2015 IL App (1st) 132791-U

FIRST DIVISION
NOVEMBER 16, 2015

No. 1-13-2791

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 8585
	)	
RONALD JOHNSON,	)	Honorable
	)	Jorge Alonso
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 ***Held:*** Sentence of eight years' imprisonment affirmed over contention that it was excessive; cause remanded for a hearing on defendant's ability to pay public defender fee; order imposing fines, fees and costs corrected.

¶ 2 Following a jury trial, defendant Ronald Johnson was found guilty of two counts of unlawful use of a weapon by a felon (UUWF) and sentenced to concurrent terms of eight years in prison. On appeal, defendant does not contest the sufficiency of the evidence to sustain his convictions, but contends that his sentence is excessive, given his rehabilitative potential and background. He further contends that the circuit court failed to comply with the hearing requirements of section 113-3.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS

5/113-3.1 (West 2010)), before imposing a public defender fee of $3500, and challenges the propriety of a number of fines and fees that were assessed against him.

¶ 3 The record shows that defendant was arrested on May 7, 2011, following the execution of a search warrant by Chicago police officers at 6933 South Indiana Avenue, Unit 1, Chicago. The public defender was appointed to represent defendant, and the case was set for a jury trial.

¶ 4 At a pre-trial appearance, on March 13, 2012, defendant indicated to the court that his wife had posted five thousand dollars bond for him, and that the money was a loan from a friend of the family who expected it back. He also stated that he could not find employment because of the pending case. On May 23, 2012, defendant stated that he continued to need the services of the public defender, and that he was working odd jobs to support himself. He further stated that he was legally married, but separated from his wife, and that they were in the process of getting a divorce. The court explained to defendant that the money that had been posted for bond could be used to pay for an attorney, court costs and fines, or to reimburse the public defender's office. Defendant stated that "As far as my best knowledge that she has to return – the money have to be returned to the original source and the pay back of the 10 percent would fall on me pending the result of this case."

¶ 5 At trial, Officer Paul Kirner testified that on the day in question, he was part of the team executing the search warrant for defendant at the indicated premises on the belief that defendant illegally possessed firearms. Before the team entered, defendant was stopped by other officers as he left the building, and when he entered the building, Officer Kirner observed the names "Jefferson" and "Johnson" on the mailbox.

¶ 6 The officers forcibly entered the designated unit after no one responded to their announcement, and when they entered, they found Lashawnda Hazelwood sitting on the bed. She was then escorted out of the apartment.

¶ 7 Sergeant Raymond McInerney, Officer Kirner's supervisor, took pictures of all the rooms in the apartment, and their search revealed two loaded firearms in the front bedroom. The officers photographed the guns, unloaded the weapons and inventoried them. Detective Ludwig testified that he searched a bookcase in the front bedroom and found a letter to defendant from the Social Security Administration, a copy of defendant's birth certificate, a piece of junk mail addressed to defendant at the Indiana avenue address in question, and a telephone bill and envelope bearing defendant's name, all of which were photographed and inventoried.

¶ 8 Sergeant McInerney's testimony was substantially similar to that of the other officers regarding the search. He added that defendant was arrested and taken to the police station where he was informed of his *Miranda* rights, then stated that he understood them and that he wanted to talk to the officers. Defendant stated that he had lived at that address with his wife since September, and that one night, he observed two men enter a gangway carrying a blue book bag and left without it. He retrieved the bag and inside, found some heroin and crack cocaine and the two handguns police recovered from his apartment. Defendant told them that he planned to sell the semi-automatic gun for $300 and keep the other one. When police asked him to memorialize his statement, he refused and demanded a lawyer.

¶ 9 The parties then stipulated that defendant was previously convicted of a qualifying felony, possession with intent to deliver. The court denied the defense motion for a directed verdict, and the defense proceeded with the testimony of Hazelwood.

¶ 10 She testified that she was defendant's wife, but that defendant never lived at the address in question. She claimed that she lived in that apartment with her five children, who were playing outside when the police arrived. Hazelwood testified that she was returning to the bedroom from the kitchen when the police broke her door down without knocking and "flooded" her apartment. They demanded that she put her dog away and handcuffed her. During the search, her children were outside yelling for her, but police did not allow them into the building.

¶ 11 Hazelwood further testified that she no longer lived with defendant because he had an affair, and that his belongings were in the apartment because he did not have anywhere to store them. She also kept his birth certificate and social security documents in the apartment so that her family could receive benefits if something happened to him. She explained that despite their marital issues, she and defendant remained married because they could not afford a divorce.

¶ 12 In rebuttal, Sergeant McInerney testified that following the search of the apartment, he was sitting at the table working on the evidence log, and Hazelwood informed him that defendant slept where the guns were found. Sergeant McInerney included this information in his evidence report.

¶ 13 The jury found defendant guilty of two counts of UUWF, and on August 8, 2013, the circuit court denied defendant's motion for a new trial, and the case proceeded to sentencing. In aggravation, the State pointed out that defendant had three prior convictions from 2009 involving

the manufacture, delivery, and possession of heroin, for which he was sentenced to boot camp. The State further noted that defendant kept two loaded firearms in his home with children present, and given his background and the nature of the charges, the State requested the maximum sentence of 14 years in prison.

¶ 14 In mitigation, defense counsel argued that defendant maintained his innocence, and that he was never seen with the weapons. Defendant exercised his right to allocution, and stated that he had made his share of mistakes in life, but that "the only real positive" in his life was his children, whom he loved, and the decisions he made were to provide and care for them. Since he was released on bail, he was "undergoing a complete reconstruction of [his] foundation, faith and character," had resumed contact with his pastor and church, and begun formal training as a Sunday school teacher. He also stated that his uncle had agreed to provide him with a hot dog cart as a source of employment following his release.

¶ 15 The court intitially noted that defendant was eligible as a Class 2 offender, for a sentence of 3 to 14 years. The court then stated that it had considered the evidence presented at trial, including the nature and circumstances of the offense which involved more than one firearm, the information contained in the presentence investigation, and the financial impact associated with incarceration. The court also stated that it had considered the statutory factors in aggravation and mitigation, including the arguments of counsel and defendant's statement, and the love defendant professed to have for his children, as well as his family. The court then sentenced defendant to concurrent terms of eight years in prison on each count of UUWF, followed by two years of mandatory supervised release (MSR).

¶ 16 At this point in the proceedings, the State filed a motion for reimbursement. Defense counsel pointed out that defendant was indigent and unemployed, and that during allocution, he had expressed his desire and plans to be gainfully employed upon release. Counsel then requested the court to consider those factors with regard to defendant's ability to reimburse the public defender's office.

¶ 17 After that, the court admonished defendant as follows:

> "THE COURT: All right. Mr. Johnson, anything you want to say?
>
> [DEFENDANT]: Oh, about not being able to pay?
>
> THE COURT: Yes, sir.
>
> [DEFENDANT]: Actually, right now, sir, I don't have two nickels to rub together, but that will change if that was to be assessed later, you know, I would be in compliance with whatever you ask.
>
> THE COURT: All right. Thank you, Mr. Johnson."

¶ 18 The court noted that defendant had been represented by an attorney from the public defender's office since June 2011, and counsel had appeared in court more than 25 times, in the jury trial, at sentencing, and had prepared various motions. The court stated that it had reviewed the "PTI" regarding "this information of ability to pay and also the fact that [defendant] was able to muster up $5,000 to get out of jail with the help of his family." The court then granted the State's motion, and ordered defendant to pay $3,500 as reimbursement, to be satisfied by a bond deduction. The court also assessed fees, fines and costs in the amount of $559, and gave defendant pre-sentence custody credit for the 351 days that he had spent in jail. The court then

denied defendant's motion to reduce sentence, informed defendant of his right to appeal, and defendant did so in a timely manner. Accordingly, we have jurisdiction.

¶ 19 On appeal, defendant first contends that the trial court abused its discretion in sentencing him to eight years' imprisonment. He acknowledges that his sentence falls within the 3-14 year statutory range provided for Class 2 offenders (720 ILCS 5/5-4.5-35(a) (West 2010); 730 ILCS 5/5-8-2 (West 2010)), but asserts that his sentence is excessive, given his rehabilitative potential, and the fact that this was his first prison sentence.

¶ 20 A trial court's sentencing decision is afforded great deference, and a reviewing court will not disturb a sentence within statutory limits unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000). A sentence within the statutory limits will be deemed excessive only if it is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 54 (1999). In fashioning a sentence, the court must balance the retributive and rehabilitative purposes of punishment, and undertake careful consideration of all factors in aggravation and mitigation, but it need not explain the exact thought process it used to arrive at the ultimate sentencing decision. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002).

¶ 21 Defendant contends that a sentence closer to the minimum of three years would serve the intent of the legislature and "provide [defendant] a greater opportunity and incentive to rehabilitate himself." Defendant also contends that the sentence indicates that the trial court did not adequately consider mitigating factors, such as, the absence of physical harm, that he was not

observed in possession of the weapons, that he had a non-violent background, a supportive family, and a positive employment history, and that this was his first prison sentence.

¶ 22 We initially observe that when a trial court is presented with mitigating evidence, we presume that the court considered that evidence, absent some indication, other than the sentence itself, to the contrary. *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011). Here, the record shows that the sentencing court reviewed the pre-sentence investigation report, noted defendant's two prior convictions, which required that he be sentenced as a Class 2 felon, and the court heard arguments in aggravation concerning the seriousness of the offense and defendant's criminal history. In mitigation, the court was apprised of defendant's religious background, his family situation and his love for his children, as well as his desire to pursue gainful employment upon release, and the court specifically commented on a number of those factors in rendering its decision. Given this record, we find that defendant has failed to rebut the presumption that the trial court considered the mitigating evidence before it, or that it abused its discretion in imposing the eight-year term, which falls in the middle of the permissive sentencing range. *Hill*, 408 Ill. App. 3d at 30.

¶ 23 In reaching this conclusion, we observe that the trial court heard the evidence presented at trial, which proved his guilt of the charged offense, but was also aware of defendant's personal circumstances and that he had been sentenced to bootcamp on his previous convictions. In fashioning a sentence, the court may balance the retributive and rehabilitative purposes of punishment with the seriousness of the offense (*Quintana*, 332 Ill. App. 3d at 109), and here, we cannot say that the sentence imposed on defendant's UUWF conviction is greatly at variance

with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense (*Fern*, 189 Ill. 2d at 54). While we may have reached a different sentencing decision based on these facts and circumstances that is not the standard by which we must review the trial court's sentencing decision. Having found no abuse of discretion in the sentencing court's decision, we have no basis to modify it. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 24 Defendant next contends that the trial court erred in imposing a fee for reimbursement of his court-appointed counsel without first conducting a hearing to determine his ability to pay. In the alternative, he contends that the trial court's hearing failed to comply with the requirements of section 113-3.1 of the Code (725 ILCS 5/113-3.1 (West 2010)), and was therefore inadequate, requiring a remand.

¶ 25 As a preliminary matter, we reject the State's contention that defendant has forfeited this issue by failing to raise it during the sentencing hearing or in a post-trial motion. Although defendant did not raise this issue, we will not apply the forfeiture rule where, as in this case, a trial court imposes the fee at issue without following the proper procedural requirements. *People v. Williams*, 2013 IL App (2d) 120094, ¶ 13.

¶ 26 Pursuant to section 113-3.1 of the Code, upon the motion of the State or the court, the circuit court may order a defendant to pay "a reasonable sum to reimburse" the cost of court-appointed counsel, not to exceed $5,000 for a felony, by conducting a hearing into defendant's financial circumstances and finding an ability to pay. 725 ILCS 5/113-3.1 (West 2010); *People v. Love*, 177 Ill. 2d 550, 551 (1997). "An adequate *Love* hearing need not be lengthy or complex," but "defendant must (1) have notice that the trial court is considering imposing a payment order

under section 113-3.1 of the Code and (2) be given the opportunity to present evidence or argument regarding his ability to pay and other relevant circumstances." *People v. Barbosa*, 365 Ill. App. 3d 297, 301-02 (2006). Whether the trial court complied with this section in imposing the fee presents a question of law, which we review *de novo*. *People v. Gutierrez*, 2012 IL 111590, ¶ 16.

¶ 27 In this case, the record shows the court put defendant on notice that the bond money posted by his wife could be used, *inter alia*, to reimburse the public defender's office. We note that it was the State that asked for the public defender fee to be reimbursed in accordance with the statute. The record suggests that the public defender representing defendant did not support the State in its request that the Public Defender's office be reimbursed. The State argues on appeal that the court heard argument on the matter. However, the record reveals that the court engaged in a brief colloquy with defendant regarding his ability to pay. If anything, that exchange established defendant's indigence. Nevertheless, the court then noted the number of appearances made by the public defender in this case, reviewed the "PSI," on defendant's ability to pay and ordered a reimbursement of $3,500 from the cash bond which had been posted in defendant's behalf. This "hearing" fell far short of the requirements under section 113-3.1. The paradox of the statute which permits the State to request reimbursement for the public defender who seemed to oppose the State's motion in the trial court and vigorously on appeal, highlights the perversity and often unintended consequences of this statutory provision embodied in section 113-3.1.

¶ 28 In a hearing to determine the amount that the public defender is entitled to receive from the defendant, the court must consider the affidavit prepared by defendant under section 113-3 of the Code and any other information submitted by the parties pertaining to the defendant's financial circumstances. 725 ILCS 5/113-3.1(a) (West 2010); *People v. Somers,* 2013 IL 114054, ¶ 14. Here, as the State concedes, no financial affidavit was prepared for the hearing, yet, the State argues that the trial court "looked at pertinent financial data in defendant's PSI," citing *Barbosa,* 365 Ill. App. 3d at 302 ("[I]t is entirely appropriate for the court to consider existing evidence of defendant's financial condition, such as an affidavit prepared in order to obtain court-appointed counsel or a presentence investigation report that contains pertinent financial data."). Notwithstanding, this assertion by the State, the supreme court has indicated that during a *Love* hearing, the trial court "must consider, *among other evidence,* the defendant's financial affidavit." (Emphasis added.) *Somers*, 2013 IL 114054, ¶ 14. Thus, the trial court's consideration of the PSI, or any other relevant financial information in the record must be *in addition* to the defendant's financial affidavit, and the record here is devoid of that document. In addition, even where, as here, a cash bond has been posted, a hearing is required because the existence of a bond is not conclusive evidence of the ability to pay (*People v. Schneider,* 403 Ill. App. 3d 301, 303 (2010)), and the trial court should consider whether a third party who provided the money for that bond should be given special consideration (*Love,* 177 Ill. 2d at 563-64). In this case, there is a suggestion in the record that the bond money was borrowed from a third party. Further, both defendant and his wife were unrebutted in proclaiming their indigence. For example, defendant's

wife testified that although she and defendant were estranged they remained legally married because they were unable to afford a divorce.

¶ 29 Under these circumstances, we find that the trial court failed to conduct an adequate *Love* hearing (*Barbosa*, 365 Ill. App. 3d at 302). Since the court indicated its intent to order reimbursement and did so within the proper time frame, we remand the case for an adequate hearing pursuant to applicable case law and section 113-3.1 of the Code (*People v. Bass*, 351 Ill. App. 3d 1064, 1070 (2004)).

¶ 30 Finally, we review *de* novo, defendant's challenge to a number of fees and fines which were assessed against him. Defendant finally challenges the propriety of a number of the fees and fines he was assessed, and our review of those fees and fines is *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007). The record shows that the trial court assessed fees and fines in the amount of $559.

¶ 31 Defendant contends, the State concedes, and we agree, that defendant's $5 electronic citation fee should be vacated. UUWF is a Class 2 felony, exempt from the electronic citation fee statute, which applies to traffic, misdemeanor, municipal ordinance or conservation cases. 705 ILCS 105/27.3e (eff. Aug. 16, 2011). Similarly, the parties and this court agree that defendant is entitled to a credit of $5-per-day for the 351 days he spent in pre-sentence custody, amounting to a total of $1755, which can offset certain fees, including the $15 State Police operations fee (725 ILCS 5/110-14 (eff. Jan. 1, 2005)).

¶ 32 Defendant also contends that his pre-sentence custody credit should be used to offset the $50 court system fee, which is a fine. Notwithstanding several decisions of the Second and Third

Districts to the contrary (see, *e.g.*, *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 18-21; *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17; *People v. Ackerman*, 2014 IL App (3d) 120585, ¶¶ 28-30), the State argues that the court systems fee is not a fine, but a fee, and that it cannot be offset by the pre-sentence custody credit.

¶ 33 We reject the State's contention, and find persuasive the cited cases, which relied on the logic of the supreme court in *People v. Graves*, 235 Ill. 2d 244, 254-55 (2009), to find that the court system fee is a "fine" used to finance the court system. Accordingly, we conclude that defendant's pre-sentence custody credit can be used to offset the $50 court system fee. *Smith*, 2013 IL App (2d) 120691 ¶¶ 18-21.

¶ 34 Defendant further contends that the $2 State's Attorney automation fee and the $2 public defender automation fee are "fines," which were improperly assessed in violation of *ex post facto* principles. The State responds that these fees are "fees," and that therefore *ex post facto* principles do not apply. *People v. Dalton*, 406 Ill. App. 3d 158, 163 (2010) ("The prohibition against *ex post facto* laws applies only to laws that are punitive. It does not apply to fees, which are compensatory instead of punitive.").

¶ 35 We find the reasoning of the Fourth District appellate court in *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30, applicable here. In *Rogers*, the court held that the State's Attorney automation fee (55 ILCS 5/4–2002.1(c) (eff. Jun. 1, 2012)), is a fee because it is intended to reimburse the State's Attorneys for their expenses related to automated record-keeping systems, and therefore not subject to *ex post facto* rules. *Id.* ¶ 30. Although *Rogers* did not directly address the $2 public defender automation fee, the statutory language for the public defender automation

fee is identical to that of the State's Attorney's automation, with the exception that it benefits the Cook County Public Defender (see 55 ILCS 5/3-4012 (eff. Jun. 1, 2012)). Therefore the reasoning applied to the State's Attorney automation fee is equally applicable to the Public Defender. Accordingly, we find that neither the State's Attorney automation fee, nor the public defender automation fee were improperly assessed against defendant. *Rogers*, 2014 IL App (4th) 121088 ¶ 30.

¶ 36 In sum, we find that defendant's $5 electronic citation fee must be vacated. The $15 State Police operations fee; and the $50 court system fee, which total $65, must be fully credited for the time defendant served in pre-sentence custody. *Wynn*, 2013 IL App (2d) 120575 ¶ 18. However, the $2 State's attorney records automation fee and the $2 public defender records automation fee were properly assessed against defendant. Accordingly, the total of fines, fees and costs should be reduced to $554, and based on the fines offset by his pre-sentence custody credit, the mittimus should be corrected to reflect that defendant owes $449.

¶ 37 Pursuant to our authority under Supreme Court Rule 615(b) (1) (eff. Aug. 27, 1999), we direct the clerk of the court to correct the order imposing fines, fees and costs as indicated, and further to vacate the $3,500 public defender fee as we have remanded the case for a hearing compliant with applicable case law and section 113-3.1 of the Code. We affirm the judgment in all other respects.

¶ 38 Affirmed in part, vacated in part, order corrected, and remanded with directions.