

No. 1-09-3102

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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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. 07 CR 14883
	)	
ROBERT MITCHELL,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE GARCIA delivered the judgment of the court.  
Presiding Justice R. E. Gordon and Justice Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court acted properly by exercising its discretion in rejecting the jury's request for trial transcripts; defendant's sentence was not excessive; and defendant was properly subject to a three-year term of MSR; the trial court's judgment was affirmed.

¶ 2 Following a jury trial, defendant Robert Mitchell was convicted of delivery of a controlled substance and sentenced as a Class X offender to 14 years' imprisonment. On appeal, defendant asserts that (1) the trial court erred when it failed to exercise its discretion in

responding to the jury's request for trial transcripts, (2) his sentence was excessive, and (3) his mandatory supervised release (MSR) term should be reduced from three to two years. We affirm.

¶ 3 At trial, defendant proceeded *pro se*. The evidence revealed that on June 24, 2007, at about 12:25 p.m., Officer Moses Flores drove to 5801 West Fulton Street in Chicago in an unmarked squad car and observed defendant standing alone on the sidewalk. Flores asked defendant if he had any "rocks," and defendant responded by asking Flores how many he wanted. When Flores stated that he wanted one rock, defendant walked over to Flores' vehicle, Flores handed defendant a marked \$10 bill, and defendant gave Flores one rock of cocaine. The transaction was observed by surveillance Officer Dobek. Flores and Dobek radioed their partners that a narcotics transaction had occurred, along with a description of defendant. Shortly thereafter, Officer Rivera and Sergeant Arpaia arrested defendant.

¶ 4 During deliberations, the jury sent a note to the trial court stating, "can we see transcripts of testimony by Officer Doubeck [*sic*] to Officer Flores to come make the buy." After discussing the question with the State and defendant, the trial court returned the jury's note with the question, "Are you asking for a transcript of Dobek's testimony from this past Tuesday, September 15, 2009?" The jury returned the note stating, "Yes." After the court received this response from the jury, it again requested input from the parties on how to proceed. The State suggested that the court instruct the jury that they heard the evidence, while defendant requested the records. The court told the parties that "the court reporter is not available. The transcript was not ordered. [Defendant] did not order daily copy. If it was available, it would be a matter of judicial discretion to provide it. So in exercising my discretion the fact that it is not available." The trial court then returned the jury's note with the following written answer and instruction: "No. The transcripts are not available. You have heard all the evidence in this case.

Please use your collective memory of the evidence and continue your deliberations." Shortly thereafter, the jury found defendant guilty of delivery of a controlled substance.

¶ 5 At sentencing, the State commented in aggravation that defendant had five prior felony convictions, including delivery of a controlled substance, aggravated battery to a peace officer, burglary, robbery, and possession of a stolen motor vehicle. The State also noted that defendant's background made him Class X mandatory. In mitigation, defendant stated that he was a drug addict and that his prior convictions were related to his addiction. Defendant explained that he never received any drug treatment, and that after his terms of imprisonment were over, he was released and continued his drug use. He also argued that the offense at bar involved a small amount of drugs. Following aggravation and mitigation, the trial court sentenced defendant to 14 years' imprisonment. In doing so, the court stated that it considered the presentence investigation report, the factors in aggravation and mitigation, defendant's history of drug abuse, and his social history.

¶ 6 On appeal, defendant contends that the trial court committed reversible error when it failed to exercise its discretion in responding to the jury's request to review Officer Dobek's trial testimony. Defendant specifically maintains that the court mistakenly believed that it had no discretion because a transcript of Officer Dobek's testimony was unavailable.

¶ 7 The decision whether to grant or deny a jury's request for transcripts of testimony rests within the sound discretion of the trial court. *People v. Klinier*, 185 Ill. 2d 81, 163 (1998). Absent an abuse of that discretion, the trial court's determination will not be disturbed on review. *Klinier*, 185 Ill. 2d at 163.

¶ 8 Here, the trial court sent a note to the jury denying its request to review the transcripts of Officer Dobek's trial testimony because they were unavailable. In explaining its decision to the parties, the trial court stated that,

"the court reporter is not available. The transcript was not ordered. [Defendant] did not order daily copy. If it was available, it would be a matter of judicial discretion to provide it. So in exercising my discretion the fact that it is not available."

¶ 9 We have previously held that a trial court exercises its discretion when it denies a jury's request for transcripts for the reason that they are unavailable. See *People v. Shaw*, 258 Ill. App. 3d 119, 122 (1994) (finding that the trial court exercised its discretion where it declined the jury's request for transcripts because they were unavailable); *People v. Whitley*, 49 Ill. App. 3d 493, 500 (1977) (where the trial court denied the jury's request for a transcript because it was unavailable, the reviewing court held that the trial court implicitly recognized that it had the discretionary authority to furnish one to the jury). Therefore, the court's statements in this case show that it expressly exercised its discretion in denying the jury's request because the transcripts of Officer Dobek's testimony were unavailable.

¶ 10 Nevertheless, defendant interprets the court's comments to mean that the court believed it only had discretion to rule on the jury's request if the transcripts were available. In making his argument, defendant focuses on the court's statement that "if [the transcript] was available, it would be a matter of judicial discretion to provide it." Defendant, however, ignores the court's next statement where the court plainly stated that it exercised its discretion in denying the jury's request for Officer Dobek's transcripts.

¶ 11 We further note that *People v. Queen*, 56 Ill. 2d 560 (1974), *People v. Autman*, 58 Ill. 2d 171 (1974), and *People v. Jackson*, 26 Ill. App. 3d 618 (1975), relied on by defendant, are factually distinguishable from the case at bar. In all three cases, the trial courts' responses to the juries' notes were found to be in error because it was clear that they mistakenly believed they were without discretion to consider the juries' requests. *Queen*, 56 Ill. 2d at 565 (in denying the

jury's request for transcripts, the trial court stated, "I cannot have any testimony of any witnesses read to you"); *Autman*, 58 Ill. 2d at 175-76 (trial court responded, "No. It is not permissible to read or play back testimony," to the jury's request for transcripts); *Jackson*, 26 Ill. App. 3d at 629 (trial court failed to ascertain from the jury the specific testimony that it wished to review, and failed to fulfill its duty of determining whether a review of the requested transcript would assist the jury). Here, however, the court did not indicate that it lacked discretion to inquire into the jury's note. It simply stated that the transcript did not exist and that the jury should continue to deliberate. See *People v. Abrego*, 371 Ill. App. 3d 987, 996 (2007) (distinguishing *Queen*, *Autman*, and *Jackson* on similar grounds).

¶ 12 We also find *People v. Bryant*, 176 Ill. App. 3d 809 (1988), relied on by defendant, unpersuasive. In *Bryant*, 176 Ill. App. 3d at 813, this court held that the trial court's combined errors of failing to determine the specific testimony requested by the jury, and the question of whether the defendant or his lawyer was present when the court ruled on the jury's request, required reversal and a new trial for the defendant. Unlike in *Bryant*, however, this court did in fact determine the specific testimony desired by the jury, and both defendant and the State were present when the court made its ruling.

¶ 13 Defendant next contends that his 14-year sentence was excessive. He specifically maintains that his sentence is disproportionate to the nature of the offense, it does not take into account mitigating factors, and runs directly contrary to the constitutional objective of protecting the public's welfare.

¶ 14 Defendant was convicted of a Class 2 offense for delivery of less than 1 gram of cocaine (720 ILCS 570/401(d)(i) (West 2006)), which carries a sentence of not less than three years and not more than seven years' imprisonment (730 ILCS 5/5-8-1(a)(5) (West 2006)). Defendant, however, concedes that he was subject to a mandatory Class X sentence as a Class X

offender (730 ILCS 5/5-5-3(c)(8) (West 2006)), which carries a sentencing range of 6 to 30 years' imprisonment (720 ILCS 5/5-8-1(a)(3) (West 2006)).

¶ 15 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *People v. Alexander*, 239 Ill. 2d 205, 214-15 (2010). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Henderson*, 354 Ill. App. 3d 8, 19 (2004).

¶ 16 The trial court clearly stated that it had considered appropriate factors in mitigation and aggravation. At defendant's sentencing hearing, the court stated:

"I have read the presentence investigation, I have considered the factors in aggravation and mitigation, the arguments of counsel, including your history of drug addiction, your social history, the fact that you were a ward of DCFS, your poor education, family history, your relationship or lack thereof with your family or with your father. I have considered the statements that are in here attributed to you of your drug use. You admitted in here that you sell drugs to support yourself. It may be one of the unfortunate by-products of an individual who is uneducated and has a drug problem.

I believe the State correctly argues that you are Class X mandatory based upon your background and having been

convicted of a third Class 2 or greater offense. \*\*\* [Y]ou have a Class 2 possession of a stolen motor vehicle from '94. You have a Class 2 robbery from '95. You have a Class 2 or greater drug case in 2001 where you received eight years in the Illinois Department of Corrections.

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After considering the factors in aggravation and mitigation, I find an appropriate sentence to be 14 years in the Illinois Department of Corrections."

¶ 17 From these statements, it is clear that the trial court thoughtfully weighed the appropriate mitigating and aggravating factors and sentenced defendant to a term within the permissible sentencing range. The record makes clear that the trial court relied heavily on defendant's extensive criminal background when it sentenced him to 14 years' imprisonment. Therefore, we cannot find that the trial court abused its discretion in imposing a 14-year sentence, which is 16 years less than the maximum.

¶ 18 Defendant finally maintains that his MSR term should be reduced to two years because he was convicted of a Class 2 felony. Defendant does not dispute his status as a Class X offender due to his prior convictions. Although defendant failed to properly preserve this issue for review, he maintains that the State is seeking to enforce a void order which may be challenged at any time. *People v. Thompson*, 209 Ill. 2d 19, 27 (2004).

¶ 19 The MSR term for a Class X felony is three years, and for a Class 2 felony, two years. 730 ILCS 5/5-8-1(d)(1),(2) (West 2006).

¶ 20 Defendant's argument for a reduction of his MSR term has been previously rejected by this court. In *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995), we affirmed

the three-year MSR term based on our finding that the gravity of conduct offensive to the public safety and welfare that authorizes Class X sentencing requires lengthier watchfulness after prison release than less serious violations. See also *People v. Watkins*, 387 Ill. App. 3d 764, 767 (2009); *People v. Smart*, 311 Ill. App. 3d 415, 417-18 (2000).

¶ 21 Defendant takes issue with these holdings and cites to *People v. Pullen*, 192 Ill. 2d 36 (2000), for support. In that case, the supreme court held that defendant's maximum consecutive sentence is determined by the classification of the underlying felonies. *Pullen*, 192 Ill. 2d at 46. Reviewing courts that have considered the application of *Pullen* in similar situations have concluded, contrary to defendant's position, that a defendant sentenced as a Class X offender is subject to a three-year term of MSR. See *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Lee*, 397 Ill. App. 3d 1067, 1073 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 83 (2010); and *People v. Lampley*, 405 Ill. App. 3d 1, 13-14 (2010). In following the above cited cases, we find that defendant, who is a Class X offender, was properly subject to a three-year term of MSR.

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

¶ 23 Affirmed.