

NOTICE

Decision filed 03/10/11. 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. 5-09-0530

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,)	Jackson County.
)	
v.)	No. 08-CF-178
)	
WALTER HOLDERBAUM, JR.,)	Honorable
)	E. Dan Kimmel,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Chapman and Justice Donovan concurred in the judgment.

R U L E 2 3 O R D E R

Held: The circuit court did not abuse its discretion in sentencing the defendant to a midrange term of imprisonment where it gave careful consideration to the factors in aggravation and mitigation and adequately considered the defendant's potential for rehabilitation as well as the seriousness of the crime.

On March 28, 2008, the defendant, Walter Holderbaum, Jr., was charged in the circuit court of Jackson County with two counts of unlawful delivery of 1 or more grams, but less than 15 grams, of a substance containing cocaine and one count of unlawful possession with intent to deliver 15 grams or more, but less than 100 grams, of a substance containing cocaine. The second count of unlawful delivery was later dismissed on the State's motion.

On May 22, 2009, the defendant entered an open plea of guilty to unlawful delivery of a controlled substance in return for the dismissal of the charge of unlawful possession with intent to deliver a controlled substance. No agreement had been reached with regard to sentencing. The factual basis of the plea was that a confidential informant directed by law enforcement officers had arranged for and purchased approximately 3.6 grams of powdered

cocaine from the defendant. The court accepted the plea and a presentence investigation report was ordered.

The matter came on for a sentencing hearing on July 31, 2009. No evidence was presented at the hearing except the presentence investigation report. The presentence investigation report indicated that the defendant was 29 years of age. The defendant had no juvenile record but had been convicted as an adult of illegal consumption of alcohol by a minor in 1998, battery in 1998, disorderly conduct in 1998, aggravated robbery in 1998, a second charge of aggravated robbery in 1998, unlawful possession of alcoholic liquor in 1999, transportation of alcohol in 1999, operation of an uninsured motor vehicle in 2005, driving under the influence of alcohol in 2006, and battery in 2005. On the first aggravated robbery conviction, the defendant had been sentenced to five years' imprisonment.

The defendant was married and resided with his wife and their three children, as well as a stepchild. The report indicated that on at least one occasion the defendant's seven-month old-child had been present in the vehicle while a delivery of cocaine was made.

The defendant did not graduate from high school but earned his GED in 1999. At the time of the sentencing, the defendant was employed on a part-time, seasonal basis as a laborer at a winery, earning \$10 per hour. He had begun employment there in May 2009. His employer rated him as a very good employee who is very dependable and well-mannered and gets along well with other employees. The defendant had held previous employment and had owned and operated his own lawn care business.

He was in good physical and mental health. He had a history of substance abuse, primarily marijuana and alcohol, for which he had received treatment.

In argument, the State pointed out that the defendant was ineligible for probation because of his prior conviction for aggravated robbery. The State recommended a sentence of 12 years' imprisonment, with credit for one day served, and a fine, costs, and assessments

in the amount of \$4,500. The State further pointed out that the defendant was eligible for an extended-term sentence, but it did not recommend it. The State did recommend a prison term far greater than the minimum because an additional amount of cocaine and marijuana had been discovered at the defendant's home pursuant to a search warrant and he had taken his minor child in the car during a delivery of cocaine.

The defendant's counsel pointed out that the cocaine found at the defendant's home had been found in an outbuilding in which a different man, Eric Mitchell, lived. Mitchell had pleaded guilty in a different case to the delivery of cocaine. A small amount of marijuana was recovered from the defendant's bedroom, but no cocaine was found in his house. Defense counsel agreed that the defendant was not eligible for probation. Defense counsel argued, in a letter written to the court and included in the presentence investigation report, that the defendant had accepted responsibility for his actions and recognized the impact his actions had on his family. A lengthy period of incarceration would entail excessive hardship on the defendant's wife and children. The defendant was working part-time but anticipated working full-time in the near future. He was in training to get his state license for pesticide chemical application, which would increase his earning ability. Defense counsel argued that in light of all this, the defendant is unlikely to reoffend. Defense counsel asked for the minimum sentence of four years' imprisonment.

The defendant made a statement in allocution in which he apologized to the court and to his family. He stated that he was doing very well at his job, which he liked.

The court stated that the defendant's crime was one of forethought and intent to violate the law. It was not a crime of passion or one that occurred incidental to lawful activity. The defendant was not new to the criminal justice system and knew the risk he was taking. The court sentenced the defendant to a 10-year term of imprisonment, with credit for one day served, and a fine, costs, and assessments in the amount of \$4,500. The court did not award

the defendant a \$5 credit toward his fine for the one day he had spent in custody.

On August 27, 2009, the defendant filed a motion to reconsider his sentence, arguing that it was excessive and failed to reflect adequate consideration given to the mitigating factors presented at the sentencing hearing and the defendant's potential for rehabilitation. The motion was denied and a notice of appeal was filed.

On appeal, the defendant argues that the circuit court abused its discretion in imposing a 10-year prison sentence, which is excessive in light of the defendant's potential for rehabilitation. He asks us to reduce his sentence.

The charge of which the defendant was convicted, unlawful delivery of less than 15 grams of a substance containing cocaine, is a Class 1 felony, punishable by a minimum of 4 years in prison and a maximum of 15 years in prison. 720 ILCS 570/401(c)(2) (West 2008). Because of his conviction for aggravated battery, the defendant was not eligible for probation, but he was eligible for an extended prison term of 15 to 30 years. 730 ILCS 5/5-8-2(a)(3) (West 2008). The defendant was not given an extended-term sentence but was sentenced to a term about midway between the minimum and the maximum nonextended terms allowable and two years less than that recommended by the State.

A circuit judge's decisions in regard to sentencing are entitled to great deference and weight, and absent an abuse of discretion by the circuit court, a sentence may not be altered upon review. *People v. Outland*, 226 Ill. App. 3d 1034, 1040 (1992). In order to modify a sentence that is within statutory limits, it must appear that the sentence imposed is a clear departure from the spirit and purpose of the fundamental law and the requirement of the constitution that the sentence be proportionate to the nature of the offense and measure possibilities for rehabilitation. *Outland*, 226 Ill. App. 3d at 1040. The supreme court has repeatedly emphasized the undesirability of a reviewing court substituting its judgment or preference regarding punishment for that of the sentencing court. *Outland*, 226 Ill. App. 3d

at 1040. Accordingly, absent an abuse of discretion, this court must not alter a sentence on appeal merely because it might have weighed the mitigating and aggravating factors differently. *People v. Grace*, 365 Ill. App. 3d 508, 512 (2006).

The sentence imposed in the case at bar is well within the statutory limits. We find no indication in the record that the circuit court failed to consider the factors in mitigation and the factors in aggravation or adequately consider the defendant's potential for rehabilitation as well as the seriousness of the crime.

There is no indication that the court considered any improper facts in sentencing the defendant. The discovery of cocaine at his home pursuant to the search warrant was adequately explained by defense counsel as having belonged to the resident of the outbuilding in which it was found.

We cannot conclude that the circuit court abused its discretion or otherwise erred in evaluating the defendant's potential for rehabilitation. The defendant had a long history of criminal offenses. His work record was somewhat sporadic, and he had a history of alcohol and drug abuse. Not only was he involved in selling cocaine, but an individual living in an outbuilding on his property was also so involved. The mitigating facts that the defendant appeared to accept responsibility for his crime and was gainfully employed do not outweigh these aggravating facts.

Before this court will interfere with the sentence imposed, it must be manifest from the record that the sentence is excessive and not justified under any reasonable view which might be taken of the record. *People v. Smith*, 214 Ill. App. 3d 327, 338 (1991). It is not so manifest, and we will not alter the sentence imposed by the circuit court.

The defendant argues, and the State concedes, that the circuit court erred in failing to award the defendant a \$5 credit toward his fine for the one day he spent in custody prior to the sentencing. See 725 ILCS 5/110-14 (West 2008); *People v. Smith*, 258 Ill. App. 3d 261,

270 (1994). Pursuant to the power granted us by Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we hereby modify the defendant's sentence to award him a credit of \$5 against his fine for the one day he spent in custody prior to the sentencing.

For the foregoing reasons, the judgment of the circuit court of Jackson County is hereby affirmed as modified.

Affirmed as modified.