2017 IL App (1st) 143585-U

No. 1-14-3585

Order filed June 1, 2017

Fourth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 21418 |
| | ) | |
| CHARLES SPRIGGS, | ) | Honorable |
| | ) | Thomas J. Hennelly, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Burkeconcurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm defendant's conviction where the trial court did not improperly admit hearsay testimony and the trial court did not abuse its discretion in sentencing defendant. Mittimus corrected.

¶ 2 Following a bench trial, defendant Charles Spriggs was convicted of one count of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)) and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)) and sentenced to concurrent terms of 16 years' and 3 years' imprisonment, respectively. On appeal, he argues the

trial court improperly admitted hearsay testimony regarding a prerecorded funds sheet and abused its discretion in sentencing him, and the mittimus should be corrected to reflect the proper convictions. We affirm and correct the mittimus.

¶ 3 Defendant was charged by indictment with possession of a controlled substance with intent to deliver (between 1 and 15 grams of heroin) and delivery of a controlled substance (less than 1 gram of heroin), stemming from a narcotics purchase by an undercover Chicago police officer. The following evidence was presented at trial.

¶ 4 Chicago police officer Jones testified that, on October 15, 2013, he was working as an undercover officer on a team conducting controlled narcotics purchases in the area of Lexington and Albany Streets in Chicago. He noticed a man, identified in court as defendant, wearing a black hooded sweatshirt, gray t-shirt, and dark pants walking up and down Lexington. Jones exited his vehicle and approached defendant, who asked what he needed. Jones responded that he needed "two blows," a street term for heroin. Defendant told him to wait there and then walked north on Albany into a gangway. After two minutes, Jones was unsure whether defendant would come back, returned to his vehicle, and pulled around the corner onto Albany. Defendant then came from the gangway and approached Jones's vehicle. Defendant handed Jones two clear Ziplock bags containing a white powder substance of suspect heroin in exchange for $20 in prerecorded funds.

¶ 5 Jones explained that he had received the prerecorded funds from his "office," the bursar, for use in narcotics transactions. Every serial number for the denominations "is denoted on a 1505 prerecorded fund sheet." He stated that he believed he had shared the prerecorded funds sheet with the enforcement officers on his team via a photo on his cell phone.

¶ 6 After receiving the suspect heroin, Jones drove away and radioed his team members of a positive narcotics transaction. Jones subsequently returned to the location he had provided, where he observed defendant detained by the enforcement officers. Jones drove past and radioed to the officers that defendant was the man who sold him the suspect narcotics. Jones returned to the police station and inventoried the suspect narcotics.

¶ 7 Chicago police officer Brandon Smith testified that, on October 15, 2013, he was working as a surveillance officer on a team conducting narcotics purchases in the area of 3100 West Lexington. Smith observed a man, identified in court as defendant, approach Officer Jones's vehicle and engage in a hand-to-hand transaction. Defendant walked away and entered a vehicle, and Smith received a communication from Jones. Smith radioed enforcement officers, who arrived and detained defendant. Smith never lost sight of defendant.

¶ 8 Chicago police officer Denton testified that, on October 15, 2013, he was working as an enforcement officer on a team conducting undercover narcotics purchases. After receiving a radio communication, he went to the area of 3100 West Lexington. He detained a man, identified in court as defendant, matching the description he had received and seated inside a parked car. After Officer Jones identified defendant as the man involved in the narcotics transaction, Denton placed defendant in custody and transported him to the police station. A custodial search of defendant recovered 11 small Ziplock bags containing suspect heroin and $138 of United States currency, including $20 of prerecorded funds. The $20 of prerecorded funds matched currency listed on the prerecorded funds sheet. The recovered narcotics and the $20 in prerecorded funds were both inventoried.

¶ 9 The parties stipulated that forensic scientist Lenetta Watson would testify that she received an inventory containing 11 items of powder and testing of the items revealed the presence of 3.8 grams of heroin. She would further testify that she received another inventory containing two items, which tested positive for 0.6 grams of heroin.

¶ 10 The trial court found defendant guilty of delivery of a controlled substance (less than 1 gram of heroin) and guilty of possession of a controlled substance (between 1 and 15 grams of heroin), the lesser-included offense of the charged possession of a controlled substance with intent to deliver. It found the officers were credible, clear and convincing, and that any inconsistencies were "minor and the result of an exhaustive cross-examination by irrelevant minutia."

¶ 11 Defendant filed a written supplemental motion for a new trial, which the court denied. The trial court then proceeded to sentencing.

¶ 12 In aggravation, the State argued defendant should be sentenced as a Class X offender based on his criminal history. It noted defendant had 11 prior felonies and asked the court to sentence him to "a term larger than the minimum of six years in the department of corrections."

¶ 13 In mitigation, defense counsel presented a letter from superintendent Tyrone Everhart of the pre-release barber shop. The letter indicated that defendant was a respectful, hard-working barber, who kept "Pre-Release inmates looking presentable for court and feeling good about themselves."

¶ 14 Counsel noted defendant's two stepbrothers were murdered in previous years and that his mother died while he was in custody. Counsel argued that defendant grew up in a household without a father and in a neighborhood "full of gangs and drugs," causing him to "[get] involved

with that." She stated defendant "had a long history of drug abuse and alcohol abuse and had been in and out of prison for quite a long part of his life." Counsel asked the trial court for "the lower end of sentencing."

¶ 15 In allocution, defendant stated he was an addict and became an addict because of watching his mother "deteriorate." He told the court that his mother, cousin, and aunt had all recently passed away, and that he did not have anybody "to be here while [he is] going through this situation." Defendant asked the court for leniency so he could further his career as a barber, which he described as his "passion."

¶ 16 The trial court sentenced defendant as a Class X offender to a term of 16 years' imprisonment on the delivery of a controlled substance conviction and a concurrent term of 3 years' imprisonment on the possession of a controlled substance conviction. It stated it had considered the evidence presented at trial, which was "overwhelming" as defendant was identified within minutes by the officers and was in possession of the "1505 funds." The court noted it had considered the presentence investigation report (PSI), the evidence and factors in aggravation and mitigation, the financial impact of incarceration, the arguments of counsel and defendant, and the potential for rehabilitation.

¶ 17 The court highlighted defendant's criminal background, which evinced "no hope of possible rehabilitation" as all defendant did his "whole life [was] break the law and go[] to the penitentiary." It mentioned defendant's criminal history began with 1988 juvenile possession of a stolen vehicle and robbery convictions, for which he received probation. He had a 1991 conviction for possession of a stolen vehicle, for which he again received probation. However, at some point those probations were violated and defendant received two years in the Illinois

Department of Corrections (IDOC). In 1992, defendant was convicted of misdemeanor unlawful use of a weapon and received 10 months in the Cook County Department of Corrections (CCDOC). Defendant had 1993 and 1994 convictions for drug-related offenses, for which he received four and two years' imprisonment, respectively. In 1995, 2002, 2003, and 2012, defendant received 18, 30, 36 and 12 months in the IDOC for possession of a controlled substance, respectively. In 1996 and 2005, he was convicted of possession of a stolen vehicle, for which he received nine and eight years in the IDOC, respectively. In 2004, defendant was convicted of unlawful use of a weapon, for which he received 54 months in the IDOC. Finally, defendant had a 2013 misdemeanor resisting a peace officer conviction, for which he received 44 days in the CCDOC.

¶ 18 The court told defendant "there's a strong argument to be made you should get the maximum and should get 30 years. But given the fact the mitigation I heard from your lawyer and from you, and your mother's passing, I will not sentence you to 30 years in the Illinois Department of Corrections." The court found defendant must be sentenced as a Class X offender and sentenced him to concurrent terms of 16 and 3 years' imprisonment.

¶ 19 Defendant filed a written motion to reconsider sentence, which the trial court denied. Defendant filed a timely notice of appeal.

¶ 20 On appeal, defendant argues (1) the trial court improperly admitted hearsay testimony regarding the prerecorded funds, (2) the trial court abused its discretion in sentencing him, and (3) the mittimus should be corrected to reflect the proper convictions and sentences.

¶ 21 Defendant first argues his delivery conviction should be reversed and remanded for a new trial as the State elicited inadmissible hearsay testimony to establish $20 recovered from

defendant matched the bill or bills on the prerecorded funds sheet. He concedes that counsel failed to object at trial when the officers testified to the prerecorded funds and thus, the issue is forfeited. However, he urges us to review his claim under the plain-error doctrine.

¶ 22 To preserve an issue for review, the defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, unpreserved claims of error can be reviewed under the plain-error doctrine when (1) the evidence at trial is closely balanced, or (2) the error is so serious it affected the fairness of the trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). When a defendant fails to establish plain error, that procedural default must be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 23 Defendant contends that the first prong applies, that is, the evidence at trial was closely balanced. However, the first step of plain-error review is to determine whether a clear or obvious error occurred. *In re M.W.*, 232 Ill. 2d 408, 431 (2009). "This requires a 'substantive look' at the issue raised." *People v. Banks*, 2016 IL App (1st) 131009, ¶ 71.

¶ 24 Hearsay is an out of court statement offered to prove the truth of the matter asserted. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008). Hearsay is generally inadmissible due to its lack of reliability. *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). The trial court has discretion to determine whether statements are hearsay, and we will not overturn that determination absent an abuse of discretion. *People v. Leak*, 398 Ill. App. 3d 798, 824 (2010). However, the determination of whether a statement is hearsay is reviewed *de novo* as it is a legal issue and does not require fact-finding or assessing the credibility of witnesses. *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994); see *People v. Risper*, 2015 IL App (1st) 130993, ¶ 33.

¶ 25 Defendant argues the State improperly used hearsay testimony that the serial numbers of the funds had been recorded on the funds sheet by an unidentified, nontestifying person to bolster its case, and defendant could not cross-examine on the recorded funds sheet regarding its accuracy. He asserts the reliability of Officer Denton's testimony that the recovered $20 of prerecorded funds from defendant matched funds on the funds sheet was entirely dependent on the contents of that out-of-court funds sheet, which the State had never introduced and for which the creator was not available for cross-examination.

¶ 26 We disagree with defendant's contention that the State's use of the contents of the prerecorded funds sheet constituted inadmissible hearsay. Here, Officer Jones testified that he received prerecorded funds from the bursar, and every denomination's serial number is denoted on a prerecorded funds sheet. He shared the prerecorded funds sheet with the enforcement officers on his team via his cell phone. Jones then exchanged with defendant $20 of that prerecorded funds for 0.6 grams of heroin. Officer Smith observed Jones and defendant engage in a hand-to-hand transaction and never lost sight of defendant. Finally, Officer Denton recovered heroin and currency from defendant, $20 of which matched the prerecorded funds sheet. The prerecorded funds sheet was never admitted into evidence or relied on by the officers during examination by the State. Therefore, the State did not improperly elicit any hearsay testimony regarding the funds sheet, as the officers did not testify to any specific information contained on the funds sheet, only that $20 matched what was on the funds sheet.

¶ 27 Even if the references to the prerecorded funds sheet constitute hearsay, they would be admissible under the business records exception to the hearsay rule and the past recollection recorded exception to the hearsay rule. See *People v. Rivas*, 302 Ill. App. 3d 421, 432 (1998) (a

prerecorded funds sheet is a business record as the "document is not likely to indicate bias or prejudice against defendant"); see *People v. Strother*, 53 Ill. 2d 95, 101 (1972) (while prerecorded funds sheet "may have been hearsay evidence-introduced to prove that the serial numbers recorded were in fact those of the currency used in the controlled purchase, it was in our opinion properly admitted under the Past Recollection Recorded exception to the hearsay rule"). Therefore, Officers Jones and Denton's testimonies regarding the prerecorded funds sheet were properly admitted.

¶ 28 Lastly, even if the testimonies were improperly admitted, defendant cannot establish that the evidence at trial was closely balanced and, thus, there was no first-prong plain error to overcome forfeiture. The State did not have to prove Officer Jones exchanged money with defendant in order to sustain the conviction for delivery of a controlled substance. See 720 ILCS 570/401 (West 2012); 720 ILCS 570/102(h) (West 2012) ("Delivery" is "the actual, constructive or attempted transfer of possession of a controlled substance with or without consideration, whether or not there is an agency relationship"). Moreover, "there is no requirement that pre-recorded or marked funds used in a narcotics transaction be recovered for a conviction to stand." *People v. Trotter*, 293 Ill. App. 3d 617, 619 (1997). Thus, the $20 in prerecorded funds and the funds sheet were not material to whether defendant "delivered" narcotics to Jones.

¶ 29 The unrefuted evidence established that defendant handed two small Ziplock bags containing 0.6 grams of heroin to Jones. Officer Smith observed Jones and defendant engage in a hand-to-hand transaction and never lost sight of defendant. Both officers identified defendant in court as the individual involved in the transaction and subsequent recovery. The positive identification of even a single eyewitness who had ample opportunity to observe is sufficient to

sustain a conviction. *People v. Piatkowski,* 225 Ill. 2d 551, 566 (2007). This evidence overwhelmingly established defendant delivered heroin to Jones. Accordingly, we do not find the evidence to be closely balanced, as the alleged improper testimony regarding the prerecorded funds sheet was not required to sustain the conviction for delivery of a controlled substance. Defendant has therefore failed to establish his assertion of first-prong plain error.

¶ 30 Defendant next argues the trial court abused its discretion in sentencing him to 16 years' imprisonment as a Class X offender on the delivery conviction. The trial court has broad discretion in imposing a sentence, which we will not alter absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). 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." *Id.* at 210 (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). It is presumed the trial court considered all relevant factors and any mitigation evidence presented, and the defendant must make an affirmative showing the trial court did not consider the relevant factors in order to rebut this presumption. *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48.

¶ 31 We find the trial court did not abuse its discretion in imposing a 16-year prison sentence. Delivery of a controlled substance is a Class 2 felony. 720 ILCS 570/401(d)(i) (West 2012). However, defendant had prior felony convictions and was therefore a Class X offender, facing a term of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). The 16-year sentence falls within the range provided by statute and we therefore presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 32 Defendant argues his 16-year prison sentence does not reflect the seriousness of the offense, as he merely delivered $20 worth of heroin to an undercover police officer, was

unarmed and did not resist arrest or behave dangerously. A sentence must reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 12. However, the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Here, the trial court explicitly stated it had considered the evidence presented at trial, which necessarily includes the testimony that defendant exchanged 0.6 grams of heroin for $20. The trial court was also aware defendant was unarmed and did not resist arrest. Defendant therefore cannot affirmatively show the trial court did not consider the seriousness of the offense.

¶ 33 While the trial court was aware of the underlying facts of the case, it focused on defendant's criminal history, noting "[a]ll [defendant] did in [his] whole life is break the law and gone to the penitentiary." Defendant had an extensive criminal history, including 11 prior felony offenses convictions, two prior misdemeanor convictions, and three juvenile adjudications. Criminal history alone may warrant a sentence substantially above the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). The 16-year sentence is not disproportionate to defendant's twelfth felony conviction, and seventh drug-related felony conviction. There is no basis on which to overturn the trial court's sentencing determination. See *Wilson*, 2016 IL App (1st) 141063, ¶ 13 (affirming 15-year prison sentence for delivery of 1.04 grams of heroin within 1,000 feet of a church where the defendant "was not deterred by previous, more lenient sentences").

¶ 34 Defendant was 42 years old at sentencing and he contends his age should be considered in mitigation as "recidivism declines with age and drug use generally diminishes with age as addicts become more receptive to treatment." However, the trial court was well aware of defendant's age but, given defendant's prior criminal history, found there was "no hope of any possible rehabilitation" for him.

¶ 35 Defendant argues the trial court ignored his rehabilitation potential, which was demonstrated by the letter submitted on his behalf and his prior work as a barber. However, the trial court stated it had considered the evidence in aggravation and mitigation as well as defendant's rehabilitative potential. It explicitly noted that it considered mitigation evidence presented by both defense counsel and defendant, as well as the passing of defendant's mother before it imposed sentence. Further, as the letter and information regarding defendant's work as a barber were presented to the trial court, we must presume it considered them, absent some indication to the contrary. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Defendant fails to point to any evidence that the trial court failed to consider the letter or defendant's previous employment as a barber. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993) ("Where mitigating evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other then the sentence imposed"). The court had the discretion to weigh this mitigating evidence as it saw fit. See *People v. Brown*, 2017 IL App (1st) 142877, ¶ 60.

¶ 36 Defendant argues his criminal history is related to his dependence on heroin and marijuana. He notes that the PSI indicates he has been abusing these drugs since he was young and was even under the influence of heroin when arrested for the present offense. However, the

trial court explicitly stated it had considered the "presentence investigation." It was thus well aware of defendant's history of drug abuse but chose not to give it the weight defendant desires. See *People v. Coleman*, 183 Ill. 2d 366, 404 (1998) ((" ' [S]imply because the defendant views his drug abuse as mitigating does not require the sentencer to do so.' " (quoting *People v. Shatner*, 174 Ill. 2d 133, 159 (1996))). The trial court adequately considered defendant's history of drug use.

¶ 37 Defendant contends the trial court failed to consider the financial impact of his incarceration on the State of Illinois. The court is required to consider the financial impact of defendant's incarceration on the State based on the financial impact statement filed by the Department of Corrections with the clerk of the court. 730 ILCS 5/5-4-1(a)(3) (West 2012). Here, the trial court explicitly stated it "considered the financial impact of incarceration" prior to imposing sentence. Defendant therefore cannot present any evidence the trial court did not consider the financial impact statement prior to sentencing him. In sum, defendant's 16-year sentence for delivery of a controlled substance was not excessive as the court properly considered all mitigating factors.

¶ 38 Defendant argues, and the State correctly concedes, the mittimus should be corrected to accurately reflect the proper convictions and sentences imposed. The question of whether the mittimus should be corrected is a legal issue, which we review de novo. *People v. Lewis*, 2012 IL App (1st) 102089, ¶ 23. The court's oral pronouncement is the court's judgment, and it controls over the mittimus. *People v. Lucious*, 2016 IL App (1st) 141127, ¶ 62.

¶ 39 The mittimus states that, for count 2, defendant was convicted of delivery of between 1 and 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2012)), a Class 1 felony for which he

was sentenced to 16 years' imprisonment. It further states that, for count 4, defendant was convicted of delivery of "other amount narcotic," (720 ILCS 570/401(d)(i) (West 2012)), a Class 2 felony for which he was sentenced to three years in prison. The mittimus also states defendant was sentenced as a Class X offender on count 2 pursuant to 730 ILCS 5/5-5-3(c)(8).

¶ 40 This does not reflect the court's oral sentencing pronouncement. Instead, the mittimus should reflect that, for count 2, defendant was convicted of possession of a controlled substance (720 ILCS 570/402(c) (West 2012)), a Class 4 felony for which he received a sentence of three years' imprisonment. For count 4, the mittimus should state that defendant was convicted of delivery of "other amount narcotic," (720 ILCS 570/401(d) (West 2012)), a Class 2 felony for which he received a concurrent prison term of 16 years. Finally, the mittimus should reflect defendant was sentenced on count 4 as a Class X offender pursuant to 730 ILCS 5/5-4.5-95(b).

¶ 41 Accordingly, pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we direct the clerk of the circuit court to correct defendant's mittimus to reflect the proper convictions and sentences entered. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 42 Affirmed; mittimus corrected.