NOTICE
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2012 IL App (4th) 100834-U

Filed 4/10/12

NO. 4-10-0834

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Coles County
DAVID L. ROGERS,	)	No. 09CF312
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Appleton and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court held that (1) the trial court did not abuse its discretion by sentencing defendant to five years in prison and (2) defendant's sentence is not a disproportionate penalty.

¶ 2 In June 2010, defendant, David L. Rogers, entered a partially negotiated guilty plea to possession of a controlled substance (less than 15 grams of a substance containing cocaine), a Class 4 felony. 720 ILCS 570/402(c) (West 2008). In August 2010, the trial court sentenced him to five years in prison.

¶ 3 Defendant appeals, arguing that his sentence is (1) excessive and (2) a disproportionate penalty under the Illinois Constitution. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2010, defendant entered a partially negotiated guilty plea to possession of

a controlled substance (less than 15 grams of a substance containing cocaine) (720 ILCS 570/402(c) (West 2008)), a Class 4 felony. In exchange for defendant's guilty plea, the State agreed to dismiss a count of obstructing justice. The State did not, however, agree to make any particular sentencing recommendation.

¶ 6 At the time of defendant's guilty plea, the parties stipulated that defendant had been arrested in June 2009 after a police officer stopped a vehicle in which defendant was a passenger. The officer did so after observing the vehicle fail to stop at a stop sign. As defendant exited the vehicle, the officer observed defendant place an item on the front passenger floorboard. The officer later discovered (1) residue on a chrome metal pipe burnt on both ends and (2) a clear plastic bag containing a white powder substance on the floorboard. A subsequent field test indicated the presence of cocaine. The officer attempted to weigh the substance, but the weight of the substance did not register on his testing equipment.

¶ 7 Defendant was 52 years old at the time of the sentencing hearing. The presentence investigation report (PSI) showed that defendant had seven prior felony convictions, including a 1980 murder conviction, rendering him eligible for an extended-term sentence of between three and six years in prison.

¶ 8 At an August 2010 sentencing hearing, defendant's probation officer testified that while defendant was on pretrial release, defendant tested positive five times for the presence of cocaine. Defendant admitted using cocaine while on pretrial release and testified that he suffered from drug addiction.

¶ 9 At the conclusion of the sentencing hearing, the trial court reviewed the PSI and acknowledged defendant's substance-abuse treatment. The court noted that it had given

defendant several chances by reducing bond to allow for pretrial release and residential treatment. The court observed that (1) there was "very little chance that [defendant] would ever comply with probation," and (2) a sentence of probation or conditional discharge would deprecate the seriousness of defendant's conduct. The court thereafter sentenced defendant to five years in prison.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant argues that his sentence is (1) excessive and (2) a disproportionate penalty under the Illinois Constitution. We address defendant's contentions in turn.

¶ 13 A. Defendant's Excessive-Sentence Claim

¶ 14 Defendant contends that his sentence is excessive in light of the statutory factors set forth in section 5-4-1(a) of the Unified Code of Corrections (Unified Code) (730 ILCS 5/5-4-1(a) (West 2008)). Specifically, defendant contends that although he "possessed cocaine residue and, as a result, broke the law," his sentence is excessive in light of (1) the evidence received at trial, (2) the PSI, (3) the financial impact of incarceration, (4) the aggravating and mitigating evidence presented, and (5) the option of substance-abuse treatment. We disagree.

¶ 15 1. *The Standard of Review*

¶ 16 A reviewing court may not alter a defendant's sentence absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010). A sentence is an abuse of discretion when 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, 940 N.E.2d at 1066 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626,

629 (2000)).

¶ 17 2. *The Available Sentence and the Statutory Factors*

¶ 18 " 'The range of sentences permissible for a particular offense is set by statute. Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant. [Citation.] The sentencing judge is to consider "all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding." [Citation.]' " *People v. Lewis*, 361 Ill. App. 3d 1006, 1019-20, 838 N.E.2d 996, 1007 (2005) (quoting *People v. Fern*, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 210-11 (1999)). "A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment and habits than a reviewing court, which must rely on a 'cold' record." *People v. Little*, 2011 IL App (4th) 090787, ¶ 24, 957 N.E.2d 102, 105-06.

¶ 19 Section 402(c) of the Illinois Controlled Substances Act (Act) provides, in pertinent part, as follows: "Any person who violates this Section with regard to an amount of controlled substance *** is guilty of a Class 4 felony." 720 ILCS 570/402(c) (West 2008). The Unified Code provides for an extended-term sentence of not less than three years and no more than six years in prison when, as here, a defendant is convicted of a Class 4 felony after having been convicted in Illinois of a similar or greater class felony within 10 years after the previous conviction. 730 ILCS 5/5-5-3.2(b), 5-8-2(a)(6) (West 2008). Defendant does not dispute that he

was statutorily eligible for the imposition of an extended-term sentence.

¶ 20 As for the factors the trial court must consider at sentencing, section 5-4-1(a) of the Unified Code provides, as follows:

> "At the hearing the court shall:
>
> (1) consider the evidence, if any, received upon the trial;
>
> (2) consider any presentence reports;
>
> (3) consider the financial impact of incarceration based on the financial impact statement filed with the clerk of the court by the Department of Corrections;
>
> (4) consider evidence and information offered by the parties in aggravation and mitigation;
>
> (4.5) consider substance abuse treatment, eligibility screening, and an assessment, if any, of the defendant by an agent designated by the State of Illinois to provide assessment services for the Illinois courts." 730 ILCS 5/5-4-1(a) (1) through (4.5) (West 2008).

¶ 21 3. *Defendant's Sentence in This Case*

¶ 22 Defendant's primary contention is that his sentence is excessive in light of the evidence that showed that the cocaine in his possession was merely residue. In addition, defendant asserts that the trial court improperly weighed the PSI, the financial cost of incarceration, and aggravating and mitigating evidence in determining his sentence. Defendant adds that his sentence is excessive "in light of the fact that his offense was a product of his drug

addiction." We are unpersuaded.

¶ 23 The record in this case shows that the trial court considered each of the section 5-4-1(a) factors at defendant's sentencing hearing. As previously discussed, the evidence presented at the plea hearing showed that defendant possessed cocaine residue. While on pretrial release, defendant tested positive for cocaine, even after completing a residential treatment program. Moreover, the PSI showed that defendant had been previously convicted of several felonies—including, among others, aggravated battery, armed robbery, unlawful use of a weapon, and murder—rendering him eligible for an extended-term sentence.

¶ 24 Given defendant's (1) eligibility for an extended-term sentence of three to six years in prison and (2) inability to comport his actions with the laws of this state, we conclude that the trial court did not abuse its discretion by sentencing defendant to five years in prison.

¶ 25 B. Defendant's Claim That His Sentence Is Disproportionate Under the Illinois Constitution

¶ 26 Defendant next contends that his sentence does not comply with the constitutional mandate that all sentences be proportionate according to the seriousness of the underlying offense. Specifically, defendant asserts that his sentence is disproportionate in light of other potential sentences and the legislative scheme for punishing drug offenses. We disagree.

¶ 27 1. *The Standard of Review*

¶ 28 A defendant's challenge to his sentence on proportionate-penalties grounds, where not a challenge to the statute itself, is reviewed for an abuse of discretion. See, *e.g.*, *Stacey*, 193 Ill. 2d at 209-10, 737 N.E.2d at 629; *People v. Starks*, 344 Ill. App. 3d 766, 771, 800 N.E.2d 1239, 1243-44 (2003).

¶ 29 2. *Article I, Section 11, of the Illinois Constitution*

¶ 30 Article I, section 11, of the Illinois Constitution provides as follows: "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. A defendant may challenge a statute on proportionate-penalties grounds by arguing that a penalty violates the "cruel or degrading" standard or is harsher than the penalty for an offense with identical elements. *People v. Pelo*, 404 Ill. App. 3d 839, 882, 942 N.E.2d 463, 499 (2010).

¶ 31 3. *Defendant's Proportionate-Penalties Claims*

¶ 32 Defendant first claims that his sentence is excessive because a person possessing additional amounts of cocaine could have been sentenced less severely, as follows:

> "[Defendant] possessed a minuscule amount of cocaine residue and had no prior drug offenses. Yet, [defendant] was sentenced to five years in the Illinois Department of Corrections—a sentence more severe than that of a first-time offender who possessed 15 grams of cocaine, an amount in excess of that normally used by a drug dealer. [Citations.] In fact, a person who possessed 99 grams of cocaine could have also been sentenced less severely than [defendant] was in this case."

¶ 33 Here, defendant attempts to compare his sentence with the penalty for an offense with different elements—namely, a sentence for a drug conviction involving more weight. Such cross-comparison challenges, however, have been rejected by our supreme court. *People v. Sharpe*, 216 Ill. 2d 481, 519, 839 N.E.2d 492, 515-16 (2005). Defendant's argument suffers a

critical flaw: the trial court imposed a five-year prison term based on his eligibility for extended-term sentencing due to his history of criminality. But for that extended-term eligibility, defendant's sentence would have been in the range of one to three years. 730 ILCS 5/5-8-1(a)(7) (West 2008).

¶ 34 As for defendant's claim that his five-year sentence for possession of cocaine residue is excessive when weighed against the legislative scheme for punishing drug offenses, we reject it as well.

¶ 35 The express intent of the legislative scheme to punish drug offenses under the Act is to "deter the unlawful and destructive abuse of controlled substances." 720 ILCS 570/100 (West 2008). Defendant appears to assert that the legislative intent is to not punish those defendants convicted of possessing residue as harshly as other offenders. This assertion, however, fails to account for the structure of the Act that prescribes elevated sentences for manufacture or delivery according to the weight of the drug found in the defendant's possession, which includes residue. 720 ILCS 570/401, 402 (West 2008).

¶ 36 III. CONCLUSION

¶ 37 For the reasons stated herein, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 38 Affirmed.