2012 IL App (4th) 110393-U

Filed 9/13/12

NO. 4-11-0393

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
MALCOLM C. FOX,	)	No. 10CF1004
Defendant-Appellant.	)	
	)	Honorable
	)	Richard P. Klaus,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices McCullough and Knecht concurred in the jugdment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in sentencing defendant.

(2) The appellate court vacated the $10 Anti-Crime Fee improperly imposed by the trial court.

¶ 2 On June 16, 2010, the State charged defendant, Malcolm C. Fox, with aggravated driving with a blood alcohol concentration of 0.08 or more, a Class 1 felony (625 ILCS 5/11-501(a)(1), (d)(2)(D) (West 2010)), alleging defendant had previously committed a violation of this section or similar provisions on four occasions. Defendant pleaded guilty, and the trial court sentenced defendant to 13 years' imprisonment, with 2 years' mandatory supervised release and credit for 7 days previously served. The court also imposed a $5,000 fine and a $10 Anti-Crime Fee. Defendant appeals, arguing the court (1) abused its discretion in sentencing defendant and (2) improperly imposed a $10 Anti-Crime Fee. We vacate the $10 Anti-Crime Fee and affirm as

modified.

¶ 3 I. BACKGROUND

¶ 4 On June 16, 2010, the State charged defendant with aggravated driving with an alcohol concentration of 0.08 or more, alleging defendant had four similar prior convictions. On January 24, 2011, defendant appeared before the trial court. The court admonished defendant of the charges against him and the possible sentences. The State presented a factual basis for the charge, noting chemical testing revealed a 0.261 blood alcohol level and defendant was incoherent and unsteady on his feet, had a strong odor of alcohol on his breath, and had four prior convictions for driving under the influence (DUI). Defendant entered an open guilty plea.

¶ 5 On March 17, 2011, the trial court held a sentencing hearing. The presentence investigation report (PSI) indicated defendant had attended four prior inpatient-treatment programs. The PSI also reflected defendant had used marijuana, cocaine, and crack cocaine up until the age of 42. He was 43 years old at the time of sentencing. The State did not present any evidence in aggravation.

¶ 6 Defendant presented several letters from friends and colleagues in mitigation. Defendant then called his wife, Donna Fox, to testify. Fox testified she and defendant had been married 16 1/2 years, and during their marriage they had experienced marital problems as a result of defendant's alcohol consumption. In 2007, defendant received treatment for his alcohol use at Heritage Behavioral Health Center (Heritage) in Decatur, Illinois. Defendant stayed sober for less than a year. Defendant returned to Heritage for treatment for his alcohol use and mental health issues after he received a 2010 citation for DUI. Defendant was prescribed medication for his mental health issues. Fox testified the medicine helped defendant "rationalize things" and

"communicate *** better, " and she had noticed a "material change in his behavior." Since his last DUI, defendant had been going to "A[lcoholics] A[nonymous]" and church.

¶ 7 Gladys Williams, an addictions therapist at Heritage, testified she first met defendant in 2007 when he underwent treatment at Heritage. Defendant entered Heritage to "detox" for 3 to 5 days and to "engage in residential rehab[iltation] treatment" for 30 days. Residential rehabilitation treatment required a minimum of 25 hours a week of substance abuse treatment and the attendance of Alcoholics Anonymous meetings. After residential rehabilitation, defendant engaged in outpatient treatment and "severed his ties" with Heritage.

¶ 8 Gladys Williams testified defendant returned to Heritage in July 2010 and had a "stronger resolve" to make a change in his life. While defendant was at Heritage, he was diagnosed with bipolar disorder and was prescribed medication. She believed defendant was "sincere" in his desire to get treatment. Williams did not have any professional interaction or treatment with defendant after he was discharged in late September 2010. Williams did not learn of defendant's 2010 DUI until approximately one month after he reentered treatment, and she believed defendant wanted to make a "genuine" effort to combat his alcohol and mental health issues without regard to his legal concerns.

¶ 9 Defendant testified he was employed as a substitute teacher for Urbana School District 116, where he received an award for "excellent achievement and service as a substitute teacher." In 2007 and 2010 defendant sought substance abuse treatment at Heritage. In June 2010, defendant was diagnosed with bipolar disorder. Defendant testified he is currently taking Seroquel for his bipolar disorder and Celexa for his depression.

¶ 10 After hearing the evidence in mitigation, the trial court heard arguments from

both parties. The State recommended a sentence of at least 7 years' imprisonment, while defendant asked to be sentenced "on the lower end of the range." Defendant made a statement in allocution, acknowledging the seriousness of the offense. The trial court stated it "considered the presentence report, the documentary evidence submitted in mitigation, the testimony submitted in mitigation, the [d]efendant's exercise of his right of allocution[,] and the attorneys' arguments." The court also noted defendant's history of DUIs—this being the fifth—his separate criminal record, and his substance abuse issues. The court noted defendant had previously been sentenced in 2001 to 3 years in the Illinois Department of Corrections (DOC) for DUI. The court sentenced defendant to 13 years in DOC, with credit for 7 days previously served and 2 years of mandatory supervised release. The court found defendant was a "danger to the public" and that a "minimum sentence would deprecate the seriousness of the offense." The court also imposed a minimum fine of $5,000 and a $10 Anti-Crime Fee.

¶ 11 On April 14, 2011, defendant filed a motion to reconsider his sentence. On April 15, 2011, defendant filed a motion to vacate the judgment and withdraw his guilty plea. On April 29, 2011, the court held a hearing on defendant's motions and denied defendant's motion to withdraw his guilty plea and vacate the judgment and took defendant's motion to reconsider his sentence under advisement. On May 5, 2011, the court denied defendant's motion to reconsider his sentence in a docket entry.

¶ 12 This appeal followed.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues the trial court (1) abused its discretion in sentencing defendant and (2) improperly imposed a $10 Anti-Crime Fee. The State argues the court

properly sentenced defendant and concedes the $10 Anti-Crime Fee was improperly imposed and should be vacated. We consider each in turn.

¶ 15 A. Defendant's Sentence

¶ 16 A sentencing order is reviewed for an abuse of discretion. *People v. Nussbaum*, 251 Ill. App. 3d 779, 780-81, 623 N.E.2d 755, 757 (1993). "A sentence which falls within the statutory guidelines will not be disturbed on review unless it is manifestly disproportionate to the nature of the offense." *Nussbaum*, 251 Ill. App. 3d at 783, 623 N.E.2d at 758. In sentencing a defendant, the trial court "enjoys wide latitude in determining and weighing factors in mitigation or aggravation, and this court gives great deference and weight to the sentence the trial court thought appropriate in any given case." *Nussbaum*, 251 Ill. App. 3d at 781, 623 N.E.2d at 757.

¶ 17 Defendant pleaded guilty to aggravated driving with a blood alcohol content over 0.08, fifth violation, a Class 1 felony (625 ILCS 5/11-501(a)(1), (d)(2)(D) (West 2010). The applicable sentencing range for a Class 1 felony is 4 to 15 years' imprisonment, with 2 years of mandatory supervised release. 730 ILCS 5/5-4.5-30(a), (*l*) (West 2010). The trial court sentenced defendant to 13 years in prison, with 2 years of mandatory supervised release and credit for 7 days previously served.

¶ 18 Defendant argues the trial court abused its discretion in sentencing defendant because it must consider defendant's mental health issues as a factor in mitigation and it failed to do so. The State argues the court is not required to consider defendant's mental health as a mitigating factor. We agree with the State.

¶ 19 We recently concluded in *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 64, 2012 WL 1098366, at *11, that a defendant's mental health is not a statutorily enumerated

mitigating factor and the trial court is not required to consider it during sentencing. See 730 ILCS 5/5-5-3.1(a) (West 2010). Rather, a defendant's mental health is often a "double-edged sword," which the court may view as a mitigating or aggravating factor. *Brunner*, 2012 IL App (4th) 100708, ¶ 65, 2012 WL 1098366, at *11.

¶ 20 The record shows the trial court considered the mitigating evidence in this case, and it is not this court's province to reweigh the factors involved in the trial court's sentencing decision. See *People v. Alexander*, 239 Ill. 2d 205, 214-15, 940 N.E.2d 1062, 1067 (2010). The court "considered the presentence report, the documentary evidence submitted in mitigation, the testimony submitted in mitigation, the [d]efendant's exercise of his right of allocution[,] and the attorneys' arguments." While the court did not state it was considering defendant's mental health issues as a mitigating or an aggravating factor, it was not required to do so. Defendant offered evidence of his mental health problems in mitigation, and the court stated it considered the testimony submitted in mitigation. The court found a minimum sentence was not appropriate because defendant is a "danger to the public" and a "minimum sentence would deprecate the seriousness of the offense." In imposing the 13-year sentence, the court emphasized this was defendant's fifth DUI, defendant "has a number of substance abuse issues," and defendant has a separate criminal record for domestic battery and driving while his license was revoked or suspended. The court sentenced defendant to a term within the statutory range and we conclude it did not abuse its discretion in imposing defendant's sentence.

¶ 21 B. Anti-Crime Fee

¶ 22 Defendant next argues the trial court improperly imposed a $10 Anti-Crime Fee and the fee should be vacated. The State concedes the fee was improperly imposed and should

be vacated. We accept the State's concession.

¶ 23 Sections 5-6-3(b)(12) and 5-6-3.1(c)(12) of the Unified Code of Corrections allow the trial court to impose fines to reimburse local anti-crime programs. See 730 ILCS 5/5-6-3(b)(12), 5-6-3.1(c)(12) (West 2010). Such fines may be imposed when a defendant is sentenced to probation, conditional discharge, or supervision but may not be imposed when a defendant is sentenced to prison. *People v. Beler*, 327 Ill. App. 3d 829, 837, 763 N.E.2d 925, 931 (2002). Thus, if a trial court sentences a defendant and imposes such a fine, that fine is void. *Beler*, 327 Ill. App. 3d at 837, 763 N.E.2d at 931. Because defendant was sentenced to prison, the $10 Anti-Crime Fee is void and must be vacated.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we vacate the $10 Anti-Crime Fee and otherwise affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 26 Affirmed as modified.