2017 IL App (3d) 150184-U

Order filed July 7, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 13th Judicial Circuit,
	)	La Salle County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0184
v.	)	Circuit No. 13-CF-202
	)	
HARLEY M. BRADY,	)	
	)	Honorable Cynthia M. Raccuglia,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not give improper weight to a factor inherent in the offense of armed robbery when it sentenced defendant, and defendant's sentence was not excessive.

¶ 2 Defendant, Harley M. Brady, appeals from his convictions for armed robbery and unlawful possession of a weapon by a felon. Defendant argues that the court erred in imposing his sentence for armed robbery because it considered the threat of harm, a factor inherent in the offense. Defendant also argues that the armed robbery sentence was excessive. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with one count each of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2012)). The cause proceeded to a jury trial where defendant represented himself.

¶ 5 At trial, Erich Delk testified that he was employed as the closing manager of the Ottawa Burger King. On April 18, 2013, before midnight, three masked individuals walked into the restaurant. One of the individuals went to the office and took the deposit bags. Delk thought that one of the masked individuals was Keith Manning, whom he had previously worked with at Burger King. Delk did not see any individuals with firearms.

¶ 6 Jerica Milligan testified that she was working at Burger King when the three men entered. Milligan noted that the person who went into the office was carrying a black handgun. Delk pushed the second individual, and the third individual raised his shirt to reveal a shotgun in his pants.

¶ 7 Keith Manning testified that he, Blair Lavoy, and defendant robbed Burger King for money to purchase drugs. Defendant provided two firearms and an "air soft" pistol that were used in the robbery. Manning recalled that defendant had loaded the shotgun with five rounds. When the group entered the restaurant, Manning went directly to the office. Manning took approximately $700 or $800 from the safe. Manning recalled that, during the robbery, defendant concealed the shotgun in his pants. Manning said the shotgun did not have a "[l]ong stock."

¶ 8 Allison Spaulding testified that she drove defendant, Manning, and Lavoy to and from Burger King. Spaulding did not see them with any guns on the night of the robbery.

¶ 9 Deborah Wheeler testified that defendant lived at her house. Wheeler remembered seeing defendant cut the stock off a double-barreled shotgun with a saw.

¶ 10 Detective Randy Baxter testified that he participated in the search of defendant's residential trailer. The search uncovered a sawed-off double-barreled shotgun and ammunition. Defendant told Baxter that the shotgun was supposed to be in a scrap pile outside of the trailer. On cross-examination, Baxter noted that the armed robbery was unusual in that the suspects did not point weapons at the victims or demand money.

¶ 11 Defendant testified that, on the date of the incident, Spaulding drove the group of men to Burger King. The men concealed their faces with T-shirts and entered the restaurant. None of the individuals carried firearms. Defendant admitted that money was taken from Burger King while he was present.

¶ 12 The jury found defendant guilty on both counts.

¶ 13 At the sentencing hearing, the State argued that the presentence investigation (PSI) report included almost no mitigating evidence. The PSI showed that defendant had a minimal history of employment and an extensive history of drug abuse. The State argued that several factors in aggravation warranted a lengthy prison sentence. First, defendant's conduct threatened serious harm. The State acknowledged that the threat of harm was partially encompassed in the charge itself, but it contended that the nature of the offense threatened greater harm than what the statute contemplated. The State specifically argued that defendant carried a shotgun into a restaurant and threatened employees with the shotgun. Second, a substantial sentence was necessary to deter others from committing similar offenses. Third, defendant had an extensive criminal history with juvenile offenses.

¶ 14 The court found that the factors in aggravation argued by the State were "absolutely true." Specifically, defendant had a substantial criminal history, which included violent offenses and a prior weapons charge. The court emphasized that "the system was too lenient with

[defendant]," and it should have imposed greater sentences for defendant's prior offenses. The only mitigating factor was that a prison sentence would deprive defendant of time to bond with his child. The court concluded:

> "[T]he aggravating factors are so overwhelming. Specifically, and in summary, your conduct threatened serious injury.
>
> There's no question not only this conduct threatened serious injury, but your whole life of crime and criminal activity."

The court sentenced defendant to 40 years' imprisonment for armed robbery and a concurrent term of 14 years' imprisonment for unlawful possession of a weapon by a felon.

¶ 15 Defendant filed a motion to reconsider. Defendant argued the PSI was inaccurate as it did not contain the full details of his mental health records, and that his sentence was excessive. At the hearing on the motion, the court considered a new PSI that included defendant's history of mental health issues. Defendant's criminal history in the revised PSI included multiple misdemeanor and felony convictions. The convictions included aggravated battery of a peace officer, aggravated battery, battery causing bodily harm, resisting a peace officer or correctional employee, criminal damage to government property, felon in possession of a weapon, and unlawful possession of a controlled substance. The court found:

> "First of all when I said there [were] no mitigating factors, there [were] no mitigating factors. But I want you to know the fact that you went to trial and did not plead guilty and therefore couldn't show remorse was not real important to me because I saw great growth in you during that trial. And actually, I saw that it had a positive effect on you. I saw a drug addict turn into a

> person that I liked. And I liked you and still do. This job I do not always like, and I was not happy to do it when I sentenced you. And I'm not happy that I have to by law not reduce your sentence today."

The court denied defendant's motion. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 I. Factor Inherent in the Offense

¶ 18 Defendant raises a two-part challenge to his sentence. Defendant first argues that the court erroneously considered the threat of harm while imposing his sentence for armed robbery. Specifically, defendant directs our attention to the court's statement "your conduct threatened serious injury. There's no question *** this conduct threatened serious injury." Defendant contends that threat of harm is inherent in the offense of armed robbery. Defendant acknowledges that he has forfeited review of this issue, but he argues that it is reviewable under the second prong of the plain-error doctrine. We find that the trial court did not err when it considered the degree of harm posed by defendant's acts.

¶ 19 The first step of plain-error review is to determine whether the circuit court erred. *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 (2007). Generally, a court may not consider in aggravation a factor that is inherent in the offense that defendant is being sentenced. *People v. Thomas*, 171 Ill. 2d 207, 226-27 (1996). This rule does not apply rigidly as public policy dictates that a sentence must be varied according to the circumstances of the offense. *People v. Cain*, 221 Ill. App. 3d 574, 575 (1991).

¶ 20 As charged in this case, a person commits armed robbery when he knowingly takes property from another person by the use of force or threat of the imminent use of force while he carries or is armed with a firearm. 720 ILCS 5/18-1(a), 18-2(a)(2) (West 2012).

¶ 21 Threat of force is implicit in the offense of armed robbery. *People v. Carmack*, 103 Ill. App. 3d 1027, 1037 (1982). While armed robbery involves the use or threat of force, "it does not necessarily follow that a threat of serious harm is always involved." *Id.* The court may consider the degree of harm threatened by the particular weapon used in the armed robbery. See *People v. Burnette*, 325 Ill. App. 3d 792, 810 (2001) (court may consider the degree of danger presented by the type of weapon used in the armed robbery); *People v. Shick*, 318 Ill. App. 3d 899, 909 (2001) (court did not improperly consider that defendant committed armed robbery with a sawed-off shotgun).

¶ 22 Logically, the threat of force involved in an armed robbery varies according to the firearm used. See *e.g.*, *People v. Gray*, 212 Ill. App. 3d 613, 617 (1991) ("[a] sawed-off shotgun has been considered among the most dangerous and threatening weapons, the use of which threatens serious harm greater than is inherent in all armed robberies."). For example, a single-fire rifle poses a far lower threat of harm than a fully automatic submachine gun. While both weapons have the inherent ability to endanger life, it is the ability of the submachine gun to rapidly endanger many lives that shrouds the weapon with an extraordinarily high threat of harm. Analogously, a sawed-off shotgun poses a heightened threat of harm as it has the ability to inflict numerous injuries by firing a single shot. So great is the harm posed by a sawed-off shotgun that the legislature criminalized the knowing possession of the weapon. See 720 ILCS 5/24-1(a)(7) (West 2014). Moreover, in *Gray*, 212 Ill. App. 3d at 617, this court noted that "[a] sawed-off shotgun has been considered among the most dangerous and threatening weapons, the use of

which threatens serious harm greater than is inherent in all armed robberies *(People v. Smith*, 105 Ill. App. 3d 639 (1982))."

¶ 23 Here, the court found that defendant's conduct "threatened serious injury." In its sentencing argument, the State emphasized that defendant's conduct threatened serious harm in that he carried a shotgun into Burger King and threatened employees with the weapon. The trial evidence established that the shotgun was not a weapon that was previously used for sport, but that defendant had modified the weapon by cutting off part of the barrel. The shortened barrel on the shotgun would cause the shot to disperse widely over a small area which would lead to greater bodily harm. Although defendant did not fire the weapon, according to Milligan, defendant exposed the weapon in a threatening manner during the robbery. Because of the nature of the weapon, it posed a higher degree of harm than what is contemplated by the armed robbery statute. *Gray*, 212 Ill. App. 3d at 617. We conclude that defendant's use of a sawed-off shotgun in the commission of the armed robbery permitted the court to find in aggravation that defendant's "conduct threatened serious injury."

¶ 24 II. Excessive Sentence

¶ 25 Defendant argues that his 40-year sentence for armed robbery is excessive because no one was injured during the offense, the threat of harm was relatively low, and the court recognized that defendant was a likeable, intelligent person, who had significant potential for growth. In essence, defendant argues that the court gave insufficient weight to these potential mitigating factors. We find that the court considered the relevant factors in mitigation and aggravation, and defendant's sentence was, therefore, not the result of an abuse of discretion.

¶ 26 We review a sentence that is within the statutory limits for an abuse of discretion. *People v. Snyder*, 2011 IL 111382, ¶ 36. We may only alter a sentence when it varies greatly from the

spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* The circuit court has broad discretion to sentence a defendant to any term within the statutory sentencing range. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). We presume that the court considered all mitigating factors in the record absent affirmative indication to the contrary. *People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011). The presence of mitigating factors does not require a minimum sentence or preclude the imposition of the maximum sentence. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 57.

¶ 27 Here, defendant's sentence for armed robbery fell within the statutory sentencing range. Defendant's armed robbery conviction was a Class X felony (720 ILCS 5/18-2(b) (West 2012)) with a sentencing range of 6 to 30 years' imprisonment (730 ILCS 5/5-4.5-25(a) (West 2012)), plus a 15-year sentence enhancement because defendant carried a firearm on his person (720 ILCS 5/18-2(b) (West 2012)). Defendant's 40-year prison sentence is below the maximum possible sentence of 45 years' imprisonment and is presumptively valid. See *People v. Busse*, 2016 IL App (1st) 142941, ¶ 27 (sentence within the statutory range is presumptively valid).

¶ 28 At the sentencing hearing, the court considered the relevant factors in mitigation before it imposed defendant's sentence, and the court found only one factor in mitigation—a lengthy sentence would deprive defendant of time to bond with his child. In denying defendant's motion to reconsider sentence, the court contradicted its earlier statement and found no mitigating factors. This inconsistency is of little consequence as the court denied defendant's motion without modifying his sentence. Several aggravating factors supported defendant's sentence. These factors included the need to deter others in the community from committing similar offenses, defendant's conduct threatened serious harm, and defendant had a substantial criminal history that included four misdemeanors and five felonies. The convictions included the

following misdemeanor or felony offenses: aggravated battery of a peace officer, aggravated battery, battery causing bodily harm, resisting a peace officer or correctional employee, criminal damage to government property, felon in possession of a weapon, and unlawful possession of a controlled substance. We find no abuse of discretion.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the judgment of the circuit court of La Salle County.

¶ 31 Affirmed.