

2017 IL App (1st) 152001-U
No. 1-15-2001
Order filed September 29, 2017

Second Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 234
)	
TINY TIM GILBERT,)	Honorable
)	Vincent Michael Gaughan,
Defendant-Appellant.)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's 13-year sentence for second degree murder is affirmed over his contention that the sentence was excessive in light of his advanced age, health conditions, and lack of recent criminal convictions.

¶ 2 Following a bench trial, defendant Tiny Tim Gilbert was convicted of second degree murder (720 ILCS 5/9-2(a)(2) (West 2012)) and sentenced, based on his background, as a Class X offender to 13 years' imprisonment. Gilbert appeals, arguing that his 13-year sentence is

excessive in light of his advanced age, poor health, and lack of recent criminal convictions. We affirm the judgment of the trial court.

¶ 3 Gilbert was charged with six counts of first degree murder for the death of Brian Lopez-Burgos. Gilbert waived his right to a jury trial, and the State proceeded to a bench trial on two counts of first degree murder. Because Gilbert solely challenges his sentence, and not the sufficiency of the evidence to sustain his conviction, we recount the facts only to the extent necessary to resolve the issue on appeal.

¶ 4 The evidence at trial showed that Gilbert and his fiancé, Cindya Fisher, had acted as caretakers for 24-year-old Lopez-Burgos for seven years. The couple took Lopez-Burgos to medical appointments, became his emergency contacts at his school, and helped him secure housing at a YMCA shelter. After he was evicted from the shelter, the couple allowed him to live in their apartment.

¶ 5 On November 15, 2012, Gilbert and Lopez-Burgos got into an argument in the kitchen of Gilbert's apartment. The argument escalated to a physical altercation. A friend of Gilbert and Lopez-Burgos, Julio Soto, was present and saw Gilbert grab Lopez-Burgos by the neck and the men fall to the floor. As Lopez-Burgos was trying to stand up, Gilbert hit him three or four times in the back with a cane. Soto did not see anything in Lopez-Burgos's hands during the altercation and he did not see Lopez-Burgos hit Gilbert. Gilbert left the kitchen and, about a minute later, returned with a gun in his hand. Gilbert struck Lopez-Burgos three or four times in the head with the gun and then shot him in the head, killing him. After Gilbert shot Lopez-Burgos, he told Soto to leave because he "[did not] need any witnesses." As Soto passed by Lopez-Burgos's body on the Kitchen floor, he did not see anything in his hands. Gilbert prevented Fisher from entering

the kitchen and told her “I need the phone. I need the police. I shot the kid.” When police arrived, they found a knife in Lopez-Burgos’s left hand. A paramedic treated Gilbert for chest pains and observed a series of cuts on his torso. One of the cuts sliced through a nitroglycerin patch which Gilbert had been wearing to treat a heart condition.

¶ 6 The trial court found Gilbert guilty of the lesser-included offense of second degree murder, finding that Gilbert’s “belief that self defense was appropriate was an unreasonable belief.” The court denied Gilbert’s motion for a new trial, and the case proceeded to sentencing.

¶ 7 In aggravation, the State argued that Gilbert was Class X mandatory based on his background, which included a 1987 conviction for burglary, a 1981 conviction for robbery, a 1981 conviction for burglary, a 1976 conviction for burglary, a 1970 conviction for unlawful use of a weapon, 1970 convictions for robbery and deceptive practices, a 1970 conviction for theft, a 1965 conviction for burglary, and a 1963 conviction for armed robbery. Based on Gilbert’s background and “his actions in the case,” the State asked for “a significant amount of IDOC time.”

¶ 8 In mitigation, defense counsel noted that Gilbert was 76 years old and that he had “major health concerns.” Counsel pointed out that Gilbert and Fisher took care of Lopez-Burgos for seven years and eventually provided him with a place to live. Counsel also emphasized that Gilbert had not been convicted of any crime for 25 years and that, during that time, he was steadily employed until he became disabled in 2010. Counsel asked for the minimum sentence of 6 years’ imprisonment. In allocution, Gilbert expressed his remorse and noted that the incident “was simply unavoidable.”

¶ 9 After the court “listened to the State in aggravation, listened to the defense in mitigation, reviewed the presentence investigation,” and reviewed the statutory and non-statutory factors in mitigation, it sentenced Gilbert to 13 years’ imprisonment. The court denied Gilbert’s motion to reconsider sentence. Gilbert appeals, arguing that his 13-year sentence is excessive.

¶ 10 A trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to deference on review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). This is because a trial court has a superior opportunity “to weigh such factors as the defendant’s credibility, demeanor, general moral character, mentality, social environment, habits, and age.” *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). 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.

¶ 11 In reviewing a defendant’s sentence, this court will not reweigh the aggravating and mitigating factors and substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20. Reviewing courts will not alter a defendant’s sentence absent an abuse of discretion. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 50. A sentence which falls within the statutory range 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)).

¶ 12 Here, we find that the trial court did not abuse its discretion in sentencing Gilbert to 13 years' imprisonment. Gilbert was convicted of second degree murder, a Class 1 felony with a sentencing range of 4 to 20 years' imprisonment. 720 ILCS 5/9-2(d) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). Because of his criminal background, Gilbert was subject to a mandatory Class X sentence of 6 to 30 years. 730 ILCS 5/5-4.5-95(a) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). The trial court's 13-year sentence falls within and, in fact, toward the lower end of the statutory range and, thus, we presume that it is proper. *Brown*, 2015 IL App (1st) 130048, ¶ 42.

¶ 13 Gilbert does not dispute that his sentence fell within the permissible range and is presumed proper. Rather, he argues that his sentence is excessive in light of his advanced age, poor health, and the age of his prior convictions. But, as noted above, 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. That presumption may be overcome by an affirmative showing that the sentencing court failed to consider factors in mitigation. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. Gilbert is unable to make such a showing.

¶ 14 The record shows that the trial court was aware of Gilbert's age and his health conditions, because information regarding his health problems was brought to the trial court's attention throughout the proceedings. A medical status update report filed by defense counsel on June 5, 2014, listed Gilbert's chronic medical issues and the medication that he was prescribed for treatment of those issues. During trial, paramedic Zachary Fisher testified that he treated Gilbert for chest pains on the day of the incident and that Gilbert was wearing a nitroglycerin patch for

heart complications. Gilbert's presentence investigation report (PSI) recounted his various medical conditions, and defense counsel argued in mitigation that Gilbert had "major health concerns." The trial court was also aware of the nature and age of Gilbert's prior convictions. These convictions were listed in Gilbert's PSI and argued by the State in aggravation. Further, defense counsel argued Gilbert's criminal convictions were at least "25 years old" and that the court should consider this in mitigation.

¶ 15 Given that all of the mitigating factors Gilbert raises on appeal were discussed in his presentence investigation report or in arguments in mitigation, Gilbert essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. (This is evident from Gilbert's contention on appeal that a sentence higher than the minimum—he suggests 10 years—would have been appropriate.) But, as noted above, 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). As the trial court is presumed to have considered all evidence in mitigation, and the evidence suggests that it did, we find that the trial court did not abuse its discretion in sentencing Gilbert to 13 years' imprisonment for second degree murder.

¶ 16 Gilbert nevertheless argues that his 13-year sentence is excessive because his age and health condition suggest "an extremely low risk of recidivism." However, a sentencing court is not required to afford a defendant's rehabilitative potential greater weight than the seriousness of the offense. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 17. This court has stated that "[i]n fashioning the appropriate sentence, the most important factor to consider is the seriousness of the crime." *Busse*, 2016 IL App (1st) 142941, ¶ 28. Here, the record shows that Gilbert, after an

argument with Lopez-Burgos, beat him with a cane and a gun before shooting him in the head. Although Gilbert argued that he acted in self-defense, the trial court found that defendant's "belief that self defense was appropriate was an unreasonable belief." Under these circumstances, we cannot say that Gilbert's 13-year sentence, a term at the lower end of the sentencing range, was excessive.

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

¶ 18 Affirmed.