

No. 1-16-2773

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 12 CR 20348
)	
ARTEZ SMITH,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held:* On remand for resentencing, the trial court did not abuse its discretion in imposing the same term to which defendant was initially sentenced, despite a reduction upon remand of the applicable sentencing range, where the sentence remained within statutory guidelines.

¶ 2 This appeal follows defendant Artez Smith's 2016 resentencing for the offense of unlawful use of a weapon (UW) by a felon to the same nine-year term that was originally imposed following his bench trial in 2014. On appeal, Smith contends the trial court abused its discretion in again sentencing him to nine years in prison because his initial sentence reflected

his status as a Class X offender, which carried a maximum 30-year prison term, while on remand, he was subject to a sentence of between 2 and 10 years pursuant to the UUW statute (720 ILCS 5/24-1.1(e) (West 2012)). We affirm.

¶ 3 Smith was charged with two counts of UUW by a felon and six counts of aggravated UUW. At trial, the State presented evidence that on October 21, 2012, Smith fled from a car following a traffic stop and tossed a gun away while being pursued by police on foot. As the predicate offense for the charged counts of UUW by a felon, the State introduced a certified copy of Smith's 2006 conviction for aggravated battery to a peace officer. The trial court found Smith guilty and entered judgment on one Class 2 count of UUW by a felon, with all other counts merging into that count. The trial court sentenced Smith as a Class X offender based on his commission of two prior Class 2 felonies, including the 2006 conviction. The court imposed a term of nine years in prison, to be followed by a three-year period of mandatory supervised release.

¶ 4 On direct appeal, Smith contended that the predicate felony for UUW by a felon, namely his prior conviction for aggravated battery to a peace officer, was not a forcible felony which was required to enhance the offense to a Class 2 felony, and he asserted that his conviction should be reduced to a Class 3 offense. *People v. Smith*, 2016 IL App (1st) 140496, ¶ 4. This court agreed. *Id.* ¶¶ 11, 15.

¶ 5 We examined the separate statute defining various offenses as forcible felonies. *Id.* ¶ 6. Section 2-8 of the Criminal Code of 2012 (the Code) includes in the list of forcible felonies the offense of "aggravated battery resulting in great bodily harm or permanent disability or disfigurement" and concludes with a residual category of "any other felony which involves the

use of threat of physical force or violence against any individual." *Id.*, quoting 720 ILCS 5/2-8 (West 2012). *Id.* This court found that Smith's prior conviction of aggravated battery to a peace officer was not based on great bodily harm or permanent disability or disfigurement and determined that when the legislature set out the list of forcible felonies in section 2-8 of the Code, it did not intend to include in the residual category those offenses that were denoted in the definition itself. *Smith*, 2016 IL App (1st) 140496, ¶ 11.

¶ 6 Therefore, we concluded that Smith's prior aggravated battery conviction did not meet the definition of a forcible felony under section 2-8 of the Code and found that the trial court erred in enhancing his conviction to a Class 2 offense. *Id.* ¶ 15. We further concluded that without that Class 2 offense, Smith was no longer eligible for sentencing as a Class X offender. *Id.* ¶ 16. We affirmed Smith's conviction for UUW by a felon, but reduced the offense to a Class 3 felony, vacated Smith's nine-year sentence and remanded for resentencing. *Id.* ¶ 18.

¶ 7 During the sentencing hearing conducted on remand, the trial court heard arguments in aggravation and mitigation. The State noted that Smith was subject to the sentencing range of between 2 and 10 years pursuant to the UUW statute and asserted that a nine-year term was "still a reasonable sentence" in light of Smith's criminal history.

¶ 8 In mitigation, defense counsel told the court Smith had worked as a barber while in prison and had applied for other inmate programs. Counsel requested "an extended sentence of 6 years or less," stating Smith "has credit for such a sentence." Smith addressed the court in allocution and stated he would like to be with his family.

¶ 9 After summarizing the facts of the offense, the trial court made the following remarks:

"The matters contained in the presentence investigation in terms of the defendant's background indicated the 2006 aggravated battery to a police officer which the parties at the time of sentencing believed to be a Class 2, thus elevating this to a Class X offense, and the defendant was sentenced within that range of 6 to 30 years to a 9-year sentence, 3 years of mandatory supervised release.

Additionally, the defendant had been sentenced to 6 years in the Illinois Department of Corrections on a charge of delivery of a controlled substance in 2002, a delivery of a controlled substance in 1997. And in 1994, he had received a sentence on two cases, one which appears to be a probation terminated *instanter* matter, possession of a controlled substance with intent to deliver, the other a 5-year sentence to the Illinois Department of Corrections with a boot camp recommendation. ***

The Appellate Court in the opinion that I had previously noted said ["W]e will not speculate as to what the trial court might have done, but [] merely remand the cause for resentencing.[] The defendant was sentenced to the lower range of the Class X sentencing range, as I indicated was the 6 to 30 [year] sentencing range. I felt a 9 year sentence based on the defendant's background of his previous sentences to the Illinois Department of Corrections was, in fact, an appropriate sentence. I still feel that is an appropriate sentence, and I will resentence you, Mr. Smith, to 9 years in the Department of Corrections. *** [B]ecause this is a Class 3 extended-term which is a 2- to 10-year sentencing range, I will sentence you to a 1-year period of mandatory supervised release which would be controlling. The defendant will receive credit for every day that he has been in custody."

¶ 10 After admonishing the Smith as to his appeal rights, the trial court remarked:

"I referenced the extended term. It is technically not an extended term. It is extended by the statute itself *** [to] *** a 2- to 10-year time period. Normally a Class 3 [felony sentencing range] would be 2 to 5 years and you would have to be extended up to 10 years. This, as I say, is extended by the statute itself."

¶ 11 Defense counsel filed a motion to reconsider sentence, asserting the nine-year term imposed on remand was "latently vindictive." Counsel argued the sentence should be reduced because he was subject to a lower sentencing range on remand and asserted the trial court did not consider Smith's rehabilitative potential or mitigating factors in resentencing him to the same term.

¶ 12 After hearing argument, the trial court denied Smith's motion to reconsider sentence, stating:

"The defendant was sentenced to a term of nine years. The defendant's background which I considered is basically that [this] would have been his fifth sentence to the Illinois Department of Corrections. In terms of the number of cases that he had, he was sentenced on a 1994 case, a 1997 case and a 2002 case. Those were all drug-related cases as well as the aggravated battery charge from 2006."

¶ 13 The trial court noted Smith's sentence was within the applicable range and that "the possession of weapons by a person who is a felon is something that is absolutely prohibited." The court again remarked this was Smith's fifth felony conviction, stating:

"I felt that the nine-year sentence was an appropriate sentence within the Class X sentencing range. I still feel that it is an appropriate sentence within the extended Class 3 sentencing range."

¶ 14 In this appeal, Smith contends the trial court's imposition on remand of the same nine-year term to which he was originally sentenced was excessive and constituted an abuse of discretion. Smith requested and we granted his motion to consider this appeal on an expedited basis.

¶ 15 Smith points out that the maximum sentence he could have received on remand was 10 years, in contrast to the maximum term of 30 years applicable to a Class X offender, and he contends the trial court did not consider that his UUW conviction had been reduced to a Class 3 offense. Smith also asserts his original sentence was based on the court's belief that his criminal record included a prior conviction for a forcible felony. He asks that his sentence be reduced to no more than eight years, which would allow his release in 2017 based on the application of good-conduct credit.

¶ 16 The State responds that the trial court did not abuse its discretion in resentencing Smith to nine years because that term was within the applicable range of between 2 and 10 years for UUW by a felon. The State points out that the court expressly considered the original sentencing range and the new sentencing range applicable on remand.

¶ 17 A reviewing court gives "substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. It is the

purview of the sentencing court to balance those factors and provide a reasoned punishment according to the facts of a particular case. *People v. Latona*, 184 Ill. 2d 260, 272 (1998).

Therefore, this court will not disturb a sentence that is within the applicable sentencing range unless the trial court abused its discretion. *Id.* A sentence does not represent an abuse of the trial court's discretion unless it is at great variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000).

¶ 18 While a trial court, on a remand for resentencing, may not impose a more severe sentence than was originally ordered (730 ILCS 5/5-5-4 (West 2012)), the court is not required to impose a lower sentence, even when the case is remanded for resentencing on a lesser class offense. *People v. Raya*, 267 Ill. App. 3d 705, 709 (1994); see also, e.g., *People v. Aleman*, 355 Ill. App. 3d 619, 626-27 (2005); *People v. Flanery*, 243 Ill. App. 3d 759, 761 (1993) (trial court did not abuse its discretion in imposing same sentence on remand).

¶ 19 Here, Smith was convicted of UUW by a felon under section 24-1.1(a) of the Code (720 ILCS 5/24-1.1(a) (West 2012)). Although the standard sentencing range for a Class 3 felony is between 2 and 5 years in prison (730 ILCS 5/5-4.5-40 (West 2012)), the statute that sets out the offense of UUW by a felon includes a greater range, namely that a violation of the statute by a person not confined in a penal institution is a Class 3 felony subject to a sentence of between 2 and 10 years in prison. 720 ILCS 5/24-1.1(e) (West 2012).

¶ 20 The trial court's remarks at the sentencing hearing on remand and in the court's denial of Smith's motion to reconsider sentence reflect the trial judge's full awareness of, and consideration given to, both the initial sentencing range and the class of offense and sentencing

range that applied on remand. The trial court concluded that a nine-year term remained "an appropriate sentence" for Smith. In making that determination, the trial court reviewed Smith's criminal history, which included four previous felony convictions, which entailed five- and six-year sentences to the Department of Corrections. Moreover, the court noted at the hearing on Smith's motion to reconsider sentence that the possession of a weapon by a felon was "absolutely prohibited." The seriousness of an offense is the most important factor in sentencing, and its significance is not diminished by mitigating factors such as a defendant's rehabilitative potential. *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010). The court chose, as it was entitled to, to give greater weight to Smith's criminal history and his conduct in the instant case than to factors in mitigation of his sentence.

¶ 21 Smith does not cite any authority for his contention because the maximum sentence on remand was 10 years, as opposed to the previous maximum sentence of 30 years, his nine-year sentence should have been reduced proportionately. Indeed, if proportionality was the guiding principle, the trial court, in Smith's view, would have been obligated to sentence him to a three-year term on remand ($9/30 = 3/10$). But, as noted, Smith's counsel requested a six-year term in the trial court and concedes on appeal that an eight-year term would have been appropriate, so it we cannot find that the trial court abused its discretion in imposing a sentence that was one year longer and within the applicable sentencing range.

¶ 22 The trial court did not abuse its discretion in sentencing Smith on remand to the same nine-year term that was originally imposed. Accordingly, the judgment of the trial court is affirmed.

¶ 23 Affirmed.