2016 IL App (1st) 142712-U

FIRST DIVISION
November 21, 2016

No. 1-14-2712

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 540
	)	
STEVEN GARNETT,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's sentence where the trial court did not improperly consider in aggravation a factor inherent in the offense when sentencing him, nor did it fail to give proper consideration to factors in mitigation. We also modify the fines and fees order.

¶ 2 Following a jury trial, defendant Steven Garnett was convicted of aggravated arson and sentenced to 15 years' imprisonment. On appeal, defendant contends that his sentence is excessive where the State relied on a factor inherent in the offense in making its argument in aggravation, and the trial court failed to give proper consideration to factors in mitigation.

Defendant also contests several fines and fees. We affirm as modified.

¶ 3 Defendant was charged with aggravated arson in that, by means of fire, he knowingly damaged the building at 10922 South Wentworth Avenue in Chicago and knew or reasonably should have known that one or more persons were present inside. 720 ILCS 5/20-1.1(a)(1) (West 2012).

¶ 4 At trial, Cherese Rodgers testified that on December 1, 2012, she lived with defendant, Michael McDonald, and Christopher Conrad at 10922 South Wentworth Avenue, which was a single family home with two floors. On the evening of November 30, 2012, the landlord, George Ford, was at the house to collect rent from defendant. Defendant told Ford that he did not have the rent. The two men argued for about 20 minutes. Rodgers stated that defendant was angry, appeared drunk, and told Ford that "there was going to be even Steven." Following the argument, Ford and Rodgers left together. Rodgers returned home a few hours later and saw that defendant was still angry. He repeated that he was going to "make it even Steven," that Ford had taken "a lot of things" from him, and that he was going to burn down the house so that "George ain't [*sic*] going to own sh*t." Rodgers testified that defendant repeated this a few more times, stating that this was the last house Ford would own. Early on December, 1, 2012, defendant left the house with a gas can. When defendant returned about 20 minutes later, Rodgers saw the gas can that he was carrying and picked it up and shook it, but there was no gasoline inside.

¶ 5 Rodgers went to her bedroom. Several minutes later, defendant told her that his friend threw a "cocktail bomb" into the house and the house was on fire. Rodgers, who had been awake, had not heard glass break and accused defendant of setting the fire. Rodgers woke up the individuals in the house. She saw the back porch on fire and gas coming out of the stove in the kitchen. All of the occupants of the house, including defendant, went outside. Rodgers told her

neighbors that defendant had started the fire, and defendant left the scene. The police and fire department arrived shortly thereafter. The fire, which damaged the interior of the house, was extinguished and Rodgers told police what had happened. About 10 minutes later the police returned with defendant. Rodgers identified defendant and indicated that he had started the fire.

¶ 6 George Ford testified that he went to the residence to collect rent from defendant on November 30, 2012, but defendant did not pay him. Ford told defendant that if he did not pay his rent, he would have to leave. Defendant became hostile and said that he would "burn this b*tch up before I leave." Shortly, thereafter, Ford left with his son and Rodgers.

¶ 7 Michael McDonald testified that he was present when Ford asked defendant for the rent. Ford and defendant talked for approximately 25 minutes. According to McDonald, nobody raised their voice or got angry. When Ford left, defendant said "I'm going to burn the house down Mike, so when I call your name, come on down, the house will be on fire." Defendant repeated that statement about four or five times. McDonald believed defendant and went to sleep wearing his clothes so that he could get up quickly. McDonald never fell asleep and then heard defendant telling him to come downstairs as the house was on fire. McDonald exited the house and saw that the back porch was on fire.

¶ 8 Christopher Conrad testified that he was also present when Ford attempted to collect rent from defendant. When defendant stated that he did not have the money, the mood in the room changed and Ford and defendant started arguing. Conrad heard defendant state that "it was going to be an even Steven," and that he was going to burn down the house. Later that evening, Rodgers woke up Conrad and told him the house was on fire.

¶ 9 Sergeant Kirkland Crossley testified that, on the night in question, he saw defendant walking on the street and then into a restaurant. Defendant was carrying a five-gallon gas tank

that appeared to be empty by the ease with which defendant carried it. Later that night, Crossley received a radio call regarding arson in progress at the subject residence. He responded to the scene in about three minutes. He sent a "flash message" to the other police, describing defendant and indicating that he had seen defendant in the area. Shortly thereafter, responding officers brought defendant to the scene, where he was identified by Rodgers, McDonald, and Conrad.

¶ 10 Officer Brian Wells testified that following defendant's arrest, he performed a custodial search on defendant at the police station and recovered a burnt match from his left pocket. Officer Brian Graham testified that a bag defendant was carrying was also inventoried, and it contained personal items, including a broken lighter.

¶ 11 Steven Breden, an investigator with the Office of Fire Investigations for Chicago, testified that the classification of the cause of the fire in this case was incendiary, meaning that it was set by a person. He also stated that the fire was started by an open flame like a match, candle, or lighter to the mattress that was on the back porch. Breden saw no evidence that the fire was started by a Molotov cocktail, or that an accelerant was used. Breden also detailed the damage to the residence, including damage to the side and rear of the building, the back porch, and the first and second floors.

¶ 12 In defendant's case-in-chief, defendant testified that, on the night of November 30, 2012, he was walking home and encountered three men to whom he owed $400 for drugs. Following a conversation with those men, defendant said he had reason to be concerned. Later that evening, Ford asked him to pay his rent, and defendant responded that rent was due on the first day of the month. Ford left the residence and defendant went to his room where he stayed until the early morning hours of December 1, 2012. Defendant then left the house to go to a 24 hour store to buy cigarettes and beer.

¶ 13 After making his purchases, defendant walked back to the house, which was on fire. Defendant stated that he went inside to help everyone exit the house. Defendant took some personal items with him when he exited. When everyone was outside, Rodgers accused defendant of owing the residents of the house money. Rodgers also told neighbors to "get him," and that was when defendant walked away from the scene. Defendant testified that he did not set fire to the house, never said "it was going to be even Steven," and never threatened to burn the property. Defendant denied possessing a match, grabbing a gas can and walking to a restaurant, or telling Rodgers that someone set the fire with a Molotov cocktail.

¶ 14 Following closing arguments, the jury found defendant guilty of aggravated arson. Defendant's motion for a new trial was denied and the matter proceeded to sentencing. In aggravation, the State argued that defendant's conduct caused or threatened serious harm to the victims and the firefighters and first responders who were at the scene. A "substantial period of penitentiary time" was necessary to deter others from committing a similar offense where defendant's response to his financial dispute with his landlord was to set the house on fire. The State emphasized that defendant admitted in his presentence investigation report (PSI) that he had a $150 per day cocaine and heroin habit, and admitted during his testimony that he used the money that he was supposed to pay his rent with to pay off drug dealers. The State highlighted defendant's criminal background, which spanned 40 years and included five felony convictions. Defendant was convicted of theft in 1975, robbery in 1977, pandering in 1982, burglary in 1993, and possession of a controlled substance in 2010.

¶ 15 In mitigation, defense counsel argued that defendant's addiction to drugs should be considered as a mitigating not aggravating factor, and maintained that the State's contention that the court should take into consideration the harm to first responders would be improper as the

factor was one that was inherent in the charged offense. Defense counsel further stated that the evidence at trial showed that defendant woke up the residents of the house to warn them of the fire, and assisted them in safely getting out of the house. Moreover, defendant was 57 years old with serious medical issues, including, as listed in his PSI, Type 1 diabetes, cirrhosis of the liver, and prostate cancer, for which he was receiving medical treatment. The PSI further showed that defendant was diagnosed with schizophrenia and bipolar disorder, for which he was taking medication. He had family support as well as a work history, including several years of working at a warehouse and as a janitor and laborer. Based on these mitigating factors, counsel requested the minimum sentence.

¶ 16 In allocution, defendant apologized, said he was glad nobody was injured, and emphasized that he never testified that he paid drug dealers. He also stated that he has been rehabilitating himself by working with "mental health programs."

¶ 17 Following arguments in aggravation and mitigation, the court stated that it reviewed the PSI, the factors in aggravation and mitigation, defendant's health status, social history, long criminal history, rehabilitative potential, and the facts of the case. The court further stated that after taking these factors into consideration, it found an appropriate sentence to be 15 years' imprisonment. The court also assessed $904 in fines, fees, and costs against defendant.

¶ 18 Defendant filed a motion to reconsider sentence, arguing that his sentence was excessive in view of his background and the nature of his participation in the offense, and the court improperly considered in aggravation matters that are implicit in the charged offense. The trial court denied the motion and this appeal followed.

¶ 19 On appeal, defendant contends that the trial court abused its discretion in sentencing him to an excessive prison term that was over twice the minimum as several mitigating factors were

present. He points out that he was 57 years old, had extensive mental, physical, and substance abuse problems, a largely nonviolent criminal background, and a history of employment. Defendant also makes the related argument that a factor inherent in the charged offense was improperly relied upon as an aggravating factor at sentencing. Accordingly, defendant requests that we reduce his sentence or reverse and remand the matter for resentencing.

¶ 20 We initially address defendant's improper-factor argument. Defendant specifically maintains that the State erroneously argued in aggravation that defendant's conduct threatened serious harm to those inside the house, first responders, and firefighters, where this factor was inherent in the offense.

¶ 21 A fact that is implicit in the offense cannot be used as an element of the offense, and as a factor in aggravation. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 13 (citing *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004)). This prohibition against "double enhancement" is based on the assumption that the legislature considered the factors inherent in the offense when it assigned the applicable range of punishment for that offense. *People v. Rissley*, 165 Ill. 2d 364, 390 (1995). We review *de novo* whether the trial court relied on an improper sentencing factor. *People v. Shanklin*, 2014 IL App (1st) 120084, ¶ 91.

¶ 22 As charged in this case, a person commits aggravated arson when, in the course of committing arson, he knowingly damages any building or structure and he knows or reasonably should know that one or more persons are present therein. 720 ILCS 5/20-1.1(a)(1) (West 2012). Aggravated arson is a Class X felony with a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/20-1.1(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 23 As defendant claims, the State argued in aggravation that defendant's conduct threatened serious harm to those inside the house and to the first responders. Defendant does not, however

point to, nor can we find, any evidence in the record showing that the trial court considered this factor in sentencing him. Instead, the trial court's recitation shows it considered proper factors such as the PSI, defendant's health status, social history, criminal history, rehabilitative potential, and the facts of the case. Further, the court was well aware that the State had arguably raised an improper factor. Defense counsel had highlighted for the court both in mitigation and defendant's motion to reconsider sentence, that the State's argument regarding the threat of serious harm should not be considered in aggravation as it was a factor inherent in the charged offense.

¶ 24 This case is thus distinguishable from *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶¶ 18-19, which remanded the defendant's 10-year sentence for aggravated arson for a new sentencing hearing as the trial court improperly relied on the threat of harm to others as an aggravating factor. The trial court in *Abdelhadi* stated, "Specifically in aggravation the Court has considered that the conduct caused by the defendant did, in fact, endanger the lives of individuals." *Id*. ¶ 4. Unlike *Abdelhadi*, however, the trial court here never made any statements regarding the threat of serious harm in sentencing defendant. Therefore, we find that the trial court did not improperly rely on any factors inherent in the offense of aggravated arson.

¶ 25 Turning to defendant's excessive-sentence argument, he maintains that the trial court did not afford the proper weight to the mitigating factors presented at the sentencing hearing.

¶ 26 A trial court has broad discretion in sentencing a defendant, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for the trial court's judgment merely because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence that falls within the statutory range for the offense does not amount to an abuse of discretion unless it varies greatly from the purpose of the

law, or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When the trial court is provided mitigating evidence, it is presumed, absent some indication to the contrary, other than the sentence itself, that the court considered it in fashioning the sentence. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). The trial court is not required to reduce a maximum sentence simply because mitigating factors are present. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 27 Here, the trial court specifically stated:

> "I've had the opportunity to review the pre-sentence investigation, the factors in aggravation and mitigation. The defendant's social history, criminal history.
>
> I considered his health status, the facts of the case. His rehabilitative potential. He has a long criminal history. This is dating back to when he was a much younger man, obviously.
>
> After considering these factors, judgment entered on the finding of the Court. The Court finds an appropriate sentence to be fifteen years Illinois Department of Corrections."

The above comments show that the trial court thoughtfully weighed the appropriate mitigating and aggravating factors and sentenced defendant to a term within the permissible sentencing range.

¶ 28 Nevertheless, defendant maintains that his sentence is excessive as (1) his criminal history in the 10 years leading up to this case shows that he was only convicted of a single non-violent offense for Class 4 possession of a controlled substance, (2) he has a chronic substance abuse problem, (3) he has mental and physical health problems, (4) he is unlikely to re-offend based on his age and health issues, (5) he did not intend to hurt anyone and helped people get out

of the burning house and, (6) he maintained steady employment. He also argues public policy considerations suggest that his lengthy prison sentence is an ineffective method of advancing the sentencing goals of incapacitation, deterrence, retribution, and rehabilitation. In discussing these factors, however, defendant fails to show anything in the record rebutting the presumption that the court considered them. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 20. Moreover, the State discussed defendant's criminal history in detail in aggravation, and defense counsel raised defendant's substance abuse problems, health issues, age, work history, and fact that he alerted the occupants of the house to the fire in mitigation. The PSI, as acknowledged by defendant in his brief, indicated that defendant had mental health issues and treated them with medication. We thus presume the trial court considered these factors in sentencing defendant.

¶ 29 In arguing that public policy concerns suggest that his prison sentence should be shortened, defendant improperly cites to a study from the National Research Council on the incapacitation and deterrent effects of incarceration. Such a source does not qualify as relevant authority on appeal and will not be considered. See, *e.g.*, *Vulcan Materials Co. v. Bee Construction*, 96 Ill. 2d 159, 166 (1983); *People v. Magee*, 374 Ill. App. 3d 1024, 1029-30 (2007); *People v. Heaton*, 266 Ill. App. 3d 469, 476-78 (1994); *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993).

¶ 30 Defendant also argues that his 15-year sentence shows that the court "failed to meaningfully consider the financial impact of incarceration on the State." See 730 ILCS 5/5-4-1(a)(3) (West 2012) (financial impact statement filed by the Department of Corrections must be considered at sentencing hearing). However, we have previously held that a trial court is not obligated to state its reasons on the record for a defendant's sentence. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Absent evidence to the contrary, it is presumed that the trial court

considered the financial impact statement prior to sentencing a defendant. *Sauseda*, 2016 IL App (1st) 140134, ¶ 22 (citing *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24. As we found in *Sauseda*, 2016 IL App (1st) 140134, ¶ 22, defendant's argument that the trial court failed to consider the financial impact statement before sentencing him must fail where he points to nothing in the record to show otherwise. Based on the above, we presume that the court acted in accordance with the law when it sentenced him to 15 years in prison, which was 9 years above the minimum and 15 years below the maximum allowed.

¶ 31 Defendant also contests several fines and fees. Although defendant did not challenge the fines and fees order in the trial court, a reviewing court may modify fines and fees orders without remanding the case to the trial court. Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999). Consequently, we need not consider defendant's alternative theories of plain error or ineffective assistance of counsel. "We review the propriety of a trial court's imposition of fines and fees *de novo*." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 32 Defendant first contends, and the State correctly agrees, that the $5 electronic citation fee (705 ILCS 105/27.3e (West 2014)) and the $5 court system fee (55 ILCS 5/5-1101(a) (West 2014)) should be vacated. The $5 electronic citation fee applies to "any traffic, misdemeanor, municipal ordinance or conservation case." 705 ILCS 105/27.3e (West 2014). The $5 court system fee applies to defendants who violate the Illinois Vehicle Code or a similar provision of a county or municipal ordinance. 55 ILCS 5/5-1101(a) (West 2014). Neither fee applies here where defendant was convicted of felony aggravated arson. Because the $5 electronic citation and $5 court system fees were improperly imposed, we vacate those charges. See *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115; *People v. Brown*, 388 Ill. App. 3d 104, 112 (2009).

¶ 33 Defendant next argues that several of the fees assessed against him were actually fines subject to offset by presentence credit.

¶ 34 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 of presentence custody. 725 ILCS 5/110-14(a) (West 2014). Here, defendant spent 625 days in presentence custody, entitling him to $3,125 in offsetting credit.

¶ 35 Presentence custody credit only applies to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A fine is punitive and is imposed as part of a sentence for a criminal offense, while a fee seeks to recoup expenses incurred by the State, or to compensate it for expenditures incurred in prosecuting the defendant. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). Although the label for a charge is strong evidence of whether the charge is a fee or fine, the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant. *Id*.

¶ 36 Defendant argues, and the State concedes, that his $15 State Police Operations charge (705 ILCS 105/27.3a(1.5) (West 2014)) is a fine and should be offset by presentence credit. We agree with the parties and find that defendant is entitled to presentence incarceration credit toward the State Police Operations charge. See *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31 (State Police Operations fee is a fine subject to credit); see also *People v. Maxey*, 2016 IL App (1st) 130698, ¶¶ 140-141 (following *Millsap*).

¶ 37 Defendant next asserts that he is entitled to presentence incarceration credit toward the $10 probation and court services operation charge (705 ILCS 105/27.3a(1.1) (West 2014)). The State disagrees that defendant is entitled to credit toward this assessment as the charge is compensatory in nature. We agree with the State. The Fourth District has previously held that

when a probation officer is involved in the defendant's prosecution, this charge constitutes a fee. *People v. Rogers*, 2014 IL App (4th) 121088, ¶¶ 37-39; but see *People v. Carter*, 2016 IL App (3d) 140196, ¶¶ 56-57 (declining to follow *Rogers* and holding that the charge is a fine regardless of a defendant's actual utilization of those services). Here, the probation office was used to create a PSI report that the trial court considered at sentencing. Therefore, this assessment reimbursed the State for a charge incurred in defendant's prosecution. We thus follow *Rogers* and hold that the $10 probation and court services operations charge is a fee which may not be offset by presentence incarceration credit.

¶ 38 Defendant further contends that he is entitled to presentence incarceration credit toward the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) and the $2 Public Defenders records automation fee (55 ILCS 5/3-4012 (West 2014)). We disagree. Prior decisions of this court have held these charges are fees and not fines. See *People v. Green*, 2016 IL App (1st) 134011, ¶ 46; *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 62-65; *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 114-116; but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (holding that the assessments are not fees as they do not compensate the state for prosecution costs). Accordingly, we find that neither records automation fee is subject to offset.

¶ 39 Defendant finally maintains that four additional charges assessed against him are fines subject to offset. In particular, defendant asserts that the following charges are actually fines: the $15 clerk's automation charge (705 ILCS 105/27.3a(1), (1.5) (West 2014)), the $15 document storage charge (705 ILCS 105/27.3c(a) (West 2014)), the $190 charge imposed for filing a felony complaint (705 ILCS 105/27.2a (w)(1)(A) (West 2014)), and the $25 court services assessment (55 ILCS 5/5-1103 (West 2014)).

¶ 40 In *People v. Tolliver*, 363 Ill. App. 3d 94 (2006), this court held that these four charges were fees as they are compensatory and represent a "collateral consequence" of a defendant's conviction. *Tolliver*, 363 Ill. App. 3d at 97. Defendant acknowledges *Tolliver* in his reply brief, but points out that it was decided three years before our supreme court's decision in *Graves*, 235 Ill. 2d at 244. In *Graves*, the court held that, to be correctly designated as a fee, a charge must reimburse the State for a cost that was incurred in the prosecution of the defendant. *Id*. at 250. However, *Tolliver* used the same reasoning as later employed in *Graves*, finding the charges do represent a portion of the overall costs incurred to prosecute a defendant. *Tolliver*, 363 Ill. App. 3d at 97. Further, cases decided after *Graves* have treated these four charges as fees. See *People v. Larue*, 2014 IL App (4th) 120595, ¶¶ 62-68; *People v. Smith*, 2014 IL App (4th) 121118, ¶¶ 25-31; *People v. Martino*, 2012 IL App (2d) 101244, ¶¶ 29-38. The fact that the dissent in *People v. Breeden*, 2014 IL App (4th) 121049, ¶¶ 121-52, ((Appleton, P.J., concurring in part and dissenting in part), opinion vacated in light of *People v. Castleberry*, No. 118880 (Jan. 20, 2016)), concluded that those four charges are fines does not change our result because, as defendant acknowledges in his reply brief, a dissent is not binding authority.

¶ 41 For the foregoing reasons, we find that the $5 electronic citation and $5 court services fees were improperly assessed and vacate them; the $15 police operations fee is offset by presentence custody credit; and pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 42 Affirmed as modified.