

No. 1-11-2009

**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 16254
	)	
JAMES BROWN,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Harris and Justice Connors concurred in the judgment.

**ORDER**

¶ 1 *Held:* Trial court did not err by failing to reopen trial to consider a police log discovered after trial when defendant could with due diligence have discovered the log before trial, and counsel did not render ineffective assistance because the log was unlikely to change the outcome of the proceedings. Defendant's eight-year prison sentence for burglary, as a mandatory Class X offender, was not excessive where the court had for its consideration the mitigating factors raised by defendant. Defendant's three-year term of mandatory supervised release was proper where he was convicted of a Class 2 felony but sentenced as a mandatory Class X offender.

¶ 2 Following a bench trial, defendant James Brown was convicted of burglary and sentenced as a mandatory Class X offender to eight years imprisonment. On appeal, defendant contends that the trial court erred by not reopening the trial to consider a police log discovered after trial

1-11-2009

corroborates his account of events, arguing in the alternative that trial counsel rendered ineffective assistance by not discovering the log earlier. He also contends that his sentence was excessive in light of his relatively minor offense, age, criminal background, and consistent employment. Lastly, he contends that his term of mandatory supervised release (MSR) should be the two years for his Class 2 felony offense rather than the three years for a Class X felony.

¶ 3 Defendant was charged with burglary for entering a garage owned by Bernice and Howard Toney on August 24, 2009, without authority and with the intent to commit theft therein.

¶ 4 Defendant filed a motion to suppress pre-trial identification. He alleged that he was stopped by police on the day in question because Bernice reported seeing a man exiting her garage carrying six first-aid kits "kits", three of which he immediately threw in a garbage can before leaving the scene on a bicycle. She described the burglar as dark-skinned and wearing a baseball cap and jacket. When responding officers saw defendant on a bicycle nearby, they stopped him. Defendant argued that he wasn't committing a crime at the time, but police brought him to Bernice, who identified him as the burglar. The officers did not let him exit the police vehicle and thus Bernice's identification was made without "his height, skin tone, weight, and clothing fully viewed." He also alleged that no kits were found in his possession and that his clothing did not match Bernice's description of the burglar. He sought to suppress the identification, which he characterized as illegal and unduly suggestive, and any other evidence arising from the identification.

¶ 5 While the motion to suppress was pending, defendant made a discovery request for the "911 query logs" regarding the burglary in question, and for the criminal backgrounds of all potential State witnesses. In open court, defendant clarified that he needed the logs "[n]ot for my motion but before trial." The request was continued at the court's behest due to scheduling issues, with no indication on the record that it was raised again before trial.

¶ 6 At the hearing on the motion to suppress, police officer Jon Venegas testified that he and another officer responded at about 4:30 a.m. on the day in question to a radio report of a burglary

1-11-2009

in progress. The burglary suspect was described as a dark-complected black man on a large bicycle; Officer Venegas did not believe the radio report included a clothing description. The officers "toured" the area and, about five minutes after receiving the radio call and less than a block from the burglary scene, saw defendant on a large "cruiser" bicycle wearing a multicolored sweater. Officer Venegas admitted that his police report did not mention that he found defendant after about five minutes. Officer Venegas and his partner ordered defendant to step off his bicycle and then patted him down but did not handcuff him. Officer Venegas's partner took him to the burglary scene while Officer Venegas brought the bicycle there. He could not recall any conversation with defendant during the stop. The officers approached Bernice and Howard and told her "that we had someone that we would like for her to see." The officers had defendant exit the vehicle and stand. They then shined a light on him since it was "still dark outside." Bernice then identified defendant as the burglar; Officer Venegas recalled the identification being "positive" but not exactly what Bernice said. Officer Venegas was told that there had been three burglars, but he could not recall if Bernice gave a clothing description for the man on the bicycle. The court denied the motion to suppress, finding that the show-up identification was not suggestive or improper and noting that any issues with the identification would go to its weight at trial.

¶ 7 Just before trial, the State informed the court that, in interviewing Officer A. Rose in preparation for trial, he gave additional information not disclosed in the police report. The State informed defendant of this information and gave defense counsel an opportunity to interview Officer Rose. Defendant maintained that he was still ready for trial.

¶ 8 At trial, Bernice Toney testified that she and her husband Howard were eating breakfast at about 4:30 a.m. on the day in question when an alarm went off, indicating that the garage door was open. Bernice looked out the window and saw three men entering her yard and then her detached garage. She pushed a button so that the alarm company would summon the police; as she did so, two of the men left. Defendant then left the garage carrying three kits, which had

1-11-2009

been stored in the garage, and went out into the alley through the unlocked back gate. About five minutes later, defendant rode down the alley on a bicycle, no longer carrying the kits. Two police officers arrived a short time later and found the three kits in a neighbor's garbage can. She was able to identify defendant by his cap and eyeglasses. When police returned with defendant and "made him get out" of the police vehicle, she identified him as the burglar in part due to his eyeglasses. Defendant did not have permission to be in her garage or remove anything from it.

¶ 9 On cross-examination, Bernice testified that the police asked her about, and she described, only the man she saw exiting with kits and later riding away on a bicycle. She described him as a short black man on a bicycle. When the officers brought defendant to her, he was no longer wearing the jacket and cap he had worn when exiting the garage, and she said so to the officers. Howard was with her when she identified defendant as the burglar.

¶ 10 Officer R. Thompson testified that he and Officer Rose went to the Toney home at about 4:30 a.m., and Bernice told them that the burglar was a dark-complected man wearing eyeglasses and riding a large bicycle. Officer Thompson could not recall the clothing or hair description. Bernice also told them that she saw him put the kits into a neighbor's trash can. Officer Thompson went to the can and found three kits inside, and Bernice identified them as her property.

¶ 11 Officer Venegas testified consistently with his hearing testimony, including that the entire radioed description of the burglar was of a dark-complected black man on a large bicycle. When defendant was stopped by Officer Venegas about a block from the scene and after about 5 to 10 minutes of searching, he was wearing eyeglasses and a multicolored sweater but no cap or jacket. Officer Venegas did not see defendant in possession of a cap, jacket, or any of the kits. Bernice alone identified defendant, though Howard was present for the identification, and she did not identify or rule out the bicycle. She mentioned that there had been two other men present but did not describe them.

¶ 12 Defendant's motion for a directed finding was denied.

1-11-2009

¶ 13 Officer Rose testified that he arrived at the scene about five minutes after receiving the call, before Officer Thompson, and saw a man riding a bicycle back and forth across the mouth of the alley. However, Officer Rose could not describe him. Officer Rose spoke with Bernice, who was alone at the time and described the lone burglar who exited her garage as a black man wearing eyeglasses and dark clothing riding a large bicycle. Officer Rose relayed this description over the police radio. He was still at the scene when officers brought defendant there, about five to ten minutes after he radioed his description, and Bernice identified defendant as the burglar.

¶ 14 Detective Craig Levins testified that, in investigating the Toney burglary, he spoke with Bernice that morning. She told him that she saw two men exiting the garage, then a third man as she was talking with the alarm company. However, she did not tell him that she had seen anyone entering the garage.

¶ 15 Defendant testified that he was a 48-year-old carpenter who lived about three blocks from the burglary scene. On the day in question, he left home at about 5:45 a.m., traveling to work by bicycle. He was wearing a multicolored sweater, with slacks and white sneakers, and had not been wearing either a cap or jacket. At about 6 a.m., he was stopped by officers, who requested his wallet and checked his identification. They took him to their police vehicle, explaining that he "fit a description" but nothing further. He responded to the officers' questions that he was coming from home and had previously been arrested. They handcuffed him and took him to the burglary scene, where one of the officers shined a light into the vehicle while he was still seated in it. A woman he had never seen before said "that's not him," and he was then taken out of the vehicle. The woman said that "he wasn't that tall," and the officers put him back into the vehicle. An officer showed him some boxes and asked him where "the rest of the stuff" was, but he denied knowing what he was referring to. A few minutes later, defendant was arrested for burglary. Defendant denied entering, or removing anything from a garage that day.

¶ 16 Following closing arguments, the court found defendant guilty of burglary. The court noted that defendant's testimony (1) as to when he left home and was stopped, and (2) that

1-11-2009

Bernice not only did not identify him but stated positively that he was not the burglar, was contradicted by the other witnesses. If the court accepted defendant's testimony regarding the on-scene identification, the court noted, Bernice as well as the officers lied in their trial testimony. However, the court expressly found defendant's testimony "totally unbelievable."

¶ 17 Defendant's post-trial motion challenged the sufficiency of the evidence and the denial of his motion to suppress pretrial identification. He also offered new evidence regarding the discrepancy between his testimony that he did not leave home until well after 5 a.m. and the police testimony that defendant was detained several minutes before 5 a.m. The new evidence was allegedly to the effect that the arresting officers did not arrive at the scene until 5:58 a.m.

¶ 18 Attached to the motion was the police log of the burglary incident, showing that the initial report was received at 4:40 a.m. and showing various entries regarding Beats 611 and 612 from 4:40 a.m. through 4:47 a.m. The log showed Beat 614 "enroute" at 5:36:32 a.m. and "onscene" at 5:58 a.m. while it was not "clear" until 8:08 a.m. (The police reports in the record indicate that Officer Venegas was on Beat 614 while Officers Rose and Thompson were on Beats 611 and 612 respectively.) The log showed no "enroute" or "onscene" entry for Beats 611 or 612 and that both beats were "clear" at 5:36:27 a.m. The log also indicated that the initial call reported "3 males inside" the caller's garage and that the later description was of three men in the garage, one last seen wearing a cap, a blue and white jacket, and riding a bicycle.

¶ 19 At the hearing on the post-trial motion, when defendant sought to reopen the case for new evidence – the log – the court asked defense counsel where he obtained the log. Counsel replied "after trial" and that he "never received it from the State." Counsel explained that "my expectations of the verdict wasn't to be based upon time [but] the testimony of the victim and how believable it was" under the circumstances of the show-up identification; that is, that his trial strategy involved challenging Bernice's credibility rather than that of the officers. The State told the court that the log "was not something that was in the State's possession, nor is it in our file now" and argued that defendant could have subpoenaed the log before trial. The parties and

1-11-2009

court discussed whether an entry in the log for 5:36 a.m. – "614 [006 W/1]" – meant that Beat 614 was proceeding at said time to the 6<sup>th</sup> District police station with one person in custody, and whether defendant being in custody at 5:36 a.m. contradicted his testimony that he did not leave home until 5:45 a.m. The court denied the post-trial motion, noting that newly-discovered evidence must have been undiscoverable before trial while the log was discoverable. The court also found that a key factor in the finding of guilt was that defendant testified that Bernice denied that he was the burglar while she testified to identifying defendant, observing that the log both corroborated Bernice's testimony, by documenting that she reported three burglars but described only one, and contradicted defendant's testimony that he did not leave home until about 5:45 a.m.

¶ 20 The pre-sentencing investigation report (PSI) showed defendant's prior convictions: for attempted armed robbery and robbery, separately, in 1980; for theft in 1983; for unlawful use of a weapon by a felon, and separately for domestic battery, in 2000, and for violation of an order of protection in 2003. Defendant was born in 1962, the fourth of five children. His parents separated when he was seven or eight years old; he was raised by his mother with regular contact with his father, and defendant described his childhood as "good" with no abuse. Defendant had five children by four women; he is in contact with them and provides financial support when he can. He married in 2001 but separated in 2006 without children. Defendant was a sophomore when he left high school but received his GED in 2006. He subsequently was trained in carpentry and bricklaying. He was employed from 2006 through 2008, and again from 2009 to his arrest for the instant offense, with volunteer work between. He admitted drinking alcohol and taking drugs until 1987 but denied using either alcohol or illegal drugs since. He admitted to being a gang member from 1982 to 1995.

¶ 21 At the sentencing hearing, the State argued, and defendant did not challenge, that defendant was a mandatory Class X offender based on his 1980 convictions. In aggravation, the State argued defendant's criminal record and that the victim was a senior citizen. Defense counsel argued in mitigation that the triggering felony offenses were committed when he was 17

1-11-2009

years old and that he "kind of change[d] his life around" afterwards with no convictions for the last decade. Counsel attributed the 2003 conviction for violating an order of protection to a "situation with his then-fiancee" where "he was just defending himself from some of her family members." Counsel also presented a letter from the "impact program" to which he was assigned, stating that he "interacts well with peers and staff," obeying rules and performing his duties to the point where he was appointed a house elder who "runs the day to day operations of the house when staff isn't present." Counsel noted that defendant owned his home and was working at the time of the instant arrest.

¶ 22 Defendant addressed the court, arguing that he had made mistakes in his past but had changed his life since 1995 by getting married, obtaining his GED and job training, and working in a skilled trade.

¶ 23 Before passing sentence, the court noted that it considered the trial testimony and the PSI. After reciting defendant's criminal history, the court sentenced him to eight years imprisonment with three years of MSR. This appeal followed.

¶ 24 On appeal, defendant first contends that the trial court erred by not reopening the trial evidence to consider a police log discovered after trial that corroborates his account of events.

¶ 25 Newly-discovered evidence warrants a new trial when it is (1) discovered since the trial, (2) of such character that it could not have been discovered prior to trial by the exercise of due diligence, (3) material to the issue and not merely cumulative, and (4) of such a conclusive character that it will probably change the result on retrial. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010). The denial of a motion for a new trial based on newly-discovered evidence is reviewed for abuse of discretion. *Id.*

¶ 26 Here, the trial court did not abuse its discretion in finding that the police log does not constitute newly-discovered evidence meriting reopening of the trial evidence. Defendant in fact requested the log in pre-trial discovery but, when the matter was continued, did not follow up on the request. The court did not rule upon the request before trial. We find that defendant showed

1-11-2009

a lack of due diligence by not pursuing an order on the request, and if granted would have resulted in production of the log before trial. While it is not dispositive to our decision, we find defense counsel's explanation of this oversight – that his trial strategy was to challenge Bernice's identification rather than the officers' credibility – harms rather than helps the case for a new trial. It is not the role of a motion for new trial to allow a defendant a second bite at the apple, an opportunity to look back with hindsight at a strategy or argument that did not succeed at trial and try again by a different route. The purpose of such a motion is to allow a defendant to present evidence or arguments that he could not raise at trial, not that he chose not to raise.

¶ 27 Moreover, we find that the log was unlikely to change the outcome of proceedings even if trial counsel had discovered it earlier and used it at the suppression hearing, thus reinforcing that the trial court did not err and establishing that counsel did not render ineffective assistance by not discovering the log earlier. *People v. Cathey*, 2012 IL 111746, ¶ 23 (no ineffective assistance without a reasonable probability that, absent counsel's unreasonable performance, the result of the proceedings would have been different). At trial, defense witness Officer Rose corroborated that Officer Venegas brought defendant to the scene within five to ten minutes of Officer Rose radioing a description of the suspect. That, along with victim Bernice's testimony that police responded to her call within a few minutes, supports the State's time line that defendant was stopped and identified before 5 a.m. rather than around 6 a.m. as defendant claims. See *People v. Harris*, 2012 IL App (1st) 100678, ¶ 45 (motion to suppress may be reviewed on the evidence from the trial as well as the suppression hearing).

¶ 28 Additionally, we find that the log does not support the inferences that defendant makes from it. The trial court posited an explanation of a 5:36 a.m. log entry – "614 [006 W/1]" – that Officer Venegas and his partner were proceeding at 5:36 a.m. to the 6<sup>th</sup> District police station with defendant in custody. The log supports such an interpretation rather than defendant's interpretation that Officer Venegas was enroute at 5:36 a.m. to the crime scene for the showup. Firstly, Beats 611 and 612 have neither an "enroute" or "onscene" time logged, though Officers

1-11-2009

Thompson and Rose clearly testified to being at the crime scene and Bernice testified that officers responded within a few minutes of her call. More tellingly, both Beats 611 and 612 were logged as "clear" at 5:36:27 a.m., five seconds before Beat 614's "enroute" entry and almost 22 minutes before Beat 614's "onscene" entry. Although Officer Rose testified that he was present for Bernice's showup identification of defendant. For this court to interpret the log as defendant desires, we would also have to infer, contrary to the evidence from both State and defense witnesses, that Officers Thompson and Rose left the crime scene and were available for other police duties immediately as (or, somewhat absurdly, before) Officer Venegas and partner signaled that they was coming to the crime scene and well before they arrived. We conclude that the trial court did not err in not reopening the trial based on the log nor did trial counsel render ineffective assistance by not discovering or using the log earlier.

¶ 29 Defendant also contends that his eight-year prison sentence was excessive in light of his relatively minor offense and his rehabilitative potential as demonstrated by his age, "remote" criminal background, and consistent employment.

¶ 30 The mandatory Class X offender statute provides that a defendant over 21 years old convicted of a Class 1 or Class 2 felony, after two separate and sequential convictions for felonies of Class 2 or greater "shall be sentenced as a Class X offender." 730 ILCS 5/5-4.5-95(b) (West 2010). Burglary is a Class 2 felony. 720 ILCS 5/19-1(b) (West 2010). A Class X felony is punishable by 6 to 30 years imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010).

¶ 31 A sentence within statutory limits is reviewed on an abuse of discretion standard. We may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). So long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range. *People v. Perkins*, 408 Ill. App. 3d

1-11-2009

752, 762-63 (2011). This broad discretion means we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Alexander*, at 212-13.

¶ 32 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Alexander*, at 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Id.* The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Perkins*, at 763. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Alexander*, at 214; *People v. Brewer*, No. 1-07-2821, at 16 (June 30, 2011).

¶ 33 Here, defendant does not challenge that he is a mandatory Class X felony subject to at least six years imprisonment but contends that his eight-year sentence is excessive in light of his rehabilitative potential. However, the trial court was properly apprised of all the mitigating factors now cited by defendant, many of which were expressly argued by defense counsel at sentencing. We see no basis for concluding that the trial court abused its discretion in sentencing defendant to a prison term at the low end of the statutory range.

¶ 34 Defendant lastly contends that he should receive the two year MSR term for his Class 2 felony offense rather than the three year term for a Class X felony that he received.

¶ 35 "[E]very sentence includes a term [of MSR] in addition to the term of imprisonment," with the MSR term for a Class X felony being three years and for a Class 2 felony being two years. 730 ILCS 5/5-4.5-15(c), -25(l), -35(l) (West 2010). This court has repeatedly held that a defendant sentenced as a mandatory Class X offender receives the Class X MSR term of three years. *People v. Davis*, 2012 IL App (5th) 100044, ¶¶ 26-34; *People v. Brisco*, 2012 IL App (1st)

1-11-2009

101612, ¶¶ 58-62; *People v. Lampley*, 2011 IL App (1st) 090661-B, ¶¶ 47-49; *People v. Allen*, 409 Ill. App. 3d 1058, 1078 (2011); *People v. Rutledge*, 409 Ill. App. 3d 22, 26 (2011); *People v. Holman*, 402 Ill. App. 3d 645, 652-53 (2010); *People v. McKinney*, 399 Ill. App. 3d 77, 81-83 (2010); *People v. Lee*, 397 Ill. App. 3d 1067, 1072-73 (2010); *People v. Watkins*, 387 Ill. App. 3d 764, 766-67 (2009); *People v. Smart*, 311 Ill. App. 3d 415 (2000); *People v. Anderson*, 272 Ill. App. 3d 537, 541-42 (1995). Defendant argues that these cases are cast into doubt by our supreme court's decision in *People v. Pullen*, 192 Ill. 2d 36 (2000), where a defendant convicted of multiple burglaries and sentenced as a Class X offender to consecutive prison terms totaling 30 years challenged his consecutive sentencing on the basis that the aggregate sentence exceeded the statutory maximum. The *Pullen* court found that the consecutive sentences exceeded the maximum for burglary on the basis that the Class X offender statute does not change the class of the felonies themselves, and defendant contends that this principle should apply to MSR as well. However, in *Davis*, *Brisco*, *Lampley*, *Rutledge*, *Holman*, *McKinney*, and *Lee*, we expressly rejected the contention that *Pullen* applies to MSR. Adhering to these well-reasoned decisions, we find that defendant's three-year MSR term is not erroneous.

¶ 36 Accordingly, the judgment of the circuit court is affirmed.

¶ 37 Affirmed.