2017 IL App (1st) 142840-U

FIRST DIVISION
January 3, 2017

No. 1-14-2840

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. 10 CR 14171
	)	
KEVIN SCHAFFER,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirm defendant's sentence where the trial court considered all relevant factors in mitigation.

¶ 2 Following a bench trial, defendant Kevin Schaffer was found guilty of, *inter alia*, possession of a controlled substance (PCS) (720 ILCS 570/402(c) (West 2012)) and unlawful use of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to

concurrent terms of 3 years' and 10 years' imprisonment, respectively. On appeal, defendant contends that his 10-year sentence is excessive given his background, his potential for rehabilitation, and the non-violent nature of his offense. We affirm.

¶ 3 Defendant was charged with, *inter alia*, possession of a controlled substance with intent to deliver (Count 2) and multiple counts of aggravated unlawful use of a weapon (AUUW) and UUWF. The State subsequently amended Count 2 to reduce it to PCS. Prior to trial, the court denied in part and granted in part defendant's motion to quash arrest and suppress evidence. The case proceeded as a bench trial.

¶ 4 At trial, Officer Celani testified that, in the afternoon of July 16, 2010, he and his partner observed defendant sitting in the passenger seat of a parked vehicle "with a chrome revolver in his right hand and a clear plastic bag containing a larger chunk of a yellowish substance which [he] believed to be suspect crack cocaine." Celani ordered defendant out of the vehicle "multiple times" before defendant pocketed the suspected narcotics, dropped the gun to the floor of the car, started the vehicle, and told the female driver to "drive." She accelerated and Celani returned to his vehicle and followed in pursuit.

¶ 5 The vehicle stopped at 7236 South Bell Avenue. Defendant got out and, carrying the "chrome revolver" in his left hand, ran towards the residence. Celani followed defendant into the house and was told defendant ran into the bathroom before running upstairs. Celani went to the bathroom, where he saw "[a] chrome revolver on the floor" and "a white rock-like substance, suspect crack cocaine in the toilet." He caught defendant on the roof and placed him under arrest. Celani recovered from the apartment a clear plastic bag containing 22 yellowish rock-like substances of suspect crack cocaine and $814 in cash. At the police station, defendant waived his *Miranda* rights and told Celani that he sold drugs because it was easy to do when he was not on

work release and that he received the chrome revolver from his friend. The chrome revolver was loaded with six live rounds.

¶ 6 The State introduced a certified copy of conviction for defendant's previous 2006 felony conviction for delivery of a controlled substance (No. 06-CR-12543). The parties stipulated that an expert in the field of forensic chemistry, if called, would testify that 15 items containing the "chunky substance" recovered by Officer Celani tested positive for cocaine. The State rested.

¶ 7 The parties entered stipulated testimony derived from the testimony given during the pretrial hearing on the motion to quash arrest and suppress evidence. In that testimony, several witnesses who had interacted with defendant on July 16, 2010, testified they did not see him holding either a gun or contraband that day.

¶ 8 The court found defendant guilty of PCS, four counts of AUUW, and two counts of UUWF, one based on possession of a firearm and the other on possession of firearm ammunition. The court denied defendant's motion for a new trial.

¶ 9 At sentencing, a presentence investigation report (PSI) was tendered to the court and to the parties. It showed defendant had prior convictions and sentences for: resisting a peace officer (2000) – probation; manufacture/delivery of cannabis (2000) - probation; possession of a controlled substance (2000) – probation terminated unsatisfactory; possession of more than 100 but less than 400 grams of cocaine (2001) - bootcamp; driving on a revoked or suspended license (2003) – seven days CCDOC after violation of conditional discharge; attempting to obstruct a peace officer (2004) - fine; possession of more than 15 grams of cocaine (2006) – five years IDOC after violation of probation; possession of more than 15 but less than 100 grams of cocaine (2006) – four years IDOC; manufacture/delivery of 1-15 grams of cocaine (2006) – four years

IDOC concurrent to four years on the 2006 PCS sentence; and possession of less than 2.5 grams of cannabis (2013) – two days CCDOC.

¶ 10 In aggravation, the State argued that defendant's background, which included three felony narcotics convictions, rendered his UUWF conviction a class 2 felony. It argued defendant's criminal background shows he is "a drug dealer" and the fact that this drug offense was committed in the presence of a firearm warranted the maximum sentence of 14 years' imprisonment.

¶ 11 In mitigation, defense counsel argued that defendant's background is non-violent, he has familial support and, because "no gun in this case was used in any manner," he deserved a "reasonable sentence close to the minimum."

¶ 12 During elocution, defendant thanked God, the court, his family and friends, and his attorney. He stated he has since become a member of the Salem Baptist Church and he asked for leniency.

¶ 13 The trial court sentenced defendant to 10 years' imprisonment on the UUWF/firearm conviction and 3 years' on the PCS conviction, to be served concurrently. The court merged the AUUW and UUWF/ammunition convictions into the UUWF/firearm conviction. It agreed that defendant should receive a class 2 extended term based on his background.

¶ 14 The court stated that it had "considered the matters contained in the pre-sentence investigation, and also considering the statutory factors in aggravation and mitigation, along with the arguments of the attorneys, and the elocution of the defendant." It noted defendant's previous conviction for resisting a peace officer in 2000 where his probation was terminated unsuccessfully. The trial court detailed defendant's "amended sentence where the defendant was sentenced to Cook County Boot Camp in 2001," as well two cases that resulted in probation in

2003 and 2006, which defendant violated. It noted defendant was sentenced to IDOC for violation of probation and again sentenced to IDOC in a 2006 case. The court stated it had "considered the background of the defendant, the opportunities that had been given to him, the boot camp program while on probation," the 3 to 14 year sentencing range, and that the last sentence the defendant had received on the 2006 and 2004 cases totaled 8 years in the IDOC. The court then sentenced defendant to 10 years' imprisonment on the UUWF/firearm count and 3 years' imprisonment on the PCS conviction, to be served concurrently. The court denied defendant's motion to reconsider sentence. Defendant timely appealed.

¶ 15 On appeal, defendant solely contends that the trial court abused its discretion when it imposed a 10-year sentence for UUWF. As defendant had a prior class 1 felony conviction for delivery of a controlled substance, his UUWF conviction was a class 2 felony with a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (West Supp. 2013). Defendant's 10-year sentence is well within the applicable statutory sentencing range and is therefore presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. He contends, however, that the trial court did not meaningfully consider or properly weigh the following mitigating factors in sentencing: (1) the offense was nonviolent and no one was threatened or injured in the commission of the offense and (2) defendant's background and "strong potential for rehabilitation." He requests that his sentence be reduced or the case remanded for resentencing.

¶ 16 The trial court has broad discretion in sentencing and its sentencing decisions are entitled to great deference and, thus, we will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). A sentence will be considered an abuse of discretion where it 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 205 at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 17 A sentence should reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. Careful consideration must be given to all mitigating and aggravating factors, " 'including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it.' " *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94 (quoting *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002)). However, a defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 18 Further, because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214. A reviewing court " 'must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.' " *Alexander*, 239 Ill. 2d at 213 (quoting *Stacey*, 193 Ill. 2d at 209).

¶ 19 Two mitigating factors that courts are required to consider are (1) "[t]he defendant's criminal conduct neither caused nor threatened serious physical harm to another" and (2) "[t]he defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another." 730 ILCS 5/5-5-3.1(a)(1), (2) (West 2012). Defendant contends that his sentence is excessive as both these factors apply here since the gun was found on the floor and no one was threatened or harmed during the commission of the offense.

¶ 20 We initially observe that when mitigating evidence is before the trial court, it is presumed the court considered the evidence absent some contrary indication other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). It is a defendant's burden to "make an affirmative showing that the sentencing court did not consider the relevant factors." *Burton*, 2015 IL App (1st) 131600, ¶ 38. Here, the record shows that the court reviewed the PSI, noted defendant's criminal history which required him to be sentenced as a class 2 felon, and specified that it had considered "the statutory factors in aggravation and mitigation." It heard the evidence at trial and is therefore presumed to know violence was not involved in the offense. *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011). Further, defense counsel had raised defendant's "non-violent" background and that "no gun in this case was used in any manner" in mitigation. Thus the court was clearly aware of these mitigating factors. Defendant has failed to make an affirmative showing that the trial court did not consider them.

¶ 21 Defendant also argues the trial court failed to consider or properly weigh his potential for rehabilitation based on his strong employment history, two years of college, strong family ties, and familial support. All of these factors were set out in the PSI and defense counsel raised defendant's strong family ties in mitigation. The court was therefore aware of these factors and in fact specifically stated it "considered the matters contained in the pre-sentence investigation." The record shows that the court considered defendant's rehabilitative potential.

¶ 22 Further, criminal history alone may warrant a sentence substantially over the minimum (*People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009)), and defendant's criminal history was extensive. Moreover, defendant was not deterred by more lenient sentences. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13. In imposing the 10-year sentence, the court stated it had "considered the background of the defendant, the opportunities that had been given to him, [and]

the boot camp program while on probation." It gave more weight to defendant's criminal history and prior unsuccessful incarcerations than to the non-violence of the offense and the defendant's rehabilitative potential, and we find no reason to disturb that determination on review.

¶ 23 It was defendant's burden to make an affirmative showing that the trial court did not consider the relevant sentencing factors. *Burton*, 2015 IL App (1st) 131600, ¶ 38. Given the record, we find that defendant has failed to rebut the presumption that the trial court considered the mitigating evidence before it. As the trial court properly considered all the aggravating, mitigating, and statutory factors before prescribing a sentence within the statutory range, we affirm.

¶ 24 Affirmed.