THIRD DIVISION
January 18, 2017

No. 1-14-3532

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 16232
	)	
JOSHUA MIELA,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's sentence where the trial court considered all relevant factors and the sentence was not excessive. Fines and fees order is corrected.

¶ 2 Following a jury trial, defendant Joshua Miela was convicted of two counts of unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to concurrent terms of 10 years' imprisonment. On appeal, defendant contends that his sentence is excessive in light of the nature of the offense, his background, and his potential for rehabilitation.

He further challenges various fees imposed by the trial court. We correct the fines and fees order and affirm in all other respects.

¶ 3 Defendant was charged with four counts of UUWF, one count of aggravated unlawful use of a weapon, and two counts of unlawful use of a weapon. The State proceeded at trial on two counts of UUWF, charging defendant, a convicted felon, with possessing a revolver and a shotgun.

¶ 4 At trial, Mil Anndred Durham testified that she lived with defendant, her boyfriend, at 1123 West 47th Street. On August 4, 2013, Durham and defendant got into an argument and defendant took Durham's cell phone and backpack, which contained materials she needed for school and work. That evening, Durham and two friends returned to her home to retrieve the items defendant had taken. Her friends waited outside as she entered the apartment alone. After she retrieved her backpack, she searched the house for her slippers and saw defendant's approximately 8-year-old nephew, Kevion, lying on a bed, along with two firearms. One was a "shotgun" and the other was a "black," "western type" gun.

¶ 5 Unable to find her phone or slippers, Durham tried to leave through the open front door when defendant "grabbed [her] and slammed [her] up against the wall." Durham's friends, who were still outside, asked if she was okay. Defendant then ran into the bedroom, retrieved the shotgun that Durham had seen lying on the bed, and returned to the front entrance. Durham heard defendant "click" the shotgun and then he pointed it "towards [her] chest." Defendant told Durham to "get the f**k out." She left and borrowed a friend's cell phone to call the police. Durham heard a "bang" come from the house that she recognized as their back door opening, and believed defendant left the apartment through the back door.

¶ 6 The police arrived and searched inside and outside the house. They recovered two firearms and brought them to Durham for identification. She identified them as "the brown shotgun and the black revolver" that were on the bed and the shotgun as the one defendant "pointed at [her]." Durham identified the weapons at trial. During cross examination, Durham acknowledged that she did not tell police that defendant shoved her prior to pointing the gun at her.

¶ 7 Officer Adolpho Garcia testified that he and his partner responded to 1123 West 47th Street following a call detailing "a person with a gun." Garcia spoke to Durham at the scene and then entered the house and asked to speak to the "offender," who he recognized in court as defendant. He conducted a "protective pat down" and detained defendant. Once outside, Garcia saw Officer Considine with "[t]he weapon Ms. Durham had described," "a sawed off shotgun." Considine also had a "six shooter revolver."

¶ 8 Officer Joseph Considine testified that he responded to 1123 West 47th street following a report of "domestic disturbance and then it came out as a person with a gun." Considine accompanied Durham inside to search the residence but did not find any firearms. He searched outside and observed a wooden fence with missing slats dividing defendant's yard from his neighbor's yard. In the adjacent lot, Considine found "a sawed-off shotgun leaning against the fence right adjacent to a missing slat, along with a revolver." The shotgun was loaded with "two live shotgun shells." Durham identified the two firearms as the weapons she saw inside the house. She further identified the shotgun as the one defendant pointed at her.

¶ 9 The parties stipulated that defendant had previously been convicted of an unspecified felony offense. The State rested and the court denied defendant's motion for a directed verdict.

The jury found defendant guilty of both counts of UUWF, one for possessing the shotgun and one for possessing the revolver. The State *nolle prossed* all remaining counts. Defendant filed a motion to vacate conviction or, alternatively, for a new trial, both of which the court denied.

¶ 10 At sentencing, the presentence investigation report (PSI) showed defendant had prior felony convictions and sentences for: possession of a stolen motor vehicle (2008) – 6 years; UUWF (2006) – 30 months; manufacture/delivery of a controlled substance (2004) – 2 years; possession of a stolen motor vehicle (2003) – 3 years; and possession of a stolen motor vehicle (2003) – 24 months' probation, terminated unsatisfactorily. Defendant also had a misdemeanor domestic battery conviction in 2011 for which he served 60 days. The State argued defendant was a class X mandatory based on his prior convictions. In further aggravation, the State argued "this happened in front of a little boy," the firearms were on the bed with the boy and, although defendant "is a domestic batterer," he owned two firearms and "committed more domestic batteries on this particular day involving two guns." The State noted defendant had prior gang affiliations and argued that the PSI, which detailed defendant's stable home life, demonstrated that "defendant is standing before you today because of choices he made."

¶ 11 Defense counsel argued defendant was 29 years old, that he grew up in "a pretty bad neighborhood," that he only advanced to a 10th grade education because he was diagnosed with ADHD and that he has two children. Counsel pointed out that defendant had a consistent job and paid "$150 a week in child support" and his employer said "he was one of the best guys and *** he has a job when he gets out." In allocution, defendant questioned why the police did not test the recovered firearms for fingerprints, acknowledged both he and Durham committed infidelity,

and stated that "[t]hings just got out of hand. [Durham] just really wanted to get back at me and to make me feel hurt." He concluded that he hoped "the police would have did a better job."

¶ 12 The trial sentenced defendant to 10 years' imprisonment followed by 3 years' mandatory supervised release. It recited the facts of the case and referenced the PSI's details concerning defendant's criminal history, "including the defendant's prior history of domestic violence, the defendant's multiple felony convictions." The court indicated it also considered "that the defendant did maintain employment for some period of time in the past couple of years. That the defendant at least for a short period of his life more recently had managed to not get arrested and convicted of any felony offenses." The court noted that defendant had a good relationship with his mother, that his parents were married when he was born, and that there was no abuse or neglect in his childhood. It noted defendant's prior gang affiliation but stated "I don't see that *** had anything to do with this case."

¶ 13 The court detailed defendant's marijuana and alcohol use and his treatment by mental health professionals for anger problems and ADHD. It stated that it "was very interested in what the defendant was going to say to me today," concluding from defendant's allocution that "[h]e doesn't seem to feel that any of this has been his fault which is disturbing." The trial court noted that defendant was a class X mandatory with a sentencing range of 6 to 30 years, and then sentenced him to 10 years' imprisonment. It granted Durham an order of protection prohibiting defendant from contacting her, gave defendant credit for 432 days served, and imposed fines, fees, and costs totaling $449. Defendant timely appealed.

¶ 14 On appeal, defendant first contends that his sentence was excessive in light of the nature of the offense and his background. Defendant further alleges that the trial court failed to consider or properly weigh his potential for rehabilitation.

¶ 15 We first note that defendant forfeited this claim by failing to object during sentencing and failing to raise it in his motion to reconsider sentence. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, defendant argues, and the State agrees, that his claim is reviewable under the second prong of the plain-error doctrine. Pursuant to Supreme Court Rule 615(a), plain errors or defects affecting substantial rights, such as sentencing issues may be reviewed under the plain error doctrine even when forfeited. *People v. Owens*, 377 Ill. App. 3d 302, 304 (2007) (quoting *People v. Baaree*, 315 Ill. App. 3d 1049, 1050 (2000)) (" 'Sentencing issues are regarded as matters affecting a defendant's substantial rights and are thus excepted from the doctrine of waiver' "). Before we reach the issue of plain error, we must first determine whether any error occurred at all. *People v. Walker*, 392 Ill. App. 2d 277, 294 (2009).

¶ 16 Defendant does not dispute that, due to his criminal history, the instant UUWF convictions (720 ILCS 5/24-1.1(a) (West 2012)) were class X mandatory, with a sentencing range of 6 to 30 years. 720 ILCS 5/24-1.1(e) (West 2012); 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 10-year sentence is well within the applicable statutory sentencing range and is therefore presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 17 We review the trial court's sentencing decision under the abuse of discretion standard, so that we may alter the sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382,

¶ 36. The court's broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). The trial court is responsible for balancing the mitigating and aggravating factors before imposing sentence. *People v. Shaw*, 351 Ill. App. 2d 1087, 1095 (2004). In imposing a sentence, the trial court balances the relevant factors including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent an affirmative indication to the contrary other than the sentence itself. *People v. Abrams*, 2015 IL App (1st) 133746, ¶¶ 32-33.

¶ 18 Defendant's 10-year sentence within the statutory range is presumed proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, defendant was a 5-time convicted felon with a history of domestic abuse when he chose to possess a sawed-off shotgun and a revolver. Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). Moreover, previous efforts at rehabilitation failed, as demonstrated when defendant was not deterred by previous, more lenient sentences. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13. Lastly, given his prior UUWF conviction, defendant was well aware that it was illegal for him to possess the weapons.

¶ 19 Defendant nonetheless argues that his sentence was excessive in light of the nature of the offense, his background, and his rehabilitative potential, demonstrated by his employment

history and educational ambitions. This mitigating evidence was set forth in the PSI and argued by defense counsel. When, as here, mitigating evidence is before the trial court, it is presumed the court considered the evidence absent some contrary indication other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Defendant has not made the requisite affirmative showing that the sentencing court did not consider the relevant factors. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. In fact, the record shows the trial court clearly considered defendant's rehabilitative potential, the nature of the offense and defendant's background in imposing sentence.

¶ 20 The court expressly considered defendant's family background and "that the defendant did maintain employment for some period of time in the past couple of years," noting the praise offered by defendant's employer and that defendant was supporting himself and paying child support. It also expressly considered the nature of the offense, reciting the facts of the case. However, the court also pointed out that, not only did defendant illegally possess two firearms, he kept them accessible by his 8-year old nephew and threatened Durham with the shotgun. It noted defendant's prior history of domestic violence and multiple felony convictions. The court found it "disturbing" that, rather than accept responsibility for his actions, defendant suggested at allocution that his conviction was the result of shoddy police work and a desire for revenge by Durham. The court assigned more weight to defendant's criminal history, prior unsuccessful incarcerations, and failure to take responsibility for his actions than to his rehabilitative potential, taking into account the nature of the offense and his background. We find no reason to disturb that determination on review. We, therefore, cannot conclude that the court abused its discretion

in sentencing defendant to 10 years' imprisonment, which is at the low end of the applicable sentencing range.

¶ 21 Defendant next contends that the electronic citation fee was improperly assessed against him and that four other assessments are fines that should be offset by presentence custody credit. "We review the propriety of a trial court's imposition of fines and fees *de novo*." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 22 Defendant first argues, and the State correctly concedes, that the $5 electronic citation fee should be vacated because the charge applies only to traffic, misdemeanor, municipal ordinance, and conservation cases and is inapplicable to his felony conviction for delivery of UUWF. 705 ILCS 105/27.3e (West 2012); *People v. Moore*, 2014 IL App (1st) 112592-B, ¶ 46 ($5 electronic citation fee does not apply to felonies); *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115 (vacating the fee where the defendant's offense did not fall into an enumerated category). We agree. Accordingly, the $5 electronic citation fee is vacated.

¶ 23 Defendant next argues, and the State concedes, that his $15 State Police Operations Fee (705 ILCS 105/27.3a(1.5) (West 2012)) is a fine and should be offset by presentence credit. A defendant incarcerated on a bailable offense who does not supply bail and against whom a fine is levied is allowed a credit of $5 for each day of presentence custody. 725 ILCS 5/110-14(a) (West 2014). Here, defendant spent 432 days in custody and, therefore, has accumulated $2,160 worth of credit toward his eligible fees.

¶ 24 The presentence custody credit applies only to reduce fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 599 (2006). A "fine" is punitive in nature and is imposed as part of a sentence for a criminal offense. *People v. Graves*, 235 Ill. 2d 244, 250 (2009). A fee, in contrast, seeks to

recoup expenses incurred by the state, or to compensate the state for expenditures incurred in prosecuting the defendant. *Id*. The legislature's label for a charge is strong evidence of whether the charge is a fee or a fine, but the most important factor is whether the charge seeks to compensate the state for any costs incurred as the result of prosecuting the defendant. *Id*.

¶ 25 We agree that the $15 State Police Operations fee is a fine and defendant is thus entitled to a pre-sentence incarceration credit toward it. *People v. Millsap*, 2012 IL App (4th) 110668, ¶ 31, (State Police operations fee is a fine subject to credit). Accordingly, that charge is offset by defendant's presentence custody credit.

¶ 26 Defendant next contends, and the State correctly concedes, that the $50 court system fee (55 ILCS 5/5-1101(c)(1) (West 2014)) imposed by the trial court is a fine subject to offset by presentence custody credit. *People v. Blanchard*, 2015 IL App (1st) 132281, ¶ 22 ("the $50 Court System fee *** is a fine"). Accordingly, that charge should be offset by defendant's presentence custody credit.

¶ 27 Defendant further contends that the $2 Public Defender records automation fee (55 ILCS 5/3-4012 (West 2014)) and the $2 State's Attorney records automation fee (55 ILCS 5/4-2002.1(c) (West 2014)) are fines subject to offset. We agree with prior decisions holding these charges are fees as opposed to fines. *People v. Green*, 2016 IL App (1st) 134011, ¶ 46 ("the $2 Public Defender Records Automation charge was a fee not a fine"); *People v. Bowen*, 2015 IL App (1st) 132046, ¶¶ 63-65 ("both charges constitute fees"); *People v. Warren*, 2016 IL App (4th) 120721-B, ¶¶ 114-116 (State's attorney records automation assessment is compensatory rather than punitive and is, therefore, a fee); see *contra People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56 (the assessments do not compensate the state for the costs associated in

prosecuting a particular defendant and, therefore, cannot be considered fees). Accordingly, neither records automation fee is offset by defendant's presentence custody credit.

¶ 28 For the foregoing reasons, we find the $5 electronic citation fee was improperly assessed and vacate it. Additionally, the $15 state police operations fee and $50 court system fee are offset by presentence custody credit. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to correct the fines and fees order accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 29 Affirmed as modified.