2017 IL App (3d) 160333-U

Order filed March 9, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0333
v.	)	Circuit No. 12-CF-59
	)	
JUAN F. NESBIT,	)	Honorable Kevin W. Lyons,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not abuse its discretion in sentencing defendant.

¶ 2 Defendant, Juan F. Nesbit, appeals his sentence of 26 years' imprisonment, arguing his sentence was excessive because the court did not give adequate weight to mitigating evidence. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with (1) attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2012)); (2) aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2012)); and (3) attempted armed robbery (720 ILCS 5/8-4(a), 18-2(a) (West 2012)). The matter proceeded to a jury trial.

¶ 5 The State called a series of witnesses, including the victim, Jason Lindsey, who established that Lindsey had arranged to deliver a quarter of a pound of marijuana to defendant on January 12, 2011, which he would sell for $400. “Some girls” who Lindsey had sold to before had called him to set up the buy for defendant. The girls picked Lindsey up at a gas station and drove him to an apartment complex. Once they arrived at the apartment complex, they waited in the vehicle outside the building for 30 minutes until defendant arrived. Lindsey and defendant met outside the apartment door. Lindsey walked into the apartment first and defendant followed. Once inside the apartment, defendant shoved Lindsey into the kitchen where a man in a mask was holding a gun. He pointed the gun at Lindsey. Lindsey reached for the gun and a struggle ensued. Lindsey was shot in the stomach and fell onto the floor. Lindsey was then shot twice in the back and once in the head, through his left ear. He tried to escape by crawling, but the right side of his body was not functional, and he kept sliding in blood. He eventually was able to crawl out the door. He last remembered lying in the snow in front of the apartment complex. Lindsey was in the hospital for 1½ months. An inmate with defendant at the jail further testified that defendant admitted they had planned to rob Lindsey as they did not have the money to purchase the marijuana.

¶ 6 Prior to the second day of trial, before the end of the State’s case, defendant entered into a partially negotiated plea agreement. The terms of the agreement were such that defendant

would: (1) plead guilty to attempted armed robbery; (2) be sentenced to a term of imprisonment between 10 and 30 years, which would be determined by the court at a sentencing hearing; and (3) cooperate and testify at the trial of the codefendants "and other matters" by testifying consistently with his videotaped statement. The other counts would be dismissed. The testimony from the first day of trial would be used as the factual basis. The court admonished defendant and accepted the plea.

¶ 7 At the sentencing hearing, the State noted defendant did testify at the trial of his codefendant and mentioned defendant's cooperation in a separate case, noting defendant's willingness to wear a wire was helpful to the prosecution. However, the State also pointed to defendant's lengthy criminal history, including the fact that defendant was on probation when the incident occurred. Defense counsel asked the court to consider defendant's potential for rehabilitation and sentence him on the low end of the range. Defendant offered a statement apologizing for his actions.

¶ 8 In sentencing defendant, the court stated:

> "I have considered the presentence investigation report, the evidence and the arguments of the lawyers and the statement of allocution, the statement given by the defendant, and I have given due regard to the statutory matters in aggravation and mitigation. I have considered the history and character of the defendant, given due regard to the circumstances and nature of the offense and those that surround the entry of plea."

¶ 9 The court noted defendant's family had a history of wrongdoing, with defendant's father and brother in prison and defendant and his twin brother having been in trouble in the past. The court further noted defendant had been gainfully employed for two years, which the court

commended. The court considered, in detail, the seriousness of the offense, stating: "When I [am] asked to choose what sentence to give you between 10 years and 30 years, I pick the side of the Jason Lindsay's [*sic*] of the world. Boy, oh, boy. That guy testified three feet from me two times. I can't believe he's not dead." The court then noted Lindsey was just trying to sell some drugs when he was ambushed by defendant's "group of thugs who had guns." The court further pointed to the extent of Lindsey's injuries, how he could not stand up because of all the blood on the floor, and how defendant and his group ran away instead of trying to help.

¶ 10 The court then stated:

> "Well, I beat up on you here, but I will tell you, [defendant] you did—you have some moxie in you. You have some small amount of character in you when you helped to tighten the noose apparently around another killer by wearing a wire, and that's meaningful. And I think that you testified somewhat honestly when you did testify ***. ***
>
> I am going to sentence you to 26 years in the Illinois Department of Corrections [(DOC)] followed by a period of two years of mandatory supervised release, and I do that because, shameful as it is, that will allow you to be released right about the time your son graduates from high school. I hope he does. The Nesbits have got to improve. There's got to be parts of your family—and I hope they are sitting in this courtroom—that want things to turn around because you are destroying yourselves, but I'm not going to let you destroy anymore Peorians. Because, although I have some sympathy for you, I am here to protect people that are afraid of people like you, and today that's what I'm going to do."

The court noted day for day time would apply.

¶ 11 Defendant filed a motion to reconsider sentence, which was denied. On appeal, this court granted a summary motion for remand as defense counsel had not filed a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). *People v. Nesbit*, No. 3-14-0406 (Dec. 11, 2015) (dispositional order). On remand, counsel filed a 604(d) certificate and a new motion to reconsider sentence, which argued defendant's sentence was excessive. At a hearing on the new motion to reconsider, defendant testified he was 25 years old. Defendant had cooperated with the authorities in two separate cases—against his codefendant and in a murder investigation. For the second case, defendant wore a wire while he was in a jail cell with another individual. He was able to audio record conversations with the individual that amounted to "the whole story, the confession and how he did it, where he did it, the gun he used, everything." The individual was convicted with the help of the evidence defendant obtained by wearing the wire. Defendant further testified that since he had been sent to the DOC he had held several jobs and had not had any disciplinary issues.

¶ 12 In denying the motion to reconsider sentence, the court said it had "taken into account all of the various filings and the testimony of the Defendant, the arguments of the lawyers and the various remarks and points made by the Appellate Court and the parties while we try to put some architecture to how to proceed today." Though the court commended defendant on working in the DOC, it noted, "However, here's what I recall from this case: That it was calculated. It wasn't an opportunity, 'Let's go rob the weed dealer.' It was somewhat precise." The court then stated: "This had murder written all over it. I don't—and I don't think you meant to kill anybody, but boy, you were so deep into it and so thick into it ***." The court noted it took into account what defendant faced at trial and the lengths he went through for his plea deal, stating: "That's a very risky thing to do. It was the right thing to do, and I considered it, but I cannot—it was too

much gut and grime to overcome." Further, the court stated: "And although I recognize that you're a young man and you'll do another decade or so, you'll still be young when you get out, and I think the sentence was appropriate."

¶ 13 ANALYSIS

¶ 14 On appeal, defendant argues his sentence was excessive. Specifically, defendant argues the court abused its discretion by failing to give adequate weight to defendant's youth, personal history, the particular circumstances of the offense, his cooperation with the State, and his potential for rehabilitation.

¶ 15 The circuit court's decision in sentencing defendant is given great deference and will not be altered on review absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796, 801 (2007). When a sentence falls within the statutory range, it is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of the law. *People v. Alexander*, 239 Ill. 2d 205, 215 (2010). The circuit court sees firsthand the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age and is able to consider these factors over the course of the case, and therefore, is in a better position than the reviewing court to determine the punishment to be imposed. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). The court has the responsibility to "balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). Though the court cannot ignore a pertinent mitigating factor, the weight to be given each factor depends on the facts and circumstances of each case. *People v. Burnette*, 325 Ill. App. 3d 792, 808-09 (2001); *People v. Gross*, 265 Ill. App. 3d 74, 80 (1994). On review, we assume the court considered all mitigating evidence before it, unless the record indicated otherwise. *People v. Burton*, 184 Ill. 2d 1, 34 (1998). The court is not required to recite

and assign value to each fact presented at a sentencing hearing. *People v. Merritte*, 242 Ill. App. 3d 485, 495 (1993).

¶ 16 We construe defendant's argument on appeal as an invitation to reweigh the sentencing factors, which we will not do. The record shows the court carefully reviewed and considered all of the factors in aggravation and mitigation. The court specifically mentioned defendant's age and history, and commended defendant both for being employed and for his cooperation with the State. However, the court did not believe this outweighed the seriousness of the offense and the calculated nature in which it was carried out. "The most important sentencing factor is the seriousness of the offense." *People v. Flores*, 404 Ill. App. 3d 155, 159 (2010). The court's statements show that it balanced each of the factors based on the facts and circumstances of the case before announcing the sentence.

¶ 17 Further, we note the 26-year sentence defendant received was well within the range of 10 to 30 years' imprisonment. Therefore, we cannot say the sentence imposed by the court was " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 215 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 18 In coming to this conclusion, we reject defendant's contentions that (1) "the sentence fails to adequately consider the assistance that [defendant] provided to the State, which lauded his efforts, as did the judge," and (2) the court should have given more weight to defendant's rehabilitative potential, which was shown through his cooperation, age, and history. As expressly stated by defendant, the court commented on defendant's cooperation and assistance to the State and considered the rest of the mitigating evidence. However, it believed this was outweighed by the seriousness of the offense. We emphasize that a defendant's potential for rehabilitation is not

entitled to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261 (1995). The court was in the best position to weigh the evidence with the circumstances of the case, and we are not going to disturb the court's finding. Though defendant may believe the mitigating factors compelled a lower sentence, the court was not required to agree.

¶ 19 CONCLUSION

¶ 20 The judgment of the circuit court of Peoria County is affirmed.

¶ 21 Affirmed.