2017 IL App (1st) 150670-U

No. 1-15-0670

Order filed May 10, 2017

Third 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 19659
	)	
JIMMIE YOUNG,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence affirmed as the trial court did not abuse its discretion in sentencing him to 12-years' imprisonment.

¶ 2 Following a bench trial, defendant Jimmie Young was convicted of delivery of less than one gram of heroin (720 ILCS 570/401(d)(i) (2012)). On appeal, defendant argues that the trial court abused its discretion in imposing a sentence of 12 years' imprisonment. For the following reasons, we affirm.

¶ 3 Defendant was charged with four counts: delivery of less than 1 gram of heroin within 1,000 feet of a school (720 ILCS 570/407(b)(2), 401(d) (West 2012)), possession of less than 1 gram of heroin with the intent to deliver within 1,000 feet of a school (720 ILCS 570/407(b)(2), 401(d) (West 2012)), delivery of less than 1 gram of heroin (720 ILCS 570/401(d)(i) (2012)), amd possession of a less than 1 gram of heroin with the intent to deliver (720 ILCS 570/407(b)(2), 401(d) (West 2012)). The counts in the indictment generally alleged that, on the afternoon of September 18, 2013, defendant sold one packet of heroin to an undercover police officer and was found in the possession of another packet upon arrest. Defendant waived his right to a jury trial and the State nol-prossed the first two counts of the indictment which alleged that defendant was within 1,000 of a school at the time of the offense.

¶ 4 Chicago police officer Steven Leveille testified that, on September 18, 2013, he was working as a part of an undercover narcotics unit and was dressed in civilian clothing. Leveille responded to reports of possible drug activity near the 4700 block of West Washington. Leveille, travelling by foot, encountered a man, later identified as defendant, near 4759 West Washington. Defendant approached Leveille and asked, "What are you looking for, big man[?]" Leveille responded, "I'm looking for blows," which Leveille testified was a street name for heroin. Leveille asked defendant if he had "dubs" or "sawbucks," which he testified meant $20 bags and $10 bags of heroin, respectively. Defendant responded, "We got dubs." Leveille asked him for one bag. Defendant told Leveille to wait and walked north, across Washington and out of Leveille's view.

¶ 5 Leveille testified that, after a short period of time, defendant returned and told him to follow him. They walked east on Washington and, at approximately 4745 West Washington,

defendant handed Leveille a tinfoil packet wrapped in purple tape. Leveille handed defendant $20 in prerecorded currency. Leveille left the area and returned to his unmarked vehicle, where he radioed surveillance officers that a transaction had taken place. Leveille believed the package given to him by defendant contained drugs because the packaging was "similar to what narcotics packaging is." He also opened the tinfoil package and observed a white powder inside, which he suspected to be heroin.

¶ 6 Leveille testified that, after the transaction, he drove back to the area after he was notified that officers had detained a suspect at 4850 West Maypole and identified defendant as the person who had sold him the suspect narcotics.

¶ 7 Chicago police officer Shirene Hicks testified that, on September 18, 2013, she was working as a surveillance officer for an undercover narcotics unit. Hicks travelled to 4700 block of West Washington where she was told that a controlled purchase would be taking place. She observed Leveille walk to 4759 West Washington and speak with a man, later identified as defendant. The two had a brief conversation, then defendant walked north, out of Hicks' view. Defendant returned two to three minutes later and engaged in a hand-to-hand transaction with Leveille: Leveille handed defendant something and then defendant handed Leveille something. Hicks followed Leveille to his car, where Leveille radioed officers that a drug transaction had occurred and gave a description of defendant.

¶ 8 Chicago police officer Jerry Crisp was working as an enforcement officer when he received a radio report with the description of a suspect. Crisp drove to where the suspect was reported to be and observed a man, later identified as defendant, who matched the description.

¶ 9 Crisp testified that defendant was approximately 100 feet away when he first observed him. As Crisp drove closer, he observed defendant throw something into the grass. Crisp exited his car, went to where defendant had thrown something, and recovered a packet of tinfoil wrapped in purple tape which, from experience, he suspected contained narcotics. The tinfoil package was located 10 feet away from defendant. Defendant was arrested and Crisp took the package into his possession. No prerecorded currency was discovered on defendant's person.

¶ 10 It was stipulated that forensic scientist Joseph Guillano would testify that he received two sealed items from the Chicago police department. He tested both packets' contents, finding each packet contained 0.2 grams of a substance containing heroin.

¶ 11 The trial court found defendant guilty of delivery of less than one gram of a controlled substance (720 ILCS 570/401(d)(i) (West 2012)) and not guilty of possession of less than one gram of a controlled substance with the intent to deliver (720 ILCS 570/401(d) (West 2012)). Defendant's motion for a new trial was denied.

¶ 12 Defendant's presentence investigation report (PSI) reflected a criminal history comprised of 12 convictions including, *inter alia,* 10 drug-related convictions for which he was sentenced from anywhere between 30 months' probation and 6 years' imprisonment. Defendant's most recent conviction was a 2006 conviction for possession of a controlled substance for which he was sentenced to 1 years' imprisonment.

¶ 13 The State asked that defendant be sentenced in the "upper range." It noted defendant's extensive criminal history and that he is a "multiple time convicted felon." It noted that defendant had reported in his PSI that he used heroin and was "snorting at least 2 dime bags per day." It also noted defendant reported a past affiliation with a gang.

¶ 14 Defense counsel asked the court to sentence defendant to the minimum of 6 years' imprisonment. Counsel noted that defendant's criminal history was comprised wholly of nonviolent crimes. She stated that defendant was an addict and a likely candidate for rehabilitation. Counsel also noted defendant's role as the caregiver to his blind brother, his employment history, and the unnecessary cost to taxpayers of putting a nonviolent offender in prison. Counsel submitted five letters from family members written to the court on defendant's behalf. One of defendant's brothers, Freddie Young, testified to his brother's character. In allocution, defendant stated that his drug addiction has been his downfall. However, he denied selling drugs to the police and told the court that he is "a drug user, not a drug dealer."

¶ 15 The trial court stated that it had considered "the gravity of the offense, the [PSI], the financial impact of incarceration, and the testimony in aggravation and mitigation, any substance abuse issues and treatment, the possibility of sentencing alternatives, the statement of the defendant, and all the hearsay presented." The court sentenced defendant to 12 years' imprisonment and 3 years' mandatory supervised release.

¶ 16 Defendant filed a motion to reconsider sentence, arguing his sentence was excessive. The Court denied the motion and this timely appeal followed.

¶ 17 On appeal, defendant argues that his sentence is excessive because his offense was nonviolent, his criminal history does not outweigh the mitigating factors, and that incarcerating a nonviolent offender is an unnecessary financial burden on the taxpayers. The State responds that the court properly exercised its discretion in sentencing defendant within the statutory range to 12 years' imprisonment after considering all the aggravating and mitigating factors. We agree with the State.

¶ 18 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the range provided by statute, it will not be altered absent an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). An abuse of discretion occurs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). The trial court is in the superior position to determine an appropriate sentence because of its personal observation of defendant and the proceedings. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213. It is presumed that, when mitigating evidence is presented to the trial court, the court considered it absent some indication to the contrary, other than the sentence itself. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 19 We find that the trial court did not abuse its discretion in imposing a 12-year prison sentence. Delivery of less than one gram of heroin is a Class 2 felony. 720 ILCS 570/401(d)(i) (West 2012). However, because of defendant's prior convictions, he was sentenced as a Class X offender. 730 ILCS 5/5-4.5-95(b) (West 2012). As a Class X offender, defendant faced a term of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2012). The 12-year sentence falls within this statutory range and, therefore, we presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 20 Nonetheless, defendant argues that the seriousness of the offense, a nonviolent crime involving a small amount of heroin, does not support a 12-year prison sentence. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v.*

Decatur, 2015 IL App (1st) 130231, ¶ 12. However, a defendant "must make an affirmative showing the sentencing court did not consider the relevant factors" where, as here, it is argued that the court failed to take a factor into consideration. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant makes no such showing here. The trial court heard the evidence at trial, including the circumstances surrounding defendant's exchange of 0.2 grams of heroin for $20 from an undercover police officer. 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 argues the trial court focused too much on defendant's prior criminal history and did not afford the proper weight to the mitigating circumstances, such as his age, his role as caregiver to his blind brother, his work history, and the unnecessary cost to taxpayers for incarceration. The trial court is presumed to have considered the mitigating evidence contained in the record. See *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001). The court expressly stated at the sentencing hearing that it had considered the arguments in aggravation and mitigation, the gravity of the offense, defendant's PSI, his substance abuse issues and treatment, his statement in allocution, sentencing alternatives, and the financial impact of incarceration. However, defendant's PSI also showed that he had 12 prior offenses. Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). The 12-year sentence is not disproportionate to defendant's lengthy history of drug-related convictions. Moreover, defendant was "not deterred by previous, more lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13.

¶ 22 To the extent defendant argues that his sentence is excessive because his "12-year sentence is double any sentence [he] had ever received in the past," he ignores his eligibility for Class X sentencing. Although defendant correctly states "that [his] longest previous sentence was a six-year sentence for possession of narcotics back in 1997," he fails to mention his five convictions for drug-related felonies since then. The trial court was entitled to consider that defendant had several drug-related convictions before he committed this offense. Despite receiving probation and more lenient prison sentences for his prior convictions, defendant continued to reoffend.

¶ 23 Defendant argues his sentence was a punishment for rejecting the State's two plea offers and exercising his right to go to trial, as there is a "jarring" disparity between the sentences offered by the State and the sentence actually imposed by the trial court. A trial court may not punish a defendant who has exercised his constitutional right to a trial by imposing a longer sentence that it would have had the defendant agreed to plead guilty. *People v. Means*, 2017 IL App (1st) 142613, ¶ 21 (citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962)). If it is evident from the record that a sentence was imposed, even partly, because the defendant refused to plead guilty exercised his right to trial, the sentence will be set aside. *Id.* (citing *People v. Latto*, 304 Ill. App. 3d 791, 804 (1999)). A disparity between the sentence given after trial and the one offered to the defendant before trial does not without more support the inference that the harsher sentence was punishment for exercising his right to trial. *People v. Carroll*, 260 Ill. App. 3d 319, 348 (1992). There must be a "clear showing" in the record that the harsher sentence was a result of a trial demand, which occurs when a trial court makes expressly states it's imposing a harsher sentence because a defendant exercised the to trial or a sentence is "outrageously higher" than

the State previously offered during plea negotiations. *Id.* at 349 (citing *People v. Dennis* (1975), 28 Ill. App. 3d 74, 78 (1975) (sentence imposed was 20 times greater than the minimum offered before trial)).

¶ 24 Here, there is nothing in the record indicating that the trial court considered—expressly or impliedly—defendant's rejection of the State's plea offers in imposing his 12-year sentence. The record only shows that the State informed the court it had made two plea offers outside of its presence prior to trial: a plea of guilty on Class X felony and a sentence of six years and a plea of guilty on a Class 4 felony. However, the record contains no evidence that the Court considered the plea offers at sentencing. Further, defendant's 12-year sentence is not outrageously disparate with the State's lowest offer of a plea of guilty on a Class 4 felony. Accordingly, defendant's argument fails.

¶ 25 In sum, based on this record, we find no abuse of discretion by the trial court in sentencing defendant to a term of 12 years' imprisonment, which was well within the statutory range. To impose any lesser sentence would simply be substituting our judgment for that of the trial court.

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.