

2011 IL App (1st) 092544-U

SECOND DIVISION
August 30, 2011

No. 1-09-2544

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 27752
)	
DONNELL WHITE,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Where record reflects that trial court at sentencing considered defendant's family background, work history and other factors in mitigation and did not lend weight to inappropriate factors in aggravation, and sentences for firing weapon at police officers were well within statutory range, the court's sentencing decision should not be disturbed ; the trial court's judgment was affirmed.
- ¶ 2 Following a jury trial, defendant Donnell White was convicted of aggravated discharge of a firearm, armed violence, unlawful use of a weapon by a felon and aggravated unlawful use of a weapon. Defendant was sentenced to concurrent terms of 25 years each for the first two

convictions and 10 years and 3 years, respectively, for the latter two offenses. On appeal, defendant contends the trial court erred in imposing sentences greater than the minimum statutory terms for the two most serious offenses by failing to give weight to various factors in mitigation and also by considering erroneous factors in aggravation. We affirm.

¶ 3 At trial, the State presented evidence that on September 13, 2006, defendant was riding in a car and fired a .44-caliber revolver three times at a vehicle occupied by two Harvey police officers in pursuit. When the car was stopped and defendant was arrested, he threw into the car a bag containing 2.1 grams of crack cocaine. To support the charge of unlawful use of a weapon by a felon, the State presented proof of defendant's prior felony conviction for manufacture or delivery of cannabis.

¶ 4 On appeal, defendant contends that in sentencing, the trial court failed to consider several factors indicative of his rehabilitative potential, and he argues this court should either: (1) vacate the 25-year sentences for two of his convictions and impose the minimum sentences for those offenses; or (2) remand for resentencing on those counts. Specifically, defendant contends the trial court did not adequately weigh his family background, work history, lack of a violent character, impoverished childhood, and his mental and physical problems caused by a gunshot wound to the head he sustained in his teen years. Defendant also argues the trial court erred in considering circumstances of the crime as factors in aggravation of his sentence.

¶ 5 The trial court is in the best position to evaluate the record made at sentencing as to aggravating and mitigating factors. *People v. Bailey*, 408 Ill. App. 3d 574, 591 (2011). When a sentence imposed is within the range set out by statute, it may be disturbed only where the trial court has abused its discretion. *People v. Perkins*, 408 Ill. App. 3d 752, 762 (2011). Under that standard, we reverse the trial court's determination only where that ruling is arbitrary or where no reasonable person would take the court's view. *Bailey*, 408 Ill. App. 3d at 591.

¶ 6 The sentences challenged by defendant are his 25-year term for aggravated discharge of a firearm, as defined in section 24-1.2(a)(4) of the Criminal Code of 1961 (the Code) (720 ILCS 5/24-1.2(a)(4) (West 2006)), and his 25-year sentence for armed violence (720 ILCS 5/33A-2(b) (West 2006)). Aggravated discharge of a firearm at a vehicle known to be occupied by police, as committed by defendant, is a Class X felony with a sentencing range of 10 to 45 years in prison. 720 ILCS 5/24-1.2(b) (West 2006). Defendant also was convicted of armed violence for using a firearm while committing the separate felony of possession of a controlled substance, *i.e.*, crack cocaine. See 720 ILCS 5/33A-2(b) (West 2006). Based on the type of weapon defendant used in the offense, his conviction for armed violence is a Class X felony punishable by a minimum term of 20 years in prison. 720 ILCS 5/33A-3(b-5) (West 2006).

¶ 7 Therefore, both of defendant's challenged sentences were within the applicable statutory limits. The 25-year sentence for aggravated discharge of a firearm was on the lower end of that sentencing range, and the 25-year sentence for armed violence was only five years more than the minimum sentence applicable to defendant's crime. This court will not disturb sentences that fall within the statutory guidelines unless they are greatly disproportionate to the nature of the offenses of which the defendant has been convicted. *Bailey*, 408 Ill. App. 3d at 591.

¶ 8 Furthermore, within those statutory ranges, the trial court has wide latitude in sentencing, as long as the court does not consider incompetent evidence or improper aggravating factors and does not ignore pertinent factors in mitigation. *Perkins*, 408 Ill. App. 3d at 762-63. Defendant echoes those permissible issues for appeal, first raising several mitigating factors that he contends the trial court overlooked. He argues the court failed to consider the mitigating evidence of his strong family background and continuous work history. Defendant also emphasizes his non-violent character, impoverished background and mental difficulties stemming from a gunshot wound to the head he sustained as a teenager.

¶ 9 At sentencing, the trial court was provided with a pre-sentence investigation (PSI) report and heard evidence of defendant's criminal history, which included three adjudications for juvenile delinquency for possession of a controlled substance and aggravated battery, and adult convictions for drug possession and delivery and driving on a suspended or revoked driver's license.

¶ 10 The court heard the testimony of Keturah Maynie, with whom defendant shares a 19-year relationship. Maynie and defendant have two children together, and defendant also helped Maynie raise her third child who was born before she met defendant. Maynie stated defendant worked regularly for a cleaning service owned by Maynie's father. She also testified defendant was shot in the head in 1991 when he was 14 years old and that defendant's brother was killed in 1996. Maynie described defendant as a "good family man."

¶ 11 Defendant then made the following remarks to the court that are relevant to his contentions on appeal:

"I just want to say I'm - I'm sorry about what happened.
And I [have] never been a bad person in life. So the background
that the State say is not me. And I feel like everybody makes
wrong decisions in life. And that's what makes you a better man.

*** I raised kids all my life. I raised three kids. I raised
one. The first one I raised when I first met her. *** I took on the
father's responsibility when I was young, when I was 14. *** Took
them to school. Always cooked for my kids. Always did family
things with them all the time.

And I realize the decisions I made in life were not the right decisions. But I just wanted to say that what happened, I'm sorry. They know I wouldn't hurt them. I wouldn't hurt nobody. I know the consequences of hurting somebody. Because I know how it feels to be hurt. And I wouldn't hurt nobody. I know the consequences to them.

I went to work every night. And I made sure I took my kids with us, because that's the way I wanted them to be raised up. To learn how to work, to be responsible in life. I didn't want them [to] know about my life, what decisions I had made. So I did the best I could."

¶ 12 Defendant also mentioned that during his trial, his daughter gave birth to his first granddaughter.

¶ 13 After hearing defendant's statement in allocution, the trial court addressed defendant:

"Mr. White, I have no doubt that [] when you're at home with your wife and your children, I have no doubt that you're probably a good father. I have no doubt in my mind whatsoever. And I do take [to] heart what you wanting better for your kids and raising your kids and everything like this. I also take into consideration the fact that you never had any violence in your background.

However, the evidence in this case indicated that you along with your co-defendant – this is before the police even got involved in the case – were firing out the windows of a moving car. At who or at what I have absolutely no idea. And it may be appropriate maybe in that suburb, but it's not. You may think it is, but it's not.

And then when the police finally pulled up next to you, announced their office, as you and your partner were loading the guns back up again, I assume probably to do the same thing, I don't know. Or maybe to protect yourself, I don't know.

But what happens once they announced their office, to you, that they were the police, and the car took off, what did you do? You turned the gun and fired in the direction of the police.

Now, you said, you know, that they know you wouldn't try and hurt them. You know what? Somebody's firing a .44 caliber handgun at me in my direction, I assume there's one thing in their mind and one thing only. And that's to hit me and kill me. Because a .44 handgun, one shot, there's a good chance it's going to kill somebody or cause some pretty bad injuries.

But you picked a doozie of a time to show your violent background, shooting at two people you knew to be police officers. As I said before, I have no doubt that you're a good father to these children. But you weren't a good parent that day because of the granddaughter you're not going to touch for a while, and the other children who are graduating, you should be around for them, and

you're not. Probably because you got caught up in this drug wealth that you think you're going to get.

But we cannot have people driving down the street like you were, shooting at police officers. It's that simple."

¶ 14 The court then imposed defendant's sentences "based on the factors that I did hear in aggravation and mitigation, reviewing the pre-sentence investigation and the arguments of the attorneys."

¶ 15 In determining an appropriate sentence, a trial court must consider all factors in aggravation and mitigation, including defendant's age, mental ability, credibility, demeanor, moral character, social environment and habits. *People v. Battle*, 393 Ill. App. 3d 302, 315 (2009). Contrary to defendant's argument that the court did not adequately weigh his family background or his non-violent character, the court's remarks clearly indicate it considered defendant's family history as well as the absence of violent offenses in his criminal history up to the point of the instant offense. The court stated more than once that defendant was undoubtedly a "good father" and "never had any violence in [his] background."

¶ 16 Defendant next claims the court did not consider three other mitigating factors: his steady employment history, his impoverished childhood, and his history of mental and psychological problems after he was shot in the head as a teenager. Defendant contends the evidence presented in mitigation of his sentence far outweighed the only appropriate factor presented in aggravation, *i.e.*, his criminal record.

¶ 17 A presumption exists that the trial court considers all evidence that has been presented in mitigation of a defendant's sentence. *People v. Cotton*, 393 Ill. App. 3d 237, 267 (2009). The court heard defendant describe his work ethic to the court. Although a defendant's family history, including an exposure to violence during childhood, can be a mitigating factor at sentencing

(*People v. Morgan*, 187 Ill. 2d 500, 543-44 (1999)), the trial court is not required to enumerate each factor that it considered in arriving at a sentence. *People v. Houston*, 363 Ill. App. 3d 567, 577 (2006).

¶ 18 As to defendant's mental and psychological state, no evidence of a mental deficiency or psychological issue was presented at trial, and defense counsel did not make any such argument at sentencing. The record indicates that after defendant was found guilty in September 2008, a PSI report was prepared in which defendant described his mental health to the interviewer as "good" but stated he had a prior schizophrenia diagnosis. The PSI report stated defendant sustained a gunshot wound to the head at age 15 and had suffered seizures, occasional blackouts and "unbelievable migraine headaches," according to defendant, and that he "has medication but he does not like how it makes him feel."

¶ 19 Before sentencing, the trial court reviewed the PSI report and noted the reference to schizophrenia, to which defense counsel responded, "I noticed that." The court noted defendant "has been in front of me for about the last year and a half" and the court had not observed any unusual behavior. After defendant told the court he was not taking medications prescribed to him, the court *sua sponte* ordered a behavioral clinical examination (BCX) to ascertain whether defendant was fit for sentencing. About 11 months later, in September 2009, the court received the BCX results and determined defendant had been fit to stand trial, no "*bona fide* issue of fitness" existed, and the case could proceed to sentencing. In response to defense counsel's protestations, the court noted counsel did not raise at trial any issue of defendant's mental fitness.

The trial court did not overlook any relevant evidence in mitigation as to defendant's mental health. Defendant described his mental health as "good" in the PSI report. The trial court ordered further examination of defendant's status, and the court determined based on the BCX that no issue existed as to defendant's mental competence. The trial court was informed of

defendant's mental and psychological background, including his previous gunshot wound.

Where mitigating evidence is before the trial court, as it was here, it must be presumed that the trial court considered the evidence absent some indication to the contrary. See *Battle*, 393 Ill. App. 3d at 315.

¶ 20 In summary as to the factors in mitigation, the record of defendant's sentencing hearing confirms the trial court not only heard evidence of the various mitigating factors emphasized by defendant on appeal but the court stated its consideration of his family background and lack of a violent character. The trial court is not required to lend more weight to a defendant's rehabilitative potential than it gives to the seriousness of an offense or other aggravating factors. *Cotton*, 393 Ill. App. 3d at 267. The court heard evidence that defendant fired a weapon three times from a moving vehicle, aiming at police officers.

¶ 21 Defendant next contends the trial court considered two improper points in aggravation of his sentence: his use of a gun and his "drug wealth" motivation. Defendant first points to the court's remarks that firing a weapon evidenced defendant's intent to kill and that "there's a good chance it's going to kill somebody or cause some pretty bad injuries." Defendant argues his offenses already were enhanced by the use a gun to fire at police officers and the court could not employ his use of a gun a second time to determine the length of his sentences for aggravated discharge of a firearm and armed violence.

¶ 22 A factor that is implicit in the offense for which the defendant has been convicted cannot also be used as an aggravating factor in determining his sentence. *People v. Alexander*, 239 Ill. 2d 205, 208 (2010), citing *People v. Conover*, 84 Ill. 2d 400, 404-05 (1981). In other words, a single factor cannot be used as both an element of an offense and a basis for imposing a harsher sentence than would otherwise have been imposed. *People v. Ellis*, 401 Ill. App. 3d 727, 730 (2010).

¶ 23 Defendant points to the court's comment that defendant's actions likely would "kill somebody or cause pretty bad injuries." The potential harm of defendant's actions was not an inappropriate sentencing factor. The threat of serious harm is not an inherent element of the offense of aggravated discharge of a firearm, which only requires that a defendant fire in the direction of a person or occupied car. *Ellis*, 401 Ill. App. 3d at 731.

¶ 24 As to defendant's armed violence conviction, the actual use of a weapon is not an element of that offense and the threat of serious bodily harm is a proper factor to consider in aggravation of a defendant's sentence for that offense. See *People v. Robinson*, 250 Ill. App. 3d 824, 832-33 (1993) (also noting that the varying degree of harm or threatened harm in any offense is a proper aggravating factor even where serious bodily harm is implicit in the offense). Moreover, as the State points out, the court's comments were in response to defendant's statement in allocution that he knew the consequences of hurting someone and did not intend to inflict harm on anyone.

¶ 25 Lastly, we reject defendant's contention that the trial court's remark about defendant's apparent motivation by "drug wealth" unduly influenced its sentencing decision. In determining whether the sentence was properly imposed, a reviewing court looks to the record as a whole and should not focus on a few words or statements of the trial court. *Ellis*, 401 Ill. App. 3d at 730. The court's isolated remark reflected the evidence that defendant was arrested with drugs in his possession in the instant case. Defendant's criminal history also included several drug offenses.

¶ 26 In conclusion, although defendant characterizes his sentences as "much too harsh," we again emphasize that both of the challenged sentences were in the lower portion of the applicable sentencing ranges. The record establishes that the trial court considered the mitigating factors raised by defendant in this appeal and did not give weight to improper aggravating factors.

Accordingly, the judgment of the trial court is affirmed.

¶ 27 Affirmed.

1-09-2544