2018 IL App (1st) 160815-U

No. 1-16-0815

Order filed October 9, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 15 CR 7675
	)	
TYRONE BROWN,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's sentence of nine years' imprisonment for unlawful possession of a weapon by a felon over his contention that his sentence is excessive in light of certain mitigating factors. Defendant's claim that five fees imposed against him are actually fines subject to offset by his presentence custody credit is without merit.

¶ 2 Following a bench trial, defendant Tyrone Brown was convicted of unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2014)) and sentenced, based on his criminal background, to a Class X sentence of nine years' imprisonment. Defendant

appeals, arguing that his sentence is excessive in light of the seriousness of the offense and certain mitigating factors. Defendant also challenges certain monetary assessments imposed by the trial court and requests that his presentence custody credit be applied to offset eligible fines. We affirm.

¶ 3 Defendant was charged by information with, in relevant part, two counts of UUWF (720 ILCS 5/24-1.1(a) (West 2014)) based on his April 18, 2015, possession of a handgun and bullets. Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts to the extent necessary to resolve the issues raised on appeal.

¶ 4 The facts adduced at trial showed that, at approximately 10 a.m. on April 18, 2015, a team of about 15 Chicago police officers, including Officers Patrick Kennedy, Efrain Carreno, and Kenneth Wojtan, executed a search warrant for a specific apartment at an address on South Cole Avenue. The apartment was the home of codefendant Gregory Armstrong. Kennedy, who was in a group of officers approaching the apartment building from the rear, observed defendant and another man standing on a second-floor balcony. The unknown man stared at Kennedy and defendant turned and went inside the building. Carreno, who was on the second-floor landing, saw defendant run into the apartment named in the warrant while holding his waistband and close the apartment door. Wojtan forced entry into the apartment which was comprised of, from front to back, a living room and a hallway that connected the living room with a back bathroom. From the front door, Wojtan observed defendant in the bathroom holding a firearm. Wojtan saw defendant turn and throw the firearm through the bathroom window. Defendant exited the bathroom and was detained by the police in the living room. The bathroom window, which was

open, overlooked the alley on the south side of the apartment building. Wojtan radioed a report of events to officers on the team.

¶ 5 Kennedy received the transmission from Wojtan, went to the alleyway, and observed Wojtan sticking his head out of an upstairs window. Kennedy looked over the fence into the adjoining property and saw a handgun. Kennedy recovered the weapon—a .357-caliber Glock with an extended magazine, containing two live rounds of ammunition. Wojtan was shown the handgun and confirmed that it looked like the item defendant threw out the window.

¶ 6 A certified copy of defendant's 2008 conviction for UUWF was admitted into evidence.

¶ 7 Defendant testified that on April 18, 2013, he was visiting his friend's apartment and his friend had gone to the store. As defendant was standing on the apartment's balcony, he saw police officers approaching the building. He walked back into the apartment to keep a "low profile." Defendant was in the living room when the police knocked on the door and announced their office. After defendant unlocked the door and opened it, he was immediately arrested. He denied that he was in the bathroom when police entered the apartment or that he threw anything through the bathroom window.

¶ 8 In rebuttal, the State, for purposes of impeachment, presented a certified copy of defendant's 2004 conviction for possession of a stolen motor vehicle (PSMV).

¶ 9 The court found defendant guilty of both counts of UUWF. The defendant filed a motion for new trial, which the court denied prior to sentencing.

¶ 10 Defendant's presentence investigation (PSI) report reflected that he was born on October 14, 1981, in Chicago. Defendant described his childhood as normal. Defendant reported that he was engaged to be married to the mother of his two young children. He dropped out of high

school during his second year, but earned his general equivalency diploma (GED) in 2002. Prior to his arrest in this case, defendant worked as a mail opener for City Copying Company and was enrolled in classes for electrical work. He reported that while incarcerated, he participated in the Inmate Behavioral Modification program, Male Awareness program, and yoga. Defendant reported that he suffered a "mild stroke" while in custody and that his health was "o.k." and improved with medication.

¶ 11 Defendant's PSI reflected that his criminal history was comprised of both juvenile and adult offenses. Defendant's juvenile history includes adjudications of delinquency for vehicular hijacking, aggravated battery, and aggravated discharge of a firearm. His criminal history as an adult includes, aside from the convictions presented at trial, a 2003 PSMV conviction for which he received two years' probation.

¶ 12 At sentencing, the trial court heard arguments in aggravation and mitigation. The State argued that the court should sentence defendant to a term in the middle of the Class X sentencing range because his criminal record was comprised of numerous felonies and included offenses involving firearms. Defense counsel argued that the court should sentence him to the minimum term of six years' imprisonment based on the mitigating evidence in this case, which counsel highlighted at length. Counsel noted that the UUWF offenses in this case did not result in any harm and that defendant's criminal record showed that, before the instant offense, he went eight years without a conviction. Counsel further noted that defendant had earned his GED and had a good employment history, as exemplified by a letter written from City Copy on defendant's behalf. Counsel also pointed out that defendant participated in the Inmate Behavioral Modification program, Health and Wellness program, and yoga classes while in prison.

Defendant exercised his right to speak in allocution and emphasized the nonviolent nature of the instant offenses, his use of his time in prison, and the financial, spiritual, and mental damage caused by his imprisonment. He also informed the court that he had a stroke while in custody.

¶ 13 Prior to pronouncing defendant's sentence, the trial court merged the two counts of UUWF. The court noted that it had reviewed the PSI report and the matters presented in mitigation and aggravation, including letters written on defendant's behalf and defendant's statement in allocution. The court noted that it was required, based on defendant's criminal background, to sentence him to a Class X sentence of between 6 and 30 years' imprisonment. In doing so, the court stated that:

> "I don't believe the minimum is appropriate in this case based upon your background and the other information I have received; however, I don't believe that it is midrange either. I will sentence you to 9 years in the Illinois Department of Corrections—that's three year's above the minimum—I will give you time of incarceration up to today's date and you will be on a 3-year period of supervisory release."

The court also assessed fines and fees and credited defendant with 314 days of presentence custody. Defendant filed a motion to reconsider sentence, which the court denied.

¶ 14 On appeal, defendant first argues that his nine-year sentence for UUWF was excessive in light of the seriousness of the offense and certain mitigating factors that are indicative of his strong rehabilitative potential.

¶ 15 It is well-settled that a trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 201, 212 (2010). A trial court's sentencing decisions will not be

altered by a reviewing court absent an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36. The trial court's sentencing decision is entitled to great deference because it is generally in a better position to determine the sentencing factors than the reviewing court. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The reviewing court may not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Alexander*, 239 Ill. 2d at 213. Further, a sentence which falls within the statutory range is not an abuse of discretion unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* at 212.

¶ 16 Absent some contrary indication other than the sentence imposed, the trial court is presumed to have considered all relevant factors in aggravation and mitigation. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48. While the sentencing court may not ignore evidence in mitigation, it may determine the weight to attribute to it. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). The seriousness of the crime is the most important factor in determining a sentence, and a defendant's rehabilitative potential need not be given greater weight. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). In addition, the trial court has no obligation to recite and assign a value to each mitigation factor. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Rather, a defendant must affirmatively establish that the sentencing court did not consider the relevant factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 17 In this case, defendant was convicted of UUWF, a Class 2 felony. The trial court sentenced him, based on his background, to a Class X sentence of nine years' imprisonment. See 730 ILCS 5/5-4.5-95(b) (West 2014). The sentencing range for a Class X offense is 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2014). As a result, defendant's sentence of

nine years' imprisonment falls within statutory sentencing range, and, therefore, is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 18 Defendant does not dispute that he was subject to a mandatory Class X sentence, or that his sentence fell within the permissible range and is presumed proper. Rather, he argues that the sentence is excessive in light of the seriousness of the offense and his rehabilitative potential. Specifically, he argues that the seriousness of the offense weighed in favor of a lesser sentence because there was no evidence that he owned the handgun, knew it was loaded, or intended to use it. Defendant also maintains that evidence of his rehabilitative potential warrants a lesser sentence. In support of this argument, defendant highlights: the nonviolent nature of his criminal history; the eight-year gap between his conviction in this case and the conviction preceding it; his poor health as a result of a stroke while in custody; his participation in the Inmate Behavioral Modification program, Male Awareness program, and yoga while in prison; and his strong family ties to his fiancé and their two children, as well as to his mother, sister, and cousins.

¶ 19 The State responds that the sentence was not excessive where it was within the applicable sentencing range and defendant has failed to show that the trial court did not consider this mitigating evidence. We agree with the State.

¶ 20 As mentioned, absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. That presumption may be overcome by an affirmative showing that the sentencing court failed to consider factors in mitigation *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In this case, defendant is unable to make such a showing.

¶ 21 The record shows that the trial court presided over defendant's trial and heard evidence concerning the nature of the offense. The record also shows that that the court considered the mitigating and aggravating evidence presented by both parties at sentencing, including the mitigating evidence now cited by defendant on appeal. In announcing sentence, the court expressly stated it had considered both mitigating and aggravating evidence, which included defendant's PSI report, both counsels' arguments at sentencing, defendant's statements in allocution, and letters written to the court on defendant's behalf. Defendant's PSI report and defense counsel's argument, included the mitigating factors now relied upon by defendant *i.e.* the eight-year gap between his conviction in this case and the conviction preceding it; his poor health as a result of a stroke while in custody; his participation in various behavioral programs while in prison; and his strong family ties. In sentencing defendant to a term of nine years' imprisonment—"three years above the minimum"—the court explained that it had found neither the minimum term requested by the defense, nor the "midrange" term requested by the State, appropriate in defendant's case.

¶ 22 Given this record, defendant is essentially asking us to reweigh the sentencing factors and substitute our judgment for that of the trial court. As mentioned, this we cannot do so. See *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20 (a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). As the trial court is presumed to have considered all evidence in mitigation, and the record suggests that it did, we find that the trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment, a term three years above the statutorily required minimum.

¶ 23 Defendant next argues that he is entitled to apply his presentence monetary credit against five assessments which are labeled as fees, but are actually fines.

¶ 24 Initially, we note that defendant did not raise these challenges at trial and they are, therefore, arguably forfeited. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). The State acknowledges the forfeiture, but asserts that the *per diem* monetary credit is a statutorily mandated benefit that cannot be waived. See *People v. Caballero*, 228 Ill. 2d 79, 83 (2008). The State further asserts that defendant's claims may be considered under the plain error doctrine or as a claim of ineffective assistance of counsel, and addresses the merits of his claims. We disagree.

¶ 25 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. Nor are defendant's challenges reviewable under the plain error doctrine (*People v. Griffin*, 2017 IL App (1st) 143800, ¶ 9, *pet. for leave to appeal granted*, No. 122549 (Nov. 22, 2017)), or as a claim of ineffective assistance of counsel (*People v. Rios-Salazar*, 2017 IL App (3d) 150524, ¶ 8 (failure to object to fines and fees is not an error of constitutional magnitude that will support a claim of ineffectiveness), *pet. for leave to appeal granted*, No. 123052 (Mar. 21, 2018)). However, the rules of forfeiture and waiver also apply to the State, and where the State fails to argue that defendant forfeited the issue, it waives the forfeiture. *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46. Here, although the State acknowledges the forfeiture, it asserts that this court may reach the issues, thereby waiving the forfeiture. We therefore 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.

¶ 26 A defendant incarcerated on a bailable offense who does not supply bail, and against whom a fine is levied, is allowed a credit of $5 for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2014). Here, the record reflects that defendant was entitled to credit for 314 days spent in presentence custody. Therefore, at $5-per-day, he was entitled to $1,570 (314 days multiplied by $5) credit available toward his fines.

¶ 27 Under the plain language of the Code, "the credit applies only to 'fines' that are imposed pursuant to a conviction, not to any other court costs or fees." *People v. Tolliver*, 363 Ill. App. 3d 94, 96 (2006). Whether an assessment is a fine or a fee depends on its purpose. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Fees are "intended to reimburse the state for a cost incurred in the defendant's prosecution," while fines are punitive in nature and "part of the punishment for a conviction." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 63 (citing *People v. Jones*, 223 Ill. 2d 569, 582 (2006)).

¶ 28 Defendant contends that he is entitled to credit against five fees: a $190 felony complaint fee (705 ILCS 105/27.2a(w)(1)(A) (West 2014)); a $15 clerk automation fee (705 ILCS 105/27.3a(1) (West 2014)); a $15 document storage fee (705 ILCS 105/27.3c(a) (West 2014)); a $2 State's Attorney records automation fee (55 ILCS 5/42002.1(c) (West 2014)); and a $2 public defender records automation fee (55 ILCS 5/3-4012 (West 2014)). He argues that these assessments are fines rather than fees because they do not reimburse the State for the costs

incurred in prosecuting a defendant, but, instead, finance a component of the court system for the general costs of litigation.[1]

¶ 29 However, this court has already considered challenges to these assessments and determined that they are fees and, therefore, not subject to presentence incarceration credit. See *Tolliver*, 363 Ill. App. at 97 ("We find that all of these charges are compensatory and a collateral consequence of defendant's conviction and, as such, are considered 'fees' rather than 'fines' "); *People v. Bingham*, 2017 IL App (1st) 143150, ¶¶ 41-42 (relying on *Tolliver* and finding the felony complaint assessment to be a fee); *People v. Brown*, 2017 IL App (1st) 142877, ¶ 81 (finding the clerk automation fee and document storage fee are fees not subject to offset by presentence incarceration credit); *Brown*, 2017 IL App (1st) 142877, ¶¶ 73, 75 (finding the State's Attorney records automation fee and Public Defender records automation fee to be fees); *People v. Reed*, 2016 IL App (1st) 140498, ¶¶ 16-17 (same); *Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65 (finding the State's Attorney records automation assessment and the public defender records automation assessment are both fees because they are meant to reimburse the State for expenses related to automated record-keeping systems); *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). We decline defendant's invitation to revisit these rulings. Accordingly, defendant is not entitled to offset these five fees with his presentence custody credit.

[1] Whether the felony complaint filed, automation, document storage, State's Attorney records automation, and public defender records automation assessments are fees or fines is currently pending before the Illinois Supreme Court in *People v. Clark*, 2017 IL App (1st) 150740-U, *pet. for leave to appeal granted*, No. 122495 (Sept. 27, 2017).

¶ 30 In sum, we find defendant's nine-year sentence for UUWF was not excessive; and that the five fees at issue in this case—the $190 felony complaint fee, $15 clerk automation fee, $15 document storage fee, $2 State's Attorney records automation fee, and $2 public defender records automation fee—are fees, not fines, and are thus not subject to offset by defendant's presentence incarceration credit.

¶ 31 For the reasons stated, we affirm the judgment of the Circuit Court of Cook County.

¶ 32 Affirmed.