2017 IL App (1st) 121882-UB

THIRD DIVISION
March 8, 2017

No. 1-12-1882

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. 11 CR 288
	)	
LARRY LESTER,	)	The Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶1 *Held*: The evidence was sufficient to sustain defendant's conviction for being an armed habitual criminal where his prior convictions had not been vacated at the time he possessed a firearm. Additionally, the record did not show that the trial court considered improper factors at sentencing. Furthermore, any error did not lead to an increased sentence and the trial court did not otherwise abuse its discretion. Finally, the fines and fees order must be modified.

¶ 2 Following a bench trial, defendant Larry Lester was found guilty of being an armed habitual criminal and was sentenced to 12 years in prison. On appeal, defendant asserts the evidence was insufficient to sustain his conviction because his prior conviction for Class 4 aggravated unlawful use of a weapon (AUUW) (01 CR 11627), which was used to satisfy an

element of the armed habitual criminal offense, is void pursuant to *People v. Aguilar*, 2013 IL 112116. Defendant also challenges his sentence and certain monetary impositions.

¶ 3 Initially, we agreed with defendant's former contention, vacated his armed habitual criminal conviction, and reversed and remanded for the trial court to enter a sentence on defendant's previously unsentenced conviction for unlawful use of a weapon by a felon (UUWF). The State then filed a petition for leave to appeal, however, and our supreme court entered a supervisory order directing us to vacate our judgment and reconsider our decision in light of *People v. McFadden*, 2016 IL 117424. Having done so, we now affirm the trial court's judgment but modify the fines and fees order.

¶ 4 I. BACKGROUND

¶ 5 On December 15, 2010, two police officers pulled over the vehicle in which defendant was a passenger because the driver was talking on a cell phone. One of the officers then saw defendant place a gun in the driver's seatback pocket. Consequently, defendant was charged with being an armed habitual criminal in that he knowingly or intentionally possessed a firearm after having been previously convicted of AUUW and aggravated discharge of a firearm. He was also charged with two counts of UUWF and two counts of AUUW based on the same prior aggravated discharge of a firearm conviction. Following a bench trial, the court found defendant guilty of all counts and sentenced him to 12 years' imprisonment for being an armed habitual criminal.

¶ 6 II. ANALYSIS

¶ 7 A. Sufficiency of the Evidence

¶ 8 On appeal, defendant first asserts the evidence was insufficient to sustain his conviction for being an armed habitual criminal. Section 24-1.7(a) of the Criminal Code, which defines the

offense, requires that the accused receive, possess, transfer or sell a firearm after being convicted of two qualifying felonies. 720 ILCS 5/24-1.7(a) (West 2010). As stated, defendant's convictions for aggravated discharge of a firearm and AUUW served as those qualifying felonies. Defendant asserts, however, that his prior AUUW conviction is invalid in light of recent second amendment jurisprudence, namely *Aguilar*. Specifically, *Aguilar* held that the relevant subsection of the AUUW statute (720 ILCS 5/24-1.6(a)(1), (a)(3) (West 2000)) was facially unconstitutional. *Aguilar*, 2013 IL 112116, ¶ 22. Thus, defendant argues that his invalid AUUW conviction did not satisfy a prior felony required by the armed habitual criminal statute.

¶ 9 In *McFadden*, however, our supreme court rejected a similar argument that the evidence was insufficient to sustain the defendant's UUWF conviction because that conviction was based on a prior felony conviction under the now unconstitutional AUUW statute. *People v. McFadden*, 2016 IL 117424, ¶ 8. Specifically, that court found that until a prior conviction is vacated, the UUWF statute makes it unlawful for a defendant to possess a firearm. *Id*. ¶¶ 31, 37. Thus, the prior AUUW conviction properly served as the predicate felony conviction under the UUWF offense. *Id*. ¶ 37.

¶ 10 Following *McFadden*, the appellate court determined that the supreme court's reasoning applies with equal force to the armed habitual criminal offense. *People v. Perkins*, 2016 IL App (1st) 150889, ¶¶ 6-10, *appeal denied* No. 121407 (Nov. 23, 2016)). Because that defendant's prior AUUW conviction had not been vacated at the time he possessed a firearm, it properly served as a predicate offense for his armed habitual criminal conviction. *Id*. ¶ 10. We find *Perkins* to be well-reasoned.

¶ 11 Here, defendant's prior AUUW conviction remained intact when he possessed a firearm on December 15, 2010. Accordingly, the evidence was sufficient to sustain his conviction.

¶ 12 B. Sentencing

¶ 13 Next, defendant asserts the trial court relied on an improper sentencing factor, his recidivism, in imposing a 12-year prison term because his recidivism was already used to enhance the applicable sentencing range. Specifically, defendant asserts that after his AUUW conviction and aggravated discharge of a firearm convictions were used to satisfy the elements of his armed habitual criminal conviction, the trial court used those same prior convictions as aggravating sentencing factors.

¶ 14 We review *de novo* whether a trial court relied on an improper factor at sentencing. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. A presumption exists, however, that the court based the defendant's sentence on appropriate legal reasoning. *Id*. In addition, our supreme court has held that where a factor is implicit in the offense for which the defendant was convicted, the trial court generally cannot consider that same factor in aggravation at sentencing, unless the legislature clearly intended to allow the court to do so. *People v. Ferguson*, 132 Ill. 2d 86, 97 (1989). The supreme court has also stated, however, that this rule would not be rigidly applied, as doing so would force judges to ignore relevant sentencing factors. *People v. Thomas*, 171 Ill. 2d 207, 227 (1996). Furthermore, reliance on an improper factor does not necessitate resentencing where the reviewing court can determine from the record that the weight placed on the improper factor was so insignificant that it did not lead to an increased sentence. *Ferguson*, 132 Ill. 2d at 99.

¶ 15 At sentencing, the State argued that defendant had a long history with guns. The court stated as follows:

> "You can't be around guns. That message has been attempted to be given to you in the past based on everything that I heard on your background. You know you can't be around guns but yet you still are."

These comments do not show that a double enhancement occurred, however.

¶ 16 Aside from his AUUW and aggravate discharge of a firearm convictions, defendant had prior convictions for aggravated battery of a police officer, resisting a police officer, and unlawful use of a weapon. Thus, the two convictions used to satisfy the armed habitual criminal offense were not the only offenses involving weapons. Furthermore, the court's comment reflected that it was considering defendant's possession of a gun in light of defendant's criminal history as a whole. *Thomas*, 171 Ill. 2d at 229 (finding no double enhancement occurred where the legislature enhanced the defendant's punishment based on two prior convictions and where the trial court subsequently considered those prior convictions as part of his entire criminal history in aggravation).

¶ 17 Even assuming the court improperly considered defendant's AUUW and aggravated discharge of a firearm convictions in aggravation, the record shows that the court did not place significant weight on those specific convictions, as opposed to defendant's entire criminal history. Moreover, the imposition of a 12-year sentence does not show the court failed to consider his strong ties to the community, his educational and vocational accomplishments and the financial impact of a lengthy incarceration on the State.

¶ 18 Sentencing factors include the circumstances of the defendant's case as well as his credibility, general moral character, mentality, social environment, age and potential for rehabilitation. *People v. Malcolm*, 2015 IL App (1st) 133406, ¶ 64. Courts must also consider the financial costs of incarceration. 730 ILCS 5/5-4-1(a) (3) (West 2010). A trial court is not

required, however, to specify its reasoning for the sentence imposed and, absent evidence to the contrary, we presume the court performed its obligations. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 22. Furthermore, a sentence that falls within statutory guidelines will not be disturbed absent an abuse of discretion, which will not be found merely because a reviewing court may have weighed sentencing factors differently. *People v. Johnson*, 2016 IL App (4th) 150004, ¶ 84.

¶ 19 Here, defendant was convicted of a Class X felony (720 ILCS 5/24-1.7 (West 2010)), which is subject to a sentence of between 6 and 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2010)). While defendant argues that his 12-year sentence is double the statutory minimum, he ignores that his sentence is 18 years below the maximum sentence permitted. We also note that the State had requested a sentence in excess of 15 years. Contrary to defendant's suggestion, the record shows the trial court properly considered relevant sentencing factors, regardless of whether the court expressly addressed every factor.

¶ 20 The trial court stated that it had considered the parties' arguments. While defense counsel argued that defendant had contributed to his community, the State argued that defendant had no apparent childhood difficulties that would lead to criminal life style. The court also stated that it had considered the facts and circumstances of the case, the statutory sentencing factors, and the presentence investigative report (PSI). Specifically, the PSI showed that defendant was 29 and unemployed on the day of the offense. In addition, he had acquired his GED, as well as an associate's degree in food service and sanitation, and he denied using illicit substances or belonging to a gang. Furthermore, the court said it had considered letters from defendant's family and members of the community. Those letters represented that defendant mentored minors, contributed to the community, helped his sister with her homework and mowed his neighbor's lawn.

¶ 21 In light of the foregoing, the trial court found that at 30 years of age, defendant should be more mature than he had been in his youth. While defendant did a good job of being involved with his family and his community, this was inconsistent with being a "gun toting criminal." As stated, the court found defendant continued to be around guns even though he knew he could not be. Additionally, the court found that while defendant would not be incarcerated for the rest of his life, the court had to impose a punishment and defendant could change lives even in prison. The record before us forecloses a determination that the court abused its discretion in sentencing defendant to 12 years in prison.

¶ 22 C. FINES AND FEES

¶ 23 Finally, defendant asserts and the State concedes that the $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2010)), $50 Quasi-Criminal Complaint/Conviction fee (Clerk) (705 ILCS 105/27.2a (w)(2)(B) (West 2010)) and $25 Quasi-Criminal Complaint/Conviction fee (Local Prosecutor) (55 ILCS 5/4-2002.1(b) (West 2010)) must be vacated. In addition, the State concedes that the $20 Violent Crime Victims Assistance Fund (VCVA) charge (725 ILCS 240/10(c) (West 2010)) should be vacated and replaced with the $8 VCVA charge (725 ILCS 240/10(b) (West 2010)). The State further concedes that defendant is entitled to offset the $15 State Police Operations fee (705 ILCS 105/27.3a-1.5 (West 2010)), $10 Mental Health Court charge (55 ILCS 5/5-1101(d-5) (West 2010)), $5 Youth Diversion/Peer Court charge (55 ILCS 5/5-1101(e) (West 2010)), $5 Drug Court charge (55 ILCS 5/5-1101(f) (West 2010)) and $30 Children's Advocacy charge (55 ILCS 5/5-1101(f-5) (West 2010)) with $5-per-day presentence incarceration credit (725 ILCS 5/110-14(a) (West 2010)). Although not raised below, we modify the fines and fees order to reflect these corrections. See *People v. Reed*, 2016 IL App (1st)

140498, ¶ 13 (finding that while improper fees are not void, the State waived the defendant's forfeiture of a challenge to a fee).

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, we modify the fines and fees order but otherwise affirm the trial court's judgment.

¶ 26 Affirmed as modified.