

NOTICE
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2018 IL App (4th) 180204-U
NOS. 4-18-0204, 4-18-0205 (cons.)

FILED
September 28, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
JASMINE P. BROWN,)	Nos. 11CF704
Defendant-Appellant.)	12CF356
)	
)	Honorable
)	Nancy S. Fahey,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Presiding Justice Harris and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion by sentencing defendant to an aggregate prison term of 15 years.

¶ 2 Pursuant to an open plea agreement, defendant, Jasmine P. Brown, pleaded guilty to the following: (1) one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) in Vermilion County case No. 11-CF-704 (hereinafter case No. 704), (2) one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) in Vermilion County case No. 12-CF-356 (hereinafter case No. 356), and (3) one count of attempt (aggravated discharge of a firearm) (720 ILCS 5/8-4, 24-1.2(a)(2) (West 2012)) in case No. 356. After an April 2013 sentencing hearing, the Vermilion County circuit court sentenced defendant to a seven-year prison term for unlawful possession of a weapon by a felon in case No. 704 to run consecutive to the eight-year prison term for unlawful possession of a weapon by a felon in

case No. 356. Defendant also received a three-year prison term for attempt (aggravated discharge of a firearm) to run concurrent to the eight-year prison term for unlawful possession of a weapon by a felon in case No. 356. Thereafter, defendant appealed four times, and this court remanded the cause four times for compliance with Illinois Supreme Court Rules 604(d) (eff. July 1, 2017) and 605 (eff. Oct. 1, 2001).

¶ 3 Defendant again appeals and this time asserts his aggregate 15-year prison sentence is excessive. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Case No. 704

¶ 6 In December 2011, the State charged defendant by information with one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)) and two counts of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010) (text of section eff. until July 1, 2011)). On December 22, 2011, defendant posted bond and was released from pretrial custody.

¶ 7 B. Case No. 356

¶ 8 In July 2012, the State charged defendant by information with one count of reckless discharge of a firearm (720 ILCS 5/24-1.5(a) (West 2012)), one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)), one count of defacing identification marks of firearms (720 ILCS 5/24-5(b) (West 2012)), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(C) (West 2012)), and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2012)). We note that, in this second case, the State charged the count of unlawful possession of a weapon by a felon as a first offense, which is a Class 3 felony with a sentencing range of 2 to 10 years' imprisonment, and not as a second or subsequent offense, which is a Class 2 felony with a sentencing range of 3 to 14 years'

imprisonment. See 720 ILCS 5/24-1.1(e) (West 2012). The State later amended the aggravated discharge of a firearm count to attempt (aggravated discharge of a firearm) (720 ILCS 5/8-4, 24-1.2(a)(2) (West 2012)).

¶ 9 C. Joint Proceedings

¶ 10 On February 20, 2013, the circuit court held a joint plea hearing for both cases. Under the parties' plea agreement, defendant was to plead guilty to one count of unlawful possession of a weapon by a felon in case No. 704, one count of unlawful possession of a weapon by a felon in case No. 356, and one count of attempt (aggravated discharge of a firearm) in case No. 356, and the State would seek dismissal of the other charges in case Nos. 704 and 356 as well as all of the charges in Vermilion County case Nos. 10-CF-598 and 12-CF-238. The plea agreement was open as to sentencing. After admonishing defendant and hearing the State's factual basis, the court accepted defendant's guilty plea.

¶ 11 The State's factual basis provided as follows. Defendant had a prior felony conviction in Kane County case No. 08-CF-649. In case No. 704, Danville police officer McFarland responded to a domestic-battery complaint on December 4, 2011. Defendant was present when he arrived. A handgun was recovered, and witnesses at the scene said the handgun belonged to defendant. In case No. 356, Officer McFarland responded to a report of possible gunshots in July 2012. When he arrived, Officer McFarland saw defendant with a weapon. Officer McFarland observed defendant fire the weapon into the air. Individuals were not in the immediate vicinity when defendant fired, but they were in the area. Officer McFarland took defendant into custody, and a handgun was found on defendant's person. Defense counsel stated he would only modify the factual basis to provide defendant "did fire into the ground when a group of five or more people were approaching him and he was backing away from the other

subjects as they were attacking him.” Defense counsel also noted defendant got on the ground when ordered to do so by the police and was taken into custody without any problems.

¶ 12 At the April 22, 2013, sentencing hearing, the State presented the presentence report and an Addiction Counseling Center report. The presentence report indicated defendant was 25 years old and had four biological children. He was currently unemployed and had only one prior job for four or five months. His criminal history included the 2008 felony conviction for possession of a controlled substance and four misdemeanor convictions. Defendant also had a history of juvenile delinquency and numerous traffic violations. Attached to his presentence report was a Level of Service Inventory-Revised report, which found defendant had a probability of recidivism greater than 90%. Defendant presented the testimony of the following: (1) Diane Brown, defendant’s sister; (2) Jasmine Norris, defendant’s girlfriend; and (3) Diane P. Brown, defendant’s mother.

¶ 13 Defendant’s sister Diane testified that, on July 30, 2012, she was hanging out with her sister, Nakia Brown; her brother, Darius Brown; and some friends. They were standing outside when a group of about 20 boys, who were aged 16 to 18 years old, starting coming towards them. Diane testified the group of boys was known as the “So Icy” gang. Diane and her group went into a friend’s home. She observed the group of boys had guns pointed at her friend’s home. At that point, Diane’s friend called the police, and Darius called defendant to tell him what was going on. Defendant rode to Diane’s friend’s house on a bicycle, and the group of boys was still present. One of the boys dropped his gun, and defendant picked it up and shot it towards the ground in the direction of where the people were located. Defendant did not fight with the police when they arrived.

¶ 14 The other witnesses addressed defendant’s character. Norris testified defendant

was an amazing father to their two children and Norris's other two children. She also noted defendant had expressed remorse for his actions. Norris further noted the gang had made threats to defendant's family before the incident and that was something defendant was concerned about. According to defendant's mother, he had always been very protective of his sisters and brothers. She also noted defendant was also a very good father. Additionally, defendant made a statement of allocution, in which he apologized for his behavior and indicated he was just trying to protect his sister.

¶ 15 The State asserted defendant should receive an aggregate sentence of 20 years' imprisonment. Defense counsel argued he should receive an aggregate sentence of 5 years' imprisonment with the possibility of impact incarceration. The circuit court did "not see any factors in mitigation that apply to this situation." It found several aggravating factors did apply, including defendant's conduct caused or threatened serious harm. The court sentenced defendant to prison terms of seven years for unlawful possession of a weapon by a felon in case No. 704, eight years for unlawful possession of a weapon by a felon in case No. 356, and three years for attempt (aggravated discharge of a firearm). The seven- and eight-year sentences were to run consecutive to each other, and the three-year sentence was to run concurrent to the eight-year sentence for unlawful possession of a weapon by a felon in case No. 356.

¶ 16 In September 2013, defendant filed a late notice of appeal, which this court allowed. On January 3, 2014, this court granted defendant's motion for summary remand and directed defendant be given proper admonishments under Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001), so defendant understood he must file a postplea motion in compliance with Illinois Supreme Court Rule 604(d) (eff. Feb. 6, 2013). *People v. Brown*, No. 4-13-0782 (Jan. 3, 2014) (nonprecedential order remanding for compliance with Illinois Supreme Court Rule

605(b)). On remand, the circuit court held a February 7, 2014, hearing and advised defendant of his appeal rights. Defendant filed a timely motion to reconsider his sentence, contending his sentence was excessive given his criminal history, the existence of mitigating circumstances, and his eligibility for the impact incarceration program if he had received an aggregate sentence of less than eight years. At a May 2014 hearing, the court denied defendant's motion to reconsider his sentence.

¶ 17 Defendant appealed for the second time, and this court remanded the case for a proper Rule 604(d) certificate and for new proceedings in strict compliance with Rule 604(d). *People v. Brown*, No. 4-14-0493 (Nov. 19, 2015) (unpublished summary order under Illinois Supreme Court Rule 23(c)). On remand, defendant filed a motion to withdraw his guilty plea. At an August 2016 hearing, the circuit court denied both defendant's motion to withdraw his guilty plea and his previously filed motion to reconsider his sentences.

¶ 18 Defendant appealed for the third time, and this court allowed the parties' agreed motion for a summary remand. *People v. Brown*, No. 4-16-0626 (Dec. 23, 2016) (nonprecedential order remanding for strict compliance with Illinois Supreme Court Rule 604(d)). We again remanded the case for the filing of a Rule 604(d) certificate, the opportunity to file a new postplea motion, and a new hearing on the motion, and for strict compliance with Rule 604(d). On remand, defendant's counsel filed a Rule 604(d) certificate. A new hearing was not held.

¶ 19 For the fourth time, defendant appealed. On appeal, this court again allowed the parties' agreed motion for a summary remand. *People v. Brown*, No. 4-17-0559 (Nov. 6, 2017) (nonprecedential order remanding for strict compliance with Illinois Supreme Court Rule 604(d)). We again remanded the case for the filing of a Rule 604(d) certificate, the opportunity

to file a new postplea motion, and a new hearing and ruling on the motion, and for strict compliance with Rule 604(d). On remand, the circuit court held a March 2, 2018, hearing and denied defendant's postplea motions.

¶ 20 On March 21, 2018, defendant filed timely notices of appeal for the fifth time in both cases. The notices of appeal were in sufficient compliance with Illinois Supreme Court Rule 606 (eff. July 1, 2017) but listed the appealed judgment as the denial of his postplea motions. On March 29, 2018, defendant filed timely amended notices of appeal that listed the appealed judgments as his conviction, sentence, and the denial of his postplea motions. See Ill. S. Ct. Rs. 606(d), 303(b)(5) (eff. July 1, 2017). Thus, this court has jurisdiction of both case Nos. 356 and 704 under Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). We docketed the appeal in case No. 356 as appellate court No. 4-18-0204 and the appeal in case No. 704 as appellate court No. 4-18-0205. In June 2018, we granted defendant's motion to consolidate the appeals in the two cases.

¶ 21

II. ANALYSIS

¶ 22 On appeal, defendant's sole argument is his 15-year aggregate sentence for two counts of unlawful possession of a weapon by a felon was excessive because the circuit court failed to apply several mitigating factors. The State contends defendant has forfeited his argument and the circuit court properly sentenced defendant. In his reply brief, defendant disagrees he forfeited his claim but contends that, if he did forfeit his claim, this court should review the issue under the plain-error doctrine. Since defendant has asserted plain error, we need not initially address forfeiture because our first step is the same regardless, *i.e.*, determining whether any error occurred at all. See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) (noting the first step in conducting a plain-error analysis is determining whether any

error occurred).

¶ 23 The Illinois Constitution mandates “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.” Ill. Const. 1970, art. I, § 11. In sentencing a defendant, the court must consider a number of statutory aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 5-5-3.2 (West Supp. 2011). However, “the seriousness of an offense is considered the most important factor in determining a sentence.” *People v. Jackson*, 2014 IL App (1st) 123258, ¶ 53, 23 N.E.3d 430.

¶ 24 With excessive-sentence claims, this court has explained appellate review of a defendant’s sentence as follows:

“A trial court’s sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant’s credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant’s sentence, and the trial court’s decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review. [Citation.] If the sentence imposed is within the statutory range, it will not be

deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense.” (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004)); see also *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010).

¶ 25 In this case, defendant challenges his aggregate prison term of 15 years for two counts of unlawful possession of a weapon by a felon. Section 24-1.1(e) of the Criminal Code of 2012 (720 ILCS 5/24-1.1(e) (West 2012)) provides, in pertinent part, the following: “Violation of this Section by a person not confined in a penal institution shall be a Class 3 felony for which the person shall be sentenced to no less than 2 years and no more than 10 years.” Since defendant committed unlawful possession of a weapon by a felon in case No. 356 while he was out on bond in case No. 704, defendant was subject to mandatory consecutive sentencing under section 5-8-4(d)(8) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-8-4(d)(8) (West Supp. 2011)). Thus, an aggregate sentencing range would be 4 to 20 years’ imprisonment. Here, defendant’s sentences fall within the statutory sentencing range.

¶ 26 In this case, the circuit court stated it found no mitigating factors applied in defendant’s case. Section 5-5-3.1 of the Unified Code (730 ILCS 5/5-5-3.1 (West 2012)) lists 17 grounds and provides those “grounds shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment.” Defendant contends the following factors listed in section 5-5-3.1 of the Unified Code do apply: (1) his “criminal conduct neither caused nor threatened serious physical harm to another”; (2) he “acted under a strong provocation”; and

(3) “substantial grounds tending to excuse or justify” his conduct existed. See 730 ILCS 5/5-5-3.1(a)(1), (3), (4) (West 2012). Defendant also contends he took responsibility for his conduct and pleaded guilty to the charges, which should be considered nonstatutory mitigating factors. We note defendant’s argument focuses solely on the facts surrounding his conduct in case No. 356.

¶ 27 As to whether defendant’s conduct did not cause or threatened serious physical harm to another, the circuit court found the opposite aggravating factor—defendant’s conduct caused or threatened serious harm—applied in this case. That finding is supported by the factual basis for case No. 356. There, the State’s factual basis indicated defendant fired a gun into the air with people in the area. Defense counsel added defendant fired the gun into the ground when a group of five or more people were approaching defendant.

¶ 28 Regarding whether defendant acted under strong provocation, defendant’s siblings were all inside the residence when he arrived on the scene after being called by his brother. No evidence was presented the gang was attempting to enter the residence. Diane testified defendant was the only one that fired a shot during the incident. The police were on their way. The evidence at the sentencing hearing showed defendant inserted himself into the situation with the gang members. Thus, the circuit court could have found, based on the aforementioned facts, that defendant was not acting under strong provocation.

¶ 29 Likewise, the circuit court could have found no grounds tended to excuse or justify defendant’s criminal conduct. Defendant inserted himself into the situation at a time when his siblings were inside a residence and the police were on the way to the residence. No evidence was presented suggesting defendant’s siblings were in physical danger and he needed to possess a handgun to protect them.

¶ 30 Defendant also points out he did not attempt to evade responsibility for his actions at the scene and pleaded guilty, which should be considered as a nonstatutory factor in mitigation. In support of his argument, defendant cites *People v. Bergman*, 121 Ill. App. 3d 100, 105-06, 458 N.E.2d 1370, 1375 (1984), where the reviewing court recognized a circuit court may grant leniency in sentencing to “a defendant who by his plea ensured prompt and certain application of correctional measures to him, acknowledged his guilt and showed a willingness to assume responsibility for his conduct, and cooperated in the successful prosecution of other offenders.” The *Bergman* court was explaining one of the grounds for the disparity in sentence between the defendant, who received a 25-year prison term, and his codefendant, who had pled guilty and received a six-year prison term for the same offense. *Bergman*, 121 Ill. App. 3d at 101, 105-08, 458 N.E.2d at 1372-73, 1375-77. This case does not involve a disparity in sentences between defendant and a codefendant. Moreover, the aforementioned language in *Bergman* simply recognizes circuit courts *may* grant a defendant leniency for taking responsibility for his or her conduct. See *People v. Watkins*, 206 Ill. App. 3d 228, 249, 563 N.E.2d 806, 818 (1990) (a circuit court *may* grant leniency in sentencing to a defendant who pleaded guilty and thus “ensured prompt and certain application of correctional measures against him”). It does not require a circuit court to do so. In this case, the circuit court could have found the dismissal of the five other charges in case Nos. 704 and 356 as well as two other criminal cases was already significant consideration for defendant’s guilty plea.

¶ 31 Given the seriousness of the crimes and defendant’s criminal history, as well as other circumstances of this case, we find the circuit court did not abuse its discretion in sentencing defendant to an aggregate term of 15 years for two counts of unlawful possession of a weapon by a felon.

¶ 32

III. CONCLUSION

¶ 33 For the reasons stated, we affirm the Vermilion County circuit court's judgment.

As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34 Affirmed.