2017 IL App (1st) 152009-U

No. 1-15-2009

Order filed December 8, 2017

Sixth 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 11144
	)	
VINCENT RUSSELL,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 ***Held:*** Defendant failed to show that his jury waiver was not knowingly and intelligently made. The defendant's extended-term prison sentence of 13 years for robbery was not excessive.

¶ 2 Following a bench trial, defendant Vincent Russell was convicted of robbery and sentenced to an extended term of 13 years' imprisonment. On appeal, he contends that he did not make a knowing and intelligent waiver of his right to a jury trial, and that his sentence is excessive. We affirm.

¶ 3 Defendant and codefendant Auturo Banks were charged with aggravated unlawful restraint and armed robbery for allegedly detaining and taking property from Jason Woods on or about May 28, 2014, by force or threat of force and while armed with a firearm.

¶ 4 At defendant's arraignment, the court asked defendant in relevant part if he knew what a jury trial is. He replied that he did not and stated that, regarding his prior convictions, he neither pled guilty nor was tried but "took the time." The court admonished defendant that he had certain constitutional rights, stating in part as follows:

> "One of those rights is that you can't go to prison or be convicted unless it's by a trial by jury. That would be 12 individuals selected by yourself, your attorney, and the State. *** They would hear all the evidence presented. *** Those 12 individuals would hear any evidence presented and determine whether or not that evidence has fulfilled the State's burden, and that's as opposed to a judge making the same determination."

The court asked if defendant understood "those two choices," and he replied that he did. The court continued that "their verdict, the jury, must be unanimous. The judge's alone, so he or she doesn't have to meet with anybody." Defendant again replied that he understood.

¶ 5 Just before trial, the court told defendant that he had the right to a trial by jury, and he replied that he understood. The court asked defendant if he was waiving or giving up his right to a jury trial, and if he signed a jury waiver. Defendant replied "yes," and the record includes a signed jury waiver form dated May 7, 2015. The court asked trial counsel if he had a copy of the preliminary hearing transcript, and he replied that he did. In response to the court's questions, defendant said that he signed the jury waiver, no one made any threats or promises to induce his

waiver of the right to a jury trial, he made that decision after speaking with trial counsel, and he was waiving his right to a jury trial "of [his] own free will."

¶ 6 The evidence at trial showed that defendants robbed Woods at gunpoint of his cellular telephone and bag on a CTA train. During the robbery, defendant pointed a "flat metallic black gun, like a semiautomatic" at Woods's torso. As defendant and Banks exited the train at the Garfield stop, Banks told defendant to shoot Woods if he also exited the train at that station. Woods did not exit, but pulled the train's emergency cord to stop the train. About 15 to 20 minutes after the robbery, defendant and Banks were detained walking together, about a mile from the station. Shortly thereafter, Woods identified both of them as the assailants. When defendant and Banks were frisked and searched, no weapons were found but Woods's transit card was found in defendant's possession. At trial, Woods identified both defendants as the robbers, and he identified security video of the robbery. On this evidence, the court found defendant and Banks guilty of robbery.

¶ 7 Defendant did not challenge the validity of his jury waiver in either his written posttrial motion or at the hearing on his motion. Following arguments, the court denied the posttrial motion, and the cause proceeded to sentencing.

¶ 8 The presentence investigation report (PSI) showed that defendant was born in 1991. The PSI stated that defendant was raised by his mother, was one of four children, had three half-brothers, and had no contact with his father since age 13. Although he claimed to have had a good relationship with his mother, he ran away from home at age 15 for about a year. He completed grade school but was expelled from high school for fighting, and he participated in no extracurricular activities in high school. He attended six months of "an educational program" while in prison in 2010. He has never been employed and has always been supported by his

mother. He has twin daughters being raised by a brother in Nevada, and he said he had a good relationship with them, speaking with them "every other day." Defendant had been in a street gang from age 14 until 2012 but denied holding any rank. He claimed good physical health, but he had been hospitalized for mental health treatment three times between ages 13 and 16, and he was diagnosed with bipolar disorder and attention-deficit, hyperactivity disorder. Although he was prescribed medication, defendant admitted that he sometimes failed to take his medication. He denied drinking alcohol but said he smoked marijuana daily until 2014 and received outpatient drug abuse treatment three times between 2011 and 2013. He described himself as "illiterate, [with] learning disabilities, a low level of intellectual functioning, a very negative attitude toward himself, signs of depression, hostility, anger, and very poor interpersonal skills."

¶ 9 At sentencing, trial counsel had no changes or additions to the PSI. The State told the court that, although defendant was not eligible for a Class X sentence or probation, defendant warranted an extended-term sentence because of his criminal history: a 2010 aggravated robbery conviction (a Class 1 felony), for which he received a four-year prison sentence; a 2013 escape conviction (a Class 3 felony), for which he received a two-year prison sentence consecutive to the one-year sentence for his manufacture or delivery of cannabis conviction (Class 4 felony). His criminal history also included a 2012 conviction for possessing a replica firearm or pellet gun, for which he was sentenced to two days in jail. The State further argued that, although the court did not find defendant guilty of armed robbery, the evidence showed that defendant and Banks threatened Woods with an object. The State requested a sentence in the "double digits" because defendant held the object used to threaten Woods.

¶ 10 Trial counsel argued that defendant was 24 years old, worked as a day laborer when not incarcerated, and had a large family. Trial counsel further noted that, although it was not

included in the PSI, defendant was in the high school band. In addition, defendant had also been trying to start a business "collecting and distributing CDs" while he was in jail. Counsel opined that defendant would benefit from boot camp, as he needs a "positive male role model" in the absence of his father. In allocution, defendant stated, "Lord, forgive me for my sins, and I'm sorry for my mistakes."

¶ 11 The court noted that it considered the factors in aggravation and mitigation, the trial evidence and the PSI. The court stated that:

> "In a free society, honest, peaceful citizens ought to be able to come and go and utilize mass transit without being accosted, detained, robbed. It takes away their freedom. People who do that become *** in a sense urban terrorists, stopping people from enjoying the wonderful benefits of this country. They both become afraid to go to work or to travel to the city because they are afraid to use mass transit because people rob them. And so the sentence I impose today is necessary to protect the public and any other sentence in my mind would deprecate the seriousness of this offense."

The court found defendant eligible for an extended-term sentence and sentenced him to 13 years' imprisonment. Defendant filed a postsentencing motion, which the trial court subsequently denied. This appeal follows.

¶ 12 On appeal, defendant first contends that he did not make a knowing and intelligent waiver of his right to a jury trial. Specifically, defendant argues that the trial court failed to explain the nature of a jury trial, the difference between a jury trial and a bench trial, or that the

facts would be determined by the judge rather than a jury. Defendant admits that he forfeited this claim by not raising it in the trial court but contends that it is reviewable as plain error. The first step in a plain-error analysis is determining whether an error occurred at all. *People v. West*, 2017 IL App (1st) 143632, ¶ 11.

¶ 13 A defendant may waive his constitutional right to a jury trial, and that waiver is valid if the defendant understandingly, or knowingly and voluntarily, relinquishes his right to a jury trial. *Id.* ¶ 10. A written jury waiver is a means by which a defendant may waive his right but is not conclusive. *Id*. The court need not give any specific admonishment or advice for a waiver to be effective. *Id*. The court must ensure that the defendant knows that the facts of his case will be determined by a judge rather than a jury and knows the consequences of that decision. *Id*. We determine the validity of a jury waiver under the circumstances of the particular case, and we have no precise formula for making the determination. *Id*. A jury waiver is generally valid when defense counsel waives the right in open court and the defendant does not object to the waiver. *Id*. The defendant bears the burden of establishing that his waiver was invalid, and we review *de novo* the validity of a jury waiver. *Id*.

¶ 14 Here, defendant contends that, although the court ascertained from him personally that he signed the jury waiver, he consulted with counsel before his waiver, and his waiver was not the result of threats or promises, his waiver was nonetheless not knowingly and intelligently made because the court did not tell him that he would be tried by a judge if he waived his right to a jury. At defendant's arraignment, however, the court clearly apprised him of that fact: the court described a jury as twelve persons who would hear the evidence and could convict him only unanimously, and then told defendant, "that's as opposed to a judge making the same determination *** alone, so he or she doesn't have to meet with anybody." The trial court

further described a jury trial or bench trial as defendant's "two choices." Defendant replied that he understood these admonishments. On these facts, defendant has failed to show that he was unaware when he waived his right to a jury trial that he would be tried by the court. We therefore conclude that he has failed to show that his jury waiver was not intelligently and voluntarily made. See *People v. Smith*, 372 Ill. App. 3d 179, 181 (2007) (without error there can be no plain error).

¶ 15 Defendant also contends that his 13-year prison sentence is excessive in light of the nature of the offense, his rehabilitative potential, and the court's characterization of people who commit armed robbery on public transit as "urban terrorists," which defendant argues betrayed the trial court's "subjective opinion about the crime."

¶ 16 In imposing sentence, the trial court must consider both the seriousness of the offense and the defendant's rehabilitative potential. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11 (citing Ill. Const. 1970, art. I, § 11). The court may not disregard mitigating evidence, but it may determine the weight of such evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 63. In addition, the trial court is not required to view a defendant's troubled childhood, substance abuse problems, or history of mental health issues as mitigating in nature. *People v. Holman*, 2014 IL App (3d) 120905, ¶ 75. Furthermore, a defendant's criminal history alone may warrant a sentence significantly above the minimum, especially where it shows that he has not been deterred by more lenient prior sentences. *Wilson*, 2016 IL App (1st) 141063, ¶ 13. The most important sentencing factor is the seriousness of the offense, and the court is not required to give greater weight to mitigating factors than to the severity of the offense. *Id.* ¶ 11. The trial court does not need to expressly assign a weight to each aggravating and mitigating factor or otherwise outline its reasoning for sentencing. *Id.* We presume that the court considered all mitigating

factors and did not consider any inappropriate aggravating factors absent an affirmative indication to the contrary. *Id.* Although a trial court's personal observations are generally discouraged, they may be of no consequence if the record shows that the court otherwise considered proper sentencing factors. See *People v. Bosley*, 197 Ill. App. 3d 215, 222 (1990) (citing *People v. Steppan*, 105 Ill.2d 310, 322-23 (1985)).

¶ 17 A sentence within statutory limits is reviewed for abuse of discretion, and we may alter a sentence 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. Alexander*, 239 Ill. 2d 205, 212 (2010). The trial court's broad discretion derives from its superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Id.* at 212-13. As a result, this court may not substitute its judgment merely because it would weigh the sentencing factors differently. *Id.*

¶ 18 Robbery is a Class 2 felony with a prison term of 3 to 7 years or an extended prison term of 7 to 14 years. 720 ILCS 5/18-1(c) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014). A defendant may receive an extended term for a felony if he was convicted of a separate felony (that is, arising from different acts) of the same or greater class within the preceding 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2014).

¶ 19 At sentencing, the court stated that it reviewed the PSI and the trial evidence, and that it considered both aggravating and mitigating factors. We must presume, in the absence of evidence to the contrary, that the court gave due consideration to all mitigating factors in the PSI and arguments. See *Wilson*, 2016 IL App (1st) 141063, ¶ 11. As to the court's comment on defendant's offense, the severity of the offense is not only a proper consideration in sentencing, it is the most serious factor. While defendant characterizes the commentary as the court's

subjective opinion, stating that robbing people on public transit places the public in apprehension of riding transit is a proper comment on the effects, and thus the severity, of defendant's offense. It is wholly consistent with our legislature including in the statutory aggravating factors that the offense was committed on a public bus or train. 730 ILCS 5/5-5-3.2(a)(25) (West 2014). We note, in context of the court's finding that its sentence was necessary to protect the public, that defendant's prior felony conviction rendering his sentence extendable was aggravated robbery, which is the commission of robbery while the offender indicates to the victim that he is armed with a firearm or dangerous weapon. 720 ILCS 5/18-1(b) (West 2014). The court could properly conclude that defendant's four-year prison sentence in that case did not deter him from committing a similar crime here.

¶ 20 Although the court found defendant guilty of robbery rather than armed robbery, the trial evidence was clear that defendant pointed an object that appeared to be a gun at Woods, and codefendant reinforced the perception that defendant pointed a gun at Woods by telling defendant to shoot him if he got off the train. Notably, Woods heeded that remark and did not get off the train. Pointing an object that looks like a gun at someone, and verbally representing that object to be a gun, would reasonably place a person such as Woods in terror–that is, in fear or apprehension for his life–to make the robbery easier to commit. In context of the trial evidence and the court's entire commentary, the isolated characterization of people who commit robbery on public transit as "in a sense" urban terrorists was not improper. Consequently, the court did not abuse its discretion in sentencing defendant to 13 years' imprisonment.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.