

FIRST DIVISION
February 6, 2017

No. 1-14-3882

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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 944
)	
SHURRON CLARK,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* Defendant's sentence for aggravated discharge of a firearm was not reversible error; convictions for aggravated unlawful use of a weapon vacated as unconstitutional under *Aguilar*; previously merged convictions for unlawful use of a weapon by a felon reinstated; remanded for sentencing on those convictions.

¶ 2 Following a bench trial, defendant Shurron Clark was convicted of aggravated discharge of a firearm and aggravated unlawful use of a weapon (UUW), and sentenced to concurrent prison terms of 9½ years and 7 years, respectively. The court subsequently granted Mr. Clark's petition for a new sentencing hearing and, thereafter, resentenced Mr. Clark to concurrent terms

of six years' imprisonment for each offense, with the sentence for aggravated discharge of a firearm being served at 85%, and the sentence for aggravated UUW being served at 50%.

¶ 3 On appeal, Mr. Clark contends that the trial court abused its discretion at resentencing because it failed to give adequate consideration to his potential for rehabilitation as shown by the additional mitigating evidence presented at the resentencing hearing. Mr. Clark also contends, and the State agrees, that his convictions for aggravated UUW must be vacated as they are facially unconstitutional pursuant to *People v. Aguilar*, 2013 IL 112116. Mr. Clark acknowledges that one of his convictions for UUW by a felon, which the trial court merged into the aggravated UUW conviction, must be reinstated and that he must be sentenced on that conviction. However, he argues that there is no need to remand because he should only be sentenced on one of those convictions and any sentence will be concurrent to and shorter than his current six-year sentence for aggravated discharge of a firearm. The State argues that Mr. Clark should be resentenced on both of his convictions for UUW by a felon and that we should remand for resentencing. We affirm Mr. Clark's six-year sentence for aggravated discharge of a firearm, vacate his convictions for aggravated UUW, reinstate his two convictions for UUW by a felon, and remand this case for sentencing on those convictions.

¶ 4

BACKGROUND

¶ 5 Mr. Clark was charged with several counts of attempted first degree murder, aggravated discharge of a firearm, unlawful possession of a firearm by a street gang member, UUW by a felon, and aggravated UUW. Because there is no issue before us now on Mr. Clark's convictions, we will only briefly address the evidence.

¶ 6 The evidence at trial generally showed that at approximately 1 a.m. on December 12, 2009, four men were riding in a Chevrolet vehicle near 4119 West Lake Street when several shots were fired at them. Several Chicago police officers responded to the call of shots fired and,

when two of the officers arrived at the scene, they observed an individual identified as Mr. Clark holding a handgun. Mr. Clark fled from the officers and they pursued him, eventually detaining and arresting Mr. Clark in a vacant lot.

¶ 7 Officer Hoffman testified that he and his partner, Officer Sivicek, responded to the call of shots fired. As Officer Hoffman exited his vehicle at the scene, he heard five gunshots fired from the area directly to his west. He saw Mr. Clark standing 50 feet away to the west, with his right arm extended, pointing a black handgun towards the street. Officer Hoffman immediately ran towards Mr. Clark who fled westbound on Lake Street, still holding the gun. As both Officers Hoffman and Sivicek chased Mr. Clark on foot, additional officers who had arrived on the scene joined in the pursuit in their squad car. Shortly thereafter, Mr. Clark was detained in a vacant lot. As Mr. Clark was being placed in custody, Officer Hoffman saw the gun fall and, as it was lying in the snow near Mr. Clark, observed that it was a .38-caliber revolver.

¶ 8 Officer Naughton testified that he and his partner, Officer Gallagher, responded to the call of shots fired and, when they arrived at the scene, he observed Mr. Clark running westbound on Lake Street with two police officers chasing him. Officer Naughton, who was driving, followed Mr. Clark through an alley and into a vacant lot. Once inside the lot, Officer Naughton exited his vehicle and chased Mr. Clark on foot through the lot, across the street, and into another vacant lot where he tackled Mr. Clark to the ground and apprehended him. Immediately before being tackled, Mr. Clark threw a gun from his right hand to the ground. The gun landed in the snow about an arm's length away from Mr. Clark.

¶ 9 Officer Zogg testified that he also responded to the call of shots fired on Lake Street and, when he arrived at the scene, he saw four men running. Officer Zogg asked the men what they were running from, and they replied that they were following police officers who were chasing a man who had just fired gunshots at them. Officer Zogg was then notified on his radio that a

possible suspect was in custody. Officer Naughton transported Mr. Clark to the location where the four men were standing near a squad car, and one of the men identified Mr. Clark, stating "yeah, he's the guy that shot us."

¶ 10 The State presented a stipulation that Officer Stephen Valcerzak, an evidence technician, would testify that he recovered a .38-caliber revolver from the vacant lot, and inside that gun were five spent shell casings. The officer also photographed the Chevrolet vehicle the four men had been riding in when they were shot at, which had bullet fragments on the door frame, a bullet hole on the right front panel of the passenger's door, and a flat tire with a bullet hole in it. He recovered bullet fragments from the vehicle and performed a gunshot residue test on Mr. Clark.

¶ 11 The State presented another stipulation that forensic scientist Mary Wong analyzed the gunshot residue test results from Mr. Clark and found that he may not have discharged a firearm with either hand. She further concluded that if Mr. Clark discharged a firearm, the particles were either removed by activity, not deposited, or not detected by the procedure.

¶ 12 The State presented a third stipulation that ballistics expert Diana Pratt examined the bullet fragments recovered from the Chevrolet vehicle and the .38-caliber revolver recovered in this case and, following testing, concluded that the bullet fragments were fired from that weapon. The State also presented a certified copy of Mr. Clark's 2008 Kane County felony conviction for aggravated battery of a school employee.

¶ 13 At the end of the State's case, the trial court granted Mr. Clark's motion for a directed finding as to several of the counts, including all of the counts for attempted first degree murder.

¶ 14 At the end of the trial, the court found Mr. Clark guilty of aggravated discharge of a firearm (count 13), two counts of UUW by a felon (counts 15 and 16), and two counts of aggravated UUW (counts 17 and 20). At sentencing, the court merged counts 15, 16, and 17 into

count 20, and sentenced Mr. Clark on count 13, aggravated discharge of a firearm, and count 20, aggravated UUW.

¶ 15 In aggravation, the State summarized the facts of the case and argued that those facts were aggravating in and of themselves. The State also pointed out that Mr. Clark had a prior felony conviction in Kane County for aggravated battery to a school employee and was sentenced to probation on that charge. In addition, the State noted that Mr. Clark had a significant juvenile background which included a robbery and aggravated battery in Will County for which he was also sentenced to probation. The State argued that Mr. Clark had demonstrated that he was “incapable of following the laws of society, and that he [did] pose a threat to the community.” The State then recommended a sentence of at least 10 years’ imprisonment.

¶ 16 In mitigation, defense counsel pointed out that the court found Mr. Clark not guilty of the most serious charges, which were related to attempted murder, and that he had a limited criminal history with only one adult felony conviction. Counsel argued that the time Mr. Clark had spent in custody was sufficient to satisfy the minimum sentences for both of the offenses of which he was convicted. In addition, counsel noted that Mr. Clark lived with his mother, that he had lived in the Chicago area his entire life, that his family members had attended every court proceeding, and that he had substantial ties to the community which ensured that he would not be “an additional issue” if the court granted him credit for time served.

¶ 17 In imposing the sentence, the trial court stated:

“I’ve considered the factors in aggravation and mitigation and considered the nature of the charges in the case itself, and I also believe the sentence I issue on today’s date is necessary to protect the public from the activity of this particular defendant, and with any other sentence it would in my mind deprecate the seriousness of this offense.”

The court sentenced Mr. Clark to concurrent terms of 9½ years' imprisonment for aggravated discharge of a firearm (count 13) and 7 years' imprisonment for aggravated UUW (count 20).

¶ 18 Defense counsel filed an untimely motion to reduce, modify, or correct Mr. Clark's sentence. At a hearing on that motion, counsel stated that during a presentencing conference, the parties and the court all had the incorrect understanding that Mr. Clark's sentence for aggravated discharge of a firearm would be served at 50% but, instead, Mr. Clark subsequently learned that he would be required to serve that sentence at 85%. The trial court denied the motion for lack of jurisdiction and informed counsel that she would need to file a postconviction motion to have the issue heard.

¶ 19 Thereafter, defense counsel filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2014)), again asserting that the parties and the court mistakenly determined that Mr. Clark's sentence for aggravated discharge of a firearm would be served at 50%, but that Mr. Clark was required to serve that sentence at 85% pursuant to statute (see 730 ILCS 5/3-6-3(a)(2)(iv) (West 2012)). In the petition, Mr. Clark asked the court to modify its sentence "to reflect the length of incarceration originally intended by Your Honor." The trial court granted Mr. Clark's petition, vacated his sentences, and ordered that he be resentenced.

¶ 20 At resentencing, Mr. Clark waived his right to an updated presentence investigation report (PSI) and agreed that the original PSI could be used. In aggravation, the State noted that Mr. Clark had two prior misdemeanor convictions and that he had not reported any employment prior to being incarcerated. The State argued that Mr. Clark had committed a crime of violence and that the original sentence was appropriate and should again be imposed.

¶ 21 In mitigation, defense counsel noted that Mr. Clark had already served 1337 days in custody on this case without any incidents and argued that his time in custody had been

well-spent earning a certificate of completion for a program. Counsel also pointed out that Mr. Clark had a minimal criminal history prior to these offenses. Counsel then argued “that the nine years at 50 percent would have been approximately four and a half years, so we would ask for a sentence in keeping with what your Honor’s original intent is and reflective of the amount of time that he has actually done.”

¶ 22 In allocution, Mr. Clark stated that he worked in a barbershop prior to being incarcerated and that he completed a program while in prison. Mr. Clark stated that this was his first time in prison and apologized to the court for the “charge that [he] was found guilty of.”

¶ 23 The trial court then sentenced Mr. Clark on counts 1 and 2 to concurrent terms of six years’ imprisonment, noting that count 1 would be served at 85% and count 2 would be served at 50%. The court subsequently issued a corrected mittimus to reflect that Mr. Clark was not guilty of counts 1 and 2 but, instead, that he was sentenced on count 13, aggravated discharge of a firearm, to a term of six years’ imprisonment at 85%, and on count 20, aggravated UUW, to a concurrent term of six years’ imprisonment at 50%. The court again stated that counts 15, 16 and 17 merged into count 20.

¶ 24 ANALYSIS

¶ 25 On appeal, Mr. Clark first contends that his six-year sentence for aggravated discharge of a firearm is excessive because the trial court abused its discretion at the resentencing hearing when it failed to give any consideration to his good conduct while in prison. Mr. Clark claims that the trial court did not give adequate consideration to the new evidence of his potential for rehabilitation which showed that he had completed a program while in prison and was not involved in any incidents. Mr. Clark asserts that his expression of remorse and the progress he made at becoming a responsible member of society were significant factors demonstrating his rehabilitative potential that should have been given substantial weight at resentencing. Mr. Clark

also points out that, after applying the good time credit, his new sentence of 6 years at 85% results in 5.1 years in prison, which is slightly longer than the sentence the court originally intended to impose of 9.5 years at 50%, resulting in 4.75 years in prison.

¶ 26 Mr. Clark acknowledges that he failed to preserve this issue for appeal because he did not raise the issue in a postsentencing motion. He argues, however, that this court should consider his claim under either prong of the plain error doctrine and, alternatively, that trial counsel rendered ineffective assistance when she failed to preserve the issue for appeal. However, because we find no error at all we need not review the court's sentence for plain error or consider whether counsel's performance constituted ineffective assistance.

¶ 27 Aggravated discharge of a firearm, as charged in this case, is a Class 1 felony with a sentencing range of 4 to 15 years' imprisonment. 720 ILCS 5/24-1.2(a)(2), (b) (West 2012); 730 ILCS 5/5-4.5-30 (West 2012). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 28 The Illinois Constitution mandates that criminal penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Ligon*, 2016 IL 118023, ¶ 10. In light of these objectives, “[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant.” *People v. Fern*, 189 Ill. 2d 48, 55 (1999). The court's sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to

weigh the defendant's demeanor, credibility, general moral character, mentality, habits, social environment, and age. *Alexander*, 239 Ill. 2d at 213. "The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.'" *Fern*, 189 Ill. 2d at 55 (quoting *People v. Barrow*, 133 Ill. 2d 226, 281 (1989)). In making its determination, the trial court need not give a defendant's potential for rehabilitation greater weight than the seriousness of the offense. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001).

¶ 29 Here, we find no error by the trial court in resentencing Mr. Clark to a term of six years' imprisonment for aggravated discharge of a firearm, which falls within the statutory sentencing range and is merely two years above the minimum term. The record shows that at the initial sentencing hearing, when the court sentenced Mr. Clark to a term of 9½ years' imprisonment, it expressly stated that it considered the factors in aggravation and mitigation, as well as the nature of the charges in this case. The court then stated "I also believe the sentence I issue on today's date is necessary to protect the public from the activity of this particular defendant, and with any other sentence it would in my mind deprecate the seriousness of this offense."

¶ 30 The record shows that at the resentencing hearing, after listening to the arguments in aggravation and mitigation and Mr. Clark's statement of allocution, the trial court imposed a new sentence that was 3½ years less than the original sentence. As the parties correctly note, after applying the good time credit, under the new sentence Mr. Clark will serve 5.1 years in prison, while under the original sentence he believed he would be serving 4.75 years in prison. This is a difference of merely about four months. Consequently, we find that the trial court granted Mr. Clark the precise relief he requested – it reduced the length of Mr. Clark's sentence so that the new sentence would reflect approximately the amount of time that the court originally intended for Mr. Clark to actually serve in prison.

¶ 31 Mr. Clark notes that at his resentencing hearing he was entitled to present evidence of his “life, moral character and occupation during the time since the original sentence was passed.” See 730 ILCS 5/5-5-3(d) (West 2014). The record is clear that the court allowed Mr. Clark to present this evidence and, as the State notes, the trial court is presumed to have taken all mitigating evidence into consideration.

¶ 32 We find it significant to note that the purpose of Mr. Clark’s section 2-1401 petition, and the court’s granting of that petition, was to correct a sentence that had been entered based on a misapprehension and to modify the sentence to reflect the court’s original intent. The purpose of the resentencing hearing was not to reduce an excessive sentence so that Mr. Clark would serve less time in prison. At the original sentencing hearing, the court expressly stated that the sentence being imposed was necessary to protect the public from Mr. Clark’s conduct and that a lesser sentence would “deprecate the seriousness of this offense.” There is no indication in the record that the court ever intended to reduce the actual amount of time that Mr. Clark would serve in prison from the sentence the court believed it was originally imposing, or that it failed to consider Mr. Clark’s conduct since the original sentence was imposed.

¶ 33 We find that the record shows that the trial court properly based Mr. Clark’s sentence on its consideration of the factors in aggravation and mitigation, the nature of the charges, and the seriousness of the offense, expressly articulating why a lesser sentence would not be appropriate. Accordingly, we find no abuse of discretion by the trial court. This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213) and, based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern*, 189 Ill. 2d at 56. Since no error occurred, there is

no reason to consider whether plain error applies or whether trial counsel rendered ineffective assistance in not filing a postsentencing motion.

¶ 34 Mr. Clark next contends, and the State agrees, that his convictions for aggravated UUW must be vacated because they are facially unconstitutional under *Aguilar* and its progeny. In *Aguilar*, our supreme court found that the Class 4 form of aggravated UUW under section 24-1.6(a)(1), (a)(3)(A) of the Criminal Code (Code) (720 ILCS 5/24-1.6(a)(1), (a)(3)(A) (West 2008)) is facially unconstitutional because it violates the right to keep and bear arms as guaranteed by the second amendment of the United States Constitution. *Aguilar*, 2013 IL 112116, ¶ 22. The supreme court subsequently clarified that section 24-1.6(a)(1), (a)(3)(A) of the aggravated UUW statute is facially unconstitutional without limitation to any particular form or class of the offense. *People v. Burns*, 2015 IL 117387, ¶ 25. In addition, the supreme court held that the reasoning of *Aguilar* extends to a conviction under section 24-1.6(a)(2), (a)(3)(A) of the statute. *People v. Mosley*, 2015 IL 115872, ¶ 25.

¶ 35 In this case, Mr. Clark was convicted of two counts of aggravated UUW. Under count 17, Mr. Clark was convicted of the offense pursuant to section 24-1.6(a)(1), (a)(3)(A), and under count 20, he was convicted pursuant to section 24-1.6(a)(2), (a)(3)(A). At sentencing, the trial court merged count 17 into count 20. As both sections of the statute have been deemed facially unconstitutional by our supreme court, we must vacate both of Mr. Clark's aggravated UUW convictions as void *ab initio*. See *Mosley*, 2015 IL 115872, ¶ 25.

¶ 36 The parties also agree that at least one of Mr. Clark's two convictions for UUW by a felon under counts 15 and 16, which the trial court merged into the aggravated UUW conviction under count 20, is still proper. The State asserts that both of those convictions should be reinstated and that this case should be remanded to the trial court for resentencing on those counts.

¶ 37 In his reply brief, Mr. Clark argues that under the one-act, one-crime doctrine, he should be sentenced on only the most serious of these two UUW offenses, but does not specify which count that should be. He further argues that his sentence on the reinstated UUW by a felon offense should not be greater than his sentence for the vacated aggravated UUW offense, which was six years' imprisonment at 50%. Mr. Clark asserts that if this court affirms his six-year sentence for aggravated discharge of a firearm which, as explained above, we have done, then remanding the case for resentencing on the reinstated UUW by a felon offense is not necessary because his sentences will be served concurrently, and his sentence for UUW by a felon will not exceed his aggravated discharge of a firearm sentence. Mr. Clark claims that under these circumstances, this court may impose a sentence on the reinstated conviction without remanding the case to the trial court.

¶ 38 The record shows that under count 15, Mr. Clark was convicted of UUW by a felon for knowingly possessing a firearm, specifically a handgun, on or about his person after having been previously convicted of a felony. Under count 16, Mr. Clark was convicted of UUW by a felon for knowingly possessing firearm ammunition after having been previously convicted of a felony. Both offenses were charged under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2009)).

¶ 39 Under the one-act, one-crime principle, a defendant cannot be convicted of multiple offenses that are based upon the same single physical act. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). However, in *People v. Almond*, 2015 IL 113817, our supreme court found that the UUW by a felon statute authorizes separate convictions for the simultaneous possession of a firearm and the ammunition inside a single loaded firearm. *Almond*, 2015 IL 113817, ¶ 43.

¶ 40 In this case, the State separately charged Mr. Clark with possession of the handgun and possession of the ammunition inside that handgun. The trial court found Mr. Clark guilty of both

of these offenses. Pursuant to *Almond*, the separate convictions are proper and do not violate the one-act, one-crime principle. The trial court merged both of the convictions into the more serious offense of aggravated UUW, but now that the aggravated UUW conviction has been vacated, the two UUW by a felon convictions may stand. The State has requested that the case be remanded for the trial court to sentence Mr. Clark on these two counts. Although we acknowledge Mr. Clark's argument that remanding for resentencing is unnecessary, we think the most appropriate action is to remand the case for that purpose.

¶ 41

CONCLUSION

¶ 42 For these reasons, we affirm Mr. Clark's conviction and sentence for aggravated discharge of a firearm, we vacate his two convictions for aggravated UUW (counts 17 and 20) and remand this case to the trial court to reinstate Mr. Clark's convictions for UUW by a felon (counts 15 and 16) and sentence him on those counts.

¶ 43 Affirmed in part; vacated in part; remanded with directions.