

2012 IL App (2d) 101169-U
No. 2-10-1169
Order filed February 16, 2012

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
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-1152
)	
KAREEM J. SUTTON,)	Honorable
)	John J. Kinsella,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in sentencing defendant to 11 years' imprisonment for attempt aggravated possession of a stolen or converted motor vehicle where defendant was subject to sentencing as a Class X offender, defendant had lengthy criminal history, and the 11-year sentence fell well within the sentencing range of 6 to 30 years.

¶ 1 Defendant, Kareem J. Sutton, appeals from the trial court's order sentencing him as a Class X offender to 11 years' imprisonment for his conviction of attempt aggravated possession of a stolen or converted motor vehicle (APSMV), a Class 2 felony (625 ILCS 5/4-103.2(a)(3) (West 2006); 720 ILCS 5/8-4(a), (c)(3) (West 2006)). Defendant was also sentenced to 6 years' imprisonment for his

conviction of vehicle theft conspiracy (VTC), a Class 1 felony (625 ILCS 5/4-103.1(a), (c) (West 2006)), but the trial court subsequently vacated that conviction and sentence. On appeal, defendant contends that the trial court abused its discretion when it imposed a greater sentence for defendant's attempt APSMV conviction than it had imposed for defendant's VTC conviction. We hold that the trial court did not abuse its discretion and we affirm.

¶ 2

BACKGROUND

¶ 3 The evidence presented at defendant's jury trial was that he and his fiancée went to the Bill Kay Chrysler dealership in Naperville, Illinois, on May 2, 2007. A salesman showed the couple a 2007 Chrysler 300 SRT-8, allowing them to sit in the car with the key in the ignition and the car running. The salesman retrieved the key from the couple and wrote up a contract for the purchase of a less expensive model. Defendant and his fiancée told the salesman they would be back with the money to purchase the vehicle. After the couple left, the salesman discovered that they had performed a "key switch." He notified the police, who set up surveillance and had a mechanic remove a fuse from the SRT-8 so that the engine would crank but not start. That evening, defendant and his fiancée returned to the dealership, got inside the SRT-8, and attempted to start the car. Defendant was then arrested.

¶ 4 Defendant was originally convicted of APSMV, a Class 1 felony (625 ILCS 5/4-103.2(a)(3), (c) (West 2006)), and of VTC, also a Class 1 felony (625 ILCS 5/4-103.1(a), (c) (West 2006)). Because defendant had at least two prior convictions of Class 1 or Class 2 felonies, the trial court sentenced him as a Class X offender (730 ILCS 5-5-3(c)(8) (West 2006)). The court sentenced defendant to concurrent terms of 12 years' imprisonment for APSMV and 5 years' imprisonment for VTC. Defendant appealed his convictions and sentences, and we affirmed his conviction of VTC

but reversed his conviction of APSMV (*People v. Sutton*, No. 2-07-1206 (2009) (unpublished order under Supreme Court Rule 23)). We concluded that defendant could not have been found guilty beyond a reasonable doubt of APSMV, where he had been unable to exert sufficient “control” over the vehicle to sustain a conviction of APSMV because the vehicle had been disabled. We remanded for resentencing for attempt APSMV, a Class 2 felony (625 ILCS 5/4-103.2(a)(3) (West 2006); 720 ILCS 5/8-4(a), (c)(3) (West 2006)).

¶ 5 On remand, following a new sentencing hearing, the trial court sentenced defendant to 11 years’ imprisonment for attempt APSMV. The trial judge recognized that he was not “bound by” the sentence imposed by the prior trial judge and stated that he would “consider [his] own independent judgment” in resentencing the defendant. After reading the transcripts from the original sentencing hearing and defendant’s pre-sentence report, listening to counsel’s arguments, and hearing statements from defendant, the court found that the “most aggravating” factor was defendant’s “criminal history and background,” which revealed that defendant had been involved in “repeated offenses relating to thefts of automobiles” over the course of 15 years.¹ In comparing the seriousness of the conviction of attempt APSMV to the seriousness of the original conviction of APSMV, the court considered the difference *de minimis*, reasoning that it was not defendant’s “behavior, *** conduct, or *** intent” that resulted in the conviction of the lesser offense, but the “impossibility of the [greater] offense.” The court also recognized that, although defendant’s conviction had been lowered to attempt APSMV, a Class 2 felony, defendant was still subject to sentencing as a Class X offender, as he had been for the original conviction of APSMV, a Class 1

¹The record reflects that defendant had seven prior convictions of offenses involving possession of a stolen motor vehicle.

felony. The court stated that it was “hard to judge to what extent the Court should be influenced by a Class X based upon the commission of a Class [o]ne [f]elony as opposed to a Class X based on a commission of a Class [t]wo felony when *** the facts and circumstances are as they are.” Nevertheless, the court stated that it could not “completely discount” the difference and “g[a]ve the defendant the benefit of one year less” than his original sentence.

¶ 6 Defendant timely filed a motion to reconsider the sentence. Before the court heard defendant’s motion, the State filed a “Motion to Void Sentence,” requesting that the court resentence defendant to six years’ imprisonment for his conviction of VTC, since defendant’s five-year sentence fell below the statutory minimum sentence for a Class X offender (730 ILCS 5-5-3(c)(8) (West 2006) (sentencing range is from 6 to 30 years)). The court granted the State’s motion and resented defendant to six years’ imprisonment for VTC. The court then heard defendant’s previously filed motion to reconsider. At the hearing, the court vacated defendant’s conviction of VTC and the corresponding six-year sentence, concluding that it was improper to convict defendant of “two inchoate offenses *** arising out of a single set of circumstances.” In deciding to vacate the conviction of VTC, rather than the conviction of attempt APSMV, the court reasoned that the 11-year sentence would “give[] full consideration to the factors in mitigation/aggravation” that the court had considered at the sentencing hearing. The court then denied the remainder of defendant’s motion to reconsider. Defendant timely appealed.

¶ 7

ANALYSIS

¶ 8 On appeal, defendant’s sole contention is that the trial court abused its discretion in sentencing him to 11 years’ imprisonment for attempt APSMV, a Class 2 felony, when the court had sentenced him only to 6 years’ imprisonment for VTC, a Class 1 felony. Although the order from

which defendant appeals is the same order in which the court vacated his conviction of VTC, defendant does not argue on appeal that this was error.

¶ 9 A trial court has broad discretion in imposing a sentence, and its sentencing decisions are entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010); *People v. Perruquet*, 68 Ill. 2d 149, 153-54 (1977). Although Illinois Supreme Court Rule 615(b) (eff. Jan. 1, 1967) grants a reviewing court the power to reduce a sentence, a reviewing court should exercise this power “ ‘cautiously and sparingly’ ” (*Alexander*, 239 Ill. 2d at 212 (quoting *People v. Jones*, 168 Ill. 2d 367, 378 (1995))), and only where the trial court has abused its discretion in imposing a sentence (*Alexander*, 239 Ill. 2d at 212; *Perruquet*, 68 Ill. 2d at 153-54). A trial court abuses its discretion in imposing a sentence 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 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). The rationale justifying this high level of deference is that “ ‘the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the ‘cold’ record.’ ” *Alexander*, 239 Ill. 2d at 212-13 (quoting *People v. Fern*, 189 Ill. 2d 48, 53 (1999)). “ ‘The trial judge has the opportunity to weigh such factors as the defendant’s credibility, demeanor, general moral character, mentality, social environment, habits, and age.’ ” *Alexander*, 239 Ill. 2d at 213 (quoting *Stacey*, 193 Ill. 2d at 209). “ ‘[T]he reviewing court must not substitute its judgment for that of the trial court.’ ” *Alexander*, 239 Ill. 2d at 213 (quoting *Stacey*, 193 Ill. 2d at 209).

¶ 10 The sole argument defendant offers for why the trial court abused its discretion in imposing an 11-year sentence for his conviction of attempt APSMV is that the court imposed only a 6-year sentence for his conviction of VTC, which was classified as a more serious offense. Defendant

maintains that “[n]o rational criteria justify the near double the minimum sentence for the less serious of the offenses of which [defendant] was convicted, especially where he received the mandatory minimum sentence on the more serious offense.” Defendant cites no authority holding that a trial court abuses its discretion by sentencing a defendant as a Class X offender to a lengthier sentence for a Class 2 felony conviction than for a Class 1 felony conviction, and our research has uncovered none.

¶ 11 Defendant is correct that, had he not been subject to sentencing as a Class X offender, the sentencing range for his conviction of attempt APSMV would have been lower than the sentencing range for his conviction of VTC. Attempt APSMV is a Class 2 felony punishable by between 3 and 7 years’ imprisonment (730 ILCS 5/5-8-1(a)(5) (West 2006)), or by an extended term of between 7 and 14 years if eligible (730 ILCS 5/5-8-2(a)(4) (West 2006)). VTC is a Class 1 felony punishable by between 4 and 15 years’ imprisonment (730 ILCS 5/5-8-1(a)(4) (West 2006)), or by an extended term of between 15 and 30 years if eligible (730 ILCS 5/5-8-2(a)(3) (West 2006)).

¶ 12 However, because defendant was subject to sentencing as a Class X offender, the sentencing ranges for his convictions of attempt APSMV and VTC were the same. Section 5-5-3(c)(8) of the Unified Code of Corrections (Code) provides, in part, as follows:

“When a defendant, over the age of 21 years, is convicted of a Class 1 or Class 2 felony, after having twice been convicted in any state or federal court of an offense that contains the same elements as an offense now classified in Illinois as a Class 2 or greater Class felony and such charges are separately brought and tried and arise out of different series of acts, such defendant shall be sentenced as a Class X offender.” 730 ILCS 5/5-5-3(c)(8) (West 2006).

The sentencing range for a defendant sentenced as a Class X offender is between 6 and 30 years' imprisonment, regardless of whether the defendant's underlying conviction was of a Class 1 or a Class 2 felony. 730 ILCS 5/5-8-1(a)(3) (West 2006).

¶ 13 Defendant does not challenge the constitutionality of section 5-5-3(c)(8) of the Code, but only argues that the trial court abused its discretion in applying it. Nevertheless, we find instructive *People v. Roberts*, 331 Ill. App. 3d 15 (2002), a case in which this court held that section 5-5-3(c)(8) was constitutional even though it provided a single sentencing range for defendants sentenced as Class X offenders, regardless of whether the underlying convictions were of Class 1 or Class 2 felonies. *Roberts*, 331 Ill. App. 3d at 20-21. The court reasoned that “a conviction of a Class 2 felony that triggers section 5-5-3(c)(8) is not punished *more severely* than a conviction of a Class 1 felony that triggers section 5-5-3(c)(8).” (Emphasis in original.) *Roberts*, 331 Ill. App. 3d at 20. Instead, the court noted, “[t]he penalties are equal.” *Roberts*, 331 Ill. App. 3d at 20.

¶ 14 The court in *Roberts* did recognize that the seriousness of the offense is an important factor in sentencing, and that “where other sentencing factors are equal, a defendant convicted of a Class 2 felony that triggers section 5-5-3(c)(8) is more likely to receive a lower sentence than if he were being sentenced on a Class 1 felony that triggers 5-5-3(c)(8).” *Roberts*, 331 Ill. App. 3d at 20-21. However, the court did not say that a trial court was required to impose a lower sentence where a Class 2 felony was involved. Instead, it recognized that “the trial court has the discretion in this situation to fashion a sentence based on the seriousness of the offense and the defendant's criminal history.” *Roberts*, 331 Ill. App. 3d at 21.

¶ 15 On remand, the trial court in this case was faced with circumstances that made it challenging to decide what sentence to impose for defendant's conviction of attempt APSMV. The prior trial

judge had imposed a 12-year sentence for defendant's conviction of APSMV, a Class 1 felony, and had imposed a much lower sentence for defendant's conviction of VTC, also a Class 1 felony. After this court vacated defendant's conviction of APSMV and remanded for resentencing for attempt APSMV, a Class 2 felony, the trial court likely could not have increased defendant's sentence for his conviction of VTC.² See 730 ILCS 5/5-5-4(a) (West 2006) ("Where a conviction or sentence has been set aside on direct review or on collateral attack, the court shall not impose a new sentence for the same offense or for a different offense based on the same conduct which is more severe than the prior sentence less the portion of the prior sentence previously satisfied unless the more severe sentence is based upon conduct on the part of the defendant occurring after the original sentencing."); *People v. Smith*, 44 Ill. 2d 272, 276-77 (1970) (citing *North Carolina v. Pearce*, 395 U.S. 711 (1969); *People v. Baze*, 43 Ill. 2d 298, 302 (1969)). Thus, had the court been required to impose a sentence for defendant's conviction of attempt APSMV that was lesser than the sentence for his conviction of VTC, the maximum sentence the court could have imposed would have been the minimum mandatory sentence of six years (730 ILCS 5-5-3(c)(8) (West 2006) (sentencing range for defendant sentenced as a Class X offender is from 6 to 30 years)). However, after considering defendant's criminal history and the fact that defendant's conviction of attempt APSMV was based on the same conduct as his original conviction of APSMV, the court thought that the minimum sentence would have been too lenient. The 11-year sentence was well within the statutory range of

²The court did vacate defendant's original five-year sentence for VTC and impose a six-year sentence; however, this was because the five-year sentence fell below the statutory minimum for a defendant sentenced as a Class X offender (730 ILCS 5-5-3(c)(8) (West 2006) (sentencing range is from 6 to 30 years)), and neither party challenges the propriety of this on appeal.

between 6 and 30 years, and we cannot say that the trial court abused its discretion in imposing the sentence.

¶ 16 Defendant contends that his sentence was “at variance with the spirit and purpose of the law,” which he claims is reflected in article I, section 11, of the Illinois Constitution, which provides, “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. However, our supreme court has recognized that “[i]t is the province of the legislature to determine the seriousness of an offense.” *People v. Johnson*, 237 Ill. 2d 81, 97 (2010). In the context of section 5-5-3(c)(8), the legislature’s decision to impose the same enhanced penalty when the elements of that section are triggered reflects its intent “to focus on recidivism rather than the character of the underlying Class 1 or Class 2 felony.” *Roberts*, 331 Ill. App. 3d at 21. Thus, defendant’s sentence, which fell well within the sentencing range set by the legislature, did accord with the seriousness of his offense and his status as a recidivist offender.

¶ 17 Defendant also cites *Daniels v. Allen*, 344 U.S. 443 (1953), for the proposition that judicial discretion “must be subject to rational criteria.” The Court in *Daniels* held that its denial of *certiorari* in *habeas corpus* cases could not be interpreted as an expression of an opinion on the merits of the case. *Daniels*, 344 U.S. at 497. The court reasoned, in part, that permitting a district judge to interpret the denial of *certiorari* to be an approval of the decision of the state trial court would “afford no criterion” for district judges. *Daniels*, 344 U.S. at 496. The Court’s holding in *Daniels* has no applicability to this case. The trial court was afforded a wealth of criteria on which to base its sentencing decision in the form of the Code, the case law, and the information presented

at the sentencing hearing. The court exercised its “own independent judgment” in considering those criteria, and, again, we cannot say that the court abused its discretion in doing so.

¶ 18

CONCLUSION

¶ 19 For the reasons stated, we affirm the judgement of the circuit court of Du Page County.

¶ 20 Affirmed.