NOTICE
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2018 IL App (5th) 170492-U

NO. 5-17-0492

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 14-CF-114
	)	
RICHARD G. ATCHISON,	)	Honorable
	)	Dennis E. Middendorf,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BARBERIS delivered the judgment of the court.
Justices Moore and Overstreet concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion where it sentenced the defendant to an extended-term sentence of eight years' imprisonment, a term well within the statutory range, after it took into consideration the defendant's extensive criminal history, psychiatric history and his potential for rehabilitation, based on past occurrences.

¶ 2 The defendant, Richard Atchison, pleaded guilty to two counts of retail theft and one count of obstruction of justice. The circuit court subsequently sentenced the defendant to eight years' imprisonment. The defendant appeals, arguing that his sentence was excessive and disproportionate to the nature of the offense. For reasons which follow, we affirm.

¶ 3 I. Background

¶ 4 According to the defendant's presentence investigation (PSI) report, he and his wife, Chrystal, went to Walmart in Centralia, Illinois, on August 1, 2014, where the defendant intended to steal a lawn mower and weed eater while Chrystal purchased money orders to pay outstanding fines in Marion and Clinton Counties. The defendant placed a lawn mower and weed eater, valued at $279, in a shopping cart and exited the store without paying for either item. After the defendant placed the items in his car, he reentered Walmart and observed that Chrystal had not purchased the money orders due to long lines. As a result, the defendant and Chrystal traversed the aisles, placing a vacuum cleaner, beer, soda, and other household items in their shopping cart.

¶ 5 While shopping, the defendant became "very paranoid" after he noticed that a man was following him. The defendant indicated that he had not taken his prescribed psychotropic medication for some time. Chrystal then returned to customer service to purchase the money orders while the defendant walked around the store. After a short time, the defendant "freak[ed] out" and exited the store without paying for his items because he believed the man was still following him. As the defendant exited the store he was stopped by a loss prevention officer employed by Walmart. At that time, the defendant informed the officer that he had money to pay for the items.

¶ 6 According to the State, after the officer detained the defendant for shoplifting, he attempted to escort the defendant and Chrystal to the security office, however, Chrystal fled and drove away in her vehicle. Shortly thereafter, a Centralia police officer transported the defendant to the police station. When questioned by police, the defendant

gave a false name for his wife and was informed that the stolen items totaled over $300. The surveillance video showed that the defendant had also exited the store with a lawn mower and weed eater, valued at $223.97, without paying for either item.

¶ 7 On August 7, 2014, the defendant was charged by information with four felony offenses: retail theft, a Class 4 felony (count I) (720 ILCS 5/16-25(a) (West 2014)); burglary, a Class 2 felony (count II) (720 ILCS 5/19-1(a) (West 2014)); retail theft, a Class 3 felony (count III) (720 ILCS 5/16-25(a) (West 2014)); and obstructing justice, a Class 4 felony (count IV) (720 ILCS 5/31-4(a) (West 2014)). The information also alleged that the defendant was eligible for Class X sentencing for count II and extended-term sentencing on three counts.

¶ 8 On September 10, 2014, the defendant pleaded guilty to the two counts of retail theft and the one count of obstruction of justice in exchange for a dismissal of the burglary offense. Additionally, the State stipulated "that this was one course of conduct, and we would not be seeking consecutive sentences." The circuit court admonished the defendant that he was eligible for probation but could be sentenced up to 10 years' imprisonment on count III. The court ordered a PSI report.

¶ 9 On October 22, 2014, the circuit court held the sentencing hearing. The following statement in allocution was provided:

> "[THE DEFENDANT]: Your Honor, I just want to apologize to the Courts, to my father and myself. For 50 years old, I should know better than to [do] something like that. I'm trying to—I'm trying my best. I've been out for a little over two years and as you know, my social security went through and finally I can do something for myself and I know better than to do this. That's the only thing I can say, Your Honor. I'm sorry for myself—for putting myself in this predicament. My wife is on a breathing machine. She needs me at home. My momma's got 30

> percent of her heart. She needs me at home. I just ask to be forgiven, you know. I won't do it again."

¶ 10 The State's argument in aggravation focused primarily on the defendant's "lengthy" criminal history, which included numerous felony convictions. The PSI report reflected the defendant's prior felony convictions. At the age of 14, the defendant was found guilty of armed robbery in Marion County, Illinois, and received an indeterminate sentence in the Illinois Department of Juvenile Justice (IDJJ). The defendant was released from IDJJ at the age of 17 and then convicted of the following crimes over the next three decades: sentenced to eight years for armed robbery (Marion County) (1984-CF-26); sentenced to six years for armed robbery (Marion County) (1988-CF-228); sentenced to eight years for burglary and two counts of residential burglary (Marion County) (1994-CF-56); sentenced to seven years for residential burglary (Fayette County) (1994-CF-31); sentenced to seven years for possession of a weapon (*i.e.*, sawed-off shotgun) (Marion County) (1998-CF-15); sentenced to seven years for residential burglary (Washington County) (1998-CF-53); sentenced to two years and six months for aggravated battery (Clinton County) (2004-CF-9); and sentenced to 1001 days in the Indiana Department of Corrections for conspiracy to commit dealing in methamphetamine (14D01-0602-FB-154).

¶ 11 Additionally, the PSI report reflected that the defendant had two misdemeanor convictions for criminal damage to property and numerous traffic-related offenses. The defendant acknowledged that he had violated his parole on at least one occasion and had refused to consistently take prescribed psychotropic medication while incarcerated, which

resulted in solitary confinement following rule infractions and fighting behavior with other inmates.

¶ 12 Based on the defendant's criminal history, the State characterized the defendant as "a habitual offender." The State argued that the defendant, a 50-year-old, "should know better, and that a sentence of probation would deprecate the seriousness of the offense" and "would be inconsistent with the ends of justice." The State recommended the circuit court impose an eight-year prison sentence.

¶ 13 In response, defense counsel argued that the defendant "knows what he did was wrong" and "he has not hid behind his mental health status or the fact that [his] mother and wife need him at home because of their health problems." Defense counsel urged the court to sentence the defendant to probation with court-ordered counseling, given that the offenses involved merchandise worth only a small value. Defense counsel alternatively argued that a minimum prison sentence would be reasonable "if the court determines that a prison sentence is something that [the defendant] deserves."

¶ 14 Prior to imposing a sentence, the circuit court stated:

> "THE COURT: I've had a lot of cases where by virtue of the statute, [the] law requires that the second offense of retail theft [is] a felony. It is a class 4 felony. I've had some cases where I've struggled with that issue because of the facts of those particular cases, the value of the things that were taken. I don't have that problem with you, Mr. Atchison. You are a thief. You are what you do. And you are a thief. You steal things. You rob people. [You have] committed burglaries. You've got weapons violations. You got a pretty broad spectrum of things here. Most people like to find what their type of crime is and they stick to it. But not you. You just bounce all over the place committing all kinds of felonies and going to the department of corrections for all kinds of felonies. You are 50 years old. You know, usually—and the other thing is, a kid comes in who was 23, 24, have a lot of hope maybe they're going to outgrow it. I've got no hope for you. You're not going to outgrow this. You got a—you have sick people all around you

> that you say depend on you for support. What do you do? You go commit more crimes even though you know when you commit these crimes you're going to the department of corrections.
>
> "I do find that probation—considering his criminal history, considering the facts of this case, as I said in and out, this was a—this was just a brazen theft of fairly large ticket items. Considering those factors, probation would deprecate the seriousness of his conduct and be inconsistent with the ends of justice."

¶ 15 At the conclusion of the sentencing hearing, the circuit court convicted the defendant of retail theft (count III) because the offenses occurred within one course of conduct. The court sentenced the defendant to an extended-term sentence of eight years' imprisonment, with one year mandatory supervised release (MSR), and ordered the defendant to pay restitution of $223.97 for the lawn mower and weed eater. The court also "recognize[d] that that is an extended term, but given his substantial criminal history, I believe that the extended term is warranted in this case."

¶ 16 On November 21, 2014, the defendant filed a motion to reconsider his sentence. The court subsequently denied the motion. On appeal, however, this court vacated the court's denial and remanded for proper filing of an Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014) certificate, the filing of a new postplea motion, if desired by the defendant or if the defense counsel concluded that a new motion was necessary, and a hearing on any new motion.

¶ 17 On April 21, 2015, the defendant filed a new Rule 604(d) certificate and amended motion for reduction of sentence. The defendant specifically alleged that the circuit court failed to consider the following factors in mitigation at sentencing: (1) the defendant's conduct neither caused nor threatened to cause serious bodily harm to another; (2) the

defendant's character and attitude indicates that he is unlikely to commit another crime; (3) the eight-year sentence in the Department of Corrections would provide excessive hardship upon his dependants; (4) and the defendant's mental health history of " 'Schizoaffective disorder with paranoid delusions and bipolar features' and that he has been more erratic."

¶ 18 On May 27, 2015, a hearing was held on the defendant's amended motion to reconsider, which was heard by a different judge than the original sentencing judge. Defense counsel addressed an October 7, 2014, letter from Melissa Karaffa (Karaffa), the defendant's psychiatric nurse, which was attached to the PSI report. Karaffa stated that she had treated the defendant since 2012 and believed that circuit court should have considered the defendant's mental condition at sentencing. According to Karaffa, the defendant had schizoaffective disorder with paranoid delusions and bipolar features. She believed that the defendant's condition had worsened after he stopped taking his medication, which caused him to be "more erratic" and resulted in "freak out" behaviors. Karaffa desired to treat the defendant as an alternative to prison. Even though the defendant's fitness at the time of the plea and sentencing hearings was not at issue, defense counsel argued that the sentence should be reduced in view of Karaffa's letter, the defendant's need for "continued treatment," and the possible damage to the defendant's mental health if incarcerated.

¶ 19 In response, the State argued that the original sentencing judge had considered the relevant factors and, in light of the defendant's criminal history, imposed an appropriate sentence. After reading the transcript of the sentencing hearing, the PSI report, and

Karaffa's letter, the circuit court denied the defendant's motion finding that the "sentence that was imposed was within the realm of reason but I'm not going to question that." The court further stated that "the record will support my view of his sentence so I'll deny the motion to reduce or reconsider." The defendant filed a timely notice of appeal.

¶ 20 II. Analysis

¶ 21 First, the defendant argues that the circuit court abused its discretion in imposing an extended-term sentence that was excessive and disproportionate to the seriousness of his offense. In support, the defendant argues that the seriousness of the charge was mitigated by the defendant's conduct because he neither caused nor threatened serious physical harm, did not contemplate that his conduct would cause or threaten serious physical harm to anyone, and he had been prevented from removing the merchandise from the store. The defendant also argues in mitigation that he was ordered to compensate Walmart for the lawn mower and weed eater.

¶ 22 When reviewing courts examine the propriety of circuit court sentences, they should proceed with great caution and care. *People v. Harper*, 50 Ill. 2d 296, 301 (1972). The circuit court is in a far better position than the appellate court to issue an appropriate sentence based upon its firsthand consideration of relevant factors, such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *People v. Streit*, 142 Ill. 2d 13, 19 (1991) (citing *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977)). A reviewing court gives great deference to the circuit court's sentencing decision because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than a reviewing court that must rely on

the "cold" record. *Streit*, 142 Ill. 2d at 18-19; *Perruquet*, 68 Ill. 2d at 154. A circuit court therefore has broad discretionary powers in determining an appropriate sentence for a defendant. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). Moreover, in determining the propriety of a sentence, the reviewing court must consider the record as a whole and should not focus on a few words or statements made by the circuit court. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)).

¶ 23 In reviewing a defendant's sentence, this court will not reweigh sentencing factors or substitute its judgment for that of the circuit court merely because it would have weighed these factors differently. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20; *People v. Pittman*, 93 Ill. 2d 169, 178 (1982). The existence of mitigating factors does not mandate imposition of the minimum sentence (*People v. Garibay*, 366 Ill. App. 3d 1103, 1109 (2006)) or preclude imposition of the maximum sentence (*People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001)). In formulating a sentence, a trial court may consider in aggravation criminal history, likelihood of recidivism, and deterrence. See, *e.g.*, *People v. Rader*, 272 Ill. App. 3d 796, 807-08 (1995). There is a presumption that the circuit court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998).

¶ 24 Where the sentence is one within the statutory limits, we may not disturb it absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). An abuse of discretion exists where the sentence imposed is "greatly at variance with the spirit and

purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999). The spirit and purpose of the law are upheld when the sentence imposed reflects the seriousness of the offense and adequate consideration to the defendant's rehabilitative potential. *People v. Murphy*, 72 Ill. 2d 421, 439 (1978).

¶ 25 Initially, we note that the circuit court admonished the defendant that he was extended-term eligible because of his past convictions. A defendant, as here, may be sentenced to an extended term when he is "convicted of any felony, after having been previously convicted in Illinois or any other jurisdiction of the same or similar class felony or greater class felony, when such conviction has occurred within 10 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts." 730 ILCS 5/5-5-3.2(b)(1) (West 2012). Because the 8-year sentence falls within the permissible statutory range of 5 to 10 years, we presume it proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12. As such, in order to prevail on his argument, the defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 26 While we agree that the defendant has argued mitigating factors above, we cannot say that the circuit court failed to consider the nature of the offense and the sentencing factors in determining that prison was the most appropriate disposition. First, the defendant acknowledged in the PSI report that he had initially stolen a lawn mower and weed eater from Walmart. After the initial theft, a loss prevention officer with Walmart stopped the defendant as he exited the store, which prevented the second theft worth over

$300 in merchandise. Even though the court ordered the defendant to compensate Walmart for the stolen lawn mower and weed eater, the defendant's argument fails to account for the time and resources Walmart expended to protect itself from theft, as well as the police, prosecution, and courts in attending to his crime.

¶ 27 The defendant is effectively requesting this court to reweigh the sentencing factors and substitute our judgment for that of the circuit court. As noted above, however, this court will not reweigh sentencing factors or substitute its judgment for that of the sentencing court merely because it would have weighed these factors differently. Instead, we find the defendant's argument unconvincing where the record reflects that the court considered the defendant's conduct and the particulars of his case at the sentencing hearing. The court expressed the following:

> "I've had a lot of cases where by virtue of the statute, [the] law requires that the second offense of retail theft [is] a felony. It is a class 4 felony. I've had some cases where I've struggled with that issue because of the facts of those particular cases, the value of the things that were taken. I don't have that problem with you, Mr. Atchison. You are a thief. You are what you do."

¶ 28 Although the court did not explicitly state which factors in aggravation and mitigation it considered in determining the defendant's sentence, the court is presumed to have considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record. See *Payne*, 294 Ill. App. 3d at 260. As such, the defendant cannot make such a showing that the court failed to adequately consider the relevant factors because all mitigating factors raised on appeal were discussed in the defendant's PSI report and at the sentencing hearing.

¶ 29 Next, the defendant argues that his sentence was excessive in light of his rehabilitative potential "through probation," which would have allowed him to continue with "his regular mental health treatment." The defendant specifically argues that his "best shot at rehabilitation *** was maintaining a treating relationship with an invested professional in conjunction with the additional guidance and structure of probation." In support, the defendant asserts that he had enrolled in treatment, that he had secured regular income through social security disability "for the first time in his life," and that his family was dependent on him.

¶ 30 While we note that the circuit court could have better developed the record by explicitly addressing the relevant factors in aggravation and mitigation, especially considering the defendant's psychiatric history, we cannot say that the court's apparent overriding concern, that is, the defendant's extensive criminal history, was improper. In particular, the defendant's criminal history was extensive, starting at the age of 14, and encompassed multiple forcible felonies and theft-related offenses. Moreover, even though the defendant had a lengthy history of behavioral issues when he failed to take his prescribed psychotropic medication, he was not compliant at the time of the offense. We also note that at the time of the offense the defendant had regular income and had sufficient money to pay for the merchandise, which diminishes his argument that his sentence was excessive in light of his rehabilitative potential.

¶ 31 As such, in reviewing the record as a whole, we cannot say that the sentence was manifestly disproportionate to the nature of the offense where the record demonstrated

that the court considered the defendant's psychiatric history and potential for rehabilitation in conjunction with his criminal history at sentencing.

¶ 32 Lastly, we note that the State has requested as part of its prayer for relief that we assess the statutory costs, under section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)), against the defendant for the State having prosecuted this appeal. The defendant argues that we should deny the request based on the defendant's indigency. In support, the defendant points out his ongoing mental disabilities, lack of employment history, and that Supplemental Security Income was suspended as a result of his incarceration. We agree with the State.

¶ 33 When the State defends an appeal, it is entitled to collect a statutory fee as costs. The governing provision is section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)), which sets forth a schedule of fees for state's attorneys in counties of fewer than 3 million persons. Section 4-2002(a) provides, in relevant part, as follows:

> "For each case of appeal taken from his county or from the county to which a change of venue is taken to his county to the Supreme or Appellate Court when prosecuted or defended by him, $50.
>
> * * *
>
> All the foregoing fees shall be taxed as costs to be collected from the defendant, if possible, upon conviction." 55 ILCS 5/4-2002(a) (West 2016).

¶ 34 Moreover, it is well-settled that an indigent offender can be assessed costs in the appellate court upon affirmance of his conviction. *People v. Nicholls*, 71 Ill. 2d 166, 176 (1978) (an indigent defendant may be assessed costs for a state's attorney's fee for

defending the unsuccessful appeal); see also *People v. Reese*, 121 Ill. App. 3d 977, 991 (1984) ("Contrary to defendant's contention, an indigent offender can be assessed costs in the appellate court upon affirmance of his conviction." (citing *Nicholls*, 71 Ill. 2d at 175-76)). Accordingly, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 35 III. Conclusion

¶ 36 Accordingly, based on the foregoing, we find the circuit court's imposition of an eight-year term of imprisonment, a sentence well within the statutory range, did not constitute an abuse of discretion. The judgment of the circuit court of Clinton County is affirmed. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2016).

¶ 37 Affirmed.