2024 IL App (4th) 230450-U

NO. 4-23-0450

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
March 22, 2024
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
KELYI G. KABONGO,	)	No. 21CF907
Defendant-Appellant.	)	
	)	Honorable
	)	J. Jason Chambers,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Cavanagh and Justice Doherty concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not abuse its discretion in sentencing defendant.

¶ 2 In January 2023, defendant pleaded guilty to one count of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2020)). In exchange, the State dismissed the remaining counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2020)), unlawful restraint (720 ILCS 5/10-3 (West 2020)), and three other pending cases against defendant. The trial court sentenced defendant to 15 years' imprisonment.

¶ 3 Defendant appeals, arguing the trial court abused its discretion because the court failed to adequately consider certain mitigating factors, such as his lack of criminal record, young age, potential for rehabilitation, remorse, and mental health. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The State's Charges and Defendant's Guilty Plea

¶ 6 In September 2021, defendant was charged and later indicted with two counts of criminal sexual assault (720 ILCS 5/11-1.20(a)(1) (West 2020)) and one count of unlawful restraint (720 ILCS 5/10-3 (West 2020)).

¶ 7 In January 2023, defendant pleaded guilty to one count of criminal sexual assault in exchange for the State's dismissal of the remaining charges and three other pending cases against him (McLean County case Nos. 22-CF-707, 22-CF-1237, and 22-CF-584). There was no agreement as to the sentence. At the time of defendant's plea, the trial court advised defendant that he faced a non-probationable Class 1 felony, carrying a sentence of 4 to 15 years in the Illinois Department of Corrections (DOC).

¶ 8 The State provided the following factual basis for defendant's plea. On August 24, 2021, officers were dispatched to Carle BroMenn Medical Center in Normal, Illinois, to speak with L.A., who wanted to report a criminal sexual assault that had occurred two days earlier. L.A. reported that she was celebrating her birthday at various locations on that date. Defendant, whom L.A. knew as Kevin Baroma, was in attendance. After L.A. became intoxicated, defendant gave her a ride back to an apartment located at "104 West Shelbourne, *** number three, in Normal." Officers spoke with two of the residents of the apartment, who confirmed defendant returned with a female on August 22, 2021. According to L.A., she "passed out after getting back to the apartment." She then woke up sometime "between 6:00 *** and 7:00 in the morning, and found *** defendant was on top of her, pulling on her dress. He proceeded to penetrate her vagina and her anus with his penis. She repeatedly told him to stop." L.A. told officers she struggled to get away but was unsuccessful. Testing of L.A.'s sexual

assault kit found "some partial DNA." Authorities also collected a buccal swab from defendant and "had to go to Y-STR results due to only having five sufficient loci to compare." However, based on the comparison, it was "at least 39 times more likely that the defendant or a male paternal relative was the contributor of the DNA that was found in [L.A.'s] vaginal swab." After hearing the State's factual basis, the defense stipulated "the State can present witnesses to so testify," and the trial court accepted the factual basis and defendant's plea.

¶ 9 B. The Sentencing Hearing

¶ 10 At the March 2023 sentencing hearing, the State presented, as evidence in aggravation, exhibits and witness testimony about the three dismissed cases. Justin Shively, a sergeant with the Bloomington Police Department, testified that, during a traffic stop in June 2022, police found ecstasy and methamphetamine in a backpack that also contained defendant's passport. Shively also testified defendant resisted after the drugs were confiscated and had to be subdued by three officers to secure his arrest. The lab report identifying the drugs was admitted into evidence without objection.

¶ 11 The State then called Officer Scott Karstens of the Bloomington Police Department to testify about a criminal sexual assault reported in April 2020. Karstens related taking a report from M.B., a female who indicated defendant arrived at her apartment intoxicated one evening and repeatedly attempted to have sex with her against her will. At one point, defendant, who had agreed to "leave her alone," pulled M.B.'s pants off, pinned her down, and forcibly had sex with her even after she kicked him. M.B. told defendant to stop "at least 20 times." Karstens testified a sexual assault kit was completed at the hospital, and DNA evidence collected at M.B.'s apartment connected defendant to the criminal sexual assault she reported.

¶ 12 The State then called Timothy Mann, a sergeant at the McLean County jail. Mann testified he watched a video of an incident that occurred at the jail on February 6, 2023, where defendant was housed. Mann testified he "saw *** [defendant] just kind of [run] his fingers through the nurse's hair. And *** the report stated that [defendant] made some sexual comments." Mann further testified those comments included, "I love you, Big Z, I just need four to six hours with you," and the nurse indicated to jail staff that the comments made her uncomfortable.

¶ 13 Mann also testified about another incident at the jail on December 7, 2022, where defendant was in a physical altercation with another inmate. Upon viewing the video of the altercation, Mann "noticed that an altercation occurred, and [the video] showed [another inmate] standing there, and [defendant] put down some books and then ran at him, and the two began fighting." Mann further testified, "[I]t seemed like other inmates helped separate the fight, and, once the fight was over, [the other inmate] was standing there and [defendant] came running at him and hit him when he wasn't looking and knocked him down."

¶ 14 Mann stated defendant was "one of the highest classified inmates" based on his behavior and attitude. Mann explained such classification meant defendant had to be accompanied by two officers and in handcuffs any time he was escorted out of his cell. According to Mann, defendant's classification was based on his "failure to follow the rules." Mann also identified two incident reports from March 26, 2023—a week before defendant's sentencing hearing—where defendant made a direct threat to kill a correctional officer. Later that same day, defendant gave the same correctional officer "the finger" and told the officer, "Don't let me catch you when I'm not locked up." The incident reports were admitted into evidence without objection. Further, Mann testified defendant had "approximately 30 write-ups since his

incarceration," which was "not normal." Because defendant could not be housed safely with other inmates, Mann testified defendant was housed in the jail's maximum-security block for the duration of his time in the McLean County jail.

¶ 15 In mitigation, defendant presented a letter of character reference from his girlfriend and the testimony of Chuck Grilliot, who knew defendant and his family from church. Grilliot taught a seminary class for high school students and served as a lay minister in the church. After being informed of defendant's incarceration, Grilliot visited defendant at the jail and talked to him by telephone regularly. Based on his conversations with defendant, Grilliot said, "I feel like there's a lot of remorse for things that he's done. I feel like there's a recognition that he's disappointed his family and others and a desire to change." Grilliot also felt defendant had a "very strong support system" in the church and with his family. Defendant's counsel noted a number of family members were present in the courtroom to show their support.

¶ 16 During the parties' arguments, the State noted the number of aggravating factors present in defendant's case. The State asked the trial court to consider not only defendant's pending criminal charge, but the charges dismissed pursuant to the plea and the other uncharged criminal behavior presented at the hearing. The State argued the offenses while in jail, the numerous violations of jail rules while incarcerated for this offense, and defendant's other pending case showed defendant's "complete lack of rehabilitative potential." The State concluded, "A minimum sentence or a middle sentence here deprecates the seriousness of the offense here, but also *** would not have the deterrence effect that is needed not only for the offense the Court is sentencing this defendant on, but the other conduct that the Court here is considering." As a result, the State recommended a maximum sentence of 15 years' imprisonment.

¶ 17 Defendant's counsel, acknowledging the seriousness of the offense, asked the trial court to disregard the "dismissed charges, the pending charges which have not been proven, [and] the allegations that were made today without substantial proof." Counsel noted defendant was "before the Court being sentenced on his first felony offense." Counsel also referenced how the presentence report detailed "the extent of his mental illness" and drug addiction. Counsel noted defendant "has a four-month-old daughter that he intends to provide financial support for and support when he's able to do so." Counsel mentioned defendant's church and family support, along with his length of incarceration at the time. Given defendant's young age, counsel asserted defendant was "capable of great change and rehabilitation. He has accepted responsibility for his conduct." Counsel recommended the minimum sentence of five years' incarceration.

¶ 18 In allocution, defendant denied sexually assaulting anyone, stating, "I never assaulted nobody sexually, nobody." Defendant referred to M.B. as an ex-girlfriend who made up a story because her sister and defendant's sister had issues with each other. He contended the attack at the jail was a situation wherein he "was just trying to defend [himself] because [he] can't just let somebody threaten [him] and hit [him]." Defendant denied threatening any correctional officers at the jail. He also mentioned his young age and that he was "willing to do better for [himself]" but emphasized, "I never done nothing."

¶ 19 Before imposing the sentence, the trial court stated it considered the evidence and arguments of the parties, the factual basis, the presentence investigation report (PSI), the history, character, and attitude of defendant, defendant's statement in allocution, and the relevant statutory factors in aggravation and mitigation. Further, the court noted its consideration of defendant's mental health and the seriousness of the crime, pointing out that "if I mention any

factors that are aggravating or mitigating, I'm not saying those are the only ones I'm considering."

¶ 20 In weighing the various factors in aggravation and mitigation, the trial court noted that while defendant had no prior criminal history, there had been "substantial evidence" of other instances of criminal activity. Although defendant took responsibility at the time of his plea, the court concluded such was not the case at sentencing. The court also noted defendant's behavior while incarcerated "show[ed] a lack of remorse for making bad and dangerous choices." In fact, the court stated defendant had committed "12 different rule violations since [he] pled guilty." The court recognized the serious harm caused by a sexual assault and mentioned the need for deterrence. Ultimately, after "considering all the statutory factors in mitigation and aggravation," the court found the State's recommendation appropriate and sentenced defendant to 15 years in DOC.

¶ 21 In March 2023, defendant filed a motion to reconsider the sentence, contending it was excessive, which the trial court denied.

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 On appeal, defendant argues the trial court abused its discretion and imposed an excessive sentence by failing to give proper weight to his lack of criminal record, young age, potential for rehabilitation, remorse, and mental health.

¶ 25 A. Standard of Review

¶ 26 A trial court's sentence is entitled to great deference and will not be reversed on appeal absent an abuse of discretion. *People v. Wheeler*, 2019 IL App (4th) 160937, ¶ 39, 126 N.E.3d 787. Likewise, " '[t]he weight to be given to any *proper* factor *** is left to the sound

discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion.' " (Emphasis in original.) *People v. Klein*, 2022 IL App (4th) 200599, ¶ 37, 203 N.E.3d 961 (quoting *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 104, 126 N.E.3d 703). A reviewing court "may not substitute its judgment for that of the trial court merely because it might have weighed those factors differently." *Klein*, 2022 IL App (4th) 200599, ¶ 37.

¶ 27 "We presume a sentence is proper if it falls within the statutory penalty range." *People v. Page*, 2022 IL App (4th) 210374, ¶ 52, 222 N.E.3d 259. In the case before us, defendant pleaded guilty to one count of criminal sexual assault, a Class 1 felony. 720 ILCS 5/11-1.20(a)(1), (b)(1) (West 2020). A person convicted of a Class 1 felony is subject to a sentencing range of 4 to 15 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2022). Since the trial court's 15-year sentence falls within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion. See *Wheeler*, 2019 IL App (4th) 160937, ¶ 39.

¶ 28 "A [trial] court is not required to expressly outline every factor it considers for sentencing." *People v. Harris*, 2015 IL App (4th) 140696, ¶ 57, 32 N.E.3d 211. "Absent explicit evidence to the contrary, we also presume the court considered all mitigating factors." *Page*, 2022 IL App (4th) 210374, ¶ 52. In other words, unless a defendant can show explicitly from the record the trial court did not consider mitigating factors, the presumption a trial court considered all relevant factors in fashioning a sentence stands. See *People v. Gavin*, 2022 IL App (4th) 200314, ¶ 79, 214 N.E.3d 250.

¶ 29 "We accord great deference to the trial court's sentencing decision because that court is in the best position to consider the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." (Internal quotation marks omitted.) *Page*, 2022 IL App (4th) 210374, ¶ 52. A defendant's rehabilitative potential is not entitled to

more weight than the seriousness of the offense. *People v. Alexander*, 239 Ill. 2d 205, 214, 940 N.E.2d 1062, 1067 (2010). Because "the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, and the presence of mitigating factors neither requires a minimum sentence nor precludes a maximum sentence." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470.

¶ 30 B. The Sentence in This Case

¶ 31 Defendant essentially asks this court to reweigh the sentencing factors, claiming his 15-year sentence is excessive given the "presence of multiple mitigating factors, including [his] age, family connections, remorse, mental health challenges, and drug addiction struggles." However, as noted, a reviewing court's role is not to reweigh the sentencing factors or substitute its judgment for that of the trial court. *Klein*, 2022 IL App (4th) 200599, ¶ 37. Here, the record reflects the court considered the evidence and arguments of the parties, the factual basis, the PSI, the history, character, and attitude of defendant, defendant's statement in allocution, and the relevant statutory factors in aggravation and mitigation. The court also noted its consideration of defendant's mental health and the seriousness of the crime, pointing out that "if I mention any factors that are aggravating or mitigating, I'm not saying those are the only ones I'm considering."

¶ 32 While noting nearly every aspect of mitigating evidence and some of the evidence in aggravation, defendant was careful to omit any reference to his escalating violence and aggression while awaiting sentencing, along with his continued pattern of unwanted sexual advances while in custody. Defendant did not discuss the evidence presented on the dismissed charges at all. Moreover, defendant did not contest the veracity of any of the evidence presented

in aggravation, including the multiple infractions, other than during his unsworn statement in allocution where he denied ever doing anything wrong.

¶ 33 First, while defendant did not have a significant criminal *record*, this does not mean the trial court was to ignore defendant's substantial criminal *involvement*. "[T]he Illinois Supreme Court has held that a sentencing court has wide latitude to conduct a broad inquiry into facts which may tend to mitigate or aggravate the offense and that a court may consider proof of criminal conduct which did not result in a conviction." *People v. Jorgensen*, 182 Ill. App. 3d 335, 340, 538 N.E.2d 758, 761 (1989). "[T]he ordinary rules of evidence are relaxed during sentencing," and evidence may be admitted as long as it is relevant and reliable. *People v. Varghese*, 391 Ill. App. 3d 866, 873, 909 N.E.2d 939, 945 (2009). A court "may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense." (Internal quotation marks omitted.) *People v. La Pointe*, 88 Ill. 2d 482, 495, 431 N.E.2d 344, 350 (1981). Likewise, it is not inappropriate for a court to consider charged offenses which are dismissed as part of a plea because "[p]resenting evidence of a dismissed charge does not violate a plea agreement." *Jorgensen*, 182 Ill. App. 3d at 340.

¶ 34 Here, although defendant had been released on bond in this case in September 2021, he had been in continuous custody on another felony case since June 2022. Based on the PSI and additional evidence presented by the State at sentencing, defendant had amassed an extensive history of new criminal offenses and violations of jail rules. In fact, the trial court noted defendant's continued criminal behavior while awaiting sentencing and considered it. The State presented evidence at the sentencing hearing of defendant's (1) possession with intent to deliver methamphetamine on June 4, 2022, while defendant was free on bond in this case, (2) criminal sexual assault by force committed prior to this offense, and (3) aggravated battery to

the correctional nurse committed one week after entering his plea here. Further, between defendant's arrest for this offense on September 1, 2021, and his release on bond on September 28, 2021, he had already acquired two infractions for disobeying reasonable orders given by staff members. Once he returned to custody on June 9, 2022, for the methamphetamine charge, defendant amassed a total of 34 different rule infractions, including minor/major contraband possession, multiple physical altercations with other inmates, profane or obscene remarks and gestures to other inmates and staff, and threats to staff. The court also mentioned defendant's "12 different rule violations since [he] pled guilty" and recognized how that showed "a lack of remorse for making bad and dangerous choices." The State presented evidence with regard to those resulting in criminal charges, and the uncontested violations evidenced a decreased likelihood of rehabilitation. See *People v. Willis*, 361 Ill. App. 3d 527, 531, 838 N.E.2d 130, 133 (2005) (noting the defendant's disciplinary record was relevant to determine his rehabilitative potential because it evidenced his repeated inability to follow institutional rules and disregard for authority).

¶ 35 Defendant also asserts, "[T]he court never mentioned [he] was only 21-years old at the time of the offense. Thus it is unclear if the court gave proper weight to his young age." But even though the trial court did not explicitly note defendant's young age on the record, defendant stood before the court at every proceeding, and his age was apparent. Moreover, defendant noted his young age at the time of his plea, and it was a subject of defense counsel's argument. All of these were expressly referenced by the court, and it is defendant's burden, by explicit evidence, to overcome the presumption they were considered. See *Page*, 2022 IL App (4th) 210374, ¶ 52. There is no such explicit evidence the court did not consider defendant's age here.

¶ 36 Defendant next argues his sentence "should have been mitigated by his acceptance of responsibility and expression of remorse"—inexplicably followed by "[a]lthough maintaining his innocence, [defendant] willingly accepted the consequences of his actions by entering a guilty plea." One might wonder how you can accept responsibility and express remorse for a crime you maintain you did not commit. But contrary to defendant's argument on appeal, the apology he references was followed immediately by the statement that "[a] lot of the charges is [*sic*] not accurate at all." He then went on:

> "I don't know where all this came from, the sexual assault. *I never sexual assault nobody*. *** I don't know what the State's Attorney is saying, sentence me to 15 years. *That's not very fair because I never done nothing. I never sexual nothing*.
>
> ***I never assaulted nobody sexually, nobody. You can check my record. I never done this.***
>
> Your Honor, my right hand is up. All my relationship, *I never assaulted nobody. Like, I never assaulted nobody sexually*." (Emphases added.)

This apparently is the remorse and acceptance of responsibility defendant contends the court should have weighed more heavily.

¶ 37 Defendant's lack of remorse, failure to take responsibility, and poor likelihood for rehabilitation were evident and referenced by the trial court during the sentencing hearing. The court specifically mentioned how it was attempting to consider the level of remorse defendant was showing at the sentencing hearing, pointing out how "[o]ftentimes, I want to give credit from somebody coming in and taking responsibility, which seems like you did when you pled,

but then today it's not as much." As we noted above, the court further recognized evidence of defendant's lack of remorse "for making bad and dangerous choices" by the 12 different rules violations committed since his plea.

¶ 38 Lastly, defendant claims his sentence was excessive in part due to "the trial court's failure to consider [defendant's] mental health as mitigation." He additionally argues that his history of substance abuse should have been considered as a mitigating factor. However, when discussing factors in mitigation, the court expressly stated, "I'm considering mental health factors here." Further, defendant presented no evidence to show that, at the time of the offense, any mental illness he suffered affected his ability to understand the nature of his actions or conform his conduct to the requirements of the law. See 730 ILCS 5/5-5-3.1(a)(16) (West 2022). We also note the Unified Code of Corrections does not list substance abuse as a mitigating or aggravating factor. See 730 ILCS 5/5-5-3.1(a), 5-5-3.2(a) (West 2022). Therefore, a sentencing court does not have to consider substance abuse as a mitigating factor. *People v. Prather*, 2022 IL App (4th) 210609, ¶ 39, 225 N.E.3d 1.

¶ 39 Accordingly, because the trial court's sentence was within the statutory range of sentences permissible and the court properly considered the relevant factors in aggravation and mitigation, defendant has failed to show how the court's sentence was an abuse of discretion. *Page*, 2022 IL App (4th) 210374, ¶ 52.

¶ 40 III. CONCLUSION

¶ 41 For the foregoing reasons, we affirm the trial court's judgment.

¶ 42 Affirmed.