2018 IL App (2d) 151110-U
No. 2-15-1110
Order filed April 16, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. NICHOLAS J. AMELIO, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Kendall County. Nos. 14-CF-359 14-CF-360 Honorable Timothy J. McCann, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in sentencing defendant to 25 years' imprisonment for delivery of heroin: as defendant delivered to a stranger who he knew was going to deliver to others, his offense involved harm greater than that inherent in the offense, and the court properly considered it in aggravation; although the court commented that drugs generally had "outrageous and horrible" consequences, it did not state a personal opinion as to defendant's particular offense or how it should be punished; the court considered the mitigating evidence but properly balanced it against the seriousness of the offense and defendant's substantial criminal history; (2) defendant was entitled to a $1505 credit against his drug assessment, to reflect his days in presentencing custody.

¶ 2 Defendant, Nicholas J. Amelio, appeals from the judgment of the circuit court of Kendall County, contending that his 25-year prison sentence for delivering heroin is excessive and that he is entitled to a credit against a fine. Because the trial court did not consider any improper factors or otherwise abuse its discretion, we affirm the sentence, though we grant the credit.

¶ 3 I. BACKGROUND

¶ 4 In case No. 14-CF-359, defendant was indicted on three counts of unlawful delivery of 1 gram or more but less than 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2014)) and three counts of unlawful possession of 1 gram or more but less than 15 grams of heroin (720 ILCS 570/402(c) (West 2014)). In case No. 14-CF-360, he was indicted on one count of unlawful delivery of 15 grams or more but less than 100 grams of heroin (720 ILCS 570/401(a)(1)(A) (West 2014)) and one count of unlawful possession of 15 grams or more but less than 100 grams of heroin (720 ILCS 570/402(a)(1)(A) (West 2014)). The State nol-prossed the possession charges, and defendant was tried by a jury on the four delivery counts.

¶ 5 The following facts, relevant to the sentencing issues on appeal, were established at the jury trial. On four different days during a two-week period from late October to early November of 2014, defendant sold, respectively, 1.9 grams, 3.8 grams, 3.9 grams, and 20.4 grams of heroin to undercover officer Bobby Richardson of the Kendall County narcotics task force.

¶ 6 According to Officer Richardson, he pretended to be a construction worker who liked to get high and "get other people high." He told defendant that he was giving "heroin to the guys [he] work[ed] with or selling it."

¶ 7 All four drug transactions were audio recorded. Initially, defendant reminded Officer Richardson that he did not know him and asked if he worked with a mutual acquaintance. Officer Richardson responded yes and that he would be a good customer. When defendant asked

if he used heroin daily, Officer Richardson said no, just two or three days per week, because he occasionally watched his girlfriend's daughter. Officer Richardson told defendant that he would be buying heroin a couple times per week, depending on how long it took him to sell it. Defendant expressed a willingness to sell him more heroin. Immediately after the fourth sale, defendant was arrested. The jury found defendant guilty of all four counts.

¶ 8 The presentence investigation report (PSR) showed that defendant had 15 felony convictions and had served 4 prison terms, the longest being 8 years. Although defendant's convictions included numerous ones for burglary and two for unlawful possession of a controlled substance, he had never been convicted of drug distribution. Defendant had been sentenced to probation six times and had his probation revoked four times. Defendant had a longstanding addiction to heroin. He had obtained a GED in 2001 and had worked as an apprentice union roofer the three years before his arrest in this case. A risk assessment indicated that he was a "High-Medium" risk (greater than 90%) to recidivate.

¶ 9 At the sentencing hearing, the trial court stated that it had considered the trial evidence, the PSR, and the financial-impact statement from the Department of Corrections (DOC).[1] As for mitigating and aggravating evidence, the State relied on the PSR. Defendant offered no other mitigating evidence. The State sought a 20-to-25-year prison sentence. Defendant asked for a sentence of nine years' imprisonment.

¶ 10 In imposing sentence, the trial court stated that the "obvious part of sentencing that jumps out in this case is the serious and significant criminal history." The court added that it seldom saw that many felony convictions and it noted that defendant had served prior prison sentences.

[1] Although the trial court stated that the DOC financial-impact statement had been filed with the clerk of the court, no such statement is in the record.

The court commented that defendant tended to have his probation revoked, which showed that he could not avoid getting in trouble.

¶ 11 The trial court stated that the "danger that [defendant's] conduct poses to the community [could not] be overstated." The court added that the consequences of heroin use in Kendall County and statewide are "outrageous" and "horrible." Then the court observed that defendant was "part of that problem," because he sells heroin to "complete stranger[s] as he did in this case. He has no idea who's going to use [the heroin]." The court added that defendant "had no idea whether [the heroin was] going to end up in the bodies of some 16-year-old kid or somebody else." The court considered defendant to "pose[ ] a real danger to the community" and ruled that if he received a light sentence he would be back on the street committing more crime. Thus, the court sentenced defendant to 25 years in prison on each conviction, to be served concurrently.

¶ 12 Defendant, in turn, filed a motion to reconsider, contending that the sentence was excessive. In denying the motion to reconsider, the trial court emphasized that it had considered all relevant evidence and sentencing factors. The court reiterated the importance of defendant's lengthy criminal history. Defendant filed a timely notice of appeal.[2]

¶ 13 II. ANALYSIS

[2] Defendant filed his original notice of appeal on November 4, 2015, the date of the order denying his motion to reconsider. The notice of appeal, however, identified only the June 23, 2015, sentencing order. Defendant subsequently filed in this court a motion for leave to file an amended notice of appeal. The amended notice of appeal identified the order appealed from as that denying the motion to reconsider. We granted the motion and allowed defendant to file the amended notice of appeal.

¶ 14 On appeal, defendant contends that (1) the trial court improperly considered in aggravation its personal opinion about heroin dealers and inappropriately gave weight to the harm that is inherent in every heroin-delivery offense; (2) the sentence is excessive in light of defendant's drug addiction, his nonviolent criminal history, and the high cost of his lengthy prison sentence; and (3) he should receive, in No. 14-CF-360, as he did in No. 14-CF-359, a $5-per-day credit ($1505) toward his drug assessment.

¶ 15 The State responds that the trial court did not consider any improper factors and that the sentence was not otherwise excessive. The State concedes that defendant is entitled to the additional $1505 credit.

¶ 16 The Illinois Constitution requires that all penalties be determined according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. It is well established that the trial court is the proper forum to determine a sentence and that the trial court's sentencing decision is entitled to great deference and weight. *People v. Latona*, 184 Ill. 2d 260, 272 (1998). It is the province of the trial court to balance the relevant factors and make a reasoned decision as to the appropriate punishment in a given case. *Latona*, 184 Ill. 2d at 272. A sentence within the statutory range for the offense will not be disturbed absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). A trial court abuses its discretion if it fashions a sentence based on its personal beliefs or on arbitrary reasons (*People v. Miller*, 2014 IL App (2d) 120873, ¶ 36 (citing *People v. Bolyard*, 61 Ill. 2d 583, 586-87 (1975)) or if the sentence greatly varies from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense (*People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). Reliance on an improper factor does not necessitate remand, however, if the record shows that the weight placed on the improper factor was so insignificant that it did not lead to a

greater sentence. *Miller*, 2014 IL App (2d) 120873, ¶ 37. In considering whether reversible error occurred, a reviewing court should not focus on a few words or statements of the trial court, but should make its decision based on the entire record. *Miller*, 2014 IL App (2d) 120873, ¶ 37.

¶ 17 Relevant sentencing factors include the nature of the crime, the protection of the public, deterrence, punishment, and the defendant's rehabilitative potential. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The weight to be attributed to each factor in aggravation and mitigation depends upon the circumstances of the case. *Kolzow*, 301 Ill. App. 3d at 8. Where mitigating evidence was before the trial court, it is presumed that the court considered it, absent some contrary indication. *People v. Allen*, 344 Ill. App. 3d 949, 959 (2003). We will not reduce a sentence merely because we might weigh the pertinent factors differently. *Stacey*, 193 Ill. 2d at 209.

¶ 18 We first address whether the trial court considered any improper factors in fashioning defendant's sentence. It did not.

¶ 19 Defendant contends that, because there was no evidence that defendant caused any harm beyond that inherent in the offense, the trial court improperly considered in aggravation the inherent harm to society from selling heroin. We disagree.

¶ 20 A trial court may not use a factor implicit in an offense as an aggravating factor in sentencing. *People v. Robinson*, 391 Ill. App. 3d 822, 842 (2009). However, a court may consider the nature and circumstances of the offense, including the nature and extent of each element of the crime committed by the defendant. *Robinson*, 391 Ill. App. 3d at 842 (citing *People v. Salvidar*, 113 Ill. 2d 256, 268-69 (1986)). The commission of any offense can have varying degrees of harm, and the legislature has unequivocally intended that a higher quantum of harm may constitute an aggravating factor. *Robinson*, 391 Ill. App. 3d at 844. Accordingly, if a

court considers as aggravating the societal harm that a defendant's conduct threatened, the record must show that the defendant's conduct had a greater propensity to cause harm than that which is merely inherent in the offense. *People v. McCain*, 248 Ill. App. 3d 844, 852 (1993).

¶ 21 In this case, the trial court did not consider in aggravation the harm inherent in the offense. Although the court noted the consequences of heroin use to the public generally, it followed that comment by stating that defendant especially contributed to the problem by selling heroin to a stranger, having no idea who would use the heroin. That comment was substantiated by defendant's unfamiliarity with Officer Richardson and his knowledge that Officer Richardson was "planning" to distribute the heroin to people unknown to defendant. Additionally, the court observed that, if defendant received a lighter sentence, he would be back on the street selling heroin sooner. Defendant's extensive criminal history and likelihood to recidivate supported that conclusion. Thus, the court properly considered that defendant posed a risk of harm to the community beyond that inherent in the offense. The court did not rely on the harm inherent in the offense.

¶ 22 Defendant contends that the trial court's comment that defendant sold drugs to a complete stranger was not supported by the record. That contention lacks merit, however. Defendant commented that he did not know Officer Richardson, asked him if he knew a third party, and inquired about the frequency of his heroin use. Clearly, defendant knew nothing about Officer Richardson when he first sold him heroin.

¶ 23 Nor was it improper for the trial court to conclude that defendant did not know who might be using the heroin. Indeed, Officer Richardson told defendant that he was distributing some of the heroin to others. Although Officer Richardson told defendant that he was distributing some of the heroin to his co-workers, he never told defendant that those were the

only people to whom he was distributing heroin. Nor, in any event, did defendant know those coworkers. Moreover, the court's comment that the heroin might be used by a 16-year-old merely exemplified that defendant had no idea to whom Officer Richardson was selling the heroin. Thus, the court's comments were supported by the record.

¶ 24 Defendant maintains that this case is similar to *People v. Maxwell*, 167 Ill. App. 3d 849 (1988). It is not.

¶ 25 In *Maxwell*, the appellate court vacated the defendant's sentence, because the trial court improperly considered, as an aggravating factor, that the defendant caused or threatened serious harm to another when he sold cocaine. *Maxwell*, 167 Ill. App. 3d at 852. The appellate court did so because there was no evidence that the defendant directly harmed or attempted to harm another and the general harm from cocaine distribution was inherent in the offense. *Maxwell*, 167 Ill. App. 3d at 852.

¶ 26 *Maxwell* is distinguishable from our case. Unlike in *Maxwell*, here there was evidence that defendant sold increasing amounts of heroin to a stranger who he knew was going to distribute the heroin to other unknown users. Thus, as discussed, there was evidence that defendant's conduct threatened harm beyond that inherent in the offense.

¶ 27 Defendant, relying on *Bolyard* and *People v. Henry*, 254 Ill. App. 3d 899 (1993), contends that the trial court improperly considered its personal opinion about his offense. We disagree.

¶ 28 In *Bolyard*, our supreme court held that the trial court abused its discretion when it personally opined that sex offenders should not receive probation and thus categorically rejected probation as a possible sentence. *Bolyard*, 61 Ill. 2d at 587. That case is distinguishable,

however, as here the trial court did not categorically rule out a sentencing option or state that all drug dealers should receive sentences at the higher end of the applicable sentencing range.

¶ 29 In *Henry*, the trial court, in imposing a 25-year prison sentence, characterized the crime as " 'disgusting' " *Henry*, 254 Ill. App. 3d at 904. The appellate court held that the trial court's comment demonstrated its improper personal opinion about the crime. *Henry*, 254 Ill. App. 3d at 905. Here, on the other hand, the trial court made no similar statement. Although the court noted the "outrageous" and "horrible" consequences of drug dealing, that comment merely reflected the court's view of such crimes generally, as opposed to its personal opinion about defendant's particular offense.

¶ 30 We next address whether defendant's sentence is excessive because the trial court failed to give sufficient weight to his drug addiction, his nonviolent criminal history, and the cost of his incarceration. Because defendant's sentence falls within the applicable statutory range, it will not be deemed excessive unless it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. See *Stacey*, 193 Ill. 2d at 210. Defendant's sentence is neither.

¶ 31 The record shows that the trial court considered all relevant factors, evidence, and arguments. The PSR, which the court expressly noted, showed that defendant was addicted to heroin. Additionally, defense counsel pointed out defendant's daily heroin use and his efforts at drug treatment. Likewise, the court was familiar with defendant's nonviolent criminal history, having reviewed the PSR. Further, the court, having reviewed the financial report submitted by the DOC, was aware of the cost of incarceration. Not only did the court state, when pronouncing sentence, that it had considered all of the trial evidence, the PSR, and the financial-impact

statement, it reiterated at the hearing on the motion to reconsider that it had considered all relevant evidence and sentencing factors.

¶ 32 Balanced against the mitigating evidence were defendant's numerous felony convictions, his multiple prison sentences, his repeated failures at probation, his high risk to recidivate, and his sales of progressively larger amounts of heroin to a stranger he knew was likely to distribute the heroin to unknown third parties. Although we might weigh the various sentencing factors differently, the trial court is entitled to great deference in its balance of those factors and its determination of the appropriate sentence under the circumstances. See *Stacey*, 193 Ill. 2d at 209. Recognizing that a 25-year prison sentence is significant, we do not consider it, under the circumstances, to greatly vary with the purpose and spirit of the law or to be manifestly disproportionate to the offense.

¶ 33 Although defendant relies on *People v. Busse*, 2016 IL App (1st) 142941, such reliance is misplaced. In *Busse*, the defendant was convicted of burglary for stealing $44 from a vending machine. *Busse*, 2016 IL App (1st) 142941, ¶ 1. Because of his prior record, which consisted only of nonviolent, nonserious crimes, he was eligible for a 6-to-30-year prison sentence. *Busse*, 2016 IL App (1st) 142941, ¶¶ 2, 15. The trial court sentenced him to 12 years' imprisonment. *Busse*, 2016 IL App (1st) 142941, ¶ 26. The appellate court held that the 12-year sentence was manifestly disproportionate to the offense of stealing $44 from a vending machine. *Busse*, 2016 IL App (1st) 142941, ¶ 29.

¶ 34 *Busse* is readily distinguishable, however, as the offense of selling heroin is far more serious than a "petty" theft from a vending machine. See *Busse*, 2016 IL App (1st) 142941, ¶ 34. Further, defendant's criminal history, which consisted of 15 felony convictions and several prison terms, is far more significant than that of the defendant in *Busse*.

¶ 35 That leaves the issue of the $1505 credit in No. 14-CF-360. The State concedes that defendant should receive that credit, and we agree. See *People v. Finley*, 293 Ill. App. 3d 377, 388 (1997).

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated, we affirm the judgment of the circuit court of Kendall County but modify the judgment in No. 14-CF-360 to include a $1,505 credit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 38 Affirmed as modified.