

No. 1-14-2944

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 20284
)	
OSCAR SOTO,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

O R D E R

¶ 1 *Held:* (1) Defendant's 14-year sentence for aggravated battery with a firearm was not excessive where the trial court considered all relevant factors in aggravation and mitigation; (2) resentencing is unwarranted where new sentencing provisions contained in Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105) do not apply retroactively to defendant's case.

¶ 2 Following a joint bench trial, defendant Oscar Soto was convicted of aggravated battery with a firearm and sentenced to 14 years' imprisonment.¹ On appeal, defendant contends that his sentence is excessive in view of his youth, lack of criminal history, and rehabilitative potential. Additionally, defendant contends that his case should be remanded for resentencing under new sentencing provisions contained in Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), which took effect during the pendency of his appeal. For the following reasons, we affirm the judgment of the trial court.

¶ 3 Defendant was charged with four counts of attempted first-degree murder and one count of aggravated battery with a firearm. At trial, the victim, Jason Stewart, testified that at approximately 2 a.m. on September 22, 2012, he encountered defendant and Gallegos among "[m]ore than 20" people at 52nd and Wood in Chicago. Defendant and Gallegos belonged to the Satan Disciples street gang, while Stewart formerly belonged to the rival Gangster Disciples street gang. He had known defendant and Gallegos for four years. Gallegos asked Stewart to join the Satan Disciples and defendant "kept saying that he had some weed for sale." Stewart declined to join the gang but agreed to buy marijuana from defendant, who walked to a house across the street. Half an hour later, Stewart and Gallegos entered a gangway where defendant was waiting. He gave Stewart the marijuana and said that he wanted to talk. Stewart repeatedly asked "[w]hat's up," but defendant pointed a revolver at him and said, "[f]uck you [b]itch." He fired and the bullet went past Stewart's face. When Stewart looked back, both defendant and Gallegos

¹ Codefendant Steven Gallegos, defendant's older brother, also was convicted of aggravated battery with a firearm and sentenced to 18 years' imprisonment. He is not a party to the present appeal.

were pointing guns at his face and defendant said, "G.D. killer." Both men fired and Stewart fled through the alley, chased by defendant. Stewart reached his mother's house and an ambulance took him to the hospital, where he was treated for two gunshot wounds to his head and a third gunshot wound to his back. As a result of the shooting, he had "two holes" in his head and a bullet lodged in his neck.

¶ 4 The court acquitted defendant of attempted first-degree murder but found him guilty of aggravated battery with a firearm. Defendant's motion for new trial was denied and the case proceeded to sentencing.

¶ 5 According to the presentence investigation report (PSI), defendant was the fourth of six children raised by his mother in Chicago. He did not have a relationship with his father, who abused alcohol and drugs. Defendant attended high school until his arrest and obtained his diploma in jail. According to defendant, he was a "foot soldier" in the Satan Disciples street gang from 2009 to 2012. He first tried alcohol at age 15, drinking "two or three cups" on "special occasions," and used marijuana daily from age 14 to 16.

¶ 6 At sentencing, the State asked the court to impose a sentence that would protect the public and deter defendant and others from "committing similar crimes with handguns." The State noted that defendant belonged to a gang, lured a person affiliated with a rival gang into a gangway, and shot him. Although defendant lacked a criminal history, the State requested a maximum sentence and argued that a minimum sentence would "deprecate the seriousness" of the offense.

¶ 7 In mitigation, defense counsel argued that defendant was 19 years old at sentencing and had never been arrested or involved with the criminal justice system prior to the present case.

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According to counsel, defendant was "high school valedictorian" and had "improve[d] himself" in order to "pursue a normal and law abiding life" after his release from custody. Counsel requested that defendant receive the minimum sentence.

¶ 8 Brother James Fogarty testified that he met defendant and Gallegos five years prior to sentencing, after their cousin was murdered. Fogarty testified that he "like[d] both of them very much," and had encouraged defendant to "keep in school and take care of himself."

¶ 9 Angelina Gallegos, defendant and Gallegos' mother, testified that she was a "single mother" with six children. She described defendant and Gallegos as "good boys" and good family members, and denied having "any problem with them." She testified that defendant and Gallegos attended school, worked, helped pay bills and utilities, and provided for their younger siblings.

¶ 10 In allocution, defendant stated that at the start of his incarceration, he had a "strong misunderstanding" that "violence was the answer for everything," but learned that he had "great potential *** for a chance at success." He noted that his single mother was raising his younger siblings, and asked the court to give him and Gallegos "a chance to influence them to live lives better than our own." Defendant stated that he wanted to "make my mother proud," attend college, and work as a welder and motivational youth speaker. Additionally, he asked the court to "forgive us for sentencing."

¶ 11 The court sentenced defendant to 14 years' imprisonment. In imposing sentence, the court stated that it considered the evidence at trial and sentencing, including the PSI. The court described the shooting as a "brazen bit of urban violence that is of the type [that] has been terrorizing our community," which occurred "for no good reason other than something to do with

gang pride and gang rivalry." The court noted that the case had caused "tremendous stress" to defendant's family, and that he may have "done more [d]amage" to his own family than to the victim. Additionally, the court observed that defendant had "minimal if any criminal history," was not "in and out of court," and, unlike Gallegos, had not been previously convicted of a violent crime. Rather, according to the court, "quite a bit of things" in defendant's life suggested that the offense had been an "aberration." However, the court also explained that it had an "obligation to protect the public *** from young men that are prone to this type of brazen violence."

¶ 12 The court denied defendant's motion to reconsider sentence.

¶ 13 Defendant raises two issues on appeal.

¶ 14 First, defendant concedes that his offense was "serious" but contends that his sentence, at more than double the minimum term, was nonetheless excessive in view of his youth, lack of criminal history, and rehabilitative potential. According to defendant, the trial court did not consider that he was 17 years old when the shooting occurred or that he was "likely influenced" by his older brother, Gallegos, who also belonged to a gang and had "committed an unrelated aggravated battery and robbery mere weeks before" the present offense. Defendant observes that he had no prior arrests or convictions, and that he attended high school and obtained his diploma. Defendant also notes that he assisted his family financially and that "strong family ties" motivate him to "turn his life around." Additionally, defendant argues that his statement in allocution expressed remorse and a willingness to change.

¶ 15 The State, in response, contends that the trial court did not err in imposing a sentence 16 years below the statutory maximum where the trial record and PSI establish that the court

considered defendant's age, lack of criminal history, and rehabilitative potential, but also his gang membership, drug use, and the danger he posed to the public. The State argues that defendant "was the aggressor and not acting under the influence of Gallegos" when he pressured Stewart to buy marijuana and shot him in a gangway. Moreover, the State maintains that defendant did not express remorse or apologize to the victim in allocution.

¶ 16 The reviewing court considers a trial court's sentencing decision under an abuse-of-discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence will be considered an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). However, "[t]he trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *Id.* This is because the trial judge "observed the defendant and the proceedings" and is better positioned "to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36.

¶ 17 A sentence should reflect both the "seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Jones*, 2015 IL App (1st) 142597, ¶ 38. However, the seriousness of an offense, and not mitigating evidence, is the most important factor in sentencing. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. The trial court is presumed to consider "all relevant factors and any mitigation evidence presented" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but "has no obligation to recite and assign value to each factor" (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant must affirmatively show "that the sentencing court did not consider the relevant

factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. A reviewing court " 'must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.' " *Alexander*, 239 Ill. 2d at 213 (quoting *Stacey*, 193 Ill. 2d at 209).

¶ 18 A sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Aggravated battery with a firearm is a Class X felony. 720 ILCS 5/12-3.05(e)(1) (West Supp. 2011). The sentence for a Class X felony ranges from 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 19 Here, the trial court did not abuse its discretion in sentencing defendant. The 14-year prison term is presumed proper, as it falls well within the statutory range for a Class X felony. *Id.* Moreover, the record establishes that the court heard testimony and arguments relating to defendant's lack of criminal history, education, and family ties, as well as family hardship resulting from his incarceration. The court also reviewed the PSI, which detailed defendant's date of birth. Consequently, we cannot say the court ignored defendant's age at the time of the offense, or overlooked the other factors in mitigation that defendant now raises on appeal. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 20 (presuming that the trial court considered mitigating evidence presented, including factor mentioned in PSI). After considering these factors, the court found that the need "to protect the public *** from young men that are prone to this type of brazen violence" outweighed the mitigating evidence. See *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 41 (rehabilitative potential did not outweigh seriousness of offense where defendant shot victims without provocation); see also *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010) ("the need to protect the public may outweigh mitigating factors and the goal of rehabilitation").

Where, as here, the court did not fail to consider the mitigating factors, we will not substitute our

judgment by reweighing them on review. See *Jones*, 2015 IL App (1st) 142597, ¶ 40 (declining to reweigh factors considered at sentencing).

¶ 20 Defendant argues, however, that the United States Supreme Court's decisions in *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), *Roper v. Simmons*, 543 U.S. 551 (2005), and *Graham v. Florida*, 560 U.S. 48 (2010), suggest that reviewing courts' "historic" reluctance to reduce sentences on appeal "is no longer appropriate" in cases involving teenage defendants. However, unlike the cases cited by defendant, which involved the imposition of the death penalty (*Roper*) or life sentences without the possibility of parole (*Miller* and *Graham*), the sentencing range for defendant's offense did not deprive the trial court of discretion in imposing a sentence. Rather, the court could impose a sentence of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). In view of the record, the 14-year sentence was not an abuse of discretion.

¶ 21 Next, in supplemental briefing, defendant contends that his case must be remanded for resentencing under new sentencing provisions contained in Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105), which took effect while his case was pending on direct appeal.² Defendant argues that this statutory provision applies retroactively to his case, while the State responds that the provision applies only prospectively. This court recently decided this issue in *People v. Hunter*, 2016 IL App (1st) 141904, and determined that section 5-4.5-105 of the Code applies only prospectively. *Id.* ¶ 48.

¶ 22 At the time defendant committed the aggravated battery with a firearm in 2012, he was 17 years old. Section 5-4.5-105 of the Code, effective January 1, 2016, provides:

² The text of 730 ILCS 5/5-4.5-105 also appears in Pub. Act 99-258, § 15 (eff. Jan. 1, 2016).

"(a) *On or after the effective date of this amendatory Act of the 99th General Assembly, when a person commits an offense and the person is under 18 years of age at the time of the commission of the offense, the court, at the sentencing hearing conducted under Section 5-4-1, shall consider the following additional factors in mitigation in determining the appropriate sentence[.]*" (Emphasis added.) Pub. Act 99-69, § 10 (eff. Jan. 1, 2016) (adding 730 ILCS 5/5-4.5-105).

¶ 23 Relevant to the present appeal, section 5-4.5-105(a) sets forth several factors that the court must consider in mitigation, including, *inter alia*, the offender's "age, impetuosity, and level of maturity at the time of the offense," whether the offender "was subjected to outside pressure, including peer pressure, familial pressure, or negative influences," and the offender's "family, home environment, [and] educational and social background[.]" *Id.* Additionally, the court must consider the offender's "potential for rehabilitation," "the circumstances of the offense," the offender's degree of participation, role, and level of planning, and the offender's "prior juvenile or criminal history[.]" *Id.* The court may also consider any other information it finds "relevant and reliable," including "an expression of remorse[.]" *Id.*

¶ 24 In *Hunter*, this court rejected the argument that section 5-4.5-105 of the Code could be applied retroactively to a case pending on direct appeal when the statutory provision took effect. *Hunter*, 2016 IL App (1st) 141904, ¶¶ 41, 61-62. By the statute's plain language, we found it applies "only" to "sentencing hearings held '[o]n or after the effective date' of Public Act 99-69, *i.e.*, January 1, 2016." *Id.* ¶ 43. Moreover, we held that the statute does not apply retroactively to cases where sentencing occurred prior to the statute's effective date. *Id.* Here, defendant's case

was pending on direct appeal when section 5-4.5-105 took effect. Following *Hunter*, we find that section 5-4.5-105 does not apply retroactively to defendant's case.

¶ 25 Defendant further argues that his 14-year sentence violates the eighth amendment prohibition against cruel and unusual punishment (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois constitution (Ill. Const. 1970, art. I, § 11), but similar arguments were rejected in *Hunter*. *Hunter*, 2016 IL App (1st) 141904, ¶¶ 54-59. There, we found that the defendant's 21-year sentences for aggravated kidnaping, armed robbery, and aggravated vehicular hijacking did not violate the eighth amendment because the trial court received a PSI and "considered the mitigating factors, including defendant's youth" and criminal history, before imposing sentence. *Id.* ¶¶ 55-56. Moreover, although the sentences included a mandatory firearm enhancement, they did not violate the proportionate penalties clause because the court was not precluded from considering the defendant's age as a mitigating factor in formulating the sentences. *Id.* ¶ 59. Following *Hunter*, we reject defendant's retroactivity and constitutionality arguments regarding section 5-4.5-105, and find that the statute does not apply retroactively to his case.

¶ 26 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 27 Affirmed.