

2018 IL App (1st) 153556-U

No. 1-15-3556

Order filed April 4, 2018

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County,
)	
v.)	No. 13 CR 18222
)	
DEREK JONES,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE COBBS delivered the judgment of the court.
Justices Fitzgerald Smith and Howse concurred in the judgment.

ORDER

¶ 1 *Held:* 13-year sentence for second degree murder not excessive.

¶ 2 Following a bench trial, defendant Derek Jones was convicted of second degree murder and sentenced to 13 years' imprisonment. Defendant contends on appeal that his sentence was excessive and that the sentencing hearing was not fair because the trial court did not explain its reasoning for the sentence. For the reasons stated below, we affirm.

¶ 3 Defendant was charged with first degree murder for allegedly, on or about August 20, 2013, fatally shooting Lenardo Allison with a firearm.

¶ 4 At trial, the State's evidence was that Allison and Anthony Ballard were fighting in public and defendant was one of the bystanders watching the fight. No weapons were used in the fight, and defendant was not involved. At some point, either Allison or Ballard¹ asked someone to "get my shit" – that is, his property – and a woman picked up something from the ground and gave it to defendant. When the fight ended, defendant and Ballard walked away together, and Allison followed them and demanded that they return his property. When Allison caught up to defendant and Ballard, Allison and Ballard argued: Allison reiterated that he wanted his property returned and Ballard denied that he had it. Defendant fired a single shot at Allison and then left with the gun in hand. He discarded the gun near a dumpster as he left. Police arrived almost immediately, arrested defendant, and recovered the gun near the dumpster. Allison died of a single gunshot to the eye. The recovered gun bore defendant's DNA and fired the bullet found in Allison's body and the spent shell casing found at the scene.

¶ 5 Defendant testified that Ballard asked someone to "get his shit" during the fight. Allison did not merely demand the return of his property after the fight but threatened to kill Ballard and defendant. When he caught up to defendant and Ballard, Allison punched Ballard to the ground, reached towards his back pocket, and pointed his arm at defendant. Defendant fired a single shot at Allison before realizing that he had been holding a cellphone. Defendant explained that he carried a gun because his mobility was limited after a car accident and he had been robbed in the past. He admitted to discarding the gun because the police were arriving. An acquaintance of

¹ One eyewitness testified that Ballard asked someone to "get his shit," while the other eyewitness did not specify whether Allison or Ballard said it.

defendant and Allison testified for the defense that, in the summer of 2013, Allison drank with defendant and the witness and then fired a shot into the air from a gun he retrieved from a mailbox. However, the witness also testified that Allison's action was a "joke," he did not know Allison to be a violent person, and defendant did not seem afraid of Allison.

¶ 6 Following arguments, the court found defendant guilty of first degree murder. After summarizing the evidence, the court concluded that defendant's self-defense theory was not "demonstrated in a credible way" and shooting Allison was "wholly unjustified."

¶ 7 In his posttrial motion, defendant asked the court to set aside its finding of guilt and either find him not guilty, grant a new trial, or find him guilty of second degree murder. Following arguments, the court partially granted the motion by vacating the first degree murder finding and entering a finding of guilty on second degree murder. The court noted that defendant admitted that Allison had a cellphone in his hand rather than a gun. However, Allison "had been physically aggressive with another person, was making demands, [and] made things more anxious, more tense." While defendant was walking away from the scene, Allison was "coming towards him aggressively." The court concluded that "any thoughts that this was in self-defense were mistaken. There may have been some passions aroused and certain things that happened, but it didn't rise to the requirement to use deadly force in self-defense."

¶ 8 The presentencing investigation report (PSI) reflected that defendant was born in 1983 and raised by his parents with three siblings, and he was still close to them all at the time of the PSI. His childhood was "normal" without abuse or neglect, albeit in a "gang and drug infested" neighborhood. He completed high school with A and B grades, and attended but did not complete college. He served in the army from 2002 through 2006 and received a "general under

honorable conditions” discharge. He had a 2005 military conviction for larceny and destruction of government property punished by 26 days’ labor and a demotion. After his military service, he was employed as a technician or equipment operator, and he was supported by his family during periods of unemployment. He was married in 2008 and separated later that year, and he has three children from a previous relationship who are raised by his mother. He reported that his injuries in a 2013 automobile accident had healed and that he had no serious physical illnesses nor any treatment for mental illness. He drank socially several times a week while younger, and he abused alcohol while in the army until he received counseling. He admitted smoking marijuana daily from ages 15 to 17 and denied any other drug use. He denied being under the influence of drugs or alcohol upon his arrest. The PSI preparer described defendant as “cooperative and forthcoming during this interview.”

¶ 9 The court received victim-impact statements from Allison’s grandmother and sister. Each described her personal loss and pain. Allison’s grandmother noted that defendant and Allison were closely acquainted.

¶ 10 The State argued in aggravation that defendant’s actions toward Allison were “absolutely uncalled for,” “unnecessary,” and “senseless,” and noted that defendant discarded the gun after shooting Allison. The State sought the maximum sentence.

¶ 11 Defense counsel argued that defendant completed high school, attended college, served in the army, and was employed. He has no psychological issues but has substance drug issues that should be treated in prison, counsel argued. Noting that defendant’s family was in court, counsel asked for a “lower end” sentence.

¶ 12 Defendant addressed the court, apologizing to Allison’s family, claiming that he never intended to hurt him, and noting that Allison was his friend. He apologized to the court and to his family, noting that he has two sons to raise so they do not enter into violence.

¶ 13 The court noted that defendant worked, “had no problems with the law,” and served in the military. Absent his substance abuse in the military, he “has led a law-abiding life.” The court noted that defendant’s family was raising his three children and that he would be unavailable to raise his children while in prison. The court also noted that defendant “was walking around with a gun that he never should have had in the first place and he used it. I also know that he wasn’t necessarily looking for trouble. There was some skirmish that took place. He decided to stand by and watch. He injected himself into these proceedings. He took a bag that had fallen during the course of the fight. [Allison] came towards him and was demanding and aggressive, and he took out a gun and he shot him.” The court noted that both Allison’s family and defendant’s family are impacted by the shooting. The court found that defendant’s act was not premeditated, noting that he fired a single shot, but he “was willing to use the gun in an unnecessary situation,” and the result “was wholly avoidable.” Reiterating the absence of a “lengthy criminal history,” the court sentenced defendant to 13 years’ imprisonment.

¶ 14 Defendant filed a motion to reconsider his sentence, which the court denied. The court noted that it “considered everything on this case” and “was very mindful of all factors in aggravation and mitigation,” and found that it imposed a “moderate” sentence.

¶ 15 On appeal, defendant contends that his 13-year prison sentence for second degree murder was excessive, in that it did not adequately consider his rehabilitative potential, and his sentencing hearing was not fair because the court did not explain its reasoning for his sentence.

¶ 16 Second degree murder is a Class 1 felony punishable by 4 to 20 years' imprisonment. 730 ILCS 5/5-4.5-30(a) (West 2014). A sentence within statutory limits is reviewed for abuse of discretion, and we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. The trial court's broad discretion means that we cannot substitute our judgment merely because we would weigh the sentencing factors differently. *People v. Wilson*, 2016 IL App (1st) 141063, ¶¶ 10-11 (citing *People v. Alexander*, 239 Ill. 2d 205, 212-213 (2010)). The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 36.

¶ 17 In imposing sentence, the trial court must consider both the seriousness of the offense and the defendant's rehabilitative potential. *Wilson*, ¶ 11 (citing Ill. Const. 1970, art. I, § 11). While the court may not disregard mitigating evidence, it may determine the weight of such evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 63. The most important sentencing factor is the seriousness of the offense, and the court is not required to give greater weight to mitigating factors than to the severity of the offense. *Brown*, ¶ 63; *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 17 (citing *Alexander* at 214); *Wilson*, ¶ 11.

¶ 18 The Code of Corrections provides that the "sentencing judge in each felony conviction shall set forth his or her reasons for imposing the particular sentence entered in the case." 730 ILCS 5/5-4.5-50(c) (West 2014). However, our supreme court has held that this provision is permissive rather than mandatory.² *People v. Davis*, 93 Ill. 2d 155, 162 (1982). Since *Davis*, we have held that the trial court may impose sentence without stating its reasoning or reciting how

² More precisely, *Davis* analyzed an earlier and substantively identical version of this provision, Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-1(b).

the aggravating and mitigating factors applied. See *Bryant*, ¶¶ 25-35 (Hyman, J. specially concurring)(exhorting trial court to make sentencing findings while acknowledging, based on *Davis* and appellate cases, that a lack of findings is not reversible error). The court does not need to expressly assign a weight to each aggravating and mitigating factor or otherwise outline its reasoning. *Bryant*, ¶ 16; *Wilson*, ¶ 11. We presume the court considered all mitigating factors on the record, and did not consider inappropriate aggravating factors, absent an affirmative indication to the contrary other than the sentence itself. *Brown*, ¶ 64; *Bryant*, ¶ 16; *Wilson*, ¶ 11.

¶ 19 Here, the trial court referred to mitigating factors in the PSI: defendant's nearly-blemished record including military service and employment, and the loss his family, including his children, would suffer by his incarceration. As noted above, we must presume in the absence of a remark to the contrary that the court gave due consideration to all mitigating factors in the PSI. The court also properly referred to details and circumstances of the offense. On one hand, defendant did not premeditate this offense but fired a single shot in reaction to Allison being "demanding and aggressive." On the other hand, defendant was out in public armed with a firearm and, after standing by and watching the fight, "injected himself into" it by taking the fallen property, which prompted Allison's reaction. The court found that Allison's death was "wholly avoidable," and we do not find that assessment unreasonable on this record. We conclude that the record belies defendant's contention that the court did not explain its sentence. While it did not enumerate each statutory mitigating and aggravating factor it found and mathematically weigh them on the record, it described multiple aggravating and mitigating factors in this case that it deemed noteworthy.

¶ 20 We also conclude that the court did not abuse its considerable discretion when it imposed a 13-year sentence, in the middle of the applicable range. Defendant committed this offense with a firearm, as the court emphasized in imposing sentence. Defendant argues that killing Allison with a firearm was inherent to his offense, but the record does not bear that out. While defendant was charged with personally and fatally discharging a firearm, as that is a sentence enhancement for first degree murder (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2014)), he was convicted of second degree murder and there was no firearm enhancement here. Had defendant reacted to Allison's aggressiveness other than by firing a gun, because he did not have one at hand to readily punctuate his unreasonable belief that his life was threatened, the outcome of the incident may have been very different. We deem that a reasonable consideration in the court's sentencing.

¶ 21 Accordingly, the judgment of the circuit court is affirmed.

¶ 22 Affirmed.