

No. 1-11-1620

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. 09 CR 8765
)	
SWAAN SMITH,)	Honorable
)	Colleen A. Hyland,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Harris and Justice Quinn concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment affirmed on defendant's conviction of armed robbery over his contention that the trial court considered an improper aggravating factor in sentencing him to nine years' imprisonment.
- ¶ 2 Following a jury trial, defendant Swaan Smith was found guilty of armed robbery and sentenced to nine years' imprisonment. On appeal, he solely contends that the trial court improperly considered pending charges in aggravation during sentencing, requiring that his cause be remanded for resentencing.

¶ 3 The record discloses that defendant was convicted of armed robbery on evidence showing that he and his accomplice, Aaron Jones, who lived downstairs from the victim Roldolpho Martinez-Zamora, at 8004 South Lamon Avenue in Burbank, Illinois, planned to rob the victim on April 23, 2009. At 2:15 that afternoon, defendant and Jones knocked on the victim's door, and when he opened it, they pushed the door wide open. Defendant held a shovel two feet away from the victim in a threatening manner while Jones went through the victim's pockets taking his debit card and cellular phone. When they left, defendant discarded the shovel in the grass behind the residence. The shovel was later retrieved by police and found to have defendant's fingerprints on it. Defendant was subsequently arrested and signed a one-page typed statement in which he admitted robbing the victim and using the shovel in a threatening manner.

¶ 4 At the sentencing hearing, the State argued, in aggravation, that the facts of the case showed that defendant committed a violent crime where he used a shovel as a weapon and held it in a threatening manner. The State also noted that while this case was pending, and defendant was out on bond, he "picked up four [separate,] additional felonies in DeKalb County." There was also an active warrant for his arrest on the four pending felonies for failing to appear on them which included one false reporting, one forgery, and two misuse of credit cards. The State explained that it was an aggravating factor that:

"[defendant] had the nerve to come to this Court with an active warrant, testify on the stand that he's studying criminal justice at Kishwauekee College, knowing that he hadn't appeared five days earlier for his felony cases in DeKalb. I would think that's certainly aggravating."

Defendant responded that he is asking the court not to consider "arrests in which someone has pled not guilty." The court replied that the State is arguing that while defendant was on bond for

a felony in this case, he has been arrested four separate times "in violation of the terms and conditions of his bond," which is properly before the court. The court further explained that:

"They're presented to the Court to be considered for the purpose of the fact that while the defendant was on bond for this offense, he has been arrested for four separate felonies in violation of the terms of the bond, and you heard how the State presented. There's no indication that he's been found guilty, and that has not been presented to the Court. But it is noted that he has four other pending felonies at this time. And that's properly considered to be given that weight."

¶ 5 Defense counsel argued, in mitigation, that defendant was 17-years-old and in college at the time of the offense, and pointed out that he had no prior criminal history at the beginning of this case. He then presented character witnesses, including a fellow church member, who described defendant as a quiet, meek and humble person, and his Sunday school teacher. Counsel also introduced letters in mitigation, including one from defendant's high school teacher, and two from leaders of his church.

¶ 6 In announcing its sentencing determination, the court stated that it considered everything it heard in aggravation and mitigation, that it has reviewed the pre-sentence investigation report (PSI), and considered the facts it heard during the jury trial. The court also noted that it considered the testimony of the mitigation witnesses, and defendant's lack of criminal background. In addition, the court noted that there are four additional pending cases, one of which resulted in a warrant for defendant's arrest for his failure to appear days before he was to begin his jury trial in this case. The court further stated:

"[A]ll of those pending cases are felony matters, and all of those are matters which [defendant] still has yet to address. And at this time, he is yet to be adjudged guilty or not guilty of any of those offenses, but what is aggravating about those is that they were allegedly committed while they [*sic*] were on bond for this matter, and that the defendant had failed to comply with the conditions of his bond in those matters in that, um, he had warrants issued for his arrest for failing to appear in those courts, which shows a total lack of -- of recognition of the court system and -- and the requirements that [defendant] is -- is to face when he is out on bond. And it's a lack of respect."

The court then sentenced defendant to nine years' imprisonment.

¶ 7 Defendant filed a motion to reconsider the sentence alleging, in relevant part, that the trial court erred in considering his arrests in aggravation which were subsequent to his arrest in this case. At the proceeding on the motion, the State asserted that the court may inquire into defendant's natural inclination or aversion to crime, and that the court was within its bounds to consider the relevant and reliable information provided, which went to defendant's moral character and was relevant for sentencing. The trial court denied defendant's motion, and in doing so explained that what it "[s]aw was a disrespect for the court's conditions of the bond that [this] court had set and that the defendant failed to appear in another courtroom as ordered by a court." The court further stated that defendant's outstanding warrants for four other felonies suggested a lack of respect for the court system which it was allowed to consider in determining the appropriate sentence. The court further noted that it also considered the facts of the case, the

arguments presented by the respective parties, defendant's history, and the aggravating nature of what was before the court regarding the facts, as well as the sentencing range.

¶ 8 On appeal, defendant maintains that the trial court improperly relied on his four separate pending felony charges in aggravation during sentencing. He claims that they "undoubtedly affected [his] sentence, as they were the only evidence presented in aggravation." He thus requests this court to vacate his sentence and remand his cause for resentencing.

¶ 9 There is no dispute that the nine-year sentence imposed in this case for armed robbery fell within the statutory range of 6 to 30 years' imprisonment. 730 ILCS 5/5-8-1 (West 2010). As a result, we may not disturb that sentence absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002). We find none here.

¶ 10 In support of his claim that bare arrests and pending charges may not be considered in aggravation during sentencing, defendant relies on *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004), citing *People v. Wallace*, 145 Ill. App. 3d 247, 255 (1986); and *People v. Thomas*, 111 Ill. App. 3d 451, 453-54 (1983). He also claims that consideration of the "mere fact of a pending charge" is erroneous (emphasis added) citing *Wallace*, 145 Ill. App. 3d at 256. Defendant maintains that this case "falls squarely within the law expressed in *Wallace* and *Johnson*," where the trial court considered these prohibited factors in sentencing him to a nine-year term. We disagree.

¶ 11 The record shows that the State presented the following factors in aggravation: 1) the violent nature of the case, and 2) that defendant violated the conditions of his bond where he was arrested for four separate felonies during the pendency of this case. The trial court considered this evidence in aggravation, specifically noting that defendant had no criminal history, and that its "purpose" of noting the pending felonies was for the aggravating factor that defendant was "in violation of the terms of the bond." Thus, contrary to defendant's contention, the trial court did

not consider the *mere* fact of the pending felony charges in aggravation, but, rather, considered that defendant had outstanding warrants for felonies allegedly committed while out on bond which violated the terms of the bond conditions, a factor that may be considered in aggravation. *People v. Hunzicker*, 308 Ill. App. 3d 961, 963, 966 (1999); *People v. Williams*, 97 Ill. App. 3d 394, 405 (1981).

¶ 12 In this respect, this case is unlike *Wallace*, 145 Ill. App. 3d at 255-56, where the sentencing court stated that it must consider that defendant had been charged with a very serious offense, rape, in South Carolina, which was found to be reversible error. Here, the trial court did not consider "bare pending charges," but, rather, considered them as violations of his bond conditions, which is permissible. *Hunzicker*, 308 Ill. App. 3d at 963, 966; *Williams*, 97 Ill. App. 3d at 405.

¶ 13 In *Johnson*, the sentencing court similarly noted a prior charge of a sexual assault offense in Arkansas. On review, this court observed that the presentencing report showed that the Arkansas offense was an arrest and not a conviction, and thus the trial court erred in relying upon it in sentencing defendant. *Johnson*, 347 Ill. App. 3d at 576. Here, unlike *Johnson*, the court specifically stated that it was not relying on the pending charges as evidence of guilt in sentencing defendant, but, rather, noted that they showed his violation of his bond conditions. *Hunzicker*, 308 Ill. App. 3d at 963, 966; *Williams*, 97 Ill. App. 3d at 405.

¶ 14 In sum, we find this case more akin to *Hunzicker* and *Williams*. In *Hunzicker*, the sentencing court found factors in aggravation based on defendant's criminal history, and his commission of another offense "while on bond." *Hunzicker*, 308 Ill. App. 3d at 963. The reviewing court noted that defendant's recidivism, while on bond, weighed against a minimal sentence and found no abuse of discretion in sentencing by the trial court. *Hunzicker*, 308 Ill. App. 3d at 966. We reach the same conclusion here.

¶ 15 In *Williams*, defendant maintained that the trial court improperly relied on her record of bond forfeitures in imposing sentence, and rejected defendant's attempt to analogize bond forfeiture warrants to arrests, which may not be considered in sentencing. *Williams*, 97 Ill. App. 3d at 405. This court held that the fact that defendant does not appear in court when required to do so as a condition of her bond indicates a disrespect for the law, and reflects on defendant's moral character which is a proper area of inquiry in sentencing. *Williams*, 97 Ill. App. 3d at 405.

¶ 16 The trial court here, as in *Williams*, considered defendant's violations of the bond conditions and failure to appear on the other cases as a sign of disrespect for the law, which is also an aggravating factor (*Williams*, 97 Ill. App. 3d at 405-06) reflecting on his moral character, and impacting his potential for rehabilitation. The court also considered defendant's entire history and the aggravating nature of the facts before it, and further noted that it did not take into consideration the pending offenses as evidence of guilt because defendant is presumed innocent until found guilty. The record, thus, does not show that the trial court improperly considered mere pending charges in imposing sentence. *People v. Alvelo*, 201 Ill. App. 3d 496, 501 (1991).

¶ 17 We, therefore, find no abuse of discretion in the sentence imposed, and have no cause for interfering with the sentencing determination made by the court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985). We, therefore, affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.