NOTICE
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2013 IL App (4th) 110900-U

NO. 4-11-0900

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 25, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DENNIS E. KINCAID,	)	No. 10CF961
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The State proved by a preponderance of the evidence that defendant consumed alcohol, and thus the trial court did not err in finding he violated a condition of his probation; (2) the trial court did not abuse its discretion in sentencing defendant to six years in prison given his poor rehabilitative potential and long criminal history; and (3) defendant is entitled to additional credit against his fines for time spent in presentence custody.

¶ 2 In November 2010, defendant, Dennis E. Kincaid, pleaded guilty to theft with a prior theft conviction, and the trial court sentenced him to probation. In March 2011, the State filed a petition to revoke probation. In April 2011, the court revoked defendant's probation. In June 2011, the court resentenced him to six years in prison.

¶ 3 On appeal, defendant argues (1) the State failed to prove by a preponderance of the evidence that he violated his probation, (2) his six-year sentence was excessive, and (3) he is entitled to additional credit against his fines for time spent in presentence custody. We affirm as

modified and remand with directions.

¶ 4 I. BACKGROUND

¶ 5 In June 2010, the State charged defendant by information with one count of theft with a prior theft conviction (720 ILCS 5/16-1(a)(1)(A) (West 2010)), alleging he knowingly exerted unauthorized control over Susan Porter's property, a purse and its contents with a total value not exceeding $300, with the intent to permanently deprive the owner of the use and benefit of the property.

¶ 6 In November 2010, defendant pleaded guilty. The State's factual basis indicated Susan Porter left Chipotle Grill without taking her purse. Witnesses identified defendant and saw him leave the restaurant with the purse. He then removed $15 from the purse and threw it onto a roof, where police officers recovered it. In accordance with the plea agreement, the trial court sentenced defendant to 18 months' probation and 13 days in jail with credit for time served. The court also ordered him to pay various fines and fees.

¶ 7 In March 2011, the State filed a petition to revoke probation, alleging defendant violated two conditions of his probation when he (1) committed the offense of trespass to real property and (2) consumed alcohol. In April 2011, defendant failed to appear for the hearing on the petition, and the trial court held the hearing *in absentia* over defense counsel's objection.

¶ 8 Bhadre Patel testified he worked as a manager at a Dairy Queen in Urbana. On March 23, 2011, Patel observed a man "in the lobby by himself" with an open bottle of alcohol underneath his chair. Patel asked the man to take his bag and bottle outside. Patel described the man as a "white American." After Patel told the man to leave, the man called him "some bad names" and got in Patel's face. Patel backed away and went to his office to call the police. Patel

stated it took the man about five minutes to exit after he was asked to leave and the man then stood "right outside my door" until the police arrived. Patel believed the man was drinking alcohol.

¶ 9 Urbana police officer Robert Benschneider testified he arrived at the Dairy Queen and found defendant standing outside talking with two University of Illinois police officers. Benschneider stated defendant "had a bottle of malt liquor at his feet" and appeared "very intoxicated." Defendant had "slurred speech," had trouble standing, and kept leaning against the building. He also smelled of a "strong odor of alcohol." After speaking with Patel and learning Patel had told defendant to leave, Benschneider arrested defendant.

¶ 10 The trial court found the State met its burden of proof by a preponderance of the evidence. The court revoked defendant's probation. In June 2011, the court resentenced defendant to six years in prison. The court credited him with $440 toward his fines. In July 2011, defendant filed an amended motion for reduction of sentence, which the court denied. This court granted defendant's motion for late notice of appeal.

¶ 11 II. ANALYSIS

¶ 12 A. Sufficiency of the Evidence

¶ 13 Defendant argues the State failed to prove by a preponderance of the evidence that he violated his probation by consuming alcohol and committing the offense of criminal trespass to real property. We find the evidence established defendant violated his probation.

¶ 14 "A probation revocation proceeding is in the nature of a civil proceeding arising in the wake of a previous conviction and sentence of probation, and the violation of previously imposed conditions of probation, not the commission of a culpable offense, must be proved."

People v. Williams, 303 Ill. App. 3d 264, 267, 707 N.E.2d 729, 731 (1999). The State has the burden of proving the probation violation by a preponderance of the evidence. *Williams*, 303 Ill. App. 3d at 267, 707 N.E.2d at 731; 730 ILCS 5/5-6-4(c) (West 2010).

¶ 15 On appeal, the trial court's decision on a petition to revoke probation will not be overturned unless the court's findings are against the manifest weight of the evidence. *Williams*, 303 Ill. App. 3d at 267, 707 N.E.2d at 731. "A finding is against the manifest weight of the evidence only if a contrary result is clearly evident." *People v. Clark*, 313 Ill. App. 3d 957, 960, 731 N.E.2d 432, 435 (2000).

¶ 16 In this case, Patel testified he observed a white male sitting at a table with a bottle of alcohol underneath his chair. Patel also believed the man was drinking alcohol. After telling the man to leave, the man got into Patel's face and called him "some bad names." Patel stated the man stood outside until police arrived. Officer Benschneider testified he saw defendant, whom he recognized from prior contacts, standing outside the Dairy Queen with a "bottle of malt liquor at his feet." Benschneider stated defendant appeared "very intoxicated" and had slurred speech, trouble standing, leaned against the building, and smelled of a "strong odor of alcohol." Benschneider also stated defendant "was very loud and cursing" outside the building.

¶ 17 In this case, the testimony at the probation-revocation hearing established defendant consumed alcohol by a preponderance of the evidence. Both witnesses testified to seeing a man with a bottle of alcohol near him. Officer Benschneider testified the "bottle of malt liquor" at defendant's feet had been "half consumed." Benschneider also stated he observed defendant exhibiting signs of not only alcohol consumption but also intoxication. We note a police officer's testimony alone may support a finding of alcohol consumption, if the testimony is

credible. *People v. Janik*, 127 Ill. 2d 390, 402, 537 N.E.2d 756, 761-62 (1989).

¶ 18 Defendant argues Officer Benschneider's testimony was contradicted by Patel's, who did not testify defendant slurred his speech or had difficulty in standing. "When the evidence is controverted, the trial court, which sits as the trier of fact, has the function of weighing the evidence, assessing the credibility of the witnesses, and drawing reasonable inferences from the testimony presented." *Williams*, 303 Ill. App. 3d at 267, 707 N.E.2d at 731. Here, Patel initially saw the man sitting at a table, and after the man was asked to leave, the man became belligerent, got in Patel's face, and called him "some bad names." A rational trier of fact could conclude the man had consumed alcohol and was possibly intoxicated based on such behavior. Given the evidence presented, we find the State proved defendant violated his probation by a preponderance of the evidence. As the failure to comply with a term of probation is sufficient to revoke that probation, we need not address the remaining ground. See *People v. Bell*, 219 Ill. App. 3d 264, 266, 579 N.E.2d 1154, 1156 (1991).

¶ 19 B. Defendant's Sentence

¶ 20 Defendant argues his six-year prison sentence for taking $15 from a purse was excessive and must be reduced. We disagree.

¶ 21 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting

People v. Hernandez, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)).

¶ 22 A trial court has broad discretion in imposing a sentence. *People v. Chester*, 409 Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118 (2011). A reviewing court gives great deference to the sentencing court's decision because the trial judge is generally in a better position to weigh these factors in fashioning a sentence. *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27, 33.

¶ 23 "After revoking a sentence of probation, the trial judge may resentence a defendant to any sentence that would have been appropriate for the original offense." *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005). Moreover, when resentencing a defendant after a revocation of probation, the sentencing court may consider the defendant's conduct on probation. *People v. Rathbone*, 345 Ill. App. 3d 305, 312, 802 N.E.2d 333, 339 (2003). The trial court's decision as to the appropriate sentence will not be overturned on appeal "unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008).

¶ 24 Here, defendant pleaded guilty to theft with a prior theft conviction, a Class 4 felony (720 ILCS 5/16-1(b)(2) (West 2010)). A defendant convicted of a Class 4 felony is subject to a sentencing range of one to three years in prison. 730 ILCS 5/5-4.5-45(a) (West 2010). Because of defendant's criminal record, he was subject to extended-term sentencing. The maximum extended-term sentence for a Class 4 felony is six years in prison. 730 ILCS 5/5-4.5-45(a) (West 2010). As the trial court's extended-term six-year sentence for theft with a prior theft conviction was within the relevant sentencing range, we will not disturb the sentence absent an

abuse of discretion.

¶ 25 Defendant argues his six-year sentence was excessive in light of the nature of the crime, stealing $15 from a purse, and by not considering rehabilitation. However, defendant gives scant attention to the particulars of his extensive criminal history, which indicates his lack of potential for rehabilitation. Defendant, age 47 at the time of sentencing, had a long history of criminal activity dating back to 1979. His record included 31 misdemeanor convictions for such crimes as theft, battery, domestic battery, and criminal trespass to property, as well as 7 felony convictions for such crimes as burglary, aggravated battery, aggravated criminal sexual assault, driving under the influence, and unlawful failure to register as a sex offender. During his career in criminality, defendant has received sentences in the range of fines, court supervision, conditional discharge, probation, and time behind bars. The trial court found defendant never successfully completed parole and concluded a community-based sentence "would absolutely deprecate" the seriousness of his conduct and be inconsistent with the ends of justice. The record clearly shows that, while defendant's criminal act here was minor, it was just another in a long history of defendant's inability or unwillingness to conform his conduct to the laws of this state. The court considered defendant's rehabilitative potential and, in light of his criminal record, found little hope for reform.

¶ 26 Defendant also argues his sentence was excessive considering he was homeless, an alcoholic, and suffered from serious health issues, including congestive heart failure, diverticulitis, and the need to wear a colostomy bag. The trial court considered defendant's economic circumstances and "his serious physical health issues." The court noted people with diverticulitis "function as law-abiding people" and people with colostomy bags "manage to

function like any normal person." Given defendant's failure to seek the help and treatment he needs for his alcoholism, the court found "the sad irony is he'll receive better treatment and be protected from himself when he's in prison." Given defendant's criminal history, his lack of rehabilitative potential, and the destruction of his own health through his abuse of alcohol, the court found an extended term of six years in prison appropriate. We find no abuse of discretion.

¶ 27 C. Credit Against Fines

¶ 28 Defendant argues he is entitled to additional credit against his fines for time spent in presentence custody. The State does not contest this issue.

¶ 29 Section 110-14(a) of the Code of Criminal Procedure of 1963 (Code) states, "[a]ny 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." 725 ILCS 5/110-14(a) (West 2010). The statutory right to the monetary credit is mandatory. *People v. Brown*, 406 Ill. App. 3d 1068, 1084, 952 N.E.2d 32, 45 (2011). Moreover, "[t]he issue of monetary credit against a defendant's fine cannot be waived and may be raised for the first time on appeal." *People v. Sulton*, 395 Ill. App. 3d 186, 188, 916 N.E.2d 642, 644 (2009).

¶ 30 In the case *sub judice*, the trial court found defendant was entitled to $440 credit against his fines for the 88 days he spent in presentence custody. Defendant argues the drug-court assessment and the state-police-operations-assistance assessment are fines subject to offset. We agree.

¶ 31 The credit under section 110-14(a) applies only to fines, not fees. *People v. Jones*, 223 Ill. 2d 569, 580, 861 N.E.2d 967, 974 (2006). This court has found the drug-court

assessment constitutes a fine when it is unrelated to costs incurred by the State as a result of a prosecution. *People v. Unander*, 404 Ill. App. 3d 884, 886, 936 N.E.2d 795, 797 (2010). The state-police-operations-assistance assessment also constitutes a fine. See 30 ILCS 105/6z-82(b) (West 2010) (text of section as added by P.A. 96-1029); *Jones*, 223 Ill. 2d at 600, 861 N.E.2d at 986 (noting an assessment will constitute a fee when it seeks to compensate the State for any costs incurred as a result of prosecuting the defendant). Here, neither assessment went toward reimbursing the State for prosecuting defendant. As they constitute fines, defendant is entitled to credit under section 110-14(a) of the Code. We remand to the trial court for an amended sentencing judgment to reflect this credit.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm as modified and remand this cause to the trial court for issuance of an amended sentencing judgment to reflect application of defendant's monetary credit to the drug-court assessment and the state-police-operations-assistance assessment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed as modified and cause remanded with directions.