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No. 3--09--0339

Order filed April 6, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

| | | |
|----------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE OF |) | Appeal from the Circuit Court |
| ILLINOIS, |) | of the 14th Judicial Circuit, |
| |) | Rock Island County, Illinois |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 05--CF--737 |
| |) | |
| RAPHAEL L. OWENS, |) | |
| |) | Honorable Charles H. Stengel, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

Held: The trial court did not err in sentencing defendant to 18 years for residential burglary.

Defendant, Raphael Owens, appeals his sentence of 18 years for residential burglary. Defendant argues that his

sentence should be reduced because the court relied on improper sentencing factors and imposed an unreasonably long sentence. He claims that the court applied factors inherent in the offense in aggravation, and he argues that his sentence is unreasonably long because his co-conspirator only received a sentence of four years. The factors relied upon by the court are sufficient to support the sentence in this case. The factual differences between the defendant and his co-conspirator in this case preclude finding defendant's sentence unreasonable in relation to the co-conspirator. We affirm.

FACTS

The State charged defendant with residential burglary in August 2005. Defendant was 19 at the time of the alleged burglary. At trial, the owner of the residence in question testified that she returned to her house after being gone for over an hour. When she entered her house, she saw a shadow moving in an upstairs room and heard noises in the attic. She ran downstairs and called the police. She then proceeded back up the stairs and saw defendant coming down

the stairs. Defendant said that her daughter was upstairs to which the owner replied that she was not upstairs but was at school. Defendant pushed the owner aside and ran out the front door. She never saw the other person in her house. She later identified the defendant as the person she saw in her home.

Jamiele Fayson testified at trial. He was defendant's co-conspirator. Prior to the trial, he pled guilty to burglary of the residence and was sentenced to four years in the Department of Corrections. As part of his plea agreement, he agreed to testify against defendant. Fayson explained that he entered the house through a window on the second floor and then let defendant in through the front door. When the owner arrived, he was in the attic. He left by jumping out a window.

After Fayson's testimony, while the jury was not present, the defendant asked the court if he could say something. The court allowed it. Defendant then said, "I never once say [sic] that I did not go in this woman's house." Defendant's counsel then advised him to quit

talking. A police detective who was present at the time later testified that "[defendant] made a statement to the judge that he wanted to ask a question, the judge gave him permission to speak, he held his hand up, he says I'm not saying I wasn't in that woman's house." The defense put on no evidence and the jury convicted defendant.

At sentencing, the State requested a sentence of 18 years and supported that request by a review of defendant's criminal history. In August 2003, defendant was convicted of two Class 4 felonies: possession of a controlled substance and aggravated unlawful use of a short barreled shotgun. He received adult probation for those offenses. While still on probation for those offenses, defendant was convicted of aggravated robbery and received a sentence of five years followed by two years of supervised release. Defendant committed the burglary which gives rise to this case while on supervised release.

The court specifically pointed out that each time defendant was on parole, he committed additional felonies. The court said, "This burglary occurred in broad daylight at

a time in which you believed the -- the evidence would show, that you believed that the occupants of the house would not be there, would not be coming home. That it was planned. That you knew that this would be the time to strike."

The court said that after it considered all the factors in mitigation and aggravation, a long sentence was required to protect the public. The court then explained why. It said, "Because you get out, and you would do the same thing all over again. You didn't learn at the time were you [sic] on probation in Cook County, you didn't learn at the time that you were on parole this time, and you committed a Class 1 felony offense." The court again explained that the defendant committed additional felonies each time he was placed on supervised release. The trial court denied defendant's motion to reconsider sentence. Defendant appeals.

ANALYSIS

Defendant argues that the trial court relied on improper factors in fashioning his sentence. First, he points to two facts discussed by the court, that this

burglary occurred in broad daylight and was planned in advance. He argues the court's use of these facts as aggravating factors was improper because those facts are elements of the crime. Second, he argues that the court improperly relied on the need to protect the public as its reason for imposing an extended term sentence.

We review the trial court's sentencing decision for an abuse of discretion. *People v. Reed*, 376 Ill. App. 3d 121, 127 (2007). The trial court's sentence is entitled to great deference; the trial court is in a much better position than this court to determine the correct sentence. *Id.* We presume the sentence is correct. *Id.* at 128. The defendant must provide an affirmative showing of error to obtain relief. *Id.*

I. Improper Factors

A. Elements of Robbery

Defendant argues that the trial court used improper aggravating factors when it noted that defendant and Fayson committed this crime in broad daylight, by brazenly using a ladder to crawl through a second-floor window. The court

found that this showed the burglary had been planned in advance. Defendant argues that this should be a factor in mitigation because it showed they were trying to avoid violence by avoiding people. We will not second guess the trial court's determination that this was an aggravating factor in this offense.

Defendant also argues that these two factors are elements of residential burglary, making them improper aggravating factors. Residential burglary occurs when someone "knowingly and without authority" enters someone else's dwelling "with the intent to commit a felony or theft." 720 ILCS 5/19-3(a) (West 1996). Neither advance planning nor time of day are elements of residential burglary. While police often refer to a burglar as a "second story man," the point of entry is also not an element of burglary. The trial court did not consider improper factors in aggravation.

B. Extended Term Sentence

Defendant next argues that the trial court improperly relied on its belief that a long sentence was required to

protect the public to support imposition of an extended term sentence. The court need not list every factor it considered in sentencing. *People v. McGhee*, 238 Ill. App. 3d 864, 882 (1992). However, it must indicate its consideration of the factors relied on when imposing an extended term sentence. *Id.* "The absence of specific findings will not result in a remand where the sentence is justified by the record." *People v. Pinkonsly*, 331 Ill. App. 3d 984, 991 (2002). In *People v Brown*, 327 Ill. App. 3d 816 (2002), the court addressed a trial court's imposition of an extended term sentence. It said: "While the trial court did not precisely articulate 'I am sentencing defendant to an extended term of 6½ years based on defendant's prior felony convictions,' *** neither the Unified Code nor case law requires such a strict pronouncement of sentence. While it would be a wise practice for every trial judge to be so precise, the Unified Code and [case law] merely require the trial court to enumerate its consideration of requisite aggravating factors that support the imposition of an extended-term sentence."

Id. at 827.

Defendant was eligible for an enhanced sentence because he had committed a Class 1 felony in the 10 years prior to committing the residential burglary for which he was convicted in this case. 730 ILCS 5/5-5-3.2(b) (West 2006). While the trial court did not explicitly state that it was imposing an extended term sentence due to defendant's previous Class 1 felony conviction, it did repeatedly mention the prior Class 1 felony conviction. We find no error.

II. Unreasonable Sentence

The defendant's final argument is that his sentence is unreasonably long for two reasons. First, the sentence of his co-conspirator was only 4 years while defendant received an 18-year sentence. Second, the trial court failed to consider rehabilitation as an objective in sentencing.

A. Sentence Comparison

"A disparity in sentences will not be disturbed where it is warranted by differences in the nature and extent of the concerned defendant's participation in the offense."

People v. Flores, 153 Ill. 2d 264, 294 (1992). But an "arbitrary and unreasonable" difference in the sentence between similarly situated co-defendants is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). A mere disparity in sentences does not violate fundamental fairness and will not be disturbed where it is warranted by the difference in the participants "participation in the offense." *Id.*

Defendant attempts to show that his sentence is unreasonable because it is so much longer than Foyle's sentence. However, "[a] sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial. [Citation.] Further, dispositional concessions are properly granted to defendants who plead guilty when the interest of the public in the effective administration of criminal justice would thereby be served. [Citation.]" *People v. Caballero*, 179 Ill. 2d 205, 217-18 (1997). Foyle's pled guilty. We cannot compare his sentence with that of the defendant. Defendant's argument fails.

B. Rehabilitation

Defendant further argues that his sentence is unreasonable because the trial court failed to consider rehabilitation as an objective in sentencing. He is correct that the trial court must consider his rehabilitative potential in determining a sentence. Ill. Const. 1970, art. 1, §11; *People v. Smith*, 178 Ill. App. 3d 976, 985 (1989). A review of the record indicates that the court did consider rehabilitation in this case.

The trial court did not explicitly state that it found the defendant to lack rehabilitative potential. However, it is clear from its comments that it considered rehabilitation. The court's main focus in sentencing was that defendant had committed this residential burglary, while on supervised release for a previous Class 1 felony. Further, it noted that the prior Class 1 felony was committed while he was on parole for two prior Class 4 felonies. The court considered the defendant's potential for rehabilitation. It concluded that potential was very low. We find no error.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island is affirmed

Affirmed.