2019 IL App (1st) 170989-U

No. 1-17-0989

Order filed June 28, 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. 16 CR 12879
	)	
MARK GARY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for resisting or obstructing a peace officer is affirmed over his contention that the indictment lacked the specificity required for him to prepare a defense. The trial court did not abuse its discretion in imposing a sentence within the statutory range.

¶ 2 Following a bench trial, defendant Mark Gary was found guilty of resisting or obstructing a peace officer and sentenced to an extended term of six years in prison. He appeals, arguing that (1) the charging instrument failed to set forth the conduct comprising the elements of the offense

with adequate specificity, and (2) the trial court abused its discretion in imposing an excessive sentence. We affirm.

¶ 3 Defendant was charged in a 10-count indictment with being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2016)) (count I), unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2016)) (counts II and III), aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1), (a)(3)(A-5); (a)(1), (a)(3)(C); (a)(2), (a)(3)(A-5) (West 2016)) (counts IV-IX), and resisting or obstructing a peace officer (720 ILCS 5/31-1(a-7) (West 2016)) (count X).

¶ 4 All charges were based on events that allegedly occurred in Cook County "on or about August 09, 2016."[1] Relevant here, counts VIII and IX alleged that defendant carried a handgun on "West Polk Street" in "the City of Chicago" on or about August 9, 2016, without having been issued a currently valid Firearm Owner's Identification (FOID) card. Count X alleged that, on or about August 9, 2016, defendant:

> "knowingly resisted or obstructed the performance of Chicago police officer P[hillip] Renault, Star Number 19250, one known to defendant to be a peace officer, of any authorized act within his official capacity and was the proximate cause of an injury to said peace officer, in violation of Chapter 720 Act 5 Section 31-1 (A-7) of the Illinois Compiled Statutes as amended."

¶ 5 At trial, Renault testified that he and his partner, Officer Riley,[2] were patrolling in an unmarked vehicle at around 3:40 p.m. on August 9, 2016. As Renault drove westbound down the alley between Central Park and Lawndale Avenues, a sedan backed out of a parking space in the alley such that it faced his vehicle. The driver, whom Renault identified in court as defendant,

[1] Certain capitalizations in the indictment are omitted for readability.

[2] The transcript does not contain Riley's first name.

and a passenger were the only occupants. The sedan "reversed down the alley at a faster than normal pace." Renault activated his vehicle's emergency equipment, but defendant did not stop. Renault followed the sedan southbound onto Lawndale, where he observed the passenger toss a "powdery substance" that Renault believed to be heroin out of the window. Defendant turned onto Polk and eventually pulled over. As he did, Renault observed him reach between his legs toward the bottom of his seat. Defendant then "immediately" exited the sedan.

¶ 6 Renault exited his own vehicle wearing a bullet-resistant vest bearing his name, star, and unit designator, and ordered defendant to reenter the sedan. Defendant instead ran eastbound down Polk, and Renault pursued. After a brief foot chase, Renault "grabbed ahold of [defendant]," who then "stiffened, began flailing his arms, [and] grabb[ed] onto objects in [an] attempt to defeat arrest." Renault eventually subdued defendant with "an emergency takedown" and placed him in handcuffs with the assistance of Riley, who had arrived in their unmarked vehicle.

¶ 7 Renault explained that, during the "emergency takedown," he and defendant "slid onto the curb into the street," resulting in "[l]arge" abrasions to Renault's elbow. Renault did not seek medical treatment, but later bandaged the wound himself after cleaning it with soap, water, and alcohol pads at the police station.

¶ 8 After detaining defendant, the officers returned to the curbed sedan. Riley recovered a loaded, .38-caliber revolver from the "floorboard area of the driver seat." On cross-examination, Renault stated that the sedan's passenger escaped and was never arrested.

¶ 9 The State entered certified copies of four of defendant's prior felony convictions into evidence. The State also entered a stipulation that defendant had never been issued a FOID card, and rested.

¶ 10 Defense counsel moved for a directed finding on counts I through IX, which the court granted after hearing arguments. The defense then rested without presenting evidence on the remaining charge of resisting or obstructing a peace officer.

¶ 11 In closing, defense counsel argued that "[t]here's simply not enough evidence to show that [defendant] intended" to injure Renault, as "[i]t could have been done in the heat of the moment" and Renault did not require medical attention.

¶ 12 The trial court found defendant guilty. In so finding, the court stated that defendant did not resist arrest when he "engaged in a series of turns, all in an effort to evade police," but did resist arrest once Renault caught up to him on foot. In addressing defense counsel's argument that Renault did not seek medical treatment, the court noted that "an injury did occur during the course of the officer trying to do his job," and that it was "not [a] question of magnitude."

¶ 13 Defense counsel filed a motion for a new trial, arguing that defendant did not commit the charged offense because he was not "the proximate cause of anything" and Renault did not sustain "any actual injuries." The court denied the motion.

¶ 14 According to the presentence investigation (PSI) report, defendant's juvenile record included adjudications of delinquency for aggravated battery, burglary, possession of a controlled substance, two for robbery, and two for possession of a stolen vehicle. His adult criminal history included 14 convictions for which he was sentenced to a total of 10 separate prison terms, 3 days in jail, and 4 terms of probation, all of which were terminated

unsatisfactorily. Of these 14 convictions, 7 were for possession of a controlled substance, 1 was for possession of a controlled substance with intent to deliver, and 4 were for manufacturing and delivering a controlled substance. The remaining two convictions were for possession of a stolen vehicle and soliciting unlawful business.

¶ 15 With respect to defendant's substance abuse, the PSI report stated that defendant had "abused [heroin] on a sporadic basis prior to his incarceration," but had since "ma[d]e the decision to discontinue his drug use." He last used drugs in the summer of 2016.

¶ 16 The State submitted in aggravation that defendant was "a career criminal" who had more than 10 adult felony convictions and "a juvenile background." Consequently, the State requested that the court impose "the highest possible sentence you can give based on that extensive background."

¶ 17 In mitigation, defense counsel argued that defendant had done his best to "break free" of a "life style that led to poor decisions," including dropping out of high school and joining a gang. Counsel noted that defendant maintained "productive [and] normal" relationships with family members and was employed as a laborer before being arrested in the present case. Defendant had also twice completed substance abuse treatment, and had "foresworn" using drugs.

¶ 18 In announcing its decision, the trial court stated that it considered the trial evidence, the PSI report, the "financial impact of this incarceration," and the arguments made at the sentencing hearing. The court opined that defendant "certainly has had his share of challenges in his life," but that "he really deserves" an extended sentence based on his criminal history. Accordingly, the court sentenced defendant to six years in prison. Defendant's motion to reconsider the sentence was denied.

¶ 19 On appeal, defendant first contends that the indictment is "void" with respect to the count of resisting or obstructing a peace officer (count X) because it did not adequately specify the nature of the charge. In particular, he claims that he was deprived of the opportunity to prepare a full defense because the indictment did not specify (1) how he resisted or obstructed Renault, and (2) what "authorized act" Renault was engaged in at the time. In response, the State maintains that "the indictment as a whole" provided defendant with sufficient detail to prepare a defense.

¶ 20 Every criminal defendant has a constitutional right to be informed of the nature of the criminal accusations made against him. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. In Illinois, this fundamental right is implemented through section 111-3 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/111-3 (West 2016)). Section 111-3(a) of the Code requires that a criminal charge be in writing and state (1) the name of the accused, (2) the date and county of the offense, (3) the name of the offense, (4) the statutory provision involved, and (5) the "nature and elements of the offense charged." 725 ILCS 5/111-3(a) (West 2016). The statute " 'protects the defendant against being forced to speculate as to the nature or elements of the underlying offense, thus spreading his resources thin, attempting to rebut all of the possibilities, while the prosecutor merely focuses on the most promising alternative and builds his case around that.' " *People v. Carey*, 2018 IL 121371, ¶ 20 (quoting *People v. Hall*, 96 Ill. 2d 315, 320 (1982)).

¶ 21 The timing of a challenge to the sufficiency of a charging instrument is important. *Carey*, 2018 IL 121371, ¶ 21. If an indictment is challenged in a pretrial motion, it must "strictly comply" with section 111-3(a) of the Code. *Carey*, 2018 IL 121371, ¶ 21. However, where, as here, the indictment is attacked for the first time on appeal, it is sufficient so long as it "notified

the defendant of the precise offense charged with enough specificity to allow the defendant to (1) prepare his or her defense and (2) plead a resulting conviction as a bar to future prosecution arising out of the same conduct." *Carey*, 2018 IL 121371, ¶ 22. " 'In other words, the appellate court should consider whether the defect in the information or indictment prejudiced the defendant in preparing his defense.' " *Carey*, 2018 IL 121371, ¶ 22 (quoting *People v. Thingvold*, 145 Ill. 2d 441, 448 (1991)). It is the defendant's burden to show that he suffered prejudice. *People v. Davis*, 217 Ill. 2d 472, 479 (2005).

¶ 22 In determining whether the defendant was prejudiced in preparing a defense, a reviewing court should consider the record and the indictment as a whole. *Carey*, 2018 IL 121371, ¶ 22. "[T]he question is whether, in light of the facts of record, the indictment was so imprecise as to prejudice [the] defendant's ability to prepare a defense." *Carey*, 2018 IL 121371, ¶ 22. If a reviewing court cannot say that the charging instrument inhibited the defendant in preparing a defense, it cannot conclude that the defendant suffered prejudice. *Carey*, 2018 IL 121371, ¶ 22. The sufficiency of an indictment is reviewed *de novo*. *Carey*, 2018 IL 121371, ¶ 19.

¶ 23 Here, defendant was convicted of resisting or obstructing a peace officer in violation of section 31-1(a-7) of the Criminal Code of 2012 (720 ILCS 5/31-1(a-7) (West 2016)). The statute provides that "[a] person who knowingly resists or obstructs the performance by one known to the person to be a peace officer *** of any authorized act within his or her official capacity commits a Class A misdemeanor." 720 ILCS 5/31-1(a) (West 2016). When the resistance or obstruction is "the proximate cause of an injury to a peace officer," the offense is a Class 4 felony. 720 ILCS 5/31-1(a-7) (West 2016).

¶ 24 Count X of the indictment, which charged defendant with resisting or obstructing Renault, listed defendant's name, the name and statutory provision of the offense, the date of the offense, and the county in which it allegedly occurred. Defendant contends only that the indictment failed to inform him of the "nature and elements" of the offense in that it did not specify which of his actions allegedly resisted or obstructed Renault, and which authorized act Renault was performing at the time. Defendant suggests that there are two events that could have conceivably formed the basis for the charge—one when he evaded Renault's attempts to curb his sedan, and another when he resisted Renault's attempt to detain him after the foot chase—and he observes that the trial court discussed both in its ruling.

¶ 25 We initially note that, to the extent defendant claims the indictment allowed two different possibilities for how he allegedly committed the offense, he cannot show that he was forced to "spread *** his resources thin" in fashioning his defense because he did not dispute that either event occurred. See *Carey*, 2018 IL 121371, ¶ 20. Moreover, the indictment specified that the charge was based on defendant's actions that were "the proximate cause of injury" to Renault. Thus, the allegation was clearly based on defendant's actions causing Renault to fall to the street, and not on defendant's failure to immediately submit to a traffic stop.

¶ 26 The record also shows that defense counsel understood the nature of the charges and mounted a capable defense, as evidenced by her obtaining a directed finding on 9 of the 10 counts. As to the charge now at issue, the defense's strategy was not to deny that defendant resisted or obstructed Renault, but rather to argue that he did not intentionally injure Renault because his resistance "happened in the heat of the moment" and resulted in only superficial injuries. Notably, defendant does not argue that he would have presented a different defense had

the indictment been more specific. See *People v. Davis*, 217 Ill. 2d 472, 479 (2005) (rejecting a posttrial challenge to an indictment where the defendant did not "identify what, in fact, he could have done differently" had the indictment been more detailed).

¶ 27 We also find no merit to defendant's argument that, for the purposes of a prejudice analysis, the indictment was fatally deficient for failing to specify which "authorized act" Renault was engaged in at the time of the alleged resistance or obstruction.

¶ 28 Four cases upon which defendant relies—*People v. Hilgenberg*, 223 Ill. App. 3d 286 (1991); *People v. Stoudt*, 198 Ill. App. 3d 124 (1990); *People v. Leach*, 3 Ill. App. 3d 389 (1972); and *People v. Hughes*, 229 Ill. App. 3d 469 (1992)—are distinguishable from the present case. *Hilgenberg* and *Stoudt* both involved charging instruments that were challenged and dismissed before trial. *Hilgenberg*, 223 Ill. App. 3d at 287; *Stoudt*, 198 Ill. App. 3d at 125. Thus, the inquiry in those cases was whether the charging instruments strictly complied with the statutory requirements, not the more lenient question of whether the defendants were prejudiced by the lack of specificity.

¶ 29 Similarly, *Leach* was decided before our supreme court established the timing-dependent standards explained above. See *People v. Pujoue*, 61 Ill. 2d 335, 339 (1975) (differentiating between pretrial and posttrial challenges to charging instruments). As such, although *Leach* found a complaint insufficient where, among other things, it "did not allege the physical act or acts [the defendant] committed which resisted or obstructed the peace officer," the court analyzed the charging instrument for strict compliance with section 111-3(a) of the Code. *Leach*, 3 Ill. App. 3d at 394. The *Leach* court therefore did not decide whether the defendant was

prejudiced in mounting a defense or whether she was susceptible to future prosecution for the same conduct. Thus, it does not control here.

¶ 30 Finally, we recognize that, in *Hughes*, this court stated that a charging instrument alleging resistance or obstruction of a peace officer "must contain language describing the act(s) alleged to have obstructed the officer." *Hughes*, 229 Ill. App. 3d at 473. However, there, the transcript of proceedings was not included in the record on appeal. *Hughes*, 229 Ill. App. 3d at 474. Thus, there was no way to determine from the record whether the defendant suffered prejudice, and the court was left to examine only the language of the charging instrument. This is inapposite to the present case, where, as noted, the record demonstrated that defendant was not prejudiced in preparing his defense.

¶ 31 The charging instrument in the present case was also sufficiently detailed for defendant to plead his conviction as a bar against future prosecution. Read as a whole, the indictment alleged that defendant resisted Renault near Polk Street in Chicago on August 9, 2016, resulting in injury to Renault. This information, combined with the details contained in the record, including the trial court's statement that its finding of guilt was based on defendant's actions after the foot chase, would enable defendant to protect himself from future prosecution on double jeopardy grounds. See *People v. DiLorenzo*, 169 Ill. 2d 318, 325 (1996) (finding the defendant adequately protected from subsequent prosecution by the record of proceedings and an indictment that listed the defendant's name, the date of the offense, and location at which it occurred); see also *People v. Stephenson*, 2016 IL App (1st) 142031, ¶ 23. We therefore find that the indictment in the present case was not fatally deficient. Because the indictment did not prejudice defendant, his

additional claim that counsel was ineffective for failing to attack it or request a bill of particulars also fails. *People v. Phillips*, 215 Ill. 2d 554, 565-66 (2005).

¶ 32 Defendant next argues that the trial court abused its discretion by imposing a sentence that was manifestly disproportionate to the nature of his offense, and by "fail[ing] to weigh [his] non-violent background and drug addiction" in mitigation. The Illinois Constitution requires that a sentence "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. A trial court's sentencing decisions are entitled to great deference, as the trial judge, having observed the proceedings firsthand, is in a superior position to consider factors such as the defendant's demeanor, moral character, mentality, environment, and age. *People v. Snyder*, 2011 IL 111382, ¶ 36. There is a strong presumption that the trial court considered all relevant sentencing factors, and that presumption will not be overcome without affirmative evidence to the contrary. *People v. Brown*, 2018 IL App (1st) 160924, ¶ 9. A reviewing court must not reweigh the sentencing factors or substitute its own judgment for that of the trial court merely because it would have weighed the factors differently. *Brown*, 2018 IL App (1st) 160924, ¶ 8. When a defendant's sentence falls within the statutory range for the offense, it is presumed valid. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 13. Accordingly, a defendant's sentence will not be reduced absent an abuse of discretion, which occurs only where the sentence is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 33 Here, defendant was found guilty of resisting or obstructing a peace officer, which is a Class 4 felony when it results in injury to the officer. 720 ILCS 5/31-1(a-7) (West 2016). While a

Class 4 offense normally requires a sentence between one and three years (730 ILCS 5/5-4.5-45(a) (West 2016)), there is no dispute that defendant was eligible for an extended term sentence of up to six years based on his criminal history (730 ILCS 5/5-4.5-45(a), 5-8-2 (West 2016)). Consequently, his six-year sentence was within the statutory range and is presumed proper. Although, as defendant notes, Renault sustained relatively minor injuries during the offense, that does not overcome the presumption that the trial court fashioned an appropriate sentence. This is especially so where the record demonstrates that the trial court relied heavily upon defendant's criminal history, which included more than a dozen felonies, multiple prison sentences, and multiple probation violations. See *People v. Evangelista*, 393 Ill. App. 3d 395, 398-99 (2009) (the defendant's "extensive criminal history" alone warranted a sentence "substantially above the minimum").

¶ 34 We similarly reject defendant's argument that the trial court failed to consider his drug addiction or the nature of his past offenses in imposing a sentence. As noted, there is a presumption that the court gave due consideration to all the relevant factors (*Brown*, 2018 IL App (1st) 160924, ¶ 9), and defendant offers nothing to overcome that presumption apart from the sentence itself. Indeed, the record affirmatively demonstrates that the court considered these factors. The court stated it considered the information presented in mitigation and in the PSI report, and acknowledged that defendant "has had his share of challenges in his life." Nevertheless, the court found defendant deserving of an extended term sentence. See *Evangelista*, 393 Ill. App. 3d at 360 (drug use is not necessarily a mitigating factor, especially when the defendant reoffended after opportunities for treatment). Under these circumstances, we cannot say that the court failed to consider the required factors or that it abused its discretion.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 36 Affirmed.