens if we, the jury, cannot come to a unanimous decision? Answer: Continue your deliberations."

¶ 40 The third note asked, "[h]ow are police reports normally handled when other officers are present? Are they also required to contribute to the initial report or write their own separate reports? Answer: You have heard all of the evidence in the case. You must consider only the evidence in the case. You have received all of your instructions on the law. You must follow all of the instructions. Continue your deliberations."

¶ 41 Later, the jury sent out a fourth and fifth note simultaneously, asking "[d]id Officer Doolan [*sic*] say that he made a report of what [defendant] told him at his arrest? and "[i]s it appropriate to completely disregard the testimony of one of the witnesses and only consider the others? Answer to questions 4 & 5: Refer to your instructions. The jury decides the credibility of the witnesses and the jury determines the facts of the case. The jury must rely on its collective and individual memory to decide the facts and the verdict."

¶ 42 In a sixth note, the jury stated that "[a]fter much deliberation, we are at an impasse. We are at a point where nobody will change their minds and we are not in agreement. What should our next course of action [*sic*]? In response, the trial court brought the jury back into the courtroom and gave them the *Prim* instruction.[9] The jury then continued with deliberations.

¶ 43 The seventh note asked, "[w]hy are there two different dates on the gun envelope? According to Fahey the gun was submitted the same day it was recovered. There is a label date of 7/16/2010 and a stamped date of 7/19/2010 on the submitted evidence." In a written response, the trial court stated that "the date of 7-19-2010 was not mentioned by any witness. I instructed

[9] *People v. Prim*, 53 Ill. 2d 62 (1972).

you not to conduct or perform independent investigations. You must decide the case based on the evidence before you."

¶ 44 The defendant first argues that the jury "had difficulty believing the officers' testimony," noting that even though the State only took three hours to present the evidence at trial, the jury deliberations lasted much longer. He then concludes that the "lengthy jury deliberations" was evidence that the State's case was weak. We find the defendant's arguments to be unavailing. In support of this argument, the defendant cites *People v. Preatty*, 256 Ill. App. 3d 579 (1994) and *People v. Palmer*, 125 Ill. App. 3d 703 (1984). However, *Preatty* and *Palmer* are highly distinguishable from the facts in the case at bar, where they do not concern the length of jury deliberations or jury notes as they relate to the sufficiency of the evidence to sustain a conviction. Rather, *Preatty* and *Palmer* involve alleged trial court errors or prosecutorial misconduct and the court examined the issue of the length of jury deliberations or jury notes in determining whether the evidence was close and a retrial was required (*Preatty*) and whether the evidence was "closely balanced" under the first prong of the plain error doctrine (*Palmer*). Thus, we find these cases to be highly distinguishable. See *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 75 (whether the evidence is closely balanced is a separate question from whether the evidence is sufficient to sustain a conviction beyond a reasonable doubt. The closely balanced standard errs on the side of fairness and grants a new trial even if the evidence was otherwise sufficient to sustain a conviction).

¶ 45 The defendant also argues that the sixth jury note in which the jury expressed that it was at an impasse, "showed that the State's case was not very strong as the jury was having a difficult time reaching a unanimous verdict." He claims that "Illinois courts have routinely found that

where the jury sends out a note that it is unable to agree upon a verdict, that indicates that the jury viewed the evidence to be closely balanced." However, the cases the defendant cites in support of this contention are inapposite, where they do not pertain to a claim challenging the sufficiency of the evidence on appeal. See *People v. Morey*, 308 Ill. App. 3d 722 (1999) (reversing and remanding for a retrial, where the trial court abused its discretion in refusing to grant defendant a continuance to secure the presence and testimony of a confidential informant, and the jury viewed the evidence as closely balanced because it was deadlocked during deliberation, but finding that a retrial would not offend the principles of double jeopardy because the State had presented sufficient evidence to convict defendant); *People v. Aguirre*, 291 Ill. App. 3d 1028 (1997) (holding that although the evidence was sufficient to support the conviction, defendant was entitled to a new trial because of prosecutorial misconduct, where the evidence was closely balanced under the plain error doctrine as evidenced by the jury's note requesting the police reports and the witnesses' statements and by the note stating that the jury was split 10 to 2); and *People v. Lee*, 303 Ill. App. 3d 356 (1999) (finding that the evidence was closely balanced under the plain error analysis, where the jury was deadlocked for several hours and had on three occasions indicated that it could not reach a unanimous verdict, but holding that trial court's failure to respond to two jury notes indicating jury's continued inability to reach unanimous verdict was not plain error).

¶ 46 In the case at bar, although the jury was at an impasse during deliberations, the trial court brought the jury back into the courtroom and gave them the *Prim* instruction, after which the jury continued deliberations and ultimately reached a verdict. We find no reason to reverse the defendant's conviction on this basis. To accept defendant's argument would suggest that

whenever a jury received the *Prim* instructions and then later reached a verdict, their difficulty prior to receiving the *Prim* instruction would be grounds for overturning their verdict. Likewise, we reject the defendant's arguments that specific jury notes (the third, fifth, and seventh jury notes) questioning the evidence showed that the jury had difficulty finding a witness credible. As discussed, the jury engaged in thorough deliberations and was satisfied that the evidence was sufficient before reaching a unanimous guilty verdict. It is within the province of the jury to determine the appropriate weight of the testimony, and we will not reverse the defendant's conviction on this basis. Thus, viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found beyond a reasonable doubt that the defendant was the individual who fled from the police officers and discarded the handgun on July 16, 2010. Accordingly, the State proved beyond a reasonable doubt that the defendant was an armed habitual criminal.

¶ 47 We next determine whether the trial court erred in denying defense counsel's motion to reconsider the sentence as untimely.

¶ 48 The defendant argues that the trial court's January 24, 2014 ruling denying as untimely defense counsel's motion to reconsider the sentence was erroneous, arguing that the motion should have been decided on its merits because counsel had timely filed an earlier November 16, 2012 motion to reconsider the sentence within 30 days of the imposition of the defendant's sentence.

¶ 49 The State counters that the trial court did not err in determining that the motion to reconsider the sentence was untimely and in refusing to consider the merits of the motion. The State contends that because defense counsel failed to present to the trial court the file-stamped

copy of the November 16, 2012 motion to reconsider the sentence, the trial court did not err in ruling that the later filed November 6, 2013 motion to reconsider the sentence was untimely.

¶ 50 Section 5-4.5-50 of the Unified Code of Corrections provides that:

> "A motion to reduce a sentence may be made *** within 30 days after sentence is imposed. A defendant's challenge to the correctness of a sentence or to any aspect of the sentencing hearing shall be made by a written motion filed with the circuit court clerk within 30 days following the imposition of sentence. A motion not filed within that 30-day period is not timely. *** A notice of motion must be filed with the motion. ***
>
> If a motion filed pursuant to this subsection is timely filed, the proponent of the motion shall exercise due diligence in seeking a determination on the motion and the court shall thereafter decide the motion within a reasonable time." 730 ILCS 5/5-4.5-50(d) (West 2012)

¶ 51 The record shows that defense counsel filed a motion to reconsider the sentence with the circuit court clerk's office on November 16, 2012, within 30 days of the trial court's imposition of sentence on October 18, 2012. Although the November 16, 2012 motion was file stamped by the clerk's office, it did not include a notice of motion as required by statute. Despite filing the November 16, 2012 motion to reconsider the sentence, the motion did not appear on the court's half sheet, defense counsel never moved for a hearing on the motion, and nothing in the record shows that defense counsel sought a determination on the motion as he was required to do. See

People v. Newman, 211 Ill. App. 3d 1087, 1098 (1991) ("[u]nless a motion is brought to the attention of the court and the court is requested to rule on it, the motion is not effectively made. A motion is an application to the court which must be brought to the court's attention. Merely filing the motion with the clerk of the court does not constitute a sufficient application"). Instead, defense counsel waited a year, until November 6, 2013, before filing another motion to reconsider the sentence, which appeared to contain the exact same arguments made in his original November 12, 2012 motion. The November 6, 2013 motion was filed along with a notice of motion and defense counsel thereafter sought a hearing on it. At the January 24, 2014 hearing, the trial court directed defense counsel to show the court "a motion that was filed within thirty days" of sentencing on October 18, 2012, which defense counsel failed to do. Rather, defense counsel was only able to produce the file-stamped copy of the November 6, 2013 motion to reconsider the sentence. Thus, based on the foregoing, we cannot conclude that the trial court erred in denying the motion to reconsider the sentence as untimely, where the only motion brought to the court's attention was the one filed on November 6, 2013—over a year after the imposition of the defendant's sentence.

¶ 52 The defendant argues in the alternative that, if this court finds no error in the trial court's denial of the motion to reconsider the sentence as untimely, defense counsel was ineffective for failing to exercise due diligence in seeking a determination on the November 16, 2012 motion in a timely manner. The State counters that the defendant was not deprived of the effective assistance of counsel, where he cannot establish prejudice by counsel's alleged error.

¶ 53 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive

him of the right to counsel under the sixth amendment; and (2) that this substandard performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* To show that he was prejudiced by defense counsel's failure to present the November 16, 2012 motion to reconsider the sentence in a more timely fashion, the defendant must show that the underlying merits of the motion would have had a reasonable probability of success. See *People v. Steels*, 277 Ill. App. 3d 123, 128 (1995). The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 54 While it would have been ideal for counsel to advance the November 16, 2012 motion, we find that the defendant's ineffective assistance of counsel claim must fail where he cannot establish that he was prejudiced by counsel's failure to bring the November 16, 2012 motion to reconsider the sentence to the court's attention in a timely manner. In the November 16, 2012 motion, defense counsel argued that the defendant's 10-year sentence was excessive. An armed habitual criminal conviction is a Class X felony subject to a sentencing range of 6 to 30 years of imprisonment. 720 ILCS 5/24-1.7 (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008). Here, the trial court's imposition of a 10-year sentence was well within and at the low end of the statutory range. The defendant argues on appeal that the 10-year sentence, which was only 4 years above

the statutory minimum, was excessive because the evidence at trial only established that he discarded the handgun, which he claims was less serious than had he fired the handgun or aimed it at someone. He further claims that the sentence was excessive in light of his criminal history showing that his prior convictions were all nonviolent drug possession offenses for which he was incarcerated on only one of those convictions. He also argues that the trial court failed to give adequate weight to his rehabilitative potential in imposing the excessive sentence, and that he should have been sentenced only to the statutory minimum of 6 years in prison in light of the fact that the "very little aggravation" factors in this case did not justify a sentence beyond the minimum. We reject the defendant's arguments. At the sentencing hearing, the trial court heard arguments in aggravation and mitigation, including defense counsel's arguments that the defendant had no prior violent felony convictions. In imposing the 10-year sentence, the trial court expressly noted that it had reviewed the defendant's presentence investigation report (PSI report), which set forth his background and criminal history, that it was familiar with the facts in the case, that it had reviewed the defendant's background, and that it had heard all arguments in aggravation and mitigation. Moreover, the defendant made no affirmative showing that the trial court failed to give proper weight to the mitigating evidence offered at the sentencing hearing. Thus, we cannot conclude that the trial court abused its discretion in sentencing the defendant to a 10-year term, just because the defendant would have liked to serve only the statutory minimum of 6 years in prison. See *People v. Stacey*, 193 Ill. 2d 203, 209 (2000) (trial court has broad discretionary powers in imposing a sentence; trial court's sentencing decision is entitled to great deference because it is generally in a better position than the reviewing courts to determine the appropriate sentence); *People v. Peacock*, 324 Ill. App. 3d 749, 758 (2001) (a trial court is not

required to set forth every reason or the weight it gave each factor considered in determining defendant's sentence; absent evidence to the contrary, a trial court is presumed to have considered any mitigating factors brought before it; a sentence is presumptively correct and only where that presumption has been rebutted by an affirmative showing of error will a reviewing court find that the trial court has abused its discretion). Therefore, because the imposition of the 10-year sentence was not excessive, the defendant cannot show that the underlying merits of the November 16, 2012 motion to reconsider the sentence would have had a reasonable probability of success. Accordingly, the defendant cannot establish prejudice and his ineffective assistance of counsel claim must fail.

¶ 55 We next determine whether the trial court's imposition of $634 in mandatory fines, fees, and costs, should be modified. We review this issue *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 56 At sentencing, the trial court sentenced the defendant to a 10-year term, with 3 years of MSR, and imposed $634 in mandatory fines, fees, and costs. The total $634 assessed fines, fees, and costs included the $5 Electronic Citation Fee; the $25 Court Services Fee; and the $50 Court System Fee.

¶ 57 First, the defendant argues, the State concedes, and we agree that he was improperly assessed the $5 Electronic Citation Fee (705 ILCS 105/27.3e (West 2012)), on the basis that the statute underlying the fee was not in effect at the time of the defendant's offense in the case at bar. See *People v. Bosley*, 197 Ill. App. 3d 215, 220 (1990) ("[i]t is well established that a defendant is entitled to be sentenced in accord with the law in effect at the time of the offenses"). Accordingly, we order the $5 Electronic Citation Fee to be vacated.

¶ 58 The defendant next argues that the trial court improperly assessed the $25 Court Services Fee against him (55 ILCS 5/5-1103 (West 2010)), claiming that it only applies in criminal cases involving certain drug or alcohol-related convictions and does not apply to his conviction for armed habitual criminal. However, as the State argues, and the defendant acknowledges, this court has already held that the $25 Court Services Fee applies to all criminal convictions. See *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 18; *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010); accord *People v. Anthony*, 2011 IL App (1st) 091528-B, ¶¶ 26-27; *People v. Lattimore*, 2011 IL App (1st) 093238, ¶¶ 103-05. We see no reason to deviate from this court's prior holdings on this issue. Therefore, the trial court properly assessed the $25 Court Services Fee against the defendant.

¶ 59 The defendant also challenges the imposition of the $50 Court System Fee (55 ILCS 5/5-1101(c)(1) (West 2010)), arguing that it is a fine, not a fee, which should be offset by his presentence custody credit at the rate of $5 for every day spent in custody prior to being sentenced. The State responds that the presentence custody credit may be used only for the payment of fines, not fees, and that the $50 Court System Fee is a fee.

¶ 60 Section 5-1101(c) of the Counties Code states that for a felony conviction, a defendant shall pay a fee of $50. 55 ILCS 5/5-1101(c)(1) (West 2010). An offender who has been assessed a fine is entitled to a $5 credit for each day he spends in presentence custody up to the amount of any applicable fines levied against him. 725 ILCS 5/110-14(a) (West 2005). A "fine" is a charge that is punitive in nature and not intended to compensate the State for costs incurred in prosecuting the defendant, but instead to finance the court system. *People v. Breeden*, 2014 IL

App (4th) 121049, ¶ 83. A fee, on the other hand, seeks to recoup expenses incurred by the State in prosecuting the defendant. *People v. Jones*, 223 Ill. 2d 569, 582 (2006).

¶ 61 In *People v. Graves*, 235 Ill. 2d 244, 253 (2009), our supreme court held that the charges in section 5-1101 of the Counties Code represent "monetary penalties to be paid by a defendant" upon a judgment of guilty of certain offenses. The *Graves* court concluded that because the costs assessed pursuant to section 5-1101 are not intended to compensate the State for the prosecution of any particular defendant, they are fines. *Id.* at 252-53; accord *People v. Raymond Smith*, 2013 IL App (2d) 120691, ¶21; *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17; *People v. Darrell Smith*, 2014 IL App (4th) 121118, ¶ 54; *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30. Although the State maintains that *Raymond Smith* was wrongly decided, we choose to follow it as it relied upon the holding of our supreme court in *Graves*. Accordingly, we find the $50 Court System Fee to be a fine that the defendant may offset with his presentence custody credit.[10]

¶ 62 We next determine whether the trial court erred in dismissing his section 2-1401 petition, which we review *de novo*. See *People v. Vincent*, 226 Ill. 2d 1, 13 (2007).

¶ 63 The defendant argues that the trial court's *sua sponte* dismissal of his section 2-1401 petition was premature because the State was never properly served with the petition and the State did not waive objection to the defective service.

¶ 64 The State responds, in part, that the defendant had no standing to raise his opponent's objection to improper service, and the defendant should not be rewarded for his own failure to properly serve the State. The State points out that the defendant makes no arguments on the

[10] The defendant received 811 days of presentence custody credit.

merits of his section 2-1401 petition and, thus, any issues as to the actual merits of his petition are forfeited for review on appeal.

¶ 65 On January 22, 2013, the defendant filed a *pro se* section 2-1401 petition, alleging that his 3-year MSR term should be counted as part of, not in addition to, his 10-year prison term. The notice of filing indicated that the defendant placed two copies of the section 2-1401 petition in the prison "U.S. mail box," to be sent to the circuit court clerk's office by first-class mail on January 17, 2013. The petition was file stamped by the circuit court clerk's office on January 22, 2013. However, there is no indication in the record that a copy of the petition was ever sent to or served upon the assistant State's Attorney. On February 21, 2013, during in-court proceedings, the trial court noted that the defendant had filed a *pro se* section 2-1401 petition seeking relief from judgment and the court continued the matter to April 23, 2013. The front page of the transcript of the February 21, 2013 proceedings indicates the presence of ASA Guerrero, who remained silent during the brief proceedings and the trial court did not address her. On April 23, 2013, the trial court denied the section 2-1401 petition, finding the defendant's arguments to be without merit and holding that the MSR statutory provisions were constitutional on their face and as applied to the defendant. The front page of the transcript of the April 23, 2013 proceedings indicates that ASA Collins and ASA Para were present at the proceedings. On May 23, 2013, the defendant filed a *pro se* notice of appeal, appealing from the court's April 23, 2013 denial of his section 2-1401 petition.

¶ 66 Section 2-1401 of the Code allows for final judgments to be vacated more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). To obtain relief under section 2-1401, the defendant must affirmatively set forth specific factual allegations supporting each of the

following elements: " '(1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition for relief.' " *People v. Pinkonsly*, 207 Ill. 2d 555, 565 (2003) (quoting *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986)). "A meritorious defense under section 2-1401 involves errors of fact, not law." *Pinkonsly*, 207 Ill. 2d at 565.

¶ 67 Supreme Court Rule 106 provides that notice for the filing of section 2-1401 petitions is governed by Supreme Court Rule 105. See Ill. S. Ct. R. 106 (eff. Aug. 1, 1985); R. 105 (eff. Jan. 1, 1989). Rule 105 states that notice may be served by either summons, certified or registered mail, or by publication. Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). Once notice has been served, the responding party has 30 days to file an answer or otherwise appear. *Id.* "The notice requirements of Rule 105 are designed to prevent a litigant from obtaining new or additional relief without first giving the defaulted party a renewed opportunity to appear and defend." *Albany Bank & Trust Co. v. Albany Bank & Trust Co.*, 142 Ill. App. 3d 390, 393 (1986). "The object of process is to notify a party of pending litigation in order to secure his appearance." *Professional Therapy Services, Inc. v. Signature Corp.*, 223 Ill. App. 3d 902, 910 (1992). "In construing sufficiency of the notice, courts focus not on whether the notice is formally and technically correct, but whether the object and intent of the law were substantially attained thereby." (Internal quotation marks omitted.) *Id.* at 910-11.

¶ 68 In the instant case, the defendant failed to perfect service on the State in accordance with Rule 105 when he mailed his petition by regular first-class mail, rather than by certified or registered mail, as required under the plain language of Rule 105. See *People v. Roberts*, 214 Ill. 2d 106, 116 (2005) (the rules of statutory construction also apply to interpretation of our supreme

court rules); Ill. S. Ct. R. 105 (eff. Jan. 1, 1989). It is this improper service that the defendant now argues should be the basis for reversing the trial court's dismissal of the petition. However, we find *People v. Kuhn*, 2014 IL App (3d) 130092, instructive, in which this court held that a defendant who files a section 2-1401 petition "does not have standing to raise an issue regarding the State's receipt of service." *Id.* ¶ 16; see also *People v. Alexander*, 2014 IL App (4th) 130132, ¶ 48 (agreeing with *Kuhn* on the issue of standing). Applying the principles of *Kuhn* and *Alexander*, we find that the defendant lacked standing to challenge the imperfect service of his section 2-1401 petition on the State.

¶ 69 Notwithstanding the defendant's improper service and lack of standing to challenge it, we find that the State received *actual* notice of the filing of the section 2-1401 petition—thus, satisfying the purpose of Rule 106 and achieving the object of the notice requirements—and forfeited any objections to improper service, when ASA Guerrero appeared in court on February 21, 2013 and remained silent during the proceedings. See *People v. Ocon*, 2014 IL App (1st) 120912, ¶¶ 31-35 (although it was unclear whether defendant properly served the State with his section 2-1401 petition, the State had actual notice of the filing of the petition through the court appearance of an assistant State's Attorney on January 10, 2012 and the purpose of service was achieved. Also, because the State was present at the January 10, 2012 proceedings, but remained silent during those proceedings, any objection to the lack of proper service has been waived). We further find the defendant's reliance on *People v. Carter*, 2014 IL App (1st) 122613, *appeal granted*, No. 117709 (Sept. 24, 2014), unpersuasive. *Carter* is distinguishable from *Ocon* and the case at bar, where there was no indication that anyone other than the judge and the court reporter was present in court when the section 2-1401 petition was docketed and there was

nothing to indicate that the prosecutor had any knowledge of, and could thus knowingly waive, service of the petition. Unlike *Carter*, in the case at bar, ASA Guerrero was present in court during the February 21, 2013 proceedings and, thus, the State clearly received actual notice of the petition and forfeited any objection to improper service of the petition by failing to raise the issue at that time.

¶ 70 It is also important to note that allowing defendant to benefit from his failure to properly serve the State would be a waste of judicial resources where he does not even contend on appeal that his petition has merit. See *Ocon*, 2014 IL App (1st) 120912, ¶ 42 (noting that remand would be a waste of judicial resources where the defendant's petition lacked merit). Because the defendant presents no argument on how his petition is meritorious, we find that he has forfeited this issue for review. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing"). Moreover, in its April 23, 2013 order, the trial court concluded that the defendant's petition was without merit, holding that the MSR statutory provisions were constitutional on their face and as applied to the defendant. We agree with the trial court and likewise find the petition to be without merit. Accordingly, we hold that the trial court did not err in dismissing the section 2-1401 petition.

¶ 71 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the defendant's mittimus to reflect: (1) a vacation of the $5 Electronic Citation Fee; and (2) an offset of the $50 Court System Fee by the defendant's presentence custody credit. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 72 Affirmed; mittimus corrected.