2018 IL App (1st) 160721-U

No. 1-16-0721

Order filed August 17, 2018

Sixth Division

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. 15 CR 9764
	)	
ALAN TILLMAN,	)	Honorable
	)	James M. Obbish,
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 concurrent 10-year sentences for possession of a controlled substance with intent to deliver and delivery of a controlled substance were not excessive, as the record establishes that the trial court considered the circumstances of the case and all appropriate factors. Fines, fees, and costs order modified.

¶ 2 Following a jury trial, defendant Alan Tillman was convicted of one count of possession of a controlled substance with intent to deliver and one count of delivery of a controlled substance (720 ILCS 570/401(c)(1), (d)(1) (West 2014)) and sentenced to 10 years'

imprisonment on each count, to be served concurrently. On appeal, defendant contends his sentences were excessive. He also challenges the fines and fees assessed against him. We affirm, but order modification of the fines and fees order.

¶ 3 We recount the facts only as necessary to resolve the issues on appeal. At trial, testimony from five Chicago police officers established that defendant sold one bag of white powder to an undercover police officer and engaged in two additional suspected narcotics transactions with other individuals in the 3900 block of West Roosevelt Road on May 25, 2015. In each instance, defendant exchanged a small item he removed from his left sock for money. Officers recovered from defendant $61 and the prerecorded $10 bill used by the undercover officer, as well as eight bags of white powder from defendant's sock. A forensic scientist testified the single bag of the white powder contained .2 grams of heroin and four of the eight bags contained .294 grams of heroin.

¶ 4 Defendant testified that he was standing near Springfield Avenue and Roosevelt Road talking to two people when three police officers approached him, searched him, and arrested him. He asserted he had not been selling drugs, had no intention to sell drugs, and had never seen the undercover officer before. He did not sell the officer drugs or receive money from him, officers had not found drugs in his sock, and none of the officers who arrested him testified in court. The jury found defendant guilty of possession with intent to deliver more than 1 gram but less than 15 grams of heroin and delivery of a less than 1 gram of heroin.

¶ 5 The court denied defendant's motion and supplemental motion for a new trial, and the case proceeded to sentencing. The presentence investigation report (PSI) showed defendant had the following prior convictions and terms of incarceration in the Illinois Department of

Corrections (IDOC): armed robbery and aggravated battery with discharged firearm (1979 - 9 years), voluntary manslaughter (1987 - 15 years), and possession of a controlled substance (1995 - 4 years, 1995 - probation unsatisfactorily terminated, 1997 - 3 years, 1999 - 1 year, 2001 - 4 years, 2003 - 2 years, 2004 - 3 years, 2007 - 2 years, 2011 - 4.5 years). In the PSI, defendant reported his version of the offenses: he had been standing outside with friends when the police pulled up, searched him, and took him away. Defendant stated he had not been abused as a child, was raised by his mother, had completed 11th grade, did not use illegal drugs, and had no family members who used illegal drugs.

¶ 6 In aggravation, the State stated defendant's criminal history made him subject to Class X sentencing. It noted defendant had 11 prior felony convictions, including for a 1978 armed robbery and aggravated battery with a discharged firearm, a 1986 voluntary manslaughter and two 1995 Class 2 narcotics cases, and submitted certified copies of conviction for the manslaughter and narcotics offenses.

¶ 7 In mitigation, defense counsel asked the court to impose the minimum sentence. He stated defendant was 60 years old and a lifelong resident of Chicago. He had a family member present in court throughout the proceedings and, although he had no children of his own, had nieces and nephews. Defendant attended some high school, lived with his brother and sister-in-law, and worked as a janitor at two restaurants. Counsel noted that defendant had had no Class 2 or higher convictions within the past 21 years and requested the minimum 6-year sentence.

¶ 8 The court sentenced defendant to 10 years imprisonment on each conviction, to be served concurrently. It told defendant it had read his PSI completely, noting that his criminal history was "rather amazing in how long it goes on and on and on and how many felony convictions" he

had. The court stated that it read "everything else" about defendant regarding his work history, employment, and education, "all those matters that I take into consideration in mitigation."

¶ 9 The court found defendant was "unique" from other persons convicted of controlled substance delivery cases in that, in his PSI, he reported he did not use illegal drugs, but yet he had a litany of controlled substance convictions. The court recited the list of convictions and prison terms, concluding "If you don't use drugs, it tells me you sell drugs, which is what you were convicted of."

¶ 10 The court told defendant he was a "60-year-old gentleman" who should not be spending his life in prison, but he refused to comply with societal norms. It said:

> "You may find it surprising, but not everybody likes dope dealers walking around in your neighborhood. Maybe the people you come into contact with and the people that you sell your narcotics to for your benefit, obviously they like you; but they are scourge in the neighborhood. It's those people and people like you that are dealing drugs that prevent families from being able to raise their children and let them run around on the streets safely in certain areas where these drugs are being constantly sold. Because if somebody doesn't like the fact that you're out there selling, you know, they might fire off a couple rounds at you to get you out of there. And then one of their kids catches a bullet. Everybody is up in arms about the violence. But part of that violence comes from this drug trade and the street of trading drugs.
>
> I don't think I've ever had anybody in front of me that has had as many felony convictions as you in that short of a period of time for the same offense over and over

> again. *** [Y]ou keep getting sentences one after another. You complete it. You go right back out and do the same thing."

¶ 11 The court found defendant did not deserve the minimum sentence, pointing out he failed to accept any responsibility for his actions. Instead, he claimed he was chatting with a friend and all the officers who testified they watched him sell drugs, bought drugs from him, and found money and more drugs on him were lying. The court told defendant, "I imagine they've all been lying since the 1990's. They've all been lying on you. So you're going to have the chance to go down to the penitentiary and you can tell everybody else down there how they lied on you all 10, 11 times." It then sentenced defendant to concurrent 10-year terms on each count and 3 years mandatory supervised release, and awarded him 270 days credit for time served. The court denied defendant's motion to reconsider sentence and he appealed.

¶ 12 Defendant contends that his 10-year sentences were excessive and an abuse of discretion because he was 60 years old at sentencing, the offenses were nonviolent, he had a primarily nonviolent criminal history, and his violent past convictions occurred almost 30 years ago. He further claims that, given the nonviolent nature of the offenses, the court improperly considered the possibility of general gun violence, including the shooting of a child, in sentencing. Defendant also contends the court unfairly mischaracterized his prior criminal history when it stated, "I don't think I've ever had anybody in front of me that has had as many felony convictions as you in that *short of a period of time* for the same offense over and over again." (Emphasis added by defendant.) He lastly asserts the court improperly made the unsupported assumption that he believed the police lied during each of his prior felony convictions.

Defendant requests that we reduce his sentence to the minimum six-year term or remand for resentencing.

¶ 13 As an initial matter, the State alleges that defendant has forfeited review of his sentencing challenge by failing to raise his claims in the trial court or with specificity in his motion to reconsider sentence. See *People v. Montgomery*, 373 Ill. App. 3d 1104, 1123 (2007). It further asserts that defendant failed to seek review under the plain error doctrine, thus forfeiting plain error review. See *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). Defendant did not object at sentencing or in his postsentencing motion to the trial court's alleged improper consideration of the possibility of general gun violence, mischaracterization of his criminal history, or unsupported assumption that he believed the police lied in all his cases. Nevertheless, although defendant did not explicitly raise these issues, his motion did raise the issue of an unfair and excessive sentence, and therefore we find that the issue has been preserved for appeal. See *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 50.

¶ 14 A trial court's sentencing decision is reviewed under an abuse of discretion standard. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence is considered to be an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id*. at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference. *Id*. The trial judge, having observed the defendant and the proceedings, is in a much better position than the reviewing court to consider factors such as the defendant's credibility, demeanor, moral character, mentality, age, social

environment, and habits. *Id*. at 212-13. A reviewing court "must not substitute its judgment for that of the trial court merely because it would have weighed [the] factors differently." *Id*. at 213.

¶ 15 We find the trial court did not abuse its discretion in imposing 10-year prison terms. Defendant was convicted of Class 1 possession of a controlled substance with intent to deliver (1 gram or more and less than 15 grams of heroin) (720 ILCS 570/401(c)(1) (West 2014)) and Class 2 delivery of a controlled substance (less than 1 gram of heroin) (720 ILCS 570/401(d)(1) (West 2014)). Based on his criminal background, he was sentenced as a Class X offender, which carries a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). Thus, defendant's 10-year sentences fall within the statutory guideline and we therefore presume they are proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 16 Nevertheless, defendant argues that his sentences were excessive in light of the nature of the offenses, as he sold and was in possession of only a small amount of heroin and no one was hurt or threatened by his actions. He also claims that, given the offenses were nonviolent, it was particularly improper for the trial court to consider the possibility of gun violence, especially to a child, in sentencing him.

¶ 17 A sentence should reflect both the "seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Jones*, 2015 IL App (1st) 142597, ¶ 38. However, the seriousness of an offense, and not mitigating evidence, is the most important factor in sentencing. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. The trial court is presumed to consider "all relevant factors and any mitigation evidence presented" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but "has no obligation to recite

and assign value to each factor" (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing the sentencing court did not consider the relevant factors" where, as here, it is essentially argued that the court failed to take factors into consideration. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 18 Defendant does not make such a showing here. The record shows the trial court presided over the trial, and was well aware of the nature of the offenses. It recited defendant's many prior convictions and sentences for the same type of drug offenses, and noted his refusal to accept responsibility for his actions. It was in this context, where defendant claimed innocence despite his repeated recidivism after serving eight prison terms for drug offenses, that the court mentioned the impact drug sales have on a community and the gun violence resulting there from. A trial court may not consider improper factors in imposing sentence. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). However, the impact of defendant's continued refusal to comply with the norms of society on his community was an entirely relevant factor to consider. We find defendant's 10-year sentences were not disproportionate to defendant's 10th drug conviction and 12th felony overall. *People v. Kelley*, 2013 IL App (4th) 110874, 47 (affirming sentence where the defendant had eight prior drug convictions and been sentenced to prison five times).

¶ 19 Defendant acknowledges his extensive criminal history, but points out his prior convictions were primarily nonviolent, with "only" three Class 4 felony possession of a controlled substance convictions in the last 10 years. However, the record shows the court was aware of and properly considered the nature and timing of defendant's prior convictions, as they were reflected in the PSI and the court specifically listed them. It was the nature and timing of these convictions that led the court to note it had never presided over a case where the defendant

had as many felony convictions as defendant "in that short of a period of time for the same offense over and over again."

¶ 20 Notwithstanding defendant's assertion to the contrary, the court did not mischaracterize the evidence when it found defendant's prior drug-related convictions occurred "in that short of a period of time," where defendant accumulated 9 prior drug convictions in 21 years. As the court correctly noted, defendant kept "getting sentences one after another" and, when he completed a sentence, would "go right back out and do the same thing." A lesser sentence would deprecate the seriousness of the offense in view of defendant's criminal history. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may warrant a sentence "substantially above the minimum"); *People v. Hill*, 408 Ill. App. 3d 23, 29-30 (2011) (where the defendant had 13 prior drug-related convictions, his nonviolence and addiction did not mandate a reduced sentence).

¶ 21 The court's comment that defendant believed, in this case and all his prior cases, that the police lied does not warrant a different conclusion. Although the court's comment regarding defendant's belief in the other cases was unsupported, we find no basis in this record to conclude the court's assumption led to an increased sentence. Lastly, the record rebuts defendant's claim that the trial court did not adequately consider his age, where he was 59 years old at the time of the offense and 60 years old at the time of sentencing. The court specifically told defendant that he, "a 60-year old gentleman," should not have to spend his life in jail, reflecting the court's consideration of this factor.

¶ 22 In sum, defendant has failed to affirmatively show that the trial court did not adequately consider the mitigating factors in sentencing or that it considered improper factors. We will not

substitute our judgment for that of the trial court by reweighing the aggravating and mitigating factors on review. *Jones*, 2015 IL App (1st) 142597, ¶ 40 (declining to reweigh factors considered at sentencing). Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment on each count.

¶ 23 Defendant next contends that the assessed fines, fees, and costs should be reduced by $1,400 because he was not accorded the $1350 in presentence custody credit to which he is entitled under section 110-14 of the Illinois Code of Criminal Procedure of 1963 (720 ILCS 5/110-14 (West 2014)) and $50 in improperly assessed charges should be vacated.

¶ 24 Defendant concedes his challenge to the assessed fines and fees is arguably forfeited as he did not raise it in the trial court. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). He claims we may address the issues under the plain error doctrine or our authority under Illinois Supreme Court Rule 615(a) and (b). The State agrees that defendant's claims are reviewable.

¶ 25 We will address defendant's claims. His claim for presentence custody credit under section 110-14 cannot be forfeited, as it may be raised " 'at any time and at any stage of the court proceedings, even on appeal in a postconviction proceeding.' " *People v. Brown*, 2017 IL App (1st) 150203, ¶ 36 (quoting *People v. Caballero*, 228 Ill. 2d 79, 88 (2008)). Further, the rules of waiver and forfeiture apply to the State. *People v. Williams*, 193 Ill. 2d 306, 347-48 (2000). Therefore, as the State does not argue forfeiture, we will address the merits of defendant's claims regarding the improperly imposed charges. We review the propriety of court-ordered fines and fees *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 26 Defendant first argues, and the State agrees, that his $1350 presentence incarceration credit should be used to offset the following fines: the $10 mental health court fine (55 ILCS 5/5-

1101(d-5) (West 2014)), the $5 youth diversion/peer court fine (55 ILCS 5/5-1101(e) (West 2014)), the $5 drug court fine (55 ILCS 5/5-1101(f) (West 2014)), the $30 Children's Advocacy Center fine (55 ILCS 5/5-1101(f-5) (West 2014)), the $30 juvenile expungement fine (730 ILCS 5/5-9-1.17 (West 2014)), the $2,000 controlled substance fine (720 ILCS 570/411.2(a) (West 2014)), the $100 Trauma Center Fund fine (730 ILCS 5/5-9-1.1(b) (West 2014)), and the $25 State Police Services Fund fine (730 ILCS 5/5-9-1.17 (West 2014)).

¶ 27 Defendant is indeed entitled to presentence incarceration credit against these fines, and the fines and fees order correctly reflects these fines should be offset by the credit. Defendant spent 270 days in presentence custody and is, therefore, entitled to up to $1,350 in presentence incarceration credit. 725 ILCS 5/110-14(a) (West 2014) (a defendant incarcerated on a bailable offense who does not supply bail, and against whom a fine is levied, is allowed a credit of $5 for each day spent in presentence custody). Although the fines and fees order provides for offset of these fines, it does not state the number of days' credit defendant should receive or reflect the credit was actually awarded. Accordingly, the order should be corrected to reflect the $1,350 credit to which defendant is entitled. *Brown*, 2017 IL App (1st) 150203, ¶ 39.

¶ 28 The parties also correctly agree that defendant was erroneously assessed the $25 electronic citation fee (705 ILCS 105/27.3e (West 2014)) and the $25 methamphetamine drug traffic prevention fund fine (730 ILCS 5/5-9-1.1-5(a), (c) (West 2014)). The electronic citation fee is inapplicable because defendant's convictions are felonies (*People v. Robinson*, 2015 IL App (1st) 130837, ¶ 115) and the methamphetamine drug traffic prevention fund fine is inapplicable because his convictions are not for methamphetamine-related offenses (730 ILCS 5/5-9-1.1-5(a) (West 2014)). Accordingly, we vacate these assessments.

¶ 29 For the reasons set forth above, we vacate the $25 electronic citation fee and the $25 methamphetamine drug traffic prevention fund fine and order that the $10 mental health court, $5 youth diversion/peer court, $5 drug court, $30 Children's Advocacy Center, $30 juvenile expungement, $2,000 controlled substance, $100 Trauma Center Fund, and $25 State Police Services Fund fines be offset by defendant's $1350 in available presentence incarceration credit. We direct the circuit court to modify the fines, fees, and costs order accordingly. The judgment of the trial court is affirmed in all other respects.

¶ 30 Affirmed as modified.