

No. 1-12-1581

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 09 CR 10876 (01)
)	
FREDERICK CLAIBORNE,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's constitutional challenges to the automatic transfer provision of the Juvenile Court Act are rejected based upon established precedent of this court; the defendant's as-applied constitutional challenge to his mandatory enhanced sentence is without merit, where the sentence was not grossly disproportionate to his conduct in the offense; and the defendant's sentence was not based upon emotion or an illicit double-enhancement, and was not otherwise an abuse of discretion.

¶ 2 The defendant, Frederick Claiborne, was charged with robbery with a firearm under the Criminal Code of 1961 (Code) (720 ILCS 5/18-2(a)(2) (West 2008)), and was transferred for

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trial as an adult under the automatic transfer provision of the Juvenile Court Act of 1987 (Act) (705 ILCS 405/5-130(1)(a)(iv) (West 2010)). He was tried along with a co-defendant, Lorenzo Richardson, after which a judge found the defendant guilty and sentenced him to 10 years' imprisonment for the robbery conviction, plus the mandatory 15-year sentence enhancement under section 18-2(b) of the Code (720 ILCS 5/18(b)), for his use of a firearm during the commission of the offense. He now appeals, contending that (1) the statutory scheme under which he was prosecuted and sentenced violated his rights under the State and federal constitutions by mandating that he be sentenced as an adult and giving no regard to his youthfulness and its attendant circumstances; (2) the mandatory sentence enhancement under section 18-2 as applied to him was unconstitutional; (3) the trial court abused its discretion in imposing his sentence by failing to properly consider substantial mitigating evidence, and applying its own "emotional attachment" to the case, along with an improper double enhancement. We affirm.

¶ 3 The evidence established that, about 2 a.m. on May 14, 2009, the victim, London Hall, was sitting in his car with his girlfriend, Emma Beans, in the back of Beans's apartment complex, when he heard a sound resembling "metal hitting wood." Hall told Beans that the noise "didn't sound right" and that he wanted to leave, but before he was able to do so, three males descended the stairwell of the complex and surrounded Hall's car. Two of the males were positively identified as the defendant, then age 16, and Richardson. Beans indicated that she initially thought that the perpetrators, whom she knew from the neighborhood, were hiding from the police, and told them to go stand next to her car instead. However, the defendant then pulled out a gun and pointed it towards Hall's head, while Richardson ordered Hall and Beans to get out of the vehicle. After they complied, the defendant continued to point the gun at Hall's face from a

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distance of about two feet away, while Richardson went through Hall's pockets retrieving his cell phone, money, driver's license and social security card.

¶ 4 Beans testified that during the commission of the offense, she said to Richardson "[w]hat are you doing? We both have kids." According to Hall's testimony, the defendant's hand appeared to be shaking as he held the gun, and Hall briefly considered snatching the weapon away from him but then reconsidered when he saw that the third man had a gun tucked into his pants. When they finished taking Hall's belongings, the men escaped towards the front of the complex, while Hall and Beans ran upstairs to Beans's apartment and called the police. Officer A. Sinnott arrived at the scene, and Hall and Beans provided him with a description of the perpetrators and the details of the offense.

¶ 5 Later that morning, Beans knocked on the door of her neighbor, but no one answered. She heard noises coming from an apartment several doors away and knocked on that door. When a man answered, Beans stated that she had just been robbed and asked whether "Zo," meaning Richardson, was in the apartment. The man let Beans into the apartment where she saw Richardson sitting in the front room. Beans told Richardson that she had just seen him in the robbery, to which Richardson replied that he had seen her too. According to Beans, she felt afraid at this point and left the apartment, walked a short distance and called the police. The defendant and Richardson also left the apartment, walked in her direction and then entered the apartment Beans had initially visited.

¶ 6 Officer Sinnott and another officer responded to Beans's call, and she directed them to the apartment where she had seen the defendants enter. The officers performed a search of the apartment and discovered the defendant and Richardson in one of the bedrooms. According to Officer Sinnott, the defendant "seemed to be *** engaged in some type of activity because he

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was perspiring a lot. He was laying on the floor." The officers then discovered a milk crate near where the defendant was found, containing a loaded handgun, along with what was later proven to be the money, social security card, identification and cell phone belonging to Hall. Officer Sinnott also found a sawed-off shotgun protruding from the top of a storage tote in the same room.

¶ 7 Beans testified that the officers then brought three suspects out of the apartment for a show-up, and that she identified an individual later proven to be the defendant as having had the "gun to [Hall's] head." Beans told the officers that one of the men was not involved in the robbery, and identified the third man, later shown to be Richardson, as one of the perpetrators.

¶ 8 Hall later went to the police station, where he viewed a lineup and picked the defendant as the one that held the gun aimed at his head during the robbery. Hall also identified Richardson from a lineup, as the man who went through his pockets.

¶ 9 Officer Manuel Escalante testified that he spoke with the defendant on the day of his arrest. The defendant initially denied knowing anything about a robbery but later admitted his participation in the offense. He claimed, however, to have used a toy or a "BB" gun in the robbery.

¶ 10 Following arguments, the court found the defendant guilty of armed robbery with a firearm. The defendant's motion for a new trial was denied, and the matter proceeded to a sentencing hearing. At the hearing, the State referred to evidence that both Hall and Beans were very shaken by the offense, with Hall also appearing upset during his testimony, and to the fact that Hall had a semi-automatic weapon pointed inches from his face. The State also pointed out that Hall was "just a trigger-pull away from a *** fatal injury" and that the defendant "is not an experienced gun owner." The defense presented mitigating evidence of the defendant's young

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age, his difficult childhood, his work experience and rehabilitative potential. In imposing sentence, the court made remarks, which included the following:

"You know, it's one thing for somebody to say this person had a gun put up to his head.

You know, it's kind of cold facts, we're not, necessarily, emotionally attached to that, but when you actually listen to the witnesses talking about the gun being pointed at his head and [Beans] talking about she told the individuals that I have children, he has children, don't do this to us, we both have children.

I mean, that is what she is thinking about at this time, that she is going to be dead, he is going to be dead and there are children that are going to suffer all because somebody wants to get an easy way out and make some easy money.

Stupid, easy money.

And I don't know, it never happened to me, but I can't imagine what would happen if somebody putting right to my head a loaded gun and yelling and screaming and asking for the person's money.

This is the case that, again, as the State pointed out correctly under the factors in aggravation, your conducted [sic] caused or threatened serious harm.

They were – these individuals were one pull of the trigger away from serious injury or death.

Also, a message has to kind of go out to the neighborhood, so I think the sentence here is necessary to deter others from committing the same crime. We *** can't just go up and stick up people."

¶ 11 The court then stated that it would also take into consideration that the defendant had no criminal background, which the court found "weighs heavily" in the defendant's favor. Finally, the court stated, after considering all evidence in aggravation and mitigation, and reviewing the presentence investigation, the defendant would be sentenced to 10 years' imprisonment for the robbery conviction, plus the mandatory 15-year enhancement for the use of the firearm. The court then denied the defendant's motion to reconsider sentence, and this appeal followed.

¶ 12 On appeal, the defendant first argues that the Act's automatic transfer provision violates the proportionate penalty clauses (U.S. Const., amend. VIII; Ill. Const. 1970, art. 1, § 11), and the due process clauses (U.S. Const., amends. V, XIV; Ill. Const. 1970, art. 1, § 2) of the federal and state constitutions by mandating that he be tried and sentenced as an adult and disallowing any consideration of his youthfulness and its attendant circumstances. The relevant section of the provision requires removal from juvenile jurisdiction of any minor who, at the time of an offense, was at least 15 years of age, and who is charged with the offense of "armed robbery when the armed robbery was committed with a firearm." 705 ILCS 405/5-130(1)(a)(iv).

¶ 13 The constitutionality of a statute is a question of law and is therefore subject to *de novo* review on appeal. *People v. Sharpe*, 216 Ill. 2d 481, 486-87, 839 N.E.2d 492 (2005); *People v. Jackson*, 2012 IL App (1st) 100398 ¶ 8, 965 N.E.2d 623, *appeal denied*, 2012 IL App (1st) 100, 398, 968 N.E.2d 1069. Statutes are presumed constitutional, and this court has a duty to construe a statute in a manner that upholds its validity if reasonably possible. *Sharpe*, 216 Ill. 2d at 487; *Jackson*, 2012 IL App 100398 ¶ 7, quoting *People v. Graves*, 207 Ill. 2d 478, 482, 800 N.E.2d 790 (2003). The party challenging the statute has the burden of clearly establishing that it violates the constitution. *Sharpe*, 216 Ill. 2d at 487.

¶ 14 The defendant does not appear to dispute that the automatic transfer provision has been upheld as constitutional by our supreme court (*People v. J.S.*, 103 Ill. 2d 395, 405, 469 N.E.2d 1090 (1984); *People v. M.A.*, 124 Ill. 2d 135, 147, 529 N.E.2d 492 (1988)). He urges, however, that we reconsider the issue in light of the analyses expressed in *Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455 (2012), *Graham v. Florida*, ___ U.S. ___, 130 S. Ct. 2011 (2010), and *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), which he argues reflects a growing understanding that juvenile offenders are less culpable than their adult counterparts regardless of the offense, and thus should not automatically be treated as adults in sentencing.

¶ 15 In support of his claim that the automatic transfer provision violates the proportionate penalties clauses, the defendant argues that it subjects 15 and 16 year olds to the same treatment and punishment as adults without any antecedent findings that such treatment is warranted in light of the circumstances of the crime, or the defendant's background or criminal history. However, based upon our established precedent, we must reject this position, because it involves a challenge to the *procedure* leading to the defendant's sentence, rather than to the sentence itself. See *Jackson*, 2012 IL App (1st) 100398, ¶¶ 19, 24 ; *People v. Salas*, 2011 IL App (1st) 091880 ¶¶ 66, 67, 961 N.E.2d 831. In these cases, we determined that the proportionate penalties clauses of the Illinois Constitution and the eighth amendment of the U.S. Constitution govern penalties and punishments, not procedure, and therefore do not apply to a defendant's challenge to the automatic transfer provision. See *Jackson*, 2012 IL App (1st) 100398, ¶¶19, 24; *Salas*, 2011 IL App (1st) 091880, ¶¶ 68, 70. We will not depart from these holdings.

¶ 16 The defendant's due process challenges are premised upon similar grounds, that juveniles as a class are less culpable than adults, and thus have a fundamental interest in not being invariably treated as adults for sentencing purposes. Again, however, these arguments have been

raised and rejected by this court, which has consistently upheld the automatic transfer provision in the face of due process challenges. See, e.g., *J.S.*, 103 Ill. 2d 395; *People v. Pacheco*, 2013 IL App (4th) 110409, 991 N.E.2d 816 (*appeal allowed*, 996 N.E.2d 20 (Ill. Sept. 24, 2013) (Table No. 116402)); *People v. Patterson*, 2012 IL App (1st) 101573, 975 N.E.2d 1127. We have distinguished *Roper* and *Graham* on the basis that they did not involve due process claims, and were direct challenges to "the State's most severe" sentencing statutes, not to a procedural provision. See *Miller*, 132 S. Ct. at 2466; *Pacheco*, 2013 IL App (4th) 110409; see also *Jackson*, 2012 IL App (1st) 100398; *Salas*, 2011 IL App (1st) 091880, ¶ 76–80 (also rejecting due process challenge to automatic transfer statute, finding that *Roper* and *Graham* were inapplicable and *J.S.* remains binding). We adhere to these holdings here.

¶ 17 Next, the defendant argues that the mandatory sentence enhancement was unconstitutional as applied to him. Under section 18-2(b) of the Code, a conviction for robbery, if done with the use of a firearm, is elevated to a Class X felony requiring an enhanced sentence of 15 years' imprisonment in addition to the sentence for the underlying robbery. 720 ILCS 5/18-2(b) (West 2008). According to the defendant, this enhancement, when combined with the 10-year sentence he received for the underlying robbery, violated the proportionate penalties clauses of the federal and state constitutions because it removed the trial court's discretion to consider the defendant's youth, his difficult childhood, and the details of the offense. We disagree.

¶ 18 In support of his argument, the defendant again cites to the cases of *Miller*, *Graham*, and *Roper*, which concerned facial rather than as-applied challenges to the respective statutes, and which we have already distinguished based upon our own established precedent.

¶ 19 The defendant also relies upon *People v. Miller*, 202 Ill. 2d 328, 781 N.E.2d 300 (2002), where the court upheld an as-applied challenge to a multiple-murder sentencing statute as contrary to the proportionate penalties clauses. In *Miller*, the 15 year old defendant had spontaneously agreed to serve as a "lookout" for two co-defendants who had observed rival gang members in the area. The co-defendants then shot and killed the rival gang members, and the court subsequently convicted one of them of the murders, along with the 15 year old defendant. However, the trial court refused to sentence the defendant to a mandatory term of life imprisonment without the possibility of parole under the multiple-murder sentencing statute, and the supreme court agreed. The court found that a life sentence would have been "highly unconscionable" and "shocking to the moral sense of the community" based upon the acts of the defendant, who was convicted under an accountability theory and whom the trial court found was passively acting as a lookout for others, had never picked up a gun, and had "less than a minute" to contemplate what he was doing. *Id.* at 332, 339.

¶ 20 Here, by contrast, the defendant was a knowing, active and direct participant in a planned robbery, in which he held a semi-automatic weapon near the face of his victim. In imposing sentence for the underlying robbery, which had a potential range of 6 to 30 years (730 ILCS 5/5-4.5-25(a)), the trial court gave the defendant 10 years, only 4 years above the minimum. Under the facts of this case, the sentence with the 15-year enhancement cannot be said to have been so "cruel, degrading, or wholly disproportionate to the offense as to shock the moral sense of the community."

¶ 21 The defendant next argues that the trial court abused its discretion in imposing sentence. First, he maintains that the court failed to consider substantial evidence in mitigation, namely, that he was raised in an unstable and turbulent home, that he was a runaway who fell under the

influence of his adult co-defendant, that he had no prior criminal record, and that he had previously worked for his grandfather.

¶ 22 The trial court has wide discretion in imposing sentence, and a sentence within statutory range will not be disturbed on review unless such discretion has been abused. *People v. Mitchell*, 395 Ill. App. 3d 161, 167, 916 N.E.2d 624 (2009). 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, 940 N.E.2d 1062 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626 (2000)).

¶ 23 In this case, the record establishes that the trial court was provided with a thorough pre-sentence investigative report, and that, by its own remarks, it reviewed and considered that report along with all factors in aggravation and mitigation. Contrary to the defendant's argument, the court expressly considered his lack of a prior criminal record, and noted that this factor weighed heavily in the defendant's favor. The court imposed a sentence of 10 years for the robbery, at the low end of the range of 6 to 30 years. Based upon these factors, we reject the defendant's argument that his sentence was an abuse of discretion.

¶ 24 The defendant also maintains that the court's remarks reveal that it was "emotionally attached" to this case, and that it considered the use of the gun as an aggravating factor, which amounted to an improper double enhancement of his sentence. We disagree.

¶ 25 It is true that a court may not use a single factor both as an element of the defendant's crime and as an aggravating factor for imposing a harsher sentence. *People v. Gonzalez*, 151 Ill. 2d 79, 83–84, 600 N.E.2d 1189 (1992). However, it is not necessarily an abuse of discretion for the court to express its personal observations with regard to an offense. *People v. Steppan*, 105 Ill. 2d 310, 323, 473 N.E.2d 1300 (1985); *People v. Primm*, 319 Ill. App. 3d 411, 425-26, 745

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N.E.2d 13 (2000). Further, the need to deter others from committing a particular crime is a proper aggravating factor. *People v. Sansorez*, 156 Ill. App. 3d 986, 988, 510 N.E.2d 150 (1987).

¶ 26 We do not find that the court's comments in this case amounted to a double enhancement or revealed an emotional attachment. Read in context, the remarks regarding the weapon centered upon the fact that the defendant held the gun close to Hall's head, and that this could readily have lead to death or serious bodily harm. In light of the fact that the sentence was at the low end of the range, we are unable to conclude that the court abused its discretion.

¶ 27 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 28 Affirmed.