

**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).

2016 IL App (4th) 150816-U

NO. 4-15-0816

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 17, 2016  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign
JUSTIN J. MORRIS,	)	No. 12CF727
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.  
Justices Harris and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's sentence and remanded with directions to comply with the court's mandate on remand from the prior appeal.

¶ 2 In May 2012, defendant, Justin J. Morris, pleaded guilty to one count of theft of property having a value exceeding \$500 (720 ILCS 5/16-1(a)(1)(A) (West 2010)) and was sentenced to probation. In June 2012, the trial court revoked defendant's probation. In July 2012, the trial court resentenced defendant *in absentia* to 9 years' imprisonment, with credit for 27 days served in custody, and ordered him to pay certain assessments. In April 2013, defendant *pro se* filed a postconviction petition, alleging his constitutional right to due process was violated when he never received a hearing as required by section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2012)), which the trial court summarily dismissed.

¶ 3 In June 2013, defendant *pro se* filed a motion for a new sentencing hearing pursu-

ant to section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2012)), which the trial court denied without an evidentiary hearing. On appeal, this court vacated the trial court's denial of defendant's section 115-4.1(e) motion and remanded the case, directing the trial court to provide an evidentiary hearing, issue an amended sentencing judgment reflecting 29 days of credit for time served in custody, vacate a \$175 deoxyribonucleic acid (DNA) fee, and apply a \$5-per-day credit against all creditable fines. *People v. Morris*, 2015 IL App (4th) 130529-U. In October 2015, the trial court held an evidentiary hearing pursuant to section 115-4.1(e) of the Code and denied defendant's motion.

¶ 4 Defendant appeals, arguing the trial court (1) abused its discretion in sentencing him to 9 years' imprisonment based on his drug addiction and his absence from sentencing and (2) failed to comply with the appellate court's order to increase his sentence credit to 29 days. We affirm and remand with directions.

¶ 5

#### I. BACKGROUND

¶ 6 In May 2012, defendant pleaded guilty to one count of theft of property having a value exceeding \$500 in exchange for 24 months' probation; 15 days in jail, with credit for 15 days served; and the obligation to pay certain assessments. In June 2012, the State filed a petition to revoke defendant's probation following defendant's arrest for possession of drug paraphernalia and trespassing. Defendant admitted violating his probation. The trial court revoked defendant's probation and continued the matter for resentencing. The court admonished defendant he could be tried *in absentia* if he failed to appear at sentencing. Defendant was released on recognizance bond.

¶ 7 In July 2012, when defendant failed to appear at his sentencing hearing, the trial court sentenced him *in absentia* to 9 years' imprisonment, with credit for 27 days served, and or-

dered him to pay certain assessments. The court issued a warrant for defendant's arrest. No direct appeal was taken. In September 2012, defendant was taken into custody.

¶ 8 In April 2013, defendant *pro se* filed a postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)), alleging his constitutional right to due process was violated when he was never given a hearing as required by section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2012)). In May 2013, the trial court summarily dismissed defendant's petition as frivolous and patently without merit. The same month, defendant filed a motion to reconsider the trial court's summary dismissal, which the trial court denied. No appeal was taken.

¶ 9 In June 2013, defendant *pro se* filed a motion for a new sentencing hearing under section 115-4.1(e) of the Code (725 ILCS 5/115-4.1(e) (West 2012)). In October 2013, the trial court denied defendant's motion for a new sentencing hearing without an evidentiary hearing. Defendant appealed the trial court's denial of his section 115-4.1(e) motion. On appeal to this court in June 2014, we vacated the trial court's denial of defendant's motion and remanded for an evidentiary hearing to determine whether defendant's absence from sentencing was not his fault and beyond his control. We further directed the trial court to issue an amended sentencing judgment reflecting a sentence credit of 29 days, vacate the \$175 DNA fee, and apply a \$5-per-day credit against all creditable fines. *Morris*, 2015 IL App (4th) 130529-U, ¶ 16.

¶ 10 In October 2015, the trial court held an evidentiary hearing pursuant to section 115-4.1(e). Defendant testified he missed his sentencing hearing due to drug use. Defendant's aunt and adoptive mother, Cora Lee Morris, testified defendant's biological mother had used drugs while pregnant with him and defendant currently suffered from drug addiction. The trial court denied defendant's motion for a new sentencing hearing. In its ruling, the court noted de-

fendant "[w]asn't hospitalized, he wasn't injured, he wasn't incarcerated in another location. He got high and didn't show up. That is not an excuse for not being present for his sentencing hearing."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues the trial court abused its discretion in sentencing him to 9 years' imprisonment. Defendant also argues, and the State concedes, the trial court failed to comply with the appellate court's order to increase defendant's custody credit from 27 to 29 days. The State argues defendant's abuse of discretion claim is waived and *res judicata* applies, or in the alternative, the trial court did not abuse its discretion in sentencing defendant.

¶ 14 A. Abuse of Discretion at Sentencing

¶ 15 Defendant first argues the trial court abused its discretion when it sentenced him to an "extended sentence of nine years for Class 3 theft based primarily upon its finding that [defendant's] addiction to drugs and his absence from sentencing show[ed] that 'his rehabilitative potential is nil.' " The State argues defendant's challenge of his sentence as an abuse of discretion should have been brought in his prior appeal and is thus waived. Alternatively, the State argues the trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment. We disagree with the State on the first point but agree on the second point.

¶ 16 1. *Res Judicata and Waiver*

¶ 17 The State argues defendant's challenge of his sentence as an abuse of discretion should have been brought in his prior appeal and is thus waived. We disagree.

¶ 18 Issues that could have been raised on appeal, but were not, are considered waived. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 452 (2004). However, the doctrines of

*res judicata* and waiver will be relaxed in the following three circumstances: (1) where fundamental fairness so requires, (2) where the waiver stems from the ineffective assistance of appellate counsel, or (3) where the facts relating to the claim do not appear on the face of the original appellate record. *Williams*, 209 Ill. 2d at 233, 807 N.E.2d at 452.

¶ 19 Section 115-4.1(g) allows "[a] defendant whose motion under paragraph (e) for a new trial or new sentencing hearing has been denied [to] file a notice of appeal therefrom. Such notice may also include a request for review of the judgment and sentence not vacated by the trial court." 725 ILCS 5/115-4.1(g) (West 2012).. On appeal to this court in June 2014, the defendant appealed the trial court's denial of his motion without an evidentiary hearing as required by section 115-4.1(e). See *Morris*, 2015 IL App (4th) 130529-U.

¶ 20 We find the facts relating to defendant's current appeal did not appear on the face of the record at the time of his first appeal, as the trial court was required to hold an evidentiary hearing prior to denying defendant's section 115-4.1(e) motion—which only occurred after we vacated and remanded the original denial so a proper section 115-4.1(e) hearing could be held. The doctrines of *res judicata* and waiver therefore do not apply to defendant's appeal now before the court.

¶ 21 *2. Abuse of Discretion*

¶ 22 Defendant argues the trial court abused its discretion in sentencing him to an "extended sentence of nine years for Class 3 theft based primarily upon its finding that [defendant's] addiction to drugs and his absence from sentencing show[ed] that 'his rehabilitative potential is nil.'" In response, the State argues in response the sentence was not an abuse of discretion, as the sentence was within the statutory guidelines. We agree.

¶ 23 "When imposing sentence, a trial court must balance a defendant's rehabilitative

potential with the seriousness of the offense." *People v. Harris*, 2015 IL App (4th) 140696, ¶ 54, 32 N.E.3d 211. "Each sentencing decision must be based on the particular circumstances of the case and the court must consider factors such as 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age.'" *Harris*, 2015 IL App (4th) 140696, ¶ 54, 32 N.E.3d 211 (quoting *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999)). "A trial court is given great deference when making sentencing decisions, and if a sentence falls within the statutory guidelines, it will not be disturbed on review unless the court abused its discretion and the sentence is manifestly disproportionate to the nature of the case." *People v. Grace*, 365 Ill. App. 3d 508, 512, 849 N.E.2d 1090, 1093-94 (2006). We note "[a] court is not required to expressly outline every factor it considers for sentencing." *Harris*, 2015 IL App (4th) 140696, ¶ 57, 32 N.E.3d 211.

¶ 24 At defendant's sentencing hearing, the trial court considered the deterrent effect of any sentence it might impose and whether sentencing defendant to a term of probation would deprecate the seriousness of his conduct. In considering those two principles and defendant's overall rehabilitative potential, the court weighed defendant's failure to appear at sentencing, criminal history, past failures to comply with conditions of probation, and past substance abuse as an element motivating his criminal activity. While the court noted defendant's age and the nonviolent nature of most of his offenses as mitigating factors, it indicated the mitigating factors were outweighed by those in aggravation. The court then sentenced defendant within the statutory range allowed in defendant's case.

¶ 25 The record reveals the trial court considered the appropriate factors in aggravation and mitigation. The court fashioned a sentence within the statutory range. While defendant emphasizes the factors in mitigation, the court was not required to place greater weight on those fac-

tors than on the need to deter others from committing similar crimes. See *People v. Malin*, 359 Ill. App. 3d 257, 265, 833 N.E.2d 440, 447 (2005) (citing *People v. Gagliani*, 251 Ill. App. 3d 1019, 1029, 623 N.E.2d 887, 894 (1993)). We will not substitute our judgment for that of the court merely because we might have weighed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991). The trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment.

¶ 26 B. Noncompliance With Prior Directions

¶ 27 Defendant further contends, and the State concedes, the trial court failed to comply with this court's mandate on remand in defendant's prior appeal. In defendant's prior appeal, this court directed the trial court to issue an amended sentencing judgment reflecting a sentence credit of 29 days, vacate the \$175 DNA fee, and apply a \$5-per-day credit against all creditable fines. This argument is well taken. *Morris*, 2015 IL App (4th) 130529-U, ¶ 16. We once again direct the trial court to issue an amended sentencing judgment reflecting a credit for 29 days' time served in custody.

¶ 28 C. Appeal of Conviction and Denial of Section 115-4.1(e) Motion

¶ 29 Defendant's notice of appeal includes appeals of his underlying conviction and the trial court's denial of his section 115-4.1(e) motion after an evidentiary hearing. Defendant's appeal of these matters, however, is not among the issues addressed in his briefs. We deem these issues forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm defendant's sentence of nine years' imprisonment. We further remand and direct the trial court to issue an amended sentencing judgment re-

flecting a sentence credit of 29 days.

¶ 32 Affirmed; cause remanded with directions.