

NOTICE

Decision filed 04/07/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0148

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 06-CF-201
)	
GARET BRAXTON LEVERETT,)	Honorable
)	Walden E. Morris,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Welch and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: The 10-year sentence imposed on defendant for reckless homicide is affirmed.

Defendant, Garet Braxton Leverett, appeals from an order of the circuit court of Saline County sentencing him to 10 years in the Department of Corrections for reckless homicide (720 ILCS 5/9-3 (West 2004)). The issue raised in this appeal is whether the circuit court erred in sentencing defendant to 10 years in the Department of Corrections. We affirm.

FACTS

On July 30, 2006, defendant (date of birth, April 30, 1986) was driving his Ford Mustang at a speed in excess of the speed limit when he ran into the victims' motorcycle. An accident reconstructionist from the Illinois State Police opined that defendant was traveling at least 62 miles per hour in a 45-mile-per-hour zone when the accident occurred, and the witness testified that there were no skid marks to indicate defendant made any attempt to stop. The victims, Steven and Tammy, husband and wife, were both thrown from the motorcycle and suffered fatal injuries. The victims were transported to an area hospital,

where Tammy was pronounced dead and Steven died shortly thereafter. The victims were survived by two teenaged sons, Brayden and Austin. Tammy's sister and brother-in-law took over the care of the boys after the victims' deaths.

After the accident, defendant gave a urine sample. Drug tests revealed the presence of three drugs: morphine, codeine, and THC, which is found in marijuana. A homemade cannabis pipe, with residue, was found on the dashboard of defendant's car. Defendant told police that prior to the accident he was talking on his cell phone and dropped it. When he went to retrieve it, he hit the motorcycle without even seeing it.

On August 7, 2006, defendant was charged by information with four counts in conjunction with the accident. Count I charged defendant with aggravated driving under the influence of drugs (625 ILCS 5/11-501(a)(6), (d)(1)(F) (West 2004)). Count II charged defendant with reckless homicide (720 ILCS 5/9-3 (West 2004)). Count III charged defendant with possession of drug paraphernalia (720 ILCS 600/3.5 (West 2004)). Count IV charged defendant with failure to reduce speed to avoid an accident (625 ILCS 5/11-601(a) (West 2004)).

On May 16, 2007, defendant pled guilty to reckless homicide in return for an agreement by the State to drop the three remaining counts. There was no agreement between the State and defendant concerning the sentence to be imposed. The circuit court explained to defendant that the possible sentencing range was 2 to 5 years in the Department of Corrections but that because more than one person died in the accident, defendant was eligible for an extended-term sentence of 5 to 10 years' imprisonment.

Defense counsel stipulated to the State's factual basis, with the "caveat" that defendant would prove at sentencing that "the illegal substances were in no way responsible for this accident." The circuit court accepted the plea and set the case for sentencing. A sentencing hearing was conducted on July 12, 2007.

At the hearing, the State introduced a certified copy of a judgment from Kentucky, which reflected that defendant had pleaded guilty to the offense of unlawful possession of marijuana on October 26, 2005, and had been sentenced to two years' court probation. Jeff Thompson, a probation officer, testified that he interviewed defendant on July 2, 2007, for the purpose of preparing a presentence investigation report (PSI). At that time, defendant told Thompson that the last time he consumed alcohol was mid-May 2007. Thompson testified that in November 2004 defendant voluntarily committed himself to the Gateway Foundation in Carbondale for residential treatment but left after only two days without completing treatment. Thompson was unaware that defendant had signed himself into the drug treatment center three days after he had been arrested for residential burglary and one day after an order of protection had been entered against him.

With regard to the order of protection, the State presented evidence that in October 2004 defendant's previous girlfriend asked for an order of protection against defendant after he had threatened to shoot her to death. According to the written complaint filed by the girlfriend's mother, defendant was angry because her daughter stopped dating defendant and he suspected she was dating someone else. The order of protection was granted.

With regard to the residential burglary, Brent Stanley, a Harrisburg police officer, testified that on November 8, 2004, he investigated a residential burglary involving the theft of a firearm in which defendant was involved. At the time, defendant was 18 years old. When he arrived on the scene, defendant was with his father, Tom Leverett, who was also a Harrisburg police officer, and another young man. Defendant's father told Stanley that his son and the other young man had broken into the house and had stolen a gun and some flashlights. Stanley arrested defendant, who admitted that he had broken into the house and had stolen a gun and some other items.

James Sellers, who owned the home defendant burglarized in 2004, testified that his

son and defendant are friends. The two families worked out an agreement, and therefore, Sellers did not file a police report against defendant regarding the burglary. Also testifying for the State was the accident reconstructionist whose findings have previously been set forth.

Tracy Kleinfeldt, Tammy's sister, delivered a victim-impact statement about how the crime affected the victims' children. Kleinfeldt asked that defendant be given the maximum sentence. Valerie Hodges, another of Tammy's relatives, also submitted a victim-impact statement regarding how the crime negatively affected the victims' families. Hodges asserted as follows: "[Defendant's] life has been one of crime. However, it has been to his benefit to have a father who is a Harrisburg police officer." She asked that defendant be given the maximum sentence of 10 years.

Defendant called Christopher Long to the stand. Long is the toxicologist who performed tests on the urine sample taken from defendant following the accident. He testified that marijuana was found to be present in defendant's urine, but not the active ingredient in marijuana, which is delta-9. According to Long, this means that defendant was not high or suffering any abnormal effects. Defendant could have ingested marijuana three to seven days prior to the accident. Long also testified that while defendant tested positive for seven different opiates, they were trace amounts which did not affect defendant's behavior at the time of the accident.

Defendant testified in allocution as follows:

"I want to tell everybody I'm sorry for what I've done. I've known them all my life, too, and it's really hard for me to go day by day without doing something crazy to myself.

I loved Steve and Tammy so much, you know. It's going to be hard going to deer camp without them now. Seeing Brayden and Austin there is probably going to make

it even tougher. I'm just sorry. I wish I could go back and change things, but I can't. That's all."

The circuit court also considered the findings in the PSI.

Included in the PSI was the recitation of facts taken from the police report of the July 30, 2006, accident. The PSI also provided victim information. It noted that Tammy's brother-in-law stated "that neither he or any other member of his family was seeking vengeance in this case and that the family had a very close relationship with defendant." The report further noted defendant's history of alcohol and drug consumption, that defendant is a 2004 graduate of Harrisburg High School who partially completed a welding program, and that defendant reported being depressed since the accident.

After hearing all the evidence, the circuit court sentenced defendant to the maximum extended-term sentence of 10 years in the Department of Corrections. The circuit court noted that defendant's conduct caused serious harm, defendant has a history of prior delinquency and had not led a law-abiding life prior to the crime in question, and defendant's character and attitude suggest that he is likely to commit other crimes and is not likely to comply with a period of probation. The circuit court noted its extreme disappointment that after defendant had been released on bail after his plea in the instant matter, he was charged with theft on May 23, 2007. The circuit court noted that a preliminary hearing had been conducted on the theft charge, at which time defendant and his attorney had waived the right to present any evidence as it would relate to that charge, and that, therefore, probable cause had been found and the case was set for a trial.

Defendant filed a motion to reduce the sentence. The circuit court denied the motion, and defendant appealed. This court vacated the circuit court's denial of defendant's motion to reduce sentence and remanded with directions that counsel file a certificate of compliance with Supreme Court Rule 604(d) (eff. July 1, 2006). *People v. Leverett*, No. 5-07-0492

(2008) (unpublished order pursuant to Supreme Court Rule 23(c)(2) (eff. May 30, 2008)). On remand, defendant filed a second motion to reduce sentence.

A hearing was conducted on April 2, 2009, on the second motion to reduce sentence. The circuit court specifically noted that, in making its first determination, it had considered the factors in aggravation and mitigation. The circuit court found that nothing had changed since its original pronouncement and that it was still of the opinion, contrary to the assertions in the motion to reconsider the sentence, that defendant has a prior history of delinquency and criminality in that defendant was on probation for a marijuana conviction in Kentucky at the time of the accident in question.

The circuit court noted that within 10 days of pleading guilty to reckless homicide, defendant was again involved in behavior which would lead the court to believe "the character and attitudes of this defendant indicate that he is not unlikely to commit other crimes" and "is not likely to comply with the terms of any probation." The circuit court also specifically stated, "It is fortunate under the circumstances of this case, under the conduct of [defendant] that this Court could not have imposed a sentence in excess of ten years, at least it is fortunate for [defendant]." The court, therefore, denied defendant's motion to modify, reduce, or reconsider the sentence. Defendant filed a timely notice of appeal.

ANALYSIS

The issue we are asked to consider is whether the circuit court erred in sentencing defendant to 10 years in the Department of Corrections. In his original brief, defendant contends that the maximum 10-year extended-term sentence is excessive given his youth (age 20 at the time of the accident), his minimal criminal history, his expressed remorse, his potential for rehabilitation, the circumstances of the offense, and the circuit court's failure to consider the factors in mitigation and aggravation. The State responds that defendant's sentence—which will, assuming good-conduct credit, require him to serve four years in

custody, is appropriate for a person with defendant's history of criminal activity and drug abuse who caused the deaths of two people.

The imposition of a sentence is left to the sound discretion of the circuit court, and absent an abuse of that discretion, the sentence of the circuit court may not be altered upon review. *People v. Younger*, 112 Ill. 2d 422, 427, 494 N.E.2d 145, 147 (1986); *People v. Jennings*, 343 Ill. App. 3d 717, 731, 798 N.E.2d 1211, 1222 (2003). A sentencing judge is in a better position than a reviewing court to impose a proper sentence because the sentencing judge can make a reasoned decision based upon firsthand consideration of such factors as the defendant's credibility, demeanor, moral character, social environment, and habits. A reviewing court must rely entirely on the record before it. *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991). While reviewing courts have the power and authority under Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) to reduce a sentence imposed by the circuit court, that power must be exercised cautiously. *People v. O'Neal*, 125 Ill. 2d 291, 298, 531 N.E.2d 366, 368-69 (1988).

Contrary to defendant's assertions, the record before us indicates that defendant's sentence was the product of thoughtful consideration and a balancing of all the mitigating and aggravating factors. At the conclusion of the sentencing hearing, the circuit court discussed at length the factors to be considered in aggravation and mitigation. During the motion to reconsider, the circuit court specifically stated that it considered all the factors in mitigation and aggravation. Moreover, as the State points out, defendant's recitation of the facts was both incomplete and misleading. First, for example, defendant noted that the victims' brother-in-law advised the probation officer who completed the PSI that no family members were seeking vengeance; however, defendant failed to note the family members who offered victim-impact statements, both of whom stated a preference that defendant receive the maximum sentence.

Second, defendant's history of criminality and drug abuse is more lengthy and involved than defendant would have us believe. A review of the record indicates that defendant has been involved in several incidents, including a residential burglary which involved the theft of a firearm, threats of violence against a previous girlfriend, and a drug conviction in Kentucky. At the time of the offense in question, defendant was on probation for his 2005 misdemeanor drug conviction in Kentucky; nevertheless, tests performed after the accident revealed that defendant had numerous drugs in his system, and a cannabis pipe containing residue was found on the dashboard. While it was agreed that drugs played no part in the cause of this accident, they certainly indicate a propensity by defendant toward drug abuse and reflect poorly on his rehabilitative potential.

Defendant maintains that the State's reliance on his alleged criminal conduct as it relates to a previous girlfriend is misplaced because the evidence came from the girlfriend's mother in the form of a complaint for an order of protection and is a type of double hearsay which is too unreliable to provide an accurate assessment of his potential for rehabilitation. We disagree. During a sentencing hearing, evidence of criminal conduct is admissible even if it was never charged or never resulted in a conviction. *People v. Davis*, 205 Ill. 2d 349, 368-69, 793 N.E.2d 552, 564 (2002) (citing *People v. Flores*, 153 Ill. 2d 264, 296, 606 N.E.2d 1078, 1094 (1992)). In the instant case, the State presented uncontradicted evidence that an order of protection was issued against defendant ordering him to stay away from a previous girlfriend after he threatened to kill her and her new male friend, whom defendant believed she was dating. This evidence was appropriate for the State to present at the sentencing hearing.

Third, as one of the victim's relatives pointed out in her victim-impact statement, it appears defendant has used his father's occupation as a police officer to his advantage. The best indication of this comes from the fact that defendant was not prosecuted on the charge

of residential burglary. Finally, defendant's statement in allocution is also telling. While defendant initially offered an apology, he went on to talk about how difficult this has been on him, thereby making himself into a victim rather than offering actual remorse.

Defendant's sentence was within the statutory limits proscribed by law. As previously discussed, the circuit court was in a better position to judge the credibility, demeanor, and moral character of defendant. Under the circumstances presented here and the record before us, we cannot say that the circuit court's imposition of an extended-term 10-year sentence was an abuse of the circuit court's considerable discretion.

In a supplemental brief, defendant raises an additional argument that the circuit court erred when it considered a fact inherent in the offense of reckless homicide as an aggravating factor at sentencing. Defendant asserts that at sentencing the circuit court specifically noted as a factor in aggravation that "defendant's conduct did cause serious physical harm to another." However, because the threat or causation of serious harm is implicit in reckless homicide, the court improperly considered it a factor in aggravation. The State replies that defendant's argument should be rejected because (1) the circuit court relied on other aggravating factors when imposing sentence and (2) the aggravating factor in question actually existed because there was greater harm here than in other cases of reckless homicide in that there were two victims who died, causing their two children to become orphans. We agree with the State.

Although defendant is correct that the general rule is that a factor implicit in the offense may not be used as an aggravating factor at sentencing, it is not an inflexible rule, and sometimes it is appropriate during sentencing to consider the degree of gravity of a defendant's conduct. *People v. Hunter*, 101 Ill. App. 3d 692, 694, 428 N.E.2d 666, 668 (1981). In *People v. Gold*, 221 Ill. App. 3d 187, 581 N.E.2d 904 (1991), this court pointed out that sometimes the degree of harm may be considered as an aggravating factor in

determining the exact length of a sentence even in cases in which serious bodily harm is implicit in the offense for which a defendant is convicted. *Gold*, 221 Ill. App. 3d at 191, 581 N.E.2d at 907 (citing *People v. Martin*, 119 Ill. 2d 453, 461, 519 N.E.2d 884, 887-88 (1988)). However, in that case we found even if the circuit court's consideration of the harm inflicted upon the victim was improper in sentencing defendant for involuntary manslaughter because serious bodily harm is implicit in the offense of involuntary manslaughter, the error was harmless, in that the circuit court only mentioned the defendant's conduct causing harm to the victim in passing and, in the context of imposing sentence, the conduct carried little weight. *Gold*, 221 Ill. App. 3d at 191, 581 N.E.2d at 907. The same situation is presented here.

Here, the circuit court's reasoning for sentencing defendant to an extended term goes far beyond the fact that his actions caused great bodily harm. Our review of the record shows that defendant's prior criminal conduct and character were the main reasons the maximum term sentence was imposed. The circuit court explained its reasons for imposing the maximum sentence at the original sentencing hearing and at the hearing on the motion to reduce the sentence. At the sentencing hearing the circuit court specifically found that "defendant's criminal conduct did cause serious physical harm to another." However the circuit court went on to state as follows:

"The Court finds that defendant has a history of prior delinquency or criminal activity and has not led a law-abiding life for a substantial period before the commission of the present crime.

The Court finds and would emphasize that the character and attitudes of the defendant indicate that he is likely to commit other crimes and that the defendant is not particularly likely to comply with the terms of a period of probation."

The circuit court went on to point out that after it granted bail to defendant on May 16, 2007,

defendant was charged with the offense of theft on May 23, 2007, and further violated the terms conditions of his bail bond, which forbade him from driving or consuming alcohol. At the preliminary hearing on the theft charge, defendant waived the right to present any evidence as it would relate to that charge, and thus, the circuit court found probable cause. The circuit court noted its disappointment in defendant and found that "imprisonment is necessary for the protection of the public and that probation would deprecate the seriousness of this offense or be inconsistent with the ends of justice." The circuit court also noted that because the conduct to which defendant pleaded guilty caused the death of more than one person, an extended term was appropriate. It then sentenced defendant to 10 years.

At the motion to reconsider the sentence, the circuit court did not mention the statutory aggravating factor of serious harm but instead stated that the sentence was appropriate for the following reasons: (1) defendant has a history of prior delinquency and criminality as evidenced by the marijuana conviction for which defendant was on probation at the time of the reckless homicide, and (2) while out on bail after pleading guilty, but before the sentence was imposed, defendant broke the conditions of that bail by driving a car and violating the conditions of his bail. The circuit court went on to explain, "[T]he character and attitudes of this defendant indicate that he is not unlikely to commit other crimes." The circuit court also noted that defendant was lucky that 10 years was the maximum allowable sentencing, thus indicating that if a longer sentence could have been imposed, it would have been.

The record does not support defendant's assertion that his sentence was increased because of a factor inherent in the offense. It is clear to us after reviewing the record that defendant's sentence was the result of his prior criminal behavior and the circuit court's complete distrust of this defendant. Even assuming, *arguendo*, that it was error for the circuit court to mention defendant's conduct causing harm to the victims as a factor in aggravation,

the error was harmless.

For the foregoing reasons, the judgment of the circuit court of Saline County is hereby affirmed.

Affirmed.