

NOTICE
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2014 IL App (4th) 121003-U
NO. 4-12-1003

FILED
March 28, 2014
Carla Bender
4th District Appellate
Court, IL

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
KEVIN A. JORDAN,)	No. 11CF1169
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Pope and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's judgment in part, vacated in part, and remanded with directions, holding (1) the court did not err in sentencing defendant to 28 years' imprisonment, (2) the \$100 Violent Crime Victims Assistance fine must be vacated and this case remanded with directions, and (3) the \$10 Probation Operations Assistance assessment must be vacated.

¶ 2 After defendant, Kevin A. Jordan, was convicted of residential burglary (720 ILCS 5/19-3 (West 2010)), the trial court sentenced him to 28 years in the Department of Corrections (DOC). The circuit clerk assessed additional fines and fees, including a \$100 Violent Crime Victims Assistance (VCVA) fine and a \$10 Probation Operations Assistance (POA) assessment.

¶ 3 Defendant appeals, asserting (1) the trial court erred in imposing an excessive, 28-year DOC sentence and (2) the circuit clerk improperly assessed a \$100 VCVA fine and a \$10

POA assessment.

¶ 4 We affirm in part, vacate in part, and remand with directions.

¶ 5 I. BACKGROUND

¶ 6 In June 2011, the State charged defendant by information with one count of residential burglary (720 ILCS 5/19-3 (West 2010)), alleging defendant entered the dwelling place of Lea M. with the intent to commit therein a theft. The State also charged defendant under different case numbers with three additional and unrelated residential burglary offenses (Champaign County cases 11-CF-2131, 11-CF-2132, and 12-CF-48), all of which the State later dismissed following the sentencing hearing in this matter.

¶ 7 A. The Trial

¶ 8 In September 2012, defendant's case proceeded to jury trial. Lea M. testified that she returned home on the evening of June 25, 2011, to discover her jewelry strewn about her dresser and several pieces of jewelry missing. She asked her son, Brent, if he had been in her room looking for something, but he stated he had not. Rather, Brent told her he had been asleep in the basement since returning home from work earlier in the day. Lea then called police to report the theft of gold jewelry and family heirlooms. Lea estimated the value of her stolen jewelry to be between \$9,000 and \$10,000. After police arrived, Nicholas F., Lea's husband, noticed damage to one of the doors leading from the garage into the home. Brent recalled finding the patio door unlocked earlier that day, which he found unusual because his parents always locked the door before leaving the house.

¶ 9 Upon arrival at the residence, Officer Elizabeth Ranck of the Urbana police department dusted for fingerprints. She recovered one latent print from a tin in which Lea stored

her Christmas jewelry. That latent print matched the known prints of defendant. Lea, Nicholas, and Brent all denied knowing defendant or recognizing his photograph and indicated he did not have permission to be in the residence or to take any property. When questioned by police, defendant denied any involvement with the residential burglary of Lea's home.

¶ 10 On this evidence, the jury returned a guilty verdict.

¶ 11 B. The Sentencing Hearing

¶ 12 In October 2012, the case proceeded to a hearing on defendant's posttrial motion, which the trial court denied. The court then commenced defendant's sentencing hearing. Though defendant's conviction for residential burglary constituted a Class 1 felony, his criminal history required the court to sentence him as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). Thus, defendant was ineligible for probation and faced a sentence of 6 to 30 years in DOC. 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 13 1. *The Presentence Report*

¶ 14 According to the presentence report, defendant had been incarcerated for a total of 290 days in this case and had been consistently incarcerated since January 2012. As a juvenile, defendant completed a term of supervision for a 2000 battery offense and subsequently completed a sentence of 40 hours' community service for a 2001 possession-of-fireworks offense. In 2002, he was adjudicated delinquent for burglary and theft offenses, for which he received 12 months' probation and 10 days in a detention center.

¶ 15 In 2007, as an adult, defendant received a sentence of 18 months' probation for the Class 2 offense of robbery. In 2010, defendant accrued a Class 2 burglary conviction, for which he received a sentence of 48 months' drug-court probation and 364 days' incarceration

subject to remission if defendant entered a long-term residential drug-treatment program. As part of his plea agreement in the burglary case, the court terminated defendant's probation unsuccessfully in the robbery case with no further sentence. Additionally, defendant had numerous traffic convictions as an adult.

¶ 16 The presentence report also noted defendant had a five-year-old daughter who resided with her mother. Defendant was court-ordered to pay child support but was in arrearage. He visited his daughter three to four times per week when not using drugs. Prior to his incarceration, defendant had supervised visitation once per week and every other weekend. He said he did not see his daughter while incarcerated because he did not want her to see him in jail; however, they would communicate by phone and letter. Defendant indicated he did not have a relationship with his father, though he described having a "really good relationship" with his mother.

¶ 17 With respect to education, the presentence report noted defendant dropped out of high school and had not yet attained his general equivalency degree (GED). He aspired to earn his GED and attend college to earn a degree in either business or automotive repair. Defendant held several jobs from 2007 through 2011, in which he worked as a painter, including steady employment from 2009 to 2011, where he worked 20 to 60 hours per week. He also worked for County Market and Schnucks grocery store chains in 2010.

¶ 18 The presentence report stated defendant was admitted to the Pavilion treatment center in Champaign at age 15 for "anger issues" and drug treatment, at which time he was prescribed Risperdal and Zoloft to treat his anger and depression. However, defendant discontinued the medication after a few months because it "made him tired." He said drugs were

more of a problem than alcohol but admitted he was under the influence of alcohol when he accrued his robbery case. Defendant stated he first smoked cannabis at age 11 and began smoking on a daily basis by age 13. His use of the drug lessened at age 18 and he last smoked cannabis 15 months prior to his presentencing interview. Defendant first used cocaine at age 16 and eventually began to use it on a daily basis. Defendant first used heroin at age 16. He also experimented with hallucinogens. Additionally, defendant admitted abusing prescription medications, including Xanax, Percocet, Valium, and Seroquel, on a daily basis until December 2011. Defendant admitted committing crimes while under the influence of drugs, stating, "I have always depended on drugs to run my life and they have always got me in trouble. It has caused me financial, legal, family, and social problems. It has been a disaster all the way around. They have pretty much taken over me."

¶ 19 In an attempt to address his drug dependency, the presentence report reflects defendant sought substance-abuse treatment numerous times at various rehabilitation facilities, including (1) the Prairie Center in Urbana and the Pavilion at age 15; (2) Central East Alcoholism and Drug (CEAD) Council in Charleston, the Pavilion, and Chestnut Health Systems in Bloomington at age 16, (3) the Prairie Center at age 18; (4) Abiding Hearts in Florida in 2009 (age 22); and (4) the Gateway Foundation in Springfield and the Prairie Center in 2010 (age 23). Though brief periods of sobriety sometimes followed defendant's treatment, he could not sustain sobriety. Defendant indicated drugs were the major problem in his life, saying, "I know I can get a hold of my addiction if I change my surroundings, people, places, and things. My downfall is drugs. Period. I think I'd be OK if I continued living in a sober-living way and keep myself away from negative people." He indicated a desire to move somewhere new so he could get

away from his present surroundings because his time in jail helped him to get his "mind right."

¶ 20 *2. Evidence in Aggravation*

¶ 21 At sentencing, the probation department submitted a report detailing defendant's progress while on probation in his 2010 burglary case. After beginning drug-court probation in August 2010, defendant entered into residential treatment at the Gateway Foundation and successfully completed inpatient treatment. Thereafter, defendant (1) reported to probation sporadically, (2) missed several drug tests, (3) failed to provide verification of attendance at Alcoholics Anonymous (AA) and Narcotics Anonymous (NA) meetings, (4) failed to engage in aftercare treatment until April 2011, (5) failed two drug tests, (6) overdosed on heroin in July 2011, and (7) accrued four new residential burglary charges.

¶ 22 The State presented Lea and Nicholas's combined victim-impact statement, in which they discussed the loss of the sense of security in their home. Nicholas then explained that defendant stole several family heirlooms of great sentimental value that belonged to family members who had passed away, and that those items were priceless pieces of family history they could never recover.

¶ 23 The State called Officer Mark Vogelzang of the Champaign police department to testify regarding defendant's three other pending residential burglary cases. First, in December 2011, Ellen W. entered her residence to discover an individual she later identified as defendant stealing her silverware (Champaign County case No. 11-CF-2132). The shoe prints recovered from the scene matched those outside defendant's home. Defendant's girlfriend subsequently told police defendant admitted to her that he had been interrupted by a homeowner while burglarizing a home. Second, with respect to Champaign County case No. 12-CF-48,

defendant's girlfriend told police defendant admitted burglarizing Matthew L.'s residence. Upon following up on that information, police went to Matthew L.'s residence and discovered it had been burglarized. Matthew L. reported two basketball tickets stolen, which were later recovered from defendant's residence. Additionally, in Champaign County case No. 11-CF-2131, Michael L. reported his residence had been burglarized after he returned home to discover the front door forced open and numerous coins and foreign currency missing. Officers subsequently (1) located footage of defendant visiting several local banks where he cashed in coins and (2) recovered from defendant's home an envelope identified as belonging to Michael L. Officer Vogelzang also testified police suspected defendant of forging an elderly woman's checks after police discovered defendant cashing the checks the woman reported as stolen.

¶ 24

3. Evidence in Mitigation

¶ 25 Following the State's evidence in aggravation, defendant presented a letter from his mother in mitigation and subsequently made a statement in allocution. Defendant's mother, Alison Jordan-Frost, described defendant as "a wonderful, caring, compassionate son, father, brother, and friend." She praised defendant's decision to cooperate with his ex-girlfriend in the raising of their daughter and stated she thought defendant was ready to make "a transformation" and pursue the "right path." Alison noted defendant appeared mentally stronger in the past several months and believed he would use his incarceration as an opportunity for "healing, learning, helping others, and being a positive member of society."

¶ 26

Defendant then made a statement in allocution, stating,

"I would like to apologize for the path that I have chosen
and the decisions I have made while under the influence of drugs.

I am a wonderful, honest, and very intelligent person. I just let the drugs take hold of me and lead me down a very disturbing and destructive path.

I have a five-year-old daughter *** and a very supportive family.

I will take this time to rehabilitate and get my GED and work on college courses.

I want to be able to give my daughter *** the life she deserves and be the father that she needs.

I want to repay and apologize to everyone I have hurt, took from, or did any wrong to in any way, shape, or form.

I think back to the choices and decisions I have made, and I feel horrible.

When I do make it through all of this, my decision will be to try and help other people that suffer from the same things I have. *** I am tired of living the lifestyle and hurting myself and others. I know I am ready to change and will take every step possible to prove to myself and everyone else that I can and will change."

¶ 27

4. *Imposition of Sentence*

¶ 28 The State recommended a sentence of 22 years in DOC. Defendant did not request a specific sentence but asked the trial court to consider (1) this would be defendant's first DOC sentence and (2) an extensive sentence of 22 years in DOC was unnecessary to make an impression on defendant.

¶ 29 After hearing the evidence, the trial court stated it considered the presentence report, the evidence in aggravation and mitigation, arguments of the attorneys, and the statement in allocution. The court found no statutory factors in mitigation but found defendant's young age and employability constituted nonstatutory factors in mitigation. The court then stated there were two statutory factors in aggravation: (1) defendant's prior criminal history and (2) the need to deter defendant and other similarly situated criminal defendants. The court noted that, after committing the residential burglary in this case, defendant committed other burglaries.

¶ 30 The trial court observed defendant had numerous opportunities to deal with his substance-abuse addiction and still continued to use drugs. Nonetheless, the court expressed sensitivity to defendant's heroin addiction due to the "horribly addictive" nature of the drug. Conversely, the court noted defendant stole family heirlooms of priceless sentimentality from the victims. The court then stated,

"It's a sad case because what we have here is a 25-year-old man whose rehabilitative potential at this point, based on the numerous opportunities he has had, his rehabilitative potential is close to nil.

The only thing that is going to get him involved in a

potential program that will hopefully rehabilitate him is a lengthy period of incarceration in the Illinois Department of Corrections."

The court then sentenced defendant to 28 years in DOC. The circuit clerk assessed additional fines and fees, including a \$100 VCVA fine and a \$10 POA assessment.

¶ 31 Defendant did not file a motion to reconsider sentence.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, defendant asserts (1) the trial court erred in imposing an excessive, 28-year DOC sentence and (2) the circuit clerk improperly assessed a \$100 VCVA fine and a \$10 POA assessment. We address these contentions in turn.

¶ 35 A. Sentencing

¶ 36 Defendant first argues the trial court erred in sentencing defendant to 28 years in DOC. The court has discretion in sentencing and we will not reverse the court's decision absent an abuse of that discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. The court is granted such discretion in sentencing because "the trial court is in a better position to judge the credibility of the witnesses and the weight of the evidence at the sentencing hearing." *People v. Ramos*, 353 Ill. App. 3d 133, 137, 817 N.E.2d 1110, 1115 (2004).

¶ 37 Where a defendant fails to file a motion to reconsider sentence to preserve sentencing issues on appeal, the court's sentencing decision will only be overturned if the defendant demonstrates plain error. See *People v. Moreira*, 378 Ill. App. 3d 120, 131, 880 N.E.2d 263, 272 (2007). Under the plain-error doctrine, the first step is to determine whether a

clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007). If the reviewing court determines a clear or obvious error occurred, the second step is to determine whether (1) "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or (2) the "error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410-11. Thus, we turn to whether the court committed a clear or obvious error in sentencing defendant to 28 years in DOC.

¶ 38 The trial court errs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000). We presume the sentencing court considered all relevant factors in aggravation and mitigation unless the record affirmatively reveals otherwise. *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927, 913 N.E.2d 635, 645 (2009). As the court determines an appropriate sentence, "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed." *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001).

¶ 39 Defendant's central argument is the trial court failed to give appropriate weight to the mitigating factors, such as (1) defendant's addiction, (2) his rehabilitative potential, and (3) the nonviolent nature of the offense. Moreover, defendant asserts a lesser sentence would restore defendant to useful citizenship.

¶ 40 With respect to defendant's addiction, the record leaves no doubt that defendant

has been battling a serious substance-abuse addiction for approximately 10 years. Defendant has abused a myriad of drugs since the age of 15, starting with cannabis and progressing to cocaine, heroin, hallucinogens, and prescription drugs. Addiction is not a statutory factor in mitigation; it is a nonstatutory factor the trial court may consider in appropriate circumstances when imposing sentence. *People v. Smith*, 214 Ill. App. 3d 327, 339, 574 N.E.2d 784, 792 (1991). However, "[w]here a trial judge considers a defendant's drug addiction, but nonetheless decides that the addiction, if proved, does not entitle the defendant to lenient treatment, it cannot be said that an abuse of discretion has occurred." *Smith*, 214 Ill. App. 3d at 340, 574 N.E.2d at 792-93.

¶ 41 In this case, the trial court clearly considered defendant's addiction in imposing sentence, discussing defendant's addiction in terms of his rehabilitative potential, which the court described as "close to nil." The court noted defendant had countless opportunities to demonstrate his rehabilitative potential but had been unable to maintain sobriety. Our count indicates defendant has entered into substance-abuse treatment on nine different occasions, both outpatient and residential, but, each time, defendant returned to using drugs after, at most, a brief period of sobriety. Though defendant's lengthy period of incarceration prior to sentencing allegedly left him with a clearer plan and the resolve to discontinue his drug use, his past behavior indicates he will most likely return to abusing substances following a brief period of sobriety. Defendant admitted that he committed criminal offenses while abusing drugs, which made him a threat to the community and to himself. That is not indicative of rehabilitative potential; thus, it was not error for the court to decline to consider defendant's addiction as a factor in mitigation or to find defendant's rehabilitative potential was "close to nil."

¶ 42 Finding defendant lacked rehabilitative potential, the trial court turned its focus on

the need to punish defendant for his actions and to deter others from committing similar acts in the future. Although defendant has not served a prior DOC sentence, his prior record was of such nature and severity that the trial court was required to sentence him as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2010). Defendant argues the court imposed an excessive sentence because the present offense is nonviolent and defendant has no history of violence. We disagree. While the instant case is a nonviolent offense, defendant's criminal record does contain violent offenses. Defendant's juvenile record includes the violent offense of battery. As an adult, defendant has a 2007 conviction for the violent offense of robbery. The trial court gave defendant the opportunity to complete probation in his robbery case, which defendant failed to successfully complete. He was yet again given an opportunity to complete probation, this time with a sentence for drug-court probation in his 2010 burglary case. However, while on probation in the 2010 burglary case, defendant accrued not one, not two, but four new offenses, all alleging residential burglary.

¶ 43 In the instant case, the evidence suggested defendant committed the residential burglary while another individual slept in the home. In another case (Champaign County case No. 11-CF-2132), the homeowner interrupted defendant in the middle of the burglary. Although, thankfully, no violence resulted from the crimes, the trial court should not be required to wait for tragic circumstances to occur before fashioning a sentence that will protect the public, punish the wrongdoer, and deter future defendants from committing similar offenses. Defendant's criminal history demonstrates the need to protect the public from defendant's illegal activities. Defendant's 28-year DOC sentence, while close to the maximum, was not manifestly disproportionate to the nature of the offense, nor was it greatly at variance with the spirit and

purpose of the law. We therefore conclude the trial court did not commit a clear or obvious error in sentencing defendant to 28 years in DOC.

¶ 44 In the alternative, defendant asserts trial counsel provided ineffective assistance by failing to preserve defendant's arguments in a motion to reconsider sentence. Counsel's representation constitutes ineffective assistance where (1) counsel's representation fell below an objective standard of reasonableness and (2) defendant suffered prejudice from counsel's substandard performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Because we found the trial court did not err in sentencing defendant to 28 years in DOC, defendant cannot satisfy the prejudice prong of *Strickland*. Thus, his claim that his trial counsel provided ineffective assistance must also fail.

¶ 45 B. Assessments

¶ 46 Defendant next argues that two assessments added by the circuit clerk, the VCVA fine and the POA assessment, should be vacated. The State concedes the issue and we accept the State's concession in part. Because the imposition of fines and fees raises a question of statutory interpretation, we review the imposition of the VCVA and POA assessments *de novo*. See *People v. Price*, 375 Ill. App. 3d 684, 697, 873 N.E.2d 453, 465 (2007).

¶ 47 With respect to the VCVA fine, we begin by noting the circuit clerk is without authority to impose fines, including a VCVA fine. *People v. Chester*, 2014 IL App (4th) 120564, ¶ 32, ___ N.E.3d ___. Thus, we vacate the VCVA fine and remand the case to the trial court to assess any mandatory fines. In so doing, we point out the version of section 10(b) of the Violent Crime Victims Assistance Act (725 ILCS 240/10(b) (West 2010)) enacted by Public Act 96-712 (Pub. Act 96-712, §20 (eff. Jan. 1, 2010)), in effect at the time defendant accrued the

offense in June 2011, only authorized the imposition of \$4 for every \$40 in fines assessed.

¶ 48 In addition, defendant contends the POA assessment should be vacated because that assessment was not in effect when defendant accrued the offense in June 2011. 705 ILCS 105/27.3a(1.1) (West 2012). We agree. Because the circuit clerk applied the statute retroactively and disadvantaged defendant by imposing an assessment he otherwise would not have been required to pay, imposing the POA assessment constituted an *ex post facto* application of the law and, thus, the assessment must be vacated. See *People v. Malchow*, 193 Ill. 2d 413, 418, 739 N.E.2d 433, 438 (2000) ("A law is *ex post facto* if it is both retroactive and disadvantageous to the defendant.").

¶ 49 Therefore, we vacate the circuit clerk's imposition of the VCVA fine and the POA assessment and remand with directions for the trial court to impose any mandatory fines as authorized at the time of the offense and to apply the previously calculated *per diem* credit toward any imposed fines to which the credit applies.

¶ 50 III. CONCLUSION

¶ 51 For the foregoing reasons, we affirm the trial court's judgment in part, vacate in part, and remand with directions for the trial court to properly assess defendant's fines. As part of our judgment, because the State successfully defended a portion of this appeal, we award the State its \$50 statutory assessment against defendant as costs of this appeal. See *People v. Smith*, 133 Ill. App. 3d 613, 619, 479 N.E.2d 328, 333 (1985) (citing *People v. Nicholls*, 71 Ill. 2d 166, 178, 374 N.E.2d 194, 199 (1978)).

¶ 52 Affirmed in part and vacated in part; cause remanded with directions.