2017 IL App (2d) 151010-U
No. 2-15-1010
Order filed September 27, 2017

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EREK RUBALCAVA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 12-CF-87 Honorable C. Robert Tobin III, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 5½ years' imprisonment (on a 4-to-15 range) for aggravated discharge of a firearm: despite the mitigating evidence, which the court considered, defendant's sentence was justified by the seriousness of the offense and defendant's criminal history.

¶ 2 Defendant, Erek Rubalcava, appeals his sentence of 5½ years' incarceration for aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). He contends that his sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In June 2012, defendant was charged by indictment with aggravated discharge of a firearm, in that he knowingly discharged a firearm in the direction of a vehicle that he knew was occupied. In March 2015, he pleaded guilty. In exchange, the State dismissed two other pending felony charges against him.

¶ 5 The factual basis for the plea stated that, on May 8, 2012, police responded to a call of shots fired on West Sixth Street in Belvidere. The police found a bullet hole in the sliding glass door of a residence at 1035 West Sixth Street, and the glass was cracked. A witness, Hayden Johnson, told police that he drove down West Sixth Street and saw a white car coming toward him. A passenger in the car threw a rock at Johnson's car, breaking the windshield. Johnson continued driving to 12th and West Sixth Street, where he saw people, including defendant, coming out of the bushes and running on the sidewalk. Johnson saw defendant shoot at his car with a black pistol. Five shell casings found at the location matched defendant's gun. Bullet fragments from Johnson's car and the residence at 1035 West Sixth Street were also consistent with the gun. Defendant was 19 years old at the time.

¶ 6 At sentencing, police officer David Dammon testified that he was a member of the gang intervention unit and responded to the May 8, 2012, call. He observed a bullet hole in the rear driver's-side door of Johnson's car, and the window was shattered. Dammon was familiar with defendant, whom he described as a polite young man who had graduated from high school and had always been employed since graduation. He testified that defendant was a member of the Latin Kings gang and that Johnson was a member of the Gangster Disciples. After this incident, Dammon was not aware of any gang-related crimes committed by defendant. However, he observed defendant making contact with Latin King members the past Sunday. He also stated that several members of the Latin Kings were in the county jail and that, in the two years

preceding his testimony, some of those individuals made telephone calls to defendant. In the calls that he listened to, defendant did not engage in anything inappropriate.

¶ 7 Peter Vazquez, defendant's supervisor at the plastics company where defendant worked, testified that defendant was a good worker who was a step above other employees. Defendant had been promoted at the company and never engaged in inappropriate behavior.

¶ 8 Defendant's girlfriend, Shawna Berry, testified that, after the incident, defendant was calmer and did not act out like he used to. He spent a lot more time at home, helping his mother cook and clean. Berry's mother testified that defendant became more mature, responsible, and dependable after the incident. She described defendant as very level-headed and had no reservations about his relationship with her daughter. Defendant made a statement in allocution, expressing remorse.

¶ 9 A presentence investigation report showed that defendant had a juvenile record of disorderly conduct, for which his probation was revoked for contact with gang members. He had an adult conviction of battery. He also had two pending felony charges at the time of this offense, for theft and aggravated discharge of a firearm. He reported that he never formally joined the Latin Kings, but was an associate, and that his ties with the gang ended when he graduated high school. However, he was also listed in a national database as a self-admitted Latin King gang member. His gang membership was listed as a problem area that could have contributed to his involvement with the criminal justice system.

¶ 10 The State asked the court for a seven-year sentence, noting that defendant's crime threatened serious harm, that he had a history of delinquency, and that he was out on bond for two pending felonies at the time of the crime. Defendant asked for a sentence of impact

incarceration or the minimum sentence of four years' incarceration, arguing that his young age at the time of the offense should be taken into account and that his character had changed.

¶ 11 The court found in aggravation that defendant had a history of delinquency and that there was a need for deterrence. It also noted that defendant fired five shots, with one hitting a house. The court stated that it did not see any statutory factors in mitigation. Addressing defendant's argument that his character had changed and he was unlikely to reoffend, the court stated that it had no idea what would make a person shoot into a moving vehicle and that it was impossible for the court to find that it was not likely to recur. The court found as nonstatutory mitigating factors that defendant pleaded guilty and took ownership of his actions and that he was respectful to law enforcement and the court. The court stated that, without those factors and the way defendant had behaved himself in the community, he would be looking at least at a 10-year sentence. The court found impact incarceration inappropriate based on the seriousness of the offense and sentenced defendant to 5½ years' incarceration, to be served at 85%.

¶ 12 Defendant moved to reconsider the sentence, arguing that the court should consider everything defendant had done to improve his character after the offense. The court denied the motion, stating that it had considered everything defendant had done and his character. The court stated that it felt pretty comfortable that defendant was going to be a good member of the community after he served his time and that, if it had not had that comfort level, the sentence would have been a lot higher. Defendant appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant contends that the sentence was excessive, arguing that the sentence did not adequately account for his young age at the time of the offense and his changes in behavior afterward.

¶ 15 "[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.

¶ 16 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*. 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).

¶ 17 Here, defendant was eligible for impact incarceration or a minimum of four years' incarceration. 720 ILCS 5/24-1.2(a)(2), (b) (West 2012); 730 ILCS 5/5-8-1.1 (West 2012). The offense carried a maximum sentence of 15 years' incarceration. 730 ILCS 5/5-4.5-30(a) (West 2012). The court discussed the aggravating circumstances, including the seriousness of the crime, in which defendant shot at a moving vehicle on a public street, with bullets hitting both the vehicle and a residence. Defendant had a criminal history and was on bond for two pending felonies at the time, including another charge of aggravated discharge of a firearm. Further,

there was evidence that he was still in contact with gang members. Thus, it was reasonable for the court to decline to find that defendant was unlikely to reoffend. It was further clear that the court considered defendant's rehabilitative potential. The court specifically stated that defendant's good behavior was why the court did not impose a sentence of 10 years' incarceration or more.

¶ 18 Defendant notes various cases in which the appellate court reversed or reduced a sentence, based in part on a defendant's potential for rehabilitation. But those cases involved either a failure to consider mitigating factors or other circumstances not present here. See, *e.g.*, *People v. Brown*, 2015 IL App (1st) 130048, ¶¶ 45-47 (court relied on speculative evidence and juvenile offender's sentence would not be completed until he was 66 years old); *People v. Juarez*, 278 Ill. App. 3d 286, 294-95 (1996) (record did not indicate that the court gave serious consideration to mitigating evidence or rehabilitative potential). Here, the sentence imposed and the court's statements concerning defendant's behavior after the offense was committed show that it balanced the factors in mitigation and fully considered defendant's rehabilitative potential in crafting the sentence.

¶ 19 Citing cases discussing social science research about juvenile brain functioning and development, defendant also argues that the sentence is excessive based on his age. See, *e.g.*, *People v. House*, 2015 IL App (1st) 110580; *Brown*, 2015 IL App (1st) 130048. But the studies cited were not offered in evidence to the trial court, nor was defendant a juvenile at the time of the offense. Further, the sources cited generally are derived from cases addressing particularly lengthy sentences for young offenders. See, *e.g.*, *House*, 2015 IL App (1st) 110580, ¶¶ 89-101 (discussing natural life sentence of a 19-year-old offender); *Brown* 2015 IL App (1st) 130048, ¶¶ 45-47 (citing *Roper v. Simmons*, 543 U.S. 551, 568-75 (2005), which banned the death

penalty for juveniles). Here, defendant's sentence was not onerously long. Indeed, he was sentenced to only a year and a half more than the minimum after the court considered his good behavior following the offense.

¶ 20 Finally, defendant argues that the trial court wrongly considered the seriousness of the offense when the seriousness of it was implicit in its classification it as a Class 1 felony that must be served at 85%. However, the threat of serious harm is not inherent in the offense of aggravated discharge of a weapon. *People v. Torres*, 269 Ill. App. 3d 339, 350 (1995). Thus, a trial court may consider the threat of harm caused by the defendant's conduct. *People v. Ellis*, 401 Ill. App. 3d 727, 731 (2010). Here, defendant fired five shots at a moving vehicle on a public street, with one bullet striking a house. The trial court was well within its discretion to consider that as a factor in aggravation.

¶ 21 III. CONCLUSION

¶ 22 The trial court carefully balanced the aggravating and mitigating factors and imposed a reasonable sentence of 5½ years' incarceration. Accordingly, the judgment of the circuit court of Boone County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 23 Affirmed.