

No. 1-11-0809

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. 04 CR 24248
)	
DEVON MABRY,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Sterba concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's sentences for first degree murder and armed robbery affirmed where he affirmatively waived a sentencing hearing on remand and trial court did not abuse its sentencing discretion.
- ¶ 2 Following a jury trial, defendant Devon Mabry was found guilty of first degree murder and armed robbery, then sentenced to concurrent, respective terms of 75 and 30 years' imprisonment. This court subsequently vacated defendant's sentences and remanded the cause for resentencing. *People v. Mabry*, 398 Ill. App. 3d 745 (2010). On remand, the trial court sentenced defendant to consecutive terms of 44 years' imprisonment for first degree murder with

a 25-year firearm enhancement, and 6 years' imprisonment for armed robbery, for an aggregate of 75 years. On appeal, defendant contends that the trial court failed to comply with this court's mandate where it imposed consecutive sentences without holding a new sentencing hearing, and that his 69-year sentence for first degree murder is excessive in light of certain mitigating evidence.

¶ 3 The record shows, in relevant part, that on September 10, 2004, defendant fatally shot and robbed In Hwang at his place of business at 93rd and South Halsted Streets, in Chicago.¹ A jury found him guilty of first degree murder and armed robbery, and that he personally discharged a firearm that proximately caused death during the commission of those offenses.

¶ 4 At sentencing, the trial court confirmed that both sides had received a copy of the presentence investigation report (PSI) and provided them with an opportunity to make any corrections. In aggravation, the State presented testimony from multiple witnesses establishing that defendant stabbed another Cook County Jail inmate on October 8, 2007. Gary Newsom, an investigator for the Cook County Sheriff's Police Department, testified that defendant told him after the incident that he was a "Black Stone" with the rank of general, which Investigator Newsom testified "would be considered to be a boss position. He's got a high rank." Defendant also told the investigator that he stabbed the inmate because he had told rival gangs where the Black Stones kept their shanks, and when asked how many times he stabbed the inmate, defendant responded "not enough."

¶ 5 The State informed the court that it was seeking the death penalty and argued, *inter alia*, that defendant was "not asking for rehabilitation," but telling the court, "even in a structured facility, I am not going to follow the law and I am going to stab people and I am going to do

¹ Much of the background of this case was set out in *People v. Mabry*, 398 Ill. App. 3d 745 (2010), and we recite only those facts necessary for the disposition of this appeal.

whatever it takes because I am not finished and I am violent and I am a murderer." The State further argued that "[a]t the very least, Judge, this defendant is asking you that he never get out of jail, and that would be a life sentence."

¶ 6 In mitigation, the defense called Tina Taylor-Brown who testified that she has known defendant since he was a newborn, and that he has often provided assistance to her and her mother. The defense also called Lillian Mabry-King, defendant's grandmother, who testified that she raised defendant, and that she "might follow soon" if defendant were executed.

¶ 7 Counsel then argued that defendant was only 18 years of age in 2004, and "made incredibly stupid and foolish choices that none of us can take back at this point." He also characterized defendant's actions in jail as a "a matter of survival," and pointed out that during defendant's formative years, his father was imprisoned and his mother was addicted to drugs. In sum, counsel requested the court to "fashion a sentence that would allow [defendant] to go on living and a sentence that would restore [him] to useful citizenship."

¶ 8 Defendant spoke in allocution and apologized for his "mistake." He asserted that the State only portrayed the negative side of him and had "never seen me wake up when my grandparents them [*sic*] had to wake up. Grandmama, I'm fint [*sic*] to go iron your clothes, get you ready for work, I am going to wash the car off, I will go shovel the snow. They never seen none of that."

¶ 9 In announcing sentence, the court noted, *inter alia*, that defendant was eligible for the death penalty, but that it found "mitigating circumstances to preclude that." The court then noted that although Brown testified that defendant had been a helpful person, "she talks about the defendant doing things for friends and family and neighbors that friends, family and neighbors should do for each other. There is nothing miraculous about it." The court also referred to defendant's killing of the victim, and stated, "If you think that 17 years of helping your

grandmother outweighs that second, you are gravely mistaken. Helping your grandmother is something that you do. You don't get any credit for that. You do that. That's what you do."

¶ 10 The court also made the following comments:

"I know about that neighborhood better than you think, and when you talk about all of the ills of that neighborhood, I happen to know that a lot of young people went right through 92nd, 93rd and Peoria and are now law-abiding citizens. So while the ills of the gangs and the drugs were all around Mr. Mabry, so they were around his friends and family who managed to avoid it.

How stupid. In a dream, let's go stick up the man whose store we lounge in every day. We can't write that off as a youthful indiscretion. I passed through 17 and 18. Never thought about arming myself to commit a robbery. Never crossed my mind. The neighborhood that I grew up in was a lot tougher than Mr. Mabry's. I didn't have a state representative that lived in the same block or the next block as I [*sic*] did."

¶ 11 In conclusion, the court noted that it had considered defendant's PSI, the testimony and arguments in aggravation and mitigation, and "what I perceive to be [defendant's] potential for rehabilitation." The court then sentenced defendant to concurrent terms of 75 years' imprisonment for first degree murder and 30 years' imprisonment for armed robbery.

¶ 12 On March 11, 2008, defendant filed notice of appeal from that judgment. Thereafter, the trial court granted the State's motion to correct defendant's mittimus so that it reflected the respective sentences for armed robbery and first degree murder, then sentenced defendant to consecutive terms of 44 years' imprisonment for first degree murder with a 25-year firearm

enhancement, and 6 years' imprisonment for armed robbery, despite a defense objection to its lack of jurisdiction. On appeal, this court vacated defendant's sentences and remanded the cause "for the imposition of consecutive sentences," finding that the initial sentences imposed by the court were void because defendant was subject to mandatory consecutive sentencing, and that the second sentences were imposed after the court had been divested of jurisdiction. *People v. Mabry*, 398 Ill. App. 3d 745, 757-58 (2010).

¶ 13 On remand, the State addressed the court with all parties present, and asserted that "[i]f you read the mandate, the mandate states that they're remanding it for the imposition of consecutive sentences. I don't believe they remanded it for a new sentencing hearing. All they're asking your Honor is to impose a consecutive sentence rather than a concurrent sentence." The court asked defense counsel whether he disagreed, and counsel responded, "Judge, the clear reading of the mandate requires the Court to impose a new sentence. It does not require a new sentencing hearing." The court then noted, "I think we all agree," and sentenced defendant to consecutive terms of 44 years' imprisonment for first degree murder with a 25-year firearm enhancement, and 6 years' imprisonment for armed robbery.

¶ 14 In this appeal from that judgment, defendant first contends that the trial court failed to comply with this court's mandate when it imposed consecutive sentences without holding a new sentencing hearing. He claims that the trial court "wrongly interpreted this Court's mandate to require that he impose a sentence of 69 years to be served consecutively to a 6 year sentence," and that the "*pro forma* proceedings in this case wholly deprived [him] of the opportunity to present new evidence or arguments in support of his sentence." He also requests this court to review the issue for plain error despite counsel's failure to object in the trial court.

¶ 15 The State responds that the trial court properly followed the mandate of this court to impose consecutive sentences, and that, in any event, defendant's claim is barred under the doctrine of invited error.

¶ 16 Contrary to defendant's claim, the mandate of this court following his previous appeal was a "remand to the trial court for the imposition of consecutive sentences," not a remand for a new sentencing hearing. The parties interpreted it as such, and in light of their agreement, the trial court entered consecutive sentences without holding a new sentencing hearing in compliance with the mandate as written. *People v. Melka*, 319 Ill. App. 3d 431, 438 (2000).

¶ 17 However, section 5-5-3(d) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3(d) (West 2010)) provides that when a sentence originally imposed is vacated, the case shall be remanded to the trial court for a new sentencing hearing which may include evidence of defendant's personal situation since the original sentence was passed. Thus, when this court vacated defendant's sentences and remanded the cause for resentencing (*Mabry*, 398 Ill. App. 3d at 758), it was incumbent upon the trial court to hold a new sentencing hearing pursuant to section 5-5-3(d), and the failure to do so was error. 730 ILCS 5/5-5-3(d) (West 2010); see also *People v. Pittman*, 24 Ill. App. 3d 1089, 1089-90 (1975) (Per curiam).

¶ 18 Notwithstanding, the State contends that defendant is estopped from asserting this claim where he specifically waived a sentencing hearing on remand. It is axiomatic that a party who acquiesces in proceeding in a given manner is not in a position to claim that he was prejudiced thereby. *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). The supreme court has held that under the doctrine of invited error, defendant may not request to proceed in one manner, then later contend on appeal that the course of action was erroneous. *People v. Carter*, 208 Ill. 2d 309, 319 (2003).

¶ 19 Here, the record shows that the State asserted on remand that this court's mandate did not require a new sentencing hearing, only the imposition of consecutive sentences. Defense counsel expressly agreed, stating that, "the clear reading of the mandate requires the Court to impose a new sentence. It does not require a new sentencing hearing." The court then remarked that "we all agree" and imposed sentence. The record thus unequivocally shows that defendant acquiesced in the decision to proceed without a new sentencing hearing. Consequently, he may not raise on appeal the error he invited in the trial court (*People v. Harvey*, 211 Ill. 2d 368, 386 (2004)), nor obtain plain error review of such invited error (*People v. Sanders*, 2012 IL App (1st) 102040, ¶ 30).

¶ 20 Defendant disagrees with this conclusion and claims that "this issue is vastly different from a routine claim of trial error where strategic decisions might inject error into a case," characterizing application of the invited error doctrine as "draconian" under the circumstances. However, defendant has cited no authority to support his assertion that the invited error doctrine should not apply where a new sentencing hearing has not been held on remand for resentencing. We thus find his claim to be without merit.

¶ 21 Defendant next contends that the 69-year sentence imposed by the trial court on his first degree murder conviction was excessive in light of certain mitigating evidence. The State responds that defendant's sentence was appropriate and rendered only after the court properly considered factors in aggravation and mitigation.

¶ 22 It is well-settled that a reviewing court will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). Where, as here, the sentence falls within the prescribed statutory limits, it will not be disturbed unless it is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense. *Cabrera*, 116 Ill. 2d at 493-94. A sentence will not be found disproportionate where it

is commensurate with the seriousness of the crime, and adequate consideration was given to any relevant mitigating circumstances, including the rehabilitative potential of defendant. *People v. Perez*, 108 Ill. 2d 70, 93 (1985).

¶ 23 Defendant maintains that the 69-year sentence imposed by the trial court on his first degree murder conviction was excessive, citing "significant mitigating evidence," including his rehabilitative potential, youth, difficult upbringing, and "a number of positive qualities." However, the record affirmatively shows that the court considered this evidence when it imposed sentence. Thus, in requesting a reduction in sentence, defendant is essentially asking this court to re-balance the appropriate factors and independently conclude that his sentence is excessive, which is not our function. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987), citing *People v. Cox*, 82 Ill. 2d 268, 280 (1980).

¶ 24 Defendant's commission of first degree murder was punishable by a sentence of between 20 years' imprisonment and penalty of death. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008); 720 ILCS 5/9-1(b)(6) (West 2004). He was also subject to a sentence enhancement of 25 years to natural life for personally discharging a firearm that proximately caused death to another during the commission of the offense. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). The 69-year sentence imposed by the trial court, *i.e.*, 44 years plus a 25-year firearm enhancement, fell within this prescribed range and was not disproportionate to defendant's deliberate act. We therefore find no abuse of sentencing discretion to permit any modification by this court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 25 Finally, we note that defendant objects to comments made by the trial court at sentencing regarding its "own personal experiences about growing up in [defendant's] neighborhood," and comparing defendant's "criminal history to [its] own lack of a criminal background." He claims that this was an improper factor for consideration, and that it affected his sentence where it was

"among the first" factors discussed, and also where the court imposed "a virtual life sentence of 69 years."

¶ 26 When determining whether a sentence is improperly imposed, the focus of a reviewing court should not be on a few words or statements of the trial court, but on the entire record as a whole. *People v. Estrella*, 170 Ill. App. 3d 292, 298 (1988). In addition, we presume that the trial court considered only competent and reliable evidence when imposing sentence. *People v. Griffith*, 158 Ill. 2d 476, 497 (1994).

¶ 27 Here, the trial court's comments, when read in context, show that they were made in response to defendant's argument in mitigation that he was young and merely made a bad decision at the time of the killing, *i.e.*, that he committed a "youthful indiscretion." Thus, contrary to defendant's claim, the court's comments were a response, not a "factor" that it relied upon when imposing sentence. Since defendant has offered no other evidence that the trial court's rhetorical comments served as an improper basis for the sentence imposed, other than the length of the sentence itself, we find defendant's claim to be without merit. *Griffith*, 158 Ill. 2d at 497-98.

¶ 28 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 29 Affirmed.