2015 IL App (3d) 130158-U

Order filed July 28, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0158
v.	)	Circuit No. 10-CF-318
	)	
TIMOTHY WASHINGTON,	)	
	)	Honorable Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justice O'Brien concurred in the judgment.
Presiding Justice McDade dissented in part and specially concurred in part.

ORDER

¶ 1 *Held*: The 25-year-to-life firearm enhancement is not unconstitutionally vague on its face, or as applied to defendant. The trial court did not abuse its discretion when it considered deterrence as an aggravating factor in imposing defendant's sentence. The $250 DNA analysis fee is vacated, and the cause remanded to the circuit court for the proper calculation of presentence credit to be applied toward defendant's fines, including the $10 probation operation fee.

¶ 2 Following a trial in the Kankakee County circuit court, a jury convicted defendant, Timothy Washington, of first-degree murder, attempted murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon.

¶ 3 On the first-degree murder conviction, the trial court sentenced defendant to 50 years, plus natural life for the firearm enhancement pursuant to section 5/5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012)). The trial court sentenced defendant to 25 years on the attempted murder conviction, plus 20 years for the firearm enhancement to run consecutively to the murder conviction. On the unlawful possession of a weapon by a felon conviction, the court sentenced defendant to 25 years' incarceration to run concurrently to the previous charges. The aggravated discharge of a firearm count merged with the attempted murder charge. Finally, the trial court assessed a total of $1,645 in fines, fees and costs, and gave defendant presentence credit for time served in custody from June 22, 2010, to February 22, 2013.

¶ 4 Defendant appeals, arguing: (1) that the 25-years-to-life-firearm enhancement is unconstitutionally vague on its face and as applied to him, it allows for arbitrary and discriminatory sentencing; (2) that the trial court erred when it relied on the fact that the defendant's trial has been publicized by the media as a factor justifying an increased sentence; and (3) that this court should vacate the $250 deoxyribonucleic acid (DNA) analysis fee and apply a $5-per-day credit against various fines and fees stemming from his conviction.

¶ 5 We affirm in part and remand with directions.

¶ 6 BACKGROUND

¶ 7 The State charged defendant, Timothy Washington, with first-degree murder, attempted murder, aggravated discharge of a firearm, and unlawful use of a weapon by a felon in

connection with the shooting death of 17-year-old Justin Hawkins and the attempted murder of David Sanders.

¶ 8 At the start of *voir dire*, the court informed the venire that there would be a camera present in the court from "The Daily Journal," Kankakee's local daily newspaper. The court explained that defendant's case was part of the supreme court's pilot program for cameras in the courtroom. The jury was selected and the case proceeded to trial. The court admonished the jury on a daily basis not to read The Daily Journal until the trial concluded.

¶ 9 Throughout the pendency of the trial and sentencing hearing, newspaper reporters, cameramen, and photographers were present in the courtroom covering the case. Two of the State's witnesses, Tynishia Gray and David Sanders, objected to the media coverage of their testimony. Gray stated she was in fear for her life and did not want her picture to appear in the paper.

¶ 10 At trial, the State presented evidence from 23 witnesses. The defense did not present any witnesses in its case-in-chief.

¶ 11 The State's evidence established that on June 22, 2010, near Third Avenue and Walnut Street in Kankakee, a man identified as Timothy Washington shot at two young men, Justin Hawkins and David Sanders. Hawkins was fatally wounded in the shooting, but Sanders was able to escape without being struck by the gunfire. The Kankakee police arrested defendant later that evening and placed him in a physical lineup. Sanders identified defendant as the person who committed the shooting. Three other eyewitnesses also identified defendant, placing him in the immediate area of the shooting either shortly before or shortly after it occurred. The State presented no physical evidence linking defendant to the crime, nor did defendant confess.

¶ 12 The jury found defendant guilty of the first-degree murder of Hawkins, the attempted murder of David Sanders, aggravated discharge of a firearm, and unlawful possession of a weapon by a felon.

¶ 13 At sentencing, the State presented the victim impact statement of Hawkins' mother. The State pointed out that defendant had five prior felony convictions for residential burglary, possession of a controlled substance, possession of a controlled substance with intent to deliver, and unlawful possession of a weapon by a felon.

¶ 14 During argument, the State noted that the trial judge "tends to frown upon" the use of deterrence as an aggravating factor at sentencing and does not usually accord that factor much weight. The State urged that in the instant case, the judge should consider deterrence as a factor given the publicity of recent trials and the fact that The Daily Journal covered the case in the courtroom.

¶ 15 The State continued:

> "Realistically whatever this defendant gets he's not coming out of prison again alive and it's the State's position that it's important to get that word out there. I think it will get out there *** if one person can be deterred from doing this, then it's worth it for Your Honor to consider that factor ***."

¶ 16 The State then recommended that the court sentence defendant to 60 years, plus natural life for the firearm enhancement on the murder conviction; 20 years, plus 20 years for the firearm enhancement on the attempted murder conviction to run consecutive to the murder conviction; and 30 years for unlawful possession of a weapon by a felon to run concurrently. The State further argued that defendant should be sentenced as a Class X offender on the

unlawful possession of a weapon by a felon charge, as he had two prior convictions for Class 2 felonies or higher.

¶ 17 Defense counsel urged the court not to "just throw the book at Mr. Washington because he isn't going to get out [of prison] alive anyway" but, rather, to sentence him fairly. Counsel argued that defendant was married with seven children, and despite the lack of any formal education, maintained a good job. Counsel also stated that the odds were stacked against defendant very early on in life. Defendant never knew his father and his mother struggled with a drug problem, which resulted in defendant living with his aunt. Counsel requested that the court sentence defendant to the minimum sentence on each count.

¶ 18 Prior to imposing the sentence, the trial court stated:

> "It's true over the years many times we have said that we — we think the deterrent factor does not work necessarily, however, I would agree with [the State]. There has been a lot more press coverage recently and because of cameras in the courtroom and I think we know from hearing it in the courtroom that defendant and — are now reading the paper because we hear from them in the courtroom and seeing what's being done with trials and sentencing."

¶ 19 The court reiterated the facts of the case and stated that defendant had a "horrendous record" and that he "should never be able to return to the Kankakee streets." The court ultimately sentenced defendant to 50 years for first-degree murder, plus natural life for the firearm enhancement; 25 years on the attempted murder charge, plus 20 years for the firearm enhancement to run consecutively to the murder charge; and 25 years for the unlawful possession

of a weapon by a felon conviction to run concurrently with the murder and attempt murder convictions. The aggravated discharge of a firearm charge merged with the attempted murder charge. Defendant received presentence credit for time served in custody from June 22, 2010, to February 22, 2013.

¶ 20 The court assessed a total of $1,645 in fines, fees, and costs against defendant, which included a $250 DNA analysis fee.

¶ 21 Defendant appeals.

¶ 22 ANALYSIS

¶ 23 I. Constitutionality of the Firearm Enhancement Statute

¶ 24 Defendant contends that section 5-8-1(d)(iii) of the Unified Code of Corrections is unconstitutionally vague, both on its face and as applied to him, as it fails to offer criteria to guide judges in imposing sentences within a broad range and encourages the arbitrary and discriminatory imposition of sentences. 730 ILCS 5/5-8-1(d)(iii) (West 2012).

¶ 25 A challenge to a statute's constitutionality may be raised at any time and is reviewed *de novo*. *People v. McCarty*, 223 Ill. 2d 109, 123-24 (2006). Statutes carry a strong presumption of constitutionality, and the partying challenging the constitutionality of a statute bears the burden of rebutting this presumption. *Russell v. Department of Natural Resources*, 183 Ill. 2d 434, 441 (1998). We find that defendant fails to meet this burden.

¶ 26 A cornerstone of our jurisprudence is that no person shall be deprived of life, liberty, or property without due process of law. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. 1, § 2. Due process mandates that criminal statutes have clear definitions. *People v. Maness*, 191 Ill. 2d 478, 483 (2000). Ambiguity in a criminal statute must be resolved in a manner favoring the accused. *People v. Jones*, 223 Ill. 2d 569, 581 (2006). If a sentencing provision fails to

sufficiently clarify the consequences of violating a criminal statute, the sentencing provision can be found to be void for vagueness. *People v. Hill*, 2012 IL App (5th) 100536, ¶ 15 (citing *People v. Taher*, 329 Ill. App. 3d 1007, 1015-16 (2002)).

¶ 27 Generally, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In regard to enforcement, the statute must provide explicit standards to regulate the discretion of governmental authorities who apply the law. See *Russell*, 183 Ill. 2d at 442. If the legislature fails to provide minimal guidelines to govern law enforcement, a criminal law "may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). When a statute does not affect first amendment rights, it will not be declared unconstitutionally vague on its face unless it is incapable of any valid application—that is, unless under no set of circumstances would the statute be valid. *People v. Izzo*, 195 Ill. 2d 109, 112 (2001).

¶ 28 Section 5-8-1(a)(1)(d)(iii) of the Unified Code provides, in pertinent part:

> "[I]f, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1-(a)(1)(d)(iii) (West 2012).

¶ 29 As an initial matter, we note that defendant suggests that the firearm enhancement statute gives the court unfettered discretion to impose natural life, the harshest of criminal penalties available under Illinois law. Defendant contends that the trial court gave no indication as to what factors it relied upon to enhance his firearm add-on to natural life. However, on appeal defendant does not actually argue that the trial court abused its discretion in imposing his sentence. Rather, he only requests that this court find the statute unconstitutionally vague.

¶ 30 Turning now to the alleged unconstitutionality of the firearm enhancement statute, defendant points our attention to *People v. Maness*, 191 Ill. 2d at 484, and argues that the statute's "broad sentencing range is unconstitutionally vague because it fails to appropriately guide judges and encourages arbitrary and discriminatory sentencing based entirely on opinions and whims." Defendant's reliance on *Maness* is misplaced, as that case is easily distinguishable on one critical ground—it does not involve a sentencing statute. See *Maness*, 191 Ill. 2d at 484-85 (holding statute defining offense for permitting the sexual abuse of a child (720 ILCS 150/5.1 (West 1992) unconstitutionally vague where the statute was unclear as to what the "reasonable steps" are that a parent must take in order to comply with the statute). Here, the sentencing statute marks boundaries sufficiently distinct for the trial court to administer the law fairly in accordance with the intent of the legislature, *i.e.*, to enhance the penalty for defendants who perpetrate violence using a firearm. See *People v. Ramos*, 316 Ill. App. 3d 18, 26 (2000).

¶ 31 More importantly, identical arguments regarding the constitutionality of the 25-years-to-life firearm statute have been recently rejected in at least two other cases. In *People v. Butler*, 2013 IL App (1st) 120923, defendant argued that the 25-years-to-life sentence enhancement violated the second prong of the due process test in that it does not provide sufficiently definite standards for its application by the triers of fact. The court dismissed this claim, stating:

"Although the sentence enhancement allows for a wide range sentences, the scope of the sentencing range is clear and definite. When the enhancement is triggered, it must be applied for no less than 25 years and up to a term of natural life. The trial court has no discretion to decide whether or not to impose the sentence enhancement. Likewise, the standards for imposing the sentence enhancement are clearly defined. The sentence enhancement must be imposed when a defendant commits first-degree murder and discharges a firearm that proximately causes great bodily harm, permanent disability, permanent disfigurement, or death. Depending on the injury caused by the firearm used by the defendant, the trial court has discretion to impose a sentence in the range of 25-years-to-life. This allows the trial court to engage in fact-based determinations based on the unique circumstances of each case. The wide range of the sentence enhancement is appropriate because it is impossible to predict every type of situation that may fall under the purview of the statute. By defining the types of injuries that trigger the sentence enhancement, the legislature has provided the trier of fact with guidelines to apply when determining what sentence to impose within the boundaries of the statute. Therefore, the scope and standards of the 25-years-to-life sentence enhancement are not vague." *Butler*, 2013 IL App (1st) 120923 ¶ 41.

¶ 32 Shortly thereafter, the First District reaffirmed the holding of *Butler* in *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 121. While both *Butler* and *Thompson* noted that " 'confusion could be avoided if the legislature provided more explicit guidance regarding the imposition of the 25-years-to-life sentence enhancement,' " (*Thompson*, 2013 IL App (1st) 113105, ¶ 120) (quoting Butler, 2013 IL App (1st) 120923, ¶ 42)) both cases ultimately determined the statute was not unconstitutionally vague. Briefly, we note that defendant also contends that the trial court violated the rule against double enhancement. Relying on *People v. Siguenza-Brito*, 235 Ill. 2d 213, 232-33 (2009), he argues that the trial court cannot use the same aggravating factors to first fashion the base sentence for first-degree murder, then use them again to justify an additional term within the 25-year-to-life range.

¶ 33 *Siguenza-Brito* is inapposite. Contrary to defendant's assertion, the court actually found that the double enhancement rule does not prohibit a single factor from being used to enhance the severity of two separate and distinct offenses. In *Siguenza-Brito*, the issue was the use of each predicate felony to enhance a separate offense. *Id*. at 233 (noting that "[d]efendant was convicted of aggravated kidnapping predicated on criminal sexual assault, and aggravated criminal sexual assault predicated on kidnapping. [C]riminal sexual assault was used only once to enhance the kidnapping conviction, and kidnapping was used only once to enhance the criminal sexual assault conviction. Since no single factor was used twice to enhance both offenses, there was no double enhancement."). *Siguenzo-Brito* is not comparable to the situation here, where defendant argues the court considered the same aggravating sentences in crafting the original sentence as well as the add-on.

¶ 34 *Butler* is also persuasive on this point, noting that our supreme court rejected defendant's argument that the 25-years-to-life sentence enhancement statute allows for " 'double

enhancement.' " *Butler*, 2013 IL App (1st) 120923, ¶ 43. In *People v. Sharpe*, 216 Ill. 2d 481, 530 (2005), the supreme court held:

> "[T]he general rule against double enhancement is merely a rule of construction established by this court, which arises from the presumption that the legislature considered the factors inherent in the offense in setting the initial penalty for that offense. [Citation.] But where the legislature has made clear an intention to enhance the penalty for a crime, even in a way which might constitute double-enhancement, this court will not overrule the legislature." *Id.*

¶ 35 Thus the trial court's sentence based on the firearm enhancement in the instant case did not violate the prohibition against double enhancement. We find no issue, constitutional or otherwise, with the trial judge listing the aggravating and mitigating factors, then imposing the sentence plus the add-on. Defendant fails to cite to any case law to support his argument that the trial court must specifically outline those factors it considered in determining the firearm add-on, or that it is improper for the trial court to consider the normal sentencing factors in fashioning the firearm add-on. See 730 ILCS 5/5-5-3.1 (West 2012); 730 ILCS 5/5-5-3.2 (West 2012).

¶ 36 Following the rationale of *Butler* and *Thompson*, we accordingly find that the 25-year-to-life firearm enhancement of section 5-8-1(a)(1)(d)(iii) of the Code of Corrections is not unconstitutionally vague either on its face or as applied to defendant.

¶ 37 II. Trial Court's Reliance on Certain Aggravating Factors in Sentencing

¶ 38 Defendant argues that we should remand his case for resentencing where the trial court erroneously relied on the fact that his case and other recent cases had received substantial media

attention as a factor in justifying an increased sentence. Specifically, defendant contends that the trial court abused its discretion in considering deterrence as an aggravating factor and unfairly penalized defendant for the media presence in his case, a factor that was outside of defendant's control.

¶ 39 Defendant acknowledges that trial counsel failed to properly preserve this issue on appeal, but argues that this court may review the issue under the second prong of the plain-error doctrine, as the trial court's consideration of an improper factor in aggravation affected defendant's fundamental right to liberty. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (a reviewing court may consider an unpreserved error when a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence). The initial step in conducting plain-error analysis is to determine whether error occurred at all. *People v. Hudson*, 228 Ill. 2d 181, 191 (2008). This requires us to conduct a substantive review of the issue. *People v. Johnson*, 208 Ill. 2d 53, 64 (2003).

¶ 40 The trial court is vested with great discretion in sentencing given that it has observed the defendant and the proceedings, and is in a better position than a court of review to consider such factors as credibility, demeanor, general moral character, mentality, social environment, habits and age in fashioning the punishment to be imposed. See *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). A sentence within the applicable statutory range is presumed to be proper and may not be disturbed on appeal absent an abuse of discretion. *Id.*; see also *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992). The trial court will be found to have abused its discretion only if the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212. We may not

substitute our judgment for that of the trial court merely because we would have weighed the factors differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 41 Defendant takes issue with the fact that the court considered deterrence as a factor in fashioning his sentence, where his case garnered substantial media exposure. Section 5-5-3.2(a)(7) unequivocally provides that deterrence is a statutory aggravating factor, and deterrence is a proper consideration by a trial judge at sentencing. 730 ILCS 5/5-5-3.2(a)(7) (West 2012); *People v. Williams*, 223 Ill. App. 3d 692, 701 (1992). Thus defendant's argument that the court could not consider deterrence is unavailing. Defendant is necessarily asking us to reweigh the aggravating and mitigating factors, which we may not do. *People v. Woodard*, 367 Ill. App. 3d 304, 321 (2006). There was no error here, plain or otherwise.

¶ 42 We further find that defendant's characterization of the media presence and deterrence as factors "out of his control" misses the mark. Defendant is effectively attempting to remove the trial court's observations regarding deterrence out of the context of the crime he committed. The evidence showed that the 32-year-old defendant shot and killed 17-year-old Justin Hawkins at 5 p.m. in the evening on a public street corner over a PlayStation, which defendant thought Hawkins had stolen from him. Defendant also attempted to shoot and kill David Sanders, who happened to be with Hawkins. Aside from the seriousness of the crime, the trial court also noted defendant's abysmal criminal history, which included five separate felony convictions, three of which were Class 2 felonies or higher, and one of which involved a firearm.

¶ 43 While increased media presence may result in trial courts statewide meting out lengthier sentences, it remains that deterrence is a properly considered aggravating factor. Query: If few people are aware of the sentence, how could it act as a deterrent? The trial judge was aware of this issue, since the record reflects that she was generally unwilling to give much, if any, weight

to the deterrence factor in sentencing. The trial court did not err in considering deterrence as a factor in determining defendant's sentence.

¶ 44 III. DNA Analysis Fee and $5-Per-Day-Credit

¶ 45 Finally defendant contends that the $250 DNA analysis fee imposed by the trial court must be vacated, as his DNA was already in the State's DNA database at the time of his conviction in this case. He further argues that he is entitled to a $5-per-day-credit for the 976 days he spent in custody prior to sentencing, which should be applied toward the $300 felony offense fine, the $15 State Police Operations Assistance Fund fee, and the $10 probation operations fee.

¶ 46 As for the DNA analysis fee, the State concedes that the $250 fee should be vacated pursuant to *People v. Marshall*, 242 Ill. 2d 285 (2011) (holding that a subsequent order for samples and the concomitant analysis fee are void and must be vacated). Given that defendant's DNA was registered with the Illinois State Police prior to his conviction, we accordingly vacate the $250 DNA analysis fee.

¶ 47 The State further concedes that defendant's $5-per-day credit for 976 days of presentence incarceration would usurp the $300 felony fine and the $15 State Police Operations Assistance Fund fee. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31. However, the State argues that the $10 probation operations fee is not subject to the $5-per-day credit as it constitutes a fee, not a fine.

¶ 48 The State relies upon *People v. Rogers*, 2014 IL App (4th) 121088, where the Fourth District held that the charge imposed was compensatory in nature because it reimbursed the State for costs incurred as the result of prosecuting the defendant. *Id.* ¶ 37. In *Rogers*, defendant was eligible for (and requested) probation as his sentence and the trial court ordered the probation

office to conduct a presentence investigation and prepare a report of its findings to aid the trial court during sentencing. *Id*. The court went on to note, however that the compensatory nature of the assessment will change in cases where the probation office is not involved in a defendant's prosecution. *Id*. ¶ 38. In those cases, the probation assessment constitutes a fine because it is unrelated to costs incurred by the State as a result of a prosecution. *Id*.

¶ 49 In this case, the State merely cites to *Rogers*, failing to provide this court with any insight into whether the probation office was involved in defendant's prosecution or called upon by the court to compile a presentence investigation report. Without a citation to the record unequivocally showing that the probation office was involved in defendant's prosecution or conducted a presentence investigation report, we find that the $10 probation operations fee is a fine subject to the $5-per-day presentence incarceration credit. Such a finding is compatible with the relevant sentencing statute, as first-degree murder is not an offense subject to probation. 730 ILCS 5/5-4.5-20(d) (West 2012).

¶ 50 Accordingly, we remand to the circuit court to vacate the $250 DNA analysis fee and reduce defendant's fines, fees and costs to reflect the $5-per-day presentence incarceration credit for the $300 felony offense fine, the $15 State Police Operations Assistance Fund, and the $10 probation operations fee.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, the judgment of the circuit court of Kankakee County is affirmed in part and this cause is remanded with directions consistent with this order.

¶ 53 Affirmed in part; cause remanded with directions.

¶ 54 JUSTICE McDADE, dissenting in part and specially concurring in part.

¶ 55 I dissent from the decision of the majority that affirms the sentences of defendant, Timothy Washington, because I would find the 25-year-to-life firearm enhancement to be unconstitutionally vague and would find the natural-life enhancement void.

¶ 56 The applicable statute provides that the sentence of a defendant convicted of first-degree murder where a firearm is present during the commission of the crime must be enhanced as follows:

> "(d)(i) if the person committed the offense which *armed with* a firearm, 15 years shall be added to the term of imprisonment imposed by the court;
>
> (ii) if, during the commission of the offense, the person *personally discharged a firearm*, 20 years shall be added to the term of imprisonment imposed by the court;
>
> (iii) if, during the commission of the offense, the person *personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death* to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." (Emphasis added.) 730 ILCS 5/5-8-1(d)(i-iii) (West 2012).

Pursuant to (d)(iii), Washington was sentenced to 50 years for the first-degree murder and was given a firearm enhancement of natural life.

¶ 57 He argues that the enhancement set out in (d)(iii) was unconstitutionally vague because there are no standards to guide the trial court's choice of where an enhancement should fall within the range.

¶ 58 In rejecting defendant's claim of unconstitutional vagueness, the majority discounts his reliance on *People v. Maness*, 191 Ill. 2d 478, 484 (2000), distinguishing it on the basis of the different subject matter of the allegedly vague statutes. Instead, the majority relies on two recent first district decisions—*People v. Butler*, 2013 IL App (1st) 120923, ¶ 41, and *People v. Thompson*, 2013 IL App (1st) 113105, ¶ 121. These latter two cases address the same issue presented in the instant appeal and find, in what I believe to be a flawed analysis, that the challenged enhancement is not unconstitutionally vague either on its face or as applied.

¶ 59 *Butler* was decided first and in that case the State argued:

> "[T]he 25-years-to-life sentence enhancement *does* provide criteria to guide the trial court in imposing a sentence. The State contends that the statute specifies a sliding scale of aggravating elements which must be present in order for the likewise sliding range in sentence to be imposed. For example, the sentence enhancement must be imposed when a defendant uses a firearm to cause injuries ranging from great bodily harm, permanent disability, permanent disfigurement, or death. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012). *Thus, the State argues that logically it follows that the low range of the 25-years-to-life sentence enhancement addresses the situations with lesser harm or injury, while the higher range of the sentence enhancement is designed for the most serious situations*

such as where a death occurred." (Emphasis added.) *Butler*, 2013 IL App (1st) 120923, ¶ 37.

¶ 60 The State's argument is pure speculation. There is nothing in the plain language of the statute that supports its contentions that "the statute provides clear and unambiguous standards for its administration by sentencing courts" (*id.* ¶ 36), or its assertion that "the low range of the 25-years-to-life sentence enhancement addresses the situations with lesser harm or injury, while the higher range of the sentence enhancement is designed for the most serious situations such as where a death occurred." *Id.* ¶ 37.

¶ 61 The *Butler* court agreed, stating:

> "Depending on the injury caused by the firearm used by the defendant, the trial court has discretion to impose a sentence in the range of 25-years-to-life. This allows the trial court to engage in fact-based determinations based on the unique circumstances of each case. The wide range of the sentence enhancement is appropriate because it is impossible to predict every type of situation that may fall under the purview of the statute. *By defining the types of injuries that trigger the sentence enhancement, the legislature has provided the trier of fact with guidelines to apply when determining what sentence to impose within the boundaries of the statute. Therefore, the scope and standards of the 25-years-to-life sentence enhancement are not vague*." (Emphasis added.) *Id.* ¶ 41.

As with the State's argument, this conclusion by the court is purely speculative and finds no support in the plain language of the statute. Indeed, the *Butler* court did acknowledge that although "*confusion could be avoided if the legislature provided more explicit guidance regarding the imposition of the 25-years-to-life sentence enhancement*, we cannot say that it is unconstitutionally vague. Thus, while Butler's argument has some reasonable elements, we are not persuaded by it for the reasons discussed." (Emphasis added.) *Id.* ¶ 42.

¶ 62 In *People v. Thompson*, IL App (1st) 113105, the appellate court reiterated and agreed with the rationale of *Butler* and added nothing new to the analysis.

¶ 63 The problem is that the enhancements in *Butler* and *Thompson* belie the argument advanced by the State and accepted by the courts. In committing first-degree murder, Kendrick Butler personally discharged the gun, killing Gregory Dugar. His enhancement was 30 years—close to the lower end of the range. In committing first-degree murder, Rudolph Thompson personally discharged the gun, killing Francisco Villanueva. His enhancement was 40 years, again close to the lower end of the range. In the instant case, in committing first-degree murder, Timothy Washington personally discharged the gun, killing Justin Hawkins. His enhancement was natural life.

¶ 64 Moreover, in this case, the trial court did not even pay lip service to Washington's crime. Rather, as reported by the majority, the court stated:

> "It's true over the years many times we have said that we—we think the deterrent factor does not work necessarily, however, I would agree with [the State]. There has been a lot more press coverage recently and because of cameras in the courtroom and I think we know from hearing it in the courtroom that defendant

> and—are now reading the paper because we hear from them in the courtroom and seeing what's being done with trials and sentencing." *Supra* ¶ 18.

The court then observed that the defendant had a "horrendous record" and that he "should never be able to return to the Kankakee streets." Those appear to be aggravating factors applicable to the sentence itself and inappropriate for setting the sentencing enhancement.

¶ 65 As a matter of plain fact, there is nothing in the sentencing enhancement set out in section 5-8-1(d)(iii) that would preclude a court that was so inclined from only adding natural life to black defendants, male defendants, red-haired defendants. This statute replicates the very type of standardless, unfettered exercise of discretion that resulted in widespread sentencing abuse and the enactment of the federal sentencing guidelines.

¶ 66 Turning to the analysis of the fines and fees, I specially concur in the majority's decision. I agree that the defendant's $250 DNA analysis fee should be vacated because his DNA was already in the database. However, I believe with regard to the state police operations assistance fund fee and the probation operations fee, the court lacked the authority to impose those assessments in this case and that portion of its order is void. Defendant has not specifically challenged these fees as void, but the supreme court has held that "courts have an independent duty to vacate void orders and may *sua sponte* declare an order void." *People v. Thompson*, 209 Ill. 2d 19, 27 (2004).

¶ 67 Public Act 96-1029 (eff. July 13, 2010) created the state police operations assistance fund and added subsection 1.5 to section 27.3a of the Clerk of Courts Act (705 ILCS 105/27.3a(1.5) (West 2010)), which authorized the circuit court to collect a state police operations assistance fund fee. Because the defendant committed his offenses on June 22, 2010—before section

27.3a(1.5) became effective—the circuit court lacked the authority to impose a $15 state police operations assistance fund fee in this case, and it should therefore be vacated. *People v. Devine*, 2012 IL App (4th) 101028, ¶ 10 (holding that "[t]he imposition of a fine that does not become effective until after a defendant commits an offense violates *ex post facto* principles").

¶ 68 Additionally, the authorization to impose a $10 probation operations fee was added by Public Act 97-761 (eff. July 6, 2012), which inserted the authorizing subsection, 1.1, into section 27.3a of the Clerk of Courts Act. Because the defendant committed his offenses on June 22, 2010—well before section 27.3a(1.1) became effective—the circuit court lacked the authority to impose a $10 probation operations fee in this case, and it should also be vacated. *Devine*, 2012 IL App (4th) 101028, ¶ 10; *Thompson*, 209 Ill. 2d at 27.

¶ 69 While the end result is technically the same, I believe it is important to point out that the circuit court acted without authority when it imposed those two assessments in this case.