

NOTICE
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2014 IL App (5th) 120311-U

NO. 5-12-0311

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Clinton County.
)	
v.)	No. 11-CF-40
)	
TIMOTHY E. BEQUETTE,)	Honorable
)	Dennis E. Middendorff,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Welch and Justice Cates concurred in the judgment.

ORDER

¶ 1 *Held:* Where the defendant, Timothy E. Bequette, raises sentencing issues for the first time on appeal, the issue is waived. Where the trial court failed to hold the hearing required by section 113-3.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1 (West 2010)), we must remand that portion of the sentence mandating the defendant to pay an \$873 public defender reimbursement. Where the issue of the court's order vacating the public defender appointment is moot, we will not consider the issue.

¶ 2 The defendant raises two sentencing issues on appeal. He asks this court to vacate his sentence and remand for a new sentence. He alleges that the trial court relied on speculation and conjecture in determining that the defendant's crime warranted a six-year sentence. The defendant also argues that the trial court erred in failing to hold a

statutorily-mandated hearing before ordering him to reimburse the public defender. Finally, the defendant asks this court to consider an otherwise moot issue based on the public-interest exception. He argues that the trial court committed error in vacating his public defender appointment early in his defense. The issue is moot because the trial court reversed this order and reappointed the public defender to represent him.

¶ 3

FACTS

¶ 4 The State charged the defendant Timothy Bequette with two counts of aggravated possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2010). Four months after being charged, the defendant entered a guilty plea to an amended count of aggravated possession. The defendant pled guilty to the amended charge of knowing possession of two guns by a felon. At the conclusion of the sentencing hearing, the trial court sentenced the defendant to six years. The court also ordered the defendant to pay \$500 in fines. The sentence assessed all costs against his bond money. The court also awarded the balance of the bond money to the public defender's office. On October 28, 2011, the defendant filed his *pro se* motion asking the court to reduce his sentence or to allow him to withdraw his guilty plea. He subsequently withdrew his motion to withdraw his guilty plea. His public defender then filed an amended motion to reduce sentence, which the court denied on July 16, 2012.

¶ 5 Background Evidence from the Presentence Investigation Report. The defendant has a lengthy criminal history going back to 1984, including numerous convictions for forgery and deceptive practices crimes. The defendant received probation for many of these crimes. Petitions to revoke probation were numerous, containing allegations that

the defendant failed to timely pay the court-ordered restitution. The defendant also had convictions for grand theft and escape. Most recently, the defendant was convicted of misdemeanor cruelty to an animal.

¶ 6 The defendant lived in a rural Clinton County home with his girlfriend, Marlene McDonald, and her son, Josh McDonald. At the time of the crime, the defendant was not employed, and received disability payments. In the past, he worked as a truck driver. Finding it difficult to pay all of his bills, the defendant would buy items at auction and then offer these items for sale at a Missouri flea market. He would also demolish old homes for scrap.

¶ 7 Testimony at Sentencing Hearing. In March 2011, Nathan Nipps and Jody Boeving drove past a house that the defendant was demolishing. Jody stopped to ask the defendant if he needed any assistance. Jody was looking for extra work because her husband was not working. The defendant hired Jody.

¶ 8 Nathan testified that on a subsequent day he drove to the worksite to ask Jody if she wanted lunch. While there, he witnessed the defendant stick an object in between Jody's legs when she bent over to pick something up. Nathan believed that this action upset Jody based upon his experience with Jody and the look upon her face when she stood up.

¶ 9 Jody's husband, Mark Boeving, testified that one day instead of working on the house, Jody and the defendant worked on unloading auction items the defendant purchased. Mark stopped by at about 2:30, but Jody was still working, and so he left. He witnessed nothing unusual with Jody and the defendant. Later that evening, he saw Jody

at their home. Jody was upset. She informed Mark that earlier that day, the defendant assaulted her. She told Mark that the defendant forcibly kissed her and touched her breast. Mark called the defendant immediately after Jody told him what happened, but he did not answer. The next morning, having seen the Boevings' number on caller ID, the defendant called Mark. The defendant denied having any such contact with Jody.

¶ 10 Dale Beckman, a Germantown police officer, testified that Jody contacted him to tell him about the incident with the defendant. Although the incident did not occur in Germantown, nor did Jody live in Germantown, she called Dale because he was a longstanding friend and she trusted him. Dale confirmed that Jody was very upset about what happened. He knew that the defendant had a criminal record, and referred Jody to the Clinton County sheriff's department.

¶ 11 Detective Charlie Becherer testified that Jody met with Detective Doug Maue of the Clinton County sheriff's department. Jody described the assault to Detective Maue. She stated that the defendant informed her he was a convicted felon, and showed her two guns—a shotgun and a .357-magnum pistol. Detective Maue filed an affidavit in which he detailed this information. The court granted the request for a search warrant of the defendant's home and vehicle. Pursuant to this search warrant, Detective Becherer located and seized four guns.

¶ 12 Jody testified that she was hired by the defendant to help with work related to a tear-down of a house. She also helped him unload various auction items. She denied engaging in any sexual conversation with the defendant or other men on the jobsite on that date or on other dates. She indicated that the defendant asked her if she would be

interested in the production of pornography for the internet. She testified that the defendant approached her after she exited his bathroom. He kissed her and touched her without consent. She claims that after this occurred she was in a state of shock, and went into "survival" mode and did not try to leave his home. Later when the defendant's girlfriend arrived home, she denied laughing about a photograph the defendant took of her when she bent over to pick up something.

¶ 13 The defendant's girlfriend, Marlene McDonald, testified that when she came home on the date of the incident, she did not notice anything different about Jody. Jody was going through the boxes of auction goods, holding things up, talking about the items, and laughing as she did so. Marlene had a friendly conversation with her about the photograph her boyfriend took. Marlene denied that the defendant made income from the house demolition or auction business, but implied that the defendant needed an outlet for his feelings of inadequacy due to the disability. Marlene testified that the guns belonged to her—that she inherited them after her husband's death. She kept them locked up in a safe room in the basement and only she had a key to the room. She admitted that the guns were stored at her brother's home for some time in order to keep the defendant in compliance with the law. Her son, Josh, took the guns to her brother's home for storage. The location where her brother stored the guns was prone to moisture that could be damaging to the guns, and so Marlene's brother suggested that she take the guns back. She testified that Josh went and retrieved the guns, and that she locked the guns in the basement. One of the confiscated guns was not locked in the room, but had been stored in a closet. Marlene acknowledged this as a mistake. When the officers came to her

home with the search warrant, she opened the door to the basement room. Marlene testified that she never saw the defendant touch or handle the firearms.

¶ 14 Josh McDonald testified that the defendant is his mother's boyfriend. He occasionally worked with the defendant on his side jobs. He described Jody Boeving as someone the defendant hired to help on a jobsite. He alleged that Jody engaged in sexual conversations with the four men on the site. Josh testified that on the date of the alleged assault, he was at the house. Josh testified that in January 2010, he took all of the guns from his home to the home of Maurice Benhoff, near his home. He placed the guns in the shed. He does not remember when his mother sent him back to Maurice's home to retrieve the guns. He brought the guns back to the house, and he and his mother put the guns in the locked safe room. He testified that he did not have a key to the room. His mother kept the only key to the room on her key ring. On cross-examination, Josh testified that the odd jobs the defendant performed were done to provide extra money for the family.

¶ 15 Maurice Benhoff, brother to Marlene McDonald, testified that he lived close to the home in which Marlene, the defendant, and his nephew Josh lived. He testified that he removed the guns from Marlene's home at a time when one of her sons was talking about committing suicide. Maurice then took the guns for appraisal as he was contemplating buying them. He stored the guns in his gun safe. At some point after that, Josh returned to retrieve the guns. On a later occasion, he saw Josh unloading guns and putting them in his shed. He called his sister to ask why Josh was putting the guns in his shed. Marlene advised that a girl was living with them at the house, and they feared that she would

report the presence of the guns in the household. Maurice suggested that he store the guns in a more climate-controlled place inside his home, but Marlene indicated that she wanted the guns in the shed for her easy access. After some time passed, he contacted his sister again about the guns, asking her what he should do with them, as they were still in his shed. She told him that she would take care of the guns. Shortly thereafter, the defendant pulled up to his home. Maurice helped the defendant load the guns in Marlene's car.

¶ 16 At the conclusion of the sentencing hearing, the State's Attorney argued that the defendant should receive the maximum sentence of 10 years in the Department of Corrections. The public defender argued that his client's conviction warranted a sentence of probation.

¶ 17 The Trial Court's Sentencing Decision. The trial court determined that the defendant's crime warranted a sentence of six years. The court considered many factors in mitigation and aggravation. The court began by stating: "I want everyone in this courtroom to keep in mind that *** the crime that I'm sentencing Mr. Bequette for is *** for the offense of unlawful possession of a firearm by a convicted felon. He is not being sentenced for any other crime." The court noted that the uncharged crimes were only possibly relevant as nonstatutory factors in aggravation.

¶ 18 In mitigation, the court determined that the defendant's possession of the guns did not cause or threaten physical harm to others. The court noted that the defendant told Marlene that the guns had to be out of the home. However, the presentence investigation report stated that the defendant told the probation officer that he did not feel that he had

the right to tell Marlene to remove her deceased husband's guns from the home. The court noted this inconsistency. The court found that the defendant's criminal conduct was solely the result of his own actions and decisions and not introduced or facilitated by someone else. The court noted that the defendant has never acknowledged the mistakes made; that the defendant questioned the fairness of the search warrant and the veracity of the persons who provided information contained within the State's affidavit. The court found that the defendant's substantial criminal history was not a mitigating factor. The court stated that after reviewing the presentence investigation report several times, it believed the defendant was likely to commit other crimes. The court also determined that because the defendant had no dependents, his imprisonment would not amount to a hardship.

¶ 19 In aggravation, the court noted the defendant's numerous prior crimes both in Illinois and in Florida, but noted that there was a substantial period of time between the date of those crimes and this crime. Of special import, the court noted that a sentence was necessary to deter others from committing the same crime. "[D]eterrence is one of the primary reasons to sentence any person." In fact, the court stated that with this type of crime, the deterrence factor carries more weight than other factors.

¶ 20 Turning to the nonstatutory factor in aggravation, the court reviewed the evidence to determine if a crime against Jody Boeving was established. It concluded, based upon the testimony, that if there had been a crime committed, the crime was of criminal sexual abuse, defined as: "The accused commits criminal sexual abuse if he or she *** commits an act of sexual conduct by the use of force or threat of force." 720 ILCS 5/12-15(a)(1)

(West 2010). Based upon Jody's testimony, the court determined that she established that the conduct was unwanted, and with force, given the defendant's physical superiority. Consequently, had the defendant been charged with that crime, it would have been a Class 4 felony. The crime that he pled guilty to was a Class 3 felony. In other words, the defendant was convicted of a greater crime. The court pointed out that the maximum penalty for a Class 3 felony was 10 years. The maximum penalty for criminal sexual abuse is three years. The court found that it would be improper to use the criminal sexual abuse felony to inflate the sentence given to the defendant up to the full 10 years, when he could have only received a total of 3 years for that crime in the first place. The court stated that the main parts of Jody's story in testimony and in earlier interviews were consistent. The court found that there was unwanted contact between Jody and the defendant, but stated that it did not know if the defendant could have been found guilty of criminal sexual abuse. The court concluded that it would not make a finding on that issue, but would consider the actions overall in consideration of the defendant's overall character.

¶ 21 Turning to the defendant's character, the court noted the pattern of the defendant's inability to comply with probation. The court also referenced the defendant's character with respect to his disability and his other income sources. The court noted that the defendant seemed physically able to engage in the strenuous work of scrapping trailers, and that he was doing so to earn money. Earlier in this criminal case, the defendant made several appearances asking to be allowed to leave the state in order to engage in his flea market business in Missouri. The court discounted Marlene's testimony that the

defendant earned no income from these activities. The court finally took note of the defendant's admission to the probation officer that he had a South Carolina driver's license, despite the fact that he had never lived in South Carolina, for the sole purpose of getting lower-priced tags for his truck. The court stated, "May be a small thing, but it just kind of speaks to the kind of guy we're dealing with here who sort of just plays the system to his own advantage ***."

¶ 22 While the sentencing range for this crime was probation up to 10 years, the court sentenced the defendant to six years, plus one year of mandatory supervised release. The court stated: "I find that probation would in fact deprecate the seriousness *** and would be inconsistent with the ends of justice." The court fined the defendant \$500 plus costs, to be deducted from his bond money. Finally, stating its belief that the defendant had adequate financial resources, the court further ordered the forfeiture of the balance of his bond money—\$873—to the public defender's office.

¶ 23 **LAW AND ANALYSIS**

¶ 24 Denial of a Fair Sentencing Hearing. The defendant first argues that in sentencing the defendant to six years of imprisonment, the court relied upon speculation, unsupported inferences about probation revocations, and an undisclosed felony.

¶ 25 A defendant has a constitutional right to a fair sentencing hearing. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2; 730 ILCS 5/5-4-1 (West 2010). A sentencing court is allowed to consider a wide array of information—including unadjudicated, alleged misconduct. *People v. La Pointe*, 88 Ill. 2d 482, 498-99, 431 N.E.2d 344, 351 (1981). However, the sentencing court must be cautious in admission and consideration of this

type of proof because if the information is inaccurate, then the defendant could be wrongly prejudiced. *Id.* at 499, 431 N.E.2d at 351-52. The sentencing court cannot base the defendant's sentence upon "prejudice, speculation, and conjecture." *People v. Dempsey*, 242 Ill. App. 3d 568, 597, 610 N.E.2d 208, 227 (1993). The evidence must be reliable. *Id.*

¶ 26 The State correctly points out that the defendant raises this speculative evidence argument for the first time on appeal. Therefore, we find that the defendant waived this argument. *People v. Johnson*, 250 Ill. App. 3d 887, 892, 620 N.E.2d 506, 511 (1993).

¶ 27 However, even if we considered the issue, we find that after extensive review of the record and the transcript of the sentencing hearing, the defendant's argument fails. At sentencing for this crime, the trial court must conduct a hearing. 730 ILCS 5/5-4-1(a) (West 2010). At the hearing, the court must consider all evidence in the case, the financial impact of incarceration, evidence and information in aggravation and mitigation, the need, if any, for substance abuse treatment, hear arguments as to sentencing alternatives, and must allow the defendant to make a statement on his own behalf. 730 ILCS 5/5-4-1(a)(1)-(6) (West 2010). Sentencing judges maintain great discretion in determining the appropriate penalty for the particular defendant and crime. *Dempsey*, 242 Ill. App. 3d at 597, 610 N.E.2d at 227.

¶ 28 In this case, the trial court carefully considered all relevant factors in aggravation and in mitigation. In aggravation, the court concluded that only the deterrence factor was relevant. The court found deterrence to be a guiding factor in imposing sentence. In mitigation, the court determined that the defendant's character was consistent with

someone who would reoffend, in light of his past criminal history, as well as other character evidence. The other character evidence involved the defendant's stated disability for which he received benefits, yet he continued to work for cash on the side, as well as his stated use of a driver's license in South Carolina without residency for his personal gain. The court indicated that the defendant's character was one that tended to play the system for his own benefit. The defendant took no responsibility for the crime he committed, complaining that the search warrant that led to his arrest was bogus.

¶ 29 We do not agree that the sentencing judge relied upon speculation. At the hearing, the court heard testimony on most of these character issues. Furthermore, the defendant informed the probation officer about his usage of a South Carolina driver's license despite the fact that he has never lived there. Although we conclude that the defendant waived this sentencing issue on appeal, we find no impropriety in the trial court's sentence, which was based upon the trial judge's independent assessment in compliance with the law. 730 ILCS 5/5-4-1(b) (West 2010).

¶ 30 Public Defender Fee Reimbursement. The defendant next argues that the court-ordered public defender reimbursement fee of \$873 is improper because the court failed to hold a mandatory hearing on his ability to pay, as well as on the cost of legal representation.

¶ 31 Initially, the court appointed the public defender to represent the defendant. After the defendant was able to bond out, the court questioned the defendant's claims of indigence, and revoked that appointment. The defendant unsuccessfully attempted to hire an attorney, but he lacked monetary resources to do so. The defendant filled out the

assets and liabilities affidavit, and the court acquiesced and reappointed the public defender. At the conclusion of the sentencing hearing, the court again noted that it firmly believed that the defendant had more monetary resources than he claimed. The court then ordered that the balance of his bail money, after the fines were paid, be turned over to the public defender's office.

¶ 32 Section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2010)) provides as follows:

"Whenever *** the court appoints counsel to represent a defendant, the court may order the defendant to pay to the Clerk of the Circuit Court a reasonable sum to reimburse either the county or the State for such representation. In a hearing to determine the amount of the payment, the court shall consider the affidavit prepared by the defendant *** and any other information pertaining to the defendant's financial circumstances which may be submitted by the parties. Such hearing shall be conducted on the court's own motion or on motion of the State's Attorney at any time after the appointment of counsel but no later than 90 days after the entry of a final order disposing of the case at the trial level."

Before the court can enter an order of reimbursement, the court must conduct a hearing. *People v. Love*, 177 Ill. 2d 550, 563-64, 687 N.E.2d 32, 38 (1997). Even in cases where the defendant puts up cash for his bail, the law still mandates that the court hold the hearing, as that fact alone does not conclusively establish the defendant's ability to pay reimbursement. *Id.* at 560-63, 687 N.E.2d at 37-38. Additionally, the court should

consider the possibility that the cash bail was provided by a third party. *Id.* at 562, 687 N.E.2d at 38.

¶ 33 In this case, the trial court did not hold the required statutory hearing. The court did not announce that it was going to proceed with a section 113-3.1 hearing. The defendant was not able to present an affidavit regarding his assets and liabilities. The State did not put on evidence as to the public defender costs of representing the defendant. The State correctly points out that the State was seeking to recover all of his bail money and had filed a motion to that effect. However, the existence of the motion does not abdicate the court's statutory mandate to hold the hearing. As the statute is designed to protect constitutional rights, we must remand this portion of the sentence for a formal section 113-3.1 hearing. See *Love*, 177 Ill. 2d at 564-65, 687 N.E.2d at 39; *People v. Somers*, 2012 IL App (4th) 110180, ¶¶ 44-45, 970 N.E.2d 606.

¶ 34 The Court's Vacation of the Order Appointing the Public Defender. As stated earlier in this order, the trial judge originally appointed the public defender to represent the defendant. The trial court revoked the public defender appointment. The trial court later reappointed the public defender.

¶ 35 The defendant recognizes that this issue is moot, but asks us to consider the issue as a public-interest exception. We decline the defendant's request to consider this moot issue.

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the sentence of the Clinton County circuit court, but remand that portion of the sentence ordering reimbursement of the public

defender's office for a hearing in compliance with section 113-3.1(a) of the Code of Criminal Procedure of 1963 (725 ILCS 5/113-3.1(a) (West 2010)).

¶ 38 Affirmed and remanded with directions.