2015 IL App (2d) 130902-U
No. 2-13-0902
Order filed June 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RALPH KENDALL, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 12-CF-1962 Honorable Mark L. Levitt, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Burke and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's revocation of defendant's probation was not an abuse of discretion, as defendant quickly and deliberately violated a provision that the court had specifically told him was crucial; (2) the trial court did not abuse its discretion in sentencing defendant to 55 months' imprisonment for theft: the sentence, which was in the lower half of the extended range, was justified by defendant's criminal history; (3) we lacked jurisdiction to consider the propriety of defendant's public defender reimbursement fee, as defendant timely appealed from the revocation of his probation, not from the probation order in which the fee was imposed, and the trial court's alleged failure to hold a proper hearing did not render the fee void and subject to correction at any time; (4) in light of the termination of defendant's supervision by the probation department, we remanded for a recalculation of defendant's probation-services and drug-and-alcohol testing fees, and, in light of those and other recalculations, we also remanded for a recalculation of defendant's delinquency fee; (5) defendant was entitled to full

> credit against his State Police Operations Assistance and State Police Services Fund fines, to reflect the 263 days he spent in presentencing custody, and we remanded for a recalculation of his Violent Crime Victims' Assistance Fund fine under the statute in effect at the time of his offense.

¶ 2 Defendant, Ralph Kendall, appeals after the revocation of his probation. He asserts that (1) the revocation was an abuse of discretion or the sentence imposed was too long, and (2) certain fines and fees were improperly imposed, improperly calculated, or did not properly offset. We hold that the court did not abuse its discretion in revoking his probation or in sentencing him to 55 months' imprisonment. We further hold that we lack jurisdiction to consider the propriety of the imposition of the public defender fee. However, we make multiple corrections to fines and fees, and we remand the matter for the court to determine the correct amounts of certain others.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on one count of unlawful possession of a stolen vehicle (625 ILCS 5/4-103(a)(1) (West 2012)), one count of criminal trespass to a residence (720 ILCS 5/19-4(a)(2) (West 2012)), one count of theft (720 ILCS 5/16-1(a)(1)(A) (West 2012)), one count of theft for which the State sought an enhancement based on defendant's prior conviction of retail theft, and one count of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)).

¶ 5 On April 1, 2013, defendant entered a fully negotiated plea to the third count, theft, charged as a Class 3 felony. The parties agreed that he would receive 24 months' probation and pay $900 in restitution to the victim, Felicia Lewis, his ex-wife. The trial court told defendant that the "maximum sentence that could be imposed would be a term of two to five years in the Department of Corrections [(DOC)]," but noted that, because of defendant's prior conviction of at least one other Class 3 felony, he was "extend[a]ble and [was] facing a maximum of five to ten." A condition of defendant's probation was he not go to the address at which he committed

the offense or have any contact with Lewis. Defendant had a prior conviction of aggravated battery; Lewis was the victim. The State noted that it was "entering into this based on [its] risk at trial" and based on "guaranteed no contact."

¶ 6 The State gave the following factual basis for the agreement:

> "If called to testify in this matter, Felicia Lewis would state that on or about July 6, 2012 in Lake County, Illinois, this defendant knowingly took unauthorized control over property of Felicia Lewis being approximately $900 in United States currency intending to permanently deprive Felicia Lewis *** of the benefit of that property.
>
> This defendant had taken the money from her knowing that she had that certain amount in the home and left the area having taken that money without permission."

As the court went over the terms of probation, it emphasized that the no-contact provisions were extremely important:

> "Do you understand with respect to all of these conditions, there's a lot people and places you can't have any contact with? *** So do you understand how important it is that you have absolutely no contact with anybody or even have anybody else contact any of these people?"

The court suggested to defendant that his safest choice would be to stay entirely out of Zion, Illinois. The court accepted the plea agreement.

¶ 7 The court told defendant that the total of the "court costs" that it would assess was $2,732 and that defendant could see the breakdown of those in an attachment to the sentencing order. That attachment reflected a public defender fee of $750. The court asked defendant if he expected to get employment and be able to "pay those amounts during the term of [his]

probation." Defendant said that he could do so. The court found that defendant had an ability to pay.

¶ 8 A summary of the assessments, generated on December 10, 2014, showed a balance of $3,500.62. Assessments relevant to this appeal include:

Harris and Harris (per the parties, a late fee)	$808
Probation Services	$1,200
Public Defender	$750
State Police Operation	$12
State Police Service	$10
Urinalysis Testing (drug and alcohol testing)	$125
Crime Victims Assistance	$100

¶ 9 On June 3, 2013, the State filed a petition for revocation of probation. It alleged that, on April 5, 2013, defendant, in violation of the terms of his probation, made a telephone call to Lewis.

¶ 10 According to Lewis's testimony at the hearing on the petition to revoke, at approximately 4 p.m. on April 5, 2013, she received a call on her cell phone from a number that she did not recognize. She answered and recognized defendant's voice. He spoke to her for about five minutes, asking for her forgiveness. Defendant told her that he knew that he was not supposed to call her and so was taking a risk. He thanked her for not taking the charges to trial.

¶ 11 The State asked Lewis whether she recognized the name "Maureen Harper"; she said that she did not. The parties stipulated to the admission of records from U.S. Cellular for Lewis's cell phone and to the testimony of the police officer who took Lewis's report of defendant's call. The officer called the number from which Lewis said she had received defendant's call.

Someone who gave his name as "James" answered and said that he had been in possession of his phone all day, that he did not know defendant, and that he did not know Lewis. The records from U.S. Cellular showed that the number from which Lewis received the call was registered to Maureen Harper. Defendant testified. He denied having made the call and denied knowing "Maureen Harper" or "James." The court ruled that defendant had violated the terms of his probation by calling Lewis.

¶ 12 At the sentencing hearing, which took place on July 11, 2013, the State characterized defendant as a career criminal. It argued that, because of Lewis's disability, she was particularly vulnerable to defendant's appearing and making demands on her. It noted that the basic sentencing range was two to five years, but that the sentence was "extend[a]ble" beyond that range.

¶ 13 Defendant argued that, at the age of 53, he was tired and wanted to lead a more normal life. He asked that the court allow him to stay out of prison so that he could start to make things right with his son and grandchildren.

¶ 14 The presentencing report showed multiple convictions. Defendant was born in 1960 and had essentially no period as an adult in which he had avoided arrests. Defendant admitted to engaging in retail theft as a regular moneymaking activity. He claimed to the investigator that Lewis had been his regular get-away driver for these thefts. The report noted that Lewis had been injured in a vehicle accident and required a wheelchair for mobility. Defendant also told the investigator that he had been a high-ranking member of the Gangster Disciples, but had dissociated himself from the gang during the crack era. Defendant was on "parole" when he committed this offense.

¶ 15 The court stated that it deemed defendant to be eligible for extended-term sentencing, such that the maximum sentence would be 10 years' imprisonment, and that defendant "richly deserve[d]" an extended sentence. The court sentenced defendant to 55 months' imprisonment, but noted that, with the time-served credit, defendant would "not be spending a very long time in the Department of Corrections." (The DOC web site shows that it released defendant to mandatory supervised release (MSR) on November 6, 2014. http://www.idoc.state.il.us/subsections/search/ISdefault2.asp (visited May 28, 2015) (search "Kendall, Ralph").) Defendant timely moved for reconsideration, arguing that the court should have given more weight to mitigating factors. The court denied the motion, and defendant filed a timely notice of appeal.

¶ 16 II. ANALYSIS

¶ 17 On appeal, defendant challenges the length of his sentence and the amounts or impositions of certain fees and fines. He argues that the 55-month sentence was excessive and suggests that the trial court should have declined to revoke his probation. He challenges the imposition of a $750 public defender fee at the time of his guilty plea, arguing that the court failed to make an adequate investigation of his ability to afford the fee. He asserts that a $50-a-month probation services fee, currently assessed for the 24 months of his original probation period, should cover no more than the period from the imposition of probation to April 16, 2013, the day he asserts that he was returned to jail. Similarly, he argues that a $125 drug-and-alcohol-testing fee should be modified to cover only costs of actual testing. He further argues that he did not receive the full amount of the $5-a-day credit against fines under section 110-14(a) of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/110-14(a) (West 2012)). He asserts that he had 263 eligible days of incarceration, but received credit for only 40 of them. He points to two assessments against which he asserts he should have received credit: the State Police

Operations Assistance Fund fee (705 ILCS 105/27.3a(1.5) (West 2012) and the State Police Services Fund fee (730 ILCS 5/5-9-1.17 (West 2012)). Finally, he asserts that the Violent Crime Victims Assistance Fund fine was calculated on the wrong version of the relevant statute and that the "Harris and Harris" delinquency fee must be recalculated based on the other changes he requests.

¶ 18 The State responds. It agrees with some of defendant's challenges to the propriety of the assessments. However, it argues that the sentence was proportionate to the seriousness of the offense as that offense was characterized in the five-count indictment and the presentencing report. It argues that defendant's challenge to the public defender fee is untimely. It further argues that, with regard to the probation services fee, defendant was actively supervised by probation services even while he was jailed before the court revoked his probation, so that the fee applies to those periods. It makes a similar argument as to the drug-and-alcohol-testing fee.

¶ 19 Defendant has replied. He argues, among other things, that the circumstances of the offense as alleged in the nol-prossed counts and the presentencing report are not available to us in considering the seriousness of the offense. Concerning the public defender fee, he argues that this court has jurisdiction to review it because he filed a timely notice of appeal after the post-revocation sentencing and that, because the court did not conduct a proper hearing into his ability to pay, he did not forfeit the issue.

¶ 20 A. Neither the Decision to Revoke Defendant's Probation nor the Sentence Itself Was an Abuse of Discretion.

¶ 21 We start by considering defendant's contention that his sentence was an abuse of discretion. We conclude that it was not. In arriving at that conclusion, we reject defendant's

suggestion that the bare allegations in the nol-prossed counts or the "Official Version of Offense" in the presentencing report form the basis for affirming.

¶ 22 When we review a matter for an abuse of discretion, it is inherent that we consider the reasoning that the court itself used. "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." *People v. Rivera*, 2013 IL 112467, ¶ 37. In other words, an abuse of discretion occurs when a clear flaw exists in the court's rationale for its decision, such that the decision is arbitrary or divorced from the facts, or the nature of the decision is so unreasonable that the rationale *must* be flawed. For this reason, absent an obviously unreasonable decision, we must consider the court's specific reasoning in deciding whether a decision was within its discretion. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984) (the lack of a transcript of a hearing in which a court decided a discretionary matter precluded the court from holding that the decision was an abuse of discretion); *Thompson v. Gordon*, 356 Ill. App. 3d 447, 461 (2005) ("it is always an abuse of discretion to base a decision on an incorrect view of the law"). We thus can affirm a discretionary decision only on the same rationale as that of the trial court. See *Sadler v. Creekmur*, 354 Ill. App. 3d 1029, 1045 (2004) (holding that sanctions, as a discretionary matter, could be affirmed only on the basis given by the court).

¶ 23 Here, although the court discussed its reasoning at length, it never mentioned the "Official Version of Offense" or any of the allegations that formed the basis for the nol-prossed counts of the indictment. If those allegations were a part of the court's considerations, we would expect that to be clear in the court's statements, as the "Official Version of Offense" presented a much more dramatic series of events than did the facts presented by the State for the plea agreement.

¶ 24 Defendant's argument implies that court should not have revoked his probation—that the short time from defendant's original sentencing and the arguable mildness of the violation made the revocation an abuse of discretion. We do not agree. We do note that defendant has stated the proper standard of review. See *People v. Konwent*, 405 Ill. App. 3d 794, 800 (2010) (the decision to revoke probation—as contrasted with the ruling on whether a probation violation occurred—is reviewed for an abuse of discretion). The court's decision to revoke probation was appropriately grounded in defendant's unwillingness to abide by a condition whose importance the court had emphasized when it set the conditions. When the court imposed probation, it made clear that the only reason that it deemed probation to be an acceptable sentence was that it ensured no contact. It further emphasized to defendant that any contact at all would be a violation. That defendant would call Lewis just days after the court so firmly warned him against any kind of contact cannot be construed as a positive circumstance for defendant. Further, although the call itself might not have been a dangerous or malicious violation, it was an intentional and premeditated violation (as shown by defendant's remark to Lewis that he was taking a risk in making the call). Similarly, the violation was not of the kind that a court could characterize as a "slip"—it was not a failure of willpower or planning. For these reasons, the violation showed what the court could fairly interpret as a lack of intent by defendant to comply with the terms of his probation. Thus, we hold that revoking defendant's probation was within the court's discretion.

¶ 25 Defendant specifically argues that, even accepting that imprisonment was a proper sentence, 55 months was too long a sentence. We do not agree.

> "A reviewing court gives substantial deference to the trial court's sentencing decision 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, environment, habits, and age. [Citation.] Therefore, a reviewing court may not modify a defendant's sentence absent an abuse of discretion. [Citation.] An abuse of discretion will be found where the sentence is greatly at variance with the spirit and purpose of the law[] or manifestly disproportionate to the nature of the offense." (Internal quotations marks omitted.) *People v. Snyder*, 2011 IL 111382, ¶ 36.

Given all relevant factors, particularly defendant's decades of history of thefts, we hold that no abuse of the trial court's discretion occurred.

¶ 26 Defendant points out that the sentence was just short of the Class-3 nonextended term maximum of five years' imprisonment (see 730 ILCS 5/5-4.5-40(a) (West 2012)). He also argues that the offense as set out in the factual basis was devoid of aggravating factors. Defendant does not persuade us that this sentence is excessive. Although the nonextended maximum is 5 years' imprisonment, the "sentence of imprisonment for an extended term Class 3 felony *** [is] a term not less than 5 years and not more than 10 years." 730 ILCS 5/5-4.5-40(a) (West 2012). As the court warned defendant, he was extended-term eligible because of his past convictions. A defendant may be sentenced to an extended term when he is "convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts." 730 ILCS 5/5-5-3.2(b)(1) (West 2012). According to the presentencing investigation, in 2004 defendant was convicted of the theft of $1,462.44 in cash from a gas-station safe. He ultimately received a sentence of four years' imprisonment. Such a theft is a Class 3 felony. See 720 ILCS 5/16-1(b)(4) (West 2004).

Defendant was thus subject to a range of imprisonment of 2 to 10 years. Six years' imprisonment (72 months) thus marks the middle of the range. Defendant received 17 months less. Defendant's history marks him as someone particularly unlikely to be rehabilitated and particularly likely to reoffend. See, *e.g.*, *Snyder*, 2011 IL 111382, ¶ 37 (consideration of past offenses as an aggravating factor is proper). On that basis, we affirm the trial court's imposition of his sentence.

¶ 27 B. We Lack Jurisdiction to Consider the Propriety of the Public Defender Fee's Imposition.

¶ 28 We agree with the State that we lack jurisdiction to consider the imposition of the public defender fee. On nearly identical facts, we held untimely an appeal of such a fee when the trial court imposed it in conjunction with the imposition of a sentence of probation and the defendant failed to challenge it until he appealed from a sentence of imprisonment imposed upon the revocation of probation. *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 26-30. We held that such an appeal must conform to the timing provisions of Illinois Supreme Court Rule 606(b) (eff. Mar. 20, 2009) and that the final order relevant to determining the timeliness of the appeal was the order that imposed the fee, that is, the first sentencing order, the one that imposed probation. *Wynn*, 2013 IL App (2d) 120575, ¶ 30. Further, any error in failing to conduct a hearing into the defendant's ability to pay the fee made the fee voidable at most, and not void, so the rule that allows us to review a void order any time that we have jurisdiction was inapplicable. *Wynn*, 2013 IL App (2d) 120575, ¶¶ 29-30. We thus may not consider this issue.

¶ 29 C. The Record Does Not Allow Us to Calculate Certain Fees.

¶ 30 We agree with defendant that the probation-services fee and the drug-and-alcohol testing fee must be recalculated. The State concedes that these fees were not fixed when defendant

received his original sentence of probation, so that defendant's claim of error did not arise at the time of the original sentencing. It thus agrees that we have jurisdiction to address the calculation of the charges. The parties agree that whether a fee conforms to the record facts is a question of law. See *People v. Lake*, 2015 IL App (3d) 140031, ¶ 31 ("We review *de novo* questions regarding the appropriateness of fines, fees, and costs.").

¶ 31 Concerning the probation-services fee, we conclude that the record does not establish conclusively when probation services was actively supervising defendant. The applicable provision specifies that the fee "shall be imposed only upon an offender who is actively supervised by the probation and court services department." 730 ILCS 5/5-6-3(i) (West 2012). We will not, as defendant asks, presume without evidence that active supervision necessarily ceases immediately upon an offender's arrest and incarceration. However, we will not, as the State asks, presume that active supervision is ongoing while a defendant is incarcerated. We thus remand the matter for the court to determine the period in which defendant was actively supervised and for appropriate recalculation of the fee.

¶ 32 Concerning the drug-and-alcohol testing fee, the relevant provision requires a person on probation and subject to drug and alcohol testing "to pay all costs incidental to such mandatory drug or alcohol testing" and provides that the "county board with the concurrence of the Chief Judge *** shall establish reasonable fees for the cost of maintenance, testing, and incidental expenses related to the mandatory drug or alcohol testing." 730 ILCS 5/5-6-3(g) (West 2012). The parties agree that it was improper to assess a fee based on the entire two years of defendant's probation sentence, but do not agree on whether the court should impose it for the period in which defendant was incarcerated prior to the revocation of his probation. The statute requires the defendant to pay the costs incidental to testing. There are costs incidental to testing only

when there is in fact testing. The court thus should base the fee on the actual period of testing, and on remand it should recalculate it accordingly.

¶ 33 D. The Parties Agree That Certain Assessments Were Improperly Calculated and that Certain Fines Were Improperly Treated as Fees.

¶ 34 The parties agree that the State Police Operations Assistance Fund fee and the State Police Services Fund fee are both legally fines and are thus subject to full credit for presentencing incarceration. We accept the State's confession of error and agree.

¶ 35 The parties further agree that the Violent Crime Victims Assistance Fund fee was calculated based on a version of the relevant statute not yet in effect (725 ILCS 240/10(b), (c) (West 2012)), and that it should instead be calculated according to the version in effect on July 6, 2012, the date of the offense (Pub. Act 97-108 (eff. July 14, 2011) (amending 725 ILCS 240/10(b), (c) (West 2010)). We agree with the parties and order the trial court to so calculate the fee on remand.

¶ 36 Finally, the parties agree that the amount of the "Harris and Harris" late fee is based on the balance of the assessments overdue and that, because the amounts of the assessments must be recalculated on remand, this fee too must be recalculated on remand. We agree that the need for recalculation follows logically from the recalculation of the other assessments.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm defendant's sentence, modify the judgment to show the satisfaction of the State Police Operations Assistance Fund fee and the State Police Services Fund fee from the $5-a-day credit for presentencing incarceration, and remand the matter for recalculation of the probation-services fee, the drug-and-alcohol testing fee, the Violent Crime Victims Assistance Fund fee, and the "Harris and Harris" late fee. As part of our judgment, we

grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 39 Affirmed as modified in part and remanded with directions.