FOURTH DIVISION
July 13, 2017

No. 1-14-2447

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. 13 CR 17140
	)	
BRIAN BLUE,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Affirmed. Defendant's eight-year sentence for delivery of a controlled substance was not excessive.

¶ 2 Following a bench trial, defendant Brian Blue was convicted of one count of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)) and sentenced to eight years' imprisonment. On appeal, defendant argues his sentence is excessive. We affirm.

¶ 3 Defendant was charged by indictment with one count of delivery of a controlled substance (more than one gram but less than 15 grams of heroin) (720 ILCS 570/401(c)(1) (West 2012)) and one count of delivery of a controlled substance (more than one gram but less than 15 grams of heroin) within 1000 feet of a school (720 ILCS 570/401(c)(1), 407(b)(1) (West 2012)) stemming from an undercover narcotics purchase by Chicago police officers.

¶ 4 At trial, Chicago police officer Joseph Papke testified that, on August 16, 2013, around 4:00 p.m., he was working undercover conducting narcotics purchases in the area of 4245 West Madison Street. Papke encountered a man, who approached him saying "money bags." Papke testified that "money bags" refers to packaging used in heroin sales, plastic bags with dollar sign logos. Papke told the man, whom he identified in court as defendant, that he wanted "four," meaning four $10 bags of heroin. Defendant then took a small sandwich bag from his pocket and counted out four individual packets. In exchange for the packets, Papke handed defendant $40, consisting of two $10 bills and one $20 bill, which had serial numbers that had been prerecorded. He then placed the packets into his pocket and walked to his vehicle, arriving about two minutes later.

¶ 5 Papke notified his team members that he had engaged in a positive narcotics purchase and gave a description of defendant. Once defendant was detained about a block south from where the transaction took place, Papke arrived and identified defendant as the individual who had just sold him narcotics. He then processed the arrest and inventoried the four packets.

¶ 6 Chicago police officer William Lepine testified he was working with Papke on August 16, 2013, around 4:05 p.m., as a surveillance officer in the vicinity of Kildare and Madison. Lepine saw Papke get out of his vehicle. Papke was approached by a man, whom Lepine

identified in court as defendant. Defendant appeared to engage in conversation with Papke. Lepine then saw defendant reach out to Papke, Papke reach out to defendant, and Papke return to his vehicle. Lepine continued to surveil defendant and radioed for more enforcement officers. These officers approached defendant, who began to flee southbound. Defendant was finally apprehended after a foot chase by Officer Lee. Papke identified defendant as the individual who had sold him drugs.

¶ 7 Chicago police officer Durand Lee testified that, on August 16, 2013, around 4:05 p.m., he was working as an enforcement officer in the area of Kildare and Madison. Lee saw Papke and defendant, whom Lee identified in court, engage in a hand-to-hand transaction and defendant walk away. Following a radio transmission, Lee approached defendant in the area of 4245 West Madison Street but defendant began to run. Lee finally caught defendant at 4231 West Monroe and placed him into custody. He searched defendant, recovering the $40 in prerecorded bills as well as additional money.

¶ 8 The parties stipulated that the four packets that were inventoried tested positive for heroin and the total weight was 1.3 grams.

¶ 9 Riccardo Erbacci, an investigator for the Cook County State's Attorney's Office, testified the total distance between 4245 West Madison Street and the Legal Prep Charter Academy at 4319 West Washington is 769 feet. Samuel Finkelstein testified that he is employed by Legal Prep Charter Academy and, on August 16, 2013, it was operating as a school.

¶ 10 Defendant presented no evidence. The trial court found defendant guilty of delivery of a controlled substance. But the trial court found defendant not guilty of delivery of a controlled substance within 1000 feet of a school, because the State failed to prove beyond a reasonable

doubt that the transaction occurred within 1000 feet of a school. After defendant's written motion to reconsider or for a new trial was denied, the trial court proceeded to sentencing.

¶ 11 At the sentencing hearing, Officer Miguel Vera testified in aggravation. Vera stated that, on February 20, 2013, he was working in the vicinity of 4247 West Madison and saw defendant, whom he identified in court, being detained. Defendant pushed away the arresting officer, and Vera tackled defendant to the ground. When they were on the ground, defendant elbowed Vera in the chest, and Vera struck him in the head. After defendant was placed in custody, the police found nine Ziploc baggies of heroin and $127 on him. This incident took place within 1000 feet of Macedonia Missionary, a church located at 4244 West Madison Street. Defendant was ultimately charged with possession of heroin, battery, and resisting arrest. But the charges were *nolle prossed* after defendant's motion to quash arrest and suppress evidence was granted.

¶ 12 The State also called Officer Masters, who testified that, on January 8, 2012, while working in the vicinity of 4312 West Monroe Street, he saw defendant engage in a hand-to-hand transaction with another individual. Masters stopped defendant for a field interview, and defendant stated that he had a few bags of "weed" on him. A search revealed a plastic bag full of nine smaller bags of suspect cannabis and $150. This incident occurred within 1000 feet of the Hefferan School, located at 4400 West Monroe Street.

¶ 13 Masters further testified that, on April 24, 2011, he was working in the area of 4202 West Madison Street when he saw defendant loitering in the area. Defendant stated that he was "not doing anything" but admitted to having a couple bags of "weed" in his pocket. A search recovered five bags of cannabis and around $290. This incident took place about a half block away from 4245 West Madison Street, the location of the incident in the instant case. When

defendant was brought to the police station, he was involved in a fight with other individuals in a holding room. Defendant was separated from the other individuals but became combative with the police officers and was placed into lockup.

¶ 14 The State argued in aggravation, among other things, that defendant's criminal history, which included one felony conviction and four misdemeanor convictions, required a significant sentence. It also noted that many of the previous drug-related incidents occurred in the 11th Police District, where the instant offense occurred. Specifically, the State recounted defendant's 2011 felony conviction for possession of a controlled substance resulting in probation, which was terminated unsatisfactorily because of a 2012 misdemeanor conviction (amended from a felony) for delivery of cannabis, for which defendant was sentenced to 150 days in the Cook County Department of Corrections (CCDOC). The State further noted another cannabis conviction, as well as convictions for trespass to residence, gambling, and soliciting unlawful business. The State asked for an extended term sentence in excess of 15 years in prison.

¶ 15 In mitigation, defense counsel argued that the prior incidents where the charges were dropped or reduced are unclear and may have been the result of poor evidence. He also argued there is ample room for rehabilitation and asked for a term of four years' imprisonment with a recommendation of boot camp.

¶ 16 The trial court imposed an eight-year sentence in the Illinois Department of Corrections. It remarked that defendant was "an independent pharmaceutical salesman at the street level," working the streets "time and time again." It concluded,

> "But the bottom line, when I started I talked about one factor that I consider in aggravation or a sentencing factor and that's incapacitation, and

> frankly, if I put you in jail, you can't be selling the dope that you sell on a regular basis. I don't think an extended term is warranted. I believe that is excessive. You do have a background and you are involved in a criminal trade, there's no doubt in my mind. I don't think that would be fair to you, but I do need to send a message not only to you but to other people that want to stand on the street corner and distribute poison to people that can't control their own habits, that this can't be tolerated, that something has to change."

¶ 17 Defendant's written motion to reconsider sentence was denied. He filed a timely notice of appeal.

¶ 18 On appeal, defendant argues his sentence is excessive given his minimal criminal history and potential for rehabilitation, is manifestly disproportionate to the nature of the offense, and results in an unreasonable strain on taxpayer dollars.

¶ 19 The trial court has broad discretion in imposing an appropriate sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court's sentencing decision is entitled to great deference. *Id*. The trial court is in the superior position to determine an appropriate sentence because of its personal observation of defendant and the proceedings. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213. When mitigating evidence is presented to the trial court, we presume that the trial court considered that evidence, absent some indication to the contrary, other than the sentence itself. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19. As long as a sentence falls within the range provided by statute, it will not be altered absent an abuse of discretion. *People v. Jones*, 168 Ill.

2d 367, 373-74 (1995). An abuse of discretion occurs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey,* 193 Ill. 2d at 210; see also *People v. Fern,* 189 Ill. 2d 48, 54 (1999).

¶ 20 Delivery of more than one gram but less than 15 grams of heroin is a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2012). Class 1 felonies carry a sentencing range of 4 to 15 years. See 730 ILCS 5/5-4.5-30(a) (West 2010). Because the eight-year sentence falls within this statutory range, our inquiry is limited to whether the trial court abused its discretion in the sentence it imposed. *Jones*, 168 Ill. 2d at 373-74.

¶ 21 Defendant argues that his sentence is disproportionate to the nature of the offense, because he only sold $40 worth of heroin. He also argues that because no drugs or weapons were found on him during a custodial search, he was eligible for probation and the term of imprisonment was not warranted. But there is no indication in the record the trial court failed to consider these factors. Rather, the trial court considered defendant's role to be that of "an independent pharmaceutical salesman at the street level." The court noted that, although the amounts of money recovered from defendant during his arrests were "not extraordinary," they indicated defendant was "working the streets." The trial court stated sentencing had "to be commensurate with the crime that is committed" and that it took "all matters, both statutory and nonstatutory in mitigation." Indeed, the trial court specifically declined to impose an extended-term sentence based on the facts of the case, noting that it would be "unwarranted," "excessive," and not "fair" to defendant. The trial court adequately considered the nature of the offense.

¶ 22 Defendant also argues that his sentence was excessive given his minimal criminal background. According to the presentence investigation report, which the trial court stated it had

considered, defendant had been convicted of three prior drug offenses. In 2011, defendant had a felony possession of a controlled substance conviction resulting in 18 months TASC probation. The probation was terminated unsatisfactorily when, while on probation, defendant was charged with a felony cannabis offense that was later amended to misdemeanor charge. He served 150 days in the CCDOC for this offense. Defendant had misdemeanor convictions for cannabis possession in 2011 and criminal trespass to residence in 2012, for which he was sentenced to two days and to three days in the CCDOC, respectively. He also had misdemeanor convictions for gambling (2010) and soliciting unlawful business (2009), for which he received supervision. Lastly, the trial court heard testimony from officers Vera and Masters regarding drug-related incidents involving defendant in the 11th Police District, the same area where the offense here occurred. See *People v. La Pointe*, 88 Ill. 2d 482, 498–99 (1981) (sentencing court may rely on evidence of defendant's other criminal activity, though not resulting in conviction, if evidence is relevant and accurate); *People v. Minter*, 2015 IL App (1st) 120958, ¶ 148 (same).

¶ 23 Given this background, the trial court could have properly rejected defendant's argument that his criminal history is "minimal." While the court remarked to defendant that "[y]ou have one felony conviction. You don't have several," it further found "[y]ou do have a background and you are involved in a criminal trade." It noted that defendant "repeatedly [does] this, albeit sometimes it ends up as a misdemeanor, sometimes it ends up as a felony" and "repeatedly [decides] that [he is] going to go back to the streets and go back to the 11th District." Based on defendant's criminal background, the trial court concluded it needed to send a message to defendant and others like him. See *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13 (affirming 15-year prison sentence for selling $20 bag of heroin, as the defendant "was not deterred by

previous, more lenient sentences"). Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista,* 393 Ill. App. 3d 395, 399 (2009).

¶ 24 Defendant also contends his sentence is excessive where the amount of heroin he delivered was just over the threshold amount for a Class 1 felony and cites several cases where the appellate court addressed the amount of drugs involved when reviewing the sentence imposed. Specifically, defendant states that the amount of the controlled substance is relevant to the seriousness of the offense and, because of that, he was eligible for probation. See 730 ILCS 5/5-5-3(c)(2)(D-5) (West 2012). But the trial court heard the evidence presented at trial and during the sentencing hearing, including the evidence regarding defendant's criminal history. We will not substitute our judgment for that of the trial court where its extensive discussion of the evidence shows it properly weighed the factors in aggravation and mitigation in imposing an eight-year sentence. *Alexander,* 239 Ill. 2d at 212-13. To the extent defendant is engaging in an impermissible comparative sentencing argument, we likewise reject his contention. See *Fern,* 189 Ill. 2d at 54-55.

¶ 25 Defendant argues that the trial court failed to adequately consider his potential for rehabilitation. Specifically, he recounts his work history and claims that his family support favors his rehabilitation potential. But the record indicates otherwise. The trial court noted that it "had no question the reason you stopped working at McDonald's is because it wasn't profitable enough. It's clear to me that you are and have been an independent pharmaceutical salesman. That is your job." It also noted "[y]ou have a mother and father that were in your life and worked, and for whatever reason, you chose to take a different path than I think a responsible path." Thus, the trial court heard these arguments and rejected them. Finally, evidence was

presented that, when defendant was given TASC probation on the Class 4 felony, he violated it with a cannabis offense. Taking defendant's criminal history as a whole, the trial court reasonably concluded that defendant had a low potential for rehabilitation. See *People v. Starnes*, 374 Ill. App. 3d 329, 337 (2007) (noting previous drug-related convictions showed defendant did not take advantage of rehabilitation opportunities).

¶ 26 Defendant contends that the trial court failed to adequately consider the financial costs of his incarceration. See 730 ILCS 5/5-4-1(a)(3) (West 2010) (court "shall ***consider the financial impact of incarceration based on the financial impact statement filed with the clerk of the court"). But the trial court is not required to specify on the record the reasons for a sentence, and, absent evidence to the contrary, it is presumed the trial court considered the financial impact statement before imposing sentence. *Sauseda*, 2016 IL App (1st) 140134, ¶ 22. Defendant has failed to show the trial court did not consider the financial impact statement before sentencing him to eight years' imprisonment.

¶ 27 Defendant lastly argues that the trial court should have considered the effects of long sentences for minor drug offenders, including the mass incarceration of African-American men. Defendant cites to a case from another jurisdiction and secondary sources consisting of various scholarly articles and studies to support his arguments regarding the prison sentence imposed. As compelling as those social arguments may be, our task is to consider the facts of *this* case and review the sentence of *this* defendant in accordance with bedrock precedent on the discretion afforded to trial judges. Any discussion of the harshness of sentencing laws or the criminalization of minor drug offenses should be directed to the General Assembly.

¶ 28 The trial court gave defendant a sentence closer to the minimum than the maximum. It properly considered the relevant factors. The question is not whether we would have given him the same sentence. The question is whether the trial court abused its discretion. We find no basis for that conclusion. We affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.