2017 IL App (1st) 143806-U

No. 1-14-3806

Order filed March 6, 2017

First Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 14399
	)	
ARTHUR KIRBY,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 12-year sentence for delivery of a controlled substance affirmed over his contention that it was excessive in light of the nature and circumstances of the offense and his mitigating evidence.

¶ 2 Following a bench trial, defendant Arthur Kirby was convicted of delivery of a controlled substance (720 ILCS 570/401(d) (West 2012)) and sentenced to 12 years' imprisonment. On appeal, he contends that his sentence was excessive given the nature and circumstances of the offense and his mitigating evidence. We affirm.

¶ 3 At trial, the evidence showed that, at 11:20 a.m. on July 8, 2013, Chicago police officers Nichelle Fraction and Shayon Harris were undercover, conducting a narcotics investigation in a covert vehicle driven by Fraction. The officers were directed to drive to East 119th Street and South Michigan Avenue where two men were conducting hand-to-hand transactions. As the officers approached the intersection, Harris observed defendant with another man. The officers drove up to the men, and Harris asked where she could "get those rocks at out here?" Both men shook their heads, indicating they did not know. As the officers drove away, Harris heard someone yell "stop, stop, come back." The officers returned to the men. Defendant walked up to the passenger side of the vehicle and told them that they would have to drive to another location to get the "rocks." Harris told defendant that she needed to go to a cash station to get more money and would return. The officers drove away.

¶ 4 Five minutes later, the officers returned. Defendant entered the backseat of their vehicle and directed them to the corner of East 121st Street and South State Street. Harris gave defendant $40 of prerecorded police funds, and he exited the vehicle. Defendant walked down the street and entered a residence. Two minutes later, he returned with a clear plastic bag containing suspect crack cocaine. The officers dropped defendant back off at East 119th Street and South Michigan Avenue, and he told them to "come by any time." Other officers eventually arrested defendant. The clear plastic bag contained one "off-white rock," which tested positive for the presence of cocaine in the amount of .03 grams.

¶ 5 The trial court found defendant guilty of delivery of a controlled substance. He unsuccessfully moved for a new trial, and the case proceeded to sentencing.

¶ 6 The presentence investigative report (PSI) revealed that defendant was 45 years old at the time he committed the instant offense. The report described his childhood as "not good." He

grew up on the south side of Chicago where drugs and gangs were prevalent and had a stepfather who physically and mentally abused him. The report noted that defendant had been previously affiliated with the "Gangster Disciples" street gang and had attained the rank of "coordinator." The report stated that defendant suffered from various mental ailments, including anxiety, depression and post-traumatic stress disorders, and had been prescribed psychotropic medications for them. Three times, he had to be hospitalized due to mental health episodes. In 2011, he sustained a brain injury after being physically attacked. The report indicated that defendant was the caretaker of his biological father who was sick. It further revealed that defendant had previous felony convictions, including multiple aggravated batteries, multiple armed robberies and a previous conviction for possession of a controlled substance. In August 2011, defendant was sentenced to 42 months' imprisonment for aggravated battery of a merchant, his most recent conviction.

¶ 7 At the sentencing hearing, the State noted that, based on defendant's criminal background, he was required to be sentenced as a Class X offender. It highlighted his lengthy criminal history of "nine felony convictions," in particular his violent offenses, consisting of multiple aggravated batteries and multiple armed robberies, including one while armed with a firearm. The State concluded that defendant was "prone to violence," "a danger to society" and requested a "lengthy term."

¶ 8 Defense counsel argued in mitigation that defendant's childhood was "not good," which included him being physically and mentally abused by his stepfather. Counsel stated that defendant began drinking at 10 years old and experimented with narcotics in his teenage years. Counsel noted that defendant had been diagnosed with anxiety, depression, post-traumatic stress disorders and had been prescribed psychotropic medication for his ailments. Counsel further

observed that defendant had obtained his GED while in prison and "left the gang scene." Counsel lastly noted that defendant had 2 children and 18 grandchildren, "who he enjoys spending time with."

¶ 9 Defendant spoke in allocution, acknowledging that he had done "a lot of wrong things" in his life, but, as he aged, he "changed [his] life." He expressed remorse for not always being there for his children and wanted to "be around [his] grandchildren" whom he loved. He told the court that, despite his criminal record, "some things were just cop-outs that [he] took *** when [he] got charged." Defendant added that he "bailed *** [a]nd it would have been less."

¶ 10 The trial court found that defendant's "plea for mercy" came "a little bit late," highlighting his aggravated battery of a merchant in 2011 and asking "how is that changing?" The court noted that it had listened to the parties' arguments in aggravation and mitigation, reviewed the PSI "in its entirety," and considered the statutory aggravating and mitigating factors. The court observed that defendant had nine prior felony convictions, including six for violent offenses. It stated that, despite receiving sentences of up to 10 years' imprisonment, "[n]one of that seem[ed] to have any effect on" defendant. The court subsequently sentenced him to 12 years' imprisonment. Defendant moved the court to reconsider the sentence, arguing it was excessive, but the court denied the motion. This appeal followed.

¶ 11 Defendant contends that his 12-year sentence for delivery of a controlled substance was excessive in light of the nature and circumstances of the offense and his mitigating evidence. Specifically, he argues that the offense was "not serious enough" to warrant such a lengthy sentence because he delivered only .03 grams of cocaine, never threatened any violence and the transaction itself was initiated by an undercover police officer. Defendant further points out that

his childhood was "troubled," he has a history of mental illness and was responsible for taking care of his ill father. He therefore asks this court to reduce his sentence.

¶ 12 Normally, delivery of a controlled substance is a Class 2 felony (720 ILCS 570/401(d) (West 2012)), subjecting the defendant to a sentence of between 3 and 7 years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2012). However, due to defendant's criminal background, he was required to be sentenced as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2012)), subjecting him to a sentence of between 6 and 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 13 The Illinois Constitution requires trial courts to impose sentences according to the seriousness of the offense and with the objective of restoring the defendant to useful citizenship, *i.e.*, to consider a defendant's rehabilitative potential. Ill. Const. 1970, art. I, § 11; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. The most important factor in determining a sentence is the seriousness of the offense. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. In determining the proper sentence, trial courts are given broad discretionary powers (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)), and a sentence will not be reversed absent an abuse of that discretion. *People v. Geiger*, 2012 IL 113181, ¶ 27. Reviewing courts give such deference to the trial court because it had "the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). When a sentence falls within the statutory range, it is presumed to be proper (*Knox*, 2014 IL App (1st) 120349, ¶ 46), and may only be "deemed excessive and the result of 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." *Stacey*, 193 Ill. 2d at 210.

¶ 14 In the present case, defendant's 12-year sentence for delivery of a controlled substance is presumed proper, as it was within the statutory range for the offense. *Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, we do not find the sentence greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. Although defendant delivered a small amount of drugs to an undercover police officer at her request in circumstances where no violence was involved, the seriousness of the offense, while the most important consideration (*Kelley*, 2015 IL App (1st) 132782, ¶ 94), was but one factor the trial court had to consider. See *Stacey*, 193 Ill. 2d at 209. The court also had to consider defendant's potential for rehabilitation in light of his age and background, among other factors. *People v. Hayes*, 62 Ill. App. 3d 360, 365 (1978).

¶ 15 Defendant was 45 years old at the time he committed the instant offense, and as the trial court noted, he had a violent criminal background, consisting of multiple convictions for aggravated battery and armed robbery, including one while armed with a firearm. This lengthy and serious criminal history warranted a sentence above the minimum required. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (finding a defendant's criminal history "alone" would warrant a sentence "substantially above the minimum"). The court also found defendant's pattern of violent crime cast doubt on his rehabilitative potential, noting his previous, more lenient sentences had not deterred his criminal conduct. See *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13 (finding a 15-year sentence for delivery of a controlled substance within 1,000 feet of a church proper as the offense was the defendant's eleventh drug conviction, his fifteenth felony overall, and he "was not deterred by previous, more lenient sentences"). Under these circumstances, defendant's 12-year sentence was appropriate.

¶ 16 Moreover, while the trial court did not mention defendant's troubled childhood, his history of mental illness or his responsibility to care for his ill father, this potentially mitigating evidence was part of the PSI, which the court stated it had considered. We cannot reweigh sentencing evidence the court has considered. See *People v. Higgins*, 2016 IL App (3d) 140112, ¶ 31. Accordingly, defendant's 12-year sentence for delivery of a controlled substance was not excessive.

¶ 17 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 18 Affirmed.