

No. 1-15-0133

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 03 CR 11983
)	
EPHRAIN MITCHELL,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pierce and Justice Neville concurred in the judgment.

O R D E R

¶ 1 *Held:* Following resentencing, defendant's sentence affirmed where the record shows no abuse of discretion by the trial court where it considered the mitigating evidence and reduced defendant's sentence by four years.

¶ 2 In 2004, defendant Ephrain Mitchell was convicted of aggravated vehicular hijacking, aggravated battery with a firearm, and armed robbery, and sentenced to concurrent terms of 30 years' imprisonment on all three convictions. On direct appeal, this court affirmed that judgment.

Thereafter, our supreme court issued a supervisory order directing this court to vacate that portion of our judgment which affirmed Mitchell's sentence and to remand the case to the trial court with directions that Mitchell be sentenced to a term between 6 and 30 years' imprisonment, in accordance with section 18-2 of the Criminal Code of 1961, as it existed before being amended, effective January 1, 2000. After a long and somewhat distorted process, the new sentencing hearing was held and Mitchell was resentenced to concurrent terms of 26 years' imprisonment on all three convictions. On appeal, Mitchell's sole contention is that the sentencing court abused its discretion by failing to give adequate consideration to his extensive mitigating evidence—his becoming a changed man since his original sentencing hearing.

¶ 3 We affirm. After careful review of the record, we cannot say the resentence is excessive, manifestly disproportionate to the nature of the offense, or departs significantly from the intent and purpose of the law. While we may have reached a different result primarily due to Mitchell's rehabilitative progress, that is not our function.

¶ 4 **BACKGROUND**

¶ 5 After a jury trial, Mitchell was convicted of aggravated vehicular hijacking, aggravated battery with a firearm, and armed robbery, and sentenced to concurrent terms of 30 years' imprisonment on all three convictions. On direct appeal, this court affirmed that judgment. *People v. Mitchell*, No. 1-04-3006 (2006) (unpublished order under Supreme Court Rule 23).

¶ 6 In September 2007, our supreme court issued the supervisory order directing this court to vacate that portion of our judgment which affirmed Mitchell's sentence and to remand the case to the trial court with directions that Mitchell be sentenced to a term between 6 and 30 years' imprisonment, in accordance with section 18-2 of the Criminal Code of 1961 (720 ILCS 5/18-2

(West 1998)), as it existed before being amended by Public Act 91-404, effective January 1, 2000. *People v. Mitchell*, No. 103380, 225 Ill. 2d 660 (2007). Accordingly, this court vacated Mitchell's sentence and remanded the case to the trial court for resentencing. *People v. Mitchell*, No. 1-04-3006 (2007) (dispositional order).

¶ 7 Initially, on remand, the trial court appointed the public defender to represent Mitchell for resentencing and ordered that Mitchell be held in the Cook County Department of Corrections for that purpose. But, in June 2008, after several continuances, the assistant State's Attorney indicated that Mitchell's convictions and sentences had been affirmed and questioned whether the case needed to be on the court's call. The trial court agreed that its judgment had been affirmed on direct appeal and returned Mitchell to the Illinois Department of Corrections to continue serving his sentence.

¶ 8 In August 2008, Mitchell again appeared in court and the ASA explained that he was there on remand for resentencing. The ASA noted that Mitchell was sentenced to 30 years' imprisonment and that the remand order indicated that he was to be sentenced to a term between 6 and 30 years. She then suggested that Mitchell needed a corrected mittimus indicating that he was resentenced to 30 years' imprisonment rather than merely serving out his term. The trial court then ruled that the mittimus would be corrected, stated that Mitchell was resentenced to concurrent terms of 30 years' imprisonment, and removed the case from its call.

¶ 9 Two years later, in September 2010, the trial court discovered that Mitchell had filed a *pro se* postconviction petition in January 2008 that had never been addressed, and appointed counsel to represent Mitchell. Counsel moved to withdraw pursuant to *People v. Greer*, 212 Ill.

2d 192 (2004), and the State filed a motion to dismiss the petition. The trial court granted both motions in November 2011.

¶ 10 On appeal from that judgment, Mitchell argued that the trial court erroneously resentenced him without conducting a new sentencing hearing, and thus, his sentence was void and had to be vacated. We found that, because a new sentencing hearing was never held, our mandate from November 29, 2007, remanding the case for resentencing had not been carried out. Accordingly, we again vacated Mitchell's sentence and remanded the case for a resentencing hearing with directions to sentence Mitchell to a term between 6 and 30 years' imprisonment. *People v. Mitchell*, 2014 IL App (1st) 120080.

¶ 11 On remand, the trial court appointed counsel to represent Mitchell and ordered a new presentence investigation report (PSI). The court explained to Mitchell that the new PSI

"will give you an opportunity to talk about the things that you've done in [the] penitentiary since you were incarcerated; programs that you've taken, programs that you've been a part of, and other things, classes that you may have taken, whether or not you've got a GED in the penitentiary, anything that you did that would impact favorably on you, so that I could consider that. I think if I don't do that, I'm setting myself up for failure and I don't want to do that, and setting you up for failure. I want to be able to consider everything that's been going on in your life."

¶ 12 In October 2014, the resentencing hearing was held. The trial court verified that both parties received the new PSI, noted that Mitchell was originally sentenced in 2004 by another judge, and stated that it understood the facts of the case from reading this court's order on direct appeal which affirmed Mitchell's convictions (No. 1-04-3006). In its argument in aggravation,

the State pointed out that Mitchell had nine prior felony convictions, then listed each conviction and sentence, eight of which were drug offenses and one was a robbery. The State argued that, at the original sentencing hearing, the court considered Mitchell's criminal background, the trial testimony, the mitigating evidence including Mitchell's potential for rehabilitation, and its finding that Mitchell posed a danger to the community. The State further argued that the fact that the original trial judge sentenced Mitchell to the maximum term of 30 years' imprisonment on all three convictions spoke volumes as to what the court heard during the trial, and it asked the court to impose the same 30-year sentence.

¶ 13 Defense counsel disagreed with the State's assertion that Mitchell received the maximum sentence and pointed out that the trial court chose not to impose the 15-year firearm sentencing enhancement that was available at the time. Counsel acknowledged that the charges and facts were serious, but noted that the supreme court exercised its supervisory authority and directed the appellate court to vacate the portion of its order that affirmed Mitchell's sentence, and remanded the case for Mitchell resentencing. Defense counsel argued that Mitchell was "a wholly different person" than the person who appeared before the court 11 years earlier at the original sentencing hearing. Counsel argued that when Mitchell went to prison in 2004, he decided on his own initiative that he was going to do whatever he could to better himself to stay out of trouble and move forward, even with a 30-year sentence hanging over his head, and that he changed himself for himself, without any knowledge that he would be returning to court in the future for resentencing.

¶ 14 Mitchell was initially placed in Stateville Correctional Center, a maximum security facility, and was at the end of the list for being eligible for certain jobs and work opportunities.

Nevertheless, he repeatedly signed up for the list. When he was transferred to the Western Illinois Correctional Center, he was able to participate in a variety of programs and educational training as well as job opportunities. Counsel pointed out that in the PSI, Mitchell stated that he acquired maintenance and cooking skills, and had a realistic goal to work in general construction and building maintenance remodeling homes. Counsel added that Mitchell maintained employment in prison for the past seven years, and that his supervisor at the commissary told counsel that Mitchell completed all of his work, never caused any trouble, was a pleasure to work with, and would be welcomed back if he returned to the facility.

¶ 15 The PSI indicated that Mitchell was raised by his parents on the west side of Chicago, did not have much growing up, and both of his parents died young. Yet, Mitchell never complained or made excuses. He obtained his GED in 1995 and used his time in prison working, exercising, playing chess, and staying out of trouble. Although Mitchell had several disciplinary violations before his 2004 incarceration, since then, he only had a handful of minor infractions. Mitchell had not been involved in any physical altercations or violent acts.

¶ 16 Counsel noted that the PSI from 2004 indicated that Mitchell was heavily involved with drugs, including heroin and PCP, and that his drug use and affiliation with friends who used drugs led to his trouble. In his new PSI, Mitchell expressed regret, stating that he wished he had not committed the offenses due to his addictions, but that he had to feed his habit. Mitchell also stated that the victims were the people who were most affected by the crime. Counsel told the court that she overheard Mitchell in the lockup telling a juvenile "don't come back here. Make changes if you can. This is not where you want to be." A family member told counsel that when they visited Mitchell in prison, he begged them to make changes in their lives and encouraged

them to be better, stating, "I don't want you to go through what I'm going through." Mitchell's nephew, Dennis Williams, who had attended the court proceedings on several occasions, submitted a letter of support to the court. Mitchell was now 46 years old and trying to do everything within his power to change his life around. Counsel suggested that in light of all of this mitigation, a sentence of 15 years would be appropriate.

¶ 17 In allocution, Mitchell stated that he was a changed man and would like the opportunity to prove to himself that he can continue to do better for himself, and to coach his nephews to insure that they do not go down the same path that he did. Mitchell wanted to live his life, and thanked the court for holding the hearing on his behalf.

¶ 18 The trial court again stated that it had read the facts from this court's initial order on direct appeal affirming Mitchell's convictions. The court then stated "[t]hose facts set forth a very violent crime committed by this defendant." The court noted that Mitchell shot Pounds while attempting to flee the scene after he crashed the car he was driving into another car. The court then found that "the two most compelling factors in aggravation" were that "defendant's conduct both caused and threatened serious physical harm to all of the people involved," and that Mitchell had "a very, very serious criminal history." The court found that Mitchell "certainly knew" that being armed with a gun, trying to take a car from another person, and shooting the gun in someone's direction would have the potential to cause or threaten serious physical harm. The court also found that the shooting was not provoked, induced, or facilitated by anyone, but was an after-thought as Mitchell attempted to flee, and nothing excused or justified his criminal conduct.

¶ 19 The court pointed out that the sentencing statute provided that it must consider whether Mitchell's criminal conduct came about as a result of circumstances that were likely to recur, and whether Mitchell's attitude indicated that he was unlikely to commit another crime. The court found that these two provisions were "very, very important in this case, since I now have the benefit of looking at the man that stands in front of me." Then in light of all the relevant factors and facts presented, Mitchell was resentenced to concurrent terms of 26 years' imprisonment on each of the three counts.

¶ 20 At a later hearing on Mitchell's motion to reconsider his sentence, the court expressly stated that it "did consider that I was seeing a different person tha[n] Judge Schultz saw when Judge Schultz sentenced him in 2004." The court further stated "[t]his was a violent crime. While the defendant had a history of drug crimes, he also had a history of violent crimes." The court denied Mitchell's motion.

¶ 21

ANALYSIS

¶ 22 Mitchell contends that in reducing his sentence by just four years, the trial court abused its discretion, specifically in failing to give adequate consideration to his extensive mitigating evidence—his having become a changed person since the original sentencing hearing. Mitchell argues that he presented a significantly more positive picture of his potential for rehabilitation and demonstrated that he had worked hard to improve himself. He points to his having (i) maintained employment in prison for the last seven years, (ii) developed maintenance and cooking skills, (iii) made plans to seek construction and maintenance work when released (iv) had only a few minor infractions in prison, (v) expressed regret for committing the crime, and (vi) decided to coach his nephews to do good with their lives. According to Mitchell, the 26-year

sentence does not adequately reflect the significant changes he has made in his life, and he asks this court to reduce his sentence to a term closer to 15 years, as defense counsel requested at the resentencing hearing.

¶ 23 The State responds that the trial court properly balanced Mitchell's mitigating evidence with the seriousness of the offenses, which included a gunshot injury to one of the victims. The State notes that at resentencing, the court expressly stated that it considered that it was seeing a different man than the one who was in court in 2004, but that the facts depicted a violent crime, and Mitchell had a lengthy criminal history which included violent crimes, and thus, the 26-year sentence was appropriate.

¶ 24 Aggravated vehicular hijacking, aggravated battery with a firearm, and armed robbery are all Class X felonies with a sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/18-4(a)(4), (b) (West 2002); 720 ILCS 5/12-4.2(a)(1), (b) (West 2002); 720 ILCS 5/18-2(a)(2), (b) (West 2002); 730 ILCS 5/5-8-1(a)(3) (West 2002). "It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The weight to be attributed to each factor in aggravation and mitigation depends on the whole circumstances of the case. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998).

¶ 25 The trial court possesses broad discretion in imposing a fair sentence, and where the sentence falls within the statutory range, we will not set it aside absent abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion occurs where a sentence (i) greatly varies considering the spirit and purpose of the law, or (ii) is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

We may not substitute our judgment for that of the sentencing court merely because we might weigh the competing considerations differently. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

¶ 26 The record before us demonstrates no abuse of discretion by the trial court in arriving at concurrent terms of 26-years. The trial court properly made an individualized inquiry, specifically noting that the sentencing statute required consideration of whether Mitchell's criminal conduct was a result of circumstances that were likely to recur, and whether Mitchell's attitude indicated that he was unlikely to commit another crime. The court expressly determined that these two provisions were "very, very important in this case, since I now have the benefit of looking at the man that stands in front of me." Further, at the hearing on Mitchell's motion to reconsider, the court stated that it "did consider that I was seeing a different person tha[n] Judge Schultz saw when Judge Schultz sentenced him in 2004." We find that these comments indicate the court considered Mitchell's mitigating evidence that he had become a changed person since his original sentencing hearing. It also indicates that the court recognized that Mitchell had put substantial effort and work into improving himself, substantially changing his life in the process. Based on this mitigating evidence, the trial court reduced Mitchell's sentence by four years.

¶ 27 The existence of mitigating factors requires neither the minimum sentence (*People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1994)) nor precludes the maximum (*People v. Flores*, 404 Ill. App. 3d 155, 158 (2010)). The record shows that, even with Mitchell's substantial life changes, the trial court expressed extreme concern with the "very violent crime committed by this defendant." The two most compelling factors in aggravation were that (i) "defendant's conduct both caused and threatened serious physical harm to all of the people involved," and (2) Mitchell had "a very, very serious criminal history," comprised of nine prior felony convictions.

The court placed heavy emphasis on Mitchell shooting at someone as an after-thought while attempting to flee, having just crashed the car he had stolen at gunpoint.

¶ 28 A sentencing court need not give a defendant's potential for rehabilitation greater weight than the seriousness of the offense. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001); see also *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53 (stating "the seriousness of an offense is considered the most important factor in determining a sentence"). The record demonstrates that the trial court balanced Mitchell's mitigating evidence against the seriousness of the offense, and concluded that the violent nature of the crime and Mitchell's lengthy criminal history, warranted a reduced, but still substantial, sentence.

¶ 29 We cannot say that the 26-year sentence is excessive or manifestly disproportionate to the nature of the offense or departs significantly from the intent and purpose of the law. *People v. Fern*, 189 Ill. 2d 48, 56 (1999).

¶ 30 While not the ruling Mitchell wanted, we are impressed with the life path he has set for himself during imprisonment, and hope he continues to adhere to it.

¶ 31 We affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.