

No. 1-11-0363

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10C660218
	)	
DENNIS TABB,	)	Honorable
	)	Luciano Panici,
Petitioner-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court.  
Justices Garcia and Lampkin concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court abused its discretion by sentencing defendant to 25 years in prison, where defendant was convicted of a quickly foiled burglary of a few watches and miscellaneous jewelry from a home empty of occupants and where the maximum sentence for second degree murder is 20 years.

¶ 2 On January 19, 2010, defendant was arrested with a few stolen watches and miscellaneous jewelry in his pocket and charged with residential burglary. At the ensuing bench trial, defendant argued that the State had failed to prove that he had entered the home, as required for burglary. Although there were no fingerprints or other physical evidence to confirm that defendant had entered the home from which the watches or jewelry were stolen, the trial court found entry and found defendant guilty of residential burglary. In his posttrial motion, defendant argued again that, at most, he was guilty of possession of stolen property. The trial court denied that motion, and that issue has not been raised before us on this appeal.

¶ 3 On this direct appeal, defendant's sole issue is that the trial court abused its discretion when it sentenced him to 25 years in prison for the burglary of the watches and jewelry. In a postsentencing motion, defendant asked for a reduction of sentence to 16 years. On this appeal, he asks us to reduce his sentence or, in the alternative, to remand for resentencing.

¶ 4 For the following reasons, we find that it was an abuse of discretion for the trial court to sentence the 43-year-old defendant to 25 years in prison: when

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the maximum sentence for second degree murder is 20 years; when this was a foiled burglary of a few watches and jewelry from an empty home; when the evidence of entry by defendant was not overwhelming; when the trial court pronounced sentence without first hearing from defendant; when, although the trial court recalled defendant, the transcript suggests that he was not given the opportunity to provide a full allocution; when the uncontroverted evidence at sentencing was that defendant's criminal history was due primarily to his drug addiction and that defendant has never been placed in a drug treatment program; when the trial court stated that, in its opinion, defendant's prior sentences indicated that defendant had been "getting away with not really [being] sentenced for all of the matters that he did" and thus the trial court appeared to be resentencing defendant for prior offenses; and when the trial court stated expressly that the sentence was motivated solely by a desire "to punish" although our constitution requires that "[a]ll penalties shall be determined \*\*\* with the objective of restoring the offender to useful citizenship" (Ill. Const. 1970, art. I, §11); and when the sentence was not in line with the seriousness of this property offense, which Illinois courts have repeatedly held is the single most important factor in fashioning an appropriate sentence.

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¶ 5 We decline to exercise the authority granted to us by Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) to reduce defendant's sentence and instead, we remand this case for resentencing.

¶ 6 **BACKGROUND**

¶ 7 Since the sufficiency of the evidence is not at issue on this appeal, we summarize the facts of the offense as shown by the record before us. On January 19, 2010, defendant, who is a resident of the Englewood neighborhood, traveled with Darnell Clark and codefendant Antoine Smith, to the town of South Holland. In South Holland, they approached a home on a cul-de-sac, with jet skis in the driveway and no one at home. At least one of the three men splintered the front door and entered, setting off the alarm. The alarm systems were then broken off the wall. Although defendant's distinctive shoe prints with circular and semi-circular patterns were found in the snow around the jet skis in the driveway, they were not found either near the door or approaching the door. Inside the home, they found boxes of watches in a closet and a stack of lottery tickets on a nightstand. They took the lottery tickets, several watches, some miscellaneous jewelry, and some dollar bills. When defendant was arrested down the street, his pockets contained several of the watches and miscellaneous jewelry taken from the

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home. One of the stolen watches, which was not found in defendant's pocket, was identified by the victim as costing \$375. The State offered no fingerprint evidence to confirm that defendant had entered the house, as opposed to serving as a lookout in the driveway. Based on these facts, the trial court found defendant guilty of residential burglary and sentenced the 43-year-old defendant to 25 years in prison. Defendant filed a postsentencing motion asking for a reduction of sentence to 16 years that the trial court denied.

¶ 8 In the presentence investigation report, defendant stated that his criminal history of theft and burglary was due primarily to his drug addiction. Defendant has nine prior felony convictions, including one for having drugs in jail. Although defendant has spent a significant amount of time both in prison and on probation, the record shows that he was never placed in a drug rehabilitation program, either in or out of prison. Defendant, who was 43 years old at the time of sentencing, has lived in his parents' home since he was approximately 4 years old, and he attends his family's local Baptist church. His 15-year-old daughter lives nearby. Like defendant, his mother attributes his mostly nonviolent theft and burglary charges to his drug addiction. Defendant has worked primarily for cash in jobs such as automobile repair. Although he was removed from mainstream

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classes during middle school, he did graduate high school and he has taken a number of courses while in prison, on topics such as automotive repair.

¶ 9 At the sentencing, the trial court sentenced defendant without offering defendant a chance to speak. Later that day, the trial court realized its mistake and recalled the case. Although defendant was then offered a chance to be heard, defendant stated that, by this time, he doubted it was "going to make a difference." Defendant stated that he did not enter the house and that he wanted to apologize to the victims. The trial court then began discussing defendant's criminal history. Defendant tried to interrupt with a "[b]ut," but the trial court kept talking and defendant was not offered another opportunity to be heard. The trial court stated that "the sentence of 25 years stands," and the proceeding concluded.

¶ 10 On January 21, 2011, defendant filed a motion to reconsider sentence that asked the trial court to consider a sentence of 16 years in prison. The motion argued, first, that the sentences of defendant and codefendant Smith were disproportionate, since defendant received 25 years in prison while codefendant Smith received only 8 years. (The record does not indicate that the third man, Clark, was prosecuted.) Second, prior to trial, the State offered defendant a plea deal of 10 years, but at sentencing recommended 25 years, thus punishing

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defendant severely for exercising his right to trial. Third, the trial court did not consider the fact that defendant had never been placed in a drug treatment program, and thus did not consider defendant's potential for rehabilitation.

¶ 11 At the hearing on the motion to reconsider on January 27, 2010, the trial court informed defense counsel that, if she referred to the State's plea offer, he would "refer [her] to the A.R.D.C." and that her reference to it was "a violation of law." With respect to defendant's prior criminal history, the trial judge stated that, in his opinion, defendant "was getting away with not really [being] sentenced for all of the matters that he did." The trial judge stated that "[r]ehabilitation has definitely gone by and it is - was time to punish him." The trial judge did not explain why 16 years in prison was an insufficient punishment, and 25 years in prison was necessary. Defendant filed a notice of appeal on January 27, 2011, and this appeal followed.

¶ 12 ANALYSIS

¶ 13 The sole issue on this appeal is whether the trial court abused its discretion by sentencing defendant to 25 years in prison and denying his motion to consider a 16-year sentence. On appeal, defendant asks this court to reduce his sentence or, in the alternative, to remand for resentencing.

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¶ 14 Although there is no question that defendant has a lengthy criminal history, there is no evidence that the root cause of this history, namely, his drug addiction, was ever addressed. When the trial court denied defendant's postsentencing motion for a reduction of sentence to 16 years, it offered no explanation why 16 years would not have a sufficient deterrent effect. Sixteen years is twice as long as the sentence received by codefendant Smith for the same offense and twice as long as any sentence previously received by defendant. The defendant's 25-year sentence is five years longer than the maximum sentence for second degree murder. 730 ILCS 5/5-4.5-30(a) (West 2010). By contrast, this is strictly a property offense. For the reasons discussed below, we remand for resentencing.

¶ 15 The Illinois Constitution provides that: "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. While the legislature has determined that adequate retribution may be satisfied by imposition of the minimum penalty, "the constitutional mandate requires that the trial court actually consider rehabilitation as an objective of the sentence." *People v. Steffens*, 131 Ill. App. 3d 141, 153 (1985). In the case at bar, the trial court

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expressly rejected "rehabilitation" as an objective of the sentence, and stated it was "time to punish him."

¶ 16 Supreme Court Rule 615 provides that the appellate court may "reduce the punishment imposed by the trial court." Ill. S. Ct. R. 615(b)(4) (eff. Aug. 27, 1999). Thus, for example, our supreme court has affirmed an appellate court's reduction in punishment where there was "no indication that the trial court gave serious consideration" to the factors in mitigation. *People v. O'Neal*, 125 Ill. 2d 291, 300 (1988). Writing for this court, Justice Joseph Gordon observed that "[o]ur courts have never been reluctant to reduce a sentence on appeal, despite the serious nature of the underlying crime, where a trial court has neglected its duty to consider the relevant mitigating factors." *People v. Calhoun*, 404 Ill. App. 3d 362, 389 (2010) (list of cases cited therein).

¶ 17 Our standard of review of a trial court's sentence is abuse of discretion. *O'Neal*, 125 Ill. 2d at 297-98; *Calhoun*, 404 Ill. App. 3d at 385. This deferential standard applies because the trial court is in a better position to assess factors such as credibility and demeanor. *O'Neal*, 125 Ill. 2d at 298; *Calhoun*, 404 Ill. App. 3d at 385. We will still apply this standard even though, in the case at bar, defendant did not testify at a pretrial hearing or at trial, and the trial court imposed

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sentence prior to hearing defendant's allocution and based the sentence primarily on a written report of his record. An abuse of discretion may be found, even where the sentence is within the statutory limitations, if that sentence varies greatly from the purpose and spirit of our constitution and law. *Calhoun*, 404 Ill. App. 3d at 385; *People v. Steffens*, 131 Ill. App. 3d 141, 151 (1985).

¶ 18 The seriousness of the crime is the single most important factor in fashioning an appropriate sentence. *Calhoun*, 404 Ill. App. 3d at 388-89 (citing *People v. Weatherspoon*, 394 Ill. App. 3d 839, 862 (2009)); *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002) (citing *People v. Redmond*, 265 Ill. App. 3d 292, 307 (1994)); *People v. Nolan*, 291 Ill. App. 3d 879, 887 (1997) (examining the "factual matrix" surrounding the offense to reduce the sentence). In the case at bar, the trial court appeared to be sentencing defendant not for the underlying property offense, but appeared to be almost resentencing defendant for his prior offenses, out of a belief that those prior sentences had been inadequate. The trial court observed that defendant had been "getting away with not really [being] sentenced for all of the matters that he did."

¶ 19 As for the seriousness of this crime, residential burglary, our supreme court has found even 10 years to be excessive. *People v. Maggette*, 195 Ill. 2d 336

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(2001). In *Maggette*, our supreme court held that a 10-year prison sentence on a residential burglary count was "manifestly disproportionate to the nature of the offense," even though defendant had committed a sexual assault after entering the residence. *Maggette*, 195 Ill. 2d at 355. "Although defendant's behavior was appalling and harmful," our supreme court chose to exercise the supervisory authority provided by Supreme Court Rule 615(b)(4) to reduce the burglary sentence from 10 to 5 years. *Maggette*, 195 Ill. 2d at 355.

¶ 20 Similarly, in *People v. Center*, 198 Ill. App. 3d 1025, 1035 (1990), this court exercised its authority under Supreme Court Rule 615(b)(4) to reduce the sentence for a burglary conviction from 15 to 7 years. As in our case, the defendant in *Center* was sentenced as a Class X offender. *Center*, 198 Ill. App. 3d at 1033. In *Center*, we observed that the trial court had failed to provide any "enumeration or elaboration" on how it had chosen this sentence. *Center*, 198 Ill. App. 3d at 1034. Similarly, in the case at bar, the trial court failed to provide any enumeration or elaboration at the hearing on the motion for resentencing as to why a 25-year, as opposed to a 16-year, sentence was necessary. Although a trial court is not required to articulate its reasons or detail its thought process for the record (*Quintana*, 332 Ill. App. 3d at 109), when a trial court does announce that its sole

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motive in sentencing is "to punish" defendant, we may consider that.

¶ 21 In determining that the sentence in *Center* was too long for a "foiled" burglary, the appellate court compared its length to the minimum Class X sentence; and the sentences otherwise available for burglary; and the maximum sentence for voluntary manslaughter. *Center*, 198 Ill. App. 3d at 1034-35. Similarly, in the case at bar, the sentence is 19 years longer than the minimum Class X sentence; and 10 years longer than the maximum sentence for Class 1 residential burglary; and 5 years longer than the maximum sentence for second degree murder. 720 ILCS 5/19-3(a) (West 2010) (residential burglary is a Class 1 felony); 730 ILCS 5/5-4.5-30(a) (West 2010) (the sentencing range for a Class 1 felony is 4 to 15 years, and for second degree murder is 4 to 20 years); 730 ILCS 5/5-4.5-25(a) (West 2010) (the sentencing range for Class X is 6 to 30 years).

¶ 22 In fact, this court has found that a 30-year extended term sentence for second degree murder was too long when the defendant was not the aggressor, and reduced it to 15 years – 10 years less than defendant's sentence. *People v. Nolan*, 291 Ill. App. 3d 879, 887 (1997). Defendant's sentence is also more than three times what his codefendant received for the same offense.

¶ 23 The trial court's failure to fully consider the mitigating circumstances

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and defendant's potential for drug rehabilitation is underscored by the fact that the trial court imposed sentence without even hearing from defendant first. The trial court did call defendant back, but as defendant observed himself, it was unclear what difference that was going to make at that point. The trial court expressly rejected rehabilitation as an objective of the sentence, even though the uncontroverted evidence at sentencing was that defendant's drug addiction was at the root of his criminal history and that he had never been placed in a drug treatment program.

¶ 24

#### CONCLUSION

¶ 25

For the foregoing reasons, we find that it was an abuse of discretion for the trial court to sentence the 43-year-old defendant to 25 years in prison: when the maximum sentence for second degree murder is 20 years; when this was a foiled burglary of a few watches and jewelry from an empty home; when the evidence of entry by defendant was not overwhelming; when the trial court pronounced sentence without first hearing from defendant; when, although the trial court recalled defendant, the transcript suggests that he was not given the opportunity to provide a full allocution; when the uncontroverted evidence at sentencing was that defendant's criminal history was due primarily to his drug

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addiction and that defendant has never been placed in a drug treatment program; when the trial court stated that, in its opinion, defendant's prior sentences indicated that defendant had been "getting away with not really [being] sentenced for all of the matters that he did" and thus the trial court appeared to be resentencing defendant for prior offenses; and when the trial court stated expressly that the sentence was motivated solely by a desire "to punish" although our constitution provides that "[a]ll penalties shall be determined \*\*\* with the objective of restoring the offender to useful citizenship" (Ill. Const. 1970, art. I, §11); and when the sentence was not in line with the seriousness of this property offense, which our courts have repeatedly held is the single most important factor in fashioning an appropriate sentence.

¶ 26 We decline to exercise the authority granted to us by Supreme Court Rule 615(b)(4) to reduce defendant's sentence and instead, we remand this case for resentencing.

¶ 27 Conviction affirmed; remanded for resentencing.