

NOTICE
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2011 IL App (4th) 100630-U

Filed 12/16/11

NO. 4-10-0630

IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
EARNEST MAURICE BELL,)	No. 08CF84
)	
Defendant-Appellant.)	Honorable
)	Kevin P. Fitzgerald,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 10 years' imprisonment where the sentence was (1) within the permissible sentencing range and (2) neither grossly at variance with the purpose of the law nor disproportionate to the nature of defendant's offense.

¶ 2 In April 2008, defendant, Earnest Maurice Bell, pleaded guilty to unlawful possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(2) (West 2008)). Defendant's sentencing was delayed after questions arose regarding his fitness. In February 2010, the trial court sentenced him to 10 years' imprisonment.

¶ 3 Defendant appeals, arguing his 10-year sentence was excessive where the trial court failed to consider his rehabilitative potential, the nature of the offense, and his criminal history, as well as his "mental and physical health history, drug dependency, and personal losses." We affirm.

¶ 4

I. BACKGROUND

¶ 5 On January 23, 2008, the State charged defendant by indictment with unlawful possession of a controlled substance with intent to deliver (1 to 15 grams of cocaine) (count I), and unlawful delivery of a controlled substance (cocaine) (counts II and III).

¶ 6 On April 18, 2008, defendant pleaded guilty to count I in exchange for the State's agreement to dismiss counts II and III and not seek an extended sentencing term. The parties' written plea agreement provided the trial court would impose a prison sentence of between 4 and 15 years. Specifically, the agreement stated, "open/blind plea--no agreement/promises as to sentencing recommendation." The agreement also indicated if defendant was extended-term eligible, the court would not sentence him to more than 15 years' imprisonment. The parties also "agreed" to a \$2,000 drug-treatment assessment, a \$100 drug-laboratory fee, a \$100 drug-trauma-fund fee, a \$1,000 street-value fine, and a \$200 DNA-analysis fee. The court admonished defendant as to the nature of the charge and the possible penalties. Specifically, the court stated the following:

"I've been tendered a plea agreement which indicates you've reached a partially negotiated plea with the State with respect to these charges.

That agreement indicates you're going to be entering a plea of guilty to count one, possession of a controlled substance with the intent to deliver. The matter is going to be set over for a sentencing hearing. There's no specific agreement with the State as to what sentence will be imposed. Court will order a Presentence

Investigation Report [(PSI)].

There is an agreement as to what statutory fines will be imposed, thousand dollar Street Value Fine plus Court Costs, a \$2,000 Drug Treatment Assessment, a \$100 Lab Fee, hundred dollar Drug Trauma Fund Fine, a \$200 DNA fee.

The sentencing range will be between 4 and 15 years in the Illinois Department of Corrections. This is a non-probationable offense. So if you are extended[-]term eligible, which means you could be sentenced up to 30 years, the parties are agreeing to cap this sentence to 15 years.

We don't know if he's extended term?

MR. HORVE [(Assistant State's Attorney)]: That's correct."

¶ 7 The trial court then accepted defendant's plea and agreed to amend defendant's bail to \$50,000. The court also ordered defendant to immediately report to court services.

Thereafter, however, a warrant was issued for defendant's arrest for failing to cooperate with court services personnel. Defendant was located in South Dakota and extradited to McLean County.

¶ 8 On July 7, 2009, the trial court ordered a psychiatric evaluation to determine defendant's fitness for sentencing purposes. On September 29, 2009, defendant was found unfit to be sentenced and was placed in the custody of the Department of Mental Health. By February 22, 2010, defendant was declared fit for sentencing. Defendant was not extended-term eligible and the trial court sentenced defendant to 10 years' imprisonment.

¶ 9 On March 19, 2010, defendant filed a motion to vacate his guilty plea and reconsider sentence. At the April 19, 2010, hearing on defendant's motion, defendant withdrew his motion to withdraw his guilty plea and instead proceeded on his motion to reconsider sentence, which the trial court denied.

¶ 10 This appeal followed.

¶ 11 I. ANALYSIS

¶ 12 On appeal, defendant argues the trial court abused its discretion in sentencing him to 10 years' imprisonment. Specifically, defendant contends the court failed to consider his rehabilitative potential, the nature of the offense, and his criminal history, as well as his "mental and physical health history, drug dependency, and personal losses."

¶ 13 The State argues defendant's appeal should be dismissed because defendant was required to file a motion to withdraw his negotiated guilty plea before he could challenge his sentence. While defendant initially filed a motion to withdraw his plea, the State notes he later withdrew that motion. As a result, the State asserts defendant's appeal should be dismissed. In the alternative, the State contends the trial court did not err in sentencing defendant to 10 years in prison.

¶ 14 A. Defendant's Plea

¶ 15 We initially note the State argues defendant's appeal should be dismissed because defendant failed to file a motion to withdraw his negotiated guilty plea prior to challenging his sentence. Specifically, the State contends the fact the parties reached an "agreement" as to his street-value fine made his plea negotiated.

¶ 16 Defendant responds, arguing his plea was open because an "agreement" as to a

street-value fine does not transform an open plea into a partially negotiated plea.

¶ 17 Illinois Supreme Court Rule 604(d) provides, in pertinent part, the following:

"No appeal from a judgment entered upon a plea of guilty shall be taken unless the defendant, within 30 days of the date on which sentence is imposed, files in the trial court a motion to reconsider the sentence, if only the sentence is being challenged, or, if the plea is being challenged, a motion to withdraw the plea of guilty and vacate the judgment. No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment. For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. R. 604(d) (eff. July 1, 2006).

¶ 18 In this case, defendant's plea was clearly open as to sentence. While the parties tentatively agreed to forego an extended-term sentence, it turned out defendant was not extended-term eligible. As a result, the State did not forego a sentencing option, *i.e.*, the State gave nothing up. Further, we are unpersuaded by the State's argument that the parties' street-value fine stipulation transformed an otherwise open plea into a negotiated one. Moreover, the State fails to cite a single case to support such a proposition. While the State does cite *People v.*

Diaz, 192 2d 211, 225, 735 N.E.2d 605, 612 (2000), for the general proposition a defendant must move to withdraw his guilty plea prior to challenging his sentence where a plea agreement forecloses the State from arguing for a sentence from the full range of available penalties, our review of the record does not reveal the street-value fine was in fact negotiated or that the State made any significant concession relating to that fine. Instead, it appears the parties merely stipulated to an amount. Moreover, in his brief, defendant emphasizes he is *not* challenging the amount of the street-value fine. Rather, defendant is challenging only the amount of years he must serve. Because defendant's plea was open, he was not required to file a motion to withdraw his guilty plea prior to appealing his sentence. Accordingly, this court possesses jurisdiction to hear defendant's appeal.

¶ 19

B. Defendant's Sentence

¶ 20

Defendant argues the trial court abused its discretion in sentencing defendant because (1) it did not consider his rehabilitative potential and (2) the sentence was excessive considering the nature of the offense and his criminal history as well as his "mental and physical health history, drug dependency, and personal losses."

¶ 21

The State initially contends defendant's argument pertaining to the nature of his offense and his criminal history is forfeited because he did not preserve it in his posttrial motion. With regard to defendant's remaining argument—*i.e.*, the court's failure to consider his rehabilitative potential—the State argues the trial court correctly imposed defendant's sentence. Defendant concedes his argument regarding his criminal history and the nature of his crime was not properly preserved but urges our review of the issue under the plain-error doctrine.

¶ 22

"[T]he plain-error doctrine bypasses normal forfeiture principles and allows a

reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479 (2005). However, before we can determine whether the trial court committed plain error, we must first determine whether any error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 411 (2007).

¶ 23 The trial court has broad sentencing discretion. *People v. Phippen*, 324 Ill. App. 3d 649, 651, 756 N.E.2d 474, 477 (2001). If a sentence falls within statutory guidelines, we will not disturb that sentence unless the court abused its discretion and the sentence is manifestly disproportionate to the nature of the case. *People v. Grace*, 365 Ill. App. 3d 508, 512, 849 N.E.2d 1090, 1093-94 (2006). An abuse of discretion may be found where the sentence is excessive and cannot be justified by any reasonable view of the record. *Phippen*, 324 Ill. App. 3d at 651-52, 756 N.E.2d at 477. A reviewing court must not substitute its judgment for that of the trial court simply because it would have weighed the factors differently. *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999).

¶ 24 In this case, defendant was convicted of unlawful possession of a controlled substance with intent to deliver, a Class 1 felony. 720 ILCS 570/401(c) (West 2008). A Class 1 felony is punishable by a prison sentence of not less than 4 years and not more than 15 years. 730 ILCS 5/5-8-1(a)(4) (West 2008). As a result, defendant's 10-year prison term was within the statutory range. A sentence within the statutory range will not be deemed excessive unless it is manifestly disproportionate to the nature of the offense or deviates from the spirit and purpose of the law. *People v. Spencer*, 303 Ill. App. 3d 861, 871, 709 N.E.2d 687, 694 (1999).

¶ 25 Defendant argues his sentence is disproportionate to the nature of the offense and his criminal history given his "mental and physical health history, drug dependency, and personal losses." However, during sentencing, the trial court referenced the PSI and stated it considered defendant's drug dependency and mental health history. Defendant also contends the court did not adequately consider his rehabilitative potential. However, the court stated it considered defendant's PSI. A trial court that examines a PSI is presumed to have considered the defendant's potential for rehabilitation. *People v. Babiarz*, 271 Ill. App. 3d 153, 164, 648 N.E.2d 137, 146 (1995).

¶ 26 In this case, the trial court properly considered the mitigating and aggravating factors, arguments of counsel, and the PSI in determining defendant's sentence. The PSI described the contents of a report by Terry Killian, the psychiatrist who found defendant unfit for sentencing. The report indicated Killian found defendant was suffering from several psychiatric conditions including severe depression and post traumatic stress disorder. The court also specifically referenced the death of defendant's two children and recognized defendant had a "significant history of drug abuse and addiction."

¶ 27 During defendant's sentencing hearing, defendant's counsel presented the following evidence in mitigation:

"Judge, in mitigation, as you will recall, my client has suffered, basically, severe depression while he was incarcerated and awaiting sentencing in this case. And then in South Dakota he took steps to get properly medicated and now he's much better. He had a death of a child about a year ago and another death of another child

ten years ago. That caused him severe depression. He is the father of two children; one two years of age and one one year, approximately one year of age. He does have contact with his children. He did attempt to cooperate with the officers in this case. He had viewed a photo at least three times in jail and attempted to give them five to six names of people, you know, he thought might be involved. And that was because, you know, he was ordered to cooperate. He freely admitted his involvement in this case both initially at arrest and then by entering a plea of guilty and not using the resources of the court for trial. He also pled fairly quickly if you remember. ***

* * *

Judge, in mitigation, he also has a drug problem[,] which he has acknowledged. So although he has six other cases and they're felony cases, most of those, almost all of those are for small amounts of drugs. They're straight possession of cocaine cases, prior Class 4[']s. And he has, you know, acknowledged that he does have a drug problem."

¶ 28 When mitigating evidence is presented at a sentencing hearing, we presume the court took the evidence into consideration. *People v. Sole*, 357 Ill. App. 3d 988, 993-94, 831 N.E.2d 18, 23 (2005). Moreover, the existence of mitigating factors does not require the court to reduce a sentence from the maximum allowed. *People v. Payne*, 294 Ill. App. 3d 254, 260, 689 N.E.2d 631, 635 (1998). The trial court stated it found the following statutory factors in

mitigation. "Defendant's criminal conduct never caused nor threatened serious physical harm to another. Defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another." The court also stated it considered the evidence presented regarding his initial cooperation with the authorities. However, the court noted after his plea defendant "became a fugitive" and "more than normal amounts of resources" had to be used to return him to Illinois.

¶ 29 The PSI also showed defendant had numerous prior felony convictions. During the sentencing hearing, the trial court referenced the PSI and specifically discussed defendant's prior felony convictions with the State and defendant's counsel. The court noted defendant's prior record contained a "long history of criminal activity." The court also noted the amount of drugs involved in this case suggested defendant "was selling relatively large amounts of illegal substances." In aggravation, the trial court found defendant's "history of prior delinquency and criminal activity" and the necessity "to deter others from committing the same crime."

¶ 30 In sum, defendant was eligible for the statutory maximum of 15 years in prison for unlawful possession of a controlled substance with intent to deliver. After considering the aggravating and mitigating factors, the trial court fashioned a 10-year sentence, which is within the statutory sentencing range for the offense. Accordingly, we conclude the court did not abuse its discretion by sentencing defendant to 10 years in prison. Because we have found no error in defendant's sentencing, defendant has not established plain error.

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State its \$50 statutory assessment against defendant as costs of this

appeal.

¶ 33 Affirmed.