No. 1-17-0548

SIXTH DIVISION
JUNE 14, 2019

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 7377
	)	
ARDELL WALKER,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 12-year sentence for aggravated possession of a stolen vehicle is affirmed where the record establishes that the trial court considered the circumstances of the case and all relevant factors. We remand so that defendant may raise alleged errors in the application of *per diem* presentencing custody credit to his fines and fees.

¶ 2 BACKGROUND

¶ 3 Following a bench trial, defendant Ardell Walker was convicted of aggravated possession of a stolen motor vehicle (625 ILCS 5/4-103.2(a)(3)(West 2016)) and was sentenced to 12 years'

imprisonment. On appeal, defendant contends that: (1) the trial court abused its discretion in sentencing him by not adequately considering certain mitigating factors, including his family's support, rehabilitative potential, and history of mental illness and; (2) certain fines should be offset by his *per diem* presentence custody credit. We affirm the trial court's judgment but remand the case to the trial court to allow defendant to raise his alleged errors regarding the trial court's application of *per diem* credit to which defendant claims he is entitled.

¶ 4 Defendant was charged with two counts of aggravated kidnapping, two counts of aggravated possession of a stolen motor vehicle, one count of burglary, and one count of unlawful restraint. At trial, Ruth Castro testified that, on April 19, 2016, she drove her black Volvo SUV to a photography studio located in the 5800 block of West Roosevelt Road in Chicago. Also in the car were her one-year old daughter, Aliyah, who was asleep in a car seat in the back seat, and her 11-year-old niece, Marissa Contreras, who was also in the back seat. Upon arrival at the photography studio, Castro parked her Volvo with its engine running and keys in the ignition and went into the studio, leaving the children in the Volvo because Aliyah was asleep.

¶ 5 At some point, Marissa ran into the studio and told Castro that "somebody got into the car and is taking Aliyah." Castro and a female studio employee ran out of the studio but could not stop the Volvo. The employee then got into her own car to pursue the Volvo. Castro next saw her baby in the employee's car, when police brought Castro to the 900 block of South Menard Avenue. Castro identified photographs of her Volvo showing damage to the car. She testified that she had a diaper bag in the Volvo, which contained, *inter alia*, her Versace sunglasses and

cash totaling over $100. She also had an envelope containing $500 in $20 dollar bills in the driver's side door.

¶ 6 Alfonso Quinones, Castro's husband, testified that he had purchased the Volvo "[r]oughly about eight months prior" to the incident, and paid "80 grand" for it.

¶ 7 Marissa testified that she and Aliyah remained in the Volvo while Castro went into the photography studio. While she waited in the car, Marissa saw defendant, whom she identified at trial, staring at her from across the street. She saw him speak with another man, point to the Volvo, and then cross the street. He opened the driver's door and "jumped" into the Volvo. Marissa immediately exited the Volvo and ran into the studio to inform Castro. When Marissa, Castro and the studio employee came outside, the Volvo drove away. Afterward, the police took Marissa to another location where she identified defendant as the man who took the Volvo.

¶ 8 The photography studio employee, Coral Aguilar, testified through an interpreter that, after she ran out of the studio with Castro, she saw the "black truck" turning right. Aguilar then followed the truck in her own vehicle. She had driven three blocks when she saw a man standing next to the truck that she had followed. He was holding a Hispanic baby in his arms. She recognized the baby as Aliyah from pictures that she had seen. Aguilar waited in a nearby alley as the man crossed the street and placed the baby on the ground in a yard between two houses. After the man left, the baby began to crawl and Aguilar picked her up. Aguilar sat in her car with the baby while she waited for the police to arrive.

¶ 9 Chicago police officer Ruben Leon testified that, on April 19, 2016, at approximately 2:40 p.m., he was on duty and received a radio call of a kidnapping involving a black Volvo. He observed a black Volvo with license plates matching the dispatch call, heading westbound on

Lake Street. Officer Leon slowed in order to see the driver, whom he identified at trial as defendant. Officer Leon activated his emergency lights and followed the Volvo. The Volvo began traveling at a high rate of speed while "crashing into garbage cans and streetlights." The chase by Officer Leon was terminated for public safety reasons. Castro called her husband, Alphonso Quinones, to inform him of the incident. He then contacted Volvo which located the car using the built-in GPS system. This information allowed the police to locate the vehicle and relay the information to officers looking for the vehicle. During that time, Officer Leon saw defendant standing on the sidewalk near Officer Leon's patrol car. Officer Leon approached defendant and had a brief conversation. The officer observed that defendant seemed very nervous. A search of defendant's person recovered a pair of Versace sunglasses and two bundles of United States currency, one in the amount of $500 and the other in the amount of $262. Defendant was arrested. Two video recordings from building surveillance cameras depicting various stages of the crime were admitted into evidence, and viewed by the trial court.

¶ 10 The trial court found defendant guilty of two counts of aggravated possession of a stolen motor vehicle and one count of burglary; and not guilty as to the remaining charges. The court denied defendant's motion for a new trial and proceeded to sentencing.

¶ 11 Defendant's presentence investigation report (PSI) indicates that defendant was previously sentenced to probation for three prior felony offenses including burglary (2012 and 2015), and criminal trespass (2015). Defendant's 2015 burglary probation was a "mental health" probation. His two burglary probations were unsatisfactorily discharged, and defendant's probation for the criminal trespass charge was modified to 16 months' imprisonment in the Illinois Department of Corrections. Defendant also has convictions for reckless conduct (2016)

and domestic battery with bodily harm (2011), for which he served 8 days and 17 days in the Cook County Department of Corrections, respectively. The PSI also indicates that defendant has been diagnosed with schizophrenia and prescribed psychotropic medication.[1] He had a good relationship with his parents, a "good" childhood, suffered no abuse or neglect, and lived with his grandparents and uncle.

¶ 12 In aggravation, the State argued defendant had two prior Class 2 felony burglary convictions, requiring him to be sentenced as a Class X offender. The State noted that, although the court found reasonable doubt with regard to the aggravated kidnapping counts, defendant had placed his own interests ahead of the baby's when he left her alone in a yard, where she "could have crawled into the street and been hit by a car" or been attacked by a dog or suffer some other mishap. The State therefore requested that the court not consider defendant for the minimum sentence.

¶ 13 In mitigation, defense counsel argued for a minimum sentence as defendant took care to stop the vehicle and place the baby in the grass away from the street, where she was in a safer position than in the vehicle. Counsel further argued that defendant has a good relationship with his family, had been given mental health probations in the past, been diagnosed with schizophrenia, and been prescribed psychotropic medication.

¶ 14 In allocution, defendant informed the court that he deserved a second chance to finish school and to help raise his children and be a part of their lives. He stated that he learned his lesson, and "[t]his ain't the path [I] want to actually go."

[1]Before trial, the court ordered a behavioral clinical examination as to defendant's fitness to stand trial. The forensic psychologist opined that defendant was fit to stand trial. Defendant had been prescribed an antipsychotic medication but the psychologist found it was unlikely that he required this medication to maintain his fitness.

¶ 15 The court merged the counts and sentenced defendant to 12 years' imprisonment as a Class X offender on one count of aggravated possession of a stolen motor vehicle (625 ILCS 5/4-103.2(a)(3)(West 2016)). The court stated that it reviewed the PSI, and "considered defendant's criminal history, his social, educational background, his mental health history" and all factors in aggravation and mitigation. The court emphasized that defendant had "had the benefit" of probation for three separate convictions, and had violated each probation by "picking up new arrests," ultimately being sentenced to 16 months' imprisonment. The court found the facts of the case "aggravating," where defendant's conduct threatened "serious harm" to the baby in the car. The court found that, even if defendant did not know the baby was in the vehicle initially, once he did discover the baby, "he left it unattended in a yard not knowing whether or not anybody was following him or would come rescue the child." Due to these factors, the court did not find the minimum sentence appropriate and sentenced defendant to 12 years in prison. It imposed $429 in fines, fees and costs, and awarded defendant 291 days of presentence custody credit. The court denied defendant's motion to reconsider sentence. Defendant timely appealed. Accordingly, we have jurisdiction to resolve this appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues that the trial court failed to properly weigh certain mitigating factors in his case, specifically his history of mental illness, his family support, and his rehabilitative potential. Defendant requests that we reduce his sentence to the six-year minimum or remand the cause for resentencing.

¶ 18 A trial court's sentencing decision is reviewed under the abuse of discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A reviewing court will find an abuse of

discretion where the sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id*. The trial court has broad discretion in imposing a sentence, and its sentencing decisions are afforded great deference, because the trial judge "observed the defendant and the proceedings," and is in a better position to weigh factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. The reviewing court " 'must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.' " *Id.* at 213 (quoting *People v. Stacey*, 193 Ill. 2d 203, 209 (2000)). However, we must interpret sentencing laws "in accord with common sense and reason" and not merely rubber stamp the trial court's judgment, so as to "avoid an absurd or unduly harsh sentence." *People v. Allen*, 2017 IL App (1st) 151540, ¶ 1.

¶ 19 A sentence that falls within the statutory range is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. In this case, defendant was convicted of aggravated possession of a stolen motor vehicle and, based upon his two prior burglary convictions, sentenced as a Class X offender, with a sentencing range of 6-30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2016); 730 ILCS 5/5-4.5-25(a) (West 2016). Defendant's 12-year sentence falls within these statutory guidelines and is, therefore, presumed to be proper. *Knox*, 2014 IL App. (1st) 120349, ¶ 46.

¶ 20 While defendant concedes that his sentence is within the statutory range, he argues that the trial court abused its discretion in sentencing him by failing to give adequate consideration to pertinent mitigating factors, specifically, the defendant's history of mental illness, his family's support, and the objective of rehabilitation as a whole. He contends that his mental illness in

particular demands a reduced sentence because "his criminal activity is inexorably linked to his mental illness." He claims his mental illness diminishes his impulse control and he made an impulsive decision to take the vehicle, and is therefore in need of treatment rather than harsher punishment.

¶ 21 Defendant points out that his past convictions were not for violent offenses and two sentences were for mental health probation.[2] Defendant argues that a lengthy sentence will impede his rehabilitation, and he will be exposed to certain stressors which will adversely impact his emotional health. Defendant further argues his strong relationship with his family indicates that he has the support necessary to be successfully rehabilitated. Lastly, defendant notes that he expressed repeated remorse for his actions, and declared during allocution that he "learned [his] lesson by doing this" and wanted to "do the right thing" by finishing school and helping to raise his children, thus demonstrating his rehabilitation potential.

¶ 22 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. Neasom*, 2017 IL App (1st) 143875, ¶ 48. To that end, the trial court must consider all factors in aggravation and mitigation**.** *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The seriousness of the offense, and not mitigating evidence, is the most important factor in sentencing. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. 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 a value to each factor *(People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, where, as here, it is essentially argued that the court failed to take factors

[2]Although defendant claims, as he did in the trial court, that two of his sentences were for mental health probation, the record only reflects one such sentence.

into consideration, the defendant "must make an affirmative showing that the sentencing court did not consider relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 23 Defendant does not make such a showing here. The record reflects that the trial court specifically stated that it considered defendant's mental health issues, social history, criminal background, and all factors in aggravation and mitigation. Further, the court specifically referred to the PSI, which included a summary of defendant's mental health history, medication, and family background. Additionally, the trial court heard defense counsel's argument regarding defendant's mental health and family support system. The PSI also set forth defendant's prior convictions and the court, therefore, was aware that, as defendant claims on appeal, the majority of defendant's convictions were for nonviolent offenses. However, we note that defendant also had a conviction for domestic battery resulting in bodily harm. Finally, the court heard defendant's allocution, in which he told the court this was not "the path" he wanted to go down, and that he wanted to finish school and help raise his children. Thus, not only did the court specifically state that it considered all the mitigating evidence, all of this evidence was presented to the court prior to sentencing and the court is presumed to have considered it in sentencing defendant. See *Jackson*, 2014 IL App (1st) 123258, ¶ 48. Defendant does not show otherwise.

¶ 24 Additionally, the court was not required to accord more weight to the mitigating factors than to the seriousness of the offense (see *Kelley*, 2015 IL App (1st) 132782, ¶ 94), the facts of which the court found "aggravating" was that defendant had placed a baby directly in harm's way. The baby was only one year old and could only crawl when defendant placed it on the ground in a public place and drove away. It was fortuitous that the photography studio employee had pursued defendant so that she was able to rescue the baby. Furthermore, the court noted

defendant's history of felony convictions and probation violations, which demonstrate that defendant was not deterred by previous, more lenient sentences. Neither was the fact that he had a supportive family a deterrent from prior crime. See *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13 (criminal history alone may warrant a sentence substantially above the minimum).

¶ 25 In sum, the record reflects that the court was aware of the facts of the case, reviewed the PSI setting forth the mitigating evidence, heard argument from defense counsel regarding the mitigating factors, heard allocution from defendant showing remorse, and specifically mentioned its consideration of the mitigating factors. It thus properly considered these factors in reaching its sentencing judgment and defendant has failed to affirmatively show otherwise. See *Burton*, 2015 IL App (1st) 131600, ¶ 38 ("[t]o rebut th[e] presumption [that the sentencing court considers mitigation evidence], a defendant must make an affirmative showing that the sentencing court did not consider the relevant factors"). We will not substitute our judgment for that of the trial court by reweighing those factors on review. *Alexander*, 239 Ill. 2d at 213 (where the sentencing court adequately considered the appropriate factors, "the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed those factors differently"). Therefore, we find that the trial court did not abuse its discretion in sentencing defendant to 12 years' imprisonment.

¶ 26 Defendant next contends certain fees the trial court assessed against him are actually fines that should be offset by his *per diem* presentence custody credit. See 725 ILCS 5/110-14(a) (West 2014) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for

each day so incarcerated upon application of the defendant."). Defendant did not raise this claim before the trial court.

¶ 27 On February 26, 2019, while this appeal was pending, our supreme court adopted a new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "application of *per diem* credit against fines." Ill. S. Ct. R. 472(a)(2) (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, or appeals filed thereafter in which a party has attempted to raise sentencing errors covered by this rule for the first time on appeal, 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) (eff. May 17, 2019). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that 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 *per diem* credit to which he may be entitled. Ill. S. Ct. R. 472(e) (eff. May 17, 2019).

¶ 28 CONCLUSION

¶ 29 Accordingly, the case is remanded to the trial court for resolution of the fines and fees issue pursuant to Rule 472(e). The judgment of the circuit court of Cook County is affirmed in all other respects.

¶ 30 Affirmed; fines and fees issue remanded.