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2016 IL App (3d) 150715-U

Order filed August 11, 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,)	
v.)	Appeal No. 3-15-0715
)	Circuit No. 11-CF-541
JOSEPH S. NITZ, JR.,)	Honorable
Defendant-Appellant.)	Clark E. Erickson, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice O'Brien and Justice Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant.
- ¶ 2 Defendant, Joseph S. Nitz, Jr., appeals from his sentence of 14 years' imprisonment for aggravated battery with a firearm. Defendant argues the trial court abused its discretion by placing undue weight on the seriousness of the harm and did not adequately consider mitigating factors. We affirm.

FACTS

¶ 3

¶ 4 Pursuant to an open plea, defendant plead guilty to aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)) for committing a battery by knowingly causing an injury to Michael Plein by shooting him in the face with a handgun. The State agreed to dismiss the charge for attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2010)).

¶ 5 The case proceeded to a sentencing hearing on the Class X felony, where defendant was eligible for a sentence between 6 and 30 years. 730 ILCS 5/5-4.5-25 (West 2010). The State and defendant presented conflicting theories of the incident.

¶ 6 Michael and Tracy Plein testified that in 2004, defendant purchased a home on contract from them. Tracy was defendant's sister. Defendant began to substantially fall behind on his payments starting in 2008, and by October 2011, defendant was in arrears by approximately \$26,000.

¶ 7 On the night of the incident, Michael and Tracy were driving home from Michael's office when they saw defendant's roommate on his motorcycle. Michael thought it would be a good time to talk to defendant about his financial situation without the roommate around. The couple drove to defendant's residence and parked on the road. Michael knocked on the door. Tracy remained in the car. A man, other than defendant, opened the door and said he had been renting from defendant. Michael became upset because defendant owed him money but had not given the Pleins any of the rent defendant received from the tenant. Michael did not see defendant at the home and drove away.

¶ 8 As they were driving away, Michael and Tracy saw defendant driving toward them a little bit down the road from defendant's residence. The Plein's vehicle and defendant's vehicle stopped side by side. Michael remained in the vehicle, but rolled down his window. He wanted

defendant to open his window so they could talk, but defendant would not do so. Michael began pounding on the car window. Defendant drove forward to his house, and Michael backed up his vehicle and stopped outside defendant's house. Michael had his black cell phone in a leather case in his hand.

¶ 9 Tracy said once they backed up to defendant's house, she looked out the passenger window and saw defendant holding a gun in her face. She rolled up the window and leaned back. Defendant kept the gun aimed at her and walked around the front of the vehicle to the driver's side and then focused on Michael. At that time, Michael was trying to dial 911. Defendant said to Michael, "mother fucker, you're going to fuck with me, I'm going to fuck with you." Defendant then said, "You want a fucking piece of this." He then pulled the trigger and shot Michael. Michael fell onto Tracy. He felt a ripping through the left side of his face.

¶ 10 Tracy grabbed for Michael's phone and said she was calling 911. Defendant reached into the window and grabbed the phone out of her hand and smashed it. Defendant asked Tracy "if [she] wanted a piece of this." Tracy then was able to get into the driver's seat and drove to her house, which was just down the road. Once she arrived, she called 911. Both Tracy and Michael testified that there were no weapons in their vehicle.

¶ 11 Michael underwent 14 hours of surgery that night and was in the hospital for 11 days. About 30 days later, he had a pulmonary embolism from his injuries and spent another seven days in intensive care. Michael's jawbone had shattered, and the shot "blew [his teeth] out" of the left side of his face. His teeth had not been repaired by the time of the sentencing hearing, and he was still receiving procedures to reconstruct his jaw. At the time of the sentencing hearing, Michael could only eat soft foods. Michael believed that the injuries affected his speech. He also had a six-inch wound in his shoulder from the gun blast. He lost a "[p]retty

good piece” of flesh from his shoulder. He had to undergo physical therapy. He had approximately 50 to 70% use of his shoulder at the time of sentencing. He was told that he would not regain much more use.

¶ 12 Tracy said Michael’s shoulder “looked like a bear bite, like it was just shredded.” His face “was just hanging there and he was bleeding.” Tracy was worried Michael was going to die and that defendant was going to follow them home. Tracy said that since the incident she has had “major anxiety.” She said that she “can even be sitting in the truck and [Michael has] got to get out to go do something and [she] find[s herself] scanning the area just to see who’s there, just to keep aware.” She said she felt less safe in their home since the incident and purchased a video camera security system.

¶ 13 Michael owned an air-conditioning, heating, and plumbing business, and prior to the incident he was an active participant in the physical labor portions of the business. He was unable to participate in the labor since the time he was shot. He had to be placed on disability where he earns about half of the income he was earning before the incident.

¶ 14 Defendant testified that he was not employed prior to the incident because he had neck and back injuries due to a car accident. He was trying to get disability. After defendant was injured, he started falling behind on the house payments to Michael and Tracy. He said that on the day of the incident, he saw Michael and Tracy’s vehicle as he was returning home. They pulled up next to each other on the street, Michael banged on the car, defendant rolled down his window, and then Michael hit defendant in the face. Michael was not trying to have a conversation, but just kept hitting defendant. The only thing Michael said was “do you want to kick my ass?” He kept swinging through the window and the sunroof and tried to punch defendant at least 25 times. Defendant said Tracy tried to stop Michael. Defendant had lumps

on the back of his head and his nose was bleeding. Defendant's booking photograph from that evening did not depict any marks or dried blood on defendant's face.

¶ 15 According to defendant, he rolled the window back up, and Michael pounded on it. Defendant said he drove forward to go home and call the police. He saw Michael reverse his vehicle to follow him. Michael was driving fast. Defendant was very afraid because he thought Michael would continue to beat him. Defendant entered his house, grabbed his cell phone and gun, and then went back outside. He said he did not see any weapons in the Plein's vehicle before grabbing his gun.

¶ 16 Defendant said he went around the Plein's vehicle to the driver's side. Defendant said Michael rolled down the window and "flung the door open and [defendant saw] a black 12-gauge shotgun barrel in [Michael's] hand." Defendant stated:

"I asked him, I said, what are you doing? Are you getting out? What are you doing? And he looked back at Tracy, and Tracy backed up against the windshield backwards. And she was looking down, looking at him, looking at the gun, looking at him. He looked back at me and he come up like this (indicating) and my gun went off. It hit him in the arm, in the face, it spun him back around into the van."

Defendant said Michael was trying to give Tracy the gun and she kept hesitating and reaching down and he thought she was going to pick it up. Defendant then pointed the gun at Tracy and said, "You want some of this, too, bitch[?]"

¶ 17 Defendant said he was sorry. He did not have any hard feelings toward Michael. He stated, "I hope he heals up and they can get along and I hope everything is fine for them. I was trying to give the house back. I wanted to move out. I was coming home that day to ask my

roommate to move out.” Defendant said he wished he would have just stayed in the house that day instead of going outside. The whole incident was terrible for his family. Defendant stated he had been in jail for 18 months and completed an anger management course.

¶ 18 Defense counsel introduced 15 character reference letters and a group of certificates for defendant. Defense counsel pointed out defendant had no criminal history and would be in a good position to start his life over after incarceration. Defense counsel indicated defendant had accepted responsibility for his actions and “said that he was very sorry for the harm that he did, things happened very rapidly. He has no animosity, no hard feelings towards Mr. Plein or his sister.” Defense counsel also stated that other factors in mitigation were provocation, the conduct was a result of circumstances unlikely to recur and defendant’s attitude and character showed that he was unlikely to commit another crime.

¶ 19 Defense counsel requested the court to sentence defendant to the minimum sentence of six years. The State recommended that the court sentence defendant to 23 years in the Department of Corrections (DOC).

¶ 20 The court said: “Certainly the Court is required to consider the contents of the pre-sentence investigation, the testimony and evidence at the sentencing hearing, factors in aggravation and mitigation, the circumstances of the offense itself.” The court went through the factors in aggravation and mitigation.

¶ 21 Regarding the factor in aggravation that defendant’s conduct caused or threatened serious harm, the court said:

“I would agree with [the State] that the defendant’s crime against Michael Plein is contained within the offense itself, but I think the evidence is clear from the sentencing hearing that the defendant did threaten Tracy Plein with serious harm.

And the residual effects of that were clear when she testified. She testified that if she still, you know, a year and a half later is suffering anxiety, not when she's in her home, perhaps—although she said she testified they had taken some precautions, but certainly when she is outside her home, she looks around. This is certainly—having experienced what she experienced, it would not be inconceivable at all that she would suffer from PTSD [Post Traumatic Stress Disorder]. I mean, she's a passenger in a vehicle in which the driver is shot at point blank range in the face with a shotgun. And the photographs certainly display the effects of that.”

¶ 22 The court noted defendant did not have a criminal history. The court further stated that deterrence was a factor in aggravation, stating:

“[F]or the defendant to access the firearm in his residence and to escalate what was occurring that day in the manner that he did, does require that the Court take into consideration the factor of deterrence because too many people have easy access to firearms that could be introduced and end up escalating what otherwise would be an ugly intrafamily argument into something very deadly which is what happened here.”

¶ 23 For the factors in mitigation, the court noted that defendant acted under strong provocation, but disagreed with the defense that there were substantial grounds tending to excuse or justify defendant's criminal conduct, as he did not believe defendant was justified in walking around the car on the street with a loaded gun. The court said the character and attitude of defendant did show that he would be unlikely to commit another crime.

¶ 24 On the mitigating factor of remorse, the court said to defendant:

“[Y]ou expressed sorrow that this had happened, but there was something of a hedge there. You know, in fact, you said that you were very sorry and that you had no hard feelings.

Well, it’s Michael Plein and Tracy Plein. If anybody has hard feelings here, it’s them. They’re the ones that will have to ask themselves if they can forgive. They’re the ones that were injured. You’re in custody. You’re suffering an injury to that extent brought about by what you did. So I’m not sure that’s a complete acceptance of responsibility when you say I don’t have any hard feelings towards the victim.

Perhaps if you would ask for their forgiveness and apologized, it would have had a greater ring of true acceptance of responsibility, but that’s not quite what I heard. And that’s kind of in line with your testimony.”

¶ 25 The court further stated it was not going to follow either the State’s recommendation or defendant’s recommendation, stating:

“I do have to take into consideration your potential for rehabilitation. That’s a requirement in every sentencing hearing as well. And for a person who was able to live sometimes under trying circumstances, a life that—in which you were law abiding, I think that to serve a sentence of approximately 20 years in prison would in your situation be inconsistent with one of the purposes of sentences which is to rehabilitate and to return offenders to society. You’ve demonstrated that by taking those courses at [the jail] that you’re willing to study, willing to better yourself. ***

But, again, I think a sentence in excess of the minimum sentence is necessary considering the seriousness [of] this crime. Yes, there was the confrontation in the road, but Michael Plein did not deserve to be shot in the face for confronting you about the circumstances of your contract with him.”

¶ 26 The court sentenced defendant to serve 14 years in the DOC. Defendant filed a motion to reconsider, which was denied.

¶ 27 ANALYSIS

¶ 28 On appeal, defendant argues his 14-year sentence should be reduced because the trial court placed undue weight on the seriousness of the harm that defendant threatened to Tracy and did not adequately consider the factors in mitigation. The State submits the trial court adequately considered and properly balanced all the factors in mitigation and aggravation before announcing the court’s sentencing decision.

¶ 29 A trial judge’s sentencing decisions are given great deference and will not be altered by a reviewing court absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796, 801 (2007). A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of the law. *People v. Alexander*, 239 Ill. 2d 205, 215 (2010). Because the trial court sees firsthand the defendant’s credibility, demeanor, moral character, mentality, social environment, habits, and age and is able to consider these factors over the course of the case, it is in a better position than the court of review to determine the punishment to be imposed. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The trial court must “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). A court cannot ignore a pertinent mitigating factor (*People v. Burnette*, 325 Ill.

App. 3d 792, 808-09 (2001)), but the weight to be given each factor depends on the facts and circumstances of each case. *People v. Gross*, 265 Ill. App. 3d 74, 80 (1994). When mitigating evidence is before the trial court, it is assumed that the court considered it, unless the record indicates otherwise. *People v. Burton*, 184 Ill. 2d 1, 34 (1998).

¶ 30 Defendant’s argument on appeal appears to invite this court to reweigh the sentencing factors. We decline to do so. The court carefully reviewed each of the factors in mitigation and aggravation together with the other evidence and exhibits offered at the sentencing hearing. The court then balanced each of the factors based on the facts and circumstances of the case before announcing the sentence in this case.

¶ 31 Importantly, the 14-year sentence defendant received was well within the range of 6 to 30 years’ imprisonment for aggravated battery with a firearm. 720 ILCS 5/12-3.05(e)(1); 730 ILCS 5/5-4.5-25 (West 2010). Therefore, we do not conclude that the sentence imposed by the trial court 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 215; see *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 32 In coming to this conclusion, we reject defendant’s assertions that the court overstated the effect of the harm to Tracy and that the court’s comments that defendant “hedged” his apology “demonstrate that it discounted the significant mitigation presented.” The judge was present at the sentencing hearing and was able to observe the demeanor of both Tracy and defendant as they gave their testimony. As such, the trial court was in the best position to weigh the evidence with the circumstances of the case, and we are not going to disturb the court’s findings. As stated above, the court expressly considered each of the mitigating factors, including that defendant did not have a criminal history, accepted responsibility by pleading guilty,

demonstrated a willingness to better himself, and that the circumstances were unlikely to recur. Though defendant may believe these mitigating factors compelled a lower sentence, the court was not required to agree. The sentence imposed did not result from an abuse of discretion, but rather represents a measured, well-reasoned decision by the trial court.

¶ 33

CONCLUSION

¶ 34

The judgment of the circuit court of Kankakee County is affirmed.

¶ 35

Affirmed.