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2012 IL App (3d) 110621-U

Order filed November 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 12th Judicial Circuit,
Plaintiff-Appellee,) Will County, Illinois,
)
v.) Appeal No. 3-11-0621
) Circuit No. 09-CF-867
DARYL L. TOWNS,)
) Honorable
Defendant-Appellant.) Edward Burmila, Jr.,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The evidence was sufficient to prove beyond a reasonable doubt that defendant did not act out of necessity when he committed the offense of aggravated driving while license revoked; and (2) the trial court did not abuse its discretion by imposing an extended-term sentence of 42 months' imprisonment.
- ¶ 2 Defendant, Daryl L. Towns, was convicted at a bench trial of one count of aggravated driving while license revoked (625 ILCS 5/6-303(d-3) (West 2008) (eff. June 1, 2009)), a Class 4 felony. The trial court sentenced him to four years' incarceration. In response to defendant's motion to

reconsider sentence, the trial court reduced the sentence to 3½ years' incarceration. Defendant appeals, arguing that (1) the evidence was insufficient to prove beyond a reasonable doubt that defendant's conduct was not justified by necessity; and (2) the trial court abused its discretion by imposing defendant's sentence without discussing all factors in mitigation and defendant's potential for rehabilitation.

¶ 3 On Sunday, April 19, 2009, defendant was arrested after a traffic stop in Frankfort, Illinois. Officer Jennifer Keogh initiated the traffic stop after she observed defendant driving his vehicle with its headlights off during heavy rain. Defendant was charged with aggravated driving with a revoked license (625 ILCS 5/6-303(d-3) (West 2008)), a Class 4 felony.

¶ 4 At a bench trial, defendant raised necessity as an affirmative defense. 720 ILCS 5/7-13 (West 2008). He testified that for the past 17 years he had been prescribed a daily dose of 200 milligrams of Tegretol to prevent seizures. His physician, Dr. Adeyemi, testified that he had treated defendant for the previous eight or nine years, and that defendant's seizures could cause severe injury or death under the right circumstances.

¶ 5 On the day in question, defendant realized that his 30-day prescription for Tegretol was exhausted. His wife, who usually filled defendant's prescription at the local Walgreens, was at work. Defendant testified that he had forgotten that his prescription was running out and that his wife must have forgotten to refill it. Alone at home, defendant said he had a "funny feeling" and believed that a seizure was forthcoming. Defendant had suffered five seizures in his life and testified that those seizures were predated by the same funny, inexplicable feeling, although "it takes time" for the feeling to manifest itself as a seizure.

¶ 6 Defendant determined that he needed to travel to Walgreens to refill his prescription and

avoid a potential seizure. Defendant decided that, despite having a revoked license, he needed to drive himself to Walgreens to fill his prescription. He testified that he did not have any family in the area who could drive him there. He did not call his wife at work to ask whether she could leave work to pick up his prescription, nor did he call a taxi service or an ambulance, despite having a working telephone in his home. He testified that, instead of driving himself, "I could have called for an ambulance, but I chose not to call for an ambulance because I thought I could make it." Although defendant testified that he lived merely one-quarter of a mile from the Walgreens, he chose not to walk.

¶ 7 While driving to Walgreens, defendant was stopped and arrested by Keogh. At trial defendant stipulated to having committed aggravated driving while license revoked, as required to succeed upon a defense of necessity. *People v. Gengler*, 251 Ill. App. 3d 213 (1993). After all evidence was presented, the trial court found that the State had proven beyond a reasonable doubt that defendant did not act out of necessity, and the court entered a verdict of guilty. The trial court denied defendant's motion for a new trial.

¶ 8 At the sentencing hearing, defendant presented evidence in mitigation, including testimony that defendant had attended Alcoholics Anonymous since 1997 and had been sober since 2003; that defendant was successfully self-employed at the time of his arrest; that defendant served as a minister and ran a rooming house for troubled men in his community; and that defendant had not been charged with a crime in more than four years. Evidence in aggravation included defendant's 14 prior driving-related convictions: six misdemeanor convictions for driving with a revoked license (Ill. Rev. Stat. 1987, ch. 95½, ¶6-303), five misdemeanor convictions for driving under the influence of alcohol (Ill. Rev. Stat. 1981, ch. 95½, ¶ 11-501), one felony conviction for aggravated driving

under the influence of alcohol (625 ILCS 5/11-501(d)(1)(A) (West 1996)), and, within the previous 10 years, two felony convictions for aggravated driving while license revoked (625 ILCS 5/6-303(d-3) (West 2006)).

¶ 9 The trial court considered the mitigating and aggravating evidence and sentenced defendant to an extended-term sentence of four years' imprisonment. 730 ILCS 5/5-8-2 (West 2008) (eff. July 1, 2009). The extended-term sentence was justified by defendant's prior conviction of a similar class felony within the previous 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2008) (eff. July 1, 2009). The sentencing range for an extended term Class 4 felony is three to six years' imprisonment. 730 ILCS 5/5-4.5-45 (West 2008). Upon defendant's motion to reconsider sentence, the trial court reduced defendant's sentence to 3½ years' imprisonment. Defendant now appeals.

¶ 10 A. Necessity Defense

¶ 11 Defendant argues that the State failed to prove beyond a reasonable doubt that defendant did not act out of necessity when he committed the offense of aggravated driving while license revoked. 625 ILCS 5/6-303(d-3) (West 2008) (eff. June 1, 2009). The standard of review is whether, considering the evidence in a light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that defendant did not act out of necessity. See *People v. Grayson*, 321 Ill. App. 3d 397 (2001) (explaining standard in the context of affirmative defense of self-defense).

¶ 12 Necessity is an affirmative defense that serves to justify otherwise illegal conduct where the accused: (1) "was without blame in occasioning or developing the situation"; and (2) "reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." 720 ILCS 5/7-13 (West 2008).

The necessity defense protects individuals faced with the choice between "two evils": committing a criminal offense or engaging in conduct that would result in more harm than the illegal conduct. *People v. Planer*, 161 Ill. App. 3d 938, 941 (1987). A defendant is justified in engaging in illegal conduct only where no other reasonable alternative existed. *People v. Gibson*, 403 Ill. App. 3d 942 (2010). "Where there is yet another alternative--besides the two evil choices--and such alternative, if carried out, will cause less harm, then a person is not justified in breaking the law." *People v. White*, 78 Ill. App. 3d 979, 981 (1979).

¶ 13 In the present case, there was sufficient evidence to find beyond a reasonable doubt that defendant did not act out of necessity. First, defendant was not "without blame in occasioning or developing the situation." 720 ILCS 5/7-13 (West 2008). Defendant had been taking Tegretol daily for 17 years. As an experienced consumer of this medication, he should have been aware of when his prescription would need to be refilled. Simple planning would have prevented the emergency situation faced by defendant in the present case. A rational trier of fact could find that defendant was not without blame for allowing his prescription to become exhausted.

¶ 14 In addition, it was not reasonable for defendant to believe that violating the law by driving himself to the pharmacy was necessary to avoid the potential danger of going without his medication. The trial court found that defendant was indeed out of medication and that he could have suffered a seizure as a result of one day's absence of the medication from his system. However, defendant had reasonable alternatives available other than breaking the law by driving himself to the pharmacy. Instead of driving, defendant could have called a taxi or an ambulance. Defendant testified that "I could have called for an ambulance, but I chose not to call for an ambulance because I thought I could make it." Driving himself was an especially unreasonable action because defendant could have

harmred innocent people had he suffered a seizure while operating his vehicle. An additional reasonable alternative was for defendant to walk to Walgreens, as it was only one-quarter of a mile from his home. Driving was therefore not a necessity, as defendant had reasonable alternatives available. See *Gibson*, 403 Ill. App. 3d 942.

¶ 15 The evidence was sufficient to prove beyond a reasonable doubt that defendant did not act out of necessity.

¶ 16 B. Sentencing

¶ 17 Defendant alleges that the trial court erred in imposing a 3½ year sentence because: (1) the court failed to consider all necessary mitigating factors; and (2) the court failed to properly consider the defendant's potential for rehabilitation.

¶ 18 Where the trial court imposes a sentence within the permissible statutory range, the sentence will not be disturbed on appeal unless the trial court abused its discretion. *People v. Jones*, 168 Ill. 2d 367 (1995). An abuse of discretion occurs when the sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). A trial court has wide latitude in sentencing, so long as it does not ignore relevant mitigating factors or consider improper aggravating factors. *People v. Flores*, 404 Ill. App. 3d 155 (2010). The appellate court may not substitute its judgment merely because it would have balanced the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13 (1991).

¶ 19 A trial court is presumed to have considered all mitigating factors, and that presumption will not be overcome absent explicit evidence from the record. *Flores*, 404 Ill. App. 3d 155. In the present case, on the motion to reconsider sentence, the trial court stated on the record that it had

reviewed the documentation presented and all factors in mitigation when determining its 3½ year sentence. The trial court is not obligated to discuss each factor individually on the record. See *Id.* Defendant has provided no evidence from the record establishing that the trial court failed to consider any factors in mitigation. We will not engage in a rebalancing of the mitigation factors considered by the trial court. See *Streit*, 142 Ill. 2d 13.

¶ 20 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), but the trial court need not give a defendant's rehabilitative potential more weight than it gives the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247 (1995). In the present case, the trial court considered defendant's 14 prior convictions, including 2 for felony driving while license revoked, when imposing the 3½ year sentence. The minimum extended-term sentence available in this case was 3 years. 730 ILCS 5/5-4.5-45 (West 2008). The trial court concluded that despite defendant's positive influence on the community, a 3½ year sentence was appropriate in light of defendant's apparent resistance to rehabilitation. The trial court did not abuse its discretion by imposing its sentence.

¶ 21 The verdict and sentence of the circuit court of Will County is affirmed.

¶ 22 Affirmed.