FIFTH DIVISION
December 4, 2015

No. 1-13-2530

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. 12 CR 5088
	)	
DEMOND WILDER,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Palmer concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's six-year prison sentence for possession of cocaine is not excessive, as the record establishes the trial court considered all appropriate factors. Where the public defender fee was assessed following an inadequate hearing, the cause is remanded for a proper hearing.

¶ 2 Following a bench trial, defendant Demond Wilder was convicted of possession of less than 15 grams of cocaine and sentenced to an extended term of six years in the Illinois Department of Corrections (IDOC). On appeal, defendant contends that his sentence is excessive in view of mitigating factors, including the minimal severity of his offense, his nonviolent

criminal history, his close relationship with his family, his rehabilitative potential, and the high cost of incarceration. Defendant also contends that the trial court improperly assessed a $1,000 public defender fee without a hearing to determine his ability to pay. We affirm defendant's conviction, vacate the fee, and remand for a hearing on defendant's ability to pay.

¶ 3 At trial, two Chicago police officers testified that defendant was near 3825 West Division in Chicago around noon on February 15, 2012, standing by two individuals, one of whom solicited drugs by shouting at passing cars. A man approached defendant, who provided a small object in exchange for money. Soon afterwards, the man was arrested in possession of two bags of cannabis. Officers then approached defendant, who placed a large object in his mouth. Defendant was arrested and told to spit out the object, a balled up piece of plastic containing 13 smaller bags of cocaine totaling 1.06 grams. Four bags of cannabis and $288 were also recovered from defendant.

¶ 4 The trial court found defendant guilty of possession of less than 15 grams of cocaine. Defendant filed a motion for new trial, which the trial court denied.

¶ 5 At sentencing, the trial court determined that defendant was eligible for probation, but in view of his criminal history, was also eligible for an extended term of up to six years in the IDOC. Defendant had a juvenile conviction for battery (1990), as well as convictions for felony possession of a controlled substance with intent to deliver (1991), felony possession of a controlled substance (1995, 1998, 2002, 2004, 2006, 2008), felony manufacturing or delivery of cocaine (1998), possession of cannabis (2004, 2011), and driving under the influence of alcohol and driving without a valid license (2010). The State observed that defendant's criminal background was extensive and primarily involved narcotics. The State also noted that defendant

previously received terms of two, three, and four years in the IDOC, as well as probation that was terminated unsatisfactorily. Based on the foregoing, the State requested a six-year sentence.

¶ 6 In mitigation, defense counsel observed that defendant was 40 years old at the time of sentencing and made good use of his time in jail by participating in the inmate behavioral modification program. Defendant fathered two daughters and previously worked in a clothing store and barbershop. According to defense counsel, defendant "wrestles with his narcotics addiction" but "is not in a position to benefit from a treatment program." Defense counsel gave the court a facsimile from the Cook County Sheriff's Department and a handwritten note from defendant, neither of which were read into the record or included in the record on appeal. Defendant declined the court's invitation to speak in allocution.

¶ 7 According to the presentence investigation report (PSI), defendant was 38 years old when arrested. He was single but reported having a close relationship with his two daughters, ages 20 and 16 in 2013. Defendant described his upbringing as stable. His mother died when he was six years old. He and his four siblings lived with their grandmother for two years and then lived with a nanny but saw their father every day. Defendant said that he had an "excellent" relationship with his father, who died in 2005, and a "great" relationship with his siblings. No family members were interviewed for the PSI, as defendant provided incorrect telephone numbers for two of his sisters. Defendant was expelled from high school following a juvenile arrest but obtained a GED in the IDOC. He was affiliated with the Four Corners Hustlers gang from age 20 to 31. From August 2012 until his incarceration, he worked as a janitor at a barber shop and also did construction work. Defendant earned $1,500 per month and spent $800 for rent, $200 for

utilities, and $200 for food. He owed $900 to the court as part of his DUI case. He denied paying child support.

¶ 8 The PSI further indicated that defendant began using alcohol and marijuana at age 17. His usage increased until, at the time of his incarceration, he consumed six beers, a pint of cognac, and 8 to 10 blunts each day. Defendant used cocaine from age 17 to 19, and heroin from age 19 to 31. From age 31 until his incarceration, defendant used half an ounce of codeine cough syrup each day and took one to two Ecstasy pills every other day. Defendant reported completing 61 days of treatment while incarcerated in 1998. He attended weekly classes for two months in 2012 following an arrest for DUI, but did not complete the program. At the time the PSI was completed, defendant had attended meetings for Alcoholics Anonymous and Narcotics Anonymous four times per month for four months while in jail.

¶ 9 In imposing a sentence, the trial court noted that "probation is not an appropriate sentence in the case, [and] that it would deprecate the serious nature of the offense when coupled with [defendant's] criminal history, which I have considered." The court stated:

> "As the state has pointed out, he has one, two, three, four, five, six, seven, eight prior felony convictions. He has been to the penitentiary seven times, [and] has other convictions.
>
> It's my finding that the maximum penalty is the appropriate sentence in the case, six years IDOC."

¶ 10 After sentencing, the court asked whether the State filed a motion for defendant to pay a public defender fee. The State answered affirmatively. The trial court granted the motion, noting that defendant had posted bond, the PSI reflected a history of employment, and the public

defender had made 17 appearances in the case. A financial affidavit appears in the record but no mention of the affidavit was made by the parties or the court. The following exchange then occurred:

> "THE COURT: Mr. Wilder, anything on that motion, the Motion for Reimbursement?
>
> THE DEFENDANT: No.
>
> THE COURT: It's going to be granted. 1,000 dollars. That will be taken from bond."

Defendant did not file a motion to reconsider sentence or to challenge the order for reimbursement.

¶ 11 On appeal, defendant first contends that his sentence is excessive in view of mitigating factors, including the minimal severity of his offense, his nonviolent criminal history, his close relationship with his family, his rehabilitative potential, and the high cost of incarceration.

¶ 12 As an initial matter, the State observes and defendant acknowledges that he forfeited review of this issue because he failed to file a written motion to reconsider sentence. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("to preserve a claim of sentencing error, both a contemporaneous objection and a written post sentencing motion raising the issue are required"). Defendant urges our review under the plain error doctrine.[1] Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1970). The first inquiry before determining whether there was a plain error is to determine

[1] In the alternative, defendant urges our review because trial counsel was ineffective in failing to perfect defendant's right to appeal. However, defendant raises this issue for the first time in his reply brief and therefore it will not be considered on appeal. *People v. Thomas*, 116 Ill. 2d 290, 303-04 (1987) (rejecting defendant's "attempt to advance for the first time in this court the new issue of trial counsel's competence in the guise of a response to the State's waiver argument").

whether there was a clear and obvious error. *Hillier*, 237 Ill. 2d. at 545. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id*.; *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010). For the reasons that follow, we find no error.

¶ 13 We review for abuse of discretion to determine whether a sentence is excessive. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Id*.

¶ 14 A sentence should reflect both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The trial court is presumed to consider all relevant factors and any mitigation evidence presented but is not obligated to recite or assign a value to each factor. *People v. Meeks*, 81 Ill. 2d 524, 534 (1980); *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. To rebut this presumption, a defendant must make an affirmative showing that the sentencing court did not consider the relevant factors. *Jackson*, 2014 IL App (1st) 123258, ¶ 48. A reviewing court will not substitute its judgment merely because it would have weighed the factors differently. *Alexander*, 239 Ill. 2d at 213.

¶ 15 A sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Possession of less than 15 grams of cocaine is a Class 4 felony with a sentencing range of one to three years. 720 ILCS 570/402(c) (West 2010); 730 ILCS 5/5-4.5-45(a) (West 2010). However, a Class 4 felony is punishable by an extended term of three to six

years where, within the past 10 years, the defendant was previously convicted of the same or similar class felony or greater class felony. 730 ILCS 5/5-4.5-45(a) (West 2010); 730 ILCS 5/5-8-2(a) (West 2010); 730 ILCS 5/5-5-3.2(b)(1) (West Supp. 2011).

¶ 16 Turning to the present case, we find no error. Defendant's sentence is presumed proper, as it is within the range of an extended term sentence for a Class 4 felony and is not disproportionate to his ninth drug-related felony conviction in approximately 24 years. *People v. Garcia*, 241 Ill. 2d 416, 421-22 (2011) (goal of extended term sentencing is to impose harsher sentences on repeat offenders resistant to correction). While defendant possessed a small amount of cocaine and most of his convictions were for nonviolent crimes, the trial court noted that a lesser sentence would deprecate the seriousness of his criminal history. *People v. Kelley*, 2013 IL App (4th) 110874, ¶ 47 (affirming sentence where defendant had eight prior drug convictions and was sentenced to prison five times); *People v. Hill*, 408 Ill. App. 3d 23, 29-30 (2011) (nonviolent history did not mandate lesser sentence where defendant had multiple drug-related convictions). Further, defendant was not deterred by previous, more lenient sentences. *People v. Starnes*, 374 Ill. App. 3d 329, 337 (2007) (history of drug-related convictions indicated defendant did not take advantage of opportunities for rehabilitation). The trial court emphasized defendant's criminal history at sentencing, but also reviewed the PSI and is presumed to consider the mitigating factors therein, including defendant's rehabilitative potential, family relationships, employment, and disassociation from a gang. *Jackson*, 2014 IL App (1st) 123258, ¶¶ 52-53 (despite employment and family ties, seriousness of offense is most important factor in sentencing); *People v. Johnson*, 318 Ill. App. 3d 281, 292 (2000) (rejection of gang affiliation did not outweigh seriousness of offense). Here, the PSI noted that defendant did not provide

current contact information for his siblings, and, despite working, did not pay child support. The PSI also described defendant's extensive history of substance abuse and attempts at treatment. *People v. Daniel*, 2014 IL App (1st) 121171, ¶¶ 40-41 (trial court presumed to consider defendant's addiction and desire for treatment as addressed in PSI). Defendant further contends that the trial court failed to give adequate consideration to the financial costs of his incarceration. However, a trial court is not required to specify on the record the reasons for a defendant's sentence, and, absent evidence to the contrary, we will presume that the trial court performed its obligations and considered the financial impact before sentencing defendant. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24 (presuming the court considered the financial impact). In light of this record, we cannot say the trial court abused its discretion.

¶ 17 Defendant next contends that this court should vacate the trial court's order directing him to pay a $1,000 public defender fee. Defendant argues that the order was made without notice to him or a hearing regarding his ability to pay. The State agrees that the trial court did not conduct a sufficient hearing, but asserts that the appropriate remedy is to remand the case, not simply vacate the trial court's order.

¶ 18 Although defendant did not raise this issue below, we may consider the issue because forfeiture does not apply where the trial court ignored the statutory procedures mandated for a public defender reimbursement order. *People v. Daniels*, 2015 IL App (2d) 130517, ¶ 24 (citing *People v. Love*, 177 Ill. 2d 550, 564 (1997)). This issue is a question of law, which we review *de novo*. *People v. Gutierrez*, 2012 IL 111590, ¶16.

¶ 19 Upon the motion of the State or the trial court, the trial court may order a defendant to pay "a reasonable sum to reimburse" the cost of appointed counsel. 725 ILCS 5/113-3.1(a) (West

2010). Where the motion is made, a hearing must be held no later than 90 days after the entry of a final order disposing of the case at the trial level. *Id*. The trial court may not order reimbursement in a perfunctory manner. *People v. Somers*, 2013 IL 114054, ¶ 14. Rather, the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances. *Id*. The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay. *Id*. The trial court must consider, among other evidence, the defendant's financial affidavit. *Id*.

¶ 20 Where the trial court holds an insufficient hearing within the statutory time period, the appropriate remedy is to remand for a new hearing. In *Somers*, 2013 IL 114054, our supreme court remanded after finding that "some sort of a hearing" occurred when the trial court asked the defendant whether he could get a job after incarceration, whether he planned on using future income to pay his fines and costs, and whether there was any physical reason why he could not work. *Id*. at ¶ 15; see also, *People v. McClinton*, 2015 IL App (3d) 130109, ¶¶ 5, 18 (insufficient hearing where trial court imposed fee based on statements from PSI and defendant's allocution); *People v. Rankin*, 2015 IL App (1st) 133409, ¶¶ 20-21 (remanded after abbreviated hearing where trial court asked public defender how many times he appeared). In contrast, the fee has been vacated without remand when no hearing was held. *Gutierrez*, 2012 IL 111590, ¶ 24 (fee vacated when imposed by clerk of court); *Daniels*, 2015 IL App (2d) 130517, ¶¶ 29, 32 (fee vacated when imposed by written order).

¶ 21 Here, we find that the trial court held an insufficient hearing on the public defender fee. The proceeding on the fee occurred at the end of defendant's sentencing hearing, and thus, within

90 days of the entry of a final order disposing of the case at the trial level. The court asked whether the State filed a motion for defendant to pay a public defender fee. The State answered affirmatively. The trial court granted the motion, noting that defendant had posted bond, the PSI reflected a history of employment, and the public defender had made 17 appearances in the case. No mention of defendant's financial affidavit was made by the parties or the trial court. The following exchange then occurred:

> "THE COURT: Mr. Wilder, anything on that motion, the Motion for Reimbursement?
>
> THE DEFENDANT: No.
>
> THE COURT: It's going to be granted. 1,000 dollars. That will be taken from bond."

This abbreviated proceeding constitutes "some sort of a hearing" but does not comply with the statutory requirements. *Somers*, 2013 IL 114054, ¶ 15. Therefore, the appropriate remedy is to vacate the fee and remand to the trial court for a hearing in compliance with the statute.

¶ 22 For all the foregoing reasons, we affirm defendant's conviction, vacate the $1,000 public defender fee, and remand for a hearing on defendant's ability to pay.

¶ 23 Affirmed in part, vacated in part, and remanded.