2018 IL App (1st) 153628-U

SIXTH DIVISION
Order filed: June 22, 2018

No. 1-15-3628

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. 12 CR 7318
	)	
JUAN BARRAZA,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's combined term of 50 years' imprisonment—40 years for first degree murder and a consecutive 10-year term for aggravated discharge of a firearm—is affirmed over his contention that this "*de facto* life" sentence was excessive where he was 18 years' old at the time of the offense and was not the shooter. The mittimus is corrected to reflect the number of days defendant spent in presentence custody.

¶ 2 Following a jury trial, defendant was found guilty of the first degree murder (720 ILCS 5/9-1(a)(1) (West 2012)) of six-year-old Aliyeh Shell, and aggravated discharge of a firearm

(720 ILCS 5/24-1.2(a)(2) (West 2012)). He was sentenced to a combined term of 50 years' imprisonment: 40 years for first degree murder, which included a mandatory 15-year firearm enhancement (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2012)), and a consecutive term of 10 years for aggravated discharge of a firearm. On appeal, defendant contends that the trial court abused its discretion in sentencing him to a "*de facto* life sentence" because he was only 18 years old at the time he committed the offense, he did not have a criminal history, and he was not the shooter. Defendant also argues that he is entitled to additional presentence custody credit. We affirm and correct the mittimus.

¶ 3 Defendant and co-defendant, Luis Hernandez, were charged by indictment with multiple counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. Defendant's case proceeded to a jury trial, during which Hernandez's bench trial was simultaneously held. Because defendant does not challenge the sufficiency of the evidence to sustain his conviction, we recount the facts here to the extent necessary to resolve the issue raised on appeal.

¶ 4 The following was adduced at trial. On March 17, 2012, Diana Aguilar, her fiancé Armando Gallardo, and Aguilar's three daughters—Katlin, age two, Aliyeh Shell, age six, and Desiree Valasquez, age 14—resided on the first floor of a house located near the intersection of 31st Street and Springfield Avenue. Diana's brother, Roy Aguilar[1], his wife, Marilyn Vaca, and their four children resided in the basement of the house. The house was located within the territory of the Two-Six street gang. In 2012, Roy was associated with members of the gang.

[1] As Diana and Roy Aguilar share the same last name, we will refer to them by their first names.

¶ 5 On the date in question, at about 3:30 p.m., Diana, Gallardo, Katlin, and Shell were on the front steps of the house. Shell stood, between Diana's legs, facing the street, as Diana combed Shell's hair. A silver-gray pickup truck, headed southbound on Springfield, stopped near the curb in front of the house. Two people were inside the truck, and Diana testified that the passenger side of the truck was closest to her. Gallardo heard the passenger in the truck announce "what's up, motherf***s." Diana heard the passenger say "TSK," which she understood to mean "Two Six Killer," and saw him extending his arm and holding a gun. The passenger fired about two to three shots. As the truck began to drive south toward 32nd Street, one to three more shots were fired. The truck then headed east on 32nd Street. According to Gallardo, the passenger pointed the gun in the general direction of "the whole group" on the porch.

¶ 6 After the truck drove away, Diana saw that Shell was bleeding. Diana screamed for help, and went inside the house to call 911. An ambulance arrived and transported Shell to Mount Sinai Hospital, where she was pronounced dead. In the evening after the shooting, Diana viewed a lineup. She identified defendant as the driver of the truck and Hernandez as the shooter. Diana also identified defendant and Hernandez in open court.

¶ 7 At the time of the shooting, Tactical Sergeant Joseph Pulido was in the alley between Harding and Springfield Avenues, investigating a separate matter, when he heard gunfire. He ran to Springfield Avenue, and saw a large crowd gathered in front of the Aguilar's residence. A person at the scene provided Pulido with a description of the vehicle that had fled the scene and Pulido relayed a flash message over his police radio.

¶ 8 Just after 3:30 p.m., Officer Ramiro Gonzalez received a radio call that shots were fired in the vicinity of 31st Street and Springfield. Gonzalez was on patrol with Officer Angel Cahue in an unmarked vehicle. The officers activated their vehicle's emergency lights, and drove westbound on 32nd Street, towards 31st and Springfield. Near Millard Avenue, Gonzalez saw two men look in the officers' direction and then run. Gonzalez exited the vehicle and gave chase. Gonzalez identified one of the men in court as defendant. During the chase, Gonzalez saw the other man throw a gun into a yard. Gonzalez eventually caught defendant and placed him in custody.

¶ 9 After defendant was taken into custody, Officers Cahue and Armando Silva transported him to the police station. On the way to the station, defendant told the officers that he was the driver and that Hernandez was the shooter. Defendant also told the officers "you can check my hands, I don't have any gun powder on them," and that Hernandez threw the gun in the front yard of "one of the houses" on 31st Street and Millard. Defendant also asked whether the victim was dead or alive.

¶ 10 At the police station, about 4:45 p.m., defendant was read his *Miranda* warnings and interviewed by Detective Roberto Garcia. Officer Cahue was present for the interview and testified to the content of defendant's statement, which was not memorialized in writing. Defendant told Garcia that he was the driver and that the other person in the truck was Hernandez. Defendant said Hernandez was a member of the Latin Kings street gang, and was from around "Crown Town." According to Cahue, Crown Town is an area around 51st Street and Western and Kedzie Avenues, where a faction of the Latin Kings is located. Defendant denied being affiliated with the Latin Kings, but said that he "hung out" with members of the

gang. On the date in question, defendant encountered Hernandez at a store on 30th Street and Homan Avenue. Hernandez drove to the store in a pickup truck, and told defendant that the truck belonged to his uncle and to not "worry about it." Defendant entered the truck, and they began to "cruise" in Two-Six territory to "f*** with and shoot at the Two-Six." At Hernandez's suggestion, defendant drove the truck, because he was more familiar with the area. Hernandez had a gun in case the Two-Six "popped out a number or came out on them." Near the Aguilar's residence, Hernandez "asked or told" defendant to stop the truck. Defendant stopped the truck, and Hernandez started shooting. Afterward, defendant drove to 32nd Street, and headed eastbound toward Millard.

¶ 11 During the interview, Cahue recovered a white glove that was protruding from defendant's back pocket. Defendant told Cahue that Hernandez gave him the glove. Defendant also told Cahue that Hernandez had a brown glove to avoid getting fingerprints on the gun.

¶ 12 On the date of the shooting, a black T-shirt, a brown glove, and a gun were recovered along South Millard Avenue. Scott Rochowicz, an expert in the field of trace chemistry, administered gunshot residue kits on the T-shirt and glove, and found that they tested positive for the presence of gunshot residue.

¶ 13 During the course of his investigation, Detective David March learned that the gray Chevrolet pickup truck used in the shooting was owned by Francisco Baez. On March 16, 2012, the day before the shooting, Baez had filed a police report after discovering that his truck was missing. After learning that his truck was involved in a shooting, Baez gave the police permission to search it. Officer David Ryan, a forensic investigator, recovered a screwdriver from the front passenger area of the truck. Ryan testified that, when a portion of metal covering

the truck's steering column is removed, it is possible to start the truck using a screwdriver. Ryan, who had processed stolen vehicles on prior occasions, stated that a photo of the truck's steering column fairly and accurately depicts how a car used without a key would appear.

¶ 14 Caryn Tucker, an expert in the field of firearm identifications, testified that a bullet recovered from the front lawn of the Aguilar's residence, and a bullet jacket recovered from the porch of the residence, were fired from the gun recovered from the yard near the 3100 block of South Millard. A screwdriver was also recovered from the same yard. Emily Kuppinger, an expert in fingerprint identification, testified that defendant's fingerprint matched a fingerprint found on the screwdriver.

¶ 15 Dr. Ariel Goldsmith, a forensic pathologist, performed an autopsy of Shell. Goldsmith observed that Shell suffered gunshot wounds to the right arm, chest, and the left forearm. Goldsmith found the cause of Shell's death to be a homicide.

¶ 16 The jury found defendant guilty of first degree murder and aggravated discharge of a firearm. The jury also found that, during the commission of first degree murder, defendant, or somebody whose conduct he is legally responsible for, was armed with a firearm. In his bench trial, Hernandez was also found guilty of first degree murder and aggravated discharge of a firearm.

¶ 17 The court ordered a presentence investigation (PSI) of defendant. The PSI report reflects that defendant has had minimal contact with his father since his parents separated when he was three years old. Defendant does not have a criminal history, and his highest level of education is eighth grade. Defendant terminated his schooling because he lost interest. When defendant was 11 years old, he joined the Latin Disciples street gang. He terminated his affiliation with the gang

five years later. In 2010, defendant worked for about six months as a construction laborer, and in 2011, he worked as a factory worker for about six months.

¶ 18 Prior to the sentencing hearing, defense counsel notified the court that the PSI did not reflect defendant's mental health treatment. Defense counsel noted that, before trial, he had requested a fitness evaluation of defendant after an incident in the jail that involved defendant cutting his wrists. Defendant was found fit, but was taking medication for depression and anxiety since the incident.

¶ 19 The case proceeded to a joint sentencing hearing for defendant and Hernandez. In aggravation, Diana read aloud her victim impact statement, and the State submitted the written victim impact statements of Shell's grandparents and cousin. The State argued that defendant's and Hernandez's actions showed a callous indifference to human life, and that they did not "care who was on that porch." The State also argued that their crimes were calculated, and that they should receive a sentence that is appropriate to the nature of the offense.

¶ 20 In mitigation, defendant's cousin, Jacqueline Herrera, testified that she grew up with defendant and that he had a very unstable childhood during which he was "shuffled around throughout the family." Herrera stated that defendant had stopped going to school because his mother did not have the paperwork to enroll him. She also testified that, when defendant stayed with her family, he would do what was asked of him, and was very obedient. She described defendant as a kind, warm-hearted person, who "hung out with the wrong crowd." Defendant's aunt, Norma Cruz, testified that defendant used to visit her home, and that he was always respectful. Defendant's mother, Patricia Arcos, testified that defendant has been a great and loving son. Defense counsel argued that defendant's sentence should be close to the minimum

because he did not have a criminal history, did not fire the gun, and was a "kid" without a stable home life, who was influenced by others. Defendant declined allocution.

¶ 21 In announcing its sentence, the court recognized that defendant was 18 years old at the time of the offense and Hernandez was 16. The court recounted the facts of the case, and in doing so, described defendant as Hernandez's "able assistant." The court noted that the stolen truck used in the shooting showed that the crime was planned ahead of time, even the day before it happened. The court recalled that defendant drove the truck to a "pretty clear shot" of the family on the porch, and that he drove the truck away from the shooting. The court also observed that defendant and Hernandez intended to shoot a member of the Two-Six, but inadvertently shot Shell. The court stated that both defendants displayed a callous indifference to human life. Although defendant was not the shooter, the court explained that such a fact was "fortuitous," and that defendant and Hernandez were equally responsible for Shell's murder because defendant knew "they were going to shoot at somebody up on the porch." The court stated that defendant's sentence would not be lower than Hernandez's merely because he was the driver, but because of defendant's lack of a criminal history, and the testimony of the mitigating witnesses. However, the court said that the mitigating witness's testimony would not significantly change defendant's sentence since "they're not the ones before me today." Furthermore, the court found defendant's upbringing to be "maybe mitigating to a minor extent," but noted that it was not an excuse for the shooting. The court pointed out that defendants' mothers will be able to see them again, despite their imprisonment, and that Diana will never be able to see Shell again.

¶ 22 Defendant was sentenced to 40 years' imprisonment for first degree murder, including a mandatory 15-year firearm enhancement, and a consecutive term of 10 years' imprisonment for

aggravated discharge of a firearm. Hernandez was sentenced to 55 years' imprisonment for murder, and a consecutive term of 10 years' imprisonment for aggravated discharge of a firearm.

¶ 23 On appeal, defendant challenges his combined term of 50 years' imprisonment as being excessive. In setting forth this argument, defendant acknowledges that he failed to file a motion to reconsider sentence, and, as a result, has forfeited review of this issue. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). However, defendant argues that we should review this issue under the plain-error doctrine. The plain-error doctrine is a narrow and limited exception to forfeiture. *Id*. at 545. To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. *Id*.

¶ 24 Here, defendant has not established that a clear or obvious error occurred. 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 Illinois Constitution requires a trial court to impose a sentence that achieves a balance between the seriousness of the offense and the defendant's rehabilitative potential. *People v. Knox*, 2014 IL App (1st), ¶46 120349 (citing Ill. Const. 1970, art. I, § 11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008)). "To find the proper balance, the trial court must consider a number of aggravating and mitigating factors including: 'the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education.' " *Id.* (quoting *People v. Maldonado*, 240 Ill. App. 3d 470, 485-86 (1992)).

¶ 25 A reviewing court gives substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider these factors. *People v. Snyder*, 2011 IL 111382, ¶ 36. It is presumed that a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider mitigating factors. *People v. Halerwicz*, 2013 IL App (4th) 120388, ¶43. A reviewing court may not modify a defendant's sentence absent an abuse of discretion. *Snyder*, 2011 IL 111382, ¶ 36. An abuse of discretion will be found where the sentence is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. (Internal quotation marks omitted.) *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 26 The sentencing range for first degree murder is 20 to 60 years. 730 ILCS 5/5-4.5-20(a) (West 2012). A sentence of 15 years shall be added to the term of imprisonment imposed by the court if first degree murder was committed while armed with a firearm. 730 ILCS 5/5-8-1 (a)(1)(d)(i) (West 2012); see also *People v. Rodriquez*, 229 Ill. 2d 285, 294 (2008) (sentencing enhancement for a person committing first degree murder while being armed with a firearm applies to someone for whose conduct the person is accountable). Therefore, the sentencing range for defendant's murder conviction was 35 to 75 years' imprisonment. In addition aggravated discharge of a firearm is a Class 1 felony punishable by 4 to 15 years' imprisonment. 720 ILCS 5/24-1.2(a)(2), (b) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). Defendant's sentence for aggravated discharge of a firearm was required to run consecutive to his first degree murder sentence. 730 ILCS 5/5-8-4(d)(1) (West 2012).

¶ 27 Thus, with respect to his convictions for first degree murder and aggravated discharge of a firearm, defendant faced a total possible combined sentence ranging from 39 to 90 years' imprisonment. Because defendant's sentence of 40 years' imprisonment for murder and his 10-year sentence for aggravated discharge of a firearm fall within the permissible statutory range, we presume the sentences are proper. See *Knox*, 2014 IL App (1st) 120349, ¶ 47.

¶ 28 Defendant does not dispute that his sentence falls within the statutory range. Rather, he argues that the trial court abused its discretion in sentencing him to a combined term of 50 years' imprisonment because: (1) it amounted to a "*de facto* life sentence"; and (2) the court failed to account for mitigating factors such as his youth, rehabilitative potential, work history, family's testimony at sentencing, the remorse he has shown, lack of a criminal history, and the fact that he never fired the gun and was found guilty under an accountability theory. Defendant maintains that the trial court should have imposed the minimum total combined sentence of 39 years' imprisonment—35 years for first degree murder and 4 years for aggravated discharge of a firearm.

¶ 29 We initially note that, in setting forth his argument, defendant treats his combined 50-year-term as a single sentence and, essentially, requests that this court consider his sentences in the aggregate. Although defendant was sentenced to a combined total of 50 years' imprisonment, that total was comprised of a 40-year sentence for the first degree murder and a consecutive term of 10 years for aggravated discharge of a firearm. Our supreme court has "long held that consecutive sentences constitute separate sentences for each crime of which a defendant has been convicted." *People v. Carney*, 196 Ill. 2d 518, 529 (2001). As a result, "consecutive sentences do not constitute a single sentence and cannot be combined as though they were one sentence for

one offense. Each conviction results in a discrete sentence that must be treated individually." *Id.* at 530. Therefore, in considering defendant's argument that his sentences were excessive, we should more properly be focused on the propriety of each individual sentence.

¶ 30 That said, whether viewed individually or combined, we reject defendant's challenge to the sentences imposed by the trial court. To the extent that defendant contends he has been improperly sentenced to a *de facto* life sentence, we note that his two sentences are each well within the ranges allowed by statute. As a matter of fact, defendant's sentence of 40 years' imprisonment for first degree murder while armed with a firearm is 5 years above the statutorily required minimum, and 35 years below the maximum. This court has recognized that, so long as a defendant's lengthy prison sentence is not otherwise an abuse of discretion, it will not be found improper merely because it arguably amounts to a *de facto* life sentence. See *People v. Martin*, 2012 IL App (1st) 093506, ¶ 50.

¶ 31 We also reject defendant's argument that the trial court failed to properly consider the mitigating factors relied on by defendant. As mentioned, it is presumed that a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record that the trial court failed to consider the mitigating factors. *Halerwicz*, 2013 IL App (4th) 120388, ¶43. Defendant has not presented such evidence.

¶ 32 Instead, at sentencing, the trial court expressly considered defendant's age, his family's testimony at sentencing, his lack of a criminal history, and the fact that he never fired the gun. The record shows that the court acknowledged that defendant was 18 years of age at the time of the shooting and that he was not the shooter. However, the court explained that defendant's

sentence would not be lower than Hernandez's merely because he was the driver. The court noted that the stolen truck used in the shooting showed that the crime was planned ahead of time. The court explained that defendant being the driver was "fortuitous," and that he was equally responsible for Shell's murder because he knew that they were going to shoot at "somebody." Given the nature of the offense, the court noted that both defendants displayed a callous indifference to human life. At sentencing, the court also heard the testimonies of defendant's relatives who recounted defendant's good character and difficult childhood. Information regarding defendant's childhood, and his work history, are also contained in the PSI report. The court found defendant's upbringing to be mitigating to a minor extent, but noted that it was not an excuse for the shooting. See *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55 (because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors, and the presence of such factors does not require a minimum sentence or preclude the imposition of a maximum sentence).

¶ 33 In light of this record, defendant is essentially asking this court to reweigh the sentencing factors presented and substitute our judgment for that of the trial court. This we will not do. See *Knox*, 2014 IL App (1st) 120349, ¶ 46 ("a reviewing court will not reweigh the factors in reviewing a defendant's sentence and may not substitute its judgment for the trial court merely because it could or would have weighed the factors differently"). Moreover, the court is not obligated to impose the minimum sentence, even where there is evidence in mitigation. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010). To the extent that defendant faults the trial court for failing to specifically address certain mitigating factors, such as his remorse for the murder, we note that "a trial court need not 'articulate the process by which it determines the appropriateness of a

given sentence.' " *Martin*, 2012 IL App (1st) 093506, ¶ 48 (quoting *People v. Wright*, 272 Ill. App. 3d 1033, 1045-46 (1995)). As a result, we do not find that the court abused its discretion in sentencing defendant to a total combined sentence of 50 years' imprisonment.

¶ 34 In reaching this conclusion, we reject defendant's argument that his youth warranted lesser sentences. In support of this argument, defendant relies on United States Supreme Court and federal court opinions addressing the constitutionality of criminal sentences imposed on minors. In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the Supreme Court found that the death penalty was unconstitutional as applied to offenders who were under the age of 18 when their crimes were committed. In *Miller v. Alabama*, 567 U.S. 460, 465 (2012), the Supreme Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " In *McKinley v. Butler*, 809 F. 3d 908, 911 (2016), the Seventh Circuit Court of Appeals found that the reasoning in *Miller* applied to a 100-year sentence, which it deemed a *de facto* life sentence.

¶ 35 Here, unlike in *Roper*, defendant was not sentenced to the death penalty. In addition, unlike in *Miller*, defendant was not subject to a mandatory life sentence without parole. Rather, defendant was an adult at the time he committed his crimes, was convicted, in part, of first degree murder, and sentenced to a term of years only after the trial court considered all relevant sentencing factors in aggravation and mitigation.

¶ 36 We are likewise not persuaded by defendant's reliance on *People v. House*, 2015 IL App (1st) 110580, ¶¶ 100-02, where this court vacated a mandatory sentence of natural life imprisonment, and remanded for a sentencing hearing, because the mandatory natural life sentencing statute violated the Illinois Constitution as applied to the defendant. Here, unlike in

House, defendant is not challenging the constitutionality of a mandatory sentencing statute as applied to him, but instead argues that the trial court abused its discretion in imposing its sentence. Therefore, the applicability of *House* to this case is limited. More importantly, here, defendant was not sentenced to a *de jure* life sentence for murder, during which he merely acted as a "look out." *Id.* at ¶ 89. Rather, as mentioned, defendant was sentenced to 40 years' imprisonment, a term 5 years above the statutory required minimum, for a murder during which he drove and stopped the car in front of the victim and her family so his codefendant could fire.

¶ 37 Defendant also invites this court to compare his sentence with the sentences in *People v. Brown*, 243 Ill. App. 3d 170 (1993), and *People v. Clark*, 374 Ill. App. 3d 50 (2007). However, "a claim that a sentence is excessive must be based on the particular facts and circumstances of that case. If a sentence is appropriate given the particular facts of that case, it may not be attacked on the ground that a lesser sentence was imposed in a similar, but unrelated, case." *People v. Fern*, 189 Ill. 2d 48, 62 (1999). Therefore, we will not compare defendant's sentence to the sentences in *Brown* and *Clark*.

¶ 38 Defendant next contends, and the State agrees, that the mittimus incorrectly reflects the number of days he spent in presentence custody (defendant argues that he should receive 1318 days of presentence custody credit instead of 1308 days). A defendant "shall be given credit on the determinate sentence or maximum term and the minimum period for the number of days spent in custody as a result of the offense for which the sentence was imposed." 730 ILCS 5/5-4.5-100(b) (West 2014). The date the mittimus is issued is not to be counted as a day of presentence custody credit. *People v. Williams*, 239 Ill. 2d 503, 509 (2011). Here, defendant was taken into custody on March 17, 2012, and sentenced on October 26, 2015, for a total of 1318

days spent in custody prior to the date the court issued defendant's mittimus. Accordingly, because we have the authority to correct the mittimus at any time without remanding the matter to the trial court (*People v. Harper*, 387 Ill. App. 3d 240, 244 (2008)), we correct the mittimus to reflect that defendant spent 1318 days in presentence custody.

¶ 39 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 40 Affirmed; mittimus corrected.