2017 IL App (1st) 143889-U

SIXTH DIVISION
January 20, 2017

No. 1-14-3889

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 12 CR 17447
	)	
ANTHONY BROWN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court considered all relevant mitigating factors and we affirm the defendant's sentence.

¶ 2 Following a jury trial, defendant Anthony Brown was convicted of aggravated battery of a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2012)) and sentenced to 10 years' imprisonment. On appeal, defendant contends that the trial court did not consider, or failed to properly weigh, all the relevant factors when sentencing him. Defendant therefore requests that

we reduce the sentence, or vacate and remand for resentencing. We affirm but correct the mittimus to reflect a conviction on the proper charge.

¶ 3 Defendant was charged with three counts of aggravated battery of a police officer, alleging he knowingly caused bodily harm to a peace officer (1) knowing the officer was performing his official duties, (2) to prevent him from performing his official duties, and (3) in retaliation for the officer's performing his official duties. 720 ILCS 5/12-3.05(d)(4), (i-iii) (West 2012). The case was tried before a jury.

¶ 4 At trial, Chicago police officer Andy Mui testified that, on August 24, 2012, he and his partner, Officer Bokowski, arrested defendant and transported him back to the 8th District police station. During the five-minute car ride to the police station, defendant was "very angry" and provided basic information to Mui laced with "plenty of profanities" and "obscenities." The officers took defendant to a "secure search room." Defendant was wearing several necklaces as well as earrings. The officers asked him to remove his personal belongings, including his jewelry, as per police procedure. That procedure is followed to protect a defendant's property, the defendant, and police personnel. Defendant refused to remove his belongings and "became verbally abusive and shouted a lot of profanities." Officer Mui asked defendant "several times" to remove his belongings and his necklaces. He warned defendant that if he did not comply, Mui would do it for him. Defendant did not comply. Mui advised defendant he was going to remove his necklace and reached towards the necklaces. Defendant "grabbed both [Mui's] hands *** by the wrists and dug his nails deep into [his] skin." Mui struck defendant with an open hand and tried to free himself. Defendant grabbed Mui by the neck and shouted "I'll kill you, you fucking slope, chink motherfucker." Bokowski then pinned defendant against the wall and Mui "finally pulled [himself] free." Mui exited the room and tended to his injuries, which included "two long

scrapes" down his neck and "claw marks" on his hands and wrist. Mui testified the "claw mark" on his left wrist was still visible on the day of trial. Photographs of the scrapes to Mui's neck, left wrist, and hands were introduced at trial, which Mui identified as fairly and accurately depicting his injuries.

¶ 5 Officer William Bokowski identified defendant as the man he and Mui arrested for delivery of cannabis to an undercover officer on August 24, 2012. During the drive to the police station, defendant was "very agitated and angry." Once in the processing room, Bokowski and Mui instructed defendant, who was wearing two necklaces, to remove his jewelry, belt, and shoelaces, as is the procedural norm. Defendant, who remained agitated, refused to comply. The officers instructed defendant to remove his jewelry "several" times. He continued to refuse. Officer Mui then reached toward the necklace. Defendant grabbed both of Mui's hands near the wrists and "clasped down." Mui "broke away and struck the Defendant." Defendant then reached for and scratched Mui's neck. Bokowski intervened and pinned defendant to the wall. Bokowski observed scratch marks on Mui's neck, right hand, and both wrists.

¶ 6 The State rested. The court denied defendant's motion for a directed verdict. The defendant presented no evidence in his case-in-chief. The jury found defendant guilty of aggravated battery of a peace officer.

¶ 7 A presentence investigation report (PSI) detailed defendant's felony criminal history and sentencing, which included: Class 2 burglary (1985) - three years' imprisonment after a violation of probation; Class 3 attempted robbery (1986) - two years' imprisonment; Class 1 delivery of a controlled substance (1989) - three years' imprisonment after a violation of probation; and Class 3 unlawful use of a weapon by a felon (2003) - three years' imprisonment after a violation of probation. Defendant also had misdemeanor convictions for resisting a police

officer (1985), theft of labor services (1986), disorderly conduct (1996), possession of cannabis (2008 and 2009), and driving while his license was suspended (2009).

¶ 8 In aggravation, the State argued that defendant was a lifelong criminal, as shown by his criminal history. It noted defendant was to be sentenced as a Class X offender, based on his prior Class 2 burglary and Class 1 delivery of a controlled substance convictions. It reiterated the racial slurs and obscenities shouted by defendant during the attack and stated he "threatened to kill the officer." The State asked for a sentence "near the maximum" in this case.

¶ 9 In mitigation, defense counsel argued that, besides a disorderly conduct conviction, defendant had "no criminal history" in the past 25 years. He argued the other recent convictions the State raised were adjudicated with court supervisions that were terminated satisfactorily. Counsel stated that defendant was married with a child and "gainfully employed up until the time of his arrest." He stated there "were no drug issues," "no psychological issues," and "no domestic violence issues," calling defendant "a pretty stable guy." Counsel recognized that the court "heard the facts at trial" and conceded that defendant was "belligerent" in custody, but argued his threat to kill Officer Mui was "not one that can be taken rather seriously" because it occurred in the police station. He stated defendant had no violence in his background and asked for the minimum six year sentence.

¶ 10 During defendant's allocution, he told the court he was only "trying to defend [himself]" and that he only "held [Mui's] arm and scratched his wrist." The court admonished defendant not to "stand here and say things the facts do not support." It told defendant no facts supported that defendant only grabbed Mui's arms and, at no time as far back as 1985, when defendant was first convicted, were persons in custody allowed to keep anything around their necks. The court stated "this was not an attack on you in any way, shape or form by a Chicago Police Officer." It

further stated "the evidence, the photographs, the scratch across Officer [Mui's] face and it wasn't a scratch, it was a gouge across his face that was inflicted by you."

¶ 11 The trial court sentenced defendant as a Class X offender to 10 years' imprisonment. The court noted that defendant was not charged with a hate crime and it would therefore only consider the threats directed at Officer Mui and not any of the other remarks. It stated that it considered defendant's "criminal history, *** social history, as well as the facts of this case and the presentence investigation." The court acknowledged defendant's "more serious crimes were earlier in [his] life," but noted he had violated his probation following his 2003 unlawful use of a weapon by a felon conviction, served three years in prison, and then was "right back at it." It pointed to defendant's subsequent convictions for "cannabis, driving while license suspended." The court stated defendant's life has consisted of "arrest after arrest after arrest" and that he has "been given opportunity after opportunity at rehabilitation" and sentenced him to 10 years' imprisonment. It denied defendant's motion to reduce sentence. Defendant timely appealed.

¶ 12 On appeal, defendant contends that the court improperly considered his criminal history in imposing a 10-year sentence as it was already accounted for in qualifying defendant for Class X sentencing.

¶ 13 Due to two prior felony convictions for burglary and delivery of a controlled substance, defendant's present aggravated battery of a peace officer conviction (720 ILCS 5/12-3.05(d)(4) (West 2012)) rendered him as Class X mandatory with a sentencing range of 6 to 30 years. 720 ILCS 5/12-3.05(h) (West 2012); 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 10-year sentence was well within the statutory range and therefore presumably proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 14 We review a sentence under the abuse of discretion standard, and can alter it only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. We cannot substitute our judgment for that of the trial court simply because we may weigh the sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010).

¶ 15 The trial court is responsible for balancing the mitigating and aggravating factors before imposing sentence. *People v. Shaw*, 351 Ill. App. 2d 1087, 1095 (2004). In imposing a sentence, the trial court balances the relevant factors including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent an affirmative indication to the contrary other than the sentence itself. *People v. Abrams*, 2015 IL App (1st) 133746, ¶¶ 32-33.

¶ 16 Defendant contends that the trial court improperly considered his criminal history when it imposed a sentence above the minimum, as his history was accounted for in making him eligible for the extended Class X term. Sentencing a defendant as a Class X offender requires a conviction of a Class 2 or greater felony and two previous Class 2 or higher convictions. 730 ILCS 5/5-4.5-95(b) (West 2012). The aggravated battery of a peace officer in the current matter is a Class 2 offense. 720 ILCS 5/12-3.05(h) (West 2012). Defendant's 1985 Class 2 conviction for burglary and 1989 Class 1 conviction for delivery of a controlled substance mandated his sentencing as a Class X offender. However, that was not the extent of his criminal history.

Defendant was also convicted of two other felonies, Class 3 attempted robbery in 1986 and Class 3 unlawful use of a weapon by a felon in 2003, for which he served two years and three years, respectively. He was also convicted of misdemeanor disorderly conduct in 1996, possession of cannabis in 2008, and cannabis and driving while his license was suspended in 2009.

¶ 17 Thus, defendant's argument that his criminal history was accounted for when he was sentenced as a Class X offender ignores the majority of his substantial criminal history, including the felony and three misdemeanors he accumulated in the last 10 years, none of which served as the underlying offenses for the Class X sentence. Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). Further, defendant was not deterred by previous, more lenient sentences, as shown by his repeated convictions, violations of probation and, as the court held, "arrest after arrest after arrest." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13 (mitigating factors did not mandate reduced sentence in light of defendant's 14 previous felony convictions). We therefore cannot say that the court's consideration of defendant's criminal history was improper.

¶ 18 Defendant next argues that the court did not properly consider the nature of the offense. Specifically, he contends that his offense arose from "a momentary loss of self-control resulting in only minor injuries to a much younger and stronger police officer," and that the trial court relied on an "incorrect" recollection of the facts when it stated during sentencing that Mui suffered "a gouge across his face," when in fact it was a scratch to his neck.

¶ 19 Officer Mui and Bokowski testified that, during the car ride from the scene of the arrest to the police station, defendant was "very angry" and began what became a pattern of agitated behavior laced with "plenty of profanities" and "obscenities." He was obstructive in the search room, refusing to comply with repeated instructions to remove his necklace and warnings that, if

he did not comply, Mui would remove the necklaces. Removal of jewelry and personal items was standard police procedure, of which defendant was presumably well aware given the number of times he had been in custody. Yet when Mui approached defendant to remove his necklaces, defendant grabbed his wrists and sank his fingernails into Mui's arms, leaving cuts and abrasions. When Mui struck defendant to separate himself, defendant grabbed Mui by the throat, sank his nails into his throat leaving scratches, and shouted "I'll to kill you." Defendant's "loss of self-control" was clearly not "momentary." Instead, it began with his arrest and culminated when he battered a police officer who was attempting to perform his official duties.

¶ 20 Further, nothing in the record suggests that the trial court did not consider the nature of the offense. Indeed, in mitigation, defense counsel acknowledged that the court "heard the facts at trial," but argued defendant's threat to kill Officer Mui was "not one that can be taken rather seriously." 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). Further, the trial court specifically stated it "considered *** the facts of this case." It is a defendant's burden to "make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant has failed to do so here.

¶ 21 Defendant points out that the trial court stated defendant scratched Officer Mui's face, rather than his neck. This was a simple misstatement made in response to defendant's comments made during allocution. Reviewing the statements made by the trial court at sentencing as a whole, we are satisfied that defendant's sentence was not the product of the trial court's failure to accurately recall the evidence introduced at trial. Moreover, whether the scratch was to Mui's face or neck does not change the fact that the trial court found "defendant went for [Mui's]

throat, his face and became combative with him for no reason," reinforcing that the court was well aware of the nature of the offense.

¶ 22 Defendant briefly argues that the trial court did not adequately consider his rehabilitative potential. To the contrary, the court expressly stated that defendant's life has consisted of "arrest after arrest after arrest" and that he has "been given opportunity after opportunity at rehabilitation." It is clear from the record that the court considered defendant's rehabilitative potential. It simply did not find it to be mitigation worthy of a minimum sentence. It is not this court's function to reweigh the sentencing factors. *Alexander*, 239 Ill. 2d at 212-13. Thus, we find that the trial court properly considered defendant's criminal history, the nature of the offense, and defendant's rehabilitative potential before prescribing a sentence within the statutory range. We therefore affirm defendant's sentence.

¶ 23 Although not raised by the parties, we note that the mittimus reflects a conviction under Count 2, which alleged aggravated battery of a peace officer to prevent him from performing his official duties. 720 ILCS 5/12-3.05(d)(4)(ii) (West 2012). It is clear from the jury instructions that the jury was instructed on the aggravated battery of a peace officer offense alleged in Count 1, which alleged defendant knowingly battered a peace officer who was performing his official duties. 720 ILCS 5/12-3.05(d)(4)(i) (West 2012). Pursuant to our authority under Illinois Supreme Court Rule 615(b)(1), and our ability to correct a mittimus without remand, we correct the mittimus to reflect a conviction for aggravated battery of a peace officer under Count 1.

¶ 24 For the reasons stated above, we correct the mittimus and otherwise affirm.

¶ 25 Affirmed; mittimus corrected.