2018 IL App (1st) 151900-U
Order filed: January 26, 2018

FIFTH DIVISION

No. 1-15-1900

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. 13 CR 19628
	)	
JOHN ALLEN,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
PRESIDING JUSTICE REYES and JUSTICE HALL concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed defendant's conviction and 10-year sentence for residential burglary over his challenge that the trial court violated his constitutional right of privacy by considering improper factors at sentencing; fines and fees order modified.

¶ 2 Following a bench trial, defendant-appellant, John Allen, was convicted of residential burglary and sentenced to 10 years' imprisonment. On appeal, defendant does not challenge his conviction, but contends that, at sentencing, the trial court relied on improper aggravating factors relating to his personal life, which violated his constitutionally protected right of privacy. Defendant also contends that he is entitled to monetary credit, based on his pretrial custody,

against four fines. We modify the fines and fees order, and affirm defendant's conviction and sentence in all other respects.

¶ 3 Defendant was charged with one count of residential burglary. Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, a limited discussion of the facts at trial is sufficient.

¶ 4 The evidence at trial established that at 11 a.m. on September 29, 2013, Mary Washington left her first-floor apartment on South Kedvale Avenue and went to church. A police officer later arrived at the church and told her that someone had broken into her home. Ms. Washington returned home and found her apartment in disarray and her personal items were strewn about the apartment. A window inside a pantry off the kitchen had been shattered and there was broken glass on the floor. There was a red spot, which appeared to be blood, on the dining room floor. Ms. Washington did not know defendant and never gave him permission to enter her apartment.

¶ 5 Chicago police officer, Kamil Kuczek, responded to a call of a residential burglary in progress at the Kedvale address shortly before noon on September 29. The back door of the residence was open. Officer Kuczek entered the residence with Officer Gage, and two other officers went through the gangway to the front of the residence. When Officer Kuczek announced his office, defendant ran from a room at the back of the residence toward the living room. The police brought defendant down to the floor, and arrested him.

¶ 6 Chicago police officer, Vilmarys Morales, arrived at the residence with Officer Kuczek. Officer Morales and her partner walked through the gangway to the front of the residence. She observed defendant inside the residence running toward the front window. Officer Morales and

her partner returned to the rear of the building and entered the residence through a back door. Defendant was on the floor in custody. Another man ran out the residence through a front door.

¶ 7 Police technician, Patrick Doyle, collected swabs of the red stain from the dining room floor. Forensic evidence established that those swabs tested positive for blood and that the blood matched defendant's DNA.

¶ 8 The trial court found that the evidence overwhelmingly established that defendant was guilty of residential burglary.

¶ 9 At defendant's sentencing, in aggravation, the State stated that the presentence investigation report (PSI) showed that defendant had a prior Class 2 burglary conviction in 2012 for which he was sentenced to three years' imprisonment, and an armed robbery conviction in a 2007 case for which he was sentenced as a Class X offender and received seven years' imprisonment. Consequently, defendant was subject to mandatory sentencing as a Class X offender. The State further noted that the PSI indicated that defendant was asked how he felt about the people who were affected by his past arrests, and he replied that he did not feel anything about them. The State argued that, because defendant had not reflected on what he had done in the past, a long prison sentence would help him learn that lesson, and requested a sentence above the minimum six-year term.

¶ 10 In mitigation, defense counsel noted that the PSI detailed defendant's difficult childhood. Defendant was institutionalized in a juvenile court facility when he was about eight years old; was diagnosed with schizophrenia and bipolar disorder; and was hospitalized several times for mental health disorders. Defendant was in and out of juvenile hospitals from the age of 8 until about 14, which was the last time he received any formal education. His mother left him in one facility and never returned for him. As an adult, defendant was never hospitalized, but received

treatment for his mental health disorders each time he was in the Cook County system. Defendant was receiving treatment and taking medication throughout his custody in this case. Counsel further noted that defendant was raised by his grandmother, who also has custody of two of his four children. Defendant helped care for his children while he was living with his grandmother. Counsel requested the minimum term of six years' imprisonment.

¶ 11 In addition to the information discussed by the State and defense counsel, the PSI showed the following information. In 2007, defendant was convicted of possessing a firearm without a Firearm Owners Identification card and, in 2006, was sentenced to probation for possession of a controlled substance which had been terminated unsatisfactorily. Defendant reported that he first used marijuana when he was 13 years old, and that he used it "every day." Defendant stated that his past arrests have affected his children. When asked his opinion of the police, he replied "[t]hey do their job, but sometimes they lie – they lied on me on this case."

¶ 12 At the sentencing hearing, defendant stated in allocution:

> "I'm trying [to] get myself together so can I [*sic*] get back out here to my kids. I've got to go through this. I'm trying to close this chapter so I can start something new, go downstate, do whatever I have to do to get out so I can take care of my kids. Just go home, help my grandmother with my kids, just trying to get out."

¶ 13 After defendant's allocution, the circuit court made the following statement, which we set forth in full as it is the subject of defendant's appeal:

> "Thank you. Well, that's a wonderful sentiment and know I believe that every single person should do just that, be responsible, take care of your children. You have four. You've never been married. You fathered four separate children. You have no history of showing that you can support those children and you have other people taking

> care of them. And so you can tell me you just want to get it over with so you can take care of your kids. Words that sound, words that sound good, but I have to tell you Mr. Allen it's nothing but air. And you haven't done anything to really truly act like a father, you didn't stand up and be a father to those children. You're a biological father. You produced them. That doesn't take a lot. And that's not what being a father is. Being a father is being with your kids, not being in the penitentiary. You know what else it is, it's not being in somebody else's house. This lady, she had a right to feel secure in her own home. She had a right to leave her house, go to church and come back and not find that somebody had tossed the place. That somebody was in there trying to steal anything of value out of her house, that couldn't care less about her. And you don't walk into somebody's house, break into somebody's house, throw their stuff all over the place looking for their valuables and demonstrate that you care about anything. You care about only yourself and whatever it was that you were going to try to steal out of that house so you could sell it for whatever purpose. So, but frankly I'm not impressed with your statement. I wish that that was something that you actually believed and demonstrated by behavior, but you've got to walk the walk."

The court then went on to state:

> "Defendant is Class X mandatory. I note that he has those children and his incarceration does affect those people who are innocent and it's also sad in this particular case. You've had obviously some various medications administered to you, prescribed to help you with any disorders that you have. But you also chose, according to your own statement[,] to use marijuana every day since you were 13 years of age. ***
>
> ***

> *** More than half your life when you're not in jail. You thought it was a good idea to use some kind of mind altering substance and you don't have any acceptance of responsibility in this case. You are, as I described before, a caught inside burglar. They used DNA evidence in this case that was completely unnecessary. I guess it's DNA of somebody who has been down, but it just re-enforced the testimony of the case when you say that them, in reference to the police, oh they lied on you in this case. That I find to be disingenuous and clearly demonstrates that you don't accept responsibility. You want to blame it on somebody else. *** You want to pretend that you didn't go in there to steal from her house. Break[ing] into somebody's home is an important crime, it's a crime that even if you weren't Class X mandatory, carries with it a four year minimum sentence. But you go ahead and do it after you've already been convicted of another burglary and an armed robbery and possession of controlled substance charge. So there's very little mitigating about your behavior. If anything, it's aggravated."

¶ 14 The trial court sentenced defendant to 10 years' imprisonment as a Class X offender, assessed defendant $474 in fines and fees, and applied $80 in presentence monetary credit. Immediately thereafter, defendant filed a written motion to reconsider the sentence, which the court denied. Defendant appeals.

¶ 15 On appeal, defendant first contends that the trial court relied on improper aggravating factors at sentencing by considering several aspects of his personal life to impose a higher sentence, which violated his constitutionally protected right of privacy. Defendant specifically challenges the court's comments at the sentencing hearing that he has four children, has never been married, and has not taken care of his children. Defendant asserts that a person's decisions regarding procreation and relationships are constitutionally protected and cannot be used as

aggravating factors. He asks this court to reduce his sentence or remand his case for a new sentencing hearing before a different trial judge.

¶ 16 Defendant acknowledges that he did not preserve this issue for appeal as he did not object to the court's statements during the sentencing hearing and did not raise the issue in his motion for reconsideration of sentence. He argues, however, that this court may review his claim under both prongs of the plain error doctrine.

¶ 17 The State responds that the plain error doctrine does not apply because no error occurred. The State denies that the trial court implicated defendant's right of privacy or procreation and argues that, when the court's comments are read in context, the record shows that the remarks were in response to defendant's statement in allocution that he wanted to go home to take care of his children. The State also argues that the court did not rely on the challenged comments when determining defendant's sentence but, instead, considered many proper factors, including the seriousness of the crime, defendant's criminal history, daily drug use, continued defiance, and lack of remorse. The State asserts that defendant's three prior felony convictions alone justified the 10-year sentence.

¶ 18 The parties agree that we may only review the error in this case if we find that it constitutes plain error. The plain error doctrine is a limited and narrow exception to the forfeiture rule which can only be invoked after defendant first demonstrates that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Thereafter, defendant must show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that he was denied a fair sentencing hearing. *Id*. The burden of persuasion is on defendant, and if he fails to meet that burden, his procedural default will be honored. *Id*. We begin our analysis by examining whether a clear or obvious error occurred.

¶ 19 Class X offenders are subject to a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 10-year sentence was within the lower end of the statutory range. Defendant asserts that this court should apply a *de novo* standard of review of that sentence. We disagree. Whether the trial court considered an improper factor in aggravation at sentencing is reviewed for an abuse of discretion. *People v. Cotton*, 393 Ill. App. 3d 237, 264-65 (2009).

¶ 20 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range, it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 21 The Illinois Constitution mandates that criminal penalties be determined according to the seriousness of the offense, and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Ligon*, 2016 IL 118023, ¶ 10. In light of these objectives, "[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *People v. Fern*, 189 Ill. 2d 48, 55 (1999). The court's sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to weigh defendant's demeanor, credibility, general moral character, mentality, habits, social environment and age. *Alexander*, 239 Ill. 2d at 213. "The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.' " *Fern*, 189 Ill. 2d at 55, quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989).

¶ 22 Where the trial court relies on an improper sentencing factor or makes comments which indicate that it did not consider the statutory factors, a defendant may be entitled to a new sentencing hearing. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. However, even if the court considered an improper factor, remand for resentencing is required only if the consideration resulted in a greater sentence. *Id.* (citing *People v. Bourke*, 96 Ill. 2d 327, 332 (1983)). When reviewing the trial court's comments at sentencing, this court will not focus on isolated statements, but instead, will consider the record as a whole. *Id.* (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). Personal comments or observations by the court, though ill-advised, are generally inconsequential where the record shows that it otherwise considered proper sentencing factors. *Id.* ¶ 33.

¶ 23 Here, we find no error by the trial court in sentencing defendant to a term of 10 years' imprisonment, which falls within the statutory range and is only four years above the minimum term. *Jones*, 168 Ill. 2d at 373-74. The record shows that in imposing that sentence, the court expressly stated that defendant's incarceration would affect his children, which is a proper factor to consider in mitigation. 730 ILCS 5/5-5-3.1(a)(11) (West 2012). The court also noted that defendant took medication for his disorders.

¶ 24 Further, the court, in sentencing defendant, recognized that residential burglary was a serious offense, and that defendant had not accepted responsibility for this offense. The court pointed out that defendant was caught inside the home, but claimed that the police "lied on [him] in this case." The court also considered that defendant chose to use marijuana every day since he was 13 years old. Finally, the court noted that defendant had three prior convictions for another burglary, armed robbery, and possession of a controlled substance. The court expressly found that defendant's behavior was aggravating, and that there was very little mitigation.

¶ 25 Defendant's argument that the trial court violated his right of privacy by using his fatherhood and marital status to impose a higher sentence is unpersuasive. When read in context, the remarks clearly show that the court was directly responding to defendant's statement in allocution that he wanted to return home to take care of his children. See *Walker*, 2012 IL App (1st) 083655, ¶ 30. The court found that although defendant's words sounded good, his statement was incredible and meaningless. The court noted that defendant had no history of supporting or caring for his children, and that other people took care of them. The court expressly stated that it was not impressed with defendant's statement. However, there is no indication that the court used that finding as a consideration in determining the length of defendant's sentence. The record shows that after responding to defendant's statement, the court then considered the factors in aggravation and mitigation, as noted above.

¶ 26 The record, therefore, reveals that the trial court did not base defendant's sentence on criticism of his personal life, or any other improper factor. Instead, the court properly based the sentence on its consideration of the seriousness of the offense, the factors in aggravation and mitigation, defendant's criminal history which included a prior burglary, and the information contained in the PSI. *Id.* ¶ 33. The court then determined that a 10-year sentence was appropriate in this case.

¶ 27 This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 213. Based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern*, 189 Ill. 2d at 56. Since no error occurred, we conclude that the plain error doctrine does not apply and we honor defendant's forfeiture of the issue. *Hillier*, 237 Ill. 2d at 545-46.

¶ 28 Defendant next contends that his fines and fees order must be amended. He argues that he is entitled to have an additional $69 in presentence monetary credit applied against four fines. The State agrees that defendant is due a credit of $65 against two of the assessments, but contests the credit against the other two charges.

¶ 29 Neither defendant nor the State acknowledges his forfeiture of the issue. As discussed above, a defendant forfeits a sentencing issue that he fails to raise in the trial court through both a contemporaneous objection and a written post-sentencing motion. *Hillier*, 237 Ill. 2d at 544. Defendant asserts that he may request the *per diem* monetary credit at any time, including on appeal. *People v. Caballero*, 228 Ill. 2d 79, 82 (2008). The State does not argue forfeiture, but instead, addresses the merits of the issue.

¶ 30 Defendant's request for the *per diem* monetary credit is not merely requesting credit that is due against his fines, but rather, is raising a substantive issue regarding whether the assessments labeled as fees are fines, and therefore, is subject to forfeiture. See *People v. Brown*, 2017 IL App (1st) 150203, ¶¶ 40-41. However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue that defendant has forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, the State has not argued that the issue is forfeited, and thus, we address the merits of defendant's claims. The propriety of the imposition of fines and fees is a question of law which we review *de novo*. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 22.

¶ 31 Pursuant to section 110-14 of the Code of Criminal Procedure (725 ILCS 5/110-14 (West 2012)), a defendant is entitled to have a credit applied against his fines of $5 for each day he spent in presentence custody. Here, defendant spent 615 days in presentence custody, and is

therefore entitled to a maximum credit of $3,075. The record shows that defendant was assessed $474 in fines and fees, given credit of $80 against his fines, and has a remaining balance of $394.

¶ 32 The credit under section 110-14 can only be applied to offset fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). To determine whether an assessment is a fine or a fee, we consider the nature of the assessment rather than its statutory label. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Our supreme court has defined a "fine" as "punitive in nature" and "a pecuniary punishment imposed as part of a sentence on a person convicted of a criminal offense." (Internal quotation marks omitted.) *Id.* (quoting *Jones*, 223 Ill. 2d at 581). A "fee," on the other hand, is "a charge that 'seeks to recoup expenses incurred by the state,' or to compensate the state for some expenditure incurred in prosecuting the defendant." *Id.* (quoting *Jones*, 223 Ill. 2d at 582).

¶ 33 The parties agree that defendant is due full credit for the $15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2012)) and the $50 Court System Fee (55 ILCS 5/5-1101(c) (West 2012)). Defendant points out that, although these two charges are labeled fees, this court previously held that they are fines because they do not compensate the State for expenses incurred in the prosecution of defendant, and thus, they are subject to offset by the monetary sentencing credit. *People v. Wynn*, 2013 IL App (2d) 120575, ¶¶ 13, 17. We direct the clerk of the circuit court to amend the fines, fees and costs order to reflect a $15 credit for the State Police Operations Fee and a $50 credit for the Court System Fee.

¶ 34 Defendant next contends that he is entitled to credit against the $2 State's Attorney Records Automation fee assessed pursuant to 55 ILCS 5/4-2002.1(c) (West 2012), and the $2 Public Defender Records Automation fee assessed pursuant to 55 ILCS 5/3-4012 (West 2012). Defendant points out that these assessments apply to all defendants who are found guilty of an offense, and that the purpose of the assessments is to discharge the expenses associated with

establishing and maintaining automated record keeping systems. He argues that the assessments therefore do not compensate the State for prosecuting a particular defendant, and thus, they constitute fines rather than fees.

¶ 35 This court has repeatedly found that the $2 State's Attorney Records Automation fee and the $2 Public Defender Records Automation fee are compensatory in nature because they reimburse the State for its expenses related to maintaining its automated record-keeping systems. *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17; *People v. Green*, 2016 IL App (1st) 134011, ¶ 46 (Public Defender assessment is a fee, not a fine); *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30 (State's Attorney assessment is a fee, not a fine). In *Reed*, we explained that the State's Attorney's Office would have utilized its automated record-keeping systems in prosecuting the defendant when it filed charges with the clerk's office and made copies of discovery that were tendered to the defense. *Reed*, 2016 IL App (1st) 140498, ¶ 16. We further explained that because the defendant was represented by a public defender, counsel would have used the public defender's office record systems in representing the defendant. *Id.* at ¶ 17. Consequently, we concluded that the assessments were fees, not fines, and thus, not subject to offset by the *per diem* credit. *Id.* at ¶¶ 16-17; *Green*, 2016 IL App (1st) 134011, ¶ 46; *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; *Rogers*, 2014 IL App (4th) 121088, ¶ 30. *Contra People v. Camacho*, 2016 IL App (1st) 140604, ¶ 56 (finding the assessments are fines because they do not compensate the State for the costs associated with prosecuting a particular defendant).

¶ 36 We agree with the holdings in *Reed*, *Green*, *Bowen* and *Rogers*, and in this case, similarly conclude that the State's Attorney Records Automation fee and the Public Defender Records

Automation fee are fees, not fines. Accordingly, defendant is not entitled to offset these fees with his presentence custody credit.

¶ 37 For these reasons, we direct the clerk of the circuit court to correct the fines, fees, and costs order to reflect a credit of $65 to offset the $15 State Police Operations fee and the $50 Court System fee. Defendant's corrected total assessment is $329. We affirm defendant's conviction in all other respects.

¶ 38 Affirmed as modified; fines and fees order corrected.