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No. 3--09--0977

Order filed May 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 12th Judicial Circuit
)	Will County, Illinois
Plaintiff-Appellee,)	
)	
v.)	No. 06--CF--1747
)	
ROBERT MESSEL,)	Honorable
)	Richard C. Schoenstedt
Defendant-Appellant.)	Judge Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and Schmidt concurred in the judgment.

ORDER

Held: (1) Defendant's sentence of 5½ years imprisonment for aggravated driving under the influence (DUI) was not excessive despite several mitigating factors in his favor; (2) trial court did not consider an improper aggravating sentencing factor when it mentioned the victim's death in considering whether defendant was entitled to probation; and (3) trial court erred in entering two convictions and sentences against defendant where it orally stated that the convictions "merged."

A jury found defendant guilty of two counts of aggravated

driving under the influence (DUI). The trial court sentenced defendant to 5½ years in prison. Defendant appeals, arguing that (1) his sentence is excessive, (2) the trial court improperly considered the victim's death as a factor in aggravation of his sentence, and (3) only one conviction and sentence for aggravated DUI should have been entered. We vacate one of defendant's convictions and sentences for aggravated DUI and affirm the remaining conviction and sentence.

Defendant was charged with two counts of aggravated DUI (625 ILCS 5/11--501 (West 2006)). Both counts alleged that on July 6, 2006, defendant, with a blood alcohol level of .08 or greater, crossed the median on Interstate 55 (I-55), struck a vehicle being driven by Ardella Heinz and caused Heinz's death.

The evidence at defendant's trial established that on July 6, 2006, at 12:04 p.m., defendant was driving southbound on I-55, and Heinz was driving northbound on I-55. The van defendant was driving crossed the median and struck Heinz's car, killing her. Defendant's van was traveling between 80 and 89 miles per hour before it crossed the median and 77 to 87 miles per hour at impact. Two 16-ounce cans of beer were found near the wreckage of the van. One can was open; the other one was closed but punctured and empty. The closed can was attached to the plastic rings from a six-pack.

After the collision, defendant was taken to the hospital, where two blood draws were taken. The first, taken at 1:20 p.m.,

showed that defendant's blood alcohol level was .105. The second draw, taken at 3:45 p.m., showed that his blood alcohol level was .059. Dr. Daniel Brown, a forensic toxicologist, testified that, based on the results of defendant's blood draws, defendant's blood alcohol level at the time of the crash was between .114 and .123, which suggested that defendant drank 4½ beers before 12:04 p.m. on July 6, 2006. Defendant told officers that he drank one beer on July 6, 2006, and finished it at approximately 11:15 a.m.

Defendant introduced evidence that he suffered from several medical conditions that put him at risk for fainting episodes. Dr. Vincenzo Bartolomeo, defendant's family physician, testified that defendant's conditions could have caused him to faint while driving. Bartolomeo testified that if defendant suffered a fainting episode while driving on July 6, 2006, the episode would have been worse if defendant was drinking alcohol at the time.

The jury found defendant guilty of two counts of aggravated DUI. Defendant filed a motion for new trial or judgment notwithstanding the verdict. The trial court denied the motion.

At defendant's sentencing hearing, Kevin Heinz, Ardella Heinz's son, provided a victim impact statement, explaining how his mother's death affected him and the rest of his family. Defendant presented statements from several witnesses, including friends and neighbors, as well as his son, who explained that defendant was the sole provider for his 80-year-old wife, who had recently suffered

a broken hip. Defendant provided a statement to the court in which he expressed condolence to the Heinz family for their loss.

Defendant's pre-sentence investigation report revealed that defendant had no prior criminal history. He was born in 1940 and joined the United States Marine Corp in 1959. He served in Vietnam and was honorably discharged from the United States Marine Corp in 1963. The next year he married Elaine Climek. He had three sons with Elaine. In 2002, Elaine died. The next year he married Andrea Anderson, to whom he is still married. Prior to his incarceration, defendant was employed for seven-and-a-half years by Homeland Security Custom and Border Protection. Defendant reported "a plethora of medical issues past and present," including anemia, prostate surgery, triple bypass and valve replacement surgeries and a need for cataract surgery.

The State argued that although there were mitigating factors in defendant's favor, including his lack of criminal history and his medical condition, several aggravating factors were present, including the need to deter others from committing the same crime, the excessive speed at which defendant was traveling at the time of the accident, and that defendant was working for the United States Department of Homeland Security and driving one of their vehicles when the accident occurred.

Defendant argued that there were many mitigating factors in his favor, including his lack of criminal history, his medical

condition, the hardship his incarceration would have on his 80-year-old wife, his stable employment history and his feelings of remorse. He argued that no aggravating factors were present.

Before issuing its sentencing decision, the trial court first considered the factors set forth in section 5--6--1(a) of the Unified Code of Corrections (730 ILCS 5/5--6--1(a) (West 2006)¹ to determine if probation was an appropriate punishment. The trial court found that defendant's history, character and condition were

¹ Section 5--6--1(a) of the Unified Code of Corrections provides in pertinent part:

"(a) Except where specifically prohibited by other provisions of this Code, the court shall impose a sentence of probation or conditional discharge upon an offender unless, having regard to the nature and circumstances of the offense, and to the history, character and condition of the offender, the court is of the opinion that:

(1) his imprisonment or periodic imprisonment is necessary for the protection of the public; or

(2) probation or conditional discharge would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice." 730 ILCS 5/5--6--1(a) (1)-(2) (West 2006).

"very positive." On the other hand, "[t]he nature and circumstances of the offense is [sic] such that it could not be much worse in terms of what occurred, and what occurred was the tragic death of the victim in this case, Ms. Ardella Heinz."

The court then discussed applicable aggravating and mitigating factors. Aggravating factors were defendant's drinking and driving while he was working, the need for punishment, and deterrence. Mitigating factors included defendant's potential for rehabilitation, his medical needs, and his lack of criminal history. The court then concluded that probation "would deprecate the seriousness of the offender's conduct and would be inconsistent with the ends of justice." 730 ILCS 5/5--6--1(a)(1)-(2) (West 2006).

The court sentenced defendant to 5½ years in prison and stated that the two counts of aggravated DUI for which defendant was found guilty "merge at this point." The written sentencing order shows that defendant was convicted of two counts of aggravated DUI and sentenced to 5½ years imprisonment for each. Defendant filed a motion to reconsider sentence, which the trial court denied.

I. EXCESSIVE SENTENCE

Defendant argues that his 5½-year prison sentence was excessive in light of the mitigating factors in his favor and the lack of aggravating factors.

The range of sentences permissible for a particular offense is

set by statute. *People v. Winningham*, 391 Ill. App. 3d 476, 484 (2009). Section 11--501(d)(2)(G) of the Vehicle Code, the statute under which defendant was sentenced, provides in pertinent part:

"Aggravated driving under the influence *** is a Class 2 felony, for which the defendant, unless the court determines that extraordinary circumstances exist and require probation, shall be sentenced to *** a term of imprisonment of not less than 3 years and not more than 14 years if the violation resulted in the death of one person." 625 ILCS 5/11--501(d)(2)(G) (West 2006).

A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense. *Winningham*, 391 Ill. App. 3d at 484-85.

A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment and habits than a reviewing court. *Winningham*, 391 Ill. App. 3d at 485. In considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed the factors differently. *Id.* A reviewing court may not

reduce a defendant's sentence unless the sentence constitutes an abuse of discretion. *Id.*

In *Winningham*, the appellate court held that the trial court did not abuse its discretion in sentencing the defendant to three years imprisonment for aggravated DUI even though the mitigating factors far outweighed the aggravating factors. *Winningham*, 391 Ill. App. 3d at 485. In doing so, the court held that the defendant's three-year prison sentence was necessary to punish the defendant and deter future offenses. *Id.* at 485-86. The court stated: "[T]hose who drive drunk must be on notice that, absent extraordinary circumstances, the penalty for depriving a person of her life as a result of drunk driving will be imprisonment." *Id.* at 486.

In this case, the record shows that the trial court considered the mitigating factors presented by defendant before reaching its conclusion, specifically referring to defendant's lack of prior convictions, his health problems and his rehabilitation potential. The court considered statements provided by the victim's family, as well as defendant and his family and friends. Despite these mitigating factors, the court found that 5½ years in prison was necessary to deter defendant and others from committing a similar crime in the future and to punish defendant for his criminal conduct. The sentence imposed here was well within the statutory limits of 3 to 14 years. See 625 ILCS 5/11--501(d)(2)(G) (West

2006). Reviewing the evidence in accordance with the applicable standard of review, we conclude that the court did not abuse its discretion by sentencing defendant to 5½ years in prison.

II. IMPROPER SENTENCING FACTOR

Defendant next argues that the trial court's sentence was based on an improper aggravating factor. Defendant concedes that he failed to object at trial or raise this issue in his posttrial motions. Nevertheless, he contends that we should review it for plain error.

The plain error doctrine may be used in reviewing a sentence if the evidence at the sentencing hearing was closely balanced or the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing. See *People v. Martin*, 119 Ill. 2d 453, 458 (1988). Here, the evidence presented at the sentencing was closely balanced. The State argued that three aggravating factors applied and conceded that two mitigating factors applied. Defendant argued that no aggravating factors were present but that six mitigating factors existed. Since the evidence at the sentencing hearing was closely balanced, it is appropriate to apply the plain error rule. See *Martin*, 119 Ill. 2d at 459.

A factor inherent in the offense may not be considered as a factor in aggravation at sentencing. *People v. Dowding*, 388 Ill. App. 3d 936, 942 (2009). Death is implicit in the offense of aggravated DUI. See 625 ILCS 5/11--501(d)(1)(F) (West 2006);

Dowding, 388 Ill. App. 3d at 942.

There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning; thus, we review the trial court's sentencing with deference. *Dowding*, 388 Ill. App. 3d at 942-43. The burden is on the defendant to affirmatively establish that the sentence was based on improper considerations. *Id.* at 943.

In determining whether the trial court based a sentence on an improper factor, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court. *Dowding*, 388 Ill. App. 3d at 943. In determining the length of a particular sentence within the sentencing range for a given crime, the court may consider the manner in which the victim's death was brought about, as well as the nature and circumstances of the offense. *Id.* However, the trial court may not consider the end result, i.e., the victim's death, as a factor in aggravation where death is implicit in the offense. *Id.*

A trial judge's acknowledgment that a victim died or a general passing comment on the consequences of the defendant's actions do not establish that the judge improperly considered death as an aggravating factor. See *People v. Beals*, 162 Ill. 2d 497, 509 (1994); *People v. Lake*, 298 Ill. App. 3d 50, 58 (1998); *People v. Malave*, 230 Ill. App. 3d 556, 563 (1992). It is unrealistic to suggest that a judge must avoid mentioning the fact that someone

has died or risk committing reversible error. *People v. McClellan*, 232 Ill. App. 3d 990, 1011 (1992). However, where the trial court expressly states that it is considering the death of the victim to be an aggravating factor, the court errs. See *People v. Saldivar*, 113 Ill. 2d 256, 271 (1986); *Dowding*, 388 Ill. App. 3d at 943-44; *McClellan*, 232 Ill. App. 3d at 1011.

Here, in deciding whether defendant should be sentenced to probation or a term of imprisonment, the trial court mentioned that defendant's conduct resulted in the death of Heinz. However, the trial court never mentioned Heinz's death when discussing the aggravating sentencing factors and never stated that it was considering Heinz's death as an aggravating factor in sentencing. The trial court's comments regarding the nature and circumstances of defendant's crime and the end result of that crime do not establish that the trial court considered Heinz's death to be an aggravating factor in sentencing. Thus, we find no error.

III. MULTIPLE CONVICTIONS

Finally, defendant argues that one of his convictions and sentences for aggravated DUI should be vacated because the trial court orally ordered that his convictions "merge." The State agrees.

When the oral pronouncement of a trial court conflicts with its written order, the oral pronouncement controls. *People v. Walker*, 386 Ill. App. 3d 1025, 1026 (2008). In this case, the

trial court orally stated that defendant's two convictions for aggravated DUI "merge" into one conviction. That oral statement prevails over the written sentencing order that shows two convictions and sentences for aggravated DUI. Thus, we vacate one of defendant's convictions and sentences for aggravated DUI.

CONCLUSION

The judgment of the Circuit Court of Will County is affirmed in part and vacated in part.

Affirmed in part and vacated in part.