

NOTICE

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2014 IL App (4th) 130289-U

NO. 4-13-0289

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 17, 2014

Carla Bender

4th District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
CEDRICK VANCE GASSAWAY,)	No. 12CF789
Defendant-Appellant.)	
)	Honorable
)	Scott Drazewski,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Presiding Justice Appleton and Justice Steigmann **concurred** in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 13 years' imprisonment.

¶ 1 In November 2012, a jury convicted defendant, Cedrick Vance Gassaway, of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012) (less than 1 gram of a substance containing cocaine)). In December 2012, the trial court sentenced him to 13 years in prison.

¶ 2 Defendant appeals, arguing his sentence was excessive where the trial court failed to consider his rehabilitative potential. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 On August 21, 2012, the State charged defendant with one count of unlawful delivery of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) for delivering less than one gram of a substance containing cocaine to a confidential informant working for the Bloomington police department's vice unit.

¶ 5 During defendant's November 2012 jury trial, Bloomington police detective Kevin Raisbeck testified he conducted a controlled buy with a confidential informant on April 9, 2012. The informant arranged to meet with defendant and purchase cocaine. The confidential informant testified he purchased \$100 worth of cocaine from defendant. He could not remember, but he "thought [he] sat the money down on the window or something." He explained, that way "if anyone was watching they wouldn't see a hand-to-hand." The informant also testified he was not sure, but he thought defendant handed the cocaine directly to him. However, he testified defendant may have put the cocaine down on the windowsill. The informant testified he was positive defendant was the individual involved in the transaction.

¶ 6 Detective Tom McClusky testified he was observing the controlled buy from a nearby ditch. He observed something changing hands between defendant and the informant. McClusky heard defendant twice state, "you didn't get that from me."

¶ 7 An August 2, 2012, videotaped interview of defendant by Raisbeck was played for the jury. During the interview, defendant initially admitted giving the confidential informant cocaine but denied receiving any money. After Raisbeck explained taking money for the exchange was not necessary for delivery, defendant changed his story and maintained he never actually handed the informant the cocaine. Defendant offered to assist Raisbeck as an informant in the future but stated he did not know anyone he could set up.

¶ 8 Defendant rested without presenting any evidence.

¶ 9 Thereafter, the jury found defendant guilty of unlawful delivery of a controlled substance.

¶ 10 On November 9, 2012, defendant filed a motion for a new trial, arguing (1) the evidence was insufficient to convict him beyond a reasonable doubt, (2) he did not receive a fair trial, and (3) he was denied due process and equal protection of the laws. The trial court denied the motion.

¶ 11 During defendant's December 27, 2012, sentencing hearing, the State, citing defendant's extensive criminal history, requested a 16-year sentence. Defendant's trial counsel asked for a sentence "closer to the minimum," arguing, *inter alia*, (1) the instant offense only involved approximately half a gram of cocaine, (2) defendant was not a "big time drug dealer," and (3) defendant's history reflected only drug-related crimes caused by his substance abuse issues. The trial court stated it considered the presentence investigation report (PSI), the statutory factors in aggravation and mitigation, defendant's allocution, and counsel's arguments. The court noted defendant was being sentenced for either his eleventh or twelfth felony conviction and stated:

"You know I can't give you probation, nor would that seriously be considered even if that was an option in your case based upon your previous criminal history and your lack of success. I note that, just because of the frequency with which you committed crimes over the course of your life, that you were never actually placed upon a formal term of supervised release for probation, I think you had

conditional discharge one time, but that actually ran concurrent with a [Department of Corrections (DOC)] sentence, but, anyway, your lack of success on parole, that being once you had been released from DOC.

You have been to [DOC], by my count, and, again, it doesn't really matter if I'm off by one, nine times. That's a lot. I mean, especially for someone who is as young as you are, that being 44 years old. So, if you look at the fact that I can sentence you [to] between six and 30 [years] and those factors that I just took into consideration, there are all kinds of reasons that have been enunciated why I should go ahead and take the [S]tate's recommendations and say it's justified, and, realistically it would be, but I'm not going to do that."

The court then sentenced defendant to 13 years in prison. The court stated the sentence took into consideration "the promise that still is there with [defendant's] life" and reflects the fact he made some efforts to use the resources available to him while in jail.

¶ 12 On December 28, 2012, defendant filed a motion to reconsider sentence. During the hearing on the motion, defendant again requested a sentence closer to the minimum, arguing the underlying offense was not physically violent and was the result of his narcotics addiction. In denying the motion, the trial court explained it took into account "all the factors in mitigation *** defense counsel *** brought to the court's attention *** as well as other statutory and non-

statutory factors in mitigation." According to the court, those factors were the reason it imposed a sentence closer to 6 years, and not 30 years, in prison.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court abused its discretion in sentencing him to 13 years' imprisonment. Specifically, defendant contends his sentence was excessive because the court failed to consider his rehabilitative potential. We disagree.

¶ 16 A. Excessive-Sentence Claim

¶ 17 In imposing sentence, the Illinois Constitution requires a trial court to balance the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11; *People v. Lee*, 379 Ill. App. 3d 533, 539, 884 N.E.2d 776, 781 (2008). In doing so, the trial court must consider a number of aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2012). Because the trial court is in the best position to weigh these factors, the court's sentencing judgment is entitled to great deference and will not be reversed absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 629 (2000); *Lee*, 379 Ill. App. 3d at 539, 884 N.E.2d at 781. Accordingly, we will not substitute our judgment for that of the trial court simply because we could have weighed the factors differently. *People v. Jones*, 376 Ill. App. 3d 372, 394, 876 N.E.2d 15, 34 (2007).

¶ 18 It is undisputed defendant—because of his criminal history—was required to be sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2012). As such, he was eligible for a maximum sentence of 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012) (nonextended-term sentencing range for a Class X felony is between 6 and 30 years'

imprisonment). The State requested a 16-year sentence. Defendant asked for a sentence "closer to the minimum." The trial court fashioned a 13-year prison sentence, which is within the statutorily permissible range. A sentence within the statutory range will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Crenshaw*, 2011 IL App (4th) 090908, ¶ 22, 959 N.E.2d 703.

¶ 19 In this case, the trial court stated it considered all the evidence in mitigation and aggravation. Defendant's PSI, which the court also stated it considered, shows numerous felony convictions, including the following: residential burglary (1991); residential burglary (1992); escape from house arrest/work release (1993); burglary (1995); manufacture and delivery of a controlled substance (1996); possession of a controlled substance (2000); manufacture and delivery of a controlled substance (2002); possession of a controlled substance (2005); and possession of a controlled substance in a penal institution (2007). The PSI also reflects defendant had repeatedly been returned to custody for numerous parole violations. At the time the instant offense was committed, defendant had just served an 8-year prison sentence and was on mandatory supervised release. The court also heard evidence in mitigation (1) defendant was engaged in bible study and church worship, (2) defendant had completed a life-skills course, a recovery program, and his general equivalency degree, and (3) his criminal history was comprised of nonviolent drug-related offenses attributable to his substance-abuse issues.

¶ 20 While defendant argues the trial court did not adequately consider his rehabilitative potential, there is a presumption the sentencing court considered mitigating evidence before it. *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). Further, the

"existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed." *People v. Phippen*, 324 Ill. App. 3d 649, 652, 756 N.E.2d 474, 477 (2001). In addition, "[t]he trial court is not required to expressly indicate its consideration of all mitigating factors and what weight each factor should be assigned." *People v. Kyse*, 220 Ill. App. 3d 971, 975, 581 N.E.2d 285, 288 (1991). Instead, it is presumed a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record the trial court failed to consider mitigating factors. *Flores*, 404 Ill. App. 3d at 158, 935 N.E.2d at 1155. Our review of the record reveals no such failure. Here, defendant was eligible for a 30-year sentence. We cannot say the court abused its discretion by sentencing defendant to 13 years in prison.

¶ 21

B. Fines and Fees

¶ 22 The State raises a number of fines and fees issues. While we question the value in continuing this practice, we will address each issue in turn. We note defendant did not file a reply brief addressing the State's concerns.

¶ 23 The State first argues the \$10 arrestee's medical assessment (730 ILCS 125/17 (West 2012)) is a mandatory assessment, which should have been imposed by the trial court. We agree. See *People v. Warren*, 2014 IL App (4th) 120721, ¶ 113 (quoting 730 ILCS 125/17 (West 2010)) (arrestee's medical assessment is to be imposed " 'for each conviction or order of supervision' "). Here, the court's December 27, 2012, written supplemental sentencing order shows the court did not assess it. We agree the assessment should be assessed by the court on remand. See *Warren*, 2014 IL App (4th) 120721, ¶ 112 (arrestee's medical fee is a fine); *People*

v. Rexroad, 2013 IL App (4th) 110981, ¶ 52, 992 N.E.2d 3 (fines are to be imposed by the trial court, not the circuit clerk).

¶ 24 The "Notice to Party," which is prepared by the circuit clerk and lists various fines and costs, shows certain assessments not imposed by the trial court. The State correctly concedes the \$5 State Police operations fee (705 ILCS 105/27.3(a) (West 2012)) should be vacated because it is a fine improperly imposed by the circuit clerk. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, 979 N.E.2d 1030 (State Police operations fee is a fine); *People v. Alghadi*, 2011 IL App (4th) 100012, ¶ 20, 960 N.E.2d 612 (fines imposed by the circuit clerk are void). Accordingly, we vacate the \$5 State Police operations assistance assessment.

¶ 25 The State next argues the \$10 probation and court services operations assessment should be vacated because it violates *ex post facto* principles as it became effective in July 2012 (see 705 ILCS 105/27.3a(1.1) (West 2012) (added by Pub. Act 97-761 (eff. July 6, 2012)), *i.e.*, after defendant's April 9, 2012, offense. We disagree. "The prohibition against *ex post facto* laws applies only to laws that are punitive. It does not apply to fees, which are compensatory instead of punitive." *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 30, 13 N.E.3d 1280 (quoting *People v. Dalton*, 406 Ill. App. 3d 158, 163, 941 N.E.2d 428, 434 (2010)). The assessment in this case is compensatory in nature because the \$10 charge is to reimburse the State for costs incurred by the probation office in conducting a presentence investigation and preparing the PSI. See *Rogers*, 2014 IL App (4th) 121088, ¶ 37, 13 N.E.3d 1280. As such, it is a fee not subject to an *ex post facto* violation. *Rogers*, 2014 IL App (4th) 121088, ¶ 39, 13 N.E.3d 1280. We note, a probation assessment *would* constitute a fine in cases where the probation office is not involved in a defendant's prosecution. *Rogers*, 2014 IL App (4th) 121088,

¶ 38, 13 N.E.3d 1280. Because we have found the \$10 probation and court services operations assessment was a fee in this case and not a fine, we conclude the circuit clerk did not improperly assess it.

¶ 26 The final issue raised by the State involves a \$1,000 drug treatment assessment imposed by the trial court. The "Notice to Party" shows a \$355 drug treatment assessment. Next to that assessment is a handwritten note, which reads "\$645-PTDC." This notation presumably refers to defendant's \$645 in pretrial detention credit discussed at sentencing. While the State infers the circuit clerk improperly used the \$645 credit to reduce the assessment, the State does not cite to authority or clearly explain what is wrong with the reduction. Instead, the State urges us to remand for "an explanation for the disparity between what the court expressly ordered and what the clerk later assessed." However, under the circumstances we find remand for such a purpose unnecessary. It appears clear the clerk reduced the assessment by the amount of pretrial detention credit, which, again, the State does not argue was improper.

¶ 27

III. CONCLUSION

¶ 28 For the foregoing reasons, we (1) affirm the trial court's judgment, (2) vacate the \$5 State Police Operations Fee, and (3) remand for (a) the imposition of the mandatory \$10 arrestee's medical assessment by the trial court and (b) issuance of an amended "Notice to Party" so stating. We also award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed in part and vacated in part; cause remanded.