2017 IL App (1st) 150152-U

No. 1-15-0152

Order filed June 30, 2017

SECOND 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. 14 CR 13907
	)	
MICHAEL MILLER,	)	Honorable
	)	Sharon M. Sullivan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence of eight years' imprisonment for robbery is affirmed over his contention that his sentence is excessive where the trial court failed to consider his drug addiction. The trial court did not err in assessing the $25 Court Services fee.

¶ 2 Following a bench trial, defendant Michael Miller was convicted of robbery (720 ILCS 5/18-1(a) (West 2014)) and sentenced as a class X offender, based on his criminal background, to eight years' imprisonment. On appeal, defendant contends that his sentence is excessive. He

also claims that the trial court erroneously assessed the $25 Court Services fee (55 ILCS 5/5-1103 (West 2014)). For the reasons set forth herein, we affirm the judgment of the trial court.

¶ 3 Defendant was charged with one count of robbery and one count of unlawful restraint. Defendant waived his right to a jury trial, and on November 4, 2014, the case proceeded to a bench trial. Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts to the extent necessary to resolve the issue raised on appeal.

¶ 4 Marco Escareno testified that at 12:30 a.m., on July 28, 2014, as he was walking toward a bus stop on the corner of Cicero Avenue and Fullerton Avenue, a man, whom he identified in court as defendant, asked him if he could use his cellphone to make a phone call. Escareno allowed defendant to use his cellphone. After defendant finished his phone call, he returned the phone to Escareno. A few minutes later, defendant parked a van on the side of the street near Escareno. He exited the van, walked towards Escareno, and asked to use his cellphone again. Escareno allowed defendant to use his cellphone once more and heard defendant say to the person whom he had called that he "wasn't scared because he had a gun." Escareno explained that defendant said that he had a gun multiple times and that defendant was looking at him while he said it.

¶ 5 As he was using the cellphone, defendant walked to the other side of the van and sat in the driver's seat. When Escareno asked him to return his cellphone, defendant put the van in gear. As Escareno reached into the van and attempted to retrieve his cellphone, defendant pushed him in the chest and drove away. Escareno called the police and gave the responding officers a description of defendant and the van. A few minutes later, the officers transported him to a gas

station at 1600 North Western Avenue. There, Escareno identified defendant and his cellphone. He testified that he did not give defendant permission to keep or drive away with his cellphone.

¶ 6 Defendant testified that he did not threaten Escareno or tell him that he had a gun. He also denied pushing Escareno before driving away, but acknowledged that he chose to drive off with his cellphone. The parties then stipulated that defendant had been convicted of unlawful restraint in 2014, home invasion in 2006, and burglary in 2004. Based on this evidence, the trial court found defendant guilty of robbery and not guilty of unlawful restraint. The case then proceeded to sentencing.

¶ 7 At the sentencing hearing, the court heard arguments in aggravation and mitigation. In aggravation, the State informed the court that defendant was subject to mandatory Class X sentencing based on his 2006 home invasion and 2004 burglary convictions. In asking for a significant sentence, "in the double digits," the State noted that defendant had not conformed his conduct after previous imprisonment and that he had been on probation at the time of the robbery.

¶ 8 In mitigation, defense counsel informed the court that defendant had a substantial history of drug abuse, including a $200 to $300 a day crack cocaine and heroin habit and a $300 a week prescription drug habit. Counsel also noted that defendant's parents had been drug addicts, and that all three of his siblings also abuse drugs. Helen Ely, defendant's wife, testified in mitigation. Ely stated that she had been married to defendant for 12 years and that they had a three and a half year-old son together. Defendant had also helped Ely raise her 16 year-old daughter. Ely stated that, despite his problems with drugs, defendant was a good father. She also stated that two days before defendant was arrested for the offense at bar, he had overdosed on drugs and was

admitted to the hospital. Ely testified that, despite defendant's drug problems, she did not want her son to grow up without his father.

¶ 9 In allocution, defendant apologized for the wrong that he had done in his life and admitted that he had a drug problem. He told the trial court that he had not been eligible for drug treatment during his last term of imprisonment because of his criminal background, and requested drug treatment.

¶ 10 In announcing its sentencing decision, the trial court explained that it was constrained by the Class X sentencing statute and that it could not sentence defendant to drug probation. The court noted that defendant had opportunities, throughout his criminal history, to address his substance abuse but failed to take advantage of those opportunities. The court acknowledged that defendant's substance abuse problem was "tragic" and that it created hardship for his family members, who "care about [him]." The trial court then sentenced defendant to eight years' imprisonment and mandated that he receive drug treatment at the penitentiary.

¶ 11 Defendant moved to reconsider sentence. In denying the motion, the court noted that defendant's sentence was "lenient" and that it "accept[ed]" defendant had a substance abuse problem, which "probably [is] what led to this incident." Defendant filed a timely notice of appeal.

¶ 12 On appeal, defendant first contends that his eight-year sentence is excessive because the trial court failed to consider his substance abuse problem and the impact his sentence will have on his wife and young son.

¶ 13 The Illinois Constitution requires that a trial court impose a sentence that reflects both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill.

Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In reaching this balance, a trial court must consider a number of aggravating and mitigating factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). Although the trial court's consideration of mitigating factors is required, it has no obligation to recite each factor and the weight it is given. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. Absent some indication to the contrary, other than the sentence itself, we presume the trial court properly considered all relevant mitigating factors presented. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 14 Ultimately, because a trial court is in the superior position to weigh these factors, its sentencing decision is entitled to great deference and we review a sentence within statutory limits for an abuse of discretion. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20; *Alexander*, 239 Ill. 2d at 212-13. In reviewing a defendant's sentence, this court will not reweigh these factors and substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Busse*, 2016 IL App (1st) 142941, ¶ 20. When a sentence falls within the statutory range, it is presumed to be proper, and "will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *People v. Brown*, 2015 IL App (1st) 130048, ¶ 42 (quoting *People v. Fern*, 189 Ill.2d 48, 54 (1999)).

¶ 15 Here, we find that the trial court did not abuse its discretion in sentencing defendant to eight years' imprisonment. In this case, defendant was convicted of robbery, a Class 2 felony with a sentencing range of 3 to 7 years' imprisonment. 720 ILCS 5/18-1(a) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014). Defendant, due to his criminal history, was subject to

mandatory Class X sentencing of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(a) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). Accordingly, the eight-year sentence imposed by the trial court falls at the lower end of the permissible statutory range and, thus, we presume it is proper. *Wilson*, 2016 IL App (1st) 141063, ¶ 12; *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 16 Defendant does not dispute that his eight-year sentence is within that applicable sentencing range and is therefore presumed proper. Rather, he argues that his eight-year sentence was "contrary to the spirit and purpose of the law as well as manifestly disproportionate" to his offense because the court failed to properly analyze several statutory factors in mitigation. Specifically, defendant claims that the court failed to acknowledge that his actions were non-violent and motivated by extreme drug use. He also argues that his eight-year sentence would cause great hardship to his family.

¶ 17 In order to prevail on these arguments, defendant "must make an affirmative showing [that] the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant cannot make such a showing here where the record reveals that the trial court expressly considered his drug addiction and familial obligations in crafting its sentence. At defendant's sentencing hearing, the court heard from defense counsel regarding defendant's extensive drug abuse. The court also heard testimony from defendant's wife of 12 years. Prior to imposing sentence, the court specifically stated that it could not sentence defendant to drug probation because it was constrained by the Class X sentencing statute. However, in sentencing defendant to eight years' imprisonment, the court mandated that defendant be enrolled in a drug treatment program and acknowledged that defendant's substance

abuse problem was "tragic" and that it created hardship for his family, who cared about him. Moreover, in denying defendant's motion to reconsider sentence, the court stated that it accepted defendant had a substance abuse problem, which probably led to this incident.

¶ 18 Given this record, defendant's argument is, essentially, asking us to reweigh the sentencing factors and substitute our judgment for that of the trial court. As mentioned, this we cannot do. See *Busse*, 2016 IL App (1st) 142941, ¶ 20 (a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently). Even if we were to weigh these factors differently, we cannot say that the trial court abused its discretion in sentencing defendant to eight years' imprisonment, a term two years above the statutorily required minimum. See *Alexander*, 239 Ill. 2d at 212-214.

¶ 19 In reaching this conclusion, we are not persuaded by defendant's citations to studies which underscore the debilitating nature of substance abuse. Aside from being outside the trial record, these materials would not require a trial court to impose the minimum sentence and do not compel us to reduce a sentence that is two years above the minimum. See *People v. McGee*, 374 Ill. App. 3d 1024, 1030 (2007) (striking portions of appellant's brief that included psychological studies not presented at trial). See also *People v. Mertz*, 218 Ill. 2d 1, 83 (2005) (noting that "a history of substance abuse is a double-edged sword" at a sentencing hearing and that "simply because the defendant views his substance abuse history as mitigating does not require the sentencer to do so").

¶ 20 We are likewise not persuaded by defendant's argument that the trial court did not consider the "essentially non-violent" nature of his offense. We will not trivialize this essentially violent crime of robbery. As mentioned, the trial court is presumed to have considered all

relevant factors and any mitigation evidence, but has no obligation to recite each factor and the weight it is given at a sentencing hearing. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. This aside, the trial court heard the evidence presented at trial, including the circumstances surrounding defendant's conduct. See *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011) ("[t]he trial judge heard the evidence adduced at trial and is presumed to know violence was not involved in this case").

¶ 21 Defendant next contends that the $25 Court Services fee (55 ILCS 5/5-1103 (West 2014)) assessed against him was not authorized by statute and should, therefore, be vacated. Defendant concedes that he did not challenge the assessment of this fee in the trial court. However, as the State does not argue forfeiture on appeal, it has forfeited the defendant's claim. See *People v. Whitfield*, 228 Ill. 2d 502, 509 (2007) (the State may forfeit the claim that an issue defendant raises is forfeited if the State does not argue forfeiture on appeal). We review the imposition of fines and fees *de novo*. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16.

¶ 22 Defendant argues that the statute authorizing the Court Services fee states that the fee may only be assessed where a defendant has been convicted of a list of enumerated crimes. As robbery is not included in this list of enumerated crimes, he contends that we should vacate the fee. The statute authorizing the Court Services fee states:

> "In criminal, local ordinance, county ordinance, traffic and conservation cases, such fee shall be assessed against the defendant upon a plea of guilty, stipulation of facts or findings of guilty, resulting in a judgment of conviction, or order of supervision, or sentence of probation without entry of judgment pursuant to Section 10 of the Cannabis Control Act, Section 410 of the Illinois Controlled Substances Act, Section 70 of the Methamphetamine Control and Community Protection Act, Section 12-4.3 or subdivision

(b)(1) of Section 12-3.05 of the Criminal Code of 1961 or the Criminal Code of 2012, Section 10-102 of the Illinois Alcoholism and Other Drug Dependency Act, Section 40-10 of the Alcoholism and Other Drug Abuse and Dependency Act, 6 or Section 10 of the Steroid Control Act. 55 ILCS 5/5-1103 (West 2014).

¶ 23 However, this court has repeatedly rejected this argument and held that list of enumerated statutes modifies only the "last type of adjudication: 'sentence of probation.' " *People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 105. See also *People v. Adair*, 406 Ill. App. 3d 133, 144 (2010) (finding that "the encompassing language of the statute and its clear purpose of defraying court security expenses" meant that it could be applied to a non-enumerated offense); *People v. Anthony*, 2011 IL App (1st) 091528, ¶¶ 26-27 (finding that the fee could be assessed after a conviction of unlawful possession of a weapon by a felon); *People v. Williams*, 2011 IL App (1st) 091667-B, ¶ 18 (finding that "[i]t is clear that the statute permits assessment of this fee upon any judgment of conviction"); *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 61 (following *Adair* and finding the fee proper after a conviction of possession of contraband in a penal institution). We see no reason here to depart from our findings in these cases. The statute authorizes the fee to be assessed after a judgment of guilty in criminal cases. 55 ILCS 5/5-1103 (West 2014). Accordingly, the trial court's assessment of the $25 Court Services fee following defendant's conviction for burglary was proper.

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.