2016 IL App (3d) 140288-U

Order filed September 8, 2016
Modified upon denial of rehearing October 19, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit, Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0288
v.	)	Circuit No. 11-CF-625
	)	
DUSHAWN JOHNSON,	)	Honorable Clark Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Holdridge and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence was not excessive. Defendant's conviction for aggravated discharge of a firearm violated the one-act, one-crime rule.

¶ 2 Defendant, Dushawn Johnson, was convicted of first degree murder, attempted first degree murder, aggravated discharge of a firearm, and aggravated unlawful use of a weapon. On appeal, defendant argues: (1) his sentence was excessive; and (2) his conviction for aggravated

discharge of a firearm violated one-act, one-crime principles. We affirm defendant's sentence and vacate his conviction for aggravated discharge of a firearm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with: (1) two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2010)) for shooting Maria O'Connor; (2) one count of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2010)) for firing a handgun at Javon Saulsberry; (3) one count of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2010)) for firing a handgun at Jessie Dorsett; (4) one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) for "knowingly discharg[ing] a firearm in the direction of another" within 1000 feet of King Middle School; and (5) one count of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2010)).

¶ 5 Two trials were held. After the first trial, the jury found defendant guilty of aggravated unlawful use of a weapon but was unable to reach a verdict on the other charges. Defendant was retried on the remaining charges.

¶ 6 After the second trial, defendant was found guilty of one count of first degree murder and two counts of attempted first degree murder for firing a handgun multiple times from a moving vehicle on a street where Ashley Rutledge, Christina Magee, Jasmine Magee, Maria O'Connor, Javon Saulsberry, and Jesse Dorsett were walking. O'Connor was hit by a bullet and died as a result of her injuries. Rutledge, Christina, Jasmine, and O'Connor had been walking together. Saulsberry and Dorsett had been walking together, near to but separate from the four women. Police officers recovered seven spent shell casings from the scene of the shooting. Defendant was also found guilty of aggravated discharge of a firearm within 1000 feet of a school.

¶ 7 During closing argument, the prosecutor noted that O'Connor, Rutledge, Jasmine, and Christina were on the street when the shooting occurred, in addition to Dorsett and Saulsberry. Regarding the charge of aggravated discharge of a firearm within 1000 feet of a school, the prosecutor stated: "Again pretty self-explanatory, ladies and gentlemen. I'm not gonna go into that much detail about that."

¶ 8 Defendant filed a motion for a new trial. At the hearing on defendant's motion, the trial court asked the prosecutor if the State had a position regarding whether the aggravated discharge of a firearm count merged with the other offenses of which defendant was found guilty. The prosecutor replied:

> "I believe it does not because in addition to the–I mean Ms. O'Connor when she was walking down [the] street, she was with a group of other people and the firearm obviously was discharged in their direction because she was struck, but I think the aggravated discharge can apply to the other three individuals that she was walking with as well as Saulisberry [*sic*] and Dorsett."

¶ 9 A presentence investigation report (PSI) was filed. The PSI indicated that defendant declined to make a statement regarding his involvement in the present offense. Defendant had a prior juvenile conviction of aggravated battery to a school employee. Defendant reported that he was primarily raised by his mother but stayed with his father in Minneapolis for one to two months at a time throughout his childhood. Defendant also stayed with his great aunt in Minneapolis when he was in fifth and sixth grade and attended school in Minneapolis during that time. Defendant lived with his mother until he was 15 years old. Defendant's mother became homeless and he lived with a friend for awhile before moving to his own place. Defendant stated that he did not have a relationship with his father but saw him "every couple years." Defendant

also stated that he stayed with his father in Minnesota "for a couple of months" before he was arrested in connection with the instant case. Defendant was married and had a child.

¶ 10 Defendant reported that he first drank alcohol and smoked marijuana in 2009. Defendant stated that he did not often drink alcohol. Defendant smoked one ounce of marijuana per day until the day of his arrest. Defendant had previously been diagnosed with major depression. Defendant reported being sad while in jail but having no mental health issues. Defendant denied being affiliated with any gang but acknowledged that he spent a lot of time with members of the Harrison Gents and the Vice Lords. Defendant reported engaging in drug transactions with the gang members.

¶ 11 At defendant's sentencing hearing, Barbara Bowman, a mitigation specialist, testified that she was appointed as a mitigation expert in the instant case and had prepared a report. In preparing her report, Bowman spoke with defendant, defendant's mother, and defendant's grandmother. Defendant's grandmother told Bowman that defendant had psychological problems since childhood. Defendant's grandmother stated that when defendant was approximately five years old, he had visual and auditory hallucinations of a little boy who told defendant to hang himself. Defendant's grandmother told Bowman that on one occasion, defendant wrapped a venetian blind around his neck and jumped off a bed. Defendant was taken to the hospital for a psychiatric evaluation at that time.

¶ 12 Bowman examined defendant's school records, which showed that defendant had significant learning problems and received special education services. Defendant's intellectual cognitive functioning was found to be borderline to low average. Defendant's full scale intelligence quotient was 78. An evaluation in defendant's education records noted that defendant had been in at least 11 schools, had been homeless, had moved several times, and had

lived with various family members. The evaluation indicated that defendant saw things and heard sounds that were not there, threatened to hurt others, bullied others, ate things that were not food, drank alcoholic beverages, hit other adolescents, and was easily annoyed by others. He scored in the 99th percentile on the clinical maladjustment composite.

¶ 13 When Bowman interviewed defendant, he told her that he began drinking alcohol when he was 15 years old and began smoking marijuana when he was 11 years old. Defendant reported that he smoked marijuana seven times per day at the time of his arrest. Defendant told Bowman that drinking alcohol and smoking marijuana slowed his brain down, and he felt agitated and irritable when he was sober.

¶ 14 Defendant told Bowman that he was involved with a gang, and the gang asked him to do various things in exchange for marijuana. Defendant told Bowman that he was ordered by Barker to fire the gun. Defendant said that he did not want to fire the gun and deliberately misaimed to avoid hitting who he was supposed to shoot. Defendant said he did not want to kill anyone.

¶ 15 Defendant's grandmother indicated to Bowman that defendant was easily manipulated and had a strong desire to be liked by others.

¶ 16 Defendant gave a statement in allocution in which he said: "I am sad for the victim who lost her life and for the family who lost their loved one. I pray that they will find peace from this terrible tragedy."

¶ 17 After hearing arguments, the trial court sentenced defendant to 25 years' imprisonment for the first degree murder of O'Connor, plus a mandatory add-on of 25 years' imprisonment because defendant used a firearm in the commission of the offense. The trial court imposed sentences of 6 years' imprisonment plus mandatory 20-year add-ons for the attempted first

degree murders of Saulsberry and Dorsett. The trial court ordered that the attempted first degree murder sentences run concurrently with one another but noted that they were required by statute to run consecutively with the 50-year first degree murder sentence. The trial also sentenced defendant to eight years' imprisonment for aggravated discharge of a firearm and three years' imprisonment for aggravated unlawful use of a weapon, both to run concurrently with defendant's attempted first degree murder sentences. The trial court acknowledged that defendant would be required to serve at least 72 years of his sentence.

¶ 18 Addressing defendant, the trial court reasoned:

> "[W]hat's without dispute is that you took your arm out of that vehicle and you fired multiple rounds, broad daylight, many people in the area, and a young girl lost her life *** because she just happened to be standing there that day. It goes without saying that *** that type of behavior is *** totally unacceptable and has the effect of disrupting and damaging *** an entire community. That you took a life, you threatened other lives, and it is necessary that you be sentenced appropriately."

¶ 19 The trial court noted that there was not much room for discretion in sentencing defendant because the minimum aggregate sentence for defendant was 71 years' imprisonment, of which defendant would be required to serve 67 years. The trial court reasoned that defendant was "very very likely to die in prison and that is with the minimum mandatory sentence being applied, but that is the state of the law in Illinois." The court found that Bowman's report was largely corroborated by the PSI. The trial court noted that defendant was 17 years old at the time of the offense. The trial court stated that there was "no question that [defendant] did not have a traditional nurturing childhood." Regarding defendant's statement to Bowman that he did not

intend to kill anyone, the trial court stated: "[W]hat kind of credit can I give to that statement? That's an unsworn statement. It's not subject to cross-examination."

¶ 20 ANALYSIS

¶ 21 I. Sentence

¶ 22 A. Excessive Sentence Argument

¶ 23 On appeal, defendant argues that his sentence was excessive given the fact that he was 17 years old at the time of the offense and had a history of mental illness. Defendant acknowledges that his sentence was only five years longer than the mandatory minimum aggregate sentence for the offenses of which he was convicted. Defendant contends, however, that the additional five years' imprisonment was cruel and "defie[d] rational explanation" given that the trial court acknowledged that defendant would likely die in prison even if he were sentenced to the mandatory minimum.

¶ 24 The trial court has broad discretion in sentencing a criminal defendant, and its sentencing decision is granted great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). It is not our duty to reweigh the factors involved in the trial court's sentencing decision on review. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995).

¶ 25 "A sentence within the statutory limits will not be disturbed absent an abuse of discretion." *Id.* at 258. Here, defendant's sentence was within the statutory range. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 212 (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 26 The trial court's sentence of 72 years' imprisonment was not an abuse of discretion given the dangerous nature of defendant's conduct. "The most important sentencing factor is the seriousness of the offense." *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010). Here, defendant's action of firing a gun multiple times from a moving vehicle on a street where many individuals were walking resulted in one death and had the potential to result in many more. The record reveals that the court balanced the seriousness of defendant's conduct with the mitigating factors of defendant's youth, unstable upbringing, and history of mental illness. Lastly, we note defendant faced a maximum aggregate sentence of 125 years' imprisonment to life imprisonment. Under these circumstances, we find that the trial court's decision to impose a sentence five years above the minimum mandatory sentence was not " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense' " *Alexander*, 239 Ill. 2d at 212 (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 27 B. Petition for Rehearing

¶ 28 In a petition for rehearing, defendant complains that we "analyzed the sentence issue as a typical excessive sentence claim, under an abuse of discretion standard" and failed to address several United States Supreme Court cases cited in his brief which showed the "evolving law on the special concerns with juvenile offenders and sentences that are functionally life terms." These cases included: (1) *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (holding that imposition of the death penalty for juvenile offenders is unconstitutional); (2) *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding that the imposition of a life without parole sentence on a juvenile offender convicted of a crime other than homicide is unconstitutional); and (3) *Miller v. Alabama*, 567 U.S. ___, ___, 132 S. Ct. 2455, 2469 (2012) (holding that "the Eighth Amendment forbids a

sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders").

¶ 29 In his petition for rehearing, defendant also cited our supreme court's recent opinion in *People v. Reyes*, 2016 IL 119271. The *Reyes* defendant, who was 16 years old at the time of the offense, was convicted of one count of first degree murder and two counts of attempted first degree murder and sentenced to 97 years' imprisonment, the mandatory minimum aggregate sentence for his offenses. *Id.* ¶¶ 1-2. The *Reyes* court held that the defendant's sentence was unconstitutional under *Miller*, 567 U.S. ___, 132 S. Ct. 2455, because it amounted to a mandatory, *de facto* life without parole sentence. *Reyes*, 2016 IL 119271, ¶ 10. Here, defendant notes that, similar to the defendant in *Reyes*, he was 17 years old at the time of the offense and received a *de facto* life sentence of 76 years' imprisonment.

¶ 30 Defendant argues that in light of the "principles for juvenile sentencing" in *Graham*, *Roper*, *Miller*, and *Reyes*, "the imposition in this case of anything more than the minimum for each individual sentence—and the aggregate—should be found to involve an abuse of discretion by the circuit court."

¶ 31 Initially, we reject defendant's contention that we somehow erred in analyzing his sentencing argument as a "typical excessive sentence claim, under an abuse of discretion standard." In both his appellate brief and his petition for rehearing, the only relief defendant requests is that we find the additional five years beyond the mandatory minimum sentence to be an abuse of discretion and reduce his sentence accordingly under Illinois Supreme Court Rule 615(b)(4).

¶ 32 Turning to the cases relied upon by defendant, we find that neither *Roper*, *Graham*, *Miller*, nor *Reyes* addresses the issue defendant raises in the instant case. That is, none of the

cases relied upon by defendant address the issue of a trial court's discretion in sentencing a juvenile convicted of homicide to a sentence above the mandatory minimum where the mandatory minimum is a *de facto* life sentence. In *Miller* and *Reyes*, the courts did not hold that life without parole sentences for juveniles were always unconstitutional. Rather, it was the lack of judicial discretion to sentence a juvenile to anything other than life imprisonment that the *Miller* and *Reyes* courts found unconstitutional. *Miller*, 567 U.S. at ___, 132 S. Ct. at 2469; *Reyes*, 2016 IL 119271, ¶¶ 9-10.

¶ 33 Here, while defendant argues that his 76-year sentence is the "functional equivalent of a life term," the relief defendant requests—a 71-year sentence—is also the functional equivalent of a life sentence. Defendant does not challenge the trial court's lack of discretion to sentence him to anything other than a *de facto* life sentence but rather contends that the trial court abused its discretion in sentencing defendant to an additional five years above the mandatory minimum. However, if we assume that the mandatory minimum sentence of 71 years' imprisonment is a constitutional sentence in this case—a proposition that defendant does not challenge—we do not find that the sentence of 76 years' imprisonment imposed by the trial court constitutes an abuse of discretion given the nature of the offense and that the trial court considered the defendant's youth and history of mental illness.

¶ 34 We note that defense counsel has not argued that the sentencing scheme applied to defendant was unconstitutional under *Reyes* and *Miller*. Consequently, we do not decide that issue in this order. *In re Appointment of Special Prosecutor*, 253 Ill. App. 3d 218, 224 (1993) ("Courts, however, should not render advisory opinions *** in the absence of an actual controversy.") If defendant would like to challenge the constitutionality of the sentencing scheme in this case, he may attempt to do so in a postconviction petition.

¶ 35 II. One-Act, One-Crime

¶ 36 Additionally, defendant argues that his conviction for aggravated discharge of a firearm must be vacated under one-act, one-crime principles because it was based on the same physical act as his first degree murder and attempted murder convictions. We agree.

¶ 37 Defendant acknowledges that he forfeited this issue but asks that we review it under the second prong of the plain error doctrine. "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The second prong of the plain error doctrine is applicable where " ' "a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence" ' " *People v. Clark*, 2016 IL 118845, ¶ 42 (quoting *Thompson*, 238 Ill. 2d at 613, quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Our supreme court has held that "it is well established that a one-act, one-crime violation affects the integrity of the judicial process, thus satisfying the second prong of the plain-error test." *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009); *Clark*, 2016 IL 118845, ¶ 46 (recognizing that *Samantha V.*, 234 Ill. 2d 359, has not been overruled). Thus, the only question before us is whether a one-act, one-crime violation actually occurred.

¶ 38 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. Almond*, 2015 IL 113817, ¶ 47. In this context, "act" means "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977).

¶ 39 For multiple convictions to be sustained for separate but closely related acts, the indictment must indicate that the State intends to treat the conduct of the defendant as multiple

acts. *People v. Crespo*, 203 Ill. 2d 335, 345 (2001). In *Crespo*, the trial evidence showed that the defendant stabbed one victim three times in rapid succession. *Id*. at 338. The defendant was convicted of one count of armed violence and two counts of aggravated battery based on his conduct of stabbing the same victim. *Id*. at 337. The *Crespo* court held that the three separate stab wounds to the same victim could not sustain multiple convictions because the three stab wounds were not apportioned among the three offenses in the indictment. *Id.* at 343. The court also noted that the State's theory at trial, as evidenced by its closing argument, was that defendant's conduct constituted a single attack. *Id.* at 344.

¶ 40 Similarly, in *People v. Green*, 339 Ill. App. 3d 443 (2003), the defendant was convicted of two counts of attempted first degree murder and one count of aggravated discharge of a firearm based on evidence that the defendant reached his arm out of the window of a moving car and fired a pistol four to five times in the direction of four plainclothes police officers sitting in two unmarked cars. *Id.* at 446-47. On appeal, the court reversed defendant's conviction for aggravated discharge of a firearm on one-act, one-crime principles because the State did not apportion the defendant's separate but closely related acts of firing a pistol four to five times in the charging instrument. *Id.* at 459. Rather, the charging instrument merely stated that defendant " 'discharged a firearm.' " *Id.*

¶ 41 Additionally, in *People v. Amaya*, 321 Ill. App. 3d 923 (2001), the defendant was convicted of attempted murder, first degree murder, and aggravated discharge of a firearm based on evidence that the defendant fired gunshots at several people standing outside an apartment building, hitting three people. *Id.* at 924-25. At least one witness testified that he heard four to five gunshots. *Id.* at 930. The court vacated the defendant's conviction of aggravated discharge of a firearm, finding that the indictment failed to differentiate between the three gunshots that

actually struck the victims and other shots fired by defendant. *Id*. The *Amaya* court also noted that the prosecutor only discussed the three gunshots that struck the victims during closing argument and did not argue that some of the gunshots would be sufficient to sustain an aggravated discharge of a firearm conviction when separate shots would be sufficient to sustain murder and attempted murder convictions. *Id.*

¶ 42 Here, like in *Amaya* and *Green*, the trial evidence showed that defendant fired a series of several gunshots in the direction of multiple people. As in *Amaya*, *Green*, and *Crespo*, the indictment failed to apportion the various gunshots among the various charges. The prosecutor did not argue that some of the gunshots would be sufficient to sustain a conviction for aggravated battery while other gunshots would be sufficient to sustain convictions for first degree murder and attempted first degree murder. While the prosecutor noted that Rutledge, Christina, and Jasmine were also in the area where the gunshots were fired, the prosecutor did not argue that the aggravated discharge of a firearm charge was based on shots fired in their direction. The most the prosecutor said during closing arguments about the charge of aggravated discharge of a firearm within 1000 feet of a school was that it was "pretty self-explanatory."

¶ 43 Thus, we hold that defendant's conviction for aggravated discharge of a firearm within 1000 feet of a school was improper under one-act, one-crime principles because it was based on the same physical act as defendant's first degree murder and attempted first degree murder convictions. See *Crespo*, 203 Ill. 2d at 343; *Green*, 339 Ill. App. 3d at 459; *Amaya*, 321 Ill. App. 3d at 930. As violations of the one-act, one-crime rule constitute second-prong plain error (*Samantha V.*, 234 Ill. 2d at 378-79), we vacate defendant's conviction of aggravated discharge of a firearm within 1000 feet of a school.

¶ 44 In reaching our holding, we reject the State's reliance upon the prosecutor's statement that he did not believe the aggravated discharge of a firearm charge merged with the first degree murder charge because "the aggravated discharge [could] apply to the other three individuals that [O'Connor] was walking with as well as Saulisberry [*sic*] and Dorsett." This statement was made after the jury found defendant guilty and the State did not articulate this theory of the case at trial.

¶ 45 CONCLUSION

¶ 46 The judgment of the circuit court of Kankakee County is affirmed in part and vacated in part.

¶ 47 Affirmed in part and vacated in part.