

NOTICE
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NO. 4-09-0952

Order Filed 3/11/11

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
STEPHEN V. TYLER,)	No. 08CF135
Defendant-Appellant.)	
)	Honorable
)	Robert M. Travers,
)	Judge Presiding.

JUSTICE MYSERSCOUGH delivered the judgment of the court.
Presiding Justice Knecht and Justice Pope concurred.

ORDER

Held: Defendant is not entitled to a new sentencing hearing where the trial judge properly considered statutory factors in mitigation.

Defendant, Stephen V. Tyler, was convicted of possession of a controlled substance (less than 15 grams of cocaine) in violation of section 402(c) of article IV of the Illinois Controlled Substances Act (Act), a Class 4 felony (720 ILCS 570/402(c) (West 2008)). Defendant was sentenced to three years' imprisonment in the Illinois Department of Corrections (DOC), with credit for time served, one year mandatory supervised release, and ordered to pay various fines and fees. Defendant appeals, arguing the trial court did not properly consider that his offense did not cause or threaten serious harm to another, a statutory factor in mitigation. See 730 ILCS 5/5-5-3.1(a)(1)

(West 2008). We affirm.

I. BACKGROUND

On June 4, 2008, defendant was charged by information with one count of unlawful possession with intent to deliver a controlled substance, less than 15 grams of cocaine, in violation of section 401(c)(2) of the Act (720 ILCS 570/401(c)(2) (West 2008)) (count I), and one count of unlawful possession of a controlled substance, less than 15 grams of a substance containing cocaine, in violation of section 402(c) of the Act (count II). Defendant pleaded not guilty.

On September 8, 2009, a bench trial was held. Evidence was presented that, on June 3, 2008, Officers Sam Fitzpatrick and Jason Draper initiated a traffic stop on a vehicle in which defendant was a passenger. During a consensual search, Officer Fitzpatrick felt a suspicious object in defendant's pocket. When defendant was asked to remove the object from his front pocket, he fled. Less than a minute later, defendant was apprehended near a storm drain. Immediately prior to his apprehension, defendant was seen trying to throw objects down the drain. Officer Draper was lowered into the drain to retrieve 16 or 17 small plastic sandwich bags containing a white, powdery substance. Two additional sandwich bags containing a white, powdery

substance were found below defendant's person as he was lifted from the ground, handcuffed, and taken into custody.

At the conclusion of the evidence and arguments of counsel, the trial court found defendant guilty on count II of the complaint, unlawful possession of a controlled substance, and not guilty on count I of the complaint, unlawful possession with intent to deliver a controlled substance.

Defendant's motion for a new trial was denied, and a sentencing hearing was held on November 17, 2009. At the hearing, the presentence investigation report was submitted to the trial court. The report detailed defendant's juvenile and criminal history. Defendant's juvenile record included adjudications for battery and aggravated battery of a school employee. His criminal record included convictions for criminal damage to property, home invasion, receiving/selling/possessing a stolen vehicle, and resisting a peace officer. In addition, while on pretrial release in this case, defendant was convicted of manufacturing/delivery of a controlled substance and possession of a controlled substance in LaSalle County case No. 08-CF-661. The State asked the court to consider, as factors in aggravation, defendant's prior juvenile and criminal history, the necessity of deterring others from committing the same crime, and the fact that defendant committed a felony while on pretrial release in this case.

In sentencing defendant, the trial court stated:

"As factors in mitigation, the court finds none. As factors in aggravation, the court finds that the defendant has a history of prior delinquency or criminal activity, and a sentence is necessary to deter others from committing the same crime."

The court sentenced defendant to 3 years' imprisonment in DOC, with credit for 389 days served, 1 year mandatory supervised release, and ordered defendant to pay various costs and assessments. Because defendant committed another felony while on pretrial release for the felony charged in this case, his sentence was ordered to be served consecutively to the sentence imposed in LaSalle County case No. 08-CF-661. (See 730 ILCS 5/5-8-4(h) (West 2008)).

On December 15, 2009, a hearing was held on defendant's motion to reconsider sentence. Therein, defendant asked the trial court to reconsider its sentence because, among other reasons, the court did not consider the mitigating factor that defendant's actions did not cause or threaten serious harm to another. In response to defendant's motion, the court stated:

"One of the facts that the court did take into account in relation to sentencing, by no means the only fact, but this particu-

lar offense was committed while the defendant was out on bond. He was arrested in LaSalle County, felony drug offense while out on bond *** in a case here and was then sentenced to six years on the LaSalle County case.

If you recall, he was found not guilty in this proceeding of [c]ount 1, which would be a little more serious offense.

Reconsidering all these particular factors, the court believes that the sentence is appropriate."

The court denied defendant's motion to reconsider sentence.

This appeal followed.

II. ANALYSIS

Defendant argues he is entitled to a new sentencing hearing because the trial court failed to consider that defendant's actions did not cause or threaten harm to another person, a statutory mitigating factor.

Absent an abuse of discretion, this court will not reduce a sentence that is within the statutorily permissible range.

People v. Burnette, 325 Ill. App. 3d 792, 807, 758 N.E.2d 391, 405 (2001). A trial judge's determination of an appropriate sentence is to be afforded great deference and weight, as the trial judge is in the best position to make a sound determination

regarding punishment. *People v. Deaton*, 236 Ill. App. 3d 530, 546, 603 N.E.2d 803, 815 (1992). A trial judge's recitation of factors in both aggravation and mitigation eliminates speculation regarding the basis of its sentencing decision and better enables a reviewing court to determine if the sentence was proper. *People v. McDonald*, 322 Ill. App. 3d 244, 250-51, 749 N.E.2d 1066, 1072 (2001). However, there is no requirement that a trial judge recite each factor. *Id.*, at 251, 749 N.E.2d at 1072. In fact, when mitigating evidence is before the trial court, it is presumed that the sentencing judge considered it, unless there is some other indication to the contrary, other than the sentence itself. *Id.* Further, where a sentencing judge articulates factors in aggravation, a court of review may assume factors in mitigation were properly considered as well. *People v. Laliberte*, 246 Ill. App. 3d 159, 178, 615 N.E.2d 813, 826 (1993).

In the case *sub judice*, the trial court found no factors in mitigation and found as factors in aggravation defendant's past delinquent and criminal history and the need to deter others from committing the same offense. Defendant filed a motion to reconsider sentence, arguing, in part, the court failed to consider that defendant's crime did not cause or threaten physical harm to another person. At a hearing on this motion, the court stated it had reconsidered "all these particular factors" and found defendant's sentence appropriate. The court

denied defendant's motion to reconsider sentence.

Even if the trial court did not originally consider the mitigating factor that defendant did not cause or threaten physical harm to another during the initial sentencing hearing, the court most certainly considered this factor on defendant's motion to reconsider sentence. See *Laliberte*, 246 Ill. App. 3d at 177, 615 N.E.2d at 826 (finding the trial court is presumed to have considered evidence in mitigation especially when the record demonstrates defense counsel did argue factors in mitigation.) The fact that the court found this mitigating factor outweighed by other aggravating factors is not, in and of itself, sufficient to call into question the propriety of defendant's sentence. Defendant points to no evidence, other than the sentence itself, to suggest that the court did not properly consider statutory mitigating factors before it. Therefore, the trial court did not abuse its discretion in fashioning defendant's sentence.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs of this appeal.

Affirmed.

