



motion. Defendant appeals the trial court's judgment arguing that: (1) the court erred on remand when it prohibited defense counsel from filing an amended motion for reduction of sentence, (2) the court abused its discretion when it sentenced defendant to 12 years in prison, and (3) defendant was entitled to a reduction of the monetary judgment entered against her. For the following reasons, we affirm the court's decision but modify the monetary judgment against defendant.

¶ 3

### BACKGROUND

¶ 4 At trial, the evidence established that on April 23, 2012, defendant picked up her one-year-old granddaughter from daycare. The daycare workers reported that defendant was possibly intoxicated. The Palatine police were called and located defendant within minutes. Defendant appeared to be under the influence based on the odor of alcohol, slurred speech, failed sobriety tests, and belligerent behavior. Defendant's one-year-old granddaughter was not strapped into a car seat and was "sitting loose" in the car. Defendant was arrested and charged with aggravated DUI. Following a jury trial, defendant was found guilty of aggravated DUI.

¶ 5 On August 14, 2013, the court held a sentencing hearing. Defendant had six prior DUI convictions, a 1982 battery conviction, a 1998 possession of drug paraphernalia conviction, and a 2011 disorderly conduct conviction. In aggravation, the State presented testimony from Officer Ed Borgstrom, who testified that, in December 2001 he was called to the Motel 6 in Palatine for a guest who sustained an unknown medical problem. When he arrived, he found defendant passed out inside the motel room surrounded by an empty gallon jug of wine and a 12-pack of beer. Defendant's seven-year-old daughter was unattended and searching for help because her mother had fallen. DCFS was called and defendant temporarily lost custody of her daughter.

¶ 6 In mitigation, the defense called several members of defendant's Alcoholics Anonymous ("AA") group. Thomas Germuska, Barbara Hill and Christopher Boehm testified that they saw defendant at meetings as much as two or three times a week. The witnesses explained that they had not seen defendant drink alcohol or intoxicated at any time since 2002. Defendant served as the secretary and the treasurer of the group, and sponsored other recovering alcoholics during her 10 years in AA.

¶ 7 Defendant's brother, Mathew Dudek, testified that the two lived together on and off and he would see defendant about once a week. Dudek testified that he did not see defendant drink alcohol or intoxicated since 2002. He stated that, during the previous 10 years, defendant worked during the day and attended college at night. He explained that defendant also cared for both her daughter and granddaughter.

¶ 8 Defendant's father, David Dudek, sent a mitigation letter which corroborated defendant's brother's testimony. David Dudek's letter added that defendant had various physical limitations including an injured ankle and blindness in her right eye. He asked for leniency, mentioning that defendant was attacked by an inmate at the Cook County jail and received medical care for a concussion she sustained.

¶ 9 In allocution, defendant explained how she overcame her alcohol problem and took on the challenge of returning to school as an adult while also working. Defendant stated that the 2002 event when she lost custody of her daughter was a wake-up call and caused her to stop drinking. Defendant detailed her involvement in AA and also mentioned that her sponsor was present in court. Defendant denied that she was drinking on the day of the incident. She asked the court for leniency so that she could return to caring for her teenage daughter and her two grandchildren.

¶ 10 The court noted that, because this was defendant's seventh DUI, her conviction was a Class X offense. The court considered the information in the presentence investigation report along with the evidence presented in mitigation and in aggravation, and imposed a sentence of 12 years. The court also imposed a \$25,000 fine pursuant to 625 ILCS 5/11-501(d)(2)(E) (West 2012) because defendant committed the offense while transporting a person under the age of 16 years in her vehicle.

¶ 11 On September 13, 2013, defendant mailed a *pro se* motion to reconsider her sentence that was file-stamped by the court on September 17, 2013. The trial court dismissed defendant's motion stating that it was untimely. On direct appeal, defendant filed an agreed motion for summary remand. We remanded the matter "for a hearing and ruling on defendant's *pro se* motion for reduction of sentence." *People v. Jenkins*, No. 1-13-2718 & 1-13-3538 (unpublished summary order under Supreme Court Rule 23(c)(2)). On remand, following a hearing, the trial court denied defendant's motion to reduce sentence. This appeal follows.

¶ 12

#### ANALYSIS

¶ 13

#### Errors on Remand Claim

¶ 14 Defendant argues that the trial court erred on remand when it refused to allow defendant's newly appointed counsel to file an amended motion to reduce sentence, and limited counsel to arguing only claims contained in defendant's *pro se* motion to reduce sentence. On remand, following defendant's request for an attorney, the trial court appointed Assistant Public Defender Rosales ("counsel") to represent defendant. Counsel asked for leave to file a motion for continuance and argued that she needed time to obtain the trial and sentencing transcripts. Counsel further argued that she had not seen the police reports or viewed a copy of the in-car

squad video in the case. While granting counsel's request to continue the case for another date, the court stated the following:

"I just want to be very clear though. And I know I appointed the Public Defender, but I want to make it clear that the mandate. . . It's basically telling me to conduct a hearing on defendant's *pro se* motion. I understand once you're appointed then certainly you have to do what is right. There may be additional facts. But this isn't a post-conviction, this is not an appeal, so it's basically here for a motion—her *pro se* motion to reduce the sentence. So keep that in mind when you're going to be presenting things at the hearing."

Defendant maintains that the court's statements effectively limited counsel's arguments to what was contained in defendant's *pro se* motion, prohibited counsel from amending the *pro se* motion and denied counsel's effective representation at a critical stage of the proceedings.

¶ 15 “[A] trial court must obey the clear and unambiguous directions in a mandate issued by a reviewing court.” *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 123 quoting *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982); see also *Bond Drug Co. of Illinois v. Amoco Oil Co.*, 323 Ill. App. 3d 190, 196 (2001); *Puritan Finance Corp. v. Gumdrops, Inc.*, 101 Ill. App. 3d 888, 891 (1981) (“where a direct order with instructions has been issued by this court, a trial judge has no discretion in the matter and must follow the mandate”).

¶ 16 Here, the court's statements explained the scope of the mandate and, despite defendant's insistence that these statements prohibited counsel to amend defendant's *pro se* motion, the court did not prevent counsel from filing a motion to supplement or amend defendant's *pro se* motion. No request was made for leave to amend defendant's *pro se* motion. Based on our reading of the record, we find that the court's admonition was intended to remind counsel of the limited scope

of the mandate and the scope of a motion to reconsider the sentence in the light of counsel's arguments and requests to obtain and review more evidence.

¶ 17 Furthermore, the record illustrates that the trial court did not limit defense counsel to arguing only claims contained in defendant's *pro se* motion for reduction of sentence. At the hearing, counsel expounded on defendant's written motion. Counsel argued that defendant received ineffective assistance of counsel at her initial sentencing hearing where defendant asked her trial counsel to call her AA sponsor and her father as witnesses in mitigation and the two witnesses were not called to testify. Counsel then mentioned the statutory mitigation factors listed in 730 ILCS 5/5-3.1(West 2012) and then detailed how defendant's arguments contained in her *pro se* motion as well as additional evidence supported a reduced sentence. Counsel argued that the court should consider the excessive hardship to defendant's dependents as a mitigation factor. Counsel explained that defendant's daughter and granddaughter were struggling financially without defendant's help; that defendant's granddaughter had a health condition which made it difficult for defendant's daughter to work and she relied on defendant for childcare assistance; that no other family members were available to help defendant's daughter and her children.

¶ 18 Counsel argued next that the court should consider as a mitigating factor the fact that defendant's imprisonment would endanger her medical condition. Counsel explained that defendant suffers from chronic mastitis. The court inquired whether counsel's argument was contained in defendant's *pro se* motion. Counsel indicated that it was not in defendant's written motion and explained "I know your Honor is aware that when an attorney is appointed to a *pro se* motion they can supplement and include information the defendant herself may not have included, if it is included in the statute." The court inquired whether counsel included this

argument in the "amended motion." Counsel replied that she did not file an amended motion.

The court then prompted counsel to finish her argument about the medical conditions being fully aware that this argument was not contained in defendant's *pro se* motion to reduce sentence.

¶ 19 Counsel explained that defendant's chronic mastitis was exacerbated as defendant was not receiving proper medical care while in prison which caused defendant an infection and scarring of her breast tissue. Counsel then informed the court about another medical issue not contained in defendant's *pro se* motion. Since being held at Logan Correctional Center, defendant was attacked by an inmate and sustained a broken ankle for which she did not receive proper medical care. Finally, counsel advised the court of additional information regarding defendant's performance in prison, that defendant was compliant with the rules, and that she did not receive any disciplinary tickets.

¶ 20 The trial court acknowledged that defendant raised new claims during the hearing and noted, "[a]gain I will consider the factors in mitigation some of which I heard at the original sentencing and some of which I did not hear until today's date." The court then denied defendant's motion to reduce sentence. Based on the record, we find that that counsel was not limited to arguing only the claims contained in defendant's *pro se* motion.

¶ 21 Defendant contends she was deprived of the benefit of counsel during a critical stage of proceedings. As detailed above, the record indicates that counsel, although unsuccessful, vigorously argued and represented defendant before and during the hearing. Counsel met with defendant to prepare for the hearing, learned about defendant's familial obligations, her health conditions, her accomplishments, and her lack of disciplinary tickets. Furthermore, counsel advised the court about defendant's mitigating circumstances, argued defendant's points

contained in her *pro se* motion, added new claims, and reorganized defendant's arguments. Accordingly, defendant was not denied counsel's assistance at this stage of the proceedings.

¶ 22 Defendant also claims she was prejudiced because the trial court denied her motion without consideration of all the relevant mitigating evidence beyond the corners of defendant's *pro se* motion. Where mitigating evidence is before the court, it is presumed that the sentencing judge considered it and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider mitigating factors. *People v. McDonald*, 322 Ill. App. 3d 244, 251 (2001). We find no such indication here. Instead, the court denied defendant's motion and specifically stated that it considered "all the factors in aggravation and mitigation and the new factors" that counsel presented at the hearing. Therefore, we find that the court did not err in denying defendant's motion to reconsider her sentence. The trial court did not prohibit counsel from filing an amended motion to reduce sentence when no request to amend was made, nor did the court limit counsel from arguing only the claims contained in defendant's *pro se* motion.

¶ 23 Excessive Sentence Claim

¶ 24 Defendant argues next that the trial court abused its discretion in sentencing defendant to 12 years in prison. Defendant contends that the trial court failed to adequately consider the evidence in mitigation and her rehabilitative potential. Specifically, defendant argues that, in crafting defendant's sentence, the trial court failed to take into account defendant's lack of significant criminal history, her employment and educational background, her family situation, her dedication to Alcoholics Anonymous, and the fact that no one was hurt during the commission of the offense. According to defendant, although she had six DUI misdemeanor convictions and a disorderly conduct conviction in 2011, she remained a productive law-abiding

citizen for 13 years prior to this offense. Defendant requests the case be sent back for another sentencing hearing.

¶ 25 A trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age than the reviewing court, which must rely on the cold record on appeal. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010); *People v. Fern*, 189 Ill. 2d 48, 53 (1999). A trial court's sentencing decision is afforded great deference, and a reviewing court will not disturb a sentence within the statutory limits unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000). A sentence that falls within the statutory range is presumptively proper and does not constitute an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90 (2007).

¶ 26 In this case, defendant was eligible for a maximum sentence of 30 years in prison for aggravated DUI. 730 ILCS 5/5-4.5-25(a) (West 2012) (the nonextended-term sentencing range for a Class X felony is between 6 and 30 years). The trial court imposed a 12-year prison sentence, which is well within the statutorily permissible range. While defendant argues that the trial court did not adequately consider her demonstrated rehabilitation ability, the record reflects that the court properly considered this factor and rejected it. The evidence at trial indicated that defendant, severely intoxicated, picked up her granddaughter from daycare, almost dropped her while exiting the facility, and then placed her in the car. Defendant did not buckle the child into a car seat and the car seat was not buckled into the car. The daycare workers instructed

defendant to stop driving, but she continued driving while one of the workers held onto defendant's window. Defendant crushed into another car while leaving the daycare parking lot. Although nobody was hurt, defendant's conduct threatened serious harm to her granddaughter and potentially many others. While rejecting defendant's argument that she rehabilitated herself, the court observed that defendant's actions "are not actions of someone who substantially changed and not had anything to drink since 2002. The evidence just does not bear out what you're telling me."

¶ 27 The court balanced the seriousness of the offense with the evidence presented in mitigation. The court indicated that it considered defendant's work, educational accomplishments as well as her involvement with the AA when imposing the sentence. The court noted that it read and reviewed the presentence investigative report where defendant's education, employment, and connection with AA were also detailed. There is a presumption that the sentencing court considered mitigating evidence before it. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). The court noted that defendant did not have a significant criminal history but also observed that this offense was defendant's seventh DUI conviction, and the need to protect the community and defendant herself from defendant's repeated drinking and driving. Considering the totality of the circumstances, we cannot say that the trial court abused its discretion when fashioning defendant's 12-year sentence. We will only vacate a sentence that is within the sentencing range if the trial court abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). Here, it did not.

¶ 28 Defendant argues, and the State agrees, that she should have been awarded \$5-per-day credit against her fines for the 79 days she spent in pre-sentence custody. A defendant incarcerated on a bailable offense who is not able to post bond and receives a sentence of

imprisonment and a fine is entitled to both credit against the imprisonment sentence for each day served and a \$5-per-day credit against the fine. 725 ILCS 5/110-14 (West 2012); *People v. Lemons*, 229 Ill. App. 3d 645, 652 (1992). Accordingly, defendant's monetary judgment is reduced by \$395, from \$27,094 to \$26,699.

¶ 29 CONCLUSION

¶ 30 Based on the foregoing, we affirm.

¶ 31 Affirmed as modified.