SECOND DIVISION
January 24, 2017

No. 1-14-3390

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 644
	)	
JERRY CALDWELL,	)	Honorable
	)	Joan Margaret O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justice Neville concurred in the judgment.
Presiding Justice Hyman specially concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in imposing a sentence of 10 years' imprisonment for two counts of the offense of unlawful use of a weapon by a felon, when defendant was subject to a Class X sentencing range due to his criminal history.

¶ 2 Following a bench trial, defendant Jerry Caldwell was found guilty of two counts of unlawful use of a weapon by a felon. Based on his criminal history, he was sentenced to a Class

X term of 10 years in prison. On appeal, defendant contends that his sentence is excessive. For the reasons below, we affirm.

¶ 3 At trial, Chicago police detective William Brogan testified that at about 7 p.m. on December 12, 2009, he went with Lieutenant DeDore, Lieutenant Sanchez, and Detective Bush to 11041 South Vernon in Chicago, Illinois to conduct a follow up investigation into firearms that had been stolen from a railroad track. At this location, he went to the third floor apartment and knocked on the door. When defendant answered the door, Detective Brogan and the other officers announced their office and explained why they were there.

¶ 4 Detective Brogan asked defendant if they could come inside and if it was his residence. Defendant told the officers that it was his residence, and he gave them verbal consent to enter. In addition to defendant, Detective Brogan observed an adult male, an adult female, and a minor child inside. Upon the officers' entry into the apartment, defendant signed a "written consent to search" form. Defendant stipulated that the written consent form was shown to him and that he signed it.

¶ 5 After defendant signed the written consent to search form, assisting officers responded and searched the apartment. At the entry of the apartment, there was a living room area, and a hallway with three bedrooms on the right side and a kitchen on the left side. After the officers started their search, Detective Brogan heard defendant, who was standing in the living room area closest to the first bedroom, tell Lieutenant Sanchez and Detective Bush that "there was a pistol in his bedroom behind the mirrored dresser." Defendant made a motion with his head towards the rear of the apartment. Based on this statement and head motion, Detective Brogan went to the last bedroom, the door of which was open and unlocked. Inside of this room, Detective Brogan observed a dresser with a mirror on it. After Detective Brogan and Officer McGann moved the

dresser, Officer McGann recovered a blue .22 caliber Smith and Wesson firearm box. Inside the box, there was a .22 caliber Smith and Wesson semi-automatic pistol with 10 magazines and 10 live rounds.

¶ 6 Detective Brogan testified that he never saw defendant in the bedroom where they recovered the firearm and that he never saw him in physical possession of the gun, magazine, or box. Neither fingerprint nor DNA type evidence was collected on these items.

¶ 7 At approximately 8:30 p.m., after Detective Brogan gave defendant his *Miranda* warnings at the police station, defendant agreed to speak with Detective Brogan and Detective Bush. The detectives asked defendant if the gun was his and defendant stated that "he bought it for $100 at a gas station near his home." Defendant told the detectives that he had not stolen or sold any .22 caliber pistols. Detective Brogan did not have defendant put his statements in writing because in cases involving the offense of unlawful use of a weapon by a felon, it was not his experience to put the suspects' statements in writing.

¶ 8 After Detective Brogan testified, the State introduced into evidence a certified copy of defendant's prior conviction under case number 02 CR 26024, which was a conviction from December 12, 2002, for the offense of possession of a controlled substance with intent to deliver.

¶ 9 The trial court found defendant guilty on two counts of the offense of unlawful use of a weapon by a felon; one for possessing a firearm, and the other for possessing ammunition. Defendant's two attorneys each filed separate motions for new trial, and the trial court denied both of them.

¶ 10 At sentencing, the trial court noted that it had two copies of a presentence investigation report (PSI), one from November 2012 and one from October 2013, and that it read both of them. In aggravation, the State noted defendant's criminal history consisted of seven felony

convictions, which included four convictions for the offense of possession of a stolen motor vehicle. When the State indicated that three of these convictions were classified as Class 3 offenses, the trial court noted that convictions for the offense of possession of a stolen motor vehicle should be Class 2 offenses. The State responded by stating, "I can double check them. They should be 2s, you are right. They are listed as 3s." Then, the trial court and counsel for each party discussed the designation for defendant's 1997 conviction for the offense of "unlawful possession" of a stolen motor vehicle and determined it was a Class 1 offense. After this discussion, the State reiterated that defendant had seven felony convictions, stated that he was Class X mandatory, and requested a "significant amount."

¶ 11 In mitigation, defense counsel argued that defendant was 52 years old and suffered from numerous physical and medical problems, including diabetes and extreme hypertension, which had hospitalized him on numerous occasions. Defense counsel also summarized the facts of the case and argued that they showed defendant was "honest, forthright, candid with the police officers." Defense counsel further argued that "[i]t was not a typical type of possession of a weapon by a person who was carrying around a loaded gun. It was in a private residence." Defense counsel explained that defendant had his own business for the last five years and that he was working for the CeaseFire organization, where he counseled people about gang activity.

¶ 12 Defense counsel acknowledged defendant's criminal history and stated, "He does have unfortunately convictions which make him eligible for extended sentencing and mandatory Class X sentencing imposing a minimum penalty of six to thirty years." Defense counsel also noted that most of defendant's convictions were from the 1990s, and requested that, based on the facts of this case, the trial court consider a sentence of six years.

¶ 13 The trial court sentenced defendant to 10 years. In doing so, the trial court stated that it read the transcripts and "reviewed both PSIs and considered both attorneys' arguments, also aggravation and mitigation." Thereafter, defendant filed a motion to reconsider the sentence, which the trial court denied.

¶ 14 On appeal, defendant argues that his sentence of 10 years in prison is excessive. Defendant argues that the trial court did not adequately consider the mitigating evidence and that it improperly relied exclusively on his prior convictions as an aggravating factor, as his prior convictions were already considered in determining his status as a Class X offender. Defendant further argues that his sentence is excessive given the nonviolent nature of the offense, his background, and rehabilitative potential, and considering that he accepted responsibility for the firearm and cooperated with the investigation when he promptly let the police in, consented to the search, told the police he had a firearm in the bedroom, and freely admitted to purchasing it. Defendant requests that we reduce his sentence to the minimum Class X sentence of six years.

¶ 15 A reviewing court should give great deference to the trial court's sentencing decision because the trial court is in a better position to consider the relevant sentencing factors, including the particular circumstances of the case and the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Other relevant sentencing factors "include the nature of the crime, the protection of the public, deterrence and punishment, as well as the defendant's rehabilitative prospects." *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14. The trial court is in the best position to find an appropriate balance between protecting society and rehabilitating the defendant. *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). The reviewing court "must not substitute its judgment

for that of the trial court merely because it would have weighed the factors differently." *Fern*, 189 Ill. 2d at 53.

¶ 16 The trial court is given great discretion to determine an appropriate sentence within the statutory limits (*Fern*, 189 Ill. 2d at 53), and on review, we will not alter a sentencing decision absent an abuse of discretion (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)). A trial court abuses its discretion when no reasonable person could agree with it. *People v. Ramos*, 353 Ill. App. 3d 133, 137 (2004). "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54. Further, there is no requirement that the trial court must set forth every reason or specify the weight it gave to each factor when it determined the sentence. *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 227. Finally, "[t]here is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and the court is presumed to have considered any evidence in mitigation which is before it." *People v. Donath*, 357 Ill. App. 3d 57, 72 (2005).

¶ 17 Here, the record indicates that the trial court was well aware of the mitigating factors defendant has identified. The trial court expressly noted that it read the transcripts, and read and reviewed both PSIs. The PSIs included information regarding defendant's health history, education, and employment, including his employment with the CeaseFire organization. Defense counsel argued that defendant was 52 years old, that he suffered from numerous physical and medical problems, that most of his prior convictions were from the 1990s, that he had his own business for the last five years, and that he was employed with the CeaseFire organization, where he counseled people about gang activity. Further, defense counsel orally noted defendant's cooperation with the investigation as well as the nonviolent nature of the

offense. Prior to issuing its sentencing decision, the trial court stated that it considered the attorneys' arguments as well as the statutory factors in aggravation and mitigation. We find that there is nothing in the record to show that the trial court did not consider the applicable mitigating factors. See *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994) ("Where relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself").

¶ 18 We note that the judge at sentencing was not the same judge who presided over the bench trial. However, prior to sentencing, the sentencing judge specifically stated that she read the transcripts of the trial and the hearings on the posttrial motions. The judge reviewed the facts of the case, including that, "[t]he defendant did say it was his gun. His gun was behind the mirror in the bedroom and showed the officer where the bedroom was." Accordingly, it cannot be said that the sentencing court did not give consideration to the nature of the offense or defendant's cooperation with the investigation.

¶ 19 With respect to defendant's argument that the trial court improperly relied exclusively on his prior convictions as an aggravating factor because these convictions were already considered when his Class 2 offense was increased to the Class X sentencing range, we disagree. As we discussed above, the trial court did not "exclusively" rely on defendant's criminal history in fashioning a sentence, as it expressly considered the mitigating factors. Further, defendant argues that at the hearing on his motion to reconsider sentence, after he presented the mitigating factors, the trial court emphasized his criminal history and stated that, "[Y]ou had a long history of prior convictions which is what made you the [*sic*] Class X mandatory sentencing." However, the trial court made this statement at the hearing on the motion to reconsider the sentence, not at the sentencing hearing, and defendant does not cite to any statement made by the trial court at

sentencing to support his argument that it exclusively or improperly relied on his criminal history when fashioning the sentence.

¶ 20 Moreover, even if the trial court had made the statement at sentencing, we would not find that it was improper. Defendant had an extensive criminal history. In addition to defendant's conviction in 2002 for the offense of possession of a controlled substance with intent to deliver, he had six other prior convictions, including four convictions for the offense of possession of a stolen motor vehicle. Given this extensive criminal history, even though defendant was subject to the Class X sentencing range because of his prior criminal convictions, double enhancement is not at issue and it was not improper for the trial court to reconsider those same prior convictions as an aggravating factor. See *People v. Thomas*, 171 Ill. 2d 207, 224-25 (1996) ("However, this 'second use' of defendant's prior convictions does not constitute an enhancement, because the discretionary act of a sentencing court in fashioning a particular sentence tailored to the needs of society and the defendant, within the available parameters, is a requisite part of every individualized sentencing determination."). Additionally, the sentencing court was not required to impose a minimum sentence even if there were no other aggravating factors. See *People v. Harvey*, 162 Ill. App. 3d 468, 474-75 (1987) (affirming a 20-year Class X sentence for burglary where the defendant had four prior Class 2 felonies and the only aggravating factor was his prior convictions).

¶ 21 Defendant's offenses for unlawful use of a weapon by a felon were Class 2 felonies, which would normally carry a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (2008). As a result of defendant's prior convictions, he was sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2008). Defendant does not dispute that he should have been sentenced in the Class X sentencing range. The trial court sentenced defendant to 10 years' imprisonment, a term

well within the permissible statutory range of 6 to 30 years for a Class X offender. 730 ILCS 5/5-4.5-25(a) (West 2008). There is nothing in the record that indicates that the trial court did not consider the evidence in mitigation. Given the trial court's consideration of the PSIs, the parties' arguments, the mitigating factors, and defendant's criminal history, and that the 10-year sentence is 20 years below the 30 year maximum sentence in the Class X sentencing range, we cannot find that defendant's sentence is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54. Accordingly, we find no abuse of discretion in the length of defendant's sentence.

¶ 22 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 23 Affirmed.

¶ 24 PRESIDING JUSTICE HYMAN, specially concurring:

¶ 25 I agree with my colleagues; Caldwell's 10-year sentence was at the low end of the Class X range, and the trial court properly considered Caldwell's mitigating factors. Nevertheless, I write separately to discuss how the Class X sentencing statute, in cases like Caldwell's, operates as an obstacle to responsible sentencing policy by forcing trial courts to give harsher and lengthier prison sentences, without regard, as with Caldwell, to public safety, rehabilitation, or the nature or circumstances of the offense.

¶ 26 Caldwell's crime (UUW by a felon, more commonly known as "felon in possession") is a status crime. As such, it does not require Caldwell to have used the firearm or even planned to do so. There is no evidence that Caldwell acquired that handgun to harm another person or commit a property crime, or that he ever used it. Indeed, Caldwell volunteered to police that he owned the gun, and told them exactly where he kept it. Caldwell was undoubtedly guilty of being a

felon in possession of a firearm; but, should the nature and circumstances of the offense carry a Class X felony status?

¶ 27 Felon in possession laws exist for a reason: many felons, unlike Caldwell, do not rehabilitate themselves and use guns in further criminal pursuits. See *People v. McFadden*, 2016 IL 117424, ¶ 29 (legislative purpose of felon-in-possession statute is to protect public "from persons who are potentially irresponsible and dangerous"). The legislature, quite reasonably, has chosen to make this a status crime. But it is a blunt instrument; applying it to non-violent individuals, like Caldwell, does not further the goal of preventing future violent felonies.

¶ 28 Class X sentencing is a similarly blunt instrument. It limits the trial court's ability to make an individualized sentence. Though the trial court has discretion within the sentencing range (6 to 30 years), the statute imposes a mandatory minimum sentence on class 1 or class 2 felonies if the person has two prior class 1 or 2 felonies. Within those classifications lies a wide range of behavior: everything from criminal sexual assault to selling a stolen IPhone online. 720 ILCS 5/12-13 (West 2008) (criminal sexual assault); 720 ILCS 5/16J-10 (West 2008) (online sale of stolen property valued at more than $150). Committing three class 2 felonies leads to a mandatory minimum of six years, no matter how small the harm. For an extreme example, see *People v. Busse*, 2016 IL App (1st) 142941 (defendant who repeatedly stole loose change from vending machines sentenced as Class X felon).

¶ 29 Contrast this with the federal criminal justice system, which also outlaws possession of firearms by felons. A felon with Caldwell's criminal history (who had not committed any violent crimes, and had only one drug-related crime before his current sentence) could be sentenced up to 10 years in prison, but the average sentence for this crime is 61 months. See United States Sentencing Commission, Quick Facts: Felon in Possession of a Firearm (found at

http://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_FY15.pdf). Had Caldwell been charged in federal court, he might well have received a sentence half as long as his sentence in the circuit court.

¶ 30 Further, the Class X system makes no distinction between recent criminal behavior and old crimes. An individual who committed two Class 2 felonies as an 18-year-old (an age when stupid, thoughtless behavior is common in every race and social class) will be subject to Class X sentencing if he or she commits another felony, say, at 50 years of age—even if the individual spent the intervening decades as a contributing and law-abiding member of society. There is no credit for the years of rehabilitation and good behavior. No mercy on account of the non-violent nature of the crimes.

¶ 31 But the federal sentencing guidelines have a provision which excludes ancient criminal conduct in determining an appropriate sentence. U.S.S.G § 4A1.2 (e) (1) (to calculate criminal history, include felony sentences imposed within 15 years of commencement of current offense). For sentencing purposes, federal judges cannot consider convictions more than 15 years old. See *United States v. Jones*, No. 15-1792, 2016 WL 7383726, at *10 (7th Cir. Dec. 21, 2016) (discussing 15-year provision). This would apply to Caldwell; several of his convictions occurred at least 15 years before his felon-in-possession crime. Again, Caldwell might have benefitted from being charged in federal court as opposed to Illinois state court.

¶ 32 The trial court in sentencing Caldwell had limited options. But as this quick review of the federal system's handling of felon-in-possession sentencing illustrates that Class X, applied to a felon-in-possession, need not be an inevitability. Our legislature should consider modifying Class X laws in regard to the offense of felon-in-possession so those sentences would be less extreme and more individually tailored and rational.