2016 IL App (2d) 140572-U
No. 2-14-0572
Order filed June 21, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 12-CF-761
TERAH LYNE MAYS,	)	Honorable Randy Wilt,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence of five years' imprisonment for domestic battery was affirmed where the trial court did not rely on an improper factor during sentencing; the mittimus was corrected to reflect that defendant is not entitled to a credit against a $10 domestic battery fine.

¶ 2 In May 2012, defendant, Terah Lyne Mays, entered a fully-negotiated plea of guilty to the charge of domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2012)) and was placed on probation. In December 2012, the State petitioned to vacate the sentence of probation. Defendant admitted to violating the terms of his probation by consuming THC, and the court subsequently sentenced him to 5 years' imprisonment. Defendant appeals, arguing that the court

relied on an improper aggravating factor in sentencing him. He also disputes certain fees and fines that are reflected in a "criminal case ledger." For the reasons that follow, we affirm defendant's sentence and correct the mittimus to reflect that defendant is not entitled to credit against the $10 domestic battery fine.

¶ 3 I. BACKGROUND

¶ 4 On April 11, 2012, defendant was charged by indictment with aggravated domestic battery (720 ILCS 5/12-3.3 (West 2012)) and domestic battery in connection with events that occurred on March 18, 2012. Both counts of the indictment alleged that defendant knowingly made contact of an insulting or provoking nature with Precious King, a family or household member. Count I alleged that defendant committed aggravated domestic battery, a Class 2 felony, by choking King, thereby impeding her normal breathing. Count II alleged that defendant committed domestic battery by striking King. Count II further alleged that defendant had previously been convicted of domestic battery in August 2006, making the current offense a Class 4 felony.

¶ 5 On May 15, 2012, defendant entered a fully-negotiated guilty plea to the charge of domestic battery in exchange for the dismissal of the aggravated domestic battery charge. The State provided the following factual basis for the plea:

> "On the 18th day of March 2012 Officer Danner responded to 1621 South Main Street in reference to a domestic dispute. Officers spoke to Precious King, who said that she got into an argument with her boyfriend Terah Mays. During the argument Terah Mays punched her and slapped her. Officers observed that King had a swollen lip and torn shirt.
>
> Officers left the residence at 1621 South Main Street and were called back a short

> while later from a 911 call indicating that Terah Mays had returned to the residence. They spoke with King again, who said that Mays came back and choked her to the point that she could not breathe. Officers observed new injuries around her neck that were not present during the first visit.
>
> All of these events occurred in the County of Winnebago and State of Illinois. And Terah Mays was previously convicted of the offense of domestic battery in Winnebago County case number 2006 CM 5909 on August 22, 2006."

The court accepted the plea agreement, pursuant to which defendant was sentenced to probation for a period of 30 months together with 180 days in the county jail. Sixty days of that jail sentence was stayed contingent upon full compliance with the terms of probation, and defendant was given credit for 58 days served. The court also assessed certain fines and fees, including a $250 DNA analysis fee, a $200 domestic violence fine, and a $10 domestic battery fine.

¶ 6 On December 7, 2012, the State filed a petition to vacate defendant's sentence of probation. Among the allegations were that defendant consumed THC on or about August 9, 2012; failed to complete a mental health evaluation; failed to attend required services on four occasions; and had contact with King on two occasions. The State further alleged that on December 1, 2012, defendant had again committed the offense of domestic battery by striking King, stomping on her, and kicking her. The State filed new criminal charges against defendant in connection with the December 1, 2012, incident.

¶ 7 Defendant thereafter failed to appear in court, and a bench warrant was issued for his arrest. He was apprehended in June 2013. On November 6, 2013, defendant admitted to violating the terms of his probation by consuming THC on August 9, 2012. In exchange, the remaining allegations in the petition to revoke probation were dismissed, as were the separate

criminal charges stemming from the December 1, 2012, incident. The matter was continued for re-sentencing on the domestic battery charge arising out of the March 18, 2012, incident.

¶ 8 The presentence investigation report (PSI) contained a statement of facts regarding the March 18, 2012, incident. That statement of facts was virtually identical to the factual basis for defendant's guilty plea to the charge of domestic battery. According to the PSI, the statement of facts was "received from the Winnebago County State's Attorney's Office."

¶ 9 The court held a sentencing hearing on December 9, 2013. Although probation was an option, due to defendant's criminal history, he was eligible for an extended-term sentence of up to six years' imprisonment. The record on appeal contains the PSI that the court considered at the hearing. However, the record does not contain the other exhibits that were presented to the court. From what we can discern from the transcript of the hearing, People's Exhibit 1 was a statement of facts detailing the December 1, 2012, incident, which occurred while defendant was on probation. According to the court, People's Exhibit 1 reflected that King told police that on December 1, 2012, defendant "punched her repeatedly in the head" as she "held up her arms to shield herself," and that "he continued to punch her while she was on the ground." People's Exhibit 2 apparently contained a verified petition for an order of protection and two copies of an emergency order of protection that had been entered in a case captioned as 12 OP 2725. In the petition for an order of protection, King apparently reiterated that defendant had physically assaulted her on December 1, 2012. However, Defendant's Exhibit 1 was described as being another statement from King, dated August 23, 2013, detailing the December 1, 2012, incident. In that statement, King indicated that defendant had not assaulted her in December 2012, but that it was in fact another man who had done so. Defendant's Exhibits 2-4 were apparently documents reflecting defendant's participation in various programs while incarcerated.

¶ 10 The State presented no evidence at the hearing apart from the documents that had been tendered to the court. Although defendant did not testify, he elected to read into the record a letter apologizing for not complying with his probation. He explained that he experienced depression when his father died and had turned to drugs. He also said that he had participated in groups while incarcerated. He acknowledged his addiction to marijuana and asked for probation and drug classes rather than a prison sentence.

¶ 11 The State requested "more than the minimum" prison sentence, emphasizing defendant's extensive criminal history, that he had not cooperated with probation, and that he had gone "AWOL for half a year" in 2013 while there was an outstanding warrant for his arrest. The State argued that defendant would not be likely to comply with probation. Furthermore, referencing the December 1, 2012, incident, the State asserted that defendant had continued to be violent toward King even while he was on probation.

¶ 12 Defense counsel, on the other hand, proposed that defendant was "a good man" and that there were "some mental health issues to be addressed." Counsel argued that "there may be some medication issues that might help stabilize [defendant] so that he can engage in [treatment] more properly." Defense counsel requested probation and to have defendant "report to [the] Janet Wattles [Center] or get assessments or whatever this court deems appropriate." Counsel noted that if things did not work out, the court "would still have the option to send [defendant] to the Department of Corrections."

¶ 13 Before announcing its sentence, the court noted that King had made inconsistent statements about whether defendant attacked her on December 1, 2012. According to the court, King was a "liar" and the court could not "believe anything that she says." The court therefore stated that it was "disregarding that December 1 incident altogether."

¶ 14 The court then considered the mitigating factors. It noted that defendant's conduct on March 18, 2012, did not cause serious bodily harm. The court also took into consideration that defendant "was raised in a broken home" and was a witness to and a victim of abuse. The court gave defendant credit for obtaining his GED, especially in light of his "learning disability issues." The court acknowledged that defendant had mental health issues, but added that defendant "quit treatment and refused to take his medication." Similarly, although defendant had a drug and alcohol problem, the court recognized that defendant had "skipped out at Rosecrance Ware." The court gave defendant "a lot of credit" for the progress that he had made in jail, as supported by Defendant's Exhibits 2-4.

¶ 15 With respect to the aggravating factors, the court began: "I start off with the fact that the conduct, although it didn't cause serious bodily harm, it certainly threatened serious bodily harm. *It involved a choke, not just a punch or a slap*." (Emphasis added.) The court next noted defendant's "significant criminal history," including felonies as both a juvenile and an adult. The court also took into consideration that defendant had been imprisoned twice—once for three years and another time for four years—and that he had "been on probation at least four different times." Furthermore, the court reiterated that defendant had been noncompliant with both treatment opportunities and the terms of his probation, having "just absolutely disappeared for a long period of time." Additionally, the court found that there was a need to deter others from disregarding their probation obligations. According to the court, there was "ample evidence that [defendant was] not likely to comply with the terms and conditions of a period of probation," and sentencing defendant to probation "would deprecate the seriousness of the offense and deprecate the lack of cooperation on probation."

¶ 16 In light of "some of the good things" that defendant had done while in custody, the court did not find it appropriate to sentence him to the maximum term of six years' imprisonment. Instead, the court sentenced him to five years' imprisonment. The court explained: "I know it's near the maximum sentence. But given his total lack of compliance on probation and the fact that he just skipped out and his prior criminal history and the fact that he's been down to the Department of Corrections twice, the last time for four years, I just can't justify giving him four years or less." The court noted that defendant had 243 days of credit toward his sentence.

¶ 17 On the topic of defendant's fines and fees, the following colloquy occurred:

> "THE COURT: All right. To the extent that they remain outstanding – fines and fees of [$]192 will be offset by the per diem credit. The domestic violence fines of – a combined total of $210 will be offset by the per diem credit. Carrie Lynn Center fine will be offset by the per diem credit. So what remains outstanding is the $308 in costs.
>
> State, you marked a $250 DNA testing fee. I've got to believe he has done a DNA test in the past.
>
> [PROSECUTOR]: I'm sure he has, Judge.
>
> [DEFENSE COUNSEL]: Judge, he has indicated that he has.
>
> THE COURT: I'm striking that off then too. So all fines, fees and penalties, other than court costs, will be offset by the $1,215 per diem credit that he has. To the extent anything that will remain outstanding; [*sic*] the $308 in costs will be reduced to judgment if that has not also been satisfied."

¶ 18 On December 19, 2013, defendant filed both a motion to withdraw his guilty plea and a motion for reconsideration of the sentence. He subsequently withdrew his motion to withdraw the guilty plea. The grounds for reconsidering the sentence were: (1) "That the defendant

believes that the *** sentence is excessive in light of the nature and circumstances of the offense and history and character of the defendant"; (2) "That the defendant had no previous history of adult criminal activity except as noted in the Presentence Report"; and (3) "That the Court's sentence failed to take into consideration the rehabilitative potential of the Defendant, and the statutory factors in mitigation."

¶ 19 On June 6, 2014, the court denied the motion to reconsider the sentence. The court reiterated that it had "totally discounted" the December 1, 2012, incident. However, the court stressed that "there was a significant amount of aggravation in this case," including the fact that defendant had previously been to prison, once for a term of four years. The court "couldn't see any way of justifying imposing less time than that, especially in light of all the various factors in aggravation that [the court] listed in reviewing the sentence."

¶ 20 Defendant timely appealed.

¶ 21 II. ANALYSIS

¶ 22 Defendant argues that "the trial court relied on an improper factor when it considered the alleged choking described in the statement of facts contained in the PSI." Specifically, he contends, "[t]he court explicitly found that [defendant] had choked King, but that finding was supported only by uncorroborated multiple hearsay contained in the [PSI.]" According to defendant, this court should therefore vacate his sentence and remand the matter for a new sentencing hearing. Defendant also argues that he is entitled to a credit against his domestic violence fine and to have his DNA analysis fee vacated.

¶ 23 "It is well established that the [trial] court has wide latitude in sentencing a defendant, so long as it neither ignores relevant factors in mitigation nor considers improper factors in aggravation." *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. Accordingly, we usually will not

disturb a sentence absent an abuse of discretion. *Watt*, 2013 IL App (2d) 120183, ¶ 49. However, when a defendant argues that the trial court relied on an improper sentencing factor, our review is *de novo*. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. We presume that the trial court applied proper legal reasoning, and the defendant bears the burden "to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Dowding*, 388 Ill. App. 3d at 943.

¶ 24 Defendant forfeited his argument that the trial court relied on an improper sentencing factor by failing to raise that issue below. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required."). Accordingly, we may review defendant's claim only for plain error. *Hillier*, 237 Ill. 2d at 545. Under the plain-error doctrine, defendant bears the burden of showing that either "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Hillier*, 237 Ill. 2d at 545. Defendant argues that the second prong applies. See *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7 (explaining that the consideration of improper aggravating factors potentially implicates the second prong). The first step in our analysis is to ascertain whether any error occurred. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 33. Absent any error, there can be no plain error. *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 34.

¶ 25 Defendant relies heavily on *People v. Spears*, 221 Ill. App. 3d 430 (1991), in which the defendant was convicted of attempted first degree murder in connection with a shooting that occurred in September 1989. *Spears*, 221 Ill. App. 3d at 432. At the sentencing hearing, defense counsel objected to several items in the PSI. *Spears*, 221 Ill. App. 3d at 432. One objection pertained to a summary of a May 1987 incident that had resulted in the defendant pleading guilty to the offense of aggravated battery for firing gunshots at a man named John Catlin. *Spears*, 221 Ill. App. 3d at 432-34. Specifically, the defendant contended that the following portion of the PSI was " 'not a correct statement of fact' " regarding the 1987 incident:

> " '[T]he victim and the group of persons he was with were asked whether they were Disciples-that is, Disciple gang members. And when John Catlin responded that he was not a gang member, and not a Disciple, the defendant hit him in the face and knocked him to the ground. A scuffle ensued and the victim ran away from the defendant when he saw the defendant pull out a gun.' " *Spears*, 221 Ill. App. 3d at 432-33.

The assistant State's Attorney responded to the defendant's objection:

> " 'Well, I don't know what the defendant's alternative version of the facts would be, Your Honor. I do know that that case was resolved by a guilty plea and that at the guilty plea, the State's Attorney provided a statement of facts to the judge. And it's my understanding that the statement of facts that was taken for this statement was taken from the pen statement that was written by our office when the defendant was committed on that offense. And that the pen statement is substantially the same thing that the State's Attorney tells the judge at the time a factual basis for the plea is taken.' " *Spears*, 221 Ill. App. 3d at 433.

The trial court allowed the statement to remain in the PSI over defendant's objection. *Spears*, 221 Ill. App. 3d at 433. Defendant then testified on his own behalf regarding the 1987 incident, explaining that the victim of that shooting had run at him with a bat. *Spears*, 221 Ill. App. 3d at 434.

¶ 26 In considering the aggravating factors, the trial court mentioned the following about the 1987 incident:

> " 'A shooting. According to the information in the presentence [report], that victim was running away from defendant, also.
>
> Talks about the-well, the actual presentence [report] indicates that when John Catlin was found not to be a gang member, the defendant hit him in the face and knocked him to the ground. And there was a scuffle and the victim ran when he saw the defendant pull out a gun. The defendant then discharged the gun four times, hit the victim in the leg.
>
> I heard defense counsel mention that defendant lives in an area where many people carry a gun for self-defense, protect themselves. This is not-was not a gun used for self protection but for offense. In both instances. And the jury has made the decision in the case at bar.' " *Spears*, 221 Ill. App. 3d at 434.

The court sentenced defendant to 20 years' imprisonment. *Spears*, 221 Ill. App. 3d at 432.

¶ 27 The defendant argued on appeal that the trial court "erred in overruling his objections to the presentence report and relying upon unreliable information when imposing the sentence." *Spears*, 221 Ill. App. 3d at 435. He contended that "the trial court specifically mentioned the [1987] incident three times during sentencing, but no factual basis appears in the record to support the prosecutor's understanding regarding the origin of the narrative." *Spears*, 221 Ill.

App. 3d at 435. According to the defendant, "the State never showed that the statement was in fact presented at the time [he] pleaded guilty to the previous aggravated battery." *Spears*, 221 Ill. App. 3d at 435. Nor, the defendant argued, was there any showing that he had not objected to the statement of facts relating to the 1987 incident at the time he was sentenced in that prior case. *Spears*, 221 Ill. App. 3d at 435.

¶ *28* This court vacated the defendant's sentence and remanded for a new sentencing hearing. In holding that the trial court erroneously considered the statement in the PSI regarding the 1987 incident and that this was not harmless error, we emphasized that: (1) the source of the information was unknown; (2) the statement was "double or triple hearsay repeated from a partisan interpretation of the facts of the incident"; and (3) "the trial court relied heavily upon the disputed fact that Catlin was running away from defendant rather than toward him." *Spears*, 221 Ill. App. 3d at 438.

¶ 29 According to defendant, the matter at hand is similar to *Spears*, because "the improper factor which the trial court relied upon here consisted of a portion of the 'statement of facts' included in the PSI that indicated King had told police officers that [defendant] choked her on March 18, 2012." Defendant also suggests that the trial court may have been under the misconception that defendant had pleaded guilty to choking King. To that end, defendant stresses that the court asserted that defendant's conduct "involved a choke, not just a punch or a slap." Furthermore, defendant continues, like in *Spears*, "it is not clear who authored the statement of facts in the PSI," and the PSI "simply states that the facts were 'received from the Winnebago County State's Attorney's Office.' " According to defendant, "the statement of facts in the PSI relating to the choking of King amounted to uncorroborated multiple hearsay because

it contained a claim by an unidentified author about what [the arresting officer] supposedly said about what King had said about what [defendant] allegedly did."

¶ 30 There is simply no basis for defendant's speculation that the trial court was confused as to whether defendant had pleaded guilty to the count involving choking. Immediately before discussing the mitigating and aggravating factors, the court said: "We're talking March 18, 2012, another incident in which this gentlemen is accused of *domestic battery* against Precious King. He pled guilty to that. That's what I'm sentencing him for." (Emphasis added.) The court clearly understood that defendant had not pleaded guilty to the *aggravated domestic battery* count, which alleged that defendant choked King.

¶ 31 Additionally, defendant's reliance on *Spears* is misplaced. In contrast to *Spears*, this case does not involve a trial court considering criminal conduct that is wholly distinct from the conduct for which the court is entering a sentence. Instead, defendant was charged with two crimes in a single indictment, both of which occurred on March 18, 2012, and involved the same victim: aggravated domestic battery for choking King and domestic battery for striking her. As part of a fully-negotiated plea deal, defendant pleaded guilty to domestic battery and received the benefit of the dismissal of the more serious charge. In the factual basis for the plea, the State outlined that defendant had "punched" and "slapped" King before "chok[ing] her to the point that she could not breathe." When defendant subsequently admitted to violating the terms of his probation, the trial court was required to sentence him anew on the domestic battery count. The PSI repeated, virtually *verbatim*, the factual basis that the State had originally presented to the court in support of the plea of guilty on that charge. Unlike in *Spears*, defendant never disputed that series of events, nor did he dispute the way that those events were described in the PSI. This is a critical distinction, because defendant bore the burden to point out any factual inaccuracies

that he believed were contained in the PSI. See *People v. Powell*, 199 Ill. App. 3d 291, 294 (1990) ("To the extent that either the defendant or the State may believe that the presentence report contains inaccuracies, we hold that they have the burden to call any such inaccuracy to the court's attention at the start of the sentencing hearing."). Thus, *Spears* does not compel us to vacate defendant's sentence.

¶ 32 Moreover, we reject defendant's invitation to find a multiple hearsay problem merely because the uncontested factual basis for defendant's guilty plea happened to be re-printed in the PSI. When a trial court fashions a sentence for a criminal offense, it may consider facts that were previously set forth by the State in support of the defendant's plea of guilty to that same offense. See *People v. White*, 2011 IL 109616, ¶ 29 (where the defendant pleaded guilty to murder, and where the factual basis for the plea made it clear that a firearm was used in the course of the offense, the trial court was required to impose a firearm enhancement); *People v. Jackson*, 199 Ill. 2d 286, 299 (2002) (where the defendant pleaded guilty to the offense of aggravated battery, an extended-term sentence based on exceptionally brutal or heinous behavior was justified where: (1) the State outlined in its factual basis for the plea that the defendant had cut the victim's head with a box cutter, necessitating hundreds of stitches, and (2) the State presented photos of the victim at the sentencing hearing).

¶ 33 Furthermore, defendant's reliance on *People v. Blanck*, 263 Ill. App. 3d 224 (1994), is unpersuasive. One of the issues in that case was whether the trial court should have sustained the defendant's objections to certain statements in the PSI detailing the defendant's prior uncharged criminal activity. *Blanck*, 263 Ill. App. 3d at 236. We reiterate that in the present case, in sentencing defendant on the domestic battery charge, the trial court merely relied on the unchallenged version of the facts that had been provided by the State in support of the guilty plea

on that same charge. Defendant does not cite any case supporting that the State was required to present testimony at the sentencing hearing to prove up the factual basis for the guilty plea. In fact, imposing such a requirement would defeat the whole purpose of defendant's plea. See *People v. Bassette*, 391 Ill. App. 3d 453, 457 (2009) (where the defendant admitted to the allegations of a petition to revoke his probation, "the State was not required to present all of the evidence it had in support of that petition"; to the extent the defendant believed that the State's case was deficient, he could have requested a hearing on the petition). For these reasons, we hold that the trial court did not rely on an improper factor in sentencing defendant. Therefore, there was no error.

¶ 34 Defendant next argues that he is entitled to full credit against his $200 domestic violence fine based on his presentence custody. See 725 ILCS 5/110-14(a) (West 2014) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant."); *People v. Wynn*, 2013 IL App (2d) 120575, ¶ 13 (a domestic violence fine imposed pursuant to 730 ILCS 5/5-9-1.5 (West 2010) is subject to the $5-per-day credit). Additionally, defendant contends that he is not subject to the $250 DNA analysis fee outlined in 730 ILCS 5/5-4-3(j) (West 2014), because his DNA is already in the database as a result of a prior conviction. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011) (the DNA analysis fee applies only if the defendant is not registered in the database). Although the trial court specifically accorded defendant the relief that he now requests, defendant notes that the record contains a "criminal case ledger" filed on September 4, 2014, that erroneously includes a domestic violence fine[1] and a DNA analysis fee.

[1] This is labeled as a "domestic violence fee" in the criminal case ledger.

¶ 35 The State agrees with defendant that the judgment should be modified to vacate the DNA analysis fee and to reflect *per diem* credit toward the domestic violence fine. Nevertheless, the State also notes that there is no indication as to when the criminal case ledger was created. According to the State, the ledger may not accurately reflect the current assessments.

¶ 36 The trial court appropriately struck the DNA analysis fee and gave defendant a full credit against his $200 domestic violence fine. Accordingly, the judgment and mittimus are correct in these respects, and there is nothing to vacate or modify. If the court clerk's internal records do not accurately reflect the judgment, the parties can bring that to the attention of the clerk. However, defendant concedes that the trial court improperly gave him credit toward a $10 domestic battery fine. See 730 ILCS 5/5-9-1.6 (West 2014) (a domestic battery fine "shall not be considered a part of the fine for purposes of any reduction in the fine for time served either before or after sentencing"). We therefore correct the mittimus to reflect that defendant is not entitled to credit against the $10 domestic battery fine.

¶ 37 III. CONCLUSION

¶ 38 For the reasons stated, we affirm defendant's sentence and correct the mittimus to reflect that defendant is not entitled to credit against the $10 domestic battery fine. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 39 Affirmed; mittimus corrected.