NOTICE
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2013 IL App (4th) 110631-U

NO. 4-11-0631

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 16, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macoupin County
DAVID L. BENNETT,	)	No. 10CF265
Defendant-Appellant.	)	
	)	Honorable
	)	Kenneth R. Deihl,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Appleton concurred in the judgment.
Justice Pope specially concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of both possession of methamphetamine and aggravated participation in methamphetamine manufacturing where methamphetamine product was found on the premises, defendant was identified as one of three persons involved in manufacture, and he did not dissociate himself from the others when confronted by the police.

¶ 2 Shackling of defendant during a bench trial was not a violation of defendant's fourteenth amendment due process guarantees even though no *Boose* hearing was held where trial court made some concessions to his concerns and motion was not renewed.

¶ 3 Defendant's conviction for methamphetamine possession was not carved out of the same act as aggravated participation in methamphetamine manufacturing for purposes of the one-act, one-crime doctrine.

¶ 4 Only one mandatory drug assessment is authorized by statute per charging instrument.

¶ 5 Reimbursement order for public defender fees must be vacated where it was

imposed by the circuit clerk instead of the trial court.

¶ 6 Trial court did not abuse its discretion in using fact of children living in the home where manufacture of methamphetamine occurred as a factor in sentencing when it was also what made the offense an aggravated one.

¶ 7 Defendant is entitled to $5 per day in available fine credit for every day served in pretrial detention.

¶ 8 After a February 2011 bench trial, the trial court convicted defendant, David Bennett, of possession of methamphetamine and aggravated participation in methamphetamine manufacturing. In June 2011, the court sentenced defendant to two concurrent terms of 12 years in prison. Defendant appeals his convictions and his sentences. We affirm in part and vacate in part.

¶ 9 I. BACKGROUND

¶ 10 On December 9, 2010, a two-count information was filed against defendant. Count I alleged aggravated participation in the manufacture of 100 to 400 grams of methamphetamine in a structure where two children under the age of 18 were endangered (720 ILCS 646/15(b)(1)(B) (West 2010)). Count II alleged possession of between 15 and 100 grams of methamphetamine (720 ILCS 646/60(b)(3) (West 2010)). On December 17, 2010, count I was *nol-prossed* and an additional count III was added alleging the aggravated participation in the manufacture of 15 to 100 grams of methamphetamine in a structure where two children under the age of 18 resided (720 ILCS 646/15(b)(1)(B) (West 2010)).

¶ 11 On February 25, 2011, a bench trial began and the following evidence was presented. At 12:24 p.m. on December 8, 2010, Chief Charles Mayeda of the Virden police department learned the department received an anonymous call wherein it was reported (1)

beginning at approximately 6 a.m. that day a strong smell of anhydrous ammonia was emanating from the residence at 108 N. Ring and (2) three people were acting suspiciously behind the residence by going in and out. Based on this call, Mayeda believed people were inside the house. From an earlier incident, Mayeda knew Chris James, Vickie Breeden, and their children lived there. Mayeda and another officer went to the scene. They arrived about 12:30 p.m. Mayeda knocked on both the front and back doors and no one responded. Mayeda notified the drug task force, the Illinois State Police Methamphetamine Response Team, and the State's Attorney.

¶ 12 Breeden arrived at the residence about 1:20 p.m. with Desiree Kelly and was required to remain outside. At 1:39 p.m. Breeden gave written consent to search the residence. She told police she knew James was inside. The drug task force arrived about 2 p.m.

¶ 13 Mayeda entered the house and saw defendant lying on the living room couch. Defendant got up and asked what was going on. The police found James in a bedroom and he reacted similarly to defendant. A minute later, Gerald Sloan appeared in the doorway between the kitchen and the living room. All three men were taken into custody. No children were found in the residence. Defendant had no drugs on his person nor were any visible near where he was found.

¶ 14 Mayeda noted a strong odor of ammonia especially from the drain in the kitchen sink. There were soapy glass jars in the sink, as if recently washed. The basement also had a strong odor, strong enough it stung Mayeda's eyes. That odor emanated from a plastic pitcher having some traces of liquid in the bottom.

¶ 15 John Maher, a convicted felon, lived in a condominium behind 108 N. Ring. He was able to see the backyard of the Ring Street property from his backyard. Maher did not see

anyone enter or leave the Ring Street house while the officers were present. Earlier that day, around 6 a.m., Maher was walking his dog when he smelled anhydrous ammonia. He stated he grew up on a farm and knew the smell. Between 9 and 10 a.m., Maher went to the shed behind his home. From that vantage point he saw three men dressed in hoodies by the back porch of 108 N. Ring. The men were huddled in a circle around what appeared to be a green Mountain Dew bottle. The men were running in and out of the house over a 20- to 30-minute period. Maher identified defendant as one of the men. He did not recognize anyone else. He did not see defendant touch the green bottle. He estimated he saw defendant around 10 a.m., before the anhydrous odor dissipated.

¶ 16 Maher was cross-examined extensively on the details of a line of evergreen trees bordering the back of his property and the back of 108 N. Ring and whether he could see clearly, or at all, through the trees. Maher identified photographs of the area and stated his view was unimpeded.

¶ 17 Special agent Greg Cowell, an officer with the drug task force dispatched to 108 N. Ring, conducted a search of the premises. He arrived at 2:20 p.m. and smelled a strong odor of anhydrous ammonia from a distance of about 40 feet from the residence. He never found any pressurized containers usable to transport anhydrous ammonia. He stated the anhydrous smell can linger in a confined space after production of methamphetamine is complete.

¶ 18 The basement, which had a strong anhydrous ammonia smell, was accessed from beneath the back porch. Two foldout camping chairs were situated next to the furnace. Agent Cowell believed a nearby five-gallon bucket had been used as a table. The basement also contained a cut-corner plastic bag and a pair of pliers.

¶ 19 Throughout the house, Agent Cowell found: a plastic one-gallon pitcher with trace amounts of anhydrous ammonia; twisted coffee filters but no coffeemaker; burnt strips of aluminum foil; a Pepsi can containing syringes and plastic bags; cut corner bags with white residue inside; a store receipt for the purchase of a one-gallon pitcher; plastic Baggies containing suspected methamphetamine; a plastic bag containing 0.1 gram of suspected methamphetamine in a cardboard box; a box of 24-hour 240-milligram Sudafed pills; a round wooden stir stick; two hypodermic needles in a box with a liquid stomach upset remedy; a Kotex box containing an ibuprofen bottle filled with numerous bags of suspected methamphetamine; a bag of syringes wrapped in a pair of swim trunks in a washing machine; a bag of syringes in a tube sock in the washing machine; air line tubing; 140 grams of an unknown liquid (suspected methamphetamine cook residue) in the kitchen sink trap; a small bag containing a small amount of suspected methamphetamine; drain cleaner; coffee filters; a cut-off straw; a one-pound container of salt; and a green plastic bottle containing the remnants of an old methamphetamine cook. Cowell also found one-half to one gram of finished powder that was sent to the police laboratory for analysis.

¶ 20 Agent Cowell stated coffee filters, stir sticks, glass jars, salt, acid, needle nose pliers, and air tubing are often used in the production and packaging of methamphetamine. He stated the only item seized in plain view in the living room was a pair of pliers. All other items seized were concealed in another room. No fingerprint analysis was made of any items found in the house.

¶ 21 The liquid found in the kitchen sink drain was poured into a cup and weighed. A 30-milliliter sample was analyzed by the police laboratory and the rest, per police policy, was destroyed. In methamphetamine manufacturing, the mixture begins as a liquid. Solvent and acid

are added to draw out the methamphetamine. In the police laboratory, the production process takes about 45 minutes to an hour.

¶ 22 The sink trap would normally have water in it when not in use. Ammonia is highly soluble with water. Any methamphetamine "cook" poured down the drain would combine with the standing water. Agent Cowell did not know the actual amount of methamphetamine "cook" poured down the drain at 108 N. Ring. There was no way to date how old the methamphetamine "cook" was.

¶ 23 No Mountain Dew bottle was found in the residence. Instead, a hard plastic wide-mouth green sports bottle was found. It had the presence of ammonia and "old meth cook." Evidence was presented concerning the shape of Mountain Dew bottles and comparing them to the sports bottle.

¶ 24 Agent Cowell ran checks on the national precursor log exchange and learned there was no record of defendant buying any pills. Upon investigation, defendant was found not to have made any of the purchases for which store receipts were found at the residence. Instead, Kelly, Sloan, Breeden, and James had all made purchases of pseudoephedrine in the days leading up to December 8, 2010.

¶ 25 Illinois State Police forensic scientist Brian Stevenson testified the liquid from the sink trap weighed 39.8 grams and contained methamphetamine. The powder sent for testing was positive for methamphetamine.

¶ 26 Defendant did not testify but evidence was presented on his behalf. Lawrence Whalen, 67 years old and retired, testified defendant slept at his house on the night of December 7 to 8, 2010. Whalen takes in persons upon release from the Illinois Department of Corrections

who need a place to stay and defendant was one of them. He had known defendant for seven to eight years. Defendant had been staying with Whalen for four to five months. Defendant occasionally stayed with his girlfriend.

¶ 27 Whalen stated he first saw defendant at 12:30 a.m. on December 8 lying on his couch. Whalen was not sleeping well due to health issues and medication and saw defendant again at 3:30 a.m. About 7 a.m., defendant told Whalen he was going to Kristen Carter's house to get some clothes and returned later to use the shower. Between 11 and 11:30 a.m., defendant borrowed $5 and went to buy cigarettes and milk for Whalen but never returned.

¶ 28 Carter testified she had known defendant for 15 to 16 years and he was an old family friend. They never dated. She stated defendant came to her house at approximately 7:30 a.m. on December 8 to pick up some clothes he had stored there. She estimated it would take about 15 minutes to walk from her house to 108 N. Ring. She heard the police were surrounding 108 N. Ring and went to investigate. Carter stated she and a friend stood at a house directly behind 108 N. Ring and could not see anything from there due to the trees.

¶ 29 On March 11, 2011, the trial court entered a written finding of guilt as to counts II and III. On April 13, 2011, defendant filed a motion for a new trial. The motion was denied on May 6, 2011. On June 20, 2011, the court sentenced defendant to serve two concurrent 12-year sentences. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Reasonable Doubt

¶ 32 Defendant argues he was not proved guilty beyond a reasonable doubt of either possession of methamphetamine or aggravated participation in methamphetamine manufacturing.

He contends the State failed to prove him guilty either as a principal or an accomplice of the possession charge. Defendant did not confess; no fingerprints linked him to drugs; and he was arrested in the living room where no drugs were found. Drugs were discovered in the kitchen and bathroom of the house, which house did not belong to defendant. None of his belongings or behaviors over time linked him to the residence.

¶ 33 Defendant contends the State is required to prove knowledge of possession of an unlawful substance and it was in the immediate and exclusive control of the defendant. *People v. Frieberg*, 147 Ill. 2d 326, 360, 589 N.E.2d 508, 524 (1992). Drug possession may be constructive but there must be an intent and capability to maintain control and dominion. *Frieberg*, 147 Ill. 2d at 361, 589 N.E.2d at 524. Mere presence in the vicinity of a controlled substance in the residence cannot establish constructive possession. See *People v. Scott*, 367 Ill. App. 3d 283, 285, 854 N.E.2d 795, 798 (2006). Guilt by association is a discredited doctrine. *People v. Perez*, 189 Ill. 2d 254, 266, 725 N.E.2d 1258, 1265 (2000).

¶ 34 A reviewing court must consider whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Cunningham*, 212 Ill. 2d 274, 278, 818 N.E.2d 304, 307 (2004). Defendant argues in the review of a conviction for possession of a controlled substance, the issue is whether defendant had knowledge and possession of drugs. 720 ILCS 570/402 (West 2010); *People v. Givens*, 237 Ill. 2d 311, 334-35, 934 N.E.2d 470, 484 (2010). Knowledge may be proved by circumstantial evidence. *People v. Davis*, 50 Ill. App. 3d 163, 167, 365 N.E.2d 1135, 1138 (1977). In this case, defendant contends knowledge cannot be imputed to him where drugs were not in plain view or found in his control. He was in the living

room and appeared to be sleeping on the couch when police arrived and drugs were found out of sight in two other rooms. Defendant would also need to exercise control over the drugs. Presence at the crime scene, coupled with knowledge a crime is being committed, is insufficient to prove accountability. *People v. Taylor*, 164 Ill. 2d 131, 140, 646 N.E.2d 567, 571 (1995).

¶ 35 As to aggravated methamphetamine manufacturing, the State was required to prove defendant knowingly participated in the manufacture of methamphetamine with the intent methamphetamine or a substance containing methamphetamine be produced. 720 ILCS 646/15(a)(1) (West 2010). Defendant does not dispute circumstances strongly suggest (1) methamphetamine had been manufactured at the house and (2) James, Breeden, Kelly, and Sloan participated with intent to manufacture. All of these named people bought items associated with methamphetamine production. The house in which Breeden and James lived was filled with methamphetamine-manufacturing precursors and equipment. The smell of anhydrous ammonia permeated the air outside and inside the house. Powder methamphetamine and drug paraphernalia were stored out of sight and some liquid methamphetamine product was found in the trap beneath the kitchen sink. However, defendant was not identified as having bought any ingredients or equipment.

¶ 36 Maher, a convicted felon, testified to smelling anhydrous ammonia beginning at 6 a.m. and claimed to see three men between 9:30 and 10 a.m. by the back porch all huddled around what looked like a green eight-ounce Mountain Dew bottle. The men were wearing hoodies and kept running in and out of the house. He identified defendant as one of the men but could not identify the other two men. The only thing he saw defendant do was come from the back of the porch into the main area of the house. He did not see defendant touch the bottle.

Defendant contends Maher could not see into the backyard of the house due to evergreen trees.

¶ 37 Further, as to the "meth cook" found in the kitchen drain, Agent Cowell did not know the actual amount of "meth cook" poured down the drain nor was there any way to date how old the "meth cook" was. Defendant argues the liquid cannot be tied to him nor does its presence link him to methamphetamine production occurring on the property.

¶ 38 A common design can be inferred from circumstances surrounding the perpetration of unlawful conduct. *People v. Watts*, 170 Ill. App. 3d 815, 825, 525 N.E.2d 233, 240 (1988). Circumstances especially pertinent are (1) presence at the scene without disapproval or opposition; (2) continued close association with perpetrators after a criminal act; (3) failure to report the incident to authorities; and (4) subsequent concealing or destroying of evidence. *Id.* Evidence in the present case included (1) Maher's testimony recognizing defendant as one of three men huddled in a circle around a green bottle after smelling anhydrous ammonia; (2) Maher could not be shaken in his testimony he could see "really well" through the pine trees; and (3) Maher also described a one-hour "standoff" with police standing around the home. Mayeda and Cowell noted a very strong odor of anhydrous ammonia. The police secured all sides of the home after multiple knocks on doors had failed to get an answer. It was over an hour later when they finally gained entry to the home, plenty of time for hasty cleaning up by the occupants of the house. Police located one green bottle and it contained "the remnants of an old meth cook" with ammonia at 50 parts per million. Testimony suggested it looked similar to a Mountain Dew bottle. The bottle emitted a strong odor of anhydrous ammonia. The police removed liquid from the sink trap because they had been outside a long time and drains are used to destroy signs of methamphetamine "cook." The police preserved a 30-milliliter sample of liquid from the sink

trap and sent it to the forensic lab. The sample weight was 39.8 grams and the liquid contained some methamphetamine.

¶ 39 Maher's account was corroborated by police recovery of a green bottle testing positive for anhydrous ammonia. It appears Maher witnessed a methamphetamine "cook." Maher stated he could see defendant "really well." None of the photos presented by the defense were taken from Maher's vantage point.

¶ 40 A strong odor of anhydrous ammonia lingered for hours at the property. It can reasonably be inferred defendant would not have remained there visiting amid the strong odor and illegal manufacturing unless he was aware and involved. Defendant remained with James and Sloan even after police arrived. The time gap between the arrival of the police and their entry into the home gave time to conceal evidence of manufacturing activities. Circumstantial and direct evidence established defendant's guilt of possession of methamphetamine and aggravated participation in methamphetamine manufacturing.

¶ 41 B. Shackling of Defendant Without Determination of Necessity

¶ 42 Defendant was brought to court at the start of his bench trial in handcuffs and a belly restraint. Defense counsel requested defendant's handcuffs be removed so he could take notes and help assist in his defense. The trial court replied it had only one security officer and normally two officers were required to uncuff a defendant. The court would consider the request later if another officer arrived in the courtroom. Defense counsel then requested removal of the belly restraint so defendant could place his hands above the table. The court deferred to the security officer, who stated this procedure would be fine, and the belly restraint was removed.

¶ 43 Defendant argues our supreme court has stated, whether bench or jury trial,

defendant must not be shackled during trial without the trial court's determination defendant may try to escape or pose a threat to the safety of people in the courtroom, or shackling is necessary to maintain order during trial. *People v. Boose*, 66 Ill. 2d 261, 266, 362 N.E.2d 303, 305 (1977) (jury trial); *In re Staley*, 67 Ill. 2d 33, 38, 364 N.E.2d 72, 74-75 (1977) (bench trial). An accused has the right to stand trial "with the appearance, dignity, and self-respect of a free and innocent man." (Internal quotation marks omitted.) *Staley*, 67 Ill. 2d at 37, 364 N.E.2d at 73. "[E]ven when there is no jury, any unnecessary restraint is impermissible because it hinders the defendant's ability to assist his counsel, runs afoul of the presumption of innocence, and demeans both the defendant and the proceedings." *People v. Allen*, 222 Ill. 2d 340, 346, 856 N.E.2d 349, 353 (2006). *Boose* set forth 13 factors for a trial court to consider in deciding whether manifest need exists to restrain defendant during trial: (1) seriousness of the offense; (2) defendant's temperament and character; (3) defendant's age and physical characteristics; (4) defendant's past record; (5) any past escapes or escape attempts; (6) evidence of a present plan of escape; (7) threats by defendant to harm others or create a disturbance; (8) evidence of self-destructive tendencies; (9) risk of mob violence or attempt revenge by others; (10) possibility of a rescue attempt by cooffenders still at large; (11) size and mood of the audience; (12) nature and physical security of the courtroom; and (13) availability of alternative remedies. *Boose*, 66 Ill. 2d at 266-67, 362 N.E.2d at 305-06.

¶ 44 Defendant contends the trial court made no attempt to justify restraining him. If it had, he argues it was likely the court would have reached the conclusion restraint was not justified.

¶ 45 A reviewing court examines the record to determine whether the trial court abused

its discretion in requiring a defendant to be restrained during trial. *Boose*, 66 Ill. 2d at 267, 362 N.E.2d at 306. A finding use of physical restraints in a courtroom is necessary "for security purposes," without more, constitutes an abuse of discretion. See *Allen*, 222 Ill. 2d at 348, 856 N.E.2d at 354.

¶ 46 Continued use of restraints in the courtroom, even in a bench trial without a *Boose* hearing, is not appropriate. Compliance with the dictates of *Boose* is not excused because there may be only one court security officer in the courtroom.

¶ 47 The application of a *Boose* analysis requires an individualized analysis of the defendant and his likelihood of misbehavior. A trial judge cannot adopt a policy based only on court security staffing, nor should the trial judge defer the decision to the court security officer. In these circumstances, it was error for the trial court to keep defendant restrained.

¶ 48 However, that error does not require reversal in this case. The objection was not renewed by defense counsel at any time during the hearing. The record fails to show whether a second security officer ever appeared during trial. Defense counsel received the relief he requested, hands above the table, when his first request was declined. Defendant has not shown prejudice by remaining handcuffed with hands above the table during the bench trial. The fact the trial judge knew defendant was shackled, without more, is not enough to reverse. Restraining a defendant without a *Boose* hearing does not *per se* constitute reversible error. Where defendant did not object at trial, he must do more than set forth reasons shackling is improper in the abstract; he must set forth why in particular he was denied a fair trial or was impeded from assisting counsel. *People v. Clark*, 406 Ill. App. 3d 622, 637, 940 N.E.2d 755, 770 (2010).

¶ 49 C. One Act, One Crime

¶ 50 Defendant was convicted of aggravated participation in the manufacture of methamphetamine, yielding 15 to 100 grams of methamphetamine (count III). He argues he could not have committed that offense without also having possessed the 15 to 100 grams of methamphetamine as charged in count II. Because both offenses have at their core the same act, possession of the same methamphetamine on the same day in the same place, he contends count II is a lesser-included offense of count III. Multiple convictions are improper if based on the same physical act. *People v. Artis*, 232 Ill. 2d 156, 165, 902 N.E.2d 677, 683 (2009). When a defendant is convicted of more than one crime arising from the same act, all but the most serious conviction must be vacated. *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 306 (1996). Under one-act, one-crime analysis, a reviewing court must determine (1) whether defendant's conduct consisted of one physical act or separate physical acts; then (2) whether any of the convictions are lesser-included offenses within a greater offense. *People v. Schmidt*, 405 Ill. App. 3d 474, 486, 938 N.E.2d 559, 571 (2010).

¶ 51 Defendant contends this decision requires simply applying law to facts; thus, review is *de novo*. *People v. Sims*, 192 Ill. 2d 592, 615, 736 N.E.2d 1048, 1060 (2000).

¶ 52 Section 15(a)(1) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(a)(1) (West 2010)) provides: "It is unlawful to knowingly participate in the manufacture of methamphetamine with the intent that methamphetamine or a substance containing methamphetamine be produced." Participation in the manufacture can take many forms. It could be purchasing the precursors to methamphetamine, supplying the knowledge to concoct the methamphetamine "cook," serving as a lookout, or sampling the wares for quality control. Participation may not require the presence of a defendant during the final stages of

production where the actual methamphetamine exists and is possessed by the person doing the hands-on work of manufacturing. The person who helps the manufacturing process along the way with the intent methamphetamine be produced, without actually being present for the finished product, may be guilty of the manufacture of methamphetamine while not ever possessing the finished product. Possession of methamphetamine is not a lesser-included offense of manufacturing methamphetamine. Both of defendant's convictions are proper and both will stand.

¶ 53 D. Only One Mandatory Drug Assessment Is Authorized by Statute

¶ 54 Defendant was convicted of two offenses, the Class X offense of aggravated unlawful participation in methamphetamine production of over 15 grams but less than 100 grams of methamphetamine (count III) and the Class 1 offense of possession over 15 grams but less than 100 grams of methamphetamine. (count II). At sentencing, the trial court imposed mandatory drug assessments of $3,000 and $2,000 respectively under the Illinois Controlled Substances Act (720 ILCS 570/411.2 (West 2010)). The court should have imposed a drug assessment under section 80 of the Methamphetamine Control and Community Protection Act (720 ILCS 646/80 (West 2010)). Section 80 states the court shall not impose more than one assessment per complaint. 720 ILCS 646/80(g) (West 2010). If a person is convicted of more than one offense in a complaint, the assessment shall be based on the highest class offense for which he was convicted. 720 ILCS 646/80(g) (West 2010). As defendant was charged in one information, we vacate the $2,000 assessment and uphold the assessment for $3,000.

¶ 55 E. Reimbursement of Counsel Fees

¶ 56 The public defender was appointed to represent defendant. At sentencing, the trial

court did not impose a public defender reimbursement fee. Following sentencing, the circuit clerk assessed a $300 reimbursement fee. Defendant argues the fee cannot stand because it was imposed by the clerk and not the court; the court failed to conduct the required hearing prior to entry of the fee order; and the clerk entered the order over 90 days after the final order in the case.

¶ 57 Statute and case law state no reimbursement fee may be assessed except by the trial court after holding a hearing to determine a defendant's ability to reimburse the county for attorney fees. 725 ILCS 5/113-3.1(a) (West 2010). Section 113-3.1(a) requires the trial court to conduct a hearing into a defendant's financial resources as a precondition to ordering reimbursement. *People v. Love*, 177 Ill. 2d 550, 555, 687 N.E.2d 32, 35 (1997).

¶ 58 Here, the trial court did not assess the fee. Nor did the court conduct the required hearing. Nevertheless, the circuit clerk assessed the $300 fee. Because the method of assessment employed denied defendant the procedural safeguards mandated by section 113-3.1(a), defendant contends the reimbursement order must be vacated. See *Love*, 177 Ill. 2d at 565, 687 N.E.2d at 39.

¶ 59 The State argues we should find assessment of the public defender fee is actually in the nature of a separate civil penalty which must be challenged in a separate cause of action. Thus, defendant's notice of appeal, which did not specifically raise this issue but only appealed from his conviction and sentence, does not confer jurisdiction on this court to consider the issue. The State does not contest the fact the public defender fee was improperly assessed, only that the issue cannot be addressed in this appeal.

¶ 60 The circumstances present in this case are covered by *People v. Gutierrez*, 2012

IL 111590, 962 N.E.2d 437. In *Gutierrez*, the supreme court first found the appellate court did not lack jurisdiction to review fees or fines as the notice of appeal properly brought up the defendant's entire conviction and sentence for review and the court had jurisdiction to act on void orders of the circuit clerk. *Gutierrez*, 2012 IL 111590, ¶ 12, 962 N.E.2d 437. The court then found the circuit clerk's act of imposing the reimbursement fee without a court order violated section 113-3.1(a) (*Gutierrez*, 2012 IL 111590, ¶ 24, 962 N.E.2d 437) as that section provides the fee may be ordered by the court after a hearing on ability to pay. 725 ILCS 5/113-3.1(a) (West 2010). The court concluded where neither the trial court nor the State sought the fee, the clerk's improperly assessed fee should be vacated. *Gutierrez*, 2012 IL 111590, ¶ 22, 962 N.E.2d 437. Finally, section 113-3.1(a) sets a time limit of 90 days after entry of the final order for imposing counsel fees. Because the time limit had expired, the court in *Gutierrez* vacated the fee outright without remanding for a fee hearing, and neither the State nor the court had moved for a hearing. *Gutierrez*, 2012 IL 111590, ¶¶ 21, 28, 962 N.E.2d 437.

¶ 61 Similarly, we vacate the public defender fee in this case as it was improperly assessed by the circuit clerk, not the trial court, and no hearing was held on defendant's ability to pay.

¶ 62 F. Factor Inherent in Offense Also Used in Aggravation for Sentencing Purposes

¶ 63 Defendant argues the trial court erred in using a factor inherent in the offense of aggravated participation in methamphetamine manufacturing as a factor in aggravation for sentencing. The court used the fact two children under 18 lived in the residence as a factor in aggravation. However, the factor of children living in the home was already inherent in the crime of aggravated participation, as charged.

¶ 64 Generally, whether a sentence is excessive is reviewed for abuse of discretion. *People v. Andrews*, 132 Ill. 2d 451, 464, 548 N.E.2d 1025, 1031 (1989). Specifically, a trial court abuses its discretion if it fails to apply proper criteria when weighing facts, and review must consider the legal adequacy of the way the court reached its results as well as the reasonableness of the results.

¶ 65 However, defendant argues *de novo* review is appropriate in this case because the question of whether the trial court relied on an improper aggravating factor involves the application of law to uncontested facts. *People v. Watkins*, 325 Ill. App. 3d 13, 18, 757 N.E.2d 117, 122 (2001) (sentencing issues involving a question of law are reviewed *de novo*). Whether a sentence was the result of a double enhancement requires *de novo* review. *People v. Chaney*, 379 Ill. App. 3d 524, 527, 884 N.E.2d 783, 786 (2008) (two previous Class 2 felony convictions were used to elevate seriousness of charged offenses to Class 2 felonies and then used again to sentence him as a Class X felon).

¶ 66 No matter which standard of review is used, we find the trial court did not err in using the factor of children living in a home where the manufacture of methamphetamine occurred as an aggravating factor at sentencing despite it also being an element of the offense of aggravated manufacture of methamphetamine.

¶ 67 Section 15(b)(1)(B) of the Methamphetamine Control and Community Protection Act (720 ILCS 646/15(b)(1)(B) (West 2010)) states aggravated participation in methamphetamine manufacturing occurs when a person does so in a structure where a child under the age of 18 resides. That person is then guilty of a Class X felony and subject to a term of imprisonment of not less than 6 years and not more than 30 years (720 ILCS 646/15(b)(2)(A) (West 2010)). In

this case, when determining the sentence, the trial court stated production occurred in a structure where *two* children under 18 lived. Then, in determining whether defendant needed to be incarcerated for a longer period of time "than in the past," the court stated he was found manufacturing methamphetamine in a residence where children lived.

¶ 68 There is a general prohibition against the use of a single factor both as an element of the crime and an aggravating factor. *People v. Gonzalez*, 151 Ill. 2d 79, 83-84, 600 N.E.2d 1189, 1191 (1992). Because the single factor was already considered by the legislature when it set a range of penalties, it would be improper to consider it again as justification for imposing a greater penalty (double enhancement). *People v. James*, 255 Ill. App. 3d 516, 531-32, 626 N.E.2d 1337, 1349 (1993). When a trial court considers an improper factor in aggravation, defendant maintains the case must be remanded unless it appears from the record the weight placed on that factor was so insignificant it did not lead to a greater sentence. *People v. Glenn*, 363 Ill. App. 3d 170, 178, 842 N.E.2d 773, 780 (2006). Defendant admits it is difficult to ascertain how much weight the court placed on the fact children resided in the home. However, he asserts he has a fundamental right not to be sentenced based on improper factors in aggravation, and the court's reliance on an improper factor impinges on his fundamental right to liberty. See *People v. Martin*, 119 Ill. 2d 453, 458, 519 N.E.2d 884, 886 (1988).

¶ 69 In this case, however, we note the statute only requires one child under 18 reside in the residence for the charged crime to constitute aggravated participation in the manufacture of methamphetamine, but here there were two children so this factor is not inherent in the offense. A trial court may consider the nature and circumstances of the offense. See *People v. Robinson*, 391 Ill. App. 3d 822, 842, 909 N.E.2d 232, 252 (2009). The defendant's sentence was properly

aggravated by the number of children residing in the home and the fact their ages (7 years and 18 months) were far less than 18 years discussed in the statute. Further, defendant's sentence was 12 years' imprisonment when he was eligible for up to 30 years. Defendant had prior convictions for burglary, retail theft, possession of cannabis, theft, possession of anhydrous ammonia/intent, and methamphetamine manufacturing. He had received a prison term of five years for the last offense, and the trial court was clear he needed a longer sentence this time to finally understand he needed to change his behavior. The court did not err in sentencing him to 12 years' imprisonment.

¶ 70 G. Calculation of Fine Credit

¶ 71 A defendant is entitled to a reduction of fines at the rate of $5 per day for every day spent in custody prior to sentencing. 725 ILCS 5/110-14(a) (West 2010); *People v. Bennett*, 246 Ill. App. 3d 550, 551, 616 N.E.2d 651, 651-52 (1993). This credit is available as to drug assessments imposed upon the conviction of a drug offense. See *People v. Jones*, 223 Ill. 2d 569, 587-92, 861 N.E.2d 967, 978-81 (2006). The credit may be requested for the first time on appeal (*People v. Woodard*, 175 Ill. 2d 435, 457, 677 N.E.2d 935, 945-46 (1997)), and an appeals court should award such credit irrespective of whether the issue was brought to the attention of the trial court. *Id*.

¶ 72 Defendant did not request a credit in the trial court and raised the issue for the first time on appeal. The State concedes defendant is entitled to $975 in credit against this $3,000 drug assessment, calculated at $5 per day for each of the 195 days he spent in custody prior to sentencing. We so order.

¶ 73 III. CONCLUSION

¶ 74 We affirm defendant's convictions for possession of methamphetamine and aggravated participation in the manufacture of methamphetamine and his prison sentences for those convictions. We vacate the drug assessment for $2,000 and the public defender fee reimbursement order. We order defendant be given $975 in credit toward his drug assessment fees.

¶ 75 Affirmed in part and vacated in part.

¶ 76 JUSTICE POPE, specially concurring in part and dissenting in part.

¶ 77 I respectfully dissent in part because I believe, under the facts of this case, the possession charge is a lesser-included offense of the aggravated-participation-in-manufacture-of-methamphetamine charge.

¶ 78 The State argues defendant's conviction by accountability for the possession of methamphetamine by two codefendants was not carved out of the same physical act of his participation in methamphetamine manufacturing. The record does not support the State's argument in any manner. Defendant was not charged with possession on an accountability theory, nor did the State present evidence of accountability, nor did it argue an accountability theory to the court. The State in its closing argument said the following:

> "Your honor, this is a case of three men; they were manufacturing methamphetamine in a home in Virden ***. One of these men was the defendant, David Bennett. *** [T]he [D]efense wants us to believe he didn't have anything to do with the activity of the meth manufacturing that was going on at 108 Ring Street. But he did. He did. There was a witness ***. The eyewitness indicated that he saw the three men around the green bottle, and within their travel in and outside the house, that he saw the face of David Bennett. *** [He] specifically identified David Bennett as one of the three who were huddled around that green bottle."

The State's position on appeal concerning defendant's accountability for the offense of possession is not supported by the record and was never presented to the trier of fact. It is not appropriate to

take a position on appeal that was never presented to the trier of fact. See *People v. Johnson*, 2013 IL App (4th) 120162 ¶¶ 32-34; *People v. Millsap*, 189 Ill. 2d 155, 166, 724 N.E.2d 942, 948 (2000).

Further, the majority states:

> "Participation may not require the presence of a defendant during the final stages of production where the actual methamphetamine exists and is possessed by the person doing the hands-on work of manufacturing. The person who helps the manufacturing process along the way with the intent methamphetamine be produced, without actually being present for the finished product, may be guilty of the manufacture of methamphetamine while not ever possessing the finished product." *Supra* ¶ 52.

Here, however, defendant was present during the final stages and was one of the persons doing the hands-on work of manufacturing. While a person may be guilty of manufacture without possession of the finished product, that is not what happened here.

¶ 79 The only evidence concerning the weight of the methamphetamine related to the liquid in the sink trap. The amount of liquid submitted to the crime lab for testing was 39.8 grams. The State's closing argument makes clear it was talking only about the liquid in the sink trap and not any other finished product.

¶ 80 When Officer Cowell was asked by the State if he was dealing with an old meth cook, he stated he was dealing with an incident that occurred earlier that day. Glass jars with soap suds were in the sink when police entered to search, indicating they had been washed

recently. During the more than one-hour delay between the police banging on the doors of the residence and their entry pursuant to Breeden's consent to search, the evidence supports a finding defendant and his cohorts were disposing of the meth cook. Defendant's manufacturing resulted in the liquid meth in the sink trap. It is clear his possession conviction is a lesser-included offense of the manufacture, where the same methamphetamine is the basis for both charges. Consequently, I dissent.