2014 IL App (1st) 130883

SIXTH DIVISION
October 17, 2014

No. 1-13-0883



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 10 CR 584 |
| | ) | |
| TIMOTHY LIGHTFOOT, | ) | Honorable |
| | ) | William G. Lacy |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's combined term of 85 years' imprisonment is affirmed, where: (1) it was not excessive; (2) defendant was not prejudiced by any possible consideration of improper sentencing factors; and (3) defendant did not receive ineffective assistance of counsel with respect to his sentencing.

¶ 2 Following a jury trial, defendant-appellant, Timothy Lightfoot, was convicted of first degree murder and aggravated discharge of a firearm. He was thereafter sentenced to a combined term of 85 years' imprisonment. On appeal, defendant challenges his sentences on the basis: (1) they were excessive in light of the mitigating factors presented to the circuit court; (2) the trial court relied upon improper sentencing factors; and (3) he received ineffective assistance of counsel with respect to his sentencing. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with numerous counts of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. The counts contained in the indictment generally alleged that, on October 26, 2009, defendant shot at Martell Barrett, Darius Whalum, and Timothy Toy, resulting in the death of Mr. Barrett.

¶ 5 The matter proceeded to a jury trial commencing in September of 2012. The evidence at trial generally established that around 9:30 a.m. on October 26, 2009, near the intersection of Marquette Road and Damen Avenue in Chicago, shots were fired at Martell Barrett, Darius Whalum, and Timothy Toy. Several witnesses identified defendant or someone matching his description as one of the shooters, and after the initial shooting, defendant was also observed standing over Mr. Barrett and shooting him in the head. Defendant ran from the scene, and he was thereafter observed by an acquaintance, LaShonda Singleton, to be catching his breath or vomiting between two buildings. Defendant told Ms. Singleton that he had been shot at and asked to use her phone, at which time Ms. Singleton saw that the "[c]rotch area" of defendant's pants were wet. Shakela Brown, a cousin of Ms. Singleton, thereafter drove defendant and Ms. Singleton away. Ms. Singleton testified that later that same day, defendant called her and said "he's not going to jail for nobody, and keep his name out my mouth." Finally, the State presented evidence that Mr. Barrett died of multiple gunshot wounds, including one to his head.

¶ 6 At the conclusion of the jury trial, defendant was found guilty of first degree murder and aggravated discharge of a firearm, with the jury also finding that defendant personally discharged a firearm resulting in the death of another person. Defendant's motion for a new trial was denied, and a sentencing hearing was held in October of 2012.

¶ 7 In preparation for that hearing, a presentence investigation report was prepared reflecting that defendant was 18 years old at the time of the shooting and that defendant reported: (1) smoking marijuana since the age of 11 and drinking alcohol since the age of 13, and (2) being a member of the Black Disciples street gang from a "young age" until he left the gang when he was 17 years old. The report also revealed that defendant had two prior juvenile convictions and a single adult conviction for aggravated unlawful use of a weapon (AUUW). Defendant had received probation for each of those cases, and was on probation for the adult conviction at the time of the shooting in question. The State presented a number of victim impact statements, and defendant declined an opportunity to make a statement on his own behalf.

¶ 8 The State and defense counsel agreed that defendant was subject to a total, combined sentences ranging from 49 years' imprisonment to a term of natural life. The State argued for a total sentence of, or close to, natural life in prison, in light of: (1) the nature of defendant's actions in this case; (2) his criminal history; (3) the need for deterrence; and (4) defendant's history of gang membership, whether or not that membership had anything to do with the shooting at issue here. Defense counsel argued for a minimum sentence in light of: (1) defendant's youth; (2) the mitigating factors contained in the presentence report; and (3) the fact that the mandatory minimum sentence itself was significant, but would still permit defendant the possibility of rehabilitation.

¶ 9 At the conclusion of the sentencing hearing, the trial court stated that it had considered the presentence investigation report, the arguments and statutory factors in aggravation and mitigation, the fact that defendant declined to make a statement, and the facts of this case. The trial court then specifically highlighted the fact that the evidence at trial established that, after Mr. Barrett had been shot, defendant stood over him and shot him again. Defendant was then

sentenced to a total, combined term of 85 years' imprisonment, which included 50 years' imprisonment for first degree murder, a mandatory 25-year enhancement to that sentence for defendant's use of a firearm, and a consecutive 10-year sentence for aggravated discharge of a firearm. Defendant's motion to reconsider his sentences was denied, and he has now appealed.

¶ 10 II. ANALYSIS

¶ 11 As noted above, on appeal defendant contends: (1) his sentences were excessive, (2) the circuit court relied upon improper sentencing factors, and (3) he received ineffective assistance of counsel with respect to his sentencing. We address each issue in turn

¶ 12 A. Excessive Sentence

¶ 13 First, we address defendant's contention that sentencing him to a combined term of 85 years' imprisonment was excessive.

¶ 14 A trial court may consider a number of factors to fashion an appropriate sentence, including the nature of the crime, protection of the public, deterrence, punishment, and defendant's age, rehabilitative prospects, credibility, demeanor, and character. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998); see also 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2008) (providing various statutory factors in aggravation or mitigation). The weight attributed to each factor in aggravation or mitigation depends on the particular circumstances of each case. *Kolzow*, 301 Ill. App. 3d at 8. When a defendant challenges his sentence on appeal, we generally defer to the trial court's judgment because it had the opportunity to observe the proceedings and is, therefore, in a better position than a reviewing court. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not substitute our judgment for that of the trial court merely because we would have weighed the sentencing factors differently. *Id.*

¶ 15 Here, defendant was convicted of first degree murder and aggravated discharge of a firearm. The sentencing range for defendant's first degree murder conviction was from 20 to 60 years' imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). Because the jury also found that defendant personally discharged a firearm resulting in the death of another person, defendant's sentence for murder was also subject to a mandatory enhancement ranging from an additional 25 years' imprisonment to a term of natural life. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Defendant's conviction for aggravated discharge of a firearm, a Class 1 felony, was punishable by a term of 4 to 15 years' imprisonment. 720 ILCS 5/24-1.2(b) (West 2008); 730 ILCS 5/5-4.5-30(a) (West 2008)). Furthermore, it is undisputed that defendant was subject to consecutive sentences due to his first degree murder conviction. 730 ILCS 5/5-8-4(d)(1) (West 2008).

¶ 16 Thus, with respect to his convictions for first degree murder and aggravated discharge of a firearm, defendant faced a total possible combined sentences ranging from 49 years' imprisonment to a term of natural life. As noted above, defendant was sentenced to a total of 85 years' imprisonment, which included 50 years' imprisonment for first degree murder, a mandatory 25-year enhancement to that sentence for his use of a firearm, and a consecutive 10-year sentence for aggravated discharge of a firearm.

¶ 17 On appeal, defendant specifically contends that the combined term of 85 years' imprisonment was excessive because it: (1) amounted to a *de facto* life sentence; and (2) failed to account for the mitigating factors of defendant's youth, his early alcohol and drug use, his relatively limited criminal history, and the fact that defendant's immediate, involuntary physical reaction to the shooting "demonstrates that he did not have the sort of callousness and disregard for human life that might justify a *de facto* life sentence."

¶ 18 First, we find some fault with defendant's assertion—running throughout his briefs on appeal—that we should consider his sentences in the aggregate. While it is true that defendant was sentenced to a combined total of 85 years' imprisonment, that total was comprised of a 75-year sentence for first degree murder and a consecutive 10-year sentence for aggravated discharge of a firearm. Our supreme court has "long held that consecutive sentences constitute separate sentences for each crime of which a defendant has been convicted. *** [Thus,] consecutive sentences do not constitute a single sentence and cannot be combined as though they were one sentence for one offense. Each conviction results in a discrete sentence that must be treated individually." *People v. Carney*, 196 Ill. 2d 518, 529-30 (2001). Thus, in evaluating defendant's claim that his sentences were excessive, our analysis should more properly be focused on the appropriateness of each individual sentence.

¶ 19 Nevertheless, whether viewed individually or in the aggregate, we reject defendant's challenge to the sentences imposed by the trial court. To the extent defendant contends he has been improperly sentenced to a *de facto* life sentence, we note that his two sentences are each well within the ranges allowed by statute. Indeed, with respect to defendant's conviction for first degree murder alone, the permissible sentencing range included an *actual* sentence of natural life. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). This court has recognized that, so long as a defendant's lengthy prison sentence is not otherwise an abuse of discretion, it will not be found improper merely because it arguably amounts to a *de facto* life sentence. *People v. Martin*, 2012 IL App (1st) 093506, ¶ 50.

¶ 20 We also reject defendant's contention that the trial court failed to properly consider his relative youth, his early alcohol and drug use, his relatively limited criminal history, and his physical reaction to the shooting. " '[W]here mitigation evidence is before the court, it is

presumed the court considered that evidence absent some contrary indication other than the sentence imposed.' " *People v. Andrews*, 2013 IL App (1st) 121623, ¶18 (quoting *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991)). Here, all of these possible mitigating factors were presented to the trial court at trial, in the presentence investigation report, or during defense counsel's arguments at the sentencing hearing. Furthermore, the trial court specifically indicated that it had considered the facts of the trial, the presentence investigation report, and the arguments at sentencing in crafting defendant's sentences. In the face of this record, defendant points to nothing other than the sentences imposed upon him as indicative that these mitigating factors were not considered by the trial court. This contention is thus both improper and belied by the record before us.

¶ 21 Furthermore, we again note that both of defendant's sentences fell within the allowable statutory range. "If an imposed sentence falls within the statutory range, it will not be found excessive unless there is an affirmative showing that the sentence varies greatly from the spirit and purpose of the law or manifestly violates constitutional guidelines." *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 24. While defendant contends that his sentences do not reflect a proper weighing of the above referenced mitigating factors, this argument essentially asks this court to substitute our own judgment for that of the trial court because we would have weighed the sentencing factors differently. That would, however, be "an improper exercise of the powers of a reviewing court." *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010).

¶ 22 To the extent that defendant also faults the trial court for failing to specifically address each of the above referenced mitigating factors in announcing its sentences, we find that "[i]t is well established that a trial court 'need not articulate the process by which it determines the appropriateness of a given sentence.' [Citation.] The court 'is not required "to detail for the

record the process by which [it] concluded that the penalty [it] imposed was appropriate." [Citation.]' [Citation.]" *Martin*, 2012 IL App (1st) 093506, ¶ 48. To the extent that defendant faults the trial court for placing undue emphasis on the nature of defendant's criminal activity in announcing its sentences, we note that the trial court was not required to accord any greater weight to the mitigating evidence than to other sentencing factors. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010); *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55 ("Since the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, and the presence of mitigating factors neither requires a minimum sentence nor precludes a maximum sentence."). Ultimately, we do not find that defendant's challenged sentences so varied with "the spirit and purpose of the law," or were so "manifestly disproportionate to the nature of the offense[s]," that they amount to an abuse of discretion. *Stacey*, 193 Ill. 2d at 209-10.

¶ 23 In coming to this conclusion, we necessarily reject defendant's specific argument that his relative youth warranted lesser sentences. This argument initially relies upon a number of United States Supreme Court opinions addressing the constitutionality of various criminal sentences imposed upon minors. In *Roper v. Simmons*, 543 U.S. 551, 574-75 (2005), the Supreme Court found that the death penalty was unconstitutional as applied to minors. In *Graham v. Florida*, 560 U.S. 48, 82 (2010), the Supreme Court held that "[t]he Constitution prohibits the imposition of a life without parole sentence on a juvenile offender who did not commit homicide." Finally, in *Miller v. Alabama*, __ U.S. __, 132 S. Ct. 2455, 2469 (2012), the Supreme Court concluded that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." In each case, the

Supreme Court relied in part on the lesser moral culpability and greater rehabilitative potential of minors in support of its decisions.

¶ 24 We reject defendant's contention that he, his crimes, and his sentences should be analogized to situations presented in the above decisions due to the fact that he—18 years old at the time of the crimes at issue here—was relatively young. Under Illinois law, defendant was not a minor at the time of his crimes, he was an adult. See *People v. McCoy*, 337 Ill. App. 3d 518, 525 (2003); 705 ILCS 405/5-130 (West 2008) (excluding from juvenile court's jurisdiction those defendants at least 15 years old charged with first degree murder).

¶ 25 In addition to not being a minor, defendant was also not: (1) sentenced to the death penalty, as in *Roper*; (2) sentenced to life without parole after committing a *nonhomicide* offense, as in *Graham*; or (3) subject to a *mandatory* sentence of life without parole, as in *Miller*. Rather, defendant was an adult at the time he committed his crimes, he stands convicted of first degree murder, and he was sentenced to a term of years—albeit a lengthy one—only after the trial court had an opportunity to consider all the relevant sentencing factors in aggravation and mitigation. Indeed, the Supreme Court did not foreclose the possibility of sentencing a minor to a sentence of life without the parole in *Miller*, let alone disallowing the sentencing an adult to a lengthy term of years. *Miller*, 132 S. Ct. at 2469. Rather, the Supreme Court merely held that such lengthy sentences must result from a consideration of all relevant sentencing factors, including a defendant's age, character, personal and criminal history, and the specific nature of the crimes for which that defendant will be sentenced. *Id.* at 2469-70. This is exactly what occurred here. We therefore find the above cases to be inapposite.

¶ 26 Finally, defendant also supports the contention that his relative youth warranted lesser sentences by citing to scientific research finding that the human brain—including some of those

characteristics that make a person morally culpable for their actions—continues to develop after a person reaches the age of 18. See, *e.g.* American Bar Association, *Adolescence, Brain Development and Legal Culpability* (Jan. 2004) (available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf; Melinda Beck, *Delayed Development: 20-Somethings Blame the Brain* (Aug. 23, 2012), available online at http://online.wsj.com/news/articles/SB10000872396390443713704577601532208760746. Defendant contends that this scientific research supports the contention that he—like a juvenile—had increased rehabilitative potential such that he should have received lesser sentences. He further asserts that this argument is supported by the United States Supreme Court's recognition in *Roper* where "[t]he qualities that distinguish juveniles from adults do not disappear when an individual turns 18." *Roper*, 543 U.S. at 574.

¶ 27 Nevertheless, as the *Roper* court itself recognized immediately after the above cited language, "a line must be drawn [and] *** [t]he age of 18 is the point where society draws the line for many purposes between childhood and adulthood." *Id*. We do not find that the scientific research cited by defendant establishes that he—an 18-year-old adult at the time of shootings whose relative youth was well understood and considered by the trial court—received excessive sentences.

¶ 28 B. Improper Sentencing Factors

¶ 29 We next consider defendant's argument that he is entitled to a new sentencing hearing because the trial court relied upon improper sentencing factors. Defendant specifically contends that the trial court erred, because in aggravation it considered: (1) evidence of defendant's gang membership, when there was no evidence that defendant was a member of a gang at the time of

the shooting at issue here or that the shooting itself was gang-related; and (2) defendant's prior conviction for AUUW, where that conviction was rendered void by our supreme court's decision in *People v. Aguilar*, 2013 IL 112116, (finding that the Class 4 form of the AUUW statute, the statute under which defendant here was previously convicted, facially unconstitutional). We find defendant's contentions unfounded. *Id.* ¶ 22.

¶ 30 It is true that a matter may be remanded for resentencing where a trial court relies upon improper sentencing factors. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18. Nevertheless, "[o]ur supreme court has made it clear that not every sentencing error mandates a new sentencing hearing. For example, when a trial court considers an improper aggravating factor, our supreme court has noted that 'where it can be determined from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence, remandment is not required.' " *People v. Bourke*, 96 Ill. 2d 327, 332 (1983). Courts have interpreted this language from *Bourke* to mean that where a defendant 'would have received the same sentence' despite the sentencing error, remandment is not required. [Citation.]" *People v. Chromik*, 408 Ill. App. 3d 1028, 1050 (2011).

¶ 31 With respect to defendant's contention that the trial court improperly considered evidence of his gang membership, we initially conclude that he did not properly preserve this issue. While defendant asked the trial court not to consider this evidence at the beginning of the sentencing hearing, he did not include this issue in his written motion to reconsider his sentences. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010) (to preserve a claim of sentencing error, a defendant must both contemporaneously object and file a written postsentencing motion raising the issue).

¶ 32 Even if we overlook this forfeiture and assume that consideration of the evidence of defendant's gang membership was improper, we would not find a remand for resentencing is required. The State recognized at sentencing that defendant might not have been a gang-member at the time of the shooting, and that it was not clear that the shooting was gang-related. Thus, the State itself acknowledged the weakness of this evidence as an aggravating factor at sentencing. Moreover, the trial court never mentioned this evidence in announcing its sentences, indicating the lack of weight it placed on this factor.

¶ 33 With respect to defendant's contention that he was prejudiced by the trial court's consideration of his constitutionally invalid prior conviction for AUUW, we similarly conclude that this issue does not require a remand for resentencing. Defendant's conviction for AUUW was but one of defendant's prior offenses included in the presentence investigation report and highlighted by the State.

¶ 34 Moreover, we recently rejected just such an argument in *People v. Ware*, 2014 IL App (1st) 120485, where we concluded: (1) in the context of a challenge to a sentence in a subsequent criminal case, we did not have jurisdiction to collaterally review any issue as to whether prior AAUW convictions were now void under *Aguilar*; (2) no prior conviction for AAUW was an element of the offense or served as a basis for any statutory enhancement or extended-term sentence in the subsequent criminal case at issue in that appeal; (3) while the defendant's prior convictions for AUUW were mentioned as part of defendant's criminal background, the record revealed that the trial court placed little emphasis on those convictions; and (4) the trial court's comments at sentencing clearly indicated that it was primarily focused on the nature of defendant's crimes in the case at issue on appeal and other, unchallenged prior convictions.

*Id.* ¶ 33-36. This case presents a nearly identical situation, and we see no basis to depart from our reasoning in *Ware*.

¶ 35 Indeed, in this case the trial court itself *never* mentioned either of the above challenged sentencing factors in announcing its sentences. Rather, the only factor specifically discussed by the trial court was the serious nature of defendant's crimes. As discussed above, that was in fact the most important sentencing factor. *Jones*, 2014 IL App (1st) 120927, ¶ 55. We further note that, in considering whether any reversible error occurred at sentencing, a reviewing court should consider the record as a whole. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 37. Here, a review of the entire sentencing proceedings leads us to conclude that any weight placed on the two challenged aggravating factors was so insignificant that it did not lead to greater sentences, and therefore no resentencing is required. *Bourke*, 96 Ill. 2d at 332.

¶ 36 C. Ineffective Assistance of Counsel

¶ 37 Finally, defendant asserts that he was provided ineffective assistance of counsel at his sentencing hearing. We disagree.

¶ 38 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must generally prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010). More specifically, to succeed on a claim of ineffectiveness of counsel at sentencing, defendant must show that counsel's performance was below minimal professional

standards and that a reasonable probability exists that the sentence was affected thereby. *People v. Orange*, 168 Ill. 2d 138, 168 (1995).

¶ 39 While defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Our supreme court has held that "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). A defendant has the burden of establishing any such prejudice. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006).

¶ 40 Defendant specifically contends on appeal that his defense counsel was ineffective for failing to present any evidence or relevant case law in support of the argument that defendant's youth was a significant mitigating factor. However, defendant supports this argument by pointing to nothing other than the scientific research and case law discussed above that he also cited in support of his contention that his sentences were excessive. As we have already explained above, however, we do not think that this research or legal authority supports a conclusion that defendant's sentences were excessive. We therefore do not believe that defendant has met his burden to establish that a reasonable probability exists that his sentences would have been different had these materials been presented to the trial court at sentencing (*Orange*, 168 Ill. 2d at 168), and defendant's contention that he was provided ineffective assistance of counsel at his sentencing hearing is thus unfounded.

¶ 41 III. CONCLUSION

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

¶ 43 Affirmed.