2018 IL App (1st) 162654-U

No. 1-16-2654

December 28, 2018

Third 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. 16 CR 659
	)	
DARREN FUNCHES,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 15 years in prison for delivery of a controlled substance where defendant was subject to a mandatory Class X term due to his criminal history and the court did not consider improper factors in arriving at that sentence. The mittimus is corrected to accurately reflect the count underlying defendant's conviction.

¶ 2 Following a jury trial, defendant Darren Funches was convicted of delivery of a controlled substance (heroin) (720 ILCS 570/401(c)(1) (West 2014)) and was sentenced, based on his criminal background, as a Class X offender to 15 years in prison. On appeal, defendant

contends that his sentence is excessive and should be reduced because the trial court did not consider certain mitigating factors and took into account factors that should not be weighed in sentencing. In addition, he contends the mittimus should be corrected to accurately reflect the count underlying his conviction. We affirm defendant's sentence and correct the mittimus.

¶ 3 Defendant was charged in a two-count indictment with the delivery of between 1 and 15 grams of heroin within 1000 feet of a school or any conveyance owned leased or contracted by a school to transport students (720 ILCS 570/401(c)(1), 407(b)(1) (West 2014)) (Count 1) and the delivery of between 1 and 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2014)) (Count 2). Prior to trial, Count 1 was nol-prossed.

¶ 4 The prosecutor then informed the court that the remaining count constituted a Class 1 felony but that defendant was subject to mandatory Class X sentencing due to his criminal record, which included eight prior felony convictions. The prosecutor stated that defendant had been offered a three-year sentence in exchange for a guilty plea to the reduced offense of the Class 4 felony of possession of a controlled substance.

¶ 5 The court then addressed defendant:

> "Mr. Funches, I'm obligated to tell you by law, since they have made this offer, if you reject that offer, they're offering you three years on a Class 4. If you reject that offer, sir, and you elect to go ahead on the jury on the delivery and you're not successful and the jury convicts you, then the very minimum I can give you by law is six years. And the range of sentence would be anywhere from 6 to 30 years. *** So that's what you're looking at.

> So you have to be satisfied here in open court that you understand that. And if that's -- and if you don't want to take the three years and you want to go ahead with the jury trial, that's certainly your right to do that. But I have to understand -- I have to be satisfied that you understand that."

¶ 6 Defendant responded, "Yes, I understand." The court asked defendant if he wanted to "go ahead with the jury trial on the Class 1 with the Class X possible sentence." Defendant replied that he did.

¶ 7 At trial, Chicago police officer Jose Gonzalez testified that at about 4 p.m. on December 15, 2015, he was working as an undercover purchaser on a narcotics enforcement team near the intersection of Drake and Chicago Avenues. On the sidewalk near that location, Gonzalez approached a man he later identified as defendant, who was wearing a black skull cap, a red and gray jacket and gray pants. Gonzalez told defendant he was looking for "blow" or heroin, and asked for "five blows."

¶ 8 Defendant went into an enclosed porch at a residence at 811 North Drake Avenue and came out holding five orange-tinted zip-top plastic bags, which he handed to Gonzalez. In return, defendant accepted $50 in prerecorded funds from Gonzalez. After the transaction, Gonzalez returned to the undercover vehicle he had driven to the scene and radioed his team members regarding the transaction. Defendant was detained in a store on Chicago Avenue.

¶ 9 Chicago police officers Boonserm Srisuth and John Elster testified they were members of the narcotics team in this case. Srisuth acted as a surveillance officer and observed the transaction, and Elster arrested and searched defendant after receiving the radio message from Gonzalez. Officers recovered $56 from defendant; however, the prerecorded funds were not

among those bills. The zip-top bags that defendant gave to Gonzalez were tested and found to contain 1.2 grams of heroin.

¶ 10 The defense presented no evidence, and the jury convicted defendant of the delivery of a controlled substance. Defendant filed a motion for a new trial, which was denied.

¶ 11 At sentencing, defense counsel told the court there were corrections to be made to the presentence investigation (PSI) report, namely that defendant has four children, including two with his current wife, and that defendant was a high school graduate.

¶ 12 In aggravation, the State argued that the instant offense had resulted in defendant's tenth felony conviction. Defendant's prior convictions included two felonies that were Class 2 or greater: a Class 1 felony conviction for delivery of a controlled substance in 1999, and aggravated battery of a police officer in 2012. The State asked that defendant receive a term on the higher end of the Class X sentencing range. The court stated it had reviewed the PSI report and noted this was in fact defendant's ninth felony conviction because one of the listed convictions was a misdemeanor.

¶ 13 In mitigation, defense counsel stated defendant was a 48-year-old high school graduate who supported his wife and their two children, aged 20 and 17, who were in court. Defendant worked at Guard Security Fences as a laborer. Counsel noted many of defendant's convictions were drug offenses and did not involve violence, and counsel requested the minimum Class X term of six years.

¶ 14 The court told defendant he could make a statement in allocution, and defendant declined to do so. Before imposing sentence, the trial court stated:

> "The Court has considered the evidence presented at trial, the presentence investigation, along with the corrections and changes that were made, [and] the evidence offered in aggravation and mitigation by the parties. I've considered the statutory factors in aggravation and mitigation, the financial impact of incarceration, the arguments of the attorneys as to what they think is appropriate, and the defendant's potential for rehabilitation."

¶ 15 The court noted that defendant's first two drug offenses occurred in 1993 and 1995, for which he received probation that was terminated unsatisfactorily. The court observed defendant "twice [] had an opportunity to avail himself [of] the services of the adult probation department and has disregarded those opportunities." The court further stated defendant pled guilty to a 1999 cocaine delivery charge and was sentenced to three years, and the court noted that defendant had received conditional discharge for a 2004 misdemeanor attempted theft conviction that also was terminated unsatisfactorily. Continuing to review defendant's criminal history, the court pointed out that later in 2004 and again in 2006 and 2007, defendant entered guilty pleas and received 18-month and two-year sentences for drug offenses. In 2008, defendant pled guilty and was sentenced to two years in prison for another drug offense. In 2012, he pled guilty and received a three-year term for aggravated battery to a police officer.

¶ 16 The court then stated:

> "So on nine times for felony issues [*sic*] and one time for a misdemeanor issue, he's appeared in front of judges and admitted his wrongdoing. There is no -- I see nothing in here, Mr. Funches, that would indicate that you have any hope for any possibility of rehabilitation. You disregarded the conditional discharge and the probations. You had the

> opportunity to straighten things out, and then you continued on what I would call a life of crime. ***
>
> I think the appropriate sentence for you in this matter is not probably the maximum. I don't think your background warrants 30 years, but certainly not the minimum, not someone with this type of a track record. The minimum would be inappropriate given what I see [in] front of me."

¶ 17 The court sentenced defendant to 15 years in prison, to be followed by three years of mandatory supervised release. Defendant filed a motion to reconsider sentence, which the trial court denied.

¶ 18 On appeal, defendant first contends the 15-year term imposed by the trial court is excessive and should be reduced because the court did not consider the evidence offered in mitigation and lent undue weight to the factors in aggravation of his sentence. Specifically, he argues the court failed to sufficiently consider factors in mitigation, such as his role as a family provider, and his statement in his PSI report that he would willingly undergo drug treatment. Defendant also claims that in aggravation, the court gave undue weight to his criminal background and the unsatisfactory termination of his probationary periods.

¶ 19 The Illinois Constitution requires that a trial court impose a sentence that reflects both the seriousness of the offense and the objective of restoring the defendant to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. In reaching this balance, a trial court must consider a number of aggravating and mitigating factors, including the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010). In reviewing a defendant's sentence,

this court will not reweigh the factors and substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *People v. Busse*, 2016 IL App (1st) 142941, ¶ 20. Because the trial court is in a better position than the reviewing court to weigh the relevant sentencing factors its sentencing determination is entitled to great deference and will not be reversed on appeal absent an abuse of discretion. *People v. Cunningham*, 2018 IL App (4th) 150395, ¶ 48; *People v. Barnes*, 2017 IL App (1st) 143902, ¶ 91.

¶ 20 As a threshold matter, we note that defendant's sentence was well within the statutory range. Defendant was convicted of the delivery of between 1 and 15 grams of heroin, which is a Class 1 felony. 720 ILCS 570/401(c)(1) (West 2014). However, due to his criminal background, defendant was subject to a Class X sentencing range of between 6 and 30 years in prison. See 730 ILCS 5/5-4.5-25 (West 2012). The 15-year sentence imposed by the trial court is within the lower half of that sentencing range.

¶ 21 A sentence within the statutory range is presumed to be proper and will not be deemed excessive unless it greatly varies from the spirit or purpose of the law or is "manifestly disproportionate to the nature of the offense." *Cunningham*, 2018 IL App (4th) 150395, ¶ 48 (quoting *People v. Harris*, 2015 IL App (4th) 140696, ¶ 55); *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 10. In order to overcome this presumption and prevail on his argument, defendant "must make an affirmative showing [that] the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 22 Defendant cannot make such a showing here because the record reflects that the court expressly considered the factors presented in aggravation and mitigation. In announcing sentence, the court stated it had considered the PSI report and the evidence offered in

aggravation and in mitigation, as well as the parties' arguments and defendant's rehabilitative potential. The court reviewed defendant's criminal history in detail, noting his eight felony convictions prior to the instant offense. The court also noted defendant's repeated failure to complete his probationary periods successfully, which, along with his criminal history, is a proper factor to be considered in sentencing. See, *e.g.*, *People v. Carter*, 272 Ill. App. 3d 809, 812-13 (1995) (court could weigh defendant's prior crimes and "lack of success at completing probation opportunities"); *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("defendant's criminal history alone would appear to warrant sentences substantially above the minimum"); *People v. Cook*, 279 Ill. App. 3d 718, 727 (1995) (affirming the defendant's 15-year sentence for possession of a stolen motor vehicle where the trial court found the defendant's "habitual criminal activity" dictated such a sentence).

¶ 23 Defendant nevertheless argues the court failed to sufficiently consider factors in mitigation, such as his role as a family provider, and his statement in his PSI report that he would willingly undergo drug treatment. The trial court is presumed to have considered the mitigating evidence presented to it, absent explicit evidence to the contrary, and the court is not required to expressly indicate its consideration of all mitigating factors and the weight they should be assigned. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶¶ 42-43. While defendant contends that his term should be reduced to the minimum Class X sentence of six years, the presence of mitigating factors does not require the court to impose a minimum sentence or preclude the court from sentencing the defendant to the maximum term. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. Here, although defendant claims the court gave no weight to his role as a father, the court referred to the "financial impact of incarceration" in listing all of the factors that it

considered. Moreover, even though defendant stated, as is memorialized in the PSI report, that he had never received drug treatment but was willing to take that step, the trial court was not required to lend more weight to that fact, or to any mitigating factor, than it lent to the seriousness of the offense. See *People v. Pearson*, 2018 IL App (1st) 142819, ¶ 56.

¶ 24 Defendant next asserts the court, in imposing sentence, improperly considered two factors in aggravation. He contends the court took into account that he pled guilty in each of his previous cases and penalized him for exercising his right to a jury trial here.

¶ 25 Relevant to that contention, the court stated at sentencing:

> "[I]n front of me, you decided rather than plead guilty, you exercised your right, as is your choice, to a jury trial. And a jury of your peers found that the State had proven you guilty of this beyond a reasonable doubt. So this conviction will stand alone. These are correct, as the one time you pled not guilty and you were found guilty rather than pleading guilty."

¶ 26 Whether the trial court relied on an improper factor when sentencing defendant is a question of law subject to *de novo* review. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. Nevertheless, there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning. *Id*. Moreover, in reviewing a sentence, this court considers the record as a whole, rather than "focusing on a few words or statements by the trial court." *People v. Tatera*, 2018 IL App (2d) 160207, ¶ 72 (quoting *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009)).

¶ 27 It is well settled that a trial court may not penalize a defendant for choosing to exercise his right to stand trial. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). However, the fact that the

defendant was given a greater sentence than that offered during the plea bargaining does not, in and of itself, support an inference that the greater sentence was imposed as a punishment for demanding trial. *People v. Carroll*, 49 Ill. App. 3d 387, 396 (1977) (citing *People v. Perry*, 47 Ill. 2d 402, 408 (1971)). Rather, there must be a "clear showing" in the record that the harsher sentence was a result of a trial demand. *People v. Carroll*, 260 Ill. App. 3d 319, 349 (1992). A clear showing occurs when a trial court makes explicit remarks concerning the harsher sentence or where the actual sentence is "outrageously higher" than the one offered during plea negotiations. *Id*. (and cases cited therein).

¶ 28 Here, after reviewing the entire record, we do not read the court's comments quoted above to establish it was imposing a harsher sentence based on defendant's choice of a jury trial. Rather, the court noted the ironic situation that, after numerous guilty pleas, defendant chose to plead not guilty in this case but was found guilty by the jury. There is no indication, much less a "clear showing," that the court based the length of defendant's sentence upon his election of a jury trial in the instant proceedings. Instead, contrary to defendant's argument, the length of his term in this case reflects the fact that he was sentenced as a Class X offender due to his lengthy criminal history. See 730 ILCS 5/5-4.5-25 (West 2012).

¶ 29 Still, defendant argues his 15-year sentence, which is "five times longer than any prior sentence" received upon a conviction following a guilty plea, was essentially a "trial tax," meaning he was being punished for exercising his right to a trial. In support of that contention, defendant points to the court's willingness to approve the State's pretrial offer of three years' imprisonment for the amended charge of possessing a controlled substance. Defendant maintains that the disparity between these two sentences is strong evidence of a "trial tax." We disagree.

¶ 30 While a trial court may not punish a defendant who elects to undergo a trial by imposing a longer sentence than it would have had the defendant agreed to plead guilty, the record must clearly show that the court imposed the greater sentence as a punishment for demanding a trial for a defendant to prevail on this contention. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 13; *People v. Means*, 2017 IL App (1st) 142613, ¶ 21 (citing *Carroll*, 260 Ill. App. 3d at 349). As mentioned, there is no such showing in the record. The State's offer of three years' imprisonment for the amended charge of possession of a controlled substance is best characterized as an acceptable "concession" afforded to defendant in exchange for his guilty plea. *People v. Moss*, 205 Ill. 2d 139, 171 (2001) (noting that the trial court "may grant dispositional concessions to defendants who enter a guilty plea when the public's interest in the effective administration of justice would thereby be served"); *Ward*, 113 Ill. 2d at 526 ("Although it may be proper in imposing sentence to grant concessions to a defendant who enters a plea of guilty, a court may not penalize a defendant for asserting his right to a trial either by the court or by a jury.").

¶ 31 Here, as in *Brown*, the trial court did not refer to the earlier plea offer when it imposed defendant's sentence. Moreover, after defendant chose to stand trial, he was not sentenced on the lesser offense that was the basis of the plea bargain but was sentenced as a Class X offender based on his commission of the delivery of a controlled substance, as well as his criminal background as a whole. See *People v. Saldivar*, 113 Ill. 2d 256, 269 (1986) (trial court may consider nature and circumstances of prior convictions, along with aggravating and mitigating factors, in determining length of a Class X sentence).

¶ 32 Defendant further contends that the trial court also improperly considered in aggravation of his sentence the general toll that drug crimes take upon society. He asserts the court instead

should have imposed a lower term of years in this case based on the ill effects of narcotics on him and his family. Defendant relies on the court's remarks that although the distribution of narcotics "is not a violent crime, it indirectly leads to hardship and violence and drug abuse and disconnection for so many people and so many families." The court added, "This is not something I'm going to take lightly."

¶ 33 Although the harm that drug offenses cause to society is an "inherent consideration" in the sentencing ranges for those crimes as set by the legislature, it is not improper for a sentencing court to refer to the harm caused by narcotics offenses. *People v. McCain*, 248 Ill. App. 3d 844, 852 (1993). The trial court's general comments in this case do not warrant a determination that the court gave undue weight to that circumstance. Moreover, the court could consider defendant's commission of repeated drug offenses in determining the length of his sentence, and its comments did not preclude its finding that defendant's actions affected his own family. The court's closing remarks at sentencing indicated that it did not find the maximum sentence appropriate in this case, thus recognizing the existence of some factors to mitigate the length of the term imposed. In sum, the trial court did not abuse its discretion or consider improper factors in arriving at defendant's 15-year sentence.

¶ 34 Defendant's remaining contention on appeal is that the mittimus must be corrected to accurately state the count underlying his conviction. A review of the mittimus confirms that it lists a conviction on Count 1 of the indictment, which charged the delivery of a controlled substance within 1000 feet of a school (720 ILCS 570/401(c)(1), 407(b)(1) (West 2014)). As explained earlier in this order, Count 1 was nol-prossed prior to trial, and defendant was convicted of Count 2 of the indictment. The State agrees the mittimus should be corrected, and

we accept the State's concession. Accordingly, pursuant to our authority under Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the mittimus corrected to reflect a conviction for delivery of between 1 and 15 grams of heroin.

¶ 35 In conclusion, the trial court did not abuse its discretion in imposing a term in the lower portion of the Class X sentencing range, given defendant's lengthy criminal history. Therefore, defendant's 15-year sentence is affirmed. The mittimus is to be corrected as ordered above.

¶ 36 Affirmed; mittimus corrected.