2019 IL App (1st) 160848-U

No. 1-16-0848

Order filed August 29, 2019

Fourth 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. 13 CR 14455
	)	
ANTOINE HILL,	)	Honorable
	)	Marguerite A. Quinn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's convictions for aggravated unlawful use of a weapon are vacated pursuant to the one-act, one-crime rule. The 12-year sentences imposed on four counts of unlawful use or possession of a weapon by a felon (UUWF) are neither excessive nor disproportionate to a co-offender's sentence. However, as defendant's UUWF convictions also violate the one-act, one-crime rule, we vacate his sentences and remand for the trial court to impose a 12-year sentence on only the most serious count. Also remanded as to fines, fees, and the mittimus.

¶ 2 Following a bench trial, defendant Antoine Hill was found guilty of two counts of aggravated unlawful use of a weapon (AUUW) and four counts of unlawful use or possession of

a weapon by a felon (UUWF). The trial court imposed concurrent prison terms of 5 years for AUUW and 12 years for UUWF. On appeal, defendant contends his convictions for AUUW should be vacated pursuant to the one-act, one-crime rule. He also argues his 12-year sentence for UUWF is excessive and disproportionate to his co-offender's sentence for armed habitual criminal (AHC), and the fines and fees order and mittimus should be corrected. We affirm in part, vacate in part, and remand.

¶ 3 Defendant was charged by indictment with multiple offenses arising from an incident in Evanston on July 16, 2013. At trial, the State proceeded on charges of armed violence (count II); unlawful possession of a firearm by a street gang member (count IV); AUUW predicated on possession of a Beretta handgun (counts XI-XII); UUWF predicated on possessing the Beretta and having a conviction for second degree murder (count XXI) and while being on parole (count XXIII); UUWF predicated on possessing ammunition and having a conviction for second degree murder (count XXII) and while being on parole (count XXIV); and resisting or obstructing a peace officer (count XXVII). We set forth only the evidence relevant to the issues on appeal.

¶ 4 At trial, Evanston police officer Kyle Wideman testified that on July 16, 2013, at approximately 4:30 p.m., he was driving an unmarked vehicle in plainclothes with his partner, Detective Corey McCray. On the 1800 block of Hovland Court, Wideman noticed defendant, whom he identified in court, and another man, Blair Aikens,[1] who had an active warrant from Pennsylvania. Wideman "locked eyes" with the men, who ran through a vacant lot. Wideman chased them on foot and lost sight of defendant, but observed Aikens toss an object over the

[1] Following a separate jury trial, Aikens was convicted of AHC and two counts of UUWF, and sentenced to concurrent terms of 12 years' imprisonment. See *People v. Aikens*, 2017 IL App (1st) 143182. The same judge presided in both defendant's and Aikens's cases.

fence at a property on Hovland (Hovland property). Wideman apprehended Aikens and placed him in a squad car. Afterwards, Wideman returned to the Hovland property and located a Ruger handgun in the backyard.

¶ 5 McCray and Detective James Pillars both testified that, while Wideman was arresting Aikens, they noticed defendant running between the yards of two properties on Brown Avenue, across an alley from the Hovland property. Defendant ignored orders to stop. Pillars entered the yard of one of the properties on Brown, and chased defendant to a fence. Defendant in an attempt to maneuver over it jumped on the fence, and as Pillars attempted to pull him down, the fence collapsed. While being handcuffed by Pillars, defendant flailed his arms and legs.

¶ 6 Officer Anthony Sosa testified that he responded to the Hovland property with his police dog, Roni, to search for "contraband" in the backyard. Roni laid down near a pile of debris, indicating that he located something. Sosa leaned over Roni and observed a Beretta handgun.

¶ 7 Officer Christopher Seebacher testified that he recovered the Ruger and Beretta from the Hovland property. The Ruger contained one chambered round, while the Beretta held one live round and had an extended magazine with 28 rounds. Seebacher transported the firearms to the police station, tested them for fingerprints, and discovered fingerprints on both firearms.

¶ 8 The State entered a stipulation between the parties that the Evanston Police Department collected live scan and inked fingerprints from defendant, and that a proper chain of custody was maintained for the prints.

¶ 9 Officer Larry Miller, an evidence technician, testified as an expert in latent fingerprint comparison. He received the Ruger and Beretta, identified a latent fingerprint on the Beretta that

was suitable for comparison, and determined it matched defendant's live scan and inked fingerprints.

¶ 10 Detective Michael Endre testified as an expert in street gangs. According to Endre, another detective completed a "gang entry card" for defendant in April 2002, which stated that defendant was self-identified as a member of the Gangster Disciples. Based on conversations with "two confidential sources," and defendant's "multiple" arrests with known gang members, Endre updated the card in August 2012 to reflect that defendant was still affiliated with the Gangster Disciples. Endre opined that defendant was an active member of the gang on July 16, 2013.

¶ 11 Artesia Cameron, a parole agent for the Illinois Department of Corrections, testified that defendant was subject to a mandatory supervised release for a second degree murder conviction on July 16, 2013. The State entered a copy of defendant's conviction for second degree murder and a certification from the Illinois State Police stating that defendant had never been issued a Firearm Owner's Identification (FOID) card. Defendant rested without presenting evidence.

¶ 12 Following closing arguments, the trial court found defendant guilty of AUUW (counts XI-XII) and UUWF (counts XXI-XXIV), and not guilty of the remaining charges. The court denied defendant's motion for new trial, and the case proceeded to sentencing.

¶ 13 According to the presentencing investigation (PSI) report, defendant was 30 years old at sentencing and had an 11-year-old daughter. He reported a good childhood with "loving" and "supportive" parents, and had enrolled in college but ended three credit hours short of earning an associate degree. Defendant denied using drugs, and preferred "not to associate with the people who are in trouble with the law." He was sentenced to 18 years' imprisonment for second degree

murder in September 2006, and lived with his mother since being released from prison in September 2012. Prior to his arrest, he was employed as a custodian and briefly worked at a moving company.

¶ 14 In aggravation, the State noted that defendant committed the present offense when he had been on parole for two months for a second degree murder conviction, and "his own choices" proved that "he cannot be trusted" and lacked rehabilitative potential. According to the State, defendant's stable childhood, supportive family, and education disproved that "his life was so difficult that the only thing he knew to do was carry a gun." Additionally, the fact that defendant was arrested with Aikens, while fleeing from the police, contradicted his assertion that he "prefers not to associate" with criminals. The State urged the court to "stem the tide of gun violence" in Illinois and Evanston, and to "protect" other citizens by imposing the maximum sentence of 14 years' imprisonment.

¶ 15 In mitigation, trial counsel argued it was "senseless" for the State to request a 14-year sentence for defendant when Aikens, a wanted felon, received a lesser sentence. Counsel noted that defendant's second degree murder conviction resulted from a "bar fight," and that "[h]e didn't go out stalking in the street looking for anybody." Counsel also asserted that defendant's PSI report showed "plenty of good things," and read a letter from Tiffany Rice, the mother of defendant's daughter. Rice wrote that, after defendant had been released on parole, he became an "active participant" in their daughter's life, volunteered in her classroom, and treated Rice's other child "as his own." Rice asked the court to give defendant "another chance" because he "holds a strong desire to get things right" and "contribute to society."

¶ 16 In allocution, defendant denied gang affiliation and stated that he was "no bad guy, no tough guy, nothing like that," but just wanted to be "painted as someone who loves his daughter." Regarding his second degree murder conviction, defendant explained that the victim tried to shoot him, but he took the firearm and shot the victim instead. As to the present offense, defendant denied possessing the Beretta, and maintained that he was "standing with [his] cousin before the police rolled up."

¶ 17 The court imposed concurrent prison terms of 5 years for each AUUW count and 12 years for each UUWF count. The court stated that it "considered the entire range of possible sentences," "the possibility of rehabilitation," and "the likelihood of re-offending." The court noted that defendant was intelligent, respectful, and "much loved by [his] family." However, the court also recognized "many troubling aspects" of the case, including that defendant went to prison "as a young man," and while on parole for less than two months, returned to his "old ways" of being with people who "are going down that bad path." According to the court, the fact that defendant committed a firearm offense while on parole was "very aggravating." Further, the court noted the offense occurred when children would have been outside, and that defendant acted in "complete disregard" for his neighbors even though he was "not unfamiliar with the violence in Evanston."

¶ 18 Trial counsel filed a motion to reconsider sentence, alleging that defendant's sentence was excessive. Defendant also filed a *pro se* motion to reconsider sentence, which is not included in the record, although the trial court commented that it had "received" and "read" a copy. At the hearing on the motions, defendant stated, in relevant part, that his sentence was "basically the same" as Aiken's sentence, and he did not want to be "looked at" as though he and Aikens are

"the same." The prosecutor noted that "[n]one of things that [defendant] stated in court" were "contained" in his *pro se* motion, although Aikens's sentence "was at 85% for a vastly different charge." The trial court denied both motions, stating:

> "[W]hat was very important to me in your sentencing was the fact that you were on parole for a second-degree murder that you had been released just a matter of months and that you were arrested and found that you possessed a loaded weapon with one in the chamber.
>
> * * *
>
> And the other thing that you should understand is that your co-defendant is serving his sentence at 85 percent. You, sir *** are serving your sentence at 50 percent. That is a dramatic difference when it comes to parole and when you will be released ***."

¶ 19 On appeal, defendant first contends, and the State concedes, that this court should vacate his AUUW convictions because they were based on the same physical act as two of his convictions for UUWF (counts XXI and XXIII).

¶ 20 As a preliminary matter, defendant acknowledges he did not preserve this issue in the trial court. Generally, both a contemporaneous verbal objection and a written postsentencing motion are required to preserve a sentencing issue for review. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, one-act, one-crime errors are subject to the plain-error exception to the forfeiture rule because they implicate the integrity of the judicial process. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). Therefore, we address defendant's claim on its merits.

¶ 21 Under the one-act, one-crime rule, a defendant cannot be sentenced on multiple offenses based on precisely the same physical act. *People v. King*, 66 Ill. 2d 551, 566 (1977). In this context, an "act" is defined as "any overt or outward manifestation which will support a different offense." *Id.* If the defendant is found guilty of two or more offenses based on the same physical act, the court must vacate the conviction for the less serious offenses and impose a sentence on the conviction for the most serious offense. *People v. Lee*, 213 Ill. 2d 218, 226-27 (2004). Whether the one-act, one-crime rule was violated is reviewed *de novo*. *People v. Johnson*, 237 Ill. 2d 81, 97 (2010).

¶ 22 We agree with the parties that defendant's convictions for AUUW were based on the same physical act as two of his UUWF convictions. The State proved that defendant possessed a Beretta, which had his fingerprints and was found in the same area where he was hiding and arrested. Counts XI and XII for AUUW, and counts XXI and XIII for UUWF, were predicated on defendant's possession of the Beretta. Thus, defendant's possession of that firearm was the basis of his convictions for each of those counts.

¶ 23 AUUW by a felon is a Class 2 felony, with a sentencing range of three to seven years. 720 ILCS 5/24-1.6(d)(3) (West Supp. 2013). Generally, UUWF is a Class 3 felony with a sentencing range of 2 to 10 years. 720 ILCS 5/24-1.1(e) (West 2012). When, as here, the offender is on parole, or when the prior felony is a forcible felony, UUWF is a Class 2 felony with a sentencing range of 3 to 14 years. *Id.*; 720 ILCS 5/2-8 (West 2012) (second degree murder is a forcible felony). Therefore, the UUWF counts are more serious than the AUUW counts. *People v. Artis*, 232 Ill. 2d 156, 170 (2009) ("In determining which offense is the more serious, a

reviewing court compares the relative punishments prescribed by the legislature for each offense."). As a result, defendant's convictions for AUUW (counts XI-XII) must be vacated.

¶ 24 The parties further agree that defendant's four UUWF convictions also arose from his possession of the Beretta and ammunition. Counts XXI and XXII for UUWF alleged that defendant possessed the Beretta and ammunition, respectively, and that he had been convicted of a forcible felony, second degree murder. Counts XXIII and XXIV for UUWF alleged that defendant possessed the Beretta and ammunition, respectively, and committed the present offense while on parole. Consequently, counts XXI and XXIII were based on the same physical act, *i.e.*, possession of the Beretta, and counts XXII and XXIV were also based on the same physical act, namely, possession of the ammunition.

¶ 25 While the parties correctly concur that defendant's convictions for UUWF violate the one-act, one-crime rule, they dispute the remedy. Defendant argues that we should remand for the trial court to determine which UUWF convictions should stand. The State, however, maintains that we should amend the mittimus to reflect sentences on counts XXIII and XXIV, and merge the remaining UUWF counts because the trial court found the fact that defendant was on parole to be the most egregious factor at sentencing.

¶ 26 Although the trial court stated it was "very aggravating" that defendant committed the present offense while on parole, it imposed the same 12-year sentence for all four counts of UUWF, and each count had the same sentencing range of 3 to 14 years. When, as here, "it cannot be determined which of two or more convictions based on a single physical act is the more serious offense, the cause will be remanded to the trial court for that determination." *Artis*, 232 Ill. 2d at 177. Therefore, we remand for the trial court to resentence defendant.

¶ 27 Defendant next contends that his 12-year sentence for UUWF is excessive because the offense was nonviolent and did not involve a victim, the trial court improperly considered his prior conviction and parole, and the term does not reflect his rehabilitative potential or the public good.

¶ 28 The trial court has "broad discretionary powers" in sentencing a defendant. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court's decision is entitled to substantial deference because "the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36. In fashioning a sentence, the trial court must balance "the seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 61. However, a defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense. *People v. Reed*, 2018 IL App (1st) 160609, ¶ 62.

¶ 29 When a sentence falls within statutory guidelines, it is presumed proper (*People v. Knox*, 2014 IL App (1st) 120349, ¶ 46), and will be disturbed "only if the trial court abused its discretion in the sentence it imposed" (*People v. Jones*, 168 Ill. 2d 367, 373-74 (1995)). A sentence constitutes 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." (Internal quotation marks omitted.) *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). When considering a sentence's propriety, the reviewing court "must not substitute its judgment for that of the trial

court merely because it would have weighed the factors differently." *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 30 In this case, as we have explained, UUWF is a Class 2 felony with a sentencing range of 3 to 14 years because defendant had a previous conviction for a forcible felony and committed the present offense while on parole. 720 ILCS 5/24-1.1(e) (West 2012). Because defendant's 12-year sentence falls within statutory guidelines, we must presume it is proper. *Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 31 The record establishes that defendant's sentence is not manifestly disproportionate to the seriousness of the offense. Defendant and Aikens fled from police in a residential neighborhood around 4:30 p.m. Defendant climbed a fence and flailed his arms and legs when officers tried to arrest him. In a nearby yard, officers found a loaded Beretta with defendant's fingerprints and an extended magazine with 28 rounds. While defendant suggests the trial court improperly speculated that he "would have committed a violent offense with the handgun" had he not been arrested, the court expressly stated that it was defendant's conduct in leaving a loaded firearm in a residential neighborhood that showed "complete disregard" for public safety. *Wilson*, 2012 IL App (1st) 101038, ¶ 61 (at sentencing, "[t]he court may also consider the nature of the crime, protection of the public, deterrence, and punishment"); see also *People v. Neither*, 166 Ill. App. 3d 896, 904 (1988) (the trial court properly "emphasized *** the danger posed to the public by defendant's conduct" while fleeing arrest).

¶ 32 Defendant committed the present offense while he had been on parole approximately two months for a second degree murder conviction, which the trial court considered "very aggravating." Contrary to defendant's position, however, the court did not improperly enhance

his sentence based on his prior conviction or parole, factors that already elevated his sentencing range; rather, the court emphasized the short time between defendant's release from prison and when he re-offended. The court observed that defendant returned to his "old ways" soon after his release, despite his supportive family, college education, and employment. The court also received a letter from Rice, the mother of defendant's daughter, who asserted that he was active in their daughter's life and helped raise Rice's other child. Consequently, the trial court balanced the aggravating and mitigating factors, including defendant's rehabilitative potential in view of his quick recidivism, and we will not substitute our judgment on review. *Fern*, 189 Ill. 2d at 53.

¶ 33 To the extent defendant relies on studies and articles for the general proposition that lengthy sentences for possessory gun offenses do not reduce violence, and that his incarceration would harm his children and community, these materials were not before the trial court and therefore cannot be considered by this court for the first time on appeal. *People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993) ("A reviewing court must determine the issues before it on appeal solely on the basis of the record made in the trial court."). The record shows the trial court carefully considered the information at sentencing, including the fact that defendant's intellect and family support did not deter him from quickly re-offending and putting others in danger following his release from prison. Under these circumstances, the trial court did not abuse its discretion in imposing sentence.

¶ 34 Defendant next asserts that his 12-year sentence for UUWF, a Class 2 felony, is disproportionate to Aikens's 12-year sentence for AHC, a Class X felony (720 ILCS 5/24-1.7(b) (West 2012)). According to defendant, Aikens's lengthy criminal history, which included felony

and misdemeanor convictions, was "more serious" than his single conviction for second degree murder.

¶ 35 Initially, we observe that trial counsel's motion to reconsider sentence, which is in the record, did not allege disparate sentencing. Defendant's *pro se* motion to reconsider sentence is not in the record, but at the postsentencing hearing, he argued that he did not want to be "looked at" as though he and Aikens are "the same." The prosecutor stated that defendant did not include the issue in his written motion, but nonetheless responded to defendant's argument on the merits, and did not object when the trial court did the same. This court has explained that, "if defendants orally move to reduce their sentences without objection to this procedure by the State, the reviewing court may address such issues upon appeal despite defendants' failure to file a written postsentencing motion." *People v. Shields*, 298 Ill. App. 3d 943, 950-51 (1998). Consequently, we will consider defendant's disparate sentencing argument.

¶ 36 Fundamental fairness requires that offenders who are similarly situated and involved in the same crime should not receive "grossly disparate sentences." *Fern*, 189 Ill. 2d at 58. An improper sentencing disparity occurs "when equally culpable defendants with similar backgrounds are given substantially different sentences," or "when equally culpable defendants with different backgrounds, ages, and criminal propensities are given the same sentence." *People v. Ramos*, 353 Ill. App. 3d 133, 139 (2004). To establish a disparate sentencing claim, "a defendant must demonstrate that he and his codefendant were similarly situated with respect to background, prior criminal history, and potential for rehabilitation." *Id.*

¶ 37 To support his claim for disparate sentencing, defendant has included the transcript of Aikens's sentencing hearing and a copy of his PSI report in the record on appeal. See *People v.*

James, 2017 IL App (1st) 143391, ¶ 162 (taking judicial notice of a co-offender's appeal in evaluating a disparate sentencing claim). According to the PSI report, Aikens was 28 years old at sentencing and was employed at the time of his arrest. He reported a close relationship with his siblings, and stated that his mother was raising his two children. His criminal history included felonies, comprising three drug offenses and aggravated fleeing, and several misdemeanors. In imposing sentence, the trial court noted that Aikens did not have "a good record," and despite his prior convictions and active warrant, "thought it was wise *** to walk around the streets of Evanston with a loaded[ ] *** handgun." The court specified that Aikens was required to serve 85% of his 12-year sentence for AHC.

¶ 38 Based on this record, defendant and Aikens did not receive impermissibly disparate sentences. They are not similarly situated, as their 12-year sentences were for different offenses: defendant was sentenced for UUWF, while Aikens received concurrent sentences for AHC and UUWF. See *People v. Foster*, 199 Ill. App. 3d 372, 393 (1990) (finding that two defendants "are not similarly situated" where they were convicted of different offenses). Further, although Aikens had more convictions than defendant, the record did not show that he was on parole at the time of his offense. In contrast, defendant's criminal history was still substantial, as he had been convicted of second degree murder, sentenced to 18 years' imprisonment, and committed the present offense soon after his release. Finally, to the extent that Aikens's offense could be consider more serious than defendant's, we again observe that Aikens was required to serve 85% of percent of his sentence while defendant was only required to serve 50% of his own term. Consequently, defendant's claim of disparate sentencing is not persuasive.

¶ 39 As a final matter, defendant contends that his fines and fees order and mittimus should be corrected in several respects. Defendant argues that several costs were wrongly imposed, various fines were improperly characterized as fees, and the trial court failed to award him presentence custody credit against either his prison term or the assessments.

¶ 40 On February 26, 2019, while this appeal was pending, our supreme court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure for correcting errors in the imposition of fines and fees, the application of *per diem* credit against fines, the calculation of presentence custody credit, and clerical errors in the mittimus that create a discrepancy between the record and the actual judgment of the court. Ill. S. Ct. R. 472(a)(1)-(4) (eff. Mar. 1, 2019). On May 17, 2019, Rule 472 was amended to provide that "[i]n all criminal cases pending on appeal as of March 1, 2019, *** the reviewing court shall remand to the circuit court to allow the party to file a motion pursuant to this rule." Ill. S. Ct. R. 472(e). "No appeal may be taken" based on an error enumerated in the rule unless the alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. May 17, 2019). Therefore, pursuant to Rule 472, we "remand to the circuit court to allow [defendant] to file a motion pursuant to this rule," raising the alleged errors regarding his fines and fees, *per diem* credit, presentence custody credit, and mittimus. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 41 In sum, we (1) vacate defendant's convictions for AUUW, (2) vacate his convictions for UUWF, (3) remand to the trial court for resentencing with instructions that the trial court can impose its original 12-year sentence on only the most serious count of UUWF, and (4) also remand as to the fines and fees order and mittimus. In all other respects, we affirm.

¶ 42 Affirmed in part; vacated in part; and remanded.