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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Boone County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 10-CF-389
)	
TERRY J. JOHNSON,)	Honorable
)	Robert C. Tobin III,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it sentenced the defendant to eight years' imprisonment for retail theft.

¶ 2 After the defendant, Terry Johnson, pled guilty to retail theft (720 ILCS 5/16A-3(a) (West 2010)), the trial court sentenced him to 8 years' imprisonment. The defendant appeals from that order, arguing that the trial court's sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 17, 2010, at the Wal-Mart in Belvidere, Wal-Mart loss prevention personnel observed the defendant take a tag off of a watch and put it on his wrist. The defendant

and his wife then placed several items at the bottom of their cart and used bags to cover those items. The items included cosmetics such as face powder and lipstick, pharmaceuticals such as Prevacid, Nicorette gum, and Preparation H, as well as food products such as garlic salt and a six pack of beer. They then went through the checkout line, paid for some other items, and continued past the last point of sale without making any effort to pay for the items at the bottom of the cart. The defendant and his wife were then detained by Wal-Mart loss prevention personnel until the police arrived at the scene.

¶ 5 On October 8, 2010, the defendant was charged by indictment with one count of retail theft (720 ILCS 5/16A-3(a) (West 2010)).

¶ 6 On December 9, 2010, the defendant was arrested for driving under the influence (DUI) in Winnebago County. On December 31, 2011, the defendant was arrested for retail theft in Winnebago County. On February 20, 2012, the defendant was arrested for aggravated DUI in Winnebago County.

¶ 7 On September 27, 2012, the defendant entered into an agreement to plead guilty to the September 2010 retail theft in exchange for a one-year sentence. Under the agreement, the defendant was to serve his sentence concurrently with the February 2012 DUI conviction. However, the trial court found that the defendant committed his DUI offense while free on bond, which meant that the defendant was not eligible for concurrent sentencing. Further, the one-year agreement that had been negotiated was below the minimum sentence because the defendant was eligible for an extended term due to a prior conviction for dealing in stolen property. The State then offered the defendant a two-year sentence in exchange for a guilty plea to the September 2010 retail theft. After a continuance, the defendant stated that he no longer wished to plead guilty.

¶ 8 In October 2013, the parties began to enter into a second fully negotiated plea, and the defendant waived his right to a trial by jury. The negotiations broke down when the defendant rejected the State's offer of two years' imprisonment.

¶ 9 On March 31, 2014, the defendant entered an open plea of guilty to the September 2010 retail theft charge. The State offered, and the trial judge accepted, the defendant's testimony from his wife's trial as the factual basis for the plea. The judge advised the defendant that he could be sentenced to the maximum term of 10 years' imprisonment because of a 2005 conviction for dealing in stolen property. The trial judge then admonished the defendant of his trial rights and accepted the defendant's plea of guilty.

¶ 10 The presentence investigation report identified the defendant as a 52-year-old male born in Florida. He received his GED in 1980 and obtained an electrician certificate in 1989. The report identified numerous criminal offenses he had committed, with the first being for robbery in 1980. The report showed a history of theft-related convictions in three states, multiple convictions for DUI, as well as a drug conviction and a battery conviction. The defendant had two active warrants, one in Kane County and one in Florida. The defendant had been charged with two DUIs and a retail theft after his arrest for the instant case. The defendant entered a substance abuse program for alcoholism after his most recent DUI. The defendant did show steady employment between 1984 and 2010; however, he had been receiving \$200 a month in public aid since 2010.

¶ 11 The defendant's sentencing hearing was held on April 29, 2014. In aggravation, the State emphasized the defendant's criminal history. The State argued that, with his criminality spanning many years over three states, including several convictions for crimes committed after

the matter before the court, nothing in the defendant's prior testimony indicated his ability to be rehabilitated. The State argued that his sentence should be six years' imprisonment.

¶ 12 In mitigation, defense counsel asked the court to consider that the defendant's conduct neither caused nor threatened physical harm. Defense counsel noted the defendant's acceptance of responsibility, his medical ailments, his substance abuse problem, and the defendant's consistent attendance record at court. In allocution, the defendant apologized for his behavior and stated that he was, "totally ashamed and embarrassed" by his past. The defendant stated that he had received help with his alcohol problems and that alcohol was no longer a part of his life. Given his acceptance of responsibility and his medical issues, the defendant requested to be sentenced to two years' imprisonment with substance abuse treatment.

¶ 13 In sentencing the defendant, the trial court stated, "what I am going to do is [give] you credit for some of the mitigating factors there." The trial court then recognized that the nature of the offense was non-violent and that the defendant did not intend to cause harm to anyone. The trial court acknowledged the defendant's medical issues and gave him credit for accepting responsibility for the offense. However, the trial court stated that the defendant's record was "awful," and that a harsh sentence was necessary to deter others. After explaining that the applicable sentencing range was 2 to 10 years, the trial court found the defendant's criminal history warranted a 10-year sentence. The trial court further explained that, taking the mitigating factors into account, it would sentence the defendant to only eight years' imprisonment.

¶ 14 On August 13, 2014, the trial court conducted a hearing on the defendant's motion to reconsider the sentence. Defense counsel emphasized that the defendant had not committed any criminal offenses since 2012. The defense insisted that the mitigating factors, especially the defendant's health problems and the non-violent nature of the offense, did not warrant the eight-

year sentence. The State again emphasized the defendant's criminal history. The trial court again referred to the defendant's record as "awful" to the point of deserving a ten-year sentence. The court explained that this type of theft is harmful because it shifts the costs onto everyone else who shops at Wal-Mart. The trial court then explained that as it had already taken all of the mitigating factors into consideration, it was denying the motion to reconsider. The defendant thereafter filed a timely notice of appeal.

¶ 15

II. ANALYSIS

¶ 16 On appeal, the defendant argues that the trial court abused its discretion when it sentenced him to eight years' imprisonment for retail theft. The defendant emphasizes that he has not been charged or convicted of a crime since being offered a plea deal of two years' imprisonment and that he was present and respectful at all court dates. The defendant argues that the eight-year sentence was manifestly disproportionate to the nonviolent retail theft of merchandise worth \$456. The defendant emphasizes that the items stolen were mostly pharmaceutical items for his medical ailments. Further, the defendant argues that the trial court failed to consider his alcoholism as a mitigating factor. The defendant also argues that the trial court should not give harsh sentences as a deterrence to future criminals. The defendant requests that his sentence be reduced to six years or less.

¶ 17 "[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.*

at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id.* at 209.

¶ 18 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* There is a presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998).

¶ 19 The defendant pled guilty to the Class 3 felony of retail theft of more than \$150 of merchandise, which normally carries a sentencing range of two to five years. 720 ILCS 5/16A-3(a) (West 2010); 720 ILCS 5/16(a)-10(3) (West 2010); 730 ILCS 5/5-4.5-40(a) (West 2010). Because of the 2005 conviction for dealing in stolen property, the defendant was informed that he was eligible for an extended term of 2 to 10 years' imprisonment. 730 ILCS 5/5-8-2 (West 2010); 730 ILCS 5/5-4.5-40(a) (West 2010). Although the State offered the defendant a two-year plea deal, and recommended a six-year sentence at the sentencing hearing, the trial court was free to sentence the defendant beyond the State's recommendation. See *People v. Streit*, 142 Ill. 2d 13, 21-22 (judge is not bound by recommendation of the State).

¶ 20 The sentence was not manifestly disproportionate from the nature of the offense. The defendant argues that the degree of the harm caused and the seriousness of the offense do not warrant an eight-year sentence. The trial court expressly recognized the nonviolent nature of this crime and instead focused on the economic harm caused by retail theft. That no violence

occurred during the instant offense was an important factor for consideration, but the seriousness of the offense is among many considerations for the trial court to balance. *People v. Miller*, 254 Ill. App. 3d 997, 1017-19 (1993). The trial court was also entitled to consider the defendant's potential for rehabilitation which takes into account the defendant's prior theft-related offenses, violent offenses, and a history of DUI's. *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011).

¶ 21 The trial court properly considered all aggravating and mitigating factors put before it. The defendant argues that his alcoholism and efforts at rehabilitation were not properly considered by the trial court. However, there is no evidence in the record that the trial judge considered incompetent evidence, improper aggravating factors, or ignored pertinent mitigating factors. *People v. Perkins*, 408 Ill. App. 3d 752, 762-63 (2011). The trial court stated that the defendant, given his criminal history, deserved the maximum sentence. The trial court expressly lowered that sentence in light of the mitigating factors. The judge was not required to explicitly set forth every reason or the weight it gave each factor in fashioning the defendant's sentence. *People v. Kendall*, 213 Ill. App. 3d 782, 788 (1991). The defendant is correct that drug addiction is a mitigating factor and signs of rehabilitation should be considered by the court. However, the defendant's substance abuse problems and recent attempts at rehabilitation were put before the trial court, and we must presume that they were properly considered. *Payne*, 294 Ill. App. 3d at 260.

¶ 22 The defendant argues that the trial court overstated the defendant's criminal history and should not have considered deterrence to future criminals in its sentencing. The defendant's criminal history extends over 30 years and 3 states, and it also includes 3 charges in between the commission of the instant case and the defendant's guilty plea. The record supports a conclusion that the defendant's high rate of recidivism demanded a longer sentence. See *People v. Miller*,

286 Ill. App. 3d 297, 304 (1997). Further, it is well settled that a trial court does not abuse its discretion in considering deterrence to future criminals in its sentencing. *People v. Behl*, 279 Ill. App. 3d 1071, 1075-76 (1996).

¶ 23

III. CONCLUSION

¶ 24 For the reasons stated, the judgment of the circuit court of Boone County is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 25 Affirmed.