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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07—CF—4411
)	
MARSHARELLA K. DIXON,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion by failing to sufficiently weigh mitigating factors in imposing a 10-years sentence of imprisonment for unlawful delivery of heroin; affirmed.

¶ 1 Defendant, Marsharella K. Dixon, was initially charged with drug-induced homicide for delivering heroin to Douglas Cutinello, who died as a result of the ingestion of the drug. Defendant entered an open guilty plea to a reduced Class 1 felony charge of unlawful delivery of heroin, more than 1 gram and less than 15 grams (720 ILCS 570/401(c)(1) (West 2008)), and the trial court sentenced her to four years' probation. Defendant violated probation two months later and the court

re-sentenced her to 10 years' imprisonment. On appeal, defendant argues that the trial court failed to sufficiently weigh certain mitigating factors in imposing the 10-year sentence. We affirm.

¶ 2

BACKGROUND

¶ 3 The State offered the following facts at the guilty plea hearing. On August 25, 2007, Rockford police officers were dispatched to a Super 8 Motel where the dead body of Cutinello was found in room 210. Thomas Newman was present at the scene and told the police that he and Cutinello had gone to a local lounge during the evening hours of August 24. Later, he and Cutinello went to the Super 8 Motel with two dancers from the lounge. Defendant was one of the dancers. She gave Cutinello several bags of what Cutinello believed to be cocaine. Cutinello snorted some of the drug and stated that there was something wrong with the cocaine. Newman and Cutinello went to bed and when Newman woke up the next morning, Cutinello was dead.

¶ 4 Defendant told detectives that during the evening hours of August 24, she spoke with Cutinello at the lounge. Later that evening, defendant and a female friend went to the Penny Pincher Tavern where she purchased \$150 of cocaine. The cocaine appeared to have a dirty white color. Defendant and her friend went to the Super 8 Motel where defendant gave Cutinello the drugs. Cutinello snorted a "really big hit" of the powder. Afterwards, they all fell asleep. Defendant awakened about 9:30 a.m. She felt Cutinello's neck and did not feel a pulse.

¶ 5 It was the opinion of the doctor who performed the autopsy that Cutinello's death was caused, in part, from the adverse effects of heroin. Two packets of powder, which tested positive for the probable presence of heroin, were found in the motel room. The tested weight was less than one gram. However, the stipulated weight of the amount that was delivered to Cutinello was over

1 gram but less than 15 grams. The court found a factual basis for the plea and thereafter accepted the guilty plea.

¶ 6 At the sentencing hearing held on November 4, 2008, the prosecutor argued that defendant's conduct "most certainly caused serious harm" to the victim, that defendant pled guilty to the charge of delivery of a controlled substance, and that the drugs delivered to the victim, in fact, caused his death. The prosecutor gave an account of defendant's prior criminal history, which included repeated violations of probation orders as a delinquent and two battery convictions as an adult. Based on defendant's prior performance while on probation, the prosecutor maintained that, if defendant were sentenced to probation for the present offense, "her prospectus for success would" be "low." The prosecutor also pointed out that the community of Rockford has a "wound right now that's not healing regarding drug sales," and delivery of drugs and drugs in general are causing "rampant, horrible outcomes on this community and people of this community."

¶ 7 The trial court also heard from defense counsel who pointed out that the victim's wife wrote on her victim impact statement that she did not think her husband would want defendant to be imprisoned for her crime. Counsel requested that the court look to the reasons for defendant's prior criminal conduct which was induced or facilitated by Cutinello, noting without objection, that Cutinello wanted the cocaine and asked defendant to purchase the drugs for him. Defense counsel asked the court to take into account defendant's disruptive childhood, that defendant cooperated with police, that defendant was no longer a juvenile, that her two-year old son would be raised without her if she were imprisoned, and that her unborn child would be born in prison. (At the time of the initial sentencing, defendant was eight months pregnant.) Counsel further stated:

¶ 8 “I have explained to [defendant] that she must follow the rules to the letter in the spirit of the terms of probation. Any violations whatsoever, and you can send her to prison for up to 15 years. I believe that that potential sentence hanging over her head, as well as the fear that she has from just the crime and [loss] of her children, that is a tremendous motivator to follow the conditions of probation. And we believe that she will.”

¶ 9 The presentence investigation (PSI) reveals that: (1) defendant was born on October 31, 1986; (2) her father had a criminal history including child abuse charges and abuse of cocaine, heroin, and alcohol; (3) her brother and sister also had drug problems; (4) her mother suffered from chemical and alcoholic addictions; (5) defendant was raised between two households; (6) defendant was placed in foster care when she was 12 years’ old because her father physically abused her; (7) her father was subsequently incarcerated for physically abusing her; and (8) at 17, defendant attempted to commit suicide.

¶ 10 In pronouncing a four-year term of probation, the trial court considered the relevant factors in aggravation, including those listed by the prosecutor. The court also weighed the relevant factors in mitigation, including the PSI, the victim impact statement, defendant’s statement of allocution, defendant’s rehabilitative potential, and the arguments of counsel. The court attempted to fashion a sentence that met the societal needs referenced by the prosecutor, as well as the individual needs of defendant. The court observed:

“The prosecutor has urged me to consider a sentence that would deter others from committing the same type of crime or the same crime to more specifically recite the language of the statute. And in doing that, I have to consider, again, not only the societal

requirements, that others are deterred; but I have to look at the character and attitudes of the defendant.

* * *

[The victim's wife] hopes you can learn to live a good, clean life. She hopes that if you're ever tempted to do drugs or anything illegal, you'll think of this situation. And she attributes to her late husband a forgiving spirit. And she honors that memory by urging you to live a good, crime-free, drug-free life.

* * *

And in this case, I think that justice requires some measure of mercy. And I think if the circumstances were different, I'd be sending you to prison for a long, long time; but under these circumstances, under this particular set of circumstances, I do not find that a sentence of probation would be inconsistent with the ends of justice. *** I find that your rehabilitative potential is such that a probation properly structured with the necessary supervision can provide you an opportunity to live a crime-free, drug-free life as Ms. Cutinello says.”

¶ 11 After the court admonished defendant of her right to appeal, the court stated:

“You know, you have to choose to live for yourself and for your children. And [the victim's wife] sounds like an amazingly forgiving and generous person. And she has forgiven you. And you have to live a life worthy of the forgiveness, you might say, that she has extended to you. You have to live the life of sobriety and productivity for yourself and your children. *** You lived irresponsibly and recklessly up until now. That's all got to

change because I want you to succeed. I really do want you to succeed. But I won't have any hesitation in sending you to prison if you violate.”

¶ 12 On January 9, 2009, just over two months after the initial sentence of probation, the State filed a three-count petition to revoke defendant's probation. At the hearing held on May 4, 2009, the prosecutor presented the following as a factual basis for the petition to revoke. On November 4, 2008, the court placed defendant on a period of four years' probation for violation of unlawful delivery of heroin, and she was ordered to enter and complete treatment at the Women's Treatment Center and told to begin group treatment at the Rosecrance Substance Abuse Treatment Center. Defendant was unsuccessfully discharged from the Women's Treatment Center on January 4, 2009, and did not complete her ordered treatment due to her inability to follow the rules and regulations. Defendant did not attend group treatment at Rosecrance. Defendant also admitted using alcohol on January 7, 2009.

¶ 13 The court reminded defendant that, when it placed her on probation, the court warned defendant that she had committed a Class 1 felony, which required a sentence of 4 to 15 years in prison, and that she would have two years' mandatory supervised release following imprisonment. Defendant stipulated to the allegations in the petition and that the factual basis was sufficient to find that she had violated the conditions of her probation. Defendant admitted that she “messed up” and had “to live up to what [she] did.” The court found defendant had violated her probation.

¶ 14 The trial court heard additional arguments about defendant's history and character at the re-sentencing hearing. The prosecutor argued that defendant was given a substantial opportunity when she was originally sentenced and sent to a facility for a second chance to take the opportunity to

advance herself, but defendant made the conscious decision not to comply with the rules of probation.

¶ 15 As she did during the previous sentencing hearing, defendant reiterated how hard she was going to work to get her life together so that she could raise her sons and “never be in this situation, cause [she did not] want them to experience what [she was] going through.”

¶ 16 In response, the court stated:

“And I have to keep in mind the big picture—the facts of the case, the context, you know, how we got to this point, how you performed on probation, what you pled guilty to. I’ve got to keep it all in perspective.

And you are still a young woman and you really do have your whole life ahead of you and you do have an opportunity to get out of prison and return to raise your family. And how you use that time in prison will, to a large *** extent, determine the quality of life you have when you get out and your future.

So far, you haven’t done very well on probation and you haven’t done well with the second chance and you haven’t done well with the opportunity the State gave you when they reduced the charge.

*** I believe giving less than ten would really diminish the seriousness of what happened here.

* * *

It would be inconsistent with the ends of justice. I have to send a message to the community. Ten years is the—anything less than that would be—wouldn’t be fair to the family, the people involved.

* * *

[W]hen you get out, you'll still be a very young woman, your kids will still be young and you can be a better mom and a better person and a better example.”

Defendant appeals from the denial of her motion to reconsider sentence.

¶ 17

ANALYSIS

¶ 18 Before we begin the analysis, we note that defendant filed an untimely motion to reconsider sentence one day after the 30-day period in which to file a motion to reconsider sentencing. However, in her jurisdictional statement of her appellate brief, defendant maintains the trial court acquired jurisdiction pursuant to the revestment doctrine as set forth in *People v. Montiel*, 365 Ill. App. 3d 601, 605 (2006) (active participation revests jurisdiction). Because the State does not object and request that we revisit the holding in *Montiel*, we will not do so at this time and will proceed to defendant's argument.

¶ 19 Defendant contends that the trial court abused its discretion in sentencing defendant to an excessive 10-year term of imprisonment for unlawful delivery of a controlled substance. Defendant maintains the trial court failed to properly consider the following factors in mitigation: (1) defendant accepted responsibility for her actions by entering an open guilty plea; (2) defendant cooperated with the police in its investigation; (3) defendant expressed deep remorse for her actions; (4) defendant did not intend that her criminal conduct would cause or threaten serious physical harm to another; (5) defendant was raised in a terrible environment where her father was sent to prison for abusing her when she was 12 years' old, where her siblings and parents were all substance abusers, where her mother suffered from chemical addiction and was an alcoholic, and where her father abused cocaine, heroin, and alcohol; (6) imprisonment would entail excessive hardship to her dependents;

(7) defendant was only 20 years' old at the time the offense was committed; (8) defendant's criminal history and unsuccessful discharge while on probation was more indicative of a young woman with an ongoing drug problem; and (9) the amount of drugs seized was minimal. Defendant further argues that a less severe sentence would not diminish the seriousness of the crime, considering the court previously placed defendant on probation.

¶ 20 We turn to the well established rules governing our standard of review. The trial court is the proper forum to determine a sentence and the trial court's sentencing decision is entitled to great deference and weight. *People v. Latona*, 184 Ill. 2d 260, 272 (1998). It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case. *Latona*, 184 Ill. 2d at 272. A sentence that is within the statutory limits for the offense will not be disturbed absent an abuse of discretion by the trial court. See *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). A sentence within the statutory limits is excessive and an abuse of discretion if it "is greatly at a variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). A sentence is an abuse of discretion only when the judgment of the trial court is manifestly unjust or palpably erroneous. *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990).

¶ 21 "Penalties are to be determined not only according to the seriousness of the offense, but also with the objective of restoring the offender to useful citizenship." *People v. Bigham*, 226 Ill. App. 3d 1041, 1049 (1992). The court must "carefully weigh the factors, aggravating and mitigating, in order to reach a fair and just result, one that is based on the particular circumstances of the offense and the defendant." *People v. Palmer*, 162 Ill. 2d 465, 483-84 (1994). Relevant factors in determining what sentence to impose include the defendant's criminal activity, whether or not the

defendant's conduct caused or threatened serious harm, and whether a sentence is necessary to deter others from committing the same crime. 730 ILCS 5/5—5—3.2 (1), (7) (West 2008). Factors in mitigation include whether the defendant is particularly likely to comply with the terms of a period of probation. 730 ILCS 5/5—5—3.1(a)(10) (West 2008). The weight to be attributed to each factor in aggravation and mitigation depends upon the particular circumstances of the case. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998). The trial court is not required to recite and assign a value to each mitigating factor, and the existence of mitigating factors does not obligate the trial court to impose the minimum sentence. *People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1994).

¶ 22 A careful review of the record indicates that the trial court considered the mitigating factors cited by defendant. Having heard argument of defendant's counsel during the initial sentencing and re-sentencing, the court was well aware of defendant's acceptance of responsibility for her actions; cooperation with the police, expression of remorse, her family background and upbringing, her age when she committed the offense, the excessive hardship the term of imprisonment would have on her two young children, the minimal amount of drugs seized, her intention not to cause serious physical harm to another, the tragic occurrence of the victim's death, and the victim impact statement. Where mitigation evidence is before a court, it is presumed that the court considered that evidence, absent evidence to the contrary. *People v. Canet*, 218 Ill. App. 3d 855, 864 (1991). Furthermore, the existence of mitigating factors does not obligate the court to reduce the sentence from the maximum or to impose the minimum sentence. *People v. Madura*, 257 Ill. App. 3d 735, 740-41 (1994).

¶ 23 The trial court determined that a lenient sentence was not long enough to deter or punish defendant for her crime in weighing the mitigating factors against those factors in aggravation. The

trial court had shown leniency with the prior imposition of a probationary term and defendant violated the terms within two months. When a trial court imposes sentence following revocation of probation, the trial court must sentence the defendant based upon the original offense. *People v. Gilkey*, 263 Ill. App. 3d 706, 713-14 (1994). But the trial court may also consider defendant's conduct on probation in assessing his history, character and rehabilitative potential. *Gilkey*, 263 Ill. App. 3d at 714. Additionally, the sentence imposed fell well within the statutory guidelines of between 4 and 15 years of imprisonment (720 ILCS 570/401(c)(1) (West 2006); 730 ILCS 5/5—8—1(a)(3) (West 2006)). The court also considered the seriousness of the offense of delivering drugs to the victim and that the drugs delivered caused the victim's death; defendant's long criminal history; the impact the crime had on the community; the need to protect society from similar crimes, the need to deter others from committing the same offense; and defendant's failure to comply with the terms of probation.

¶ 24 We cannot say that the trial court abused its discretion in failing to weigh the mitigating factors differently, and we will not substitute our judgment for that of the trial court merely because we would have weighed the factors differently. See *People v. Fern*, 189 Ill. 2d 48, 53 (1999). Considering the discretion vested in the trial court, the factors presented in aggravation and mitigation, and that the sentence imposed falls well within the statutory sentencing range, we do not find the sentence excessive.

¶ 25 CONCLUSION

¶ 26 For the reasons stated, we affirm the decision of the circuit court of Winnebago County.

¶ 27 Affirmed.