FIFTH DIVISION
January 15, 2016

No. 1-13-4021



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 2433 |
| | ) | |
| ANTHONY LARES, | ) | Honorable |
| | ) | Thaddeus L. Wilson, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE PALMER delivered the judgment of the court.
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

**O R D E R**

¶ 1 ***Held:*** The trial court's initial inquiry pursuant *People v. Krankel*, 102 Ill. 2d 181 (1984), was not adversarial because the State's participation, which consisted of answering one question put to it by the trial court, was *de minimus*. The trial court did not abuse its discretion when it sentenced defendant, because of his criminal background, to a Class X sentence of 10 years in prison.

¶ 2 Following a bench trial, defendant Anthony Lares was found guilty of possession of a controlled substance with intent to deliver. He was sentenced, because of his criminal background, to a Class X sentence of 10 years in prison. On appeal, defendant contends that the trial court failed to conduct a proper preliminary inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), because it permitted the State to take an "active, adversarial role." He next contends that his sentence is excessive because the trial court failed to consider, in mitigation, his non-violent criminal history and substance abuse issues. Defendant finally contests the imposition of certain fines and fees. We affirm and correct the fines and fees order.

¶ 3 At trial, Officer Divlich testified that on the evening of January 2, 2013, he and his partner Officer Belcik were conducting narcotics surveillance when he saw defendant and Helen Lares. The officers observed for approximately 15 minutes as defendant walked back and forth on the sidewalk. As defendant walked, he was between 50 and 150 feet away from the officers. Specifically, defendant walked "from the alley back and forth" to a building from which he retrieved items. Narcotics were eventually recovered from the alley. Helen also yelled " ' blows, blows' " to passers-by. Based upon his experience, Divlich understood that "blows" was street slang for the sale of heroin.

¶ 4 Divlich observed as four people approached defendant and Helen in turn and engaged in four separate, similar transactions. Specifically, after Helen spoke to the person, defendant would walk to the side of a building, remove a red item from where mortar was missing, remove a smaller item from the red item, replace the red item, and then return to Helen and the person. Defendant would exchange the item for currency. After the fourth person left, the officers left

their surveillance location, got into their car, drove around the block and took defendant and Helen into custody. Divlich then went to the building where he had observed defendant and removed a red box. It contained suspect heroin. He gave the box to Belcik, who inventoried it. Later, at a police station, after Belcik informed defendant of his *Miranda* rights, defendant stated that he was the one that was "dirty." Divlich understood that to mean that defendant was the person caught in a criminal act. During cross-examination, Divlich admitted that he did not ask defendant to explain what "dirty" meant.

¶ 5 Officer Timothy Belcik testified that he observed defendant, through binoculars, as defendant walked back and forth on the street, and as four people approached defendant and Helen. In each instance, defendant would relocate to a building, and retrieve a small red box from the side of the building. Defendant would remove a small white item from the box before replacing it. Defendant would then return to Helen and the individual and exchange the item for currency. After breaking surveillance and taking defendant and Helen into custody, Belcik watched as Divlich retrieved a box from the side of the building. When Belcik looked inside, he saw "a clear mini ziplock baggy" containing a white powdery substance, that is, suspect heroin. He later inventoried this bag. Belcik was also present when defendant stated that "he was the one out there dirty" and that Helen, defendant's cousin, was not "selling blows." In his experience, "dirty" means that "an individual is caught committing a crime."

¶ 6 The parties stipulated that the contents of the baggy tested positive for the presence of heroin and weighed .3 gram.

¶ 7 At the close of the State's case, the defense made a motion for a directed verdict. After the trial court denied the motion, defense counsel rested. The trial court then admonished defendant that he had the right to testify and that although defendant should make that decision in consultation with his attorney, the ultimate decision rested with him. Defendant indicated that he understood and that he did not wish to testify. The trial court asked if anyone threatened or promised defendant anything in order to induce him not to testify and defendant answered in the negative. Defendant then indicated that he was making the decision of his own free will. Ultimately, the trial court found defendant guilty of possession of a controlled substance with intent to deliver.

¶ 8 At a subsequent court date, defense counsel stated that defendant wished to speak to the court. Although the court told defendant to speak to his attorney first, defendant indicated that he wanted to incorporate "some grounds" into the posttrial motion. The court told defendant that it was his attorney who files the motions. Defense counsel stated that defendant wished to include a ground that counsel did not believe was "legitimate." The court then told defendant that if he wished to file something saying that his attorney was ineffective, he could, but that he would have to represent himself with respect to those arguments.

¶ 9 The trial court then asked defendant why his attorney was ineffective. Defendant stated that he wanted an opportunity to "get another lawyer" to represent him at a jury trial. The trial court replied that it had appointed the public defender to represent defendant, so defendant needed to explain a "basis" for his claim of ineffectiveness before the court would consider appointing someone else to represent defendant. Defendant then stated that he was denied the

right to a fair trial because counsel failed to file a pretrial motion to quash defendant's statement to police that he was "dirty." Defendant denied making the statement. The court responded that the fact that defendant denied making the statement was not "a legal basis" to suppress it and that if a motion did not have a legal basis, an attorney cannot file it. Defendant then stated that the officers did not have a "written statement or anything;" rather, they just said that defendant made a confession. The court reiterated that defendant said one thing and the officers said another, and asked what the legal basis of a motion to suppress would be. When defendant indicated that he did not understand, the trial court replied that trials are for "he says, she says," that is, to determine the facts. The court then passed the case.

¶ 10 When the parties were again before the court, defense counsel stated that he had spoken with defendant. The trial court then stated that "for the record" it was going to "go through the initial analysis" regarding defendant's claim of ineffective assistance of counsel. The court then asked if there were any other issues. First, defendant stated that he "supposedly" made a statement. The trial court replied that it found the officer's testimony to be credible. Defendant continued that he was never informed of his *Miranda* rights, and did not make a statement; rather, he was out talking to his cousin. The trial court responded that this was a "factual" issue and asked if the State had anything to say. The State responded that:

> "at trial, the officer was cross-examined on the statement. The credibility of the officer was tested by the defense attorney. He asked several questions. The defendant was also admonished whether or not he wanted to testify then and he chose not to. If he had anything to say about that statement, he chose not to do so

at that time. There is no legal basis under which that statement could have been challenged and there was no ineffective assistance of Counsel."

Defendant replied that it was his first time "going through trial" and it "threw" him. He did not recall saying that he was not going to testify. When the trial court asked whether defendant was arguing that he was not admonished, defendant replied that the court "very well may have" but that he did not recall it because his mind was "caught up in the guilty verdict." The court clarified that the admonishment was before the verdict. Defense counsel then stated that he advised defendant of the right to testify and that the trial court admonished defendant on the record.

¶ 11 The court stated, "for the purpose of addressing this threshold analysis" that defendant's criminal background included "three or four theft convictions" that the court would have allowed in had defendant testified at trial. These prior convictions would have gone to defendant's "truth and veracity." Therefore, the court would have been faced with the officers' testimony that defendant was given the *Miranda* warnings and made a statement, defendant's testimony that he was not given the *Miranda* warnings and did not make a statement, and the facts of defendant's three or four retail theft convictions. Defendant replied that he told his attorney that the officer was lying about the statement.

¶ 12 Defendant next stated that he felt that defense counsel could have "proved" his case in a different way, such as presenting character witnesses to testify that defendant just moved to Chicago and was not "out there" selling drugs. When defendant admitted that his relatives were not with him at the time of his arrest, the trial court stated that these individuals would not have

been permitted to testify. Defendant finally stated that he was "never in control, in possession" of any narcotics because he was a block away from the narcotics when he was arrested.

¶ 13 Ultimately, the trial court concluded that defendant had not met the initial threshold such that new counsel would be appointed to represent defendant on his claim of ineffective assistance of counsel. The court inquired whether defendant wished to proceed *pro se*. Defendant decided to continue with defense counsel.

¶ 14 At sentencing, the State argued in aggravation that defendant had a "significant" criminal history including nine felony convictions related to narcotics, which suggested "absolutely no potential for reform or rehabilitation." In mitigation, the defense argued that defendant was visiting when he was arrested and that he lived in Georgia with his wife, who had "significant" medical issues. The defense further argued that defendant had a substance abuse problem and that his criminal history was "consistent with a person with substance abuse problems." The defense finally argued that defendant's last felony conviction was almost 10 years old which demonstrated a "lengthy" period of time that defendant was not in trouble. Defendant admitted that he was not a stranger to the "system" but that he had not had any run-ins with the law since 2004, that he had a wife and three children and that his wife was sick. With regard to Helen, he stated he was guilty by association and put himself in this position by interacting with her. He threw himself on the court's mercy and asked for leniency.

¶ 15 In sentencing defendant to a Class X sentence of 10 years in prison, the trial court stated that it considered, *inter alia*, the evidence at trial, the gravity of the offense, the presentence

investigation, all evidence in aggravation and mitigation, and defendant's substance abuse issues, potential for rehabilitation and statement to the court.

¶ 16 On appeal, defendant first contends that the trial court erred when it permitted the State to take an active, adversarial role during the preliminary *Krankel* inquiry.

¶ 17 According to *Krankel* and its progeny, when a defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel the trial court should conduct an inquiry into the factual basis for the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). If the trial court determines that the claim lacks merit or pertains only to matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *Id*. at 78. If, however, the allegations demonstrate possible neglect, then new counsel should be appointed. *Id*.

¶ 18 A preliminary *Krankel* hearing "should operate as a neutral and nonadversarial proceeding." *People v. Jolly*, 2014 IL 117142, ¶ 38. Because the defendant is essentially acting *pro se* for purposes of the preliminary proceedings, "it is critical that the State's participation at that proceeding, if any, be *de minimus*." *Id*. In other words, "the State should never be permitted to take an adversarial role against a *pro se* defendant at the preliminary *Krankel* inquiry." *Id*. We review *de novo* whether the court properly conducted the preliminary *Krankel* inquiry. *Id*. ¶ 28.

¶ 19 To support his claim that the trial court "compromised the objective nature" of the preliminary *Krankel* inquiry, defendant argues that the State was permitted to take an adversarial position "against" him. The State responds its participation was *de minimus* considering the length of the hearing and the fact that it only answered one question from the court.

¶ 20 Here, the trial court inquired into each of defendant's claims, including that counsel failed to file a motion to suppress his oral statement, that the officers lied when they stated that defendant was given his *Miranda* rights and made a statement, and that the trial court failed to admonish defendant regarding his right to testify at trial. After the trial court explained to defendant several times that the fact that he denied making a statement was not "a legal basis" to suppress it and that the trial was to answer the "he says, she says" questions, the court asked the State if it had anything to say. It was at this point that the State said that the officer was cross-examined on the statement by defense counsel, and that defendant was admonished about whether or not he wished to testify. The State also noted, before concluding that there was no legal basis under which to suppress the statement, that defendant did not say anything about the statement when the court admonished him about testifying. The court then discussed defendant's claims further with defendant and defense counsel before summarizing that if defendant had taken the stand and stated that he did not make a statement, the court would be faced with the officers stating that defendant was given the *Miranda* warnings and made a statement, defendant's denial, and the fact of defendant's prior retail theft convictions. The trial court then discussed defendant's contentions that counsel failed to present character witnesses and that he was a block away from the narcotics when he was taken into custody.

¶ 21 Here, the State answered one question from the court, and relied upon facts in the record when doing so, *i.e.*, defense counsel cross-examined the officer about the statement and the trial court admonished defendant about testifying. See *People v. Fields*, 2013 IL App (2d) 120945, ¶ 40. We reject defendant's argument that the difference between *de minimus* and adversarial

participation by the State is "one of kind, not degree" as this court has previously stated that the trial court's method of inquiry at a preliminary *Krankel* inquiry is flexible and the State may properly be asked to offer concrete and easily verifiable facts. See *Id*.

¶ 22 *People v. Jolly*, 2014 IL 117142, is instructive. In that case, the trial court permitted the State to question defense counsel regarding the defendant's *pro se* allegations of ineffective assistance of counsel and to solicit testimony from defense counsel that rebutted the defendant's allegations. Our supreme court noted that because a defendant is not appointed new counsel at a preliminary *Krankel* inquiry, it is critical that the State's participation at the proceeding, if any, be *de minimus* and that the State not be permitted to take an adversarial role against a *pro se* defendant. *Id*. ¶ 38. See also *Fields*, ¶ ¶ 40-41 (when the trial court invited "at least equal participation" by the State during the preliminary inquiry into the defendant's *pro se* ineffective-assistance of counsel claims by permitting the State to comment and provide counterarguments to the defendant's claims, the hearing changed from one consistent with *Krankel* and its progeny to an adversarial hearing where the defendant, without waiving his right to be represented, was forced to argue the merits of his claims *pro se*).

¶ 23 In the case at bar, although the State said there was no legal basis under which the defendant's statement could have been suppressed, unlike *Jolly*, the State did not question defense counsel directly regarding defendant's claims and spoke only in response to the trial court's question. Accordingly, we conclude that the State's participation in the preliminary inquiry was *de minimus* when it only answered one question from the court and the rest of the

proceeding was largely a colloquy between the trial court and defendant. *Jolly*, 2014 IL 117142, ¶ 38.

¶ 24 Defendant next contends that his 10-year sentence is excessive in light of certain mitigating evidence including his non-violent criminal history, on-going battle with substance abuse and rehabilitative potential.

¶ 25 A sentence within statutory limits is reviewed on an abuse of discretion standard, so that this court may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider improper aggravating factors or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The court does not need to expressly outline its reasoning when crafting a sentence, and we presume that the court considered all mitigating factors absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does

the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id*.

¶ 26 In the case at bar, defendant does not dispute that he was subject, because of his criminal background, to a Class X sentence of between 6 and 30 years in prison (see 730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 27 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation, including defendant's nine prior felony convictions, his substance abuse issues and the amount of time between the instant offense and defendant's last contact with the "law." In sentencing defendant to a Class X sentence of 10 years in prison, the trial court stated that it considered, *inter alia*, the evidence at trial, the gravity of the offense, the presentence investigation, all evidence in aggravation and mitigation, and defendant's substance abuse issues, potential for rehabilitation and statement to the court. Based on our review of the record, this court cannot say that a prison term of 10 years was an abuse of discretion when defendant was sentenced to a term only four years above the statutory minimum and at the low end of the range of possible sentences. See *Snyder*, 2011 IL 111382, ¶ 36.

¶ 28 Defendant, on the other hand, contends that the trial court failed to put his criminal history within the context of his substance abuse issues and potential for rehabilitation. In essence, defendant argues he should have been sentenced to the statutory minimum because his criminal history is non-violent and directly related his substance abuse issues.

¶ 29 However, it is presumed that the court properly considered the mitigating factors presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d

412, 434 (2010). Here, defendant cannot meet that burden, as the trial court stated that it considered all evidence in mitigation and aggravation when determining defendant's sentence, and defendant points to nothing in the record which contradicts the court's statement. *Id*. We reject defendant's conclusion that the trial court abused its discretion merely by giving the evidence presented in mitigation a different weight than defendant would prefer; the trial court was not required to impose a minimum sentence merely because mitigation evidence exists (*Jones*, 2014 IL App (1st) 120927, ¶ 55) or view defendant's substance abuse problems as inherently mitigating (see *People v. Holman*, 2014 IL App (3d) 120905, ¶ 75). Ultimately, the trial court did not abuse its discretion when it considered the evidence of mitigation and aggravation (*Jones*, 2014 IL App (1st) 120927, ¶ 56), and sentenced defendant to 10 years in prison (*Snyder*, 2011 IL 111382, ¶ 36).

¶ 30 Defendant finally contests the imposition of certain fines and fees. We review the imposition of fines and fees *de novo*. *People v. Price*, 375 Ill. App. 3d 684, 697 (2007).

¶ 31 Although defendant acknowledges that he has forfeited review of this claim because he did not challenge the fines and fees order in a postsentencing motion (see *People v. Naylor*, 229 Ill. 2d 584, 592 (2008)), he argues that the fees are void and may be challenged at any time. However, in *People v. Castleberry*, 2015 IL 116916, ¶¶ 11-12 (Nov. 19, 2015), our supreme court held that a void judgment, which may be attacked at any time, results from a decision in which a court lacks either personal or subject matter jurisdiction. A voidable judgment, however, is one that is entered in error by a court having jurisdiction, and is not subject to collateral attack. See *Id.* ¶ 11. Here, defendant does not challenge the trial court's personal jurisdiction or subject

matter jurisdiction. Because the complained of judgments by the trial court are not void, defendant has forfeited review of this issue on appeal. However, we conclude that we may still reach defendant's contentions on appeal pursuant to our authority under Rule 615(b)(1) to "reverse, affirm, or modify the judgment or order from which the appeal is taken." See Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999).

¶ 32 Defendant first contends, and the State agrees, that pursuant to section 110-14(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-14(a) (West 2012)), he is entitled to a $1,695 credit based on 339 days of presentence custody.

¶ 33 The parties also agree that defendant was assessed certain fines that may be offset by the presentence custody credit: the $10 Mental Health Court fine (55 ILCS 5/5-1101(d-5) (West 2012)); the $5 Youth Diversion/Peer Court fine (55 ILCS 5/5-1101(e) (West 2012)); the $5 Drug Court fine (55 ILCS 5/5-1101(f) (West 2012)); the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2012)); the $50 Court Systems Fee (55 ILCS 5/5-1101(c) (West 2012)); the $15 State Police Operations Fee (705 ILCS 105/27.3a (1.5) (West 2012)); the $1,000 Controlled Substance fine (720 ILCS 570/411.2(a)(3) (West 2012)); and the $30 Juvenile Expungement Fund assessment (730 ILCS 5/5-9-1.17 (West 2012)).

¶ 34 Therefore, pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine, the $30 Children's Advocacy Center fine, the $50 Court Systems Fee, the $15 State Police Operations Fee, the $1,000 Controlled Substance fine, and the $30 Juvenile Expungement Fund assessment be offset by defendant's presentence custody credit.

¶ 35 Defendant next contends that the $2 Public Defender Records Automation Fee (55 ILCS 5/3-4012 (West 2012)), and the $2 State's Attorney Records Automation Fee (55 ILCS 5/4-2002.1(c) (West 2012)), are actually fines that should be offset by his presentence custody credit.

¶ 36 This court has previously found that the $2 Public Defender Records Automation Fee and the $2 State's Attorney Records Automation Fee are fees to which a defendant cannot apply his presentence custody credit. See *People v. Bowen*, 2015 IL App (1st) 132046 ¶ 65 ("because the statutory language of both the Public Defender and State's Attorney Records Automation fees is identical except for the name of the organization, we find no reason to distinguish between the two statutes, and conclude both charges constitute fees"); *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30 (the State's Attorney charge is a fee because it is meant to reimburse the State's Attorney for expenses related to automated record keeping). We follow *Rogers* and *Bowen* and likewise find that the Public Defender Records Automation Fee and the State's Attorney Records Automation Fee are fees to which defendant cannot apply his presentence custody credit.

¶ 37 Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct defendant's fines and fees order to reflect that the $10 Mental Health Court fine, the $5 Youth Diversion/Peer Court fine, the $5 Drug Court fine, the $30 Children's Advocacy Center fine, the $50 Court Systems Fee, the $15 State Police Operations Fee, the $1,000 Controlled Substance fine, and the $30 Juvenile Expungement Fund assessment are offset by defendant's presentence custody credit, for a new total due of $544. We affirm the judgment of the circuit court of Cook County in all other aspects.

¶ 38 Affirmed; fines and fees order corrected.