2013 IL App (3d) 110446-U

Order filed January 30, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court) of the 12th Judicial Circuit,) Will County, Illinois,
Plaintiff-Appellee,	)
	) Appeal Nos. 3-11-0446, 3-11-0447, and) 3-11-0448
v.	) Circuit Nos. 08-CF-1736, 09-CF-1494, and) 09CF2026
	)
ANTHONY ALEXANDER,	) Honorable) Daniel J. Rozak,
Defendant-Appellant.	) Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion by sentencing defendant to seven years' imprisonment for burglary, three years' imprisonment for robbery, and three years' imprisonment for unlawful possession of cannabis. The cause is remanded for the trial court to amend the mittimus to reflect a reduction in the fines and fees.

¶ 2 The trial court found defendant, Anthony Alexander, violated the terms of his probation after the parties stipulated to the evidence presented at the jury trial and re-sentenced defendant

to seven years' imprisonment for the offense of burglary, to be served concurrently with three years' imprisonment for the offense of robbery, and to be served consecutively to three years' imprisonment for the offense of unlawful possession of cannabis. Defendant appeals, arguing these sentences were excessive and requesting this court to order the mittimus to be corrected to reflect a reduction in the fines and fees. We affirm defendant's sentences and remand the cause for the trial court to amend the mittimus.

¶ 3 FACTS

¶ 4 On July 23, 2008, defendant was charged with one count of robbery (720 ILCS 5/18-1(a) (West 2008)) and four counts of aggravated battery (720 ILCS 5/12-4(a) (West 2008)). The indictment alleged that defendant knowingly took possession of a baseball hat from a minor by the use of force. One year later, on July 2, 2009, the State charged defendant with one count of burglary (720 ILCS 5/19-1(a) (West 2008)). The State alleged that defendant, without authority, knowingly entered a building with the intent to commit a theft therein. While out on bond for the above cases, defendant was again arrested, and on September 3, 2009, charged with unlawful possession of cannabis (720 ILCS 550/4(d) (West 2008)).

¶ 5 On December 17, 2009, defendant entered into a fully negotiated plea agreement. In exchange for guilty pleas to the unrelated offenses of robbery, burglary, and unlawful possession of cannabis, and pursuant to the terms of the plea agreement, the trial court sentenced defendant to serve a concurrent term of 30 months' probation on each count. The court also assessed fines and fees against defendant including a $200 deoxyribonucleic acid (DNA) analysis fee all three cases, a $750 probation fee in each case, and a $100 street value fine and $100 crime lab fee for the unlawful possession of cannabis case.

¶ 6 While on probation, defendant was charged with aggravated criminal sexual assault and battery, but a jury acquitted him of those charges. After the acquittal, the State filed a petition to revoke defendant's probation in his burglary, robbery, and unlawful possession of cannabis cases based on the same charges of aggravated criminal sexual assault and battery.

¶ 7 At a hearing on the motion to revoke probation, the State and defense counsel stipulated to the evidence that was presented at trial. The trial court found that the evidence was sufficient to support a finding that defendant was guilty of the charges by a preponderance of the evidence. Therefore, the State's motion was granted, and defendant's probation was revoked.

¶ 8 After reviewing the statutory factors in aggravation and mitigation, the trial court sentenced defendant to three years for robbery, seven years for burglary, and three years for unlawful possession of cannabis. The robbery sentence was concurrent with the burglary sentence, and the sentence for unlawful possession of cannabis was consecutive to the sentence for burglary, thus giving defendant an aggregate sentence of 10 years' imprisonment. Defendant filed a motion to reconsider sentence, which the trial court denied. The trial court did, however, enter an order vacating the $200 DNA analysis fee and $325 of the probation fee assessed against defendant in his burglary case. Defendant appeals.

¶ 9 ANALYSIS

¶ 10 I. Excessive Sentence

¶ 11 Defendant argues that his sentence was excessive because: (1) the conduct supporting the underlying original offenses was not particularly egregious; (2) he had a minimal juvenile record; and (3) he had voluntarily availed himself of beneficial programs and services while incarcerated on unrelated offenses. Defendant argues that his aggregate 10-year sentence, imposed following

the revocation of his probation, was excessive.

¶ 12 Upon the revocation of probation, the trial court may impose any sentence that would have been appropriate for the original offense. *People v. Caldwell*, 259 Ill. App. 3d 646 (1994). The determination and imposition of a sentence involves considerable judicial discretion, and we will not reverse a trial court's sentence unless we find that the court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203 (2000).

¶ 13 The Illinois Constitution mandates that all penalties 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. Generally, in the context of sentencing following the revocation of probation, a sentence within the statutory range for the original offense will not be set aside on review unless the reviewing court is strongly persuaded that the sentence was in fact imposed as a penalty for the conduct which was the basis of the revocation, and not for the original offense. *People v. Varghese*, 391 Ill. App. 3d 866 (2009). Although the reviewing court may reduce a sentence where an abuse of discretion has occurred, the reviewing court should proceed with great caution and care and must not substitute its judgment for that of the trial court simply because it would have weighed the factors differently. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 14 Here, after defendant was found to be in violation of the terms of his probation on each count, the court re-sentenced him for burglary, robbery, and unlawful possession of cannabis. Burglary and robbery are Class 2 felonies (720 ILCS 5/19-1(b), 18-1(b) (West 2008)) punishable by a term of imprisonment of three to seven years (730 ILCS 5/5-4.5-35(a) (West 2008)). With respect to these offenses, the trial court sentenced defendant to seven years' imprisonment for

burglary and a concurrent term of three years' imprisonment for robbery. Unlawful possession of more than 30 grams but less than 500 grams of cannabis is a Class 4 felony (720 ILCS 550/4(d) (West 2008)) punishable by a term of imprisonment of one to three years. In this case, defendant received a sentence of three years' imprisonment which was to be served consecutively with the other sentences because defendant originally committed the offense of unlawful possession of cannabis while on pretrial release for the other two offenses. 730 ILCS 5/5-8-4(d) (West 2008).

¶ 15 We presume that the trial court considered all of the mitigating evidence before it, absent some indication to the contrary other than the sentence itself. *People v. Thompson*, 222 Ill. 2d 1 (2006). In this case, the trial court explicitly stated that it "considered all factors in mitigation and aggravation" and then proceeded to properly address each statutory factor, noting that a majority of the mitigating factors did not apply to these three charges. Thus, we conclude the court did not abuse its discretion by failing to properly consider the factors in mitigation. In addition, although defendant received maximum sentences for burglary and unlawful possession of cannabis, each sentence was within the permissible statutory range. Therefore, we affirm defendant's sentences as imposed by the trial court.

¶ 16 II. Mittimus

¶ 17 Defendant next argues that the mittimus should be amended to reflect a $1,250 reduction in the costs, fines, and fees assessed against him. Specifically, defendant claims that two DNA analysis fees totaling $400 and two probation fees totaling $650 should be vacated and that the court should apply a full credit against his $100 street value fine and $100 crime lab fee.[1]

[1]In defendant's brief, he asks for a credit against a $100 mandatory drug assessment fee. The State is correct in noting that the court did not impose a mandatory drug assessment fee

¶ 18 A defendant is only required to submit to and pay for the DNA assessment when he is not currently registered in the DNA database. *People v. Marshall*, 242 Ill. 2d 285 (2011). Here, defendant has submitted proof that his DNA has been on file since November 30, 2009. The State agrees that any remaining DNA fees should be vacated. Since defendant's DNA was registered in the DNA database at the time he pled guilty on December 17, 2009, in these three cases, we direct the trial court to vacate the two remaining DNA analysis fees assessed against defendant for robbery and unlawful possession of cannabis.

¶ 19 Defendant argues his probation service fees should also be vacated because these fees cannot be imposed on an offender who is not being actively supervised by the probation and court services department. 730 ILCS 5/5-6-3(i) (West 2008). Here, the trial court correctly vacated $325 of the $750 probation fee in defendant's burglary case because defendant's probation was revoked before its term expired and he was no longer being actively supervised by the probation department. For the same reason, $325 should be vacated from the probation fee assessed in defendant's robbery and unlawful possession of cannabis cases.

¶ 20 Finally, we conclude that defendant is allowed a credit against his $100 street value fine but not against his $100 crime lab fee. Pursuant to section 110-14 of the Code of Criminal Procedure of 1963, a defendant who is assessed a fine is allowed a credit of $5 for each day spent in custody on a bailable offense for which he did not post bail. 725 ILCS 5/110-14 (West 2010).

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against defendant. Based on defendant's citation to the record and the fee amount, we believe that defendant is asking for a credit against the $100 crime lab fee imposed pursuant to section 5-9-1.4 of the Unified Code of Corrections (730 ILCS 5/5-9-1.4 (West 2008)), and we will construe his request as such.

That credit can be applied to fines; however, it cannot be applied to fees. *People v. Jones*, 223 Ill. 2d 569 (2006). A fine is part of the punishment for a conviction, whereas a fee seeks to recoup expenses incurred by the State in prosecuting the defendant. *Id.*

¶ 21 Here, defendant spent 424 days in pretrial custody, and he is thus entitled to a potential credit of up to $2,120. It is clear that the street value fine is a fine, and therefore defendant is entitled to a $100 credit towards this fine. However, defendant is not entitled to a credit towards the crime lab fee. See *People v. White*, 333 Ill. App. 3d 777, 782 (2002); *People v. Littlejohn*, 338 Ill. App. 3d 281, 283 (2003).

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Will County is affirmed in part, and the cause is remanded for amendment of the mittimus pursuant to this decision.

¶ 24 Affirmed in part and remanded.