2017 IL App (1st) 152097-U

No. 1-15-2097

Order filed October 10, 2017

FIRST 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 11472
	)	
ANTONIO POLK,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Pierce and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a stolen motor vehicle is affirmed over his contention that that the State failed to prove beyond a reasonable doubt that he knew the vehicle was stolen. Defendant's sentence of 10 years' imprisonment was not excessive in light of his criminal background.

¶ 2 Following a bench trial, defendant was convicted of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) and sentenced, based on his criminal background, as a

Class X offender to ten years' imprisonment. On appeal, defendant contends that his conviction should be reversed because the State did not prove beyond a reasonable doubt that he possessed the vehicle or that he knew it was stolen. He also contends that his sentence is excessive. We affirm.

¶ 3 Defendant was arrested, on June 19, 2014, near the area of 3542 West Douglas Boulevard. He was subsequently charged by information with possession of a stolen motor vehicle.

¶ 4 The evidence adduced at trial showed that, on June 10, 2014, Milica Zivkovich spent the night with her daughter in Norwood Park. The following morning, Zivkovich awoke to find her car keys missing and her 2013 Honda CRV no longer parked in the driveway. Zivkovich filed a police report, and, around June 22, 2014, regained possession of her car. Zivkovich testified that she was not familiar with defendant and did not give him permission to use her car.

¶ 5 Officer Ramon Salcedo testified that, on June 19, 2014, at about 8:30 p.m., he and his partner, Officer Rebecca Theustad, were on patrol, in an unmarked vehicle, near the area of 13th Street and Millard Avenue. There, Salcedo saw a 2013 Honda CRV being driven without its headlights turned on. The officers activated the emergency lights on their vehicle, and the Honda came to a brief stop at 1215 South Millard, then turned into a nearby alley. The officers, with their emergency lights activated, followed the Honda as it drove south on Central Park Avenue, and then east on 13th Place. As the officers followed the Honda, Salcedo learned that it had stolen license plates. Salcedo, who was driving, tried to observe the Honda, but it had "a little bit of a lead" on the officers. Salcedo stated that, after driving around a park adjacent to 13th Place, he saw defendant at 3542 West Douglas Avenue. Defendant, who was sweating and whose heart

appeared to be "beating fast," was standing about 20 feet south of the Honda. Defendant was also wearing a red shirt. The Honda was stopped while in “drive” gear.

¶ 6 Defendant was placed into custody, and advised of his *Miranda* rights. Defendant told the officers that he had been running because he knew the Honda was stolen, and that he got the Honda for a couple of hours in exchange for "three blows" of heroin. Defendant also told the officers that he "was going to use it for a bit and then put it back up, put it away."

¶ 7 On cross-examination, Salcedo acknowledged that the Honda did not appear to have been broken into or damaged, and that the keys were found inside the car when defendant was taken into custody. Salcedo also acknowledged that defendant's statement to the officers was not memorialized in writing.

¶ 8 Officer Theustad testified that, on the date and time in question, she and Salcedo were traveling on 13th Street and she observed a 2013 Honda CRV being driven without its headlights turned on. As the officers followed the Honda, Theustad “ran” the Honda's license plate number through a computerized database and discovered that the license plate was stolen. The officers then activated their vehicle's emergency lights and followed the Honda on Millard. There, the Honda made an abrupt stop and then “immediately sped off northbound on Millard.” The officers continued to follow the Honda as it made a right turn through an alley near Roosevelt Road and back to 13th Street. Theustad explained that, along the south side of 13th Place, there was “a wide open park area.” There, the officers no longer followed the Honda, but traveled parallel to it. At this point, the Honda was south of the officers. As the officers drove parallel to the Honda, Theustad saw defendant exit the Honda through the driver's side door. Defendant,

who exited the car "as it was slowing down," was stumbling and falling, "as if he is trying to run."

¶ 9 Theustad stated that Salcedo made "a right-hand turn to go southbound on St. Louis and come back westbound where the Defendant was still running towards [the officers] in [their] direction." The officers exited their vehicle at Douglas Boulevard, where defendant was the only person in the area. Defendant was exacerbated and short of breath. Defendant was also wearing a red T-shirt. The Honda stopped on a chain-link fence near a vacant lot. Salcedo detained defendant and Theustad checked the Honda's vehicle identification number. After doing so, she learned that it was stolen. At the station, defendant was advised of his *Miranda* rights. He then told the officers that "he borrowed the car. He received it earlier in exchange for narcotics and that he was going to put it back soon." Defendant also told the officers that "he knew the vehicle was stolen, that's why he was running."

¶ 10 On cross-examination, Theustad acknowledged that defendant's statement was not memorialized in writing. The keys to the Honda were found inside the vehicle when defendant was taken into custody. Defendant was 50 to 75 feet south of the Honda when the officers caught up to him on Douglas.

¶ 11 Based on this evidence, the trial court found defendant guilty of possession of a stolen motor vehicle. In announcing its decision, the court noted that exchanging a vehicle for three blows of heroin would raise a suspicion among anybody that the vehicle is stolen, that defendant admitted to knowing the Honda was stolen, and that defendant's efforts to evade the police show he knew it was stolen. The court also noted that the officers testified credibly, and that their credibility was enhanced because Salcedo admitted that he was unable to see the person who was

driving the Honda and did not "try to fabricate any testimony to make it worse for [defendant] than it was."

¶ 12 Defendant filed a motion for a new trial, which the court denied. In doing so, the court noted:

> "the fact that two different police officers testified to slightly variations of what they saw does not automatically mean that the officers are lacking credibility or unreliable. They testified to what they visually were focusing on. And they had the integrity to come into court and not tailor their testimony so that both officers claim to see exactly what the other one saw."

¶ 13 At sentencing, the court heard argument in aggravation and mitigation. In aggravation, the State argued defendant's 2007 and 2009 convictions for burglary made him eligible for sentencing as a Class X felon. Defendant's presentence investigation (PSI) report indicated that he was close to his family and detailed defendant's extensive criminal history, which includes a felony conviction for manufacture and delivery of a controlled substance, and two felony convictions for robbery, burglary, theft, and possession of a controlled substance. The State also argued defendant did not engage in appropriate behavior for a man in his mid-forties, and that he has neither "learned his lesson" nor is he a "contributing member of society." The State recommended a sentence beyond the statutory minimum of six years' imprisonment.

¶ 14 In mitigation, defense counsel noted defendant's eligibility for Class X sentencing, and urged the trial court to sentence defendant to the statutory minimum of six years' imprisonment. While acknowledging that defendant has an "extensive criminal history," defense counsel argued that none of his crimes involved "injuries to anyone," he did not have "any guns in his

background," and his prior convictions mostly involved theft. Defense counsel also highlighted defendant's employment at a restaurant immediately prior to his arrest, his employment during incarceration, and that he had attained a General Education Diploma (GED). Counsel also pointed out that defendant did not take the vehicle from Norwood Park or damage it.

¶ 15 In announcing its sentencing decision, the trial court detailed defendant's criminal history. The court stated that because of defendant's criminal background, "it would be difficult" for a 46 year old "to be gainfully employed." The court expressed its hope that defendant would prefer his employment over "going back to the behavior that caused him [to] go to the penitentiary." The court pointed out that defendant was a mandatory Class X offender, and sentenced him to ten years' imprisonment. The court denied defendant's motion to reconsider sentence.

¶ 16 On appeal, defendant first contends the State failed to establish beyond a reasonable doubt he was guilty of possessing a stolen motor vehicle. Specifically, defendant argues that there was insufficient evidence from which a reasonable trier of fact could find beyond a reasonable doubt that he possessed the Honda or that he knew it was stolen.

¶ 17 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson*, 443 U.S. at 319)).

Therefore, this court will not substitute its judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Id.* A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Id.*

¶ 18 A person commits the offense of possession of a stolen motor vehicle when he possesses a vehicle without being entitled to the possession, knowing the vehicle to have been stolen. 625 ILCS 5/4-103(a)(1) (West 2014). In order to sustain a conviction for this offense, the State must prove beyond a reasonable doubt that: (1) defendant possessed the vehicle; (2) he was not entitled to possession of the vehicle; and (3) he knew the vehicle was stolen. *People v. Cox*, 195 Ill. 2d 378, 391 (2001). Defendant does not challenge the sufficiency of the evidence to establish the second element of the offense. Rather, he argues that the State did not prove beyond a reasonable doubt that he possessed the Honda or that he knew it was stolen.

¶ 19 Possession and knowledge are questions of fact for the trier of fact to resolve. *People v. Santana*, 161 Ill. App. 3d 833, 838 (1987). Possession exists when a person has immediate and exclusive control over an object. *Santana*, 161 Ill. App. 3d at 837. Knowledge can be established from circumstances that would lead a reasonable person to believe the property was stolen. *People v. Kaye*, 264 Ill. App. 3d 369, 383 (1994). Where possession has been shown, an inference of defendant's knowledge can be drawn from the surrounding facts and circumstances. *Kaye*, 264 Ill. App. 3d at 383; see also 625 ILCS 5/4-103(a)(1) (West 2014) (It may be inferred that a person exercising exclusive unexplained possession over a stolen motor vehicle has knowledge that such vehicle is stolen).

¶ 20 After viewing the evidence in the light most favorable to the State, we find that a rational trier of fact could have concluded that defendant was in possession of the Honda and knew it to be stolen. The record shows that the officers observed the Honda being driven without its lights turned on. The officers attempted to perform a traffic stop, but the Honda did not stop. See *People v. Jimerson*, 127 Ill. 2d 12, 45 (1989) ("Evidence of flight may be a circumstance tending to show consciousness of guilt."). As the officers followed the Honda, Theustad "ran" the Honda's license plate number through a computerized database and discovered that the license plate was stolen. Following a brief chase, Theustad saw defendant exit the Honda through the driver's side door. Defendant, who exited the car "as it was slowing down," was stumbling and falling, "as if he is trying to run." The keys for the car were found inside the vehicle. Shortly after his arrest, defendant told the officers that he received the car in exchange for narcotics and that he was going to "put it back soon." Defendant also told the officers that "he knew the vehicle was stolen" and "that's why he was running." This evidence was sufficient to prove that defendant possessed a stolen motor vehicle beyond a reasonable doubt. See *Santana*, 161 Ill. App. 3d at 836-38 (defendants were in possession of a stolen vehicle when they were discovered leaning inside the open doors of the vehicle and moving their arms around inside the vehicle).

¶ 21 Defendant nevertheless argues that the evidence was insufficient to establish that he possessed the Honda and knew that it was stolen because the testimony of the officers was unreasonable, improbable, and contrary to human experience. In setting forth this argument, defendant questions the officers' testimony that they started following the Honda because its headlights were off, as twilight had not began on the date and time in question. Defendant also argues that nothing about the Honda's physical appearance would have indicated to the officers

that it was stolen so as to justify their pursuit of him. In addition, defendant claims that the officers testified to conflicting accounts of the incident. He points out that, unlike Theustad, Salcedo did not testify that he saw defendant exit the Honda. Defendant also points out that the officers provided conflicting testimony regarding their direction of travel at the time they caught up with him. He further points out that the officers' testimony was inconsistent regarding the distance that he was standing from the Honda at the time he was taken into custody. Defendant finally argues that his statement to the officers is unbelievable because it was not memorialized.

¶ 22 We initially note that the "mandate to consider all the evidence on review does not necessitate a point-by-point discussion of every piece of evidence as well as every possible inference that could be drawn therefrom. To engage in such an activity would effectively amount to a retrial on appeal, an improper task expressly inconsistent with past precedent." *Wheeler*, 226 Ill. 2d 92, 117-18 (2007) (citing *People v. Smith*, 185 Ill. 2d 532, 541 (1999)).

¶ 23 Here, defendant's arguments are, essentially, asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Abdullah*, 220 Ill. App. 3d 687, 693 (1991) ("A reviewing court has neither the duty nor the privilege to substitute its judgment for that of the trier of fact"). As mentioned, it is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences therefrom. *Brown*, 2013 IL 114196, ¶ 48. In doing so, the trier of fact is not required to disregard inferences that flow from the evidence or search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt (*Brown*, 2013 IL 114196, ¶ 71 (citing *Wheeler*, 226 Ill. 2d at 117). Based on its decision and oral pronouncements, it is clear that the trial court found the officers credible. We will not reverse a

conviction simply because defendant claims that a witness was not credible. *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004). Rather, as mentioned, a defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt. *Brown*, 2013 IL 114196, ¶ 48. This is not one of those cases.

¶ 24 Defendant next contends that his 10-year sentence is excessive in light of the seriousness of his offense and the mitigating factors presented.

¶ 25 The Illinois Constitution requires a sentence to be "balanced between the seriousness of the offense at issue and the potential for the defendant's rehabilitation." *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008) (citing Ill. Const. 1970, art. I, §11). The proper balance is found by considering aggravating and mitigating factors, including " 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *People v. Knox*, 2014 IL App (1st) 120349, ¶46 (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)). "A defendant's rehabilitative potential, however, is not entitled to greater weight than the seriousness of the offense." *People v. Coleman*, 166 Ill. 2d 247, 261 (1995).

¶ 26 The trial court "has broad discretionary powers in imposing a sentence, and the trial court's sentencing decision is entitled to great deference." *People v. Butler*, 2013 IL App (1st) 120923, ¶30. "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 than the reviewing court, which must rely on the

'cold' record." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Where the record contains no explicit evidence that mitigating factors were not considered by the trial court, we presume that the sentencing court considered them. *People v. Gordon*, 2016 IL App (1st) 134004, ¶51.

¶ 27 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. *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)).

¶ 28 Here, we find that the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment. Defendant was convicted of possession of a stolen motor vehicle, a Class 2 felony with a sentencing range of three to seven years' imprisonment. 625 ILCS 5/4-103(b) (West 2014); 730 ILCS 5/5-4.5-35(a) (West 2014). Because of his criminal background, defendant was subject to mandatory Class X sentencing of 6 to 30 years. 730 ILCS 5/5-4.5-95(b) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). 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 offense. *People v. Means*, 2017 IL App (1st) 142613, ¶14.

¶ 29 Defendant does not dispute that he was subject to a mandatory Class X sentence, or that his sentence fell within the permissible range and is presumed proper. Rather, he argues that his

sentence is wholly disproportionate to the nature of the offense because he was by himself at the time of the offense, he did not possess any weapons or drugs, and the Honda was "returned to its owner without defect." Defendant also argues that the court relied heavily on his criminal history in fashioning its sentence without considering mitigating factors, such as, his age of 46, his having attained a GED, his close relationships with his family, and the fact that he worked both while incarcerated and while on parole. In addition, defendant argues that the trial court failed to give adequate consideration to the financial costs of incarcerating him.

¶ 30 However, 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. Defendant is unable to make such a showing.

¶ 31 The record shows that the court heard defense counsel's argument in mitigation, including that defendant has a GED, lacks a criminal history involving weapons, and that there was no evidence that defendant either took the Honda from Norwood Park or damaged it. The record also reveals the trial court gave consideration to defendant's employment history and his age at sentencing. Given that all of the mitigating factors defendant raises on appeal were discussed in defendant's presentence investigation report or in arguments in mitigation, defendant essentially asks us to reweigh the sentencing factors and substitute our judgment for that of the trial court. 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 record shows that it did, we find that the trial court did not abuse its discretion in sentencing defendant to a term four years above the statutorily required minimum. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 ("defendant's criminal history alone would appear to warrant sentences substantially above the minimum."); *People v. Cook*, 279 Ill. App. 3d 718, 727-28 (1995) (a defendant's 15 year sentence for possession of a stolen motor vehicle affirmed where the trial court "found that defendant's habitual criminal activity" dictated such a sentence).

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

¶ 33 Affirmed.