2017 IL App (1st) 150144-U

No. 1-15-0144

Order filed October 6, 2017

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 13402
	)	
CHADONES WHITMAN,	)	Honorable
	)	Joan Margaret O'Brien,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's sentence of 10 years' imprisonment for aggravated battery against a peace officer is affirmed, over his contention that his sentence was excessive. We correct defendant's mittimus and the order assessing fines, fees, and costs.

¶ 2 Following a bench trial, defendant was convicted of aggravated battery against a peace officer (720 ILCS 5/12-3.05(d)(4) (West 2012)) and sentenced, based on his criminal background, as a Class X offender to 10 years' imprisonment. On appeal, defendant contends that his sentence is excessive and that the trial court incorrectly assessed a $5.00 court system fee

against him for violating the Illinois Vehicle Code (55 ILCS 5/5-1101(a) (West 2012)). We affirm defendant's conviction, vacate the $5.00 fee, modify the order assessing fines, fees and costs, and correct defendant's mittimus to reflect that he was sentenced as a Class X offender.

¶ 3 Defendant was arrested at 11:45 p.m. on June 19, 2013, following reports that he committed battery within the vicinity of 8241 South Ellis Avenue. The State subsequently charged defendant by information with six counts of aggravated battery against a peace officer for defendant's conduct during his arrest (720 ILCS 5/12-3.05(d)(4) (West 2012)). Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts only to the extent necessary to resolve the issue raised on appeal.

¶ 4 Officer Flores testified that on June 19, 2013, at around 11:30 p.m., she and her partner, Officer Akinbusuyi, traveled in a marked police vehicle to 8241 South Ellis Avenue to investigate a battery. Flores was wearing her police uniform, and met with victim, Eunice Griffin, who informed Flores that the offender had fled on foot. In an effort to locate the offender, Flores drove Griffin around the area of 8241 South Ellis, where Griffin identified defendant as the person who battered her.

¶ 5 Flores approached defendant, and asked him to remove his hands from his pockets for purposes of officer safety. Defendant refused, and as the officers attempted to place him into custody for the reported battery, he stiffened his arms and refused to remove his hands from his pockets. As the officers tried to remove defendant's hands from his pockets, defendant began to violently flail his arms. While flailing his arms, defendant struck Flores in the face. In self-defense, Flores "performed an open hand stun to his right side of the head." Defendant laughed and told Flores "I am going to kill you Asian Hoe [sic]" and "you are not strong enough, bitch." Defendant continued to be combative and flail his arms as Flores and Akinbusuyi tried to

handcuff him. Akinbusyi called for assistance with a code "10-1," indicating to other officers there was a heightened risk of danger and that assistance was needed immediately.

¶ 6 As the officers waited for assistance, they eventually handcuffed defendant, but had difficulty placing him in the squad car because defendant was so combative. Officer Akinbusuyi tried to pull defendant into the squad car by the upper half of defendant's body, while Officer Flores held defendant's feet. As she did so, defendant kicked her in the face. The officers eventually managed to place defendant inside the squad car.

¶ 7 Following defendant's arrest, Flores was treated at Little Company of Mary Hospital. Flores, who is 5'2" and 115 pounds, experienced redness and bruising on her face, left arm, and right elbow. She also testified that her arms were sore, and that the side of her face was "a little swollen" above the brow. Flores was released from the hospital the same day she was admitted.

¶ 8 Officer Toller testified that around midnight on June 19, 2013, he and his partner, Officer Winters, went to the vicinity of 8241 South Ellis Avenue in response to a "10-1" call for assistance. Toller was wearing his full uniform and showed up in a marked vehicle. When Toller arrived, he saw defendant inside a shaking squad car, "on his back stomping his feet against the windows." As a result, the officers decided the safest way to transport defendant would be in the police wagon instead of the squad car. Toller removed defendant from the squad car and escorted him to the wagon. Defendant was very combative, and was using profane language towards Toller and Flores. While trying to place defendant in a seatbelt, defendant spat on Toller's bulletproof vest. Toller testified he felt insulted by the incident.

¶ 9 The trial court found defendant guilty of all counts. The court ordered a presentence investigation (PSI) report, and denied defendant's motion for a new trial. Defendant's case proceeded to sentencing.

¶ 10 The PSI report reflects that, in 2001, defendant was sentenced to one year probation for criminal sexual abuse. In 2002, defendant was sentenced to 18 months' probation for aggravated battery (a Class 3 felony conviction) and robbery (a Class 2 felony conviction). In February 2003, defendant was sentenced to one year probation for failing to report a change of his address as required by the Sex Offender Registration Act (a Class 4 felony conviction). In August 2003, defendant was sentenced to four years' imprisonment for the manufacture and delivery of 1-15 grams heroin (a Class 1 felony conviction), and also received concurrent sentences of three and four years for violating the conditions of his probation. In February 2008, defendant was convicted of misdemeanor battery and sentenced to 30 days in Cook County Jail. In November 2008, defendant received a sentence of 36 months' imprisonment for obstruction of justice (a Class 4 felony conviction). In July 2010, defendant was sentenced to three years' imprisonment for violating his obligation to register as a sex offender (a Class 2 felony conviction).

¶ 11 In aggravation, the State pointed out that defendant's PSI report did not indicate that he has mental health or substance abuse issues, and theorized that defendant committed aggravated battery because he was angry. The State noted that "you heard the full story, the breadth of—of the defendant's tirade that occurred that day, and it started when an older woman declined to give the defendant a phone number." The State pointed out that two women were beaten by this defendant. In arguing that defendant should receive a sentence "well above" the minimum of six years' imprisonment, the State encouraged the court to consider the threats and physical harm that he caused, and to consider his criminal history, which required that he be sentenced as a Class X offender.

¶ 12 In mitigation, defense counsel argued that the court should consider defendant's background and the fact that none of the officers required medical attention. She informed the

court that defendant was homeless when he received both convictions for failing to update his sex offender registration. She also mentioned that defendant was placed with the Department of Child and Family Services from ages 9 to 17, and acknowledged that defendant has difficulty interacting with authority. Defense counsel then went on to argue that an extensive prison sentence is not necessary to address defendant's issues with anger and authority. Rather, counsel recommended the minimum sentence of six years' imprisonment for a Class X felon, because defendant acted in anger and "[a]s egregious as the behavior may have been, nobody was hospitalized." Defense counsel also recommended that defendant be placed into anger management and a GED program while in prison.

¶ 13 In announcing its sentence, the trial court stated that it considered defendant's PSI report, and the parties' arguments. The court also considered that a male officer was spat on, and that a "female officer was battered not just once but twice." Additionally, the court acknowledged that the injuries were not life-threatening or even required hospitalization. However, the court noted that defendant's behavior at the time and "the things that he said, are certainly aggravating." The court found that, because defendant had multiple felony convictions, the minimum sentence was not appropriate and sentenced him to 10 years' imprisonment followed by 3 years' mandatory supervised release. The trial court denied defendant's motion to reconsider sentence.

¶ 14 On appeal, defendant first contends that his sentence is excessive in light of the modest harm caused by his conduct.

¶ 15 The Illinois Constitution requires a sentence to be "balanced between the seriousness of the offense at issue and the potential for defendant's rehabilitation." *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008) (citing Ill. Const. 1970, art. 1, §11). Such a balance "requires careful consideration of all factors in aggravation and mitigation, including, *inter alia*, the defendant's

age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 87. A defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261 (1995).

¶ 16 The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). " 'A reviewing court gives great deference to the trial court's judgment regarding sentencing because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors that the reviewing court, which must rely on the "cold" record.' " *Id.* at 212-13 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). In the absence of explicit evidence that the sentencing court did not consider mitigating factors, we presume that the sentencing court considered mitigation evidence presented to it. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51.

¶ 17 Because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence, "the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Absent an abuse of discretion by the trial court, the sentence may not be altered on review. *Id.* at 209-10. When "a sentence falls within the statutory guidelines, it is presumed to be proper and will not be disturbed absent an affirmative showing that the sentence is at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense." *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 18 Here, we find that the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment. Defendant was convicted of aggravated battery of a peace officer, a Class 2 felony with a sentencing range of three to seven years' imprisonment. 720 ILCS 5/12-3.05(d)(4) (West 2012); 720 ILCS 5/12-3.05(h) (West 2012); 720 ILCS 5/5-4.5-35 (West 2012). Because of his criminal background, defendant was subject to mandatory Class X sentencing of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5-4.5-25 (West 2012). The trial court's 10-year sentence falls within the statutory range and, thus, we presume that it is proper, and we will not find an abuse of discretion unless the sentence is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the nature of the offense. *Knox,* 2014 IL App (1st) 120349, ¶ 46.

¶ 19 Defendant does not dispute that he is subject to mandatory Class X sentencing, or that his sentence fell within the sentencing guidelines and is presumed proper. Instead, he argues that his sentence is wholly disproportionate to the nature of the offense because it fails to reflect the modest harm caused by his conduct. In particular, defendant points out that the most severe injuries resulting from his conduct were light bruises, and that he did not harm the officers spontaneously, but did so while resisting arrest. According to defendant, although inflicting injuries during an arrest is not excusable, it is not unusual.

¶ 20 However, as mentioned above, we presume that the trial court considered mitigating evidence presented to it. *People v. Butler,* 2013 IL App (1st) 120923, ¶ 31. To overcome that presumption, defendant must present some indication, other than the sentence imposed, that the trial court did not consider the mitigating evidence. *Id.* Defendant has not made such a showing, where the record reflects that the court heard defense counsel's arguments that defendant inflicted light injuries to the officers because he was angry about being arrested, and that people

tend to get angry when being taken into custody. Moreover, in imposing its sentence, the court specifically acknowledged that the injuries were not life threatening or even required hospitalization, but found that a minimum sentence was not appropriate in light of defendant's criminal history. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may "warrant sentences substantially above the minimum.").

¶ 21 Given this record, defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. This we cannot do. See *Stacey*, 193 Ill. 2d at 209 ("the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently."). As the trial court is presumed to have considered all evidence in mitigation, and the record shows that it did, we find that the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment, a term four years above the statutorily required minimum.

¶ 22 Defendant next contends that we should vacate a $5 court system fee (55 ILCS 5/5-1101(a) (West 2012)). Although defendant did not preserve this issue for appellate review, we will address the merits of his claim as the State has not objected to it being raised. See *People v. Reed*, 2016 IL App (1st) 140498, ¶ 13 ("Generally, a defendant forfeits any sentencing issue that he or she fails to preserve through both a contemporaneous objection and a written postsentencing motion," however, by "failing to timely argue that a defendant has forfeited an issue, the State waives the issue of forfeiture.").

¶ 23 We review the propriety of a trial court's imposition of fines and fees *de novo*. *People v. Glass*, 2017 IL App (1st) 143551, ¶ 21. The fee at issue is to be assessed when a defendant is found guilty of violating the Illinois Vehicle Code or similar provisions in a county or municipal ordinance. 55 ILCS 5/5-1101(a) (West 2012). As defendant was not found guilty of violating

the Illinois Vehicle Code, or a similar provision, such a fee was incorrectly assessed against him. Accordingly, we vacate the $5 court system fee assessed against him (55 ILCS 5/5-1101(a) (West 2012)) and order the clerk of the circuit court, pursuant to Illinois Supreme Court Rule 615(b)(1), to modify the order assessing fines, fees and costs. See *Glass*, 2017 IL App (1st) 143551, ¶ 24-28.

¶ 24 Finally, we note that defendant's mittimus does not indicate that he was sentenced as a Class X offender. The appellate court has the authority to correct the mittimus at any time without remanding the matter to the trial court. *People v. Harper*, 387 Ill. App. 3d 240, 243 (2008); see also *People v. McNeal*, 405 Ill. App. 3d 647, 682 (2010) (a reviewing court can address an unbriefed issue where "the error is clear and obvious and based upon well-established precedent"). Accordingly, we order the clerk of the circuit court, pursuant to Illinois Supreme Court Rule 615(b)(1), to correct defendant's mittimus to reflect that defendant was sentenced as a Class X offender.

¶ 25 Affirmed; fines, fees and costs order modified; mittimus corrected.