

2013 IL App (1st) 112106-U

THIRD DIVISION
May 8, 2013

No. 1-11-2106

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 22172
)	
DOMINIQUE McCANTS,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pierce concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not improperly consider an element of the offense as an aggravating factor in imposing sentence nor did it abuse its discretion in sentencing defendant to seven years of prison for aggravated discharge of a firearm.

¶ 2 After a jury trial, defendant Dominique McCants was convicted of aggravated discharge of a firearm and sentenced to seven years in prison. On appeal, McCants contends that the trial court improperly considered an element of the offense as an aggravating factor at sentencing and that his sentence is excessive in light of certain mitigating evidence. We affirm.

¶ 3 McCants was arrested and charged by indictment with, *inter alia*, attempted first degree murder and aggravated discharge of a firearm after a February 2009 incident during which shots were fired at a car containing Jheramie Mack, his girlfriend Dawn Centracchio, sister Jasmine, two-year-old niece, and friend "Black."

¶ 4 Jheramie Mack testified that while sitting in a car in a parking lot with his sister, niece and friend waiting for Centracchio to return from shopping, McCants's black Bonneville drove by. McCants, his brother Deville McCants, and another man were in the car. A verbal altercation took place. At one point, Mack was challenged to a fight and responded "any place, any time." Eventually McCants and his companions left. Later Centracchio returned and Mack drove out of the parking lot.

¶ 5 Shortly thereafter, Mack saw a black car speeding toward, and then passing, his car. Deville was driving and McCants was sitting in the passenger seat with a gun. When Mack stopped his car, Deville drove past and stopped. McCants "hung" out of the car window and fired the gun five times. The car then sped off. Mack drove to his mother's house. Once there he argued with Centracchio because he did not want to contact the police. Ultimately, however, Mack spoke to the police and identified McCants in a photographic array.

¶ 6 Centracchio testified that she did not see the black car's occupants, but she heard five gunshots. She later went to a police station, alone, to report what had happened.

¶ 7 Assistant State's Attorney Suzanne Sanders spoke to McCants at the police station and later transcribed his statement. The statement was then published to the jury without objection.

¶ 8 In his statement, McCants indicated that he, Deville, and Timothy Paige exchanged words with Mack, who McCants knew as "Remy." Later, at Paige's house, McCants took a .380 from the trunk of his car and put it in a pocket of his pants. Shortly thereafter, Deville came up with the idea of switching cars with his girlfriend. The men then drove back to the store and followed

Mack as he drove out of the parking lot. At one point, McCants pulled out the gun and pointed it up in the air. Mack then began to challenge McCants, *i.e.*, stating that he was not going to "do it." Ultimately, McCants shot at the bumper of Mack's car to scare him.

¶ 9 At trial, McCants testified that as the argument in the parking lot became more heated, McCants noticed Mack's companion, who McCants had never seen before, lift up his shirt and expose what McCants thought was a gun. After he yelled that this man was armed, he and his companions left. Deville was angry and "ready to blow up," so McCants retrieved a gun for protection. When Deville told McCants that he was going back to the store, McCants accompanied him. McCants admitted that this was not a "smart" idea. When the men saw Mack leaving, Deville pulled up alongside and words were exchanged. McCants saw the man that he believed to be armed in the backseat of Mack's car. When he saw this man holding a revolver out of the car window, he responded by sticking his own gun out of the window and firing. McCants explained that he did not want to be shot and thought that firing would make the other men back down.

¶ 10 McCants was convicted of only one charge—aggravated discharge of a firearm. The jury returned a not guilty verdict for the charge of attempted first degree murder. At sentencing the State argued that McCants had "no excuse" for his actions. The defense responded that McCants had no criminal record, was a family man, and attended every court date. The defense also admitted that McCants's actions were "very stupid," but that he accompanied his brother who was "ready to explode" and that this case warranted probation or boot camp.

¶ 11 At the next date, the court stated that it had taken time to consider this "very serious offense." The court noted that McCants did not act with good judgment when he got a gun and fired at an occupied vehicle. Although McCants was acquitted of attempted first degree murder, he still discharged a firearm at a car containing a child. The court then noted that although

McCants had some juvenile "history," he did not have an adult criminal background. The court also noted that McCants had a fiancée and two children. The court indicated that it had considered probation, but had concluded that probation would depreciate the seriousness of this offense. After considering McCants's lack of a criminal history, the factors in mitigation and aggravation, the presentence report, the parties' arguments and the circumstances of the offense, the court sentenced McCants to seven years in prison. The defense then filed an unsuccessful motion to reconsider sentence alleging that the sentence was excessive.

¶ 12 On appeal, McCants contends that the trial court improperly considered an element of the offense in aggravation at sentencing. Specifically, McCants contends that the court improperly relied on the fact that he fired a gun at an occupied car, which is an element of aggravated discharge of a firearm, as an aggravating factor. McCants admits that he failed to raise this issue before the trial court, but asks this court to review his contention as plain error.

¶ 13 To obtain relief under the plain error doctrine, a defendant must show that a clear or obvious error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). In the sentencing context, the defendant must then show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious as to deny him a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. A defendant has the burden of persuasion under both prongs. *Hillier*, 237 Ill. 2d at 545.

¶ 14 Although a factor inherent in an offense should not also be considered as a factor in aggravation at sentencing (*People v. Conover*, 84 Ill. 2d 400, 404 (1981)), the sentence imposed on a defendant is based on the nature and circumstances of the offense committed by that defendant and the nature and circumstances of each element of that offense. *People v. Saldivar*, 113 Ill. 2d 256, 268-69 (1986); see also *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992) (court may not use a single factor both as element of defendant's crime and as aggravating factor for imposing "a harsher sentence than might otherwise have been imposed"). This court considers

the record as a whole, rather than a few words or phrases, when determining whether the trial court relied on the proper factors in aggravation and mitigation when sentencing a defendant. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). A trial court has broad discretion in determining the appropriate sentence for a particular defendant and its determination will not be disturbed absent an abuse of discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005).

¶ 15 McCants's claim that the trial court considered that he fired a gun at an occupied car as a factor in aggravation when imposing sentence is unpersuasive. The court's statements referring to the shooting, taken in context, show the court was concerned by the serious nature and circumstances of the offense, that is, McCants shot a gun at a car five times in the middle of a city street. *Saldivar*, 113 Ill. 2d at 268-69. Considering the record as a whole (*Dowding*, 388 Ill. App. 3d at 943), this court rejects McCants's contention that the trial court abused its discretion when it considered at sentencing the fact that the car was occupied. See *Patterson*, 217 Ill. 2d at 448. Accordingly, as McCants has failed to show that the trial court erred, his procedural default must be honored. See *Hillier*, 237 Ill. 2d at 545.

¶ 16 McCants next contends that his sentence is excessive in light of certain mitigating evidence including his youth, lack of an adult criminal background, and stable family. He also argues that the evidence at trial established that he acted in self-defense.

¶ 17 A sentence within the statutory range will not be considered excessive unless it varies greatly from the spirit of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, a defendant's age, habits, credibility, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the

defendant's actions in the commission of the crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010).

¶ 18 McCants was convicted of aggravated discharge of a firearm, a Class 1 felony with a sentencing range of between four and 15 years in prison. See 720 ILCS 5/24-1.2(a)(2), (b) (West 2008); 730 ILCS 5/5-8-1(a)(4) (West 2008).

¶ 19 The record reveals that at sentencing, the parties presented evidence in aggravation and mitigation including, defendant's lack of criminal history, employment history, family ties, and belief that he was acting in self-defense. In sentencing McCants, the court noted that it had heard McCants's reasons for acting as he did, but then stated that McCants chose to fire a gun multiple times. The court also stated that it had considered probation, but that such a disposition would downplay the seriousness of the offense. This court cannot say that a prison sentence of seven years was an abuse of discretion when McCants was sentenced to three years above the minimum sentence. See *Patterson*, 217 Ill. 2d at 448 (trial court has broad discretion in sentencing).

¶ 20 While a defendant's potential for rehabilitation must be considered, the court is not required to give more weight to a defendant's chance of rehabilitation than to the nature of the crime (*People v. Evans*, 373 Ill. App. 3d 948, 968 (2007)), or to explain the value the court assigned to each factor in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 434). It is presumed that the court properly considered the mitigating factors presented and the defendant's potential for rehabilitation; it is the defendant's burden to show otherwise. *Brazziel*, 406 Ill. App. 3d at 434. McCants cannot meet that burden, as he points to nothing in the record to indicate that the court did not take his youth and potential for rehabilitation into consideration when imposing sentence. See *Brazziel*, 406 Ill. App. 3d at 434. To the contrary, the court stated that it had considered the facts that McCants did not have an adult criminal history and had a stable family. This court also rejects McCants's claim that the trial court failed to consider that the parts of his

brain which regulate impulse control were still developing, as McCants was 23 years old at the time of this offense and no longer subject to the Juvenile Court Act of 1987. See 705 ILCS 405/1-3(10) (West 2008) (defining minor as person under 21 years of age). Based on the record before us, McCants has failed to affirmatively show that the trial court failed to consider his age (*Brazziel*, 406 Ill. App. 3d at 434), a factor which presumably encompasses the development of impulse control.

¶ 21 The trial court did not abuse its discretion when, after properly considering factors in mitigation and aggravation (*Brazziel*, 406 Ill. App. 3d at 433-34), it sentenced McCants to seven years in prison (*Patterson*, 217 Ill. 2d at 448).

¶ 22 For the reasons stated above, we affirm the judgment of the circuit court of Cook County.

¶ 23 Affirmed.