2017 IL App (2d) 120839-UB
No. 2-12-0839
Order filed January 25, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RAFAEL E. SANTOS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 07-CF-2721 Honorable Gary V. Pumilia, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentence for first-degree murder was not excessive, and a different result is not warranted by *People v. Reyes*, 2016 IL 119271.

¶ 2 Defendant, Rafael E. Santos, appeals his sentence of 70 years in prison for first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)). He contends that the sentence was excessive in light of his age, nonviolent history, and potential for rehabilitation. In our initial order, we affirmed. *People v. Santos*, 2015 IL App (2d) 120839-U. On further appeal, the supreme court ordered us to vacate our order and to determine whether a different result is warranted by *People*

v. Reyes, 2016 IL 119271. *People v. Santos*, No. 119074 (Ill. Dec. 21, 2016). We now determine that *Reyes* does not warrant a different result. Thus, we again affirm.

¶ 3 I. BACKGROUND

¶ 4 On June 8, 2012, following a jury trial, defendant was convicted of first-degree murder. Evidence at trial established that, on July 15, 2007, Alejandro Andrade took his two-year-old daughter across the street from his home to buy ice cream from a push-cart vendor, Isidro Duran. After Andrade made his purchase, three men approached Duran and asked what flavors were available. As Andrade walked away, he saw one of the men, later identified as 17-year-old defendant, pull up his shirt and remove a gun. Defendant grabbed Duran by the shirt and demanded money. Andrade picked up his daughter, and, as he entered his house, he heard four or five gunshots. Duran ran to Andrade's house asking for help. Andrade let him in, as a neighbor called 911. Duran died in the ambulance on the way to the hospital. Four bullets were removed from his body.

¶ 5 Defendant and Justin Dismuke were taken into custody not far from the scene. Prior to being apprehended, defendant gave the gun to his girlfriend, Yolanda Gonzalez, and the bullets to Gonzalez's friend, Ericka Munoz. The gun and bullets were later recovered from Gonzalez's garage. Andrade identified defendant on the scene as the person he had seen with the gun and Dismuke as one of the other men involved. During his interview with police, defendant, after initially denying that he was present during the shooting, and then claiming that Michael Jennings was the shooter, admitted that he had pulled out the gun and that, as Duran ran away, the gun fired and kept on firing. At trial, defendant testified that it was Dismuke who shot Duran three or four times.

¶ 6 At the outset of the sentencing hearing, the trial court noted that the sentencing range was 20 to 60 years' incarceration (730 ILCS 5/5-8-1(a)(1)(a) (West 2006)) with an additional 25 years to natural life for personally discharging a firearm that proximately caused the death of another (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006)). In aggravation**,** the court heard testimony from two of the victim's daughters. Defendant's sister and a jail pastor testified in mitigation. Defendant made a statement in allocution. The State asked that defendant be sentenced to not less than 85 years in prison. Defendant asked for the minimum sentence of 45 years in prison.

¶ 7 In sentencing defendant, the court noted it had considered the evidence at trial, the factors and evidence in aggravation and mitigation, the presentence investigation report, defendant's statements, and counsels' arguments. The court addressed the circumstances and seriousness of the offense, noting that the victim did nothing to provoke the attack and that he was running away from defendant when defendant shot him in the back, not once but four times. The court cited defendant's history of delinquency, noting that when defendant was free he posed a grievous threat to the safety and peace of the community. The court commented that defendant demonstrated "a callous indifference to others." With respect to defendant's rehabilitative prospects, the court found that, although defendant may have made some improvements in his life while incarcerated, such as earning his GED, the fact that defendant continued to blame others for the offense and did not tell the truth when testifying showed that defendant was "so far away from where he needs to be." The court stated that defendant had "not accepted his role in this heinous crime." The court noted that defendant's criminal conduct was the result of circumstances likely to recur and that defendant's character and attitude indicated that he was likely to commit another crime. The court stated that the sentence was needed for the protection of the public and to deter others from committing the same offense.

¶ 8 Following the denial of his motion to reconsider sentence, defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 "[T]he trial court is in the best position to fashion a sentence that strikes an appropriate balance between the goals of protecting society and rehabilitating the defendant." *People v. Risley*, 359 Ill. App. 3d 918, 920 (2005). Thus, we may not disturb a sentence within the applicable sentencing range unless the trial court abused its discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). A sentence is an abuse of discretion only if it is at great variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Id.* at 210. We may not substitute our judgment for that of the trial court merely because we might weigh the pertinent factors differently. *Id.* at 209.

¶ 11 In determining an appropriate sentence, relevant considerations include the nature of the crime, the protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *Id.* "The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors." *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). There is a presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors or relied on improper aggravating factors. *People v. Payne*, 294 Ill. App. 3d 254, 260 (1998).

¶ 12 Here, there is no dispute that the sentence was within the applicable statutory range. Defendant argues, however, that the sentence was excessive in light of his age, nonviolent history, and potential for rehabilitation. He contends that the sentence was, in effect, a life

sentence given defendant's age. Thus, he asks this court to reduce his sentence to the minimum of 45 years' incarceration. However, there is no question here that the trial court was well aware of defendant's age and properly considered the factors in mitigation, including his rehabilitative potential. The court emphasized that defendant's failure, at the time of trial, to take responsibility for the heinous crime weighed against his rehabilitative potential. Although defendant argues that he had no adult crimes of violence, we note that the offense occurred when defendant was 17 years old and that he has been incarcerated since that time. He did have a substantial history of delinquency, which included crimes of violence. Ultimately, the court reached its sentence based on the seriousness of the crime, the protection of the public, and the need for deterrence. Given the court's express consideration of the evidence in mitigation and the presence of aggravating factors, the sentence was not an abuse of discretion. Defendant is simply asking this court to afford more weight to the mitigating factors. This we cannot do.

¶ 13 *Reyes* does not warrant a different result. There, the supreme court held that, pursuant to *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012), "sentencing a juvenile offender to a mandatory term of years that is the functional equivalent of life without the possibility of parole constitutes cruel and unusual punishment in violation of the eighth amendment." *Reyes*, 2016 IL 119271, ¶ 9. But *Reyes* does not apply here, for two reasons.

¶ 14 First, defendant has specifically waived any claim that his sentence violates the eighth amendment. In his initial brief, among his "issues presented for review," he did include the issue of "[w]hether the *de facto* life imprisonment sentence violates due process and the rule established in *Miller v. Alabama* [citation]." However, he went on to make no argument to that effect; he argued only that the sentence was excessive in light of the mitigating evidence. When the State pointed out the discrepancy, defendant, in his reply brief, apologized and confirmed

that "the only issue raised by the defendant is the one discussed *** in the initial brief." Thus, defendant specifically waived the claim to which *Reyes* would pertain.

¶ 15 Second, even if defendant had made the claim, he would not be entitled to relief under *Reyes*. As noted, *Reyes* prohibits "a *mandatory* term of years that is the functional equivalent of life without the possibility of parole." (Emphasis added.) *Reyes*, 2016 IL 119271, ¶ 9. There, the defendant was subjected "to a legislatively mandated sentence of 97 years, with the earliest opportunity for release after 89 years." *Id.* ¶ 10. Thus, "[b]ecause [the] defendant was 16 years old at the time he committed the offenses, the sentencing scheme mandated that he remain in prison until at least the age of 105." *Id.* Here, the sentencing scheme mandated nothing of the kind; the trial court was authorized to impose a sentence of 45 years, which would have entitled defendant to release at the age of 63. Thus, though the trial court quite arguably imposed a "term of years that is the functional equivalent of life without the possibility of parole," that term was not "mandatory." *Id.* ¶ 9. It was, instead, a product of the trial court's discretion. See *People v. Horta*, 2016 IL App (2d) 140714, ¶ 88 ("To the extent that [defendant] received a *de facto* life sentence, it was less the result of the [statutory] add-on and more the result of the trial court's exercise of its still-considerable discretion."). And, as noted, the trial court did not abuse that discretion.

¶ 16 III. CONCLUSION

¶ 17 The judgment of the circuit court of Winnebago County is affirmed.

¶ 18 Affirmed.