

2012 IL App (2d) 110172-U
No. 2-11-0172
Order filed July 10, 2012

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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. 09-CF-1954
)	
MICHAEL A. BOGMENKO,)	Honorable
)	John J. Kinsella,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in ordering defendant's 4-year sentence for aggravated discharge of a firearm to run consecutive to his sentences of 14 and 10 years for aggravated battery with a firearm where the court addressed mitigating factors cited by defendant and set forth the basis for its determination, which finds support in the record.

¶ 1 Defendant, 29-year-old Michael Bogmenko, was charged with 12 offenses arising from events that occurred during the early morning hours of August 8, 2009, in a residential alley in Addison, Illinois. Following a jury trial, defendant was convicted and sentenced on two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)) and one count of

aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)). Defendant appeals his sentence, claiming that the trial court abused its discretion in imposing consecutive sentencing for his conviction of aggravated discharge of a firearm.

¶ 2

BACKGROUND

¶ 3 The evidence presented at defendant's jury trial was that beginning late in the evening of August 7, 2009, three boys, 18-year-old Michael Bavetta, 15-year-old Gustavo Perez, and 14-year-old Christian Zuniga, were walking through the neighborhood between the Green Oaks Apartments and Bavetta's home, six blocks away. By 2 or 3 a.m. on August 8, 2009, the three boys were in the alley behind defendant's residence at the Green Oaks Apartments.

¶ 4 Bavetta testified that the three boys were trying to find a friend's house where Zuniga could stay the night when he heard a voice yell a gang slur and then a loud popping noise before falling to the ground in pain. Zuniga testified that they were in the alley trying to avoid detection by police for curfew violations when he heard defendant yell a gang slur before seeing him fire numerous shots in the boys' direction. Defendant testified that he came to the alley because he heard voices calling his name. According to defendant, as he approached the alley, the boys began throwing bricks and bottles at him, nearly striking defendant and causing him to fear for his life. Although the testimony is conflicting as to how the events escalated, it is clear from the verdicts returned by the jury that defendant, being a gang member, knowingly fired a handgun at the three boys, and knowingly harmed Bavetta and Perez. Bavetta sustained wounds to his abdomen, requiring emergency surgery that resulted in a hospital stay of several days. Perez was shot through the shoulder with the bullet hitting, but not penetrating, his neck.

¶ 5 Police apprehended defendant a short time after the incident and questioned him at the station. The record shows that defendant gave a confession to police officers, gave a second video-recorded confession, and also made a handwritten confession. In his recorded and handwritten confessions, and in his testimony at trial, defendant claimed he had acted in self-defense. Defendant cooperated with police by directing them to his handgun under a dumpster and by consenting to a search of his home where officers discovered items containing gang symbols. Both in the recorded statements and later at his sentencing hearing, defendant expressed regret and sorrow for his actions.

¶ 6 The 12-count indictment charged defendant with three counts of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2008)), two counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)), three counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2008)), one count of unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)), and three counts of aggravated unlawful use of a weapon (720 ILCS 5/24-1.6(a)(1) and 1.6(a)(3)(A) (West 2008) (uncased, loaded, and immediately accessible); 720 ILCS 5/24-1.6(a)(1) and 1.6(a)(3)(C) (West 2008) (no currently valid Firearm Owner's Identification Card); 720 ILCS 5/24-1.6(a)(1) and 1.6(a)(3)(F) (West 2008) (member of a street gang)).

¶ 7 The jury acquitted defendant of the three counts of attempted first-degree murder, but found defendant guilty of the remaining nine counts. Following trial, the court granted the State's motion to nol-pros the four counts of unlawful use of a firearm. The trial court also determined that two of the three aggravated discharge counts merged into the two counts of aggravated battery with a firearm, leaving for sentencing two convictions of aggravated battery with a firearm and one conviction of aggravated discharge of a firearm.

¶ 8 At his sentencing hearing, defendant offered his own statement in allocution and letters from his mother and nephew in mitigation. In his statement to the court, defendant apologized for the pain he had caused the victims and the embarrassment he had caused his family. Defense counsel argued that defendant was not firing his gun at the boys, but shooting in their general direction to get them to go away. Additionally, defense counsel urged defendant's lack of serious criminal history. Counsel noted that defendant had never been to the Department of Corrections and his prior offenses were relatively minor, although showing an alcohol and drug problem. Defense counsel stressed the importance of defendant's two small children and the role they played in defendant's decision to leave the gang. Defense counsel urged the sincerity of defendant's apologies to the court, the victims, and his family.

¶ 9 The State claimed none of the statutory factors in mitigation were present. The State argued that defendant's conduct caused and threatened serious physical harm to others and was not the result of provocation. The State urged that defendant's statements to the court were not trustworthy. The State pointed to defendant's criminal history and the events surrounding the offense in support of its argument that consecutive sentencing under section 5-8-4(c)(1) of the Unified Code of Corrections (the Code) (730 ILCS 5/5-8-4(c)(1) (West 2008)), was necessary to protect the public. The State argued that defendant, while under the influence of drugs and alcohol, emptied his gun in the direction of three individuals without regard for human life.

¶ 10 The trial court sentenced defendant to 14 years' imprisonment for one count of aggravated battery with a firearm (Bavetta) and 10 years' imprisonment for the second count of aggravated battery with a firearm (Perez). Finding severe bodily injury to Bavetta, the court imposed mandatory consecutive sentences (730 ILCS 5/5-8-4(d)(1) (West 2008)) for the aggravated battery convictions,

both Class X felonies (720 ILCS 5/12-4.2(b) (West 2008)). The court also sentenced defendant to four years' imprisonment for the single count of aggravated discharge of a firearm, a Class 1 felony (720 ILCS 5/24-1.2(b) (West 2008)). Finding it necessary to protect the public, the court ordered the sentence for aggravated discharge of a firearm to run consecutive to the 14-and 10-year consecutive sentences (730 ILCS 5/5-8-4(c)(1) (West 2008)), resulting in 28 years' imprisonment for the three convictions.

¶ 11 In determining that consecutive sentencing as to the aggravated discharge of a firearm conviction was necessary to protect the public, the trial court stated:

“[Defendant] offered at the time of trial some explanation of how and why this came about, combination of drinking, concerns over his well-being and his family and gang involvement and his attempts to extricate himself from that lifestyle and concerns that others were still threatening him as a result of that, admitted participation ***. But the bottom line is [defendant] stood out in an alley, took a gun, pointed a firearm at another human being [*sic*], and fired it at them several times. ***

And your conduct and the nature and circumstances of that offense and your character as reflected by those actions also required the imposition of consecutive sentences to deter you, protect the public from you and your conduct, and the persons who would plague a community with this absolutely mindless, senseless gang mentality of killing other people because they're part of a different group. It is the most base and ridiculous motivation for you to be standing here today and I'm sure, and I know from what you've said in here, you've reflected on it, and I think sincerely regret that you put yourself in this position, but

you can't unring these bells. It's been done. You pulled the trigger, not once, not twice, not three times[, but five times]. ***

And the community of Addison that has to deal with *** the fact that [when] people fire weapons at other human beings in a heavily populated residential area, people get killed. And in the instant case, the fact that someone didn't get killed was simply a matter of luck.”

¶12 Defendant timely filed a motion to reconsider, which the trial court denied. This timely appeal follows.

¶13 ANALYSIS

¶14 On appeal, defendant contends that the trial court abused its discretion in ordering the 4-year sentence for aggravated discharge of a firearm to run consecutive to his sentences of 14 and 10 years for aggravated battery with a firearm. Defendant does not challenge his mandatory consecutive sentences for the convictions of aggravated battery with a firearm.

¶16 The reviewing court gives the trial court great deference when reviewing a sentence because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial court has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Stacey*, 193 Ill. 2d at 209. Thus, a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Stacey*, 193 Ill. 2d at 209 (citing *People v. Streit*, 142 Ill. 2d 13, 19 (1991)). But a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210 (citing *People v. Fern*, 189

Ill. 2d 48, 54 (1999)); see also Ill. Const. 1970, art. I, § 11 (providing that “[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship”).

¶ 17 Section 5-8-4(c)(1) of the Code provides the following:

“(c) *** The court may impose consecutive sentences in any of the following circumstances:

(1) If, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record.” 730 ILCS 5/5-8-4(c)(1) (West 2008).

“When it is within the trial court’s discretion to impose consecutive sentences, the record must show that the ‘sentencing court is of the opinion that a consecutive term is necessary for the protection of the public.’” *People v. Sanders*, 356 Ill. App. 3d 998, 1006 (2005) (quoting *People v. Pittman*, 93 Ill. 2d 169, 178 (1982)). A finding of abuse of discretion may be proper when the record does not reflect that the trial court took mitigating factors into account and the facts in the record do not support the trial court’s determination that consecutive sentencing was necessary to protect the public. See *People v. O’Neal*, 125 Ill. 2d 291, 299-301 (1988).

¶ 18 After reviewing the record, we conclude that the trial court did not abuse its discretion in imposing a consecutive sentence for defendant’s conviction of aggravated discharge of a firearm. Defendant received the statutory minimum sentence of four years’ imprisonment for this offense. See 730 ILCS 5/5-4.5-30(a) (West 2008) (sentencing range for a Class 1 felony is 4 to 15 years).

In deciding whether to make the sentence consecutive or concurrent, the court addressed the mitigating factors presented by defendant. Notwithstanding those mitigating factors, the court determined that a consecutive sentence was necessary to protect the public. The court emphasized the grave danger associated with the “gang mentality” motivating defendant’s actions and his conscious disregard for human life. The record supports the court’s determination as there was evidence showing that the offense was gang related (the victims testified that they heard someone yell a gang slur before shots were fired, and police recovered evidence containing gang symbols at defendant’s apartment). The evidence also supported the court’s determination that the nature of defendant’s offense—firing a gun multiple times down a residential alley in the direction of others—reflected on defendant’s character and showed the ease with which he was willing to endanger the lives of others. Because the court clearly set forth its basis for concluding consecutive sentencing was necessary to protect the public, and because that conclusion finds support in the record, the court did not abuse its discretion. See *Sanders*, 356 Ill. App. 3d at 1006 (holding that there was no abuse of discretion when the record reflected that the trial court was of the opinion that consecutive sentencing was necessary to protect the public).

¶ 19 We now turn to defendant’s specific arguments. Defendant argues that the trial court abused its discretion in ordering the 4-year sentence to run consecutive to the consecutive 10- and 14-year sentences because factors concerning both the offense and the offender call for a “lesser aggregate sentence.” The State counters that defendant’s argument finds no support in Illinois law. We agree with the State.

¶ 20 In *People v. Carney*, 196 Ill. 2d 518 (2001), our supreme court held that a trial court’s imposition of mandatory consecutive sentences under section 5-8-4(a) of the Code (730 ILCS 5/5-8-

4(a) (West 1996)) did not violate the defendant's due process rights under the United States Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Carney*, 196 Ill. 2d at 531. In so holding, our supreme court reaffirmed the longstanding rule that consecutive sentences constitute separate sentences for each crime of which a defendant has been convicted, and cannot be combined as though they were one sentence for one offense. *Carney*, 196 Ill. 2d at 529-30. Applying this longstanding rule here, we must review the trial court's decision to impose consecutive sentences under section 5-8-4(c)(1) separately from defendant's "aggregate sentence." Therefore, we will address the remainder of defendant's arguments looking solely to the trial court's decision to order the four-year sentence to run consecutive to defendant's other sentences.

¶ 21 Defendant contends that his show of remorse undermines the determination that a consecutive sentence was necessary to protect the public. Defendant claims his "show of remorse was significant," and that, in ordering the four-year consecutive sentence, the trial court did not adequately account for his "genuine remorse and penitence." In support of his argument, defendant points out that the trial court was "struck" by defendant's show of remorse during his videotaped confession shown at a pretrial suppression hearing. Citing *People v. Phippen*, 324 Ill. App. 3d 649, 653 (2001), defendant states, "[t]rue expressions of remorse are recognized as one of the first steps toward rehabilitation and should be treated as a factor in mitigation."

¶ 22 While expressions of remorse and attempts to take responsibility for one's actions are important factors in mitigation at sentencing, a more thorough reading of *Phippen* reveals that defendant's reliance on it is misplaced. In *Phippen*, the defendant argued that the trial court should have given greater consideration to his plea of guilty and to his remorse over the incidents. *Phippen*, 324 Ill. App. 3d at 653. Concluding there was no abuse of discretion, the reviewing court noted that

the trial court had specifically stated it considered defendant's cooperation with authorities in determining his sentence. *Pippen*, 324 Ill. App. 3d at 653. The court reiterated that it would be improper to reweigh the factors involved in a trial court's sentencing decision. *Pippen*, 324 Ill. App. 3d at 653.

¶ 23 The State contends that in the present case, as in *Pippen*, the trial court acknowledged defendant's show of remorse in imposing the sentence and thus did not abuse its discretion. We agree. At defendant's sentencing hearing, the trial court stated that it believed defendant had genuinely reflected on, and truly regretted his actions, but nonetheless found that consecutive sentencing was necessary to protect the public from the dangers of gang violence and from a defendant who is willing to disregard life by firing multiple gunshots in the direction of others. Furthermore, in denying defendant's motion to reconsider his sentence, the trial court again acknowledged defendant's regret, but determined that defendant's actions were without justification and that consecutive sentencing was necessary to protect the public.

¶ 24 Defendant next contends that his actions in committing the offense were not premeditated and, therefore, the circumstances surrounding the offense make it less serious than an offense that was premeditated or committed in return for compensation. In support of this argument, defendant claims that Zuniga was a rival gang member, making him a "*de facto* enemy." From this, defendant argues, it is "reasonable to believe that defendant did not commit this crime in a premeditated manner because he reacted to the presence of rival gang members who [*sic*] he believed wished him harm."

¶ 25 Defendant's contention that his actions were not premeditated and therefore less serious misses the mark. In *People v. Romero*, 387 Ill. App. 3d 954 (2008), the defendant argued that his

sentence for first-degree murder was excessive because his actions were not premeditated but taken in the face of provocation. *Romero*, 387 Ill. App. 3d at 978. This court concluded that while the defendant in *Romero* acted spontaneously in response to the circumstances, he still made the calculated choice to fatally stab the victim. *Romero*, 387 Ill. App. 3d at 979. This court further concluded that although the defendant may not have premeditated the crime, in that he did not act pursuant to a preconceived plan or scheme, that consideration did not make his actions less serious. *Romero*, 387 Ill. App. 3d at 979. Here, assuming *arguendo* that defendant's actions were not premeditated, under *Romero*, defendant's actions would not necessarily be less serious. After all, defendant made the choice to enter the alley, and made the choice to bring a gun with him.

¶26 Furthermore, premeditation is not a prerequisite to consecutive sentencing under section 5-8-4(c)(1) of the Code and other considerations can be sufficient to justify the imposition of consecutive sentences. For example, in *People v. King*, 384 Ill. App. 3d 601, 613-14 (2008), the trial court determined that consecutive sentences were necessary to protect the public based on factors other than premeditation. This court upheld the trial court's determination that consecutive sentences for robbery and aggravated battery were necessary to protect the public because the crimes resulted in physical violence, notwithstanding defendant's claim that violence was not his objective. *King*, 384 Ill. App. 3d at 614. Here, as in *King*, the trial court relied on factors other than premeditation in concluding that consecutive sentencing was necessary to protect the public. In so concluding, the court noted the dangers associated with the "gang mentality of killing other people because they are a part of a different group" and defendant's conscious disregard for human life exhibited by firing a gun five times in the direction of others. Having set forth the basis for its determination, which finds support in the record, the trial court did not abuse its discretion.

¶ 27 Defendant also contends that consecutive sentencing was unnecessary because he was provoked by rival gang members whom he believed wished him harm. At his sentencing hearing, defendant argued to the court that he fired his gun in response to provocation. In determining that consecutive sentencing was necessary to protect the public, the trial court acknowledged defendant's account of how the shooting came about, but concluded that other evidence supported its determination. Defendant again raised the argument in his motion to reconsider his sentence. In denying defendant's motion, the court stated that there was "no good explanation or justification for his actions." We decline to reweigh the factors the court considered in deciding to impose a consecutive sentence. See *Stacey*, 193 Ill. 2d at 209 (a reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed mitigating and aggravating factors differently).

¶ 28 Finally, defendant cites *People v. Maldonado*, 240 Ill. App. 3d 470 (1992), in support of his arguments concerning premeditation and provocation, but his reliance falls short. In *Maldonado*, the reviewing court reduced a 40-year sentence for murder to 20 years where the offense was the result of a spontaneous gang fight. See *Maldonado*, 240 Ill. App. 3d 470. Unlike *Maldonado*, where the issue was the excessiveness of imposing the statutory maximum sentence (*Maldonado*, 240 Ill. App. 3d at 485), in this case the issue is the reasonableness of the trial court's determination that consecutive sentencing was necessary to protect the public from defendant. As previously stated, consecutive sentences merely determine the manner in which a defendant serves his sentences for multiple offenses. *Carney*, 196 Ill. 2d at 532. While *Maldonado* involved imposition of the maximum sentence for a conviction that arose out of gang activity, in the present case, the court imposed the statutory minimum sentence for a conviction that arose out of arguably similar

circumstances. *Maldonado*, 240 Ill. App. 3d at 486. Therefore, defendant's reliance on *Maldonado* is inapposite.

¶ 29

CONCLUSION

¶ 30 For the foregoing reasons, we hold that the trial court did not abuse its discretion in ordering defendant's four-year sentence for aggravated discharge of a firearm to run consecutive to his two sentences for convictions of aggravated battery with a firearm. The judgment of the circuit court of Du Page County is affirmed.

¶ 31 Affirmed.