2015 IL App (1st) 130952-U

SIXTH DIVISION
June 12, 2015

No. 1-13-0952

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. 12 CR 9359
	)	
MARK WARREN,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's conviction and prison sentence, as the trial court did not abuse its discretion by sentencing defendant, a Class X offender, to 18 years in prison for burglary. However, we vacate the Violent Crime Victim Assistance (VCVA) fine and Electronic Citation fee, and we modify the fines and fees order by awarding defendant $80 in presentence credit to offset the $30 Children's Advocacy Center fine and $50 Court System fine.

¶ 2 After a bench trial, defendant, Mark Warren, was convicted of burglary, sentenced as a Class X offender to 18 years in prison, ordered to pay various assessments, and awarded 267

days of presentence custody credit. He appeals, arguing (1) his 18-year sentence was excessive, (2) two of the assessments were improperly imposed, and (3) he is entitled to an $80 credit for the time he spent in presentence custody. For the reasons that follow, we affirm defendant's sentence, vacate the challenged assessments, and award defendant $80 in presentence credit.

¶ 3 At trial, Chicago police officer Kevin Clenna testified that he and his partner, Officer Paul Bower, responded to a call at approximately 4:45 p.m. on May 6, 2012. The call indicated that a black man wearing black clothing was pulling on car doors in the 500 or 600 block of Willow Street. As Clenna and Bower approached the intersection of Willow and Larrabee, they observed defendant, who matched the provided physical description, with his torso and hands inside the trunk of a vehicle. The officers drove past, made a U-turn at Larrabee, and returned to see defendant starting to close the trunk of the car.

¶ 4 Clenna approached defendant and asked him who the vehicle belonged to, and defendant responded, "I don't know." Upon patting defendant down, the officers recovered a small gift card or debit card, a coin holder containing coins, and a candy bar. They also recovered a white plastic bag from defendant's hand that contained a sweatshirt with a Hillshire Farms logo. Officer Bower ran the car's license plates to determine and seek out the vehicle's owner.

¶ 5 Edgar Barnett, the owner of the car, testified that he arrived to the scene shortly before 5 p.m. The officers showed him a coin holder with coins, a candy bar, "a little discount card," and a sweatshirt. Barnett recognized all of the items. The sweatshirt was in the trunk of Barnett's car and the coin holder, candy bar, and gift card were in the front seat. Barnett told the officers he did not recognize defendant. He denied giving defendant permission to get into his car or take any of the recovered items.

¶ 6 The trial court found defendant guilty of burglary. At a later sentencing hearing, the State noted that defendant refused to answer any questions during the presentence investigation report (PSI). The State also argued in aggravation that this was defendant's 12th felony conviction and he was on parole for attempted burglary relating to a car when he committed the present offense. The State noted defendant's prior convictions included convictions for car burglary, possession of a stolen motor vehicle, and auto theft. The State asked for a substantial sentence for defendant, arguing he was a 53-year-old "career car burglar" who had "not learned his lesson." Defense counsel asked for a minimum sentence due to the nature of defendant's crime, noting he stole a sweatshirt, some candy, and some change.

¶ 7 The trial court found that defendant was required to be sentenced as a Class X offender based on his 12 felony convictions. The court indicated that it had listened to the presentations of both sides and had reviewed the "extensive background" of defendant, which included 20 convictions, of which 12 were felonies. The court stated that defendant was a "thief" and "car burglar" who "continue[d] to prey on cars and people throughout the jurisdiction" despite 20 prior attempts to stop defendant from doing so. The court told defendant that "[t]he only thing that is going to stop you is time; time that you'll be too old to do this anymore." The court found that based upon the facts of the case and considering the PSI, the factors in aggravation and mitigation, the parties' presentations, and the fact that defendant was on parole for a similar type of offense, a minimum sentence would be inappropriate. The court then sentenced defendant to 18 years in prison, ordered him to pay $459 in fines and fees, and awarded defendant 267 days' credit for time spent in presentencing custody. It then denied defendant's motion to reconsider sentence. This appeal followed.

¶ 8 On appeal, defendant argues his 18-year sentence was excessive because it was manifestly disproportionate to the nature of his offense. He contends the court sentenced him for his prior criminal history, not his underlying burglary offense. He observes that he only took items of minimal value (a sweatshirt, coin holder, gift card, and candy bar). He further notes the car was unoccupied, he did not use or threaten force, and nobody sustained any injuries as a result of the burglary.

¶ 9 All penalties are to be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. Nonetheless, a trial court has broad discretion in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such deference is given because the trial court, having observed the defendant and the proceedings, is in a much better position to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Snyder*, 2011 IL 111382, ¶ 36. Accordingly, we may not alter a sentence on review absent an abuse of the trial court's discretion. *Alexander*, 239 Ill. 2d at 212. "A sentence will be deemed an abuse of discretion where the sentence 'is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 10 The trial court found defendant guilty of burglary, a Class 2 felony ordinarily carrying a possible prison sentence of three to seven years. 720 ILCS 5/19-1(b) (West 2012); 730 ILCS 5/5-4.5-35(a) (West 2012). However, defendant's prior felony convictions required that the trial court sentence him as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2012). A Class X sentence

carries a possible term of between 6 and 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 11 The trial court did not abuse its discretion in sentencing defendant to 18 years in prison, a sentence well within the statutory range. Defendant correctly notes that the seriousness of a defendant's offense "is the most important factor" to be considered by the trial court (*People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010)) and that he only took items of minimal value without using or threatening force. Nonetheless, the trial court was also required to consider that defendant committed the present offense while he was on parole and that he had an extensive criminal history including 19 total prior convictions and 11 prior felony convictions. 730 ILCS 5/5-5-3.2(a)(3), (12) (West 2012). Most notably, many of defendant's prior convictions were for theft-related offenses including burglary, possession of a stolen motor vehicle, and auto theft. Indeed, defendant was on parole for attempted burglary at the time of his burglary. The fact that defendant, who was 53 years old, repeatedly chose to continue committing thefts and burglaries after receiving more lenient sentences showed he had little potential for rehabilitation. See *People v. Ramos*, 353 Ill. App. 3d 133, 138 (2004) (where a defendant's rehabilitative potential can be gleaned in part from his criminal history, a defendant's "repeated commission" of theft-related offenses "suggests that he has almost no likelihood of ever rehabilitating himself"). Indeed, as the trial court noted, defendant continued to "prey on cars and people" despite numerous prior efforts to deter defendant from doing so; accordingly, the court determined the "[o]nly thing" that would stop defendant was "time." Furthermore, defendant presented almost no evidence in mitigation other than to note the minimal nature of his present crime. He refused to cooperate with the preparation of his PSI. In allocution, defendant simply challenged his status

as a Class X offender because he described the enhanced sentence as "unconstitutional." In light of all of the foregoing, we find no abuse of discretion in the trial court's 18-year sentence.

¶ 12 Defendant's claim that the trial court failed to consider the seriousness of his offense as the most important sentencing factor is without merit. The record clearly reflects that the court considered the pertinent sentencing factors, as it stated it had considered the facts of the case, the PSI, the factors in aggravation and mitigation, the presentations of the parties, and the fact that defendant was on parole for a similar offense at the time of his burglary. The court was not required to "recite and assign value" to each of these factors. (Internal quotation marks omitted.) *Brazziel*, 406 Ill. App. 3d at 434. Even though the minimal nature of defendant's offense was the most important sentencing factor to be considered, the court was not precluded from imposing an 18-year sentence where defendant was 53 years old, had 11 prior felony convictions, continued to commit thefts and burglaries despite prior more lenient sentences, was on parole for attempted burglary at the time he committed his offense, and presented little evidence in mitigation. Defendant's argument essentially asks this court to reweigh the sentencing factors and substitute our judgment for that of the trial court, which is "an improper exercise of the powers of a reviewing court." *Alexander*, 239 Ill. 2d at 214-15.

¶ 13 We disagree with defendant that even taking into account his prior criminal history, his 18-year sentence was disproportionate to the nature of the offense. In support of his claim, defendant cites several cases where the sentence of a defendant who had other convictions was reduced. See *People v. Stacey*, 193 Ill. 2d at 210-11, *People v. Maggette*, 195 Ill. 2d 336, 355 (2001), and *People v. Center*, 198 Ill. App. 3d 1025, 1034-35 (1990). Those cases are factually distinguishable from defendant's case. In *Center*, the defendant was 23 years old and employed,

had only two prior convictions, and served primarily as the lookout in a "foiled" burglary. *Center*, 198 Ill. App. 3d at 1033-34. In *Maggette*, the defendant's burglary conviction stemmed from an incident in which he entered the home of the victim and committed criminal sexual assault, and he received consecutive 8- and 10-year sentences for his criminal sexual assault convictions in addition to his consecutive 10-year sentence for residential burglary. *Maggette*, 195 Ill. 2d at 345. In *Stacey*, the defendant received consecutive 25-year prison terms for criminal sexual abuse and aggravated criminal sexual abuse where he "momentarily" grabbed the breasts of two young girls. *Stacey*, 193 Ill. 2d at 207-08, 210. Moreover, the supreme court has rejected the use of comparative sentencing as a means of showing the trial court abused its discretion. See *People v. Fern*, 189 Ill. 2d 48, 62 (1999) ("[i]f a sentence is appropriate given the particular facts of that case, it may not be attacked on the ground that a lesser sentence was imposed on a similar, but unrelated, case"). Furthermore, we note that a far more analogous set of facts was presented in *People v. Lampley*, 2011 IL App (1st) 090661-B. There, the court affirmed the defendant's 15-year sentence for burglary even though he only stole "minimal proceeds" from an unoccupied car without using violence or threatening harm. *Id.* ¶ 41. The court noted, among other things, that the defendant had five prior felony convictions. *Id.* ¶ 45. Similarly, here, defendant's 18-year sentence was not an abuse of discretion in light of his criminal record even though defendant took items of only minimal value without the use or threat of force.

¶ 14 Defendant next argues, and the State concedes, that three adjustments must be made to the fines and fees order. First, we vacate the $20 Violent Crime Victim Assistance (VCVA) fine because other fines were assessed here. See 725 ILCS 240/10(c) (West 2010) (effective through

July 2012) (allowing a $20 fine where a defendant is convicted of one of several enumerated offenses and "no other fine is imposed"). Second, we vacate the $5 Electronic Citation fee because defendant's conviction of felony burglary is not an offense for which this fee can be imposed. See 705 ILCS 105/27.3e (West 2012) (a $5 fee "shall be paid by the defendant in any traffic, misdemeanor, municipal ordinance, or conservation case"). Third, we find that the $30 Children's Advocacy Center fine is offset by defendant's per diem presentence custody credit. See *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 19.

¶ 15 Finally, the parties dispute whether defendant is entitled to apply presentence custody credit toward the $50 Court System assessment, which was imposed pursuant to section 5-1101(c) of the Counties Code (55 ILCS 5/5-1101(c) (West 2012)). While defendant argues the Court System assessment is a fine, the State contends it is a fee.

¶ 16 A defendant is entitled to a $5-per-day credit for each day he spends in presentence custody. 725 ILCS 5/110-14(a) (West 2012). Such credit may only be applied to offset eligible fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580 (2006). In this case, the trial court awarded defendant 267 days' credit for time spent in presentence custody. Therefore, defendant is entitled to an available credit of up to $1,335 ($5 per day for 267 days), which may be applied to any eligible fines assessed against him.

¶ 17 The central characteristic that separates a fee from a fine is that a fee is intended to reimburse the state for a cost incurred in the defendant's prosecution. *Jones*, 223 Ill. 2d at 600. The Second District concluded that the Court System assessment was a fine in *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 17-21. In doing so, the *Smith* court found dispositive the supreme court's decision in *People v. Graves*, 235 Ill. 2d 244 (2009). *Smith*, 2013 IL App (2d) 120691,

¶ 21. In *Graves*, the supreme court concluded that two assessments imposed under the same section of the Counties Code as the Court System assessment were fines, not fees. *Graves*, 235 Ill. 2d at 248, 255. As part of its analysis, the *Graves* court stated as follows.

> "[S]ection 5-1101 of the Counties Code also sets forth 'fines and penalties,' although they are labeled 'fees to finance the court system.' 55 ILCS 5/5-1101 (West 2006). In addition to the two subsections under which fines were imposed in this case, section 5-1101 also authorizes monetary penalties to be paid by a defendant on a judgment of guilty *** for violation of certain sections of the *** Unified Code of Corrections. See 55 ILCS 5/5-1101(a), (c), (d) (West 2006)." *Graves*, 235 Ill. 2d at 253.

Based on this language in *Graves*, the Second District concluded the Court System assessment was a fine. *Smith*, 2013 IL App (2d) 120691, ¶ 21. It further reasoned that the Court System assessment met the criteria for a fine outlined in *Graves* and *Jones*. *Id.* Specifically, the *Smith* court noted the assessment was payable only upon a conviction of a criminal offense and was authorized to help "finance [the] court system." *Id.* Most importantly, the *Smith* court found, the assessment was not intended to compensate the State for the cost of prosecuting the defendant, as a defendant was charged a flat amount depending on the classification of the severity of his offense. *Id.* Thus, the assessment was "not explicitly tied to" and bore "no inherent relationship to" the actual expenses involved in prosecuting the defendant. *Id.* The *Smith* court found the direct correlation between the fine and the classification of the severity of the offense showed the assessment was punitive and not compensatory, because "[a] felony is not necessarily twice as expensive to prosecute as a misdemeanor." *Id.*

¶ 18 The Second District has continued to adhere to its position that the Court System assessment is a fine (see *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 17), and the Third and Fourth District have both reached the same conclusion. See *People v. Smith*, 2014 IL App (4th) 121118, ¶ 54, and *People v. Ackerman*, 2014 IL App (3d) 120585, ¶ 30.

¶ 19 The State acknowledges *Smith* and its progeny but contends we should decline to follow those cases because *Smith* was wrongly decided. Among other things, the State argues that the *Smith* court erred by focusing on the fact that the Court System assessment is a flat amount and that it is imposed only upon conviction. The State also takes issue with the *Smith* court's determination that the Court System assessment is not tied to or intended to compensate for the actual expenses involved in prosecuting the defendant. The State notes the Court System assessment is intended to offset the expense of providing a court system, and the actual cost of prosecuting a defendant is often far more than the cost assessed in a fee. The State also argues that felonies are generally more expensive to prosecute than misdemeanors; thus, the variance in the Court System assessment for felony and misdemeanor defendants is not necessarily indicative of the assessment being a fine. Finally, the State argues that *Graves* provides no support for the *Smith* court's determination that the Court System assessment is a fine because the assessments at issue in *Graves* were to fund mental health and/or drug and juvenile justice courts.

¶ 20 We disagree with the State that *Smith* and its progeny were wrongly decided. In particular, we find persuasive the *Smith* court's reliance on *Graves*. Although the Court System assessment was not at issue in *Graves*, the supreme court addressed the assessment when it discussed other portions of section 5-1101 of the Counties Code, including the subsection

providing for the Court System assessment. In doing so, the supreme court explicitly referred to the assessments in section 5-1101 of the Counties Code as "fines and penalties" and "monetary penalties." *Graves*, 235 Ill. 2d at 253. Moreover, the Fourth District recently considered some of the same contentions that the State makes in the present appeal. See *People v. Smith*, 2014 IL App (4th) 121118, ¶¶ 53-54. Although the Fourth District recognized that arguments could be made that the Court System assessment was a fee, the court nonetheless found the assessment was a fine based on the supreme court's statement in *Graves* and the Second and Third District's decisions in *Smith* and *Ackerman. Id.* ¶ 54.

¶ 21 We likewise conclude that despite the State's arguments, the supreme court's decision in *Graves* makes clear that the Court System assessment is a fine, not a fee. Accordingly, we elect to follow *Smith* and its progeny. Because it is a fine, defendant is entitled to apply presentence custody credit toward the $50 Court System assessment.

¶ 22 For the reasons stated, we affirm defendant's conviction and prison sentence. We also modify the fines and fees order by vacating the $20 VCVA fine and $5 Electronic Citation fee and awarding defendant $80 in presentence credit to offset the $30 Children's Advocacy Center fine and $50 Court System fine.

¶ 23 Affirmed as modified in part and vacated in part.