SIXTH DIVISION
September 11, 2015

No. 1-13-2366

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. 11 CR 3330
	)	
CLAUDE FISHER,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm defendant's conviction for delivery of a controlled substance over his claim that his sentence is excessive. We modify the fines and fees order.

¶ 2 Following a bench trial, defendant Claude Fisher was found guilty of delivery of a controlled substance and sentenced as a Class X offender (730 ILCS 5/5-4.5-25 (West 2012)) to 14 years' imprisonment. On appeal, he contends that this sentence is excessive, given the nature of the offense and the mitigating evidence presented. He also challenges the propriety of certain monetary assessments the court imposed.

¶ 3 The record shows that at 1:30 p.m. on November 30, 2010, Chicago police officer Drumgoole was working undercover near 400 East 40th Street while Chicago police officer Michael Killeen was on patrol nearby. While undercover, Officer Drumgoole purchased narcotics from the passenger of a beige Lincoln automobile. He identified defendant as the driver of the vehicle and Deon Willis as the passenger. During the exchange, Willis provided Officer Drumgoole with a telephone number to call if he wanted to purchase more narcotics. After the transaction, Officer Drumgoole made a drive-by identification of the vehicle so that it could be stopped by Officer Killeen. Officer Killeen "curbed" the Lincoln, ordered defendant and Willis out of the car, then filled out Chicago police contact cards for both of them, which included their appearance and age.

¶ 4 Officer Drumgoole was again working undercover on December 2, 2010. He called the phone number Willis gave him during the transaction on November 30, and was instructed to drive to the 3900 block of South King Drive where he parked his undercover vehicle. He then saw a gray Toyota parked nearby with two people inside, one of whom was defendant. Officer Drumgoole walked over to the Toyota and gave defendant $40 of pre-marked Chicago Police Department funds and defendant handed Officer Drumgoole four bags of suspect heroin. Officer Drumgoole returned to his vehicle, drove away, and informed his team members over the radio that there had been a "positive transaction." Upon returning to the police station, he placed the narcotics in a heat-sealed inventory bag and then identified defendant from a photo array as the person who handed him the drugs.

¶ 5 Chicago police officer Vince Morgan testified that he was working as a surveillance officer with Officer Drumgoole on December 2, 2010, and observed the driver of a gray Toyota park near Officer Drumgoole's undercover police vehicle. He identified defendant as the

passenger in the Toyota, and watched as Officer Drumgoole approached the vehicle and then walked back to his undercover vehicle. He then returned to the police station where he showed Officer Drumgoole a photo array, from which he identified defendant as the person who handed him the narcotics.

¶ 6 The parties then stipulated that Naeemah Powell would testify that she is a chemist for the Illinois State Police Crime Lab, and received a heat-sealed inventory envelope from the Chicago Police Department. She would further testify that she tested the material therein and determined that it contained 0.8 gram of heroin.

¶ 7 Deon Willis testified on behalf of defendant that on November 30, 2010, he was driving his beige Lincoln, which no one else drives. He further testified that his friend James Colley, not defendant, was the other person in the car with him that day when they were stopped by police. He also testified that he never drove a gray Toyota and only sold drugs out of his Lincoln.

¶ 8 The parties then stipulated that a search of the license plate number for the gray Toyota showed that it was registered to Naomi Williams. The parties further stipulated that the name on the billing address for the phone number Officer Drumgoole called on December 2, 2010, was Brad Dav, and the phone records indicated no calls were received on that phone number between 8:30 a.m. and 4 p.m. that day. Following closing arguments, the court found defendant guilty of delivery of less than one gram of heroin.

¶ 9 At the sentencing hearing, the State informed the court that defendant was mandatory Class X by background, and outlined his seven prior felony convictions, including convictions for possession of large quantities of narcotics and two convictions for possession of a weapon by a felon. The State noted that several of defendant's convictions were from the early 1990's, that he served significant time on them, and has been in and out of prison ever since. The State also

noted that defendant currently has another pending drug case, and asked for a minimum sentence of 10 years.

¶ 10 In mitigation, defense counsel informed the court that defendant was on "pretrial services" for three years and had no violations during that time. She also noted that defendant's criminal background is 10 years old, which is the same time that he left the gang. She further stated that defendant has been trying to live a "straight life" by having a full-time job at a professional baseball stadium, and presented a letter from defendant's employer stating that he valued defendant's work. Defense counsel also informed the court that defendant has two children, pays child support, and has a close relationship with the mother of his children, and with his current girlfriend, who were both present in court. Counsel then asked for the minimum sentence of six years because defendant was already being harshly punished by being sentenced as a Class X offender.

¶ 11 In allocution, defendant apologized to his family for getting into trouble and stated that he had been working at the stadium for seven years, was paying his bills, and had his own apartment. He denied selling narcotics on December 2, 2010, and asked for mercy so he could get back to his family.

¶ 12 In announcing its sentencing decision, the court stated that it considered the evidence presented at trial, the gravity of the offense, the presentence investigation report, the financial impact of incarceration, and the arguments in aggravation and mitigation. The court also stated that it considered any substance abuse issues and treatment, defendant's potential for rehabilitation, and his statement in allocution. The court then sentenced defendant to 14 years' imprisonment followed by three years of mandatory supervised release.

¶ 13 In this appeal from that judgment, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but contends that his sentence is excessive. As evidence, he cites the non-violent nature of the offense, and his criminal history, which was also mostly non-violent. He also cites the State's 10-year recommendation, his supportive family, and the financial impact of his incarceration on the State of Illinois.

¶ 14 The imposition of a sentence within the statutory range provided for the class of offense of which defendant was convicted is a decision committed to the sentencing court. *People v. Barney*, 111 Ill. App. 3d 669, 679 (1982). A reviewing court will not disturb that sentence absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). A reasoned judgment as to a proper sentence must be based upon the particular facts of each case (*People v. Smith*, 258 Ill. App. 3d 1003, 1028 (1994)), and where, as here, the sentence imposed by the trial court falls within the prescribed statutory range, the sentence will not be disturbed unless it is greatly at variance with the purpose and spirit of the law, or is manifestly disproportionate to the offense (*Cabrera*, 116 Ill. 2d at 493-94).

¶ 15 In this case, defendant was convicted of the Class 2 felony offense of delivery of a controlled substance (720 ILCS 570/401(d) (West 2010)), but was subject to mandatory Class X sentencing because of his criminal history (730 ILCS 5/5-4.5-25 (West 2012)). The 14-year sentence imposed by the trial court fell within the prescribed 6-to-30-year range (730 ILCS 5/5-4.5-25(a) (West 2012)), and was entered after the court considered the appropriate sentencing factors, including the nature of the offense, defendant's familial ties, and employment background.

¶ 16 The record also shows that in making its sentencing decision, the trial court considered the same mitigating factors defendant brings to our attention here. The court stated that it

considered the gravity of the offense, defendant's criminal history, all of the evidence presented in mitigation and aggravation, the financial impact of his incarceration, and his rehabilitative potential.

¶ 17 A trial court is not required to specify on the record the reasons for the sentence imposed (*People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995)), nor is it required to recite and assign value to each factor presented at the sentencing hearing (*People v. Baker*, 241 Ill. App. 3d 495, 499 (1993)). Rather, we presume that the trial court properly considered all mitigating factors and rehabilitative potential before it, and defendant has the burden to affirmatively show the contrary. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). The sentence appears to be rather high in light of the defendant's background, and we might not have imposed the same sentence ourselves. However, we cannot say that the sentence is so outrageous that it constituted an abuse of discretion. That being the case, the scope of our review is limited; we are not permitted to reweigh the same factors and independently impose a lower sentence. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987); *Cabrera*, 116 Ill. 2d at 493-94.

¶ 18 Defendant next contends, the State concedes, and we agree, that defendant was improperly assessed a $5 electronic citation fee, which applies only when the defendant is found guilty in "any traffic, misdemeanor, municipal ordinance, or conservation case." 705 ILCS 105/27.3e (West Supp. 2011). Since defendant was convicted of delivery of a controlled substance, the assessment of the fee was inappropriate, and we vacate it.

¶ 19 Defendant finally contends that the $2 public defender records automation fee and the $2 state's attorney records automation fee were improperly assessed because they went into effect after the date of the offense. He maintains that despite their designations as "fees," these

assessments are actually fines, and because they went into effect after the date of the offense, their imposition violates *ex post facto* principles.

¶ 20 The Illinois Constitution prohibits the enactment of *ex post facto* laws. *People v. Dalton*, 406 Ill. App. 3d 158, 163 (2010) (citing *People v. Prince*, 371 Ill. App. 3d 878, 880 (2007)). These laws disadvantage a defendant by criminalizing an act that was innocent when done, increasing the punishment for a previously committed offense, or altering the rules of evidence by making a conviction easier to obtain. The prohibition against *ex post facto* laws, however, applies only to laws that are punitive. *Id.* Thus, it applies to fines, a pecuniary punishment imposed as a part of a criminal sentence, but not to fees, which are intended to compensate the State for costs incurred as a result of the prosecution of defendant. *Id*. at 163-64 (citing *People v. Jones*, 223 Ill. 2d 569, 581-82 (2006)).

¶ 21 The public defender records automation fee requires defendant to pay a $2 assessment "to discharge the expenses of the Cook County Public Defender's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/3-4012 (West 2012). Similarly, the state's attorney records automation fee requires defendant to pay a $2 assessment "to discharge the expenses of the State's Attorney's office for establishing and maintaining automated record keeping systems." 55 ILCS 5/4-2002.1(c)(West 2012).

¶ 22 The appellate court recently determined that the state's attorney records automation assessment was compensatory in nature, and, therefore, a fee. *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30. Citing its prior decision in *People v. Warren*, 2014 IL App (4th) 120721, ¶ 108, the court in *Rogers* stated that the "assessment is a fee because it is intended to reimburse the State's Attorney for their expenses related to automated record-keeping systems." *Rogers*, 2014 IL App (4th) 121088, ¶ 30.

¶ 23 Defendant acknowledges the decision in *Rogers*, but asserts that it was wrongly decided and urges us to apply the holding in *People v. Graves*, 235 Ill. 2d 244, 250 (2009), where the supreme court stated that a fee is intended to compensate the State for the costs of prosecuting defendant, while fines are punitive in nature. Defendant maintains that these assessments are not intended to compensate the State for costs incurred in defendant's specific prosecution, and thus are fines.

¶ 24 We agree with the court in *Warren* that the statutory language of section 4-2002.1(c) shows that the assessment is intended to compensate the State for the costs of prosecuting defendant by offsetting the State's costs in establishing and maintaining automated record keeping systems (55 ILCS 5/4-2002.1(c)(West 2012)), and, as such, is a fee, which is not subject to *ex post facto* principles. *Warren*, 2014 IL App (4th) 120721, ¶ 108; *Dalton*, 406 Ill. App. 3d at 163-64. The public defender records automation fee is virtually indistinguishable from the state's attorney records automation fee, other than that it is intended to compensate the Office of the Public Defender for costs incurred in defending defendant. Thus, applying the rationale set forth in *Warren* and *Rogers*, we find that it is also a fee, and therefore, not subject to *ex post facto* principles.

¶ 25 Accordingly, we order the clerk of the circuit court of Cook County to amend defendant's fines and fees order to reflect the vacation of the $5 electronic citation fee, resulting in a remaining assessment of $1624, and affirm the judgment of the circuit court of Cook County in all other respects.

¶ 26 Affirmed; fines and fees order modified.