FIRST DIVISION
December 29, 2016

No. 14-2581

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 17706
	)	
JODY HARVEY,	)	Honorable
	)	Rosemary Grant Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's sentence as the trial court did not abuse its discretion in sentencing him and vacate two improperly-assessed fees.

¶ 2 Following a jury trial, defendant Jody Harvey was convicted of one count of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)) and sentenced to nine years' imprisonment. On appeal, defendant argues his sentence is excessive and that certain fines and fees were incorrectly assessed. We affirm the sentence and modify the fines and fees order.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance (less than 1 gram of heroin) (720 ILCS 570/401(d) (West 2012)) and one count of

delivery of a controlled substance (less than one gram of heroin) within 1000 feet of a church (720 ILCS 570/401(d), 407(b)(2) (West 2012)) stemming from a controlled narcotics purchase by a Chicago police officer in Chicago.

¶ 4 At trial, three Chicago police officers testified and established that, on August 23, 2013, defendant sold two small bags of suspect heroin to an undercover officer in exchange for a $20 bill of "1505" prerecorded funds in the area of 4247 West Madison Street. An Illinois state police forensic scientist testified that the bags tested positive for 0.679 grams of heroin.

¶ 5 The jury found defendant guilty of delivery of a controlled substance. After defendant's written motion for a new trial was denied, the trial court proceeded to sentencing.

¶ 6 In aggravation, the State argued that defendant should be sentenced as a Class X offender because of his background. Specifically, it noted defendant's prior criminal history consisting of seven felony convictions including a 2010 felony conviction for possession of a weapon in a penal institution, for which he received six and a half years in the Illinois Department of Corrections (IDOC). He also had 2009 and 2006 felony convictions for possession of a controlled substance, which resulted in four years and five years in the IDOC, respectively. He had 2001 convictions for robbery and manufacturing or delivery of cocaine, for which he was sentenced to five years and six years in the IDOC, to be served consecutively. Defendant had 1988 and 1989 convictions for possession of a stolen motor vehicle, which each resulted in three years in the IDOC after a violation of probation. Finally, defendant had a 2005 misdemeanor retail theft conviction resulting in six months conditional discharge. Given defendant's criminal background, the State asked for 12 years in the IDOC.

¶ 7 Defense counsel argued in mitigation that defendant was not out actively searching for buyers and that the amount of drugs was small. Further, counsel argued that this was a non-violent offense and that defendant has a drug problem. In urging the minimum sentence, defense counsel asked for drug treatment as a condition of the sentence.

¶ 8 In allocution, defendant denied his involvement in the offense and blamed the "other guys [he] was with" for much of his criminal background. He noted that he would fight his criminal charges when he was not guilty, but when he was guilty, he would not fight them. He also stated that he is "manic depressive."

¶ 9 The trial court imposed a nine-year prison sentence with treatment as a condition. It observed that defendant's criminal background, which included seven felony convictions and one misdemeanor conviction, required him to be sentenced as a Class X offender. The court stated that, given defendant's "criminogenic behavior," particularly his possession of a weapon in a penal institution and robbery convictions, it had to "protect the public" with its sentence.

¶ 10 The trial court stated that defendant had not taken responsibility for his prior acts. It noted, "maybe you didn't get the treatment that you wanted to get, but you were given treatment or some opportunity by Judge Neville back in the '80s and you violated that probation and then on the violation he resentenced you to time in the Illinois Department of Corrections."

¶ 11 The trial court stated it had taken into account that defendant received his GED diploma and "had no major problems except for some depression in the end." It told defendant: "[y]ou didn’t have any other difficulties, and you have had opportunities. Instead you chose the life that was going to give you that immediate satisfaction, and you chose the narcissistic life. You stated yourself that you are antisocial and do not like people." To change that, defendant would "have

to start changing [his] thinking" and treatment would facilitate that process by giving defendant an incentive to change his life and take responsibility.

¶ 12 Defendant filed a written motion to reconsider sentence. In denying the motion, the trial court noted that, based on defendant's background and the belief he could "make changes," the nine-year prison term was a "light sentence." Defendant filed a timely notice of appeal.

¶ 13 On appeal, defendant argues his sentence is excessive given the nature of the offense and his history of addiction and mental illness. He also argues the trial court improperly focused on his prior criminal background and misstated his early-life background. Finally, he contests two fees assessed on his fines and fees order. He asks that we reduce his sentence or remand for resentencing and vacate improperly-assessed fees.

¶ 14 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the range provided by statute, it will not be altered absent an abuse of discretion. *People v. Gutierrez,* 402 Ill. App. 3d 866, 900 (2010). An abuse of discretion occurs 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 (citing *People v. Fern,* 189 Ill. 2d 48, 54 (1999)). The trial court is in the superior position to determine an appropriate sentence because of its personal observation of defendant and the proceedings. *People v. Alexander,* 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213. It is presumed that, when mitigating evidence is presented to the trial court, the court considered it absent some indication to the contrary, other than the sentence itself. *People v. Sauseda,* 2016 IL App (1st) 140134, ¶ 19.

¶ 15 We find the trial court did not abuse its discretion in imposing a nine-year prison sentence. Delivery of a controlled substance is a Class 2 felony. 720 ILCS 570/401(d) (West 2012). However, as a Class X offender, defendant faced a term of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b)(1), (2), (3) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). The nine-year sentence falls within this statutory range and we therefore presume it is proper. *People v. Wilson,* 2016 IL App (1st) 141063, ¶ 12.

¶ 16 Defendant argues that the seriousness of the offense, which involved a small amount of narcotics and the absence of violence, weapons, or harm, does not support a nine-year prison sentence. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Decatur,* 2015 IL App (1st) 130231, ¶ 12. However, the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors." *People v. Burton,* 2015 IL App (1st) 131600, ¶ 38. Defendant makes no such showing here. The trial court heard the evidence presented at trial, including the circumstances surrounding defendant's exchange of $20 for 0.679 grams of heroin. In addition, the trial court noted that defendant had seven prior felony convictions and one prior misdemeanor conviction. Thus, the trial court knew about the circumstances surrounding the narcotics purchase but gave more weight to defendant's "criminogenic behavior" and the need to "protect the public." See *People v. Hill,* 408 Ill. App. 3d 23, 30 (2011) ("[t]he trial judge heard the evidence adduced at trial and is presumed to know violence was not involved in this case"). The trial court imposed a sentence 3 years above the minimum and 21 years below the maximum, a sentence it considered "light" given defendant's extensive criminal background.

¶ 17 Defendant argues the trial court focused too much on defendant's prior criminal history and further, his criminal history was already accounted for because he was subject to sentencing as a Class X offender. However, only two of defendant's prior felony convictions made him a Class X offender. See 730 ILCS 5/5-4.5-95(b) (West 2010). There were still five other felony convictions and one misdemeanor conviction the trial court considered in fashioning a sentence to "protect the public." Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista,* 393 Ill. App. 3d 395, 399 (2009). The nine-year sentence is not disproportionate to defendant's eighth felony conviction. Moreover, defendant was "not deterred by previous, more lenient sentences." *People v. Wilson,* 2016 IL App (1st) 141063, ¶ 13.

¶ 18 Defendant argues the trial court failed to consider his history of addiction and mental illness as mitigation. He states the trial court treated his addiction as a "negative" and "essentially as an aggravating factor." However, the record indicates the trial court was aware of defendant's history. The presentence investigation report indicated defendant used both cocaine and heroin "daily prior to his incarceration." When a presentence investigation report is presented to the court, it is presumed the court considered the defendant's rehabilitation potential. *People v. Gutierrez,* 402 Ill. App. 3d 866, 900 (2010).

¶ 19 Further, the court noted that defendant was "given treatment or some opportunity by Judge Neville back in the '80s" but that defendant violated that probation. It noted defendant had "some depression at the end," and defendant further told the court he is "manic depressive." The trial court was thus well aware of defendant's history of addiction and mental illness but chose not to give it the weight defendant urges. See *People v. Coleman,* 183 Ill. 2d 366, 404 (1998) ((" ' [S]imply because the defendant views his drug abuse as mitigating does not require the sentencer

to do so.' " (quoting *People v. Shatner,* 174 Ill. 2d 133, 159 (1996))); *People v. Thompson,* 222 Ill. 2d 1, 42-43 (2006) ("[t]his court has repeatedly held that evidence of a defendant's mental or psychological impairments may not be inherently mitigating ***"). Indeed, the trial court ordered treatment as a condition of the nine-year sentence, highlighting its cognizance of defendant's addiction and its desire to help defendant overcome it.

¶ 20 Defendant argues the trial court improperly recounted defendant's background, thus ignoring "significant mitigation." Specifically, he points out the trial court stated he "had no major problems" and "didn't have any other difficulties." He argues the opposite is true, noting that he was raised in various foster homes having been taken from his drug-addicted mother at age six. Viewing the record, it is unclear on which point in defendant's life the trial court is commenting. The comment is made following the trial court's mention that defendant had received his GED diploma. Thus, it is logical to assume the trial court was referring to his adult life. Further, while the presentence investigation report mentions defendant's life in various foster homes, it also indicates defendant reported he had a "normal childhood for his neighborhood" and that "all his needs were met." Accordingly, we disagree with defendant that the trial court "affirmatively misstated [defendant's] background." See *People v. Andrews,* 2013 IL App (1st) 121623, ¶ 15 ("a reviewing court determining whether a sentence is properly imposed should not focus on a few words or sentences of the trial court, but should consider the record as a whole"). The court did not abuse its discretion in sentencing defendant to nine years' imprisonment.

¶ 21 Lastly, defendant challenges the accuracy of two assessments on his fines and fees order. We review *de novo* the propriety of the trial court's imposition of fines and fees. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 22 First, defendant argues the $250 DNA fee was improperly assessed as he was previously convicted of a felony and thus, his DNA profile is already in the Illinois State Police database. See 730 ILCS 5/5-4-3(j) (West 2012). The State correctly concedes this fee is improper and should be vacated. This fee is only required when a defendant is not currently in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Defendant has previously been convicted of multiple felony offenses, most recently in 2010, and we therefore presume this fee has already been imposed. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Therefore, we vacate this improperly assessed $250 DNA fee.

¶ 23 Second, defendant argues, and the State correctly concedes, that the $5 "Court System, 55 ILCS 5/5-1101(a) (for violation of 625 ILCS 5/100 et seq. other than DUI)" fee was improperly assessed because he was not convicted under the Illinois Vehicle Code. Defendant was convicted under the Criminal Code of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)), which is not part of the Illinois Vehicle Code. We therefore vacate this $5 court system fee. *People v. Brown*, 388 Ill. App. 3d 104, 112 (2009).

¶ 24 Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we order the clerk to vacate the $250 DNA fee and the $5 court system fee.

¶ 25 For the reasons set forth above, we affirm defendant's sentence and direct the clerk of the circuit court to correct the fines and fees order in accordance with this order.

¶ 26 Affirmed as modified.