FIRST DIVISION
August 10, 2015

No. 1-13-3508

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 23211
	)	
OSMAR ALEJO,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Sentence of 11 years' imprisonment for second degree murder not excessive. Public defender fee assessed with inadequate hearing remanded for proper hearing. Fines and fees order corrected.

¶ 2 Following a 2013 bench trial, defendant Osmar Alejo was convicted of second degree murder and sentenced to 11 years' imprisonment with fines and fees. On appeal, defendant contends that his sentence was excessive, and he challenges certain fines and fees and seeks

credit against others. For the reasons stated below, we grant relief regarding fines and fees and otherwise affirm.

¶ 3 Defendant and codefendant Santiago Garcia[1] were charged with first degree murder as they allegedly "beat, strangled, and killed" Christopher Pinkins with a crowbar on or about August 23, 2011.

¶ 4 At the joint bench trial, the evidence was that defendants pursued Pinkins at about 2:30 p.m. on the day in question in the belief that he had committed a theft in Garcia's garage. Pinkins's foster mother testified that Pinkins had been diagnosed with Asperger's disease, or mild autism, and that she believed he was going to visit his mother and brothers on the day in question. Two witnesses testified that defendant chased Pinkins on foot while brandishing a crowbar before striking or shoving him to the ground and then choking and pummeling him with the crowbar. One of the two witnesses heard defendant remark during the chase that he was going to kill Pinkins for "robbing me," while the other did not hear defendant say anything. Garcia arrived in a truck as Pinkins and defendant struggled for the crowbar, then defendants both held the crowbar and choked Pinkins. A third witness testified to one man chasing Pinkins with a crowbar and threatening to kill him, joined by another man who choked Pinkins with his hands, but gave differing accounts before and at trial as to which defendant pursued and which joined. A fourth witness testified that Pinkins and defendant grappled for the crowbar and then Garcia grabbed Pinkins by the neck, while a fifth witness testified that Garcia held the crowbar against the back of Pinkins's neck. Video of the fight showed defendant on the ground, Pinkins

[1]Garcia has appealed separately. *People v. Garcia*, No. 1-13-3502.

on top of him, and Garcia on top of Pinkins. Police officers testified that defendant flagged them down and that defendants were cooperative.

¶ 5 The autopsy showed that Pinkins died of strangulation by a weapon consistent with a crowbar and had other injuries including a blow to the head. The medical examiner explained that about 10-30 seconds of continuous pressure on the neck would render a person of Pinkins's size unconscious while another 2½-5 minutes of continuous pressure would kill such a person by strangulation.

¶ 6 Defendant testified that, on the day in question, his girlfriend and stepdaughter were present while he was working for Garcia. His girlfriend pointed out Pinkins standing nearby in the alley and told defendant that Pinkins had urinated in the alley and she thought he had committed theft or was about to commit theft. Defendant did not see Pinkins urinate or take anything. Defendant summoned Garcia, and Pinkins ran away. Because Garcia had been burglarized previously, he told defendant to catch Pinkins to hand him over to the police. Neither defendant checked to see if anything had been stolen. Defendant armed himself with a crowbar for the chase as Pinkins was larger than him, and Garcia followed in a truck. When defendant caught up to Pinkins, Pinkins pushed him and grabbed the crowbar while defendant still held the other end. Defendant struggled with Pinkins for the crowbar but denied grabbing him by the throat or hitting him. Garcia arrived and tried to pull Pinkins off of defendant, who denied that he or Garcia choked Pinkins with the crowbar. Defendant was carrying a knife but did not use it in the struggle because he was not trying to kill Pinkins. Defendant initially told police that Pinkins stole the crowbar and other items from Garcia before he admitted to arming himself with the

crowbar. Garcia testified consistently with defendant, adding that he phoned the police but was put on hold for an interpreter.

¶ 7 On this evidence and following argument, the court convicted defendants of second degree murder. The court found that first degree murder was proven but noted the prior burglaries and the remark that defendant was going to kill Pinkins for "robbing" him and thus found that defendants acted in a sudden and intense passion.

¶ 8 The presentence investigation report (PSI) reflected that defendant had a March 2002 juvenile disposition of probation for aggravated unlawful use of a weapon, was committed to custody in August 2002 upon violating that probation, and was resentenced in November 2002 to probation after 30 days' home confinement. As an adult, he had a June 2003 disposition of supervision for criminal defacement of property, a December 2003 sentence of one year's probation for aggravated assault of a peace officer, simple assault, criminal damage to property, and reckless conduct, and a sentence of one year's probation imposed on July 27, 2011, for aggravated assault of a peace officer. Both the 2003 and 2011 probations were terminated unsatisfactorily. Defendant told the PSI investigator that "I am truly sorry someone's life was taken. This was an accident that happened during a citizen's arrest. I care deeply for the family and I am willing to pay my debt to society." Defendant was born in April 1986 and raised by relatives with two brothers while his younger sister was raised by his mother. He described his childhood as "rough" but denied abuse or neglect. For a year prior to this arrest, defendant resided with his girlfriend and her daughter, who he regards as his stepdaughter, and he has a daughter of his own born after this arrest. He completed elementary school but not high school and was attending GED classes at the time of this arrest. He worked as a welder's apprentice for

two years before this arrest and had prior employment. He also contributed towards his girlfriend's rent and the care of his daughter. He is in good physical health but was diagnosed in jail with depression and insomnia, both treated with medication. He reported only moderate alcohol consumption and admitted to being a gang member from ages 15 to 18. His hobbies are reading and painting cars, and he "did community help" at "Epiphany church."

¶ 9 At sentencing, Pinkins's foster father Wayne Rudnick testified that Pinkins loved his mother and two brothers and advised his brothers to "do what's right" as they struggled with mental illness and substance abuse. Pinkins remained part of Rudnick's family after his foster care ended. He loved to help people by doing odd jobs, was intelligent, and had a "keen sense of right and wrong." Rudnick found Pinkins to be kind, loving, thoughtful, and helpful, noting that he was going to meet his natural family when he was killed and that 200 people attended his memorial service.

¶ 10 The State argued that Pinkins was killed "in front of children in broad daylight," apparently based on the testimony of a crossing guard who observed children crossing the street on their way home from school at the time and place of the incident. The State argued that defendant pursued Pinkins though "it was not his house and it was not his business," Pinkins's natural and foster families suffered his loss, and defendant continued to blame Pinkins though there was no evidence he did anything wrong. The State argued that defendant's multiple convictions with probation terminated unsatisfactorily showed an inability or unwillingness to obey the law.

¶ 11 Defendant filed a mitigation report, noting that he had renounced his gang membership when he met his girlfriend and became "like a father" to her daughter. He was "forever haunted

by his association" with Pinkins's death and the "immeasurable anguish" of his family. He volunteered at local churches and social-service agencies. He was the "primary breadwinner for his family," now including his own daughter, and his girlfriend has applied for public assistance and withdrawn from college since his arrest. He "has attended every worship service made available for him" and is "on a continuous search for self-forgiveness."

¶ 12 The mitigation report was supported by letters that, while in jail, defendant was attending a bible study group and receiving counseling from a priest. Defendant also demonstrated to another jail chaplain that he "has the character to contribute to our society." Another letter was to the effect that in 2007 he was volunteering as a "peer support worker" discussing his life experiences with young people and advising them how to avoid gangs and stay in school; he was successful in this role and maintained contact with the organization after he had moved to another neighborhood. Defendant's neighbor submitted a letter to the effect that he was "very helpful" and eager to assist neighbors with gardening and repairs and that his presence in his family's lives "has been greatly missed."

¶ 13 Defendant argued that he had performed good deeds and was involved in religion and the community, came "from a broken home," ended his gang involvement, has dependents who would be adversely affected by his imprisonment, and was "seeking to make a change." While noting that his offense is probationable, he sought the minimum prison sentence of four years.

¶ 14 Defendant personally addressed the court, asking for "forgiveness from the family." He stated that he never intended to kill Pinkins but "acted on impulse," noting that he had a knife in his pocket that he did not use in the struggle. He explained that "I helped my boss because he

gave me an opportunity to feed my family." He "never knew [Pinkins] was autistic," and he still thought of Pinkins daily and prayed for him.

¶ 15 The court stated that it reviewed the PSI, heard arguments by the parties, and considered the statutory and non-statutory factors in mitigation and aggravation. After noting that "there is nothing that could ever bring [Pinkins] back," the court sentenced defendant to 11 years' imprisonment. The court admonished defendant of his appeal rights, and he immediately filed a motion to reconsider his sentence, which the court denied without further argument or findings. The State then mentioned that it filed a reimbursement motion (though the record does not include such a written motion) and the court asked defense counsel "how many times have you appeared on this case?" Counsel replied "34 times," and the court imposed $5,000 in attorney fees and $934 in other fines and fees. Garcia was also sentenced to 11 years' imprisonment with fines and fees, including a $5,000 public defender fee.[2] This appeal timely followed.

¶ 16 On appeal, defendant contends that his 11-year prison sentence is excessive in light of various factors. He notes his youth, that he has a girlfriend and daughters who are emotionally close to and financially dependent upon him, and his record of volunteerism and community involvement. He also notes the absence of prior felony convictions and his repeated expressions of remorse for Pinkins's death. Lastly, he argues that it is unlikely that the circumstances of this offense – pursuing a suspected thief at the behest of his employer – would reoccur.

¶ 17 Second degree murder is a Class 1 felony punishable by 4 to 15 years' imprisonment. 720 ILCS 5/9-2(d); 730 ILCS 5/5-4.5-30(a) (West 2012). A sentence within statutory limits is

[2] In his appeal, Garcia raised similar fines-and-fees issues including the public defender fee. *People v. Garcia*, No. 1-13-3502.

reviewed on an abuse of discretion standard, so that we 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 incompetent evidence or 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. This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.*, citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010).

¶ 18 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Id.*, citing *Alexander*, 239 Ill. 2d at 213. "All penalties shall 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. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record 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.*, citing *Alexander*, 239 Ill. 2d at 214.

¶ 19 Here, after defendants pursued Pinkins while defendant was armed with a crowbar, they killed Pinkins on the street in front of multiple witnesses. Defendants set off on this fatal course because they had leapt to the conclusion that Pinkins had just committed theft, based on prior burglaries of Garcia and the uncorroborated report of defendant's non-testifying girlfriend. While the eyewitness testimony was inconclusive as to whether Pinkins was choked with the crowbar or bare hands, the autopsy clarified that Pinkins was strangled with a crowbar in a process that would take over two minutes of continuous pressure to his neck. Similarly, while there was conflicting evidence regarding the struggle between defendants and Pinkins, and defendants denied attacking Pinkins and professed to fear for the life of defendant Alejo as they subdued Pinkins, a finder of fact could reasonably conclude that defendants attacked Pinkins. Notably, the court found defendants guilty of second degree murder based on sudden and intense passion rather than an unreasonably-believed justification (720 ILCS 5/9-2(a) (West 2012)) and rejected arguments of self-defense and unreasonable belief in self-defense.

¶ 20 As to mitigation, the evidence and arguments at sentencing included the various factors now cited by defendant as grounds for reducing his sentence, and we presume the court gave them due consideration as it expressly stated it had. While defendant notes that he has no prior felony conviction, he received probation for juvenile and misdemeanor offenses, and he violated his juvenile probation while his 2003 adult probation terminated unsatisfactorily. Although several years then passed, defendant was convicted of his last prior offense – aggravated assault of a peace officer – less than a month before this offense. This criminal history casts doubt upon defendant's rehabilitative potential. We cannot find under these circumstances that the court abused its sound discretion by sentencing defendant to 11 years' imprisonment.

¶ 21 Defendant also challenges certain fines and fees – the principal being a $5,000 public defender fee – and seeks credit against others. The State agrees with defendant, except for disputing the appropriate remedy for the improperly-assessed public defender fee.

¶ 22 The parties agree that we must correct defendant's order assessing fines and fees. He was assessed $145 in fines: $50 for the court system, $30 to fund juvenile expungement, $30 for the children's advocacy center, $15 for State Police operations, $10 for mental health court, $5 for youth diversion/peer court, and $5 for drug court. 55 ILCS 5/1101(c), (d-5) - (f-5); 705 ILCS 105/27.3a(1.5); 730 ILCS 5/5-9-1.17 (West 2010); *People v. Graves*, 235 Ill. 2d 244, 251-56 (2009); *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 35; *People v. Smith*, 2014 IL App (4th) 121118, ¶¶47-54, 59-61; *People v. Rogers*, 2014 IL App (4th) 121088, ¶ 31. Because defendant has incurred $145 in fines, his violent crime victim assistance fine is $16 rather than $25 (725 ILCS 240/10(b) (West 2010)), and he must receive $145 presentencing detention credit. 725 ILCS 5/110-14(a) (West 2010); *Graves*, 235 Ill. 2d at 250-51.

¶ 23 The parties also correctly agree that defendant's $5,000 public defender fee must be vacated because the court did not comply with the statutory requirement to hold a hearing, no later than 90 days after the dispositional order, where the defendant's financial resources and ability to pay are assessed. 725 ILCS 5/113-3.1 (West 2010). However, the parties dispute the proper remedy beyond vacatur. The State contends that we should remand for a new hearing because there was a timely, albeit inadequate, hearing. Defendant contends that there was no hearing pursuant to section 113-3.1(a) and thus there is no authority for a remand as more than 90 days have passed since the dispositional order of his sentencing. We agree with the State.

¶ 24 Upon the motion of the State or the court, the court may order a defendant to pay "a reasonable sum to reimburse" the cost of court-appointed counsel, not to exceed $5,000 for a felony. 725 ILCS 5/113-3.1(a), (b) (West 2010). "In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant under Section 113-3 of this Code and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties." 725 ILCS 5/113-3.1(a), citing 725 ILCS 5/113-3 (West 2010). "Such hearing shall be conducted *** at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level." 725 ILCS 5/113-3.1(a) (West 2010). Our supreme court has explained regarding section 113-3.1 that the trial court must not:

> "simply impose the fee in a perfunctory manner. [Citation.] Rather, the court must give the defendant notice that it is considering imposing the fee, and the defendant must be given the opportunity to present evidence regarding his or her ability to pay and any other relevant circumstances. [Citation.] The hearing must focus on the costs of representation, the defendant's financial circumstances, and the foreseeable ability of the defendant to pay. [Citation.] The trial court must consider, among other evidence, the defendant's financial affidavit." *People v. Somers*, 2013 IL 114054, ¶ 14.

¶ 25 Where the requisite hearing is not held, the public defender fee has been vacated outright with no remand. In *People v. Gutierrez*, 2012 IL 111590, ¶¶ 21-26, our supreme court vacated the fee without remand where the clerk of the court imposed it *sua sponte*. In *People v. Daniels*, 2015 IL App (2d) 130517, this court vacated the fee without

remand because the court made no reference to the fee during the sentencing hearing but imposed the fee some time after the sentencing hearing by written order, so that there was "simply no evidence that there was a hearing 'held to resolve defendant's representation by the public defender.' " *Id.*, ¶ 29, quoting *Somers*, 2013 IL 114054, ¶ 20.

¶ 26 By contrast, the supreme court in *Somers* remanded for a new hearing on the fee, explaining:

> "Clearly, then, the trial court did not fully comply with the statute, and defendant is entitled to a new hearing. Just as clearly, though, the trial court did have some sort of a hearing within the statutory time period. The trial court inquired of defendant whether he thought he could get a job when he was released from jail, whether he planned on using his future income to pay his fines and costs, and whether there was any physical reason why he could not work. Only after hearing defendant's answers to these questions did the court impose the fee. Thus, we agree with the State's contention that the problem here is not that the trial court did not hold a hearing within 90 days, but that the hearing that the court did hold was insufficient to comply with the statute." *Somers*, 2013 IL 114054, ¶ 15.

¶ 27 Since, and in light of, *Gutierrez* and *Somers*, this court has remanded for a hearing in compliance with the statute in several cases where, as here, some hearing was held but that hearing was inadequate. We remanded in *People v. Williams*, 2013 IL App (2d) 120094, holding that:

> "*Somers* requires only that the trial court hold 'some sort of a hearing within the statutory time period.' [Citation.] While the trial court in *Somers* asked the

> defendant a few questions related to his finances, our supreme court never stated that such questioning was required for a hearing. Rather, the supreme court stated that a hearing 'clearly' took place [citation], implying that less would also suffice to constitute a 'hearing.' *** The proceeding here, while obviously insufficient to meet the requirements of section 113-3.1(a), still met this definition of a 'hearing,' as it was a judicial session open to the public, held to resolve defendant's representation by the public defender. Relatedly, the trial court imposed what it deemed to be an appropriate public defender fee. Therefore, we hold that the trial court conducted 'some sort of a hearing' on the issue of the public defender fee within the statutory time period." *Id.*, ¶ 20, quoting *Somers*, 2013 IL 114054, ¶ 15.

¶ 28 We also remanded in *People v. McClinton*, 2015 IL App (3d) 130109, ¶ 18, noting that the "intent of section 113-3.1 is to have a qualified defendant reimburse either the counties or the State for the cost of public defender representation. [Citation.] In light of this statutory purpose, we interpret the language broadly and find that the actions of the trial court were sufficient under *Somers*; it appears that some sort of a hearing was held." We remanded in *People v. Collins*, 2013 IL App (2d) 110915, ¶ 25, noting that the *Gutierrez* court "expressly declined to address the issue of whether the 90-day period was mandatory or directory." Most recently, we remanded in *People v. Rankin*, 2015 IL App (1st) 133409, ¶¶ 20-21. "As in *Somers*, the trial court in this case did hold an abbreviated hearing on the State's motion for the assessment of a fee for the defendant's court-appointed attorney when it asked the assistant public defender how many times that he had appeared in court." *Id.*, ¶ 21, citing *Somers*, 2013 IL 114054, ¶¶ 14-15.

¶ 29 We find the appropriate remedy in this case is to remand for a proper hearing as in *Somers*, *Williams*, *McClinton*, *Collins*, and *Rankin*. The entire proceeding on the public defender fee occurred at the end of defendant's sentencing hearing just after he was admonished of his appeal rights. The State mentioned that it filed a reimbursement motion (though the record does not include such a written motion) and the court asked defense counsel "How many times did you appear on this?" Counsel replied "34," and the court imposed $5,000 in attorney fees. Thus, neither party presented evidence nor did the court ask any questions regarding defendant's ability to pay. Moreover, neither party nor the court mentioned defendant's financial affidavit despite the express statutory requirement to consider it. Thus, the parties are correct that the trial court erred in imposing the public defender fee. Regarding remand, the State expressly sought the fee and the court expressly ruled upon it in open court, unlike *Gutierrez* or *Daniels*. Instead, this case falls squarely under *Rankin* and we similarly find that remand for a proper hearing is appropriate.

¶ 30 Accordingly, we vacate the $5,000 public defender fee and remand for the court to hold a hearing compliant with section 113-3.1(a). Pursuant to Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct the order assessing fines and fees to reflect a $16 violent crime victim assistance fine and $145 in presentencing detention credit. The judgment of the circuit court is otherwise affirmed.

¶ 31 Affirmed in part, vacated in part, order corrected, and remanded with directions.