

No. 1-14-3425

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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
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 10 CR 16605
)	
MARTELL BOX,)	Honorable
)	Michele Pitman,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the trial court is affirmed where: (1) the sentencing provisions contained in section 5-4.5-105 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-105 (West 2016) (added by Public Act 99-69, § 10 (eff. Jan. 1, 2016))) do not apply retroactively to the defendant's case; (2) the defendant's sentence does not violate the eighth amendment of the United States Constitution or the proportionate penalties clause of the Illinois Constitution; and (3) the mittimus is corrected to reflect the correct number of days the defendant spent in presentence custody.

¶ 2 Following a bench trial, the defendant, Martell Box, was convicted of armed robbery with a firearm, aggravated kidnaping, and unlawful vehicular invasion. The trial court sentenced him

to 26 years' imprisonment for both aggravated kidnaping and armed robbery to be served concurrently. The 26-year sentences consisted of the minimum 6-year sentence for Class X felonies (see 730 ILCS 5/5-4.5-25(a) (West 2010)), plus a 20-year mandatory firearm enhancement for discharging a firearm during the offense (see 720 ILCS 5/10-2(b) (West 2010); 720 ILCS 5/18-2(b) (West 2010)). The court also sentenced the defendant to 6 years' imprisonment for unlawful vehicular invasion (720 ILCS 5/18-6(a) (West 2010)), to be served concurrently with the 26-year sentences. On appeal, the defendant asserts that (1) he is entitled to a new sentencing hearing in light of recent legislation; (2) his sentence is unconstitutional; and (3) the mittimus must be corrected to reflect the correct number of days he spent in presentence custody. For the following reasons, we affirm the judgment of the trial court and order the mittimus corrected.

¶ 3 In September 2010, a grand jury indicted the defendant with, *inter alia*, armed robbery with a firearm, aggravated kidnaping, aggravated discharge of a firearm, and unlawful vehicular invasion. The defendant was 17 years old at the time he committed the alleged offenses.

¶ 4 The evidence adduced at trial generally established that, at approximately 6 a.m. on August 20, 2010, the defendant entered Oscar Delgado's truck, took his wallet and cell phone, ordered Delgado to drive to a Chase bank, and discharged a handgun towards the back of the truck. At the close of evidence, the defendant was found guilty of armed robbery with a firearm, aggravated kidnaping, and unlawful vehicular invasion.

¶ 5 On September 16, 2014, a sentencing hearing was held. In sentencing the defendant, the trial court stated that it heard the evidence in aggravation and mitigation, reviewed the presentence investigation (PSI) report and psychological evaluation, and carefully considered all of the statutory factors in mitigation and aggravation. It recognized that the defendant was raised

by a single mother and that the only positive male figure in his life was killed three years before he committed the instant offense. The court also observed that the defendant had trouble controlling his emotions and had a history of taking medication for attention-deficit-hyperactivity disorder and bi-polar disorder. The court further noted that the defendant did not have a criminal history, but that the nature of the instant offense was "very, very serious." The court ultimately sentenced the defendant to concurrent terms of 26 years' imprisonment on the armed robbery and aggravated kidnaping counts, and a concurrent term of 6 years' imprisonment on the unlawful vehicular invasion. This appeal followed.

¶ 6 We first address the defendant's contention that his case must be remanded for resentencing under the new sentencing provisions contained in section 5-4.5-105 of the Unified Code of Corrections (Code) (730 ILCS 5/5-4.5-105 (West 2016) (added by Public Act 99-69, § 10 (eff. Jan. 1, 2016))). He argues that section 5-4.5-105, which became effective on January 1, 2016, should be applied retroactively to his case because it became effective after his sentencing, but while his direct appeal was pending. The State maintains that the plain language of section 5-4.5-105 demonstrates that the legislature intended to apply it prospectively only.

¶ 7 Section 5-4.5-105 of the Code provides as follows:

"(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.) 730 ILCS 5/5-4.5-105 (West 2016) (added by Pub. Act 99-69, § 10 (eff. Jan. 1, 2016)).

The mitigating factors include, *inter alia*, the offender's "age, impetuosity, and level of maturity at the time of the offense," his "family, home environment, educational and social background, including any history of parental neglect," and his "potential for rehabilitation." *Id.* Additionally, sections 5-4.5-105(b) and 5-4.5-105(c) provide the trial court with discretion to refrain from imposing firearm enhancements, except in cases where the offender has been convicted of certain homicide offenses. *Id.*

¶ 8 The question of whether an amendment to a statute will be applied prospectively or retroactively is a matter of statutory construction and, therefore, is subject to *de novo* review. *People ex rel. Madigan v. J.T. Einoder, Inc.*, 2015 IL 117193, ¶ 27. The primary objective of statutory construction is to ascertain and give effect to the legislature's intent. *In re A.A.*, 2015 IL 118605, ¶ 21. The most reliable indicator of the legislature's intent is the plain language of the statute. *Id.* Where the language of a statute is clear and unambiguous, this court will enforce it as written and will refrain from reading into it exceptions, conditions, or limitations not expressed therein. *Id.*

¶ 9 To determine whether a statute may be applied retroactively, we must apply the two-step approach set forth in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). *Hayashi v. Illinois Department of Financial and Professional Regulation*, 2014 IL 116023, ¶ 23. Pursuant to *Landgraf*, courts first determine whether the legislature has "clearly prescribed the temporal reach of the statute"; and, if so, courts must give such intent effect, absent a constitutional prohibition. *Id.* If the legislature has not provided the statute's temporal reach, however, courts must proceed to the second step, which requires us to determine whether application of the statute would involve a "retroactive impact." *Id.* If retrospective application would result in a

retroactive impact or inequitable consequences, we must presume that the legislature did not intend such an application. *Id.*

¶ 10 The defendant argues that the language of section 5-4.5-105 demonstrates that the legislature intended for trial judges to follow the newly outlined procedures "at any sentencing hearing occurring on or after the effective date" of the statute. He maintains that the statute contains "no temporal restrictions regarding when the offense occurred" and that "so long as the defendant is being sentenced in 2016 and was under the age of 18 when he *** committed the offense, the new procedures apply."

¶ 11 A division of this court recently considered, and rejected, this argument in *People v. Wilson*, 2016 IL App (1st) 141500, ¶ 15-16. In that case, the court applied the first step of the *Landgraf* test and determined that, based upon the plain language of section 5-4.5-105, "the legislature indicated a prospective application of the statute." *Id.* ¶ 16. It noted that the temporal reach of section 5-4.5-105 was demonstrated by its clear and unambiguous language that "'on or after the effective date,'" when an individual 'commits an offense' and was under the age of 18 at the time it was committed, the sentencing court must consider the additional mitigating factors listed and could decline to impose any otherwise applicable firearm sentencing enhancement." *Id.* (quoting 730 ILCS 5/5-4.5-105 (West 2016)). The court further explained that "the use of the present tense 'commits' immediately following the temporal element [of the statute,] demonstrates the legislature's intent that the statute apply to offenses committed after the effective date." *Id.* The court concluded, therefore, that section 5-4.5-105 applied prospectively only. *Id.*; see also *People v. Hunter*, 2016 IL App (1st) 141904, ¶ 44 (the language "on or after" demonstrated the legislature's intent to apply section 5-4.5-105 prospectively).

¶ 12 We agree with the reasoning in *Wilson* and *Hunter* and find that section 5-4.5-105 applies prospectively to sentencing hearings for offenses committed "[o]n or after the effective date"—January 1, 2016. Accordingly, because section 5-4.5-105 applies prospectively only, and because the defendant committed the offense on August 20, 2010, well before the effective date of section 5-4.5-105, he is not entitled to a new sentencing hearing.

¶ 13 Having found that the temporal reach of section 5-4.5-105 is clearly demonstrated by the legislature, we need not turn to the defendant's alternative argument that section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2016)), should be applied in construing the statute. As our supreme court explained in *Hayashi*, 2014 IL 116023, ¶ 24, section 4 of the Statute on Statutes controls by default only in cases where the legislature has not clearly defined the temporal reach of the statute at issue. Where, as here, the legislature has clearly indicated the temporal reach of a statute, section 4 does not apply. See *id.*; see also *Doe A. v. Diocese of Dallas*, 234 Ill. 2d 393, 406 (2009) ("Because section 4 of the Statute on Statutes operates as a default standard, it is inapplicable to situations where the legislature has clearly indicated the temporal reach of a statutory amendment."). Nor do we find any merit to the defendant's remaining argument that the absence of a savings clause in the new law reveals that the legislature "expressed its intent that the temporal reach of the new provision was not limited based on [the] offense date ***." As discussed above, the text of section 5-4.5-105, itself, clearly expresses the legislature's intent that the amendment be given prospective application.

¶ 14 Next, the defendant maintains that his 26-year sentence violates the eighth amendment's 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). Because the proportionate penalties clause provides greater protection than the eighth amendment (*People*

v. Clemons, 2012 IL 107821, ¶ 40), we independently analyze the defendant's eighth-amendment claim and proportionate-penalties-clause claim.

¶ 15 The eighth amendment, applicable to the states through the fourteenth amendment, provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting U.S. Const., amend. VIII)). The United States Supreme Court has interpreted the cruel-and-unusual-punishment clause to prohibit "inherently barbaric punishments" as well as punishments which are "disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 59 (2010).

¶ 16 In support of his argument that the imposition of the mandatory 20-year firearm enhancement violated his eighth amendment rights, the defendant cites *Miller v. Alabama*, 567 U.S. —, 132 S. Ct. 2455 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005). In *Miller*, 567 U.S. at —, 132 S. Ct. at 2469, the Supreme Court found that the eighth amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, including those convicted of homicide. In *Roper*, 543 U.S. at 574-75, the Supreme Court held that the death penalty was unconstitutional as applied to juvenile offenders. And, in *Graham*, 560 U.S. at 74, 82, the Court concluded that the eighth amendment prohibits life sentences for juvenile offenders convicted of nonhomicide offenses. Significantly, however, both our supreme court "and the United States Supreme Court have closely limited the application of the rationale expressed in *Miller*, *Roper*, and *Graham*, invoking it only in the context of the most severe of all criminal penalties." *People v. Patterson*, 2014 IL 115102, ¶ 110.

¶ 17 In the present case, the defendant was convicted of, *inter alia*, two Class X felonies, aggravated kidnaping and armed robbery (720 ILCS 5/10-2(a)(7), 18-2(a)(3) (West 2010)). The

sentencing range for the Class X felonies, including the mandatory 20-year firearm enhancement, was 26 to 50 years. 730 ILCS 5/5-4.5-25 (West 2010). Although this sentencing range is substantial, the defendant was not subject to, and did not receive the "most severe of all criminal penalties," *i.e.*, he did not receive natural life imprisonment without parole. Rather, he received the minimum sentence of 26 years' imprisonment. As a consequence, *Miller*, *Roper*, and *Graham* are not applicable. See *Patterson*, 2014 IL 115102, ¶ 110 (concluding that a 36-year sentence for a juvenile defendant convicted of three counts of aggravated criminal sexual assault did not fall into the category of sentences discussed in *Miller*, *Roper*, and *Graham*).

¶ 18 We also reject the defendant's argument that the mandatory 20-year firearm enhancement violated his eighth amendment rights because it prevented the trial court from considering factors in mitigation, such as his age when the offenses occurred, that he was "mentally challenged," or that he lost his father figure to a violent death only three years before the offenses took place.

¶ 19 In *Hunter*, 2016 IL App (1st) 141904, this court rejected arguments similar to those made by the defendant in the instant case. In *Hunter*, the defendant, who was 16 years old at the time of the offense, was convicted of aggravated kidnaping, armed robbery, and aggravated vehicular hijacking. The trial court imposed a concurrent sentence of 21-years' imprisonment for each offense, which included a mandatory 15-year sentencing enhancement for the defendant's use of a firearm. *Id.* ¶ 11. On appeal, the defendant argued, *inter alia*, that the mandatory firearm enhancement violated the eighth amendment because it "preclude[d] the trial court from considering mitigating factors in sentencing juvenile offenders." *Id.* ¶ 54. According to the defendant, this sentencing scheme violated the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. —, 132 S. Ct. 2455 (2012), which held that the eighth amendment prohibited the imposition of statutorily mandated sentences of life imprisonment without parole.

We found, however, that the defendant's 21-year sentences did not violate the eighth amendment, as the trial judge in *Hunter* received a PSI report and "considered the mitigating factors, including [the] defendant's youth" and criminal history, before imposing the sentence. *Id.* ¶¶ 55-56.

¶ 20 Similarly, here, the trial court received a PSI report containing information regarding the defendant's age, childhood history, education, drug and alcohol use, mental health treatment, and employment history. The State introduced a victim impact statement in aggravation and relied upon the defendant's conduct, which threatened serious harm, in support of its request for a sentence above the minimum. Defense counsel introduced a psychological evaluation, a "certificate of merit" from the defendant's schools, and argued that the defendant's grades show that he is someone who can be rehabilitated. Thus, the trial court was presented with and considered the mitigating factors, including the defendant's youth, family and mental health history, and his lack of a criminal background before imposing the minimum 26-year sentence for aggravated kidnaping and armed robbery offenses. Here, as in *Hunter*, the mandatory firearm enhancement did not preclude the trial court from considering the defendant's age and other factors in mitigation.

¶ 21 We next consider whether the defendant's sentence violates the proportionate penalties clause of the Illinois Constitution. That clause provides that penalties must 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 challenge under the proportionate penalties clause "contends that the penalty in question was not determined according to the seriousness of the offense." *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). A violation may be shown where the penalty imposed is "'cruel, degrading, or so wholly disproportionate to the offense

committed as to shock the moral sense of the community.' " *Id.* (quoting *People v. Moss*, 206 Ill. 2d 503, 522 (2003)). "To determine whether a penalty shocks the moral sense of the community, we must consider objective evidence as well as the community's changing standard of moral decency." *People v. Hernandez*, 382 Ill. App. 3d 726, 727 (2008).

¶ 22 In *Sharpe*, our supreme court recognized that the imposition of a mandatory firearm enhancement does not necessarily violate the proportionate penalties clause. The court stated:

" 'Our court has previously rejected claims that the legislature violates article 1, section 11, when it enacts statutes imposing mandatory minimum sentences. Our decisions have recognized that the legislature's power necessarily includes the authority to establish mandatory minimum sentences, even though such sentences, by definition, restrict the inquiry and function of the judiciary in imposing sentence.' " *Id.* at 525 (quoting *People v. Dunigan*, 165 Ill. 2d 235, 245 (1995)).

¶ 23 In applying these principles, we find that the defendant's 26-year sentence, which included a 20-year mandatory firearm enhancement does not violate the proportionate penalties clause. As discussed above, the trial court retained discretion to impose a sentence within the statutory range and "carefully considered" all of the statutory factors in mitigation, including the defendant's age. See *People v. Pace*, 2015 IL App (1st) 110415, *Id.* ¶¶ 134, 150; see also *People v. Banks*, 2015 IL App (1st) 130985, ¶ 17 (the defendant's 45-year sentence, which included a 25-year mandatory firearm enhancement, did not violate the proportionate penalties clause where the trial court retained discretion to impose a sentence within the statutory range and could consider the mitigating factors). We conclude, therefore, that the defendant's sentence does not violate the proportionate penalties clause of the Illinois constitution.

¶ 24 Finally, the defendant contends, and the State correctly concedes, that his mittimus must be corrected to reflect 12 additional days of credit for presentence incarceration. A defendant is entitled to credit for any part of a day he spent in custody up to, but not including, the day of sentencing. 730 ILCS 5/5-4.5-100(b) (West 2010); *People v. Williams*, 239 Ill. 2d 503, 505, 510 (2011). Here, the record establishes that the defendant was arrested on August 21, 2010, and remained in custody until his sentencing on September 16, 2014, a total of 1487 days, excluding the day of sentencing. The trial court, however, granted the defendant presentence incarceration credit for 1475 days. Remand is unnecessary, as this court may correct the mittimus at any time. *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 35. Accordingly, we direct the clerk of the circuit court to amend the mittimus to reflect 1487 days of presentence credit.

¶ 25 For the foregoing reasons, we affirm the judgment of the trial court and order the mittimus corrected.

¶ 26 Affirmed; mittimus corrected.