2017 IL App (1st) 152720-U

No. 1-15-2720

Order filed September 15, 2017

Fifth 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. 13 CR 15273
	)	
MARIO JACKSON,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes specially concurred.
Justice Gordon dissented.

ORDER

¶ 1 *Held*: The trial court is not required to enunciate specific factors as the basis for a particular sentence. Moreover, the trial court did not abuse its discretion in imposing a 16-year prison term.

¶ 2 Following a bench trial, defendant Mario Jackson was convicted of aggravated domestic battery and aggravated battery. Finding defendant was subject to mandatory Class X sentencing due to his criminal background, the trial court sentenced him to 16 years in prison. On appeal,

defendant contends he should receive a new sentencing hearing because the trial court did not state the factors on which his prison term was based or explain how it arrived at that sentence. In the alternative, defendant contends his sentence should be reduced to a term closer to the minimum Class X term of six years because the court failed to consider his rehabilitative potential or other mitigating factors or recognize that his actions were provoked by the victim.

¶ 3 Defendant was charged with a total of six counts of home invasion, residential burglary, aggravated domestic battery and aggravated battery. The aggravated domestic battery count (Count 4) relating to Shana Hill alleged that she was a family member, namely the aunt of defendant's child. The two aggravated battery counts relating to Shana alleged that defendant caused great bodily harm (Count 5) and permanent disfigurement (Count 6) by pushing her off the porch.

¶ 4 At trial, Onnie Hill testified that at the time of these events, she lived at 6615 South Lowe in Chicago with Shana, Gabrielle Burns, Lamont Black and Isiah Hill, each of whom also testified for the State. On July 15, 2013, Onnie was babysitting the child of defendant and her granddaughter, Ikesha Hill. After Ikesha picked the baby up and left the house, she heard a noise and looked outside to see defendant holding the baby and hitting Ikesha. Onnie went outside and took the child back into the house after Ikesha's 14-year-old son, Thomas, intervened. Onnie returned outside when she heard Shana, Ikesha's sister, "screaming [and] crying out there." Onnie testified Shana's ankle "wasn't right" and "looked like it was hanging."

¶ 5 Gabrielle, Shana's girlfriend, testified she saw Onnie and Ikesha walk back toward the house with the child. About 5 or 10 minutes later, defendant "came busting through the house" and struck Ikesha again. Defendant then targeted Thomas. Isiah, Shana's brother, began fighting

with defendant. Defendant grabbed a stick from Thomas and swung it at Gabrielle, Thomas and Isiah.

¶ 6 Shana ran out the door, and defendant ran after her and pushed her "off the stairs." When asked how defendant did so, Gabrielle testified: "With two hands to her back." Shana fell to the ground and "her ankle was hanging from her leg *** [l]ike it was not connected."

¶ 7 Lamont testified that while defendant and Isiah fought, Shana struck defendant twice in the back of the head with a golf club. Shana threw the club aside and then ran towards the door. Lamont did not see defendant push Shana off the stairs. When he heard her scream, he ran outside and saw defendant "swinging on Shana" who was on the ground. Lamont struck defendant and pushed him off of Shana. Lamont testified that Shana's ankle was broken.

¶ 8 Isiah, Shana's brother, testified that when defendant first came to the door, Lamont told him not to come inside. After striking Ikesha, defendant followed Shana outside. Isiah heard Shana say "get off of me" and then saw her "flying off the porch." Isiah said Shana "hit the ground pretty hard."

¶ 9 Shana testified that when defendant entered the house and attacked Ikesha, he struck her face with his fists. Thomas tried to pull defendant off, and defendant and Isiah began to fight. Shana testified that defendant swung a stick at everyone, and she swung a golf club at defendant, striking him once on the top of his head.

¶ 10 When Shana ran outside, defendant followed her and grabbed her hair and the back of her shirt. Defendant pushed her off the porch. Shana testified that when she hit the ground, she "heard something snap on me and I looked down and I saw my foot hanging off." Defendant ran down the stairs and stabbed her in the face with the stick he had taken from Thomas, and Shana

shielded her face and eyes. Shana testified she had two surgeries on her ankle, including having a rod inserted and a bone transplant. She wore an ankle brace screwed into her foot and leg for a total of five months following the procedures. At the time of trial, Shana could not work and was told to elevate her foot for two to three hours daily.

¶ 11 Defendant testified as the sole witness in his defense and acknowledged three prior felony convictions. He initially denied striking Ikesha but then admitted on cross-examination that he did so. Defendant said he was attacked by several members of her family, including Shana, who hit him with a golf club. He and Shana then struggled and both fell down the stairs. Defendant denied grabbing Shana and pushing her down the stairs. Defendant was arrested and made a statement about 36 hours later in which he admitted to striking Ikesha and told police he had been drinking and needed a lawyer. Defendant denied telling a detective and an assistant State's attorney he was drunk and did not remember what had occurred.

¶ 12 The parties stipulated that Chicago police detective Ryan Forberg would testify that at about 4 a.m. on July 17, 2013, he and an assistant State's attorney interviewed defendant after advising him of his *Miranda* rights and defendant stated he did not remember everything that happened because he was drunk.

¶ 13 The court found defendant guilty of Counts 4 and 5 and merged those counts into Count 4 for sentencing. Defendant was acquitted on the remaining counts, with the court noting there was insufficient evidence that Shana was permanently disfigured by her ankle injury.

¶ 14 At sentencing, the trial court indicated that it had a copy of the presentence investigation (PSI) report. The State presented evidence of defendant's prior Class 1 and Class 2 felony convictions, which subjected him to mandatory Class X sentencing.

¶ 15 According to defendant's PSI report, he had a 1996 juvenile finding of delinquency for which he was sentenced to 18 months probation on August 8, 1996. On August 7, 1998, defendant was resentenced to probation. In 1999, defendant was convicted of a Class 2 felony drug offense for which he was sentenced to 18 months probation on August 23, 1999, and was resentenced to two years probation on March 8, 2002. Defendant was convicted of two misdemeanor drug convictions in 2000 and a 2002 Class 1 felony drug conviction with a March 8, 2002, boot camp sentence; on August 8, 2002, defendant was resentenced to four years in the Illinois Department of Corrections (IDOC). In 2006, defendant was convicted of unlawful use of a firearm by a felon and also of a drug offense and was sentenced to consecutive three-year sentences in the IDOC. In 2009, defendant was convicted of possession of a controlled substance and was sentenced to 42 months in the IDOC. In 2010, while on parole, defendant was convicted of having contact with a street gang and was sentenced to four days in the Cook County Department of Corrections.

¶ 16 Defendant's PSI report indicated that he was affiliated with the Black Disciples street gang for 11 years, from 1993 to 2004. Defendant's employment history indicated that he worked temporarily between 2006 and 2007 for Waste Management and, at the time of his incarceration in this case, he was cutting hair in his home. Although defendant had loving and supportive parents and siblings, he was consistently involved in criminal activity. Defendant was single and fathered seven children with six different women without marrying any of them. He had not been court ordered to provide financial support for any of them. Defendant had no reported physical, psychological or substance abuse problems.

¶ 17 Also at defendant's sentencing hearing, the State indicated Shana's injuries had a "significant financial impact" on her because her previous employment in the security field required her to be mobile and she was now on disability. Shana was unable to sleep and had several surgeries and "significant rehab." The State noted that a sentence of "something close to double digits is appropriate, based on what happened to her."

¶ 18 In mitigation, defense counsel noted that defendant was 35 years old, had obtained his general equivalency diploma and previously held jobs with Waste Management and as a barber. Counsel told the court that defendant had "three brothers and seven children that he's helping to support." Counsel noted defendant's testimony that he did "what he felt that he was needing to do to get out of this situation, that he was being attacked himself." Counsel asserted defendant's actions were not premeditated and asked the court to consider the minimum term "or very close to it."

¶ 19 Defendant then addressed the court in allocution:

> "Sir, I promise you, sir, I never tried to hurt anyone. I just wanted to get to my son, sir. That was it. I wanted to try to get my son and I got attacked by the whole house, sir. Nobody never told the truth. One person told close to the truth but I never tried to hurt anyone, sir. I just tried to get my son and [Shana] Hill attacked me, sir, you know? I'm sorry she got hurt. I never tried to hurt her, but she tried to hurt me, sir."

¶ 20 Defendant added he had seven children and that his mother and grandmother were disabled, stating "I got too much responsibility out there."

¶ 21 The court sentenced defendant as a Class X offender to 16 years in prison. The court stated that it had considered the pertinent factors in aggravation and mitigation of defendant's

sentence, as well as the PSI report. The court stated it had taken into account defendant's "long history of criminal behavior, as well as the facts of this case." Defense counsel filed a motion to reconsider sentence, which the trial court denied.

¶ 22 On appeal, defendant challenges the trial court's imposition of a 16-year sentence on two bases. First, he contends his sentence should be vacated and this case remanded for a new sentencing hearing because the trial court did not explain its reasons for arriving at that particular term of years. Second, defendant argues this court should reduce his sentence to the minimum statutory term or remand this case with those instructions because his 16-year term does not reflect the court's consideration of his rehabilitative potential or the evidence offered in mitigation of his sentence.

¶ 23 Defendant does not dispute that his 16-year sentence was within the permissible range. Defendant was convicted of aggravated domestic battery, which is a Class 2 felony. 720 ILCS 5/12-3.3(b) (West 2012). Based on his prior criminal convictions, he was subject to a Class X sentence in this case. 730 ILCS 5/5-4.5-95(b) (West 2012) (a defendant is subject to mandatory Class X sentencing if he is over 21 years of age and is convicted of a Class 2 felony after having twice been convicted of a Class 2 or greater felony and those felonies arise out of different series of acts). Therefore, the applicable sentencing range in this case was between 6 and 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2012).

¶ 24 A sentence within the statutory range is presumed not to be excessive. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12. Such a term will not be deemed excessive unless it is greatly in variance with 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 is vested with

"broad discretionary powers in imposing a sentence" because the court has observed the defendant throughout the proceedings and is in a better position to weigh factors including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). The trial court's sentencing determination is only to be disturbed upon an abuse of the court's considerable discretion. *Alexander*, 239 Ill. 2d at 212; *Stacey*, 193 Ill. 2d at 210 (an abuse of discretion is found where the sentence is disproportionate to the nature of the offense or is "greatly at variance with the spirit and purpose of the law").

¶ 25 Defendant contends on appeal that this court must vacate his 16-year term and remand for resentencing. He argues the trial court "committed a procedural error" when it did not explain the factors on which it based his sentence, and he claims this court cannot presume the trial court considered the mitigating evidence offered. Defendant argues that without knowing the reasoning behind his sentence, this court cannot determine on review whether the trial court abused its sentencing discretion.

¶ 26 As defendant acknowledges, our supreme court has held that a trial court is not required to set out its reasons for imposing a particular sentence. In *People v. Davis*, 93 Ill. 2d 155, 162-63 (1982), the defendants in two consolidated cases asserted that the trial court had to state for the record the bases for imposing their sentences. The defendants cited two statutes that directed sentencing judges to explain their reasoning, using the word "shall." *Id*. at 157-58 (citing Ill.Rev.Stat.1979, ch. 38, pars. 1005-4-1(c), 8-1(b)). However, on appeal, this court held the defendants had waived that issue by failing to request that the sentencing judges explain their reasoning. *Davis*, 93 Ill. 2d at 158-59.

¶ 27 In affirming the appellate courts, the supreme court noted that although the use of the word "shall" generally indicated a mandatory intent, such a reading would render the statutes constitutionally invalid as it would amount to the legislature's invasion of the inherent power of the judiciary to determine sentences. *Id*. at 162. The supreme court noted the defendants did not request a statement of reasons underlying their sentences and "[t]he statute not being mandatory, there was no independent duty upon the court to give a statement of reasons" for their particular sentences. *Id*. at 162-63. The dissenting opinion in *Davis* stated that the statutes did not "in any way affect the ability of a trial judge to pronounce the sentence he feels is most appropriate" but only required that the "reasons for the sentence must be made a part of the record." *Davis*, 93 Ill. 2d at 166 (Simon, J., dissenting).

¶ 28 As defendant notes in the instant case, the current version of the sentencing statute discussed in *Davis* retains the word "shall" in regard to the trial court's pronouncement at sentencing. Section 5/5-4.5-50(c) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-4.5-50(c) (West 2012)) provides:

> "(c) REASONS FOR SENTENCE STATED. The sentencing judge in each felony conviction shall set forth his or her reasons for imposing the particular sentence entered in this case, as provided in Section 5-4-1 (730 ILCS 5/5-4-1). Those reasons may include any mitigating or aggravating factors specified in this Code, or the lack of any such factors, as well as any other mitigating or aggravating factors that the judge sets forth on the record that are consistent with the purposes and principles of sentencing set out in this Code."

¶ 29 Defendant relies on the dissent in *Davis* and also cites the special concurrence in *People v. Bryant*, 2016 IL App (1st) 140421, ¶¶ 25-35. In *Bryant*, the defendant argued on appeal that the trial court abused its discretion in failing to explain the basis for his 21-year Class X sentence and he asserted that various mitigating factors supported a shorter prison term. *Id*. ¶ 12. This court affirmed, noting the defendant's concession to the consistent body of law holding that a sentencing court is not required to recite or assign a value to each factor in aggravation and mitigation of the sentence. *Id*. ¶ 16 (and cases cited therein). One justice in *Bryant* wrote separately to urge sentencing courts to "as a matter of course explain to a criminal defendant the reasons behind the sentence." *Id*. ¶ 26 (Hyman, J., specially concurring). Citing the dissent in *Davis*, the special concurrence noted the conflict between the common-law precedent and section 5-4.5-50(c). *Id*. ¶ 28.

¶ 30 Defendant contends the reasoning in *Davis* that the separation of powers doctrine is threatened by the use of the term "shall" is flawed because subsequent federal sentencing statutes and guidelines since then have required federal judges to explain their reasons for imposing a particular term. See 18 U.S.C. § 3553(c) (eff. May 27, 2010) (federal sentencing judges "shall state in open court the reasons for [] imposition of the particular sentence"); *United States v. Reed*, 859 F.3d 468, 472 (2017) (the court is required to address the "principal arguments" of the parties at sentencing, which "allows the reviewing court to satisfy itself that the judge considered those issues").

¶ 31 Defendant also notes that since *Davis*, the supreme court held in *People v. Felella*, 131 Ill. 2d 525, 538-39 (1989), that a provision in the Bill of Rights of Victims and Witnesses of Violent Crime Act stating that the court "shall" consider victim impact statements, along with

other appropriate sentencing factors, was directory in nature, not mandatory, and did not violate the separation of powers doctrine. Defendant argues the provision in *Felella* was permitted because it did not indicate what sentence should be imposed or what weight the victim impact statement should be given; similarly, requiring a court to set out its rationale for imposing a particular sentence is distinct from dictating the details of that sentence.

¶ 32 *Davis* must be recognized as controlling authority because the decisions of our state supreme court are binding on all lower courts. See *Blumenthal v. Brewer*, 2016 IL 118781, ¶ 28 (citing *People v. Artis*, 232 Ill. 2d 156, 164 (2009)). Under *Davis*, a sentencing judge is not required to state its reasons for imposing a particular sentence upon a defendant. *Davis*, 93 Ill. 2d at 162-63. Numerous decisions of this court have followed *Davis*. See, *e.g.*, *Wilson*, 2016 IL App (1st) 141063, ¶ 11; *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51 ("[t]he trial court is not required to detail precisely for the record the exact process by which it determined the penalty"); *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 22 ("a trial court is not required to specify on the record the reasons for a defendant's sentence"); *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). Accordingly, we reject defendant's contention that he should receive a new sentencing hearing because the trial court did not set out the reasons for imposing his 16-year term.

¶ 33 We next turn to defendant's argument that this court should reduce his term to the statutory minimum because it did not lend due weight to the factors presented in mitigation. Defendant points out that his 16-year term is 10 years longer than the minimum Class X sentence, and he contends his sentence does not reflect any consideration of his rehabilitative potential or factors including his work history or family relationships. He also asserts that he acted in response to provocation by the victim in this case. Defendant emphasizes his statement

in allocution expressing remorse for these crimes, and he argues that the State only presented two factors in aggravation of his sentence.

¶ 34 As stated at the outset of our discussion, the trial court is vested with great discretion in arriving at a sentence by weighing all relevant factors. See *Stacey*, 193 Ill. 2d at 210. While a reviewing court has the power to reduce an excessive sentence (Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967)), this court cannot overturn a sentence merely because the pertinent factors could be balanced differently. *People v. McGowan*, 2013 IL App (2d) 111083, ¶ 10.

¶ 35 A sentence should reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *Wilson*, 2016 IL App (1st) 141063, ¶ 11. The trial court has wide latitude in sentencing a criminal defendant, so long as the court does not consider improper factors in aggravation or ignore relevant factors in mitigation. *People v. Higgins*, 2016 IL App (3d) 140112, ¶ 29. The weight to be assigned to factors in aggravation and mitigation and the balance between those facts is a matter within the trial court's discretion. *People v. Lefler*, 2016 IL App (3d) 140293, ¶ 31.

¶ 36 The presence of mitigating factors does not require the court to impose a minimum sentence or preclude the court from entering a maximum sentence. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. Absent an indication to the contrary, it is presumed the sentencing court considered all relevant factors and mitigation evidence in arriving at a particular term. *Wilson*, 2016 IL App (1st) 141063, ¶ 11 (and cases cited therein). A defendant who challenges a sentence must "make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Here, defendant has not made that showing; rather, the trial court expressly stated that it had considered the factors in

aggravation and mitigation of defendant's sentence. Furthermore, where the court is provided with a PSI report, it is presumed that the court has taken into account the defendant's rehabilitative potential. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010).

¶ 37 Defendant also argues the evidence presented in aggravation of his sentence, including his criminal history and the severity of Shana's injury, should, in fact, have been considered in mitigation of his punishment or not given any weight at all. As to the first aggravating factor, defendant emphasizes that all but one of his prior felony convictions were for drug-related offenses and that he lacked a history of violent crime. Despite defendant's attempt to minimize his criminal background, the offender's prior criminal history is a factor in aggravation, not mitigation. 730 ILCS 5/5-5-3.2(a)(3) (West 2012)). Defendant was subject to a Class X sentence because he had committed at least two previous felonies of Class 2 or greater. See 730 ILCS 5/5-4.5-95(b) (West 2012). One of those prior convictions was for the possession of a weapon as a felon. It is not the purview of this court to reweigh the various aggravating and mitigating factors presented to the trial court. *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 171.

¶ 38 As to the second aggravating factor, defendant argues the court should not have considered the extent of Shana's injury in aggravation of his sentence because it was inherent to the offense. A sentencing court may consider the circumstances of an offense, including the nature and extent of each element of the offense as committed by the defendant. *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. However, a factor implicit in the offense cannot also be used to extend the defendant's sentence for that offense, as that represents an impermissible double use of a single aggravating factor. *People v. Gilliam*, 172 Ill. 2d 484, 521 (1996). The presumption against double enhancements is based on the assumption that, in designating the

appropriate range of punishment for an offense, the legislature necessarily considered the factors inherent in the offense. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 13.

¶ 39 Defendant was convicted of aggravated battery for committing a battery (namely, pushing Shana down the porch stairs) that caused great bodily harm. See 720 ILCS 5/12-3.05(a)(1) (West 2012). Defendant points to the State's remark at sentencing that his sentence should approach "double digits *** based on what happened to her." The degree of harm to a victim may be considered as an aggravating factor even in cases where serious bodily harm is implicit in the offense. *People v. Rennie*, 2014 IL App (3d) 130014, ¶ 29. Furthermore, defendant presents only speculation that the court gave undue consideration to Shana's injury based on the State's general comment.

¶ 40 Defendant next contends the trial court should have considered in mitigation of his sentence that his actions were a response to provocation by the State witnesses. That theory were presented to the court in mitigation of defendant's sentence, when defense counsel argued defendant was "being attacked himself" and was acting to get out of the situation.

¶ 41 Among factors to be considered in mitigation of a sentence are whether the defendant acted under a strong provocation or there were "substantial grounds tending to excuse the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(3), (a)(4) (West 2012). As defendant acknowledges on appeal, the testimony established he was the initial aggressor, striking Ikesha first while they were outside. Defendant then entered the house and struck her a second time. Defendant contends he was provoked when Shana struck him in the head with a golf club. However, at that point, defendant was fighting with Thomas and Isiah. By the time defendant pushed Shana off the stairs, she had discarded the club and was running

outside and away from him. The key factor in arriving at a sentence is the seriousness of the offense, not mitigating evidence. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. In summary, defendant struck Ikesha, the mother of his child, repeatedly and then attacked those who came to her defense.

¶ 42 The trial court's sentencing of defendant to a term near the midpoint of the Class X range of 6 to 30 years in prison reflects the court's consideration of facts both in aggravation and mitigation of his sentence. While defendant contrasts his punishment to the minimum possible term of 6 years, his 16-year term lies in the lower half of the Class X sentencing range and is 14 years lower than the maximum term available. Moreover, the court did not err in imposing defendant's sentence without enunciating the factors weighed in arriving at that sentence. The trial court did not abuse its discretion in imposing a term of 16 years in prison.

¶ 43 The dissent speculates that the prosecutor recommended a nine-year sentence. Whatever recommendation the prosecutor made does not bind the trial judge, as sentencing is the province of the court. This court's determination of whether the trial court abused its discretion in sentencing the defendant will not be affected by the terms that the parties suggested to the trial court. *People v. Nussbaum*, 251 Ill. App. 3d 779, 782-83 (1993) (noting that the parties' recommendations as to sentencing "are deserving of whatever weight the sentencing court wishes to accord them and nothing more"). Our supreme court has specifically held that the trial court is not bound by the State's sentencing recommendation. *People v. Striet*, 142 Ill. 2d 13, 21-22 (1991); see also *People v. Lautenschlager*, 205 Ill. App. 3d 530, 532 (1990) (rejecting the notion that the term of years urged by the State is the "upper limit of any appropriate sentence").

Likewise, the trial court is not obligated to impose the minimum sentence available. *People v. Means*, 2017 IL App (1st) 142613, ¶ 16.

¶ 44 The dissent also mischaracterizes the trial court's admonishment of defendant. The court in fact said, as the language quoted in the dissent indicates, that defendant had been found guilty and then began appellate admonishments for a guilty plea. The court then recognized he had misspoken and after stating what factors he had considered in imposing sentence, the court went on to give defendant the proper appellate admonishments. In addition, defendant did not ask the trial court to explain his reasons for a 16-year sentence.

¶ 45 Finally, the dissent is incorrect in stating that the trial court denied leave to file defendant's motion to reconsider sentence. Both the State's and defendant's brief indicate the defendant moved to reconsider his sentence and that the motion was denied.

¶ 46 The transcript indicates the following exchange:

> "MR. BURTZ [assistant public defender]: Judge, I'd seek leave to file a motion to reconsider sentence.
>
> THE COURT: Could you want to argue?
>
> MR. BURTZ: No.
>
> THE COURT: Denied.
>
> MR. BURTZ: I seek leave for -- to file a notice of appeal. Ask for the State Appellate Defender to be appointed to represent Mr. Jackson.
>
> THE COURT: State Appellate Defender will be appointed.
>
> MR. MARTIN [assistant State's attorney]: And Judge, we have an impound order for the nine photographs in this case. There's also the Court Costs.

THE COURT: Notice of appeal is filed. State Appellate Defender is appointed."

¶ 47 That colloquy makes clear that defense counsel filed a motion to reconsider sentence, the trial court asked if he wished to argue, and the attorney said no. The attorney then filed notice of appeal and the State Appellate Defender was appointed.

¶ 48 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 49 Affirmed.

¶ 50 PRESIDING JUSTICE REYES, specially concurring.

¶ 51 I concur only in the judgment reached by the majority.

¶ 52 JUSTICE GORDON, dissenting:

¶ 53 Defendant claims that the sentencing court erred by failing to give its reasons for imposing a 16-year sentence, and asks this court to vacate his sentence and remand for a new sentencing hearing. For the following reasons, I would remand to the trial court to consider defendant's motion to reconsider his sentence. Therefore, I must respectfully dissent.

¶ 54 First, I provide a fuller description of the sentencing hearing than is provided in the majority's decision.

¶ 55 At the sentencing hearing, the prosecutor observed that the applicable sentencing range was 6 to 30 years and then asked for "something close to double digits." Obviously, "double digits" begins with 10, and "something *close to* double digits" (emphasis added) would be in the neighborhood of nine. Defense counsel asked for the minimum of six years. Thus, the parties were not far apart in what they were seeking: six as opposed to nine years.

¶ 56 Immediately after announcing a 16-year sentence, the trial court began admonishing defendant as though defendant had pled guilty—even though there had been a full bench trial before this same judge. The trial court stated:

> "Even though you were found guilty, you still have a right to an appeal. In order to do that, you must first file within 30 days of today's date a written motion *asking leave to withdraw your plea of guilty, vacate this judgment, setting fourth [sic] the grounds. If I grant the motion, plea of guilty, sentence, and judgment will be vacated and a trial date will be set on the charges for which the plea of guilty was made.* I'm sorry. I misspoke." (Emphasis added.)

¶ 57 After realizing that he misspoke, the judge backtracked and stated:

> "First of all, let me start off by saying that I've considered the factors in aggravation and mitigation and the PSI and your long history of criminal behavior, as well as the facts of this case."

¶ 58 The above-quoted one line describing the trial court's reasons came in the middle of the trial court's admonishment concerning appeal rights and after the court had started talking about a completely irrelevant plea of guilty.

¶ 59 The trial court then asked defendant if he had any questions, and defendant asked about the length of the sentence in the following colloquy:

> "THE COURT: Do you have any questions?
>
> DEFENDANT: 16 years, sir?
>
> THE COURT: That's what I said. That's not a question. But, yes, 16 years at 85 percent. Three years MSR. Bye-bye."

Instead of providing reasons for the 16-year sentence when asked, the trial court replied "[t]hat's what I said" and "[b]ye-bye."

¶ 60 Defense counsel then asked for "leave to file a motion to reconsider sentence" which the trial court denied. Despite being denied leave to file a motion to reconsider, defense counsel appears to have filed one anyway, because one appears in the appellate record. There was no subsequent order or proceeding concerning it.

¶ 61 Although the trial court ended the sentencing hearing by stating "Notice of Appeal is filed. State Appellate Defender is appointed[,]" nothing appears to have happened in this case until defendant filed a *pro se* late notice of appeal on October 7, 2015, almost five months after the sentencing.

¶ 62 As Justice Hyman (*People v. Bryant*, 2016 IL App (1st) 140421, ¶ 31 (Hyman, J., specially concurring)) and the majority (*supra* ¶ 26) point out, there appears to be a conflict between common-law precedent and the governing statute about whether a sentencing court must state its reasons. While section 5-4.5-50(c) of the Unified Code of Corrections states that a sentencing judge "shall" set forth his or her reasons for imposing a particular sentence (730 ILCS 5/5-4.5-50(c) (West 2014)), our supreme court held over 35 years ago in *People v. Davis*, 93 Ill. 2d 155, 163 (1982), that a sentencing judge has "no independent duty" to set forth his or her reasons.

¶ 63 However, in *Davis*, our supreme court also observed that the defendants had "failed to request a statement of reasons for the sentences given." *Davis*, 93 Ill. 2d at 163. The *Davis* court based its holding on this omission, stating: "we hold that *where a defendant fails to request a statement of reasons* for a particular sentence, the issue is waived." (Emphasis added.) *Davis*,

93 Ill. 2d at 163. The *Davis* court explained: "the right is purely personal to the defendants and thus may be waived." *Davis*, 93 Ill. 2d at 163. By contrast, in the case at bar, defendant did ask by stating "16 years, sir?" and by filing a motion to reconsider even after the trial court had denied him leave to do so.

¶ 64 For the foregoing reasons, I would remand this case to the trial court for a hearing on defendant's motion to reconsider his sentence. On remand, I hope that the trial court would keeps in mind what Justice Hyman wrote last year in *Bryant*:

> "In his dissent [in *Davis*], the bold and brilliant Justice Seymour Simon noted that if judges were not required to put their reasoning into the record, 'the sentencing procedure *** may appear to be arbitrary and capricious. Numbers may seem to have been taken out of a hat. *** The result will be the creation in the eyes of the public of an imperial judiciary ***.' [Citation.] ***
>
> It is not enough for judges to make fair, unbiased, and particularized sentencing decisions; criminal defendants (and the public) must perceive judges as making fair, unbiased, and particularized sentencing decisions." *Bryant*, 2016 IL App (1st) 140421, ¶¶ 31-32 (Hyman, J., specially concurring).

¶ 65 Like Justice Hyman, and Justice Simon before him, "I urge sentencing courts to make a record not so much for the appellate court as for the integrity of the criminal justice system." *Bryant*, 2016 IL App (1st) 140421, ¶ 35 (Hyman, J., specially concurring). See also *People v. Jackson*, 375 Ill. App. 3d 796, 807 (2007) (Wright, J., concurring in part and dissenting in part) ("In the two decades since our supreme court's decision in *Davis*, trial courts seem to have substituted the flexibility of the permissive 'shall' with a practice of creating records that 'need

not' demonstrate careful reflection prior to sentencing."); *People v. McDonald*, 322 Ill. App. 3d 244, 251 (2001) ("A trial court's statement of factors in mitigation or aggravation eliminates speculation regarding the basis of its decision[.]").

¶ 66 I must respectfully dissent because I believe that the explicit language of *Davis* requires a remand for a hearing on defendant's motion to reconsider his sentence in this case. In addition, I hope that the trial court takes this opportunity both: (1) to reconsider the sentence, where the sentence was almost double what the prosecutor sought, where almost all of defendant's prior convictions were for drug possession, where the victim hit defendant over the head with a golf club prior to her own injury, and where the injury at issue was caused primarily by a fall from a porch; and (2) to detail its reasons for the particular sentence given.