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2012 IL App (3d) 110597-U

Order filed December 6, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-11-0597
)	Circuit No. 09-CF-797
)	
NICKLAUS J. BARNETT,)	Honorable
)	Scott A. Shore,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices O'Brien and Carter concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's imposition of an extended-term sentence of 4½ years' imprisonment for unlawful possession of a controlled substance was not an abuse of discretion.

¶ 2 Defendant, Nicklaus J. Barnett, was convicted at a jury trial of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)), a Class 4 felony, and driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2008)), a Class A misdemeanor. At sentencing, the trial court imposed an extended-term sentence (730 ILCS 5/5-8-2, 5-4.5-45, 5-5-

3.2 (West 2008)) of 4½ years' imprisonment for unlawful possession of a controlled substance, to run concurrently with one year of conditional discharge for DUI. Defendant appeals, arguing that his sentence for unlawful possession of a controlled substance is excessive. We affirm.

¶ 3

FACTS

¶ 4 On June 18, 2009, police arrived at the scene of an accident in which a vehicle was stuck in the grass center median of Interstate 74. Defendant was at the scene and identified himself as the driver of the vehicle. State Trooper Wesley Matarelli smelled alcohol on defendant's breath and administered field sobriety tests, which defendant failed. While arresting defendant for DUI, officers noticed a clear plastic bag of white powder on the ground at defendant's feet. Matarelli seized the bag, and later testing revealed that the bag contained 1.3 grams of cocaine. At a jury trial, defendant was convicted of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2008)) and DUI (625 ILCS 5/11-501(a)(2) (West 2008)).

¶ 5 A sentencing hearing was held on August 22, 2011. The State offered no formal evidence in aggravation. Defendant's presentence investigation (PSI) report chronicled defendant's background and prior criminal history. As a child, defendant had minimal contact with his biological father. He had behavior problems beginning in kindergarten and participated in learning disabled programs throughout his schooling. Defendant was expelled from school at the age of 14 and again at 15, when his formal education ended. As a juvenile, defendant was adjudicated delinquent for nine separate offenses. Those offenses began when defendant was 13 years old and include a theft charge for stealing three cans of Coca-Cola, an aggravated battery charge for pushing a classmate at school, and multiple charges for unlawful possession of a stolen vehicle.

¶ 6 When defendant was 18 years old, he committed armed violence (720 ILCS 5/33A-2 (West 1996)), a Class X felony. Defendant pled guilty and was sentenced to 15 years' imprisonment. Roughly four months into that sentence, defendant was charged with unlawful use or possession of weapons by felons or persons in the custody of the department of corrections facilities (720 ILCS 5/24-1.1(b) (West 1996)) and sentenced to six years' imprisonment, to be served consecutively with his sentence for armed violence. He was released on August 9, 2006, subject to mandatory supervised release (MSR). He committed the present offenses prior to being discharged from MSR. On August 29, 2010, defendant was sentenced to one year of court supervision for driving while driver's license suspended (625 ILCS 5/6-303 (West 2010)) in an unrelated case.

¶ 7 The PSI report also contained a court-ordered DUI evaluation, which found defendant at high risk for substance dependence. It recommended 75 hours of substance abuse treatment and ongoing participation in a continuing care plan. The evaluation found defendant acceptable for the Intensive Probation Supervision Program. The PSI report established that, at the time of sentencing, defendant was working full-time at a friend's business, J.R. Automotive.

¶ 8 Defendant called two witnesses in mitigation. Sandra Head testified that she knew defendant through her daughter and friends. Defendant would take her to the doctor and make sure that she had food and medicine in the house. Defendant never charged for these services and did them only to be helpful. Head characterized defendant as trustworthy because although Head had prescription narcotics in her home, defendant never stole any of them. Instead, defendant had warned Head that she should keep them in a safe place. Defendant would also

lecture the children in Head's home when they became rowdy and misbehaved. Head appreciated defendant's help.

¶ 9 Patricia Gibb also testified in mitigation. Gibb is the mother of defendant's two children. Although Gibb and defendant no longer have a relationship, Gibb testified that defendant maintains a relationship with the two children, along with Gibb's children from a previous relationship. When Gibb had back surgery, defendant stayed at her home and took care of the children. Defendant would also fix Gibb's car and make needed repairs to her house. Gibb testified that defendant would "drop[] everything" when Gibb or the children needed help. Gibb also stated that "I need him *** to be there. I can't imagine now [sic] I'm going to do this without his help, honestly."

¶ 10 The State requested an extended-term sentence of five years' imprisonment. Defendant requested a sentence of probation. The trial court found a threat of serious harm with regard to the conviction of DUI, but not in regard to the unlawful possession of a controlled substance. The court agreed that there was significant evidence in mitigation based upon defendant's work and family life. In addition, the court noted that defendant appeared to have the intelligence and ability to conform his actions in the future. However, the court explained that it could not justify sentencing defendant to probation, considering his continuing failure to follow the law. Instead, the court imposed an extended-term sentence of 4½ years' imprisonment for unlawful possession of a controlled substance and a sentence of one year of conditional discharge for DUI. Both sentences were to run concurrently. Defendant filed a motion to reconsider sentence, which was denied.

¶ 11

ANALYSIS

¶ 12 Defendant claims that his extended-term sentence of 4½ years' imprisonment is excessive because the trial court failed to properly consider all mitigating evidence.

¶ 13 A trial court's sentencing decision that is within the statutory limits will not be disturbed on appeal absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247 (1995). An abuse of discretion occurs when the sentencing decision is arbitrary, fanciful or unreasonable, or where no reasonable person would take the trial court's view. *People v. Morgan*, 197 Ill. 2d 404 (2001).

¶ 14 The Illinois Constitution requires that "[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. A trial court has broad discretion in imposing sentences, and a sentence within the statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *People v. Cabrera*, 116 Ill. 2d 474 (1987). A reviewing court may not substitute its judgment for that of the trial court merely because it would have balanced the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13 (1991).

¶ 15 In the present case, the trial court listened to and acknowledged the significant evidence in mitigation presented by defendant. The court agreed that defendant had rehabilitative potential, but the court was also swayed by defendant's lengthy juvenile and criminal history, the serious nature of defendant's present offense, and the fact that defendant was subject to MSR when he committed the present offense. The court determined that an extended-term sentence of imprisonment was necessary to help restore defendant to useful citizenship.

¶ 16 The trial court was statutorily authorized to impose an extended-term sentence because defendant had committed a greater class felony—armed violence (720 ILCS 5/33A-2 (West 1996))—within the previous 10 years, excluding time spent in custody. 730 ILCS 5/5-5-3.2(b)(1) (West 2008). The extended-term sentencing range for a Class 4 felony is three to six years' imprisonment. 730 ILCS 5/5-4.5-45 (West 2008). The trial court determined that based upon defendant's mitigating evidence, the maximum sentence was inappropriate, and a sentence of 4½ years' imprisonment was proper. The trial court's sentencing decision was statutorily authorized and reached only after a reasoned and thoughtful consideration of defendant's history and the nature of the present offenses. Therefore, the trial court did not abuse its discretion.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, the sentencing decision of the circuit court of Peoria County is affirmed.

¶ 19 Affirmed.