

No. 1-11-0814

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. 07 CR 11569
)	
MICHAEL JOHNSON,)	Honorable
)	Timothy Joseph Joyce,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not impose an excessive sentence when it properly weighed factors in aggravation and mitigation, then sentenced defendant within the statutory range for aggravated battery to a peace officer; \$200 DNA analysis fee must be vacated where defendant had previously submitted a DNA sample following a prior conviction.

¶ 2 Following a bench trial, defendant Michael Johnson was found guilty of aggravated battery to a peace officer and sentenced to 5 ½ years in prison. On appeal, defendant contends his sentence is excessive in light of certain mitigating factors. Defendant also correctly contends the trial court improperly imposed a \$200 DNA analysis fee. We vacate the fee and affirm in all other respects.

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¶ 3 Testimony at trial established that William Pellegrini was on duty as a deputy sheriff at Cook County jail around 1:45 p.m. on May 12, 2007, and defendant was in a receiving area of the jail as a result of an unrelated home invasion charge. Pellegrini observed defendant defecate on the floor of the cell, hold his fecal matter, then wipe the fecal matter on the wall of the cell. Pellegrini handed defendant a container of hand wipes and told him to clean up the feces. Defendant threw the container on the ground and told Pellegrini, "f*** you." Pellegrini called for back-up support and along with approximately three officers entered the cell. Pellegrini donned latex gloves and asked defendant to place his hands on the wall. Defendant ran aggressively in a "physical way" at Pellegrini with his hands out. Pellegrini put his hands up to protect himself from defendant's hands which still contained feces. Defendant made contact with Pellegrini and the force of the impact caused Pellegrini to fall backwards and his back to make contact with a bench in the cell. Pellegrini was treated at Cermak Hospital and returned to work later that day.

¶ 4 Defendant testified the toilet was not working in the cell and Pellegrini was insulting and aggressive toward him. After defendant defecated and Pellegrini fell down, deputies removed defendant from the cell, away from "prying eyes," and beat him.

¶ 5 The court found defendant guilty of aggravated battery to a peace officer.

¶ 6 At the sentencing hearing, the court noted it looked favorably upon letters it had received from defendant expressing remorse and a desire to remain with his family. The presentence investigation (PSI) report stated defendant was 26 years of age at the time of the offense, he had previously worked as a self-employed carpenter, he wished to earn a high school diploma, he reported being diagnosed with bipolar disorder, and he had two children whom he had not seen since his incarceration in 2007. In aggravation, Pellegrini testified he received medical treatment, physical therapy and workers' compensation for a herniated disk in his back he suffered as a result of the attack and was unable to work for approximately six months. When

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Pellegrini returned to work, he stated he felt "about 85 percent," due to weakness in his legs, numbness and tingling. The State argued its forensic psychiatrist testified at a pretrial fitness hearing that, while defendant did have substance abuse issues, he was not bipolar, as defendant had reported during his presentence investigation. It also argued defendant was charged with home invasion previous to the beginning of his trial for the instant offense, and he had been adjudicated delinquent as a juvenile after being charged with armed robbery. The State urged the court to sentence defendant to the maximum of seven years in prison.

¶ 7 In mitigation, defense counsel argued the State's forensic psychiatrist who testified at a pretrial fitness hearing admitted defendant had told him of 30 previous hospitalizations defendant had undergone for mental health reasons. Counsel also noted defendant's desire to earn a high school diploma and find a job through his uncle as a truck driver. Counsel finally argued defendant's remorse and lack of intent to injure Pellegrini. Defendant spoke in allocution, noting he was sorry for his past actions. Defendant also began to explain the specifics of the issues surrounding his home invasion conviction, and the court stopped him, stating "I'm not going to rely on the particulars of the home invasion. I am faced with the fact that you were convicted of home invasion."

¶ 8 In its lengthy discussion, the court expressly stated it considered "all the factors in mitigation and aggravation that are cognizable under the Unified Code of Corrections." Specifically, the court noted it believed defendant did not intend to cause Pellegrini injury, but Pellegrini was in fact hurt badly. Further, the court stated while it would be justified to sentence defendant to the maximum sentence allowable of seven years, it appreciated defendant had "come around" during the course of the trial. The court was "mindful [defendant] suffers from stressors that the rest of us don't" because of defendant's mental health issues. The court also noted the offense was a Class 2 felony, then sentenced defendant to 5 ½ years in prison, consecutive to a 10-year prison sentence defendant received for the unrelated home invasion

conviction.

¶ 9 Following the imposition of sentence, the court properly admonished defendant, *inter alia*, that any challenges to his sentence must be raised in a written motion or shall be deemed waived. Ill. S. Ct. R. 605(a)(3) (eff. October 1, 2001). Defendant immediately tendered a written post-sentencing motion and declined argument. The written motion to reconsider defendant's sentence, argued, *inter alia*, the court failed to "consider all of the factors in mitigation pursuant to 730 ILCS 5/5-5-3.1," and that:

"[s]pecifically, the court failed to consider the excessive hardship that would befall his family and dependants in determining his sentence.

Defendant was raised in the Chicago area by his father and grandmother.

Defendant has 5 brothers and sisters.

Defendant has 2 children ***. Defendant has been incarcerated for much of his children's lives.

Defendant was previously employed as a carpenter. Defendant previously attended Phillips High School. Defendant is a life-long resident of the Chicago area."

The State asked the court to "deny the motion to reconsider sentence based on the support that [it] provided in [its] ruling when [it] announced the sentencing." The court then denied the motion to reconsider defendant's sentence.

¶ 10 On appeal, defendant first contends the court's sentence is excessive. Defendant concedes the 5 1/2 year sentence falls within the statutory sentencing range and the court mentioned the "significant mitigating factors" relevant to defendant. Defendant argues, however, the trial court abused its discretion by failing to give proper weight to the mitigating circumstances in this case, including defendant's age, lack of prior criminal convictions at the time of the instant offense, mental health history, rehabilitative potential and lack of intent to seriously injure Pellegrini.

¶ 11 As an initial matter, the State contends defendant has waived review of the trial court's alleged failure to give appropriate weight to various mitigating factors because defendant failed to specifically raise these factors in his motion to reconsider sentence. Defendant responds that his arguments were sufficiently detailed in his post-sentencing motion.

¶ 12 Generally, all claims of sentencing error must first be argued during the sentencing hearing then included in a written post-sentencing motion, which is the “functional equivalent” of a posttrial motion for purposes of preserving issues for appeal. See *People v. Baez*, 241 Ill. 2d 44, 129-30 (2011). The purpose of the requirement of a written post-sentencing motion, filed within 30 days of sentencing, is to allow the trial court an opportunity to review a defendant's contentions of sentencing error and then promote efficiency by correcting the errors if the contentions have merit. *People v. Reed*, 177 Ill. 2d 389, 394 (1997).

¶ 13 During the sentencing hearing here, defense counsel made arguments in mitigation involving defendant's: lack of intent to injure Pellegrini; remorse; familial ties and children; desire to complete a high school education and gain employment; and mental illness. Counsel then tendered a post-sentencing motion immediately after the court delivered defendant's sentence. The motion included the claim that the trial court failed to "consider all of the factors in mitigation pursuant to 730 ILCS 5/5-5-3.1." The motion additionally referred to the court's failure to consider excessive hardship that would befall defendant's family due to his incarceration. On appeal, defendant claims the court failed to properly weigh mitigating factors and argues several factors specifically. We find defendant properly preserved his claim.

¶ 14 The offense of aggravated battery to a peace officer is a Class 2 felony. 720 ILCS 12-4(e)(2) (West 2006). Class 2 felonies are punishable by a term of not less than three and not more than seven years in prison. 730 ILCS 5/5-8-1(a)(5) (West 2006). Defendant concedes his 5 ½ year sentence for aggravated battery to a peace officer falls within the permissible range but argues the court did not properly weigh the mitigating factors.

¶ 15 The trial court has broad discretionary powers in imposing a sentence, and its sentencing

decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We may not substitute our own judgment for that of the trial court simply because we would have weighed mitigating factors differently. *Id.* at 214. Where a trial court gives a sentence within the permissible statutory range, we will only disturb the sentence if we find the trial court abused its discretion. *People v. Jones*, 168 Ill. 2d 367, 374 (1995). An abuse of discretion in this respect exists only where the sentence is “greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *Alexander*, 239 Ill. 2d at 212.

¶ 16 Here, the court at sentencing noted it looked favorably upon remorseful letters it received from defendant that expressed an interest in remaining with his family. In a lengthy discussion, it weighed factors in aggravation and mitigation after hearing discussion of defendant's PSI report, testimony by Deputy Pellegrini in aggravation, other mitigating factors argued by defense counsel and defendant's allocution. In sentencing defendant to 5 ½ years in prison, the court stated that while it believed defendant may not have intended to injure Pellegrini and "suffered from stressors" as a result of his mental health issues, Pellegrini had been hurt badly, and it would be justified in sentencing defendant to the maximum sentence of seven years in prison. However, it believed defendant had "come around" during the pendency of the trial, and it "appreciated" some of the mental health issues defendant was facing. It expressly noted it had considered all the mitigating factors provided by statute. In sum, we cannot say the trial court abused its discretion.

¶ 17 Defendant next contends, and the State correctly agrees, we must vacate the \$200 DNA analysis fee because defendant had previously submitted a DNA sample for analysis as a result of his conviction for home invasion. *People v. Marshall*, 242 Ill. 2d 285 (2011).

¶ 18 For the foregoing reasons, we vacate the \$200 DNA fee and affirm the judgment in all other respects.

¶ 19 Affirmed in part and vacated in part.