

No. 1-09-1260

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 3066
)	
JARVIS TERRY,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Considering the record as a whole, defendant has failed to establish that the trial court penalized him for exercising his constitutional right to a jury trial based on defendant being sentenced after his conviction to seven years, precisely what he was told would happen at the 402 conference when he was offered a five-year sentence on a plea of guilty.

¶ 2 Defendant Jarvis Terry was found guilty of delivery of a controlled substance by a jury and sentenced to seven years in prison. Defendant contends that the sentence imposed penalized him for exercising his right to a jury trial when the court told him that he would be sentenced to five years in prison if he entered a guilty plea and to seven if he took a "hit" by going to trial. We affirm.

¶ 3 In January 2008, defendant was charged by indictment with delivery of a controlled substance. At a pretrial conference held pursuant to Supreme Court Rule 402 (eff. July 1, 1997), the trial court informed defendant that he was charged with a Class 2 felony punishable by three to seven years in prison. The State provided the court with the factual basis for the charge and informed the court that defendant's criminal history included four prior felony convictions, with the last three resulting in sentences of imprisonment. On his fourth felony conviction, the defendant was sentenced in 2006 to two years in the Illinois Department of Corrections; he was charged with committing the instant offense on January 7, 2008. The defense indicated that defendant was 20 years old, lived with his grandmother, and was trying to find a job. The court stated that if defendant entered a guilty plea it "would give him five," that is, a five-year prison sentence. However, if defendant took a "hit" following a trial, the court would "give him seven." Defense counsel reiterated the court's offer: "Five years in the penitentiary. Go to trial, seven." The defendant responded, "I'll go to trial."

¶ 4 At the jury trial, Officer Sean Singleton testified that on January 7, 2008, he served as the undercover buy officer. He testified that upon being informed of possible drugs sales at a certain location, he drove to that location, parked his car, and asked defendant "are you straight," which is street terminology for asking to purchase drugs. Defendant replied, "What do you need?" Singleton asked for "rocks." Singleton gave defendant \$50 in prerecorded funds for five clear knotted baggies containing a white rock-like substance, suspected crack cocaine.

¶ 5 Officer Timothy O'Hara testified that he served as one of the backup officers. O'Hara and his partner Officer Akana were given a description of defendant following Singleton's purchase of the suspected cocaine. O'Hara and Akana located defendant on the street and conducted a search, which resulted in the recovery of \$40 of prerecorded funds, based on the serial numbers on the currency matching the serial numbers on the funds used by Singleton. Singleton also observed the stop of the defendant and radioed to O'Hara that defendant was the individual that sold him the suspected crack cocaine. Defendant was not arrested at the time because the investigation of street corner drug sales was ongoing.

¶ 6 Officer Akana testified consistently with O'Hara regarding the stop of defendant. Akana also testified that he and O'Hara went to defendant's home to arrest him on January 16, 2008. According to Akana, when defendant observed the two officers approaching him on the street, he "took off running." Akana gave chase and other officers ultimately arrested defendant.

¶ 7 Forensic scientist Linda Jenkins testified that the total weight of the items recovered from defendant was .8 gram. The contents of the single bag tested was positive for the presence of cocaine.

¶ 8 The jury convicted defendant of delivery of a controlled substance. At sentencing, the State highlighted that defendant had rejected the court's offer at the Rule 402 conference. The State requested that defendant be sentenced to significant prison time in light of his four prior felony convictions. The defense responded that defendant was young and could still choose to do something better with his life.

¶ 9 The trial court stated it never memorialized Rule 402 conferences, had "no independent recollection of the offer," and did not want to know what the offer had been. Following its review of defendant's presentence investigation report, the court stated it was clear defendant "won't stop" selling drugs and sentenced him to seven years in prison.

¶ 10 On appeal, defendant raises a single issue. He contends he was penalized for exercising his right to trial when the trial court indicated during a plea conference that it would impose a five-year sentence if defendant agreed to plead guilty and a seven-year sentence if defendant took a "hit" after a trial. Defendant asks this court to vacate his seven-year sentence and either impose the five-year sentence he was initially offered or remand the cause for resentencing.

¶ 11 A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). While the trial court may properly give concessions to a defendant who enters a plea of guilty, the court cannot penalize a defendant for asserting his right to proceed to trial. *People v. Ward*, 113 Ill. 2d 516, 526 (1986). To determine whether the punishment imposed was due, at least in part, because the defendant chose to proceed to trial, we examine the record as a whole. *People v. Latto*, 304 Ill. App. 3d 791, 804 (1999), citing *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962).

¶ 12 Although a defendant's allegation that his sentence was imposed as punishment for demanding a trial can be shown either inferentially or through the trial court's overt comments, the mere fact that a defendant was ultimately sentenced to a longer prison term than he was offered on a plea of guilty "does not support the inference that the heavier sentence was imposed as a punishment" for the decision to proceed to trial. *People v. Jackson*, 89 Ill. App. 3d 461, 481 (1980); see also *People v. Moss*, 205 Ill. 2d 139, 171 (2001) (concessions to defendants that plead guilty are consistent with the public's interest in the effective administration of justice). This is especially true when a reasonable inference can be drawn from the offer at the 402 conference that the defendant would be granted a "concession" if he elected to plead guilty, otherwise he would be given a sentence that reflected the charge and his criminal history. See *Jackson*, 89 Ill. App. 3d at 481. That the defendant was told he would be sentenced to more

years should he be found guilty after a trial rather than upon a plea of guilty, does not, standing alone, support the inference that the greater sentence was punishment for exercising his right to a jury trial. *People v. Carroll*, 260 Ill. App. 3d 319, 349 (1992).

¶ 13 During the Rule 402 conference in the instant case, the trial court offered defendant a five-year sentence if he were to enter a guilty plea and indicated that the court would impose a seven-year sentence if defendant took a "hit" after a trial. Given the two-year difference between the sentence on a plea of guilty and the sentence he would face should he be found guilty after trial, it is fair to infer that the trial court's message was that defendant's substantial criminal background warranted a substantial sentence. The trial court's statements at the 402 conference make this case unlike the case defendant cites in support. See *Moriarty*, 25 Ill. 2d at 567 (" [i]f you'd have come in here, as you should have done in the first instance, to save the State the trouble of calling a jury, I would probably have sentenced you, as I indicated to you I would have sentenced you, to one to life in the penitentiary. It will cost you nine years additional "). The inference was clear, defendant would receive a "concession" of two years should he accept responsibility.

¶ 14 Nor do we see a need to adopt the State's contention that the facts adduced at trial and in the presentence investigation report provided a more damaging portrait of the defendant than those presented at the 402 conference to reject defendant's contention. *Cf. People v. Peterson*, 311 Ill. App. 3d 38, 53 (1999) (" I heard a lot more [at trial] *** as to exactly how this incident came down. It is much more serious than I originally envisioned "). The court here did nothing more than give defendant an honest assessment of the punishment warranted by his case, in light of his background. Notably, defendant makes no suggestion how the inference of vindictiveness he draws can be avoided short of the trial judge not engaging in a 402 conference or declining to inform a defendant of the punishment he merited without the sentencing

"concession" he would receive on a plea of guilty, either of which we find to be at odds with the aim of effective administration of justice. *Moss*, 205 Ill. 2d at 171.

¶ 15 Based on the totality of the record, we cannot find that the seven-year sentence imposed after a jury trial was meant to punish the defendant for exercising his constitutional right to a jury trial. Defendant's claim is based on nothing more than he received the same sentence he was told his criminal history warranted should he take a "hit" at trial, after he declined the lesser sentence on a plea of guilty. The court's statement of a "hit" was meant to emphasize the "concession" of two years offered to defendant should he plead guilty. Defendant was properly informed that should he be convicted after a trial, a greater sentence was warranted by the charge and his criminal background. In fact, it appears defendant, knowing that the Class 2 felony he faced with his background warranted a seven-year sentence, elected to forego the lesser sentence of five years on a plea of guilty because the chance of being found not guilty was worth a two-year sentencing difference. If anything, the judge accurately informed defendant of the sentences he faced should he accept responsibility or be found guilty after a trial. The potential sentences, however, were not to be so disparate as to support an inference of vindictiveness given that the seven-year sentence imposed on defendant, in light of his criminal background, can in no way be seen as excessive. See *People v. Sivels*, 60 Ill. 2d 102, 104 (1975) (defendant's claim that he was punished for going to trial "must be clearly established by the evidence") (internal quotations marks omitted).

¶ 16 Defendant was not penalized for exercising his constitutional right to a trial by jury based simply on a showing that he was offered a lesser sentence should he elect to plead guilty and was told that he would receive a greater sentence should he be convicted after a trial, the same sentence that was in fact imposed following a guilty verdict by a jury. We affirm the trial court in all aspects.

¶ 17 Affirmed.

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