

No. 1-09-1378

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).

THIRD DIVISION
January 26, 2011

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. 01 CR 12003
)	
TONY CAMPBELL,)	Honorable
)	Kenneth J. Wadas,
Defendant-Appellant.)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

O R D E R

HELD: A judgment of conviction will be affirmed where the record establishes that the trial court, on remand, did not consider inappropriate aggravating factors in resentencing.

This case comes before us following a remand to the trial court for resentencing. *People v. Campbell*, No. 1-05-0927 (2008)

(unpublished order under Supreme Court Rule 23). In a prior appeal, we affirmed Tony Campbell's jury convictions of armed robbery and first degree murder while personally discharging a firearm that caused great bodily harm, but agreed with Campbell that the trial court abused its discretion in sentencing him to an aggregate term of 140 years' imprisonment where it had considered him a felon, rather than the juvenile probationer he was, and remanded the cause for resentencing. *Campbell*, No. 1-05-0927, order at 39-40.

On remand, the trial court sentenced defendant to an aggregate term of 110 years' imprisonment. In defendant's appeal from that judgment, defendant contends that the court again imposed an excessive sentence because it relied on improper factors in aggravation and urges this court to resentence him or remand his cause to a different trial court because the sentencing court is biased against him.

The facts outlined in our previous order show that defendant represented himself at his 2004 trial, and the State presented evidence that he and an accomplice robbed their mutual friend, the victim, Garvey Bernard, of \$3,500, then shot him 11 times, killing him.

At the commencement of the resentencing hearing, the trial court clarified that defendant would be resentedenced on the first degree murder and armed robbery convictions and noted that

consecutive terms were mandatory. Both parties announced that they would rely on the evidence and testimony presented at the first sentencing hearing, then offered arguments in support of their respective positions.

In aggravation, the State noted the facts of the case and the gruesome nature of defendant's act of shooting his friend for money, then urged the court to impose the maximum allowable sentence, an aggregate sentence of 140 years' imprisonment. In mitigation, defendant asked the court to consider that defendant did not have the influence of a father in his life, but had the support of his mother, had lived on his own, and was 17 years of age when the offenses were committed. Counsel also pointed out that defendant has not had any incidents while imprisoned and that he had written a letter to the court showing remorse. In light of these factors, counsel urged the court to sentence him to the minimum term of 51 years' imprisonment.

Defendant exercised his right of allocution, and stated that he was "sorry for the loss of Garvey Bernard's family." He still claimed that he was innocent because he had not pulled the trigger, but took responsibility for taking the "blood money," and asked for mercy and forgiveness.

In announcing its decision, the court first noted the name of the victim, and indicated that the facts of the case were "outrageous." The court also noted that defendant made 11 bad

decisions, the "number of bullets he put into [Bernard]," then reviewed the factors in mitigation. It found several factors "not applicable" to defendant's situation, including whether defendant's conduct caused serious physical harm, whether defendant contemplated that his conduct would cause serious harm, whether he acted under some provocation, or whether there were substantial grounds tending to excuse or justify his conduct. The court reached the same conclusion with regard to victim compensation, and would consider defendant's limited criminal history, but was uncertain as to whether defendant would commit other crimes of this nature.

In aggravation, the court noted that defendant's conduct caused serious harm, that he received compensation, and found applicable the provision that the sentence was necessary to deter others from committing the same crime. The court also found that a minimum sentence was inappropriate given the seriousness of the offense, noted the deterrent effect, but factored in defendant's rehabilitative potential and lack of criminal background at the time of the offense. The court then sentenced defendant to 50 years' imprisonment for the murder plus a 35-year enhancement for personally discharging the weapon, and 25 years' imprisonment for armed robbery, to be served consecutively, resulting in an aggregate term of 110 years' imprisonment.

Defense counsel contemporaneously objected to the court's consideration of several aggravating factors mentioned in this court's order on direct appeal, including the infliction of serious harm and that he received compensation. This was followed by a motion to reconsider, in which defendant argued, *inter alia*, that the court considered inappropriate aggravating factors, including the felony murder conviction vacated on direct appeal and the compensation factor. The trial court denied the motion and defendant appealed. In this court, defendant contends that his sentence is excessive because the court relied on improper aggravating factors, including the felony murder conviction and the inherent factor that he received compensation for the armed robbery.

Sentencing is a matter within the discretion of the trial court and a reviewing court will not disturb the sentence imposed absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977); *People v. Brazziel*, No. 1-08-1455, slip op. at 43 (November 22, 2010). A sentence which falls within statutory limits will not be disturbed unless it is greatly at variance with the spirit of the law or manifestly disproportionate to the nature of the offense. *People v. Fern*, 189 Ill. 2d 48, 55-56 (1999); *People v. Barrios*, 114 Ill. 2d 265, 277 (1986). Sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense; accordingly, the rule that an element

of the offense should not be used as a factor in sentencing is not meant to be applied rigidly. *People v. Spicer*, 379 Ill. App. 3d 441, 468 (2007).

The sentencing range for first degree murder is between 20 and 60 years' imprisonment, (730 ILCS 5/5-8-1(a)(1)(a) (West 2000)), with a mandatory 25 year to life enhancement if defendant personally discharged a firearm proximately causing the death during the commission of the offense. 730 ILCS 5/5-8-1(d)(iii) (West 2000). Armed robbery, a Class X felony, is punishable by a sentence between 6 and 30 years' imprisonment. 730 ILCS 5/5-8-1(a)(3) (West 2000).

Here, the court imposed a sentence of 50 years' imprisonment for murder plus a 35-year firearm enhancement, and 25 years' imprisonment for armed robbery, resulting in an aggregate term of 110 years' imprisonment. Although defendant concedes that these terms fell within the statutory guidelines, he asserts that the court improperly considered defendant's vacated felony murder conviction and the element of compensation, which is inherent in a conviction for armed robbery, in aggravation. As a result, he claims that the court used the compensation factor to aggravate the murder sentence, as well as enter a second consecutive sentence for armed robbery.

Before addressing defendant's contention, we note that in determining whether or not the sentence imposed by the court was

improper, the reviewing court should not focus on a few words or statements by the trial court, but, rather, should consider the entire record as a whole. *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986). Here, the record shows that the court discussed defendant's vacated felony conviction at various points during the sentencing hearing, but did not consider it an aggravating factor.

The court described the facts of the case and noted that the jury found defendant guilty of premeditated murder with a profit motive, inherent in felony murder. The court also twice noted that this conviction had been vacated on a one-act, one-crime theory. The court then systematically considered the statutory aggravating factors, making it clear and explicit when it considered a factor applicable or not, and commented on the factors in question. When read in context, we conclude that the court did not improperly consider defendant's vacated felony murder conviction in determining the length of sentence to be imposed.

As to the compensation factor, we agree with defendant's general proposition that a sentencing court may not consider the proceeds defendant receives from an armed robbery or murder in aggravation. *People v. Vue*, 353 Ill. App. 3d 774, 782-83 (2004). However, a reasoned judgment as to the proper penalty must be based upon the particular circumstances of each case and this does not preclude the court from considering " 'the nature and circumstances of the offense, including the nature and extent of each element of

the offense as committed by defendant.' " *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986), quoting *People v. Hunter*, 101 Ill. App. 3d 692, 694 (1981); *People v. Tolliver*, 98 Ill. App. 3d 116, 117-18 (1981).

This court has previously held that the prohibition against relying upon a factor implicit in the offense, as set forth in *People v. Conover*, 84 Ill. 2d 400, 405 (1981), and cited by defendant, constitutes error but does not mean that any mention of said factor subjects a sentence to reversal. *People v. Csaszar*, 375 Ill. App. 3d 929, 951 (2007), citing *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001), citing *People v. Saldivar*, 113 Ill. 2d at 268-69. In fact, the supreme court noted that it did not intend so rigid an application of that rule which would restrict the trial court's function by forcing it to ignore factors relevant to the imposition of a sentence. *Saldivar*, 113 Ill. 2d at 268.

Here, the court commented that defendant received proceeds from the armed robbery three times during the hearing. One comment occurred during the court's analysis of the aggravating factor of compensation, a factor which the court found inapplicable. The remaining comments came in the context of the court describing the underlying facts and circumstances of the offenses. When read in their totality, we find that the court did no more than recognize this was a factor in the armed robbery and not as an improper aggravating factor. We, therefore, find no error.

Defendant also asserts that we should reduce his sentence or remand his cause to a different trial court because the trial court was biased against him. Initially, we agree with the State that defendant forfeited this argument by failing to object contemporaneously or raise it in a post-sentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). We will not relax the rule simply because defendant claims to be challenging the conduct of the court, because such relaxation is only appropriate in extraordinary cases, such as when a trial court makes inappropriate comments before a jury or relies on commentary rather than evidence, in sentencing a defendant to death. *People v. McLaurin*, 235 Ill. 2d 478, 488 (2009).

In any event, we have found no error by the court on remand, or abuse of discretion in the sentence imposed. Accordingly, defendant's request for other relief is moot, and we affirm the judgment of the circuit court of Cook County.

Affirmed.