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No. 3-09-0580

Order filed February 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 13 th Judicial Circuit
)	LaSalle County, Illinois,
Plaintiff-Appellee,)	
)	No. 08-CF-0800
v.)	
)	
DANNETTE DUFFY,)	The Honorable
)	Cynthia Raccuglia,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Wright and Lytton concurred in the judgment.

ORDER

Held: Where the record reveals that the trial court reviewed the appropriate factors in aggravation and mitigation and the sentence is within the permissible statutory range, we find the court did not abuse its discretion in fashioning defendant's sentence.

FACTS

Defendant, Dannette Duffy, was charged on December 22, 2008, with two counts of unlawful financial exploitation of an elderly person (720 ILCS 5/16-1.3(a) (West 2008)). The

information alleged that, between December 2005 and July 2008, while standing in a position of trust and confidence to Mardel Keeney, an elderly person above the age of 70, defendant knowingly and illegally used the assets of Mardel by breaching a fiduciary relationship with Mardel with said assets having value in excess of \$100,000.

On February 26, 2009, defendant, who is Mardel Keeney's daughter, pled guilty to one count of unlawful financial exploitation of an elderly person. The remaining count was dismissed. The parties stipulated that defendant's two brothers, Richard and William Keeney, would testify that their mother, Mardel, is 75 years old and suffers from dementia and had been living at Manor Court, which is an assisted living facility. Richard and William learned from Manor Court that their mother had defaulted on her rent payments to the facility and was scheduled for eviction from that location. Defendant had power of attorney for her mother's care. Defendant admitted to the police that she had been taking funds from Mardel's account and living off the funds the last several years. Mardel's financial records revealed between \$130,000 and \$150,000 in missing funds. After admonishing defendant and hearing the factual basis, the trial court accepted defendant's guilty plea and ordered a presentence investigation report (PSI).

The PSI noted that defendant had no prior criminal history. Defendant has four children ages 18-23, has a sporadic work history, and has attended some classes at Illinois Valley Community College. She has a 20-year history of mental illness. Records attached to the PSI note that defendant suffers from severe depression, dysthymia, borderline personality disorder, and seizures. Defendant has frequently been hospitalized in several mental health facilities. She has attempted to commit suicide and has reported an inability to cope due to her limited finances.

At defendant's sentencing hearing, the parties stipulated that restitution in the amount of

\$134,640 be paid to Mardel. No restitution had been paid at the time of the hearing.

Defendant's 24-year-old son testified that due to his previous lifestyle choices, he would either be incarcerated or deceased without the defendant's support. He also testified that he suffers from major depression, which his mother has helped him address.

Defendant's 22-year-old son testified that he resides with defendant and has been unemployed due to issues with anger, attention deficit disorder, bipolar disorder and depression. Defendant has counseled him with his issues and assisted him with his medications. He opined that the family would "fall apart" if defendant were sent to prison.

Defendant's 20-year-old daughter testified that she has a 16-month-old son, whom defendant babysits and helps raise. She also testified that defendant is her only viable babysitting option and without defendant's help, she would probably not be able to maintain employment.

Defendant's 18-year-old son testified that he resides with defendant and she has helped him significantly, especially when he developed right leg parathesia. He still has this disease and needs defendant's assistance around the house. Defendant also helps him travel to and from school, a task other family members cannot help with due to their work schedules.

The trial court sentenced defendant to six and a half years' imprisonment, with two years of mandatory supervised release. The court also ordered defendant to pay \$134,640 in restitution to Mardel. In deciding probation was not an appropriate sentence, the court noted several factors in aggravation. First, although defendant had no prior criminal history, the court noted that the offense occurred several times over a two-and-a-half-year period. Second, although recognizing the likelihood the family would not emotionally survive were defendant sentenced to prison, the court noted that there are "[social] resources [available to the family] other than -- other than

depending upon their mother.” Third, the court disbelieved defendant’s claim of remorse since she never apologized to her mother. Fourth, due to defendant’s depletion of Mardel’s finances, Mardel went from residing at the privately-funded section at her assisted living facility where she received services such as haircuts and manicures, to the publicly-supported section at the facility. Fifth, the court gave some consideration to the fact that defendant would probably be unable to pay the funds back. Finally, the court found a sentence of imprisonment necessary to deter others. Defendant’s subsequent motion to reconsider sentence was denied. This appeal followed.

ANALYSIS

Defendant brings two issues in this appeal arising from the trial court’s sentencing determination. First, defendant asserts that the trial court erred in the determination of her sentence by considering as aggravating factors elements which were inherent in and essential to the crime and the nature of the offense. Second, defendant contends that the trial court erred in declining to sentence her to probation. Specifically, defendant argues that a sentence of probation was more appropriate because the “mitigating factors present in this case dwarfed the *** aggravating factors.” We find a review of the record does not reveal that the trial court considered any improper factors in aggravation. Moreover, we decline to reweigh the factors in aggravation and mitigation since that is not the role of a reviewing court.

Consideration of improper factors in sentencing may be an independent basis for reversal of a sentence. *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001). “Where a defendant claims that the trial court considered improper factors in sentencing, there is a rebuttable presumption that the sentence was proper.” *Burnette*, 325 Ill. App. 3d at 809. Thus, the burden is on the

defendant to affirmatively demonstrate error. *Burnette*, 325 Ill. App.3d at 809.

Defendant first argues that the trial court did not view defendant as a first-time offender, even though she had no criminal history prior to the instant offense. A review of the record, however, rebuts defendant's claim. Specifically, the court stated:

“Of course it's a mitigating factor that [defendant] does not have an extensive criminal history. But we have to remember, as the factual basis suggests, that this particular crime occurred between December 2005 and through the year of 2008. So during almost a two-and-a-half-year period, she was committing multiple crimes, so to speak, by taking the money.

So she's not a virgin as to an incident where this just may have happened once. I don't have a situation here where maybe she took a couple thousand dollars here and there and did what she could to pay it back. And the evidence suggests that this was a repeated action that occurred over a period of time. But it is mitigating that she indeed has no other criminal history.”

Clearly, the court noted defendant's lack of criminal history in mitigation. Moreover, we do not believe that the court erred in noting that the crime was carried out over approximately three years. Instead, we hold this fact highlights the seriousness of defendant's crime. “[T]he seriousness of the crime committed is considered the most important factor in fashioning an appropriate sentence.” *People v. Tye*, 323 Ill. App. 3d 872, 890 (2001).

Defendant also argues that the trial court improperly considered the fact that defendant's

actions resulted in Mardel Keeney being evicted from the private section of the assisted living community. Defendant asserts that this risk is “inherent in the offense of unlawful financial exploitation of the elderly.” In support of her argument, defendant cites the Criminal Code of 1961’s definition of “person with a disability” (720 ILCS 5/16-1.3(b)(2) (West 2008)).

Defendant concludes that “a person with a disability, such as Alzheimer’s, is quite often in some kind of assisted-care facility.” Ignoring the offensive nature of defendant’s claim, we note that defendant was not charged with unlawful financial exploitation of a disabled person. Instead, defendant was charged with unlawful financial exploitation of an elderly person.

To prove defendant guilty of unlawful financial exploitation of an elderly person, the State must establish that defendant (1) stood in a position of trust or confidence with a person 70 years of age or older; and (2) knowingly and by deception or intimidation obtained control over or illegally used the person’s property. 720 ILCS 5/16-1.3(a) (West 2008). The State did not have to establish that Mardel was disabled. Because Mardel’s condition was not an element of the charged offense, it was an appropriate consideration during sentencing. The trial court may consider any facts which tend to aggravate the offense. *People v. Meeks*, 81 Ill. 2d 524, 535 (1980). Here, defendant’s exploitation of Mardel resulted in her being removed from the private section of her assisted-living community. This fact was an appropriate consideration when fashioning defendant’s sentence.

Finally, defendant argues that the trial court improperly considered the fact that the assets were gone and defendant would unlikely be able to pay them back. Defendant asserts that the permanent deprivation of the assets is inherent in the charged offense. In support of his argument, defendant cites the Code’s definition of “permanent deprivation” (720 ILCS 5/13-3

(West 2008)). Much like the above analysis, “permanent deprivation” of the assets is not an element of unlawful exploitation of elderly person under section 16-1.3(a). An individual is guilty of the offense if they “obtain control over” or “illegally use” the assets. 720 ILCS 5/16-1.3(a) (West 2008). Because section 16-1.3(a) is void of any language regarding “permanent deprivation” or a similar act, the fact that the assets are unlikely to be paid back is an appropriate aggravating factor and relevant when considering defendant’s sentence.

Accordingly, we find the record does not reveal that the trial court considered any improper factors in aggravation.

Defendant next argues that the trial court erred in declining to sentence her to probation. “Where the sentence imposed is within the permissible statutory range for the offense of which the defendant was convicted, we may reduce the sentence only where its imposition was an abuse of discretion.” *Burnette*, 325 Ill. App. 3d at 807. Financial exploitation of an elderly person with assets in excess of \$100,000 is a Class 1 felony with a sentence range between 4 and 15 years. 730 ILCS 5/5-4.5-30(a) (West 2008). Here, defendant’s sentence of six and a half years is within the permissible statutory range. Moreover, the trial court expressly found that a sentence of probation would be inappropriate.

We have already held that the record does not reveal that the trial court considered any improper factors in aggravation. Upon review, we find that the record also reveals that the trial court reviewed the factors in mitigation. Because we afford the trial court great deference with respect to its role in balancing factors in mitigation and aggravation (*Burnette*, 325 Ill. App. 3d at 807), we decline defendant’s request to reweigh said factors.

For the foregoing reasons, we affirm defendant’s sentence.

Affirmed.