2017 IL App (3d) 150351-U

Order filed November 20, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARLON COLEMAN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois, Appeal No. 3-15-0351 Circuit No. 14-CF-289 Honorable Kevin W. Lyons, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 12-year sentence of imprisonment for aggravated driving while under the influence of alcohol was not an abuse of discretion.

¶ 2 Defendant, Marlon Coleman, was convicted of aggravated driving under the influence of alcohol (aggravated DUI) and leaving the scene of a personal injury accident. On appeal, defendant does not challenge his convictions, but attacks his sentences. We affirm defendant's 12-year sentence of imprisonment for aggravated DUI, and we reduce defendant's sentence for leaving the scene of a personal injury accident to three years' imprisonment.

¶ 3 FACTS

¶ 4 Defendant was charged with six counts of aggravated DUI (625 ILCS 5/11-501(d)(1)(C), (F), (2)(B) (West 2014)). Some of the aggravated DUI counts alleged that defendant caused the death of Daniel Cantrall, and other counts alleged that defendant caused great bodily harm to Jennifer Schmitt. Defendant was also charged with leaving the scene of a personal injury accident (625 ILCS 5/11-401(a) (West 2014)).

¶ 5 A jury trial was held. The trial evidence showed that defendant was driving a white Cadillac in a center turn lane. Defendant wove into a lane of oncoming traffic several times. Defendant turned in front of a motorcycle operated by Cantrall. Schmitt, Cantrall's wife, was a passenger. Defendant's Cadillac collided with Cantrall's motorcycle. After the collision, defendant turned into a grocery store parking lot, paused for a moment, and drove away. Cantrall died as a result of injuries he sustained from the collision. Schmitt suffered a concussion, a rib fracture, and a forearm fracture.

¶ 6 Caleb McConnell, Sharquan Harvey, Brandon Gordon, and Jessica Selph were in vehicles in a nearby Taco Bell drive-through lane at the time of the crash. They all testified at the trial. McConnell did not see the crash, but he saw the Cadillac run over a body after the crash and turn into a grocery store parking lot. McConnell called 911. Harvey, a passenger in McConnell's vehicle, saw the Cadillac collide head on with a motorcycle. Gordon and Selph heard the crash from their vehicle. Selph looked up and saw a light-colored vehicle bounce over something in the road and turn into a parking lot. Selph and Gordon then saw a motorcycle lying in the road. Selph, who was a nurse, attempted to aid the man and woman who had been riding the motorcycle. Gordon saw the Cadillac drive away, and he followed it. Gordon eventually caught up to the Cadillac and pulled out in front of it. Gordon called 911 as he was driving.

Defendant exited the Cadillac and stumbled, appearing to be intoxicated. Gordon could smell an odor of an alcoholic beverage on defendant's breath. The police arrived.

¶ 7 Officer Jonathan Irving arrived on the scene. Irving testified that he saw defendant and Gordon standing by defendant's Cadillac. Gordon advised Irving that defendant had been driving the Cadillac. Defendant told Irving, "That guy hit me." Defendant appeared to be confused. Irving believed defendant was intoxicated. Irving smelled an odor of an alcoholic beverage on defendant's breath. Defendant's speech was "somewhat slurred," but "mainly just slow and kind of rambling." Defendant swayed while walking. Irving stayed on the scene with defendant for approximately an hour and a half before transporting him to the police department.

¶ 8 Two other police officers who observed defendant after the crash testified that defendant appeared to be intoxicated, and they smelled an odor of an alcoholic beverage on defendant. One officer said that defendant's eyes were glassy and bloodshot. The officer also said defendant "seemed a little dazed." Another officer testified that he took defendant to the hospital to have samples taken of defendant's blood. Defendant smelled strongly of an alcoholic beverage at that time, and he stumbled while walking into the hospital. Defendant did not consent to provide the samples, so they were taken involuntarily. Between the time of the crash and the time defendant's blood was drawn, defendant was in police custody and was not permitted to drink alcohol or eat. The forensic toxicologist who tested defendant's blood sample testified that defendant's blood alcohol content was 0.273.

¶ 9 A police officer testified that he collected vehicle parts from the debris at the scene of the collision. The officer stated that all the damage to defendant's vehicle was on the left side of the vehicle. The officers were able to place the broken parts of the vehicle together like a puzzle. The part numbers on the vehicle parts the officers collected matched the numbers from the

manufacturer of defendant's vehicle. The officers did not find any vehicle parts that were not consistent with defendant's vehicle.

¶ 10 The jury found defendant guilty of all seven counts. The circuit court entered judgment for aggravated DUI on count I of the indictment, which alleged that defendant drove a vehicle while under the influence of alcohol, which proximately caused Cantrall's death in violation of section 11-501(d)(1)(F) of the Illinois Vehicle Code (625 ILCS 5/11-501(d)(1)(F) (West 2014)). The court also entered judgment for leaving the scene of a personal injury accident.

¶ 11 A sentencing hearing was held. The presentence investigation (PSI) report showed that defendant was 40 years old. Defendant had been convicted of DUI and unlawful possession of a controlled substance in 2010. Defendant also had a prior DUI conviction from 1997. Defendant had numerous prior convictions for other traffic offenses, including two convictions for illegal transportation of alcohol. The PSI indicated that defendant had been unemployed his entire life, except for two jobs which each lasted only a few months. Defendant had a daughter who lived in Nevada. He had only seen his daughter once. Defendant was ordered to pay $10 per month in child support, but he was in arrears. Defendant reported that he only consumed alcohol on special occasions and did not have a drinking problem. Defendant admitted that he had alcohol in his system at the time of his 2010 DUI but stated that he had not been under the influence of alcohol since that time.

¶ 12 The PSI indicated that defendant refused to complete a DUI evaluation for the instant offense. However, an alcohol and drug evaluation report was prepared in 2012 following defendant's 2010 DUI arrest. This evaluation was attached to the PSI. The evaluation indicated that defendant reported that he typically drank one to two beers once per week. The evaluation noted that defendant's prior treatment documents indicated a diagnosis of alcohol abuse, but the

documents gave no indication of defendant's symptoms. Defendant was classified as a "significant risk." The evaluator recommended that defendant complete a minimum of 10 hours of DUI risk education and a minimum of 20 hours of substance abuse treatment.

¶ 13 The supplemental PSI contained letters regarding defendant's good character written by defendant's family members and friends. The supplemental PSI also contained victim impact statements written by Schmitt, Cantrall's daughter, and Cantrall's sisters. The victim impact statements were read aloud in court at the sentencing hearing.

¶ 14 George Hudson, defendant's uncle, testified at the sentencing hearing that he was a retired police officer. Hudson stated that defendant, like his other family members, was a Christian. Hudson stated that defendant was not a monster and did not kill Cantrall intentionally.

¶ 15 In arguing that defendant should receive a low-end sentence, defense counsel argued:

> "We—one of the things that is important to note about someone who has a DUI for the third time is that often times alcoholism is a disease. It's an illness. It can affect anyone, regardless of one's social economical background. Sometimes it's hereditary. There are a number of things that people can do to try to prevent alcoholism, but sometimes it can get the best of you."

¶ 16 Defendant gave a statement in allocution. Defendant denied that he was responsible for the collision. He said that there was another vehicle that made a U-turn in front of Cantrall, forcing defendant to stop his vehicle. Cantrall's motorcycle hit the other vehicle's taillight, and the taillight fell into the street. Defendant said that he was 150 feet away from the scene of the collision. He stated that he told the police this version of events, but they did not investigate it. Defendant claimed that the prosecutor withheld information about the other vehicle's taillight during discovery.

¶ 17 The court sentenced defendant to 12 years' imprisonment for aggravated DUI and an extended-term sentence of 4 years' imprisonment for leaving the scene of a personal injury accident, to be served consecutively. The court stated that it had considered the PSI, the supplemental PSI, the evidence presented, the arguments of the attorneys, defendant's statement in allocution, and the statutory factors in aggravation and mitigation. The court expressly found that several statutory mitigating factors did not apply. Specifically, the court found (1) the criminal conduct was not induced by someone other than defendant, (2) the character and attitudes of defendant did not indicate that he was unlikely to commit another crime, (3) no extraordinary circumstances existed that would provide that defendant would receive probation, and (4) imprisonment would not entail excessive hardship on defendant's dependents.

¶ 18 Regarding the factors in aggravation, the court found that the sentence was necessary to deter others from committing the same crime. The court also stated:

> "Defendant's conduct did cause or threaten serious harm. It caused death and serious injury then, of course, to Miss Schmitt. That may be, however, inherent in the nature of the offense, and so I would only give it the weight that *** would apply if not already be [*sic*] a part of the offense."

¶ 19 The court stated that it was imposing the 12-year sentence, in part, because defendant failed to change his ways after his two prior DUI convictions. The court stated:

> "This was a case of careless disregard, and you wobbled yourself across the line, and Mr. Cantrall had no choice. You think he wouldn't *** have tried to stop if he could have? *** Big man, careful driver, no drinking, doing a charitable act that day, and he couldn't stop because you pulled in front of him. And then as if you

could not leave bad enough alone, you did the most cowardly thing you could do. You fled. You fled."

¶ 20 The trial judge discussed his prior career as an attorney, stating:

"reckless homicide or in this case aggravated DUI, *** those were the cases that were the most testy. Those were the ugliest ones. Why? I called them weddings in reverse, because courtrooms would fill. I wish I could say that this was a very unusual scene to see, but I have seen this scene many, many times. *** And that is a shame, because courtrooms fill up in reckless homicides or aggravated DUIs with usually wonderful families and friends. One kind of take one side or a portion of it, the other take the other side. They don't admit it, but they—they kind of dislike the other side, although they don't even know the other side."

¶ 21 The court also discussed the witnesses at Taco Bell who reported the incident to the police and aided the victims. The court stated: "I'm not going to end without recognizing what [the assistant State's attorney] calls heroes, and I have before, too."

¶ 22 ANALYSIS

¶ 23 I. Excessive Sentence–Aggravated DUI

¶ 24 Defendant argues that the 12-year sentence imposed by the circuit court for aggravated DUI was excessive. We find that the court did not abuse its discretion in imposing a sentence of 12 years' imprisonment on defendant's aggravated DUI conviction.

¶ 25 "The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference." *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

"The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment,

> habits, and age. [Citations.] Consequently, the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000).

We will not alter a defendant's sentence on review absent an abuse of discretion by the circuit court. *Alexander*, 239 Ill. 2d at 212. "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 26 The 12-year sentence was within the applicable statutory range of 3 to 14 years' imprisonment. See 625 ILCS 5/11-501(d)(2)(G) (West 2014). The PSI revealed that defendant had two prior convictions for DUI as well as prior convictions for illegal transportation of alcohol. The court also found that a lengthy sentence was necessary to deter others from committing similar crimes. The court found that defendant's conduct caused serious harm, but said it would only consider that factor to the extent that it was not inherent to the offense. We note that the court only entered judgment on one aggravated DUI count, which alleged that defendant's actions caused Cantrall's death. However, the trial evidence showed that defendant's actions also caused serious injury to Schmitt. The harm caused to Schmitt was not inherent in the offense and could be properly considered as an aggravating factor. See *People v. Mott*, 204 Ill. App. 3d 573, 577 (1990). The court explicitly stated that it had considered the supplemental PSI, which included the letters of support from defendant's family and friends.

¶ 27 Given defendant's criminal history, the need for deterrence, and the fact that his actions caused severe injury to Schmitt, the court's 12-year sentence was not "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54 (1999).

¶ 28 We reject defendant's argument that his sentence is excessive because the circuit court failed to consider "the evidence of mitigation that the defendant presented on his alcoholism." "Although alcoholism is not a statutory mitigating factor, in some circumstances it is appropriate for a trial court to consider it in mitigation." *People v. Young*, 250 Ill. App. 3d 55, 65 (1993); but see *People v. Tross*, 281 Ill. App. 3d 146, 151 (1996) (holding that it is proper to consider alcohol problems as an aggravating factor in some circumstances). At the outset, we note that a court's mere failure to expressly address a mitigating factor does not constitute evidence that it actually failed to consider the factor. "The trial court is not required to expressly indicate its consideration of all mitigating factors and what weight each factor should be assigned." *People v. Kyse*, 220 Ill. App. 3d 971, 975 (1991). Because defendant has failed to present any affirmative evidence otherwise, we presume the court considered all appropriate mitigating evidence. See *Young*, 250 Ill. App. 3d at 65.[1]

¶ 29 However, even if we were to accept defendant's conclusory argument that the court failed to consider his alleged alcoholism, we find no error. Stated another way, we do not believe the circumstances presented in this case warrant the type of situation where it would be appropriate for the court to consider defendant's alleged alcoholism as a mitigating factor. In fact, because defendant's alleged alcoholism shows that defendant lacked rehabilitative potential, the court would have been within its discretion to consider it as an aggravating factor.

> "Where a defendant's behavior indicates that his alcohol problems lead to recidivism and the defendant takes no steps to either stop drinking or stop committing crimes while under the influence of alcohol, we determine that a trial

[1]Defendant contends that the court found that no mitigation applied. However, the record does not support this argument. While pronouncing the sentence, the court said that certain, specific statutory factors in mitigation did not apply. The court did not say that no mitigation applied. We note that alcoholism is not a statutory factor in mitigation. See *Young*, 250 Ill. App. 3d at 65.

> court may, in its discretion, properly consider the defendant's alcohol problems in aggravation because a trial court is required to consider a defendant's rehabilitative potential, or the lack thereof, when fashioning a sentence." *Tross*, 281 Ill. App. 3d at 152.

We note the following facts in coming to this conclusion. Defendant was been convicted of DUI on two previous occasions. A previous DUI evaluation classified him as a "significant risk." Defendant has consistently denied he has a drinking problem and also denied any responsibility for causing Cantrall's death.

¶ 30 We also reject defendant's argument that the court gave improper weight to the seriousness of the harm caused. Specifically, defendant notes that the circuit court said aggravated DUIs were the "ugliest" cases it encountered as an attorney, said the case was about defendant's careless disregard when he "wobbled" over the line in front of Cantrall, and compared the witnesses at Taco Bell to heroes. When read in context, none of these comments directly relate to the extent of the harm caused to the victims in the instant case. Thus, the comments do not show that the court placed undue weight on the seriousness of the harm caused.

¶ 31 II. Extended-Term Sentence for Leaving the Scene of a Personal Injury Accident

¶ 32 Defendant argues that his four-year extended-term sentence for leaving the scene of a personal injury accident should be reduced to three years, the maximum nonextended term sentence. The State concedes that defendant's sentence should be reduced to three years' imprisonment. Upon consideration of the briefs and a review of the record, we accept the State's confession of error.

¶ 33 "[W]hen a defendant has been convicted of multiple offenses of differing classes, an extended-term sentence may only be imposed for the conviction within the most serious class

and only if that offense was accompanied by brutal or heinous behavior." *People v. Jordan*, 103 Ill. 2d 192, 206 (1984); 730 ILCS 5/5-8-2(a) (West 2014). "However, extended-term sentences may be imposed 'on separately charged, differing class offenses that arise from *unrelated courses of conduct.*' " (Emphasis in original.) *People v. Bell*, 196 Ill. 2d 343, 350 (2001) (quoting *People v. Coleman*, 166 Ill. 2d 247, 257 (1995)). Here, defendant was convicted of aggravated DUI, a Class 2 felony, and leaving the scene of a personal injury accident, a Class 4 felony. 625 ILCS 5/11-501(d)(1)(F), 11-401(a) (West 2014). These offenses clearly arose from the same course of conduct. Thus, because defendant's aggravated DUI conviction was in a more serious class than his conviction for leaving the scene of a personal injury accident, an extended-term sentence could only be imposed for aggravated DUI. *Jordan*, 103 Ill. 2d at 206.

¶ 34 CONCLUSION

¶ 35 We affirm the judgment of the circuit court of Peoria County relating to defendant's 12-year sentence for aggravated DUI. We reverse the judgment of the circuit court relating to defendant's four-year sentence for leaving the scene of a personal injury accident, and we reduce that sentence to three years' imprisonment.

¶ 36 Affirmed in part and reversed in part.