

2013 IL App (1st) 112793-U

FIRST DIVISION
DATE: October 21, 2013

No. 1-11-2793

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. 08 CR 22605 |
| |) | |
| MALCOLM PATTON, |) | Honorable |
| |) | Colleen Ann Hyland, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

- ¶ 1 *Held:* Judgment entered on armed robbery conviction affirmed over defendant's sole contention that 35-year sentence constituted an abuse of the court's sentencing discretion.
- ¶ 2 Following a jury trial, defendant Malcolm Patton was convicted of armed robbery and sentenced to a term of 35 years' imprisonment. On appeal, defendant does not challenge the sufficiency of the evidence to sustain his conviction, but solely contests the propriety of his sentence, which included a 15-year firearm enhancement.
- ¶ 3 The evidence adduced at trial showed that, on November 14, 2008, the victim, Jeff Lesko, and his co-worker, "Marlene," worked at the 7-Eleven Store at 3440 West 95th Street in Evergreen Park, Illinois. At 11:10 p.m., the victim was working the cash register and Marlene was in the back

1-11-2793

of the store when defendant entered wearing a black quilted jacket, a gray hooded sweatshirt and a black baseball hat that faced backwards. Defendant walked up to the register and asked the victim for Newport cigarettes, and as the victim reached for them, defendant pulled out a small silver gun, and told him to open the first register. The victim, fearing for his life, opened the register and complied with defendants' command to hand him the cash. Defendant then motioned the victim to open the second register, telling him to move "faster," and the victim tendered the cash from the second register. Defendant then asked the victim to open the lottery machine, but when he pulled out the drawer, there was no money in it. Defendant also asked for a carton of Newport cigarettes, which the victim gave to him, and defendant left the store. After that, the terrified victim yelled for Marlene, who called police.

¶ 4 Evergreen Park police officers John Murphy and Brian Yates received a call regarding the armed robbery and a description of the offender. The officers, who were in plain clothes and driving an unmarked car, noticed a car at 91st Street and Kedzie Avenue with three men in it. They followed the car and pulled up alongside it, but none of the occupants turned to look at them, which they found unusual. The officers then fell back behind the car, activated their emergency lights, and curbed the vehicle. Officer Murphy approached the driver's side and saw defendant in the back seat on the passenger side, making some movements with his hands. Officer Murphy then told the occupants to show their hands, and they complied. When defendant then started to move his left hand into the pocket of his pants, Officer Murphy drew his weapon and ordered him to show his hands. Defendant complied, but then lowered his hands again, and Officer Murphy told him to raise them. When additional officers arrived, defendant was removed from the vehicle. The officers found a gun on the floor of the backseat on the passenger side and a carton of Newport cigarettes on the floor of the backseat on the driver's side. The police searched defendant and found ammunition for the gun in the pocket of his pants.

¶ 5 The police officers took the victim to 90th Street and California Avenue where they had stopped the men, and he positively identified defendant as the offender. The victim testified that the

1-11-2793

store had two video cameras that truly and accurately captured the incident, and this video was admitted into evidence and played in court.

¶ 6 At the sentencing hearing, the State argued in aggravation for a significant sentence, noting defendant's criminal history which included numerous robberies and "preying on the community." The State pointed out that defendant had five prior felony convictions, including a 2004 robbery of a 7-Eleven store. The State further noted that defendant had a whole pocket full of ammunition to use when he committed the instant armed robbery.

¶ 7 In mitigation, counsel noted that defendant has mental health issues for which he has received counseling while incarcerated. Counsel also noted that defendant wants to obtain his GED and is not currently involved in a gang.

¶ 8 In allocution, defendant stated that his psychologist was trying to have him transferred to the Dixon psychiatric ward. He also insisted that the police reports in this case had been changed.

¶ 9 In announcing the sentence, the court stated that it had all the matters in aggravation and mitigation and the presentence investigation (PSI) report before it and had also considered defendant's statement in allocution. The court noted that defendant has been a violent criminal history, "committing crime after crime after crime," the most recent of which was a 2005 robbery conviction where defendant was sentenced to four years' imprisonment. The court also noted that all of defendant's prior convictions were armed robberies or robberies that were "reduced," except one delivery of a controlled substance, which was amended, and defendant was sentenced to three years' imprisonment after pleading guilty. The court found that the facts of this case were aggravating where defendant brazenly walked into the store brandishing a gun like it was a regular daily activity, but noted that it had to balance the nature of the crime and defendant's history of violent crimes with defendant's psychiatric background and the need to deter others. At that point, and after "tak[ing] [] all in to [*sic.*] consideration and temperate it with the mitigation," the court sentenced defendant to 35 years' imprisonment, which included a 15-year firearm enhancement.

1-11-2793

¶ 10 On appeal, defendant first contends that the 15-year firearm enhancement imposed by the court was unconstitutional, and, therefore, his sentence was void. In his reply brief, however, defendant acknowledges that this issue was pending when he filed his opening brief and that the supreme court recently determined in *People v. Blair*, 2013 IL 114122 (March 21, 2013), that the firearm enhancement is not void because it had been revived by the amendment to the armed violence statute (Pub. Act 95-688 (eff. Oct. 23, 2007) (amending 720 ILCS 5/33A-3(a) (West 2010))). Accordingly, defendant's assertions that the firearm enhancement imposed in this case was unconstitutional and that his sentence was void are without merit.

¶ 11 Defendant next contends that the 35-year term imposed by the court was excessive where the offense resulted in no injuries, his longest prior sentence was 4 years, he suffered from alcohol abuse and mental health problems, including hearing voices after being shot in the head in 2006, excessive anxiety and stress. He also claims that he demonstrated his rehabilitative potential by having a history of gainful employment prior to his incarceration in 2008, showing an interest in earning his GED, and receiving mental health treatment. He thus requests this court to reduce his sentence to the minimum term or remand for resentencing.

¶ 12 There is no dispute that defendant's sentence of 35 years' imprisonment fell within the statutory range of 21 to 45 years' imprisonment (including the firearm enhancement). 730 ILCS 5/5-4.5-25; 720 ILCS 5/18-2 (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).

¶ 13 In reaching our determination, we observe the strong presumption that the trial court based its sentencing decision on proper legal reasoning and considered the mitigation evidence before it. *People v. Snowden*, 2011 IL App (1st) 092117, ¶87. Defendant has not rebutted this presumption here. The record shows that the trial court stated that it considered the mitigation evidence presented, including defendant's psychiatric background, and balanced that against his violent criminal history over the past decade.

¶ 14 This extensive criminal history clearly showed defendant's resistance to correction (*People v. Garcia*, 241 Ill. 2d 416, 421-22 (2011)), and impacted the court's decision on his rehabilitative potential (*People v. Romero*, 387 Ill. App. 3d 954, 981 (2008)). However, the court was not required to give greater weight to defendant's rehabilitative potential than to the seriousness of the offense (*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), which involved defendant displaying his gun at the store clerk, while demanding money and cigarettes, and carrying a large amount of ammunition on his person.

¶ 15 The record shows that the trial court considered the proper sentencing factors, including those presented in mitigation (*People v. Burke*, 164 Ill. App. 3d 889, 902 (1987)), determined that the seriousness of the offense (*People v. Powell*, 159 Ill. App. 3d 1005, 1011 (1987)) negatively reflected on defendant's potential for rehabilitation (*People v. Shumate*, 94 Ill. App. 3d 478, 487 (1981)), and with his background (*People v. Taylor*, 221 Ill. 2d 157, 177 (2006)), militated against a lower sentence (*People v. Hunzicker*, 308 Ill. App. 3d 961, 966 (1999)). In that regard, we note that defendant's alcohol dependency does not necessarily lead to the conclusion that he is entitled to lenient treatment. *People v. Whealon*, 185 Ill. App. 3d 570, 573 (1989). Given the totality of the circumstances, we find no abuse of sentencing discretion by the court in imposing a term which fell within the middle of the available sentencing range. *Bennett*, 329 Ill. App. 3d at 517.

¶ 16 In reaching that result, we find defendant's reliance on *People v. Nelson*, 106 Ill. App. 3d 838 (1982) and *People v. Kosanovich*, 69 Ill. App. 3d 748 (1979) misplaced as the supreme court has rejected cross-case comparative sentencing of other defendants as a basis for challenging the defendant's sentence as excessive on appeal. *People v. Fern*, 189 Ill. 2d 48, 56-58 (1999). We also disagree with defendant's contention that *Fern* did not reject such comparisons. In *Fern*, the supreme court held that reviewing courts are not prohibited from using other reviewing court opinions as legal precedent in deciding excessive sentencing claims, but that defendants cannot challenge their sentence on appeal as excessive by cross-comparison. *Fern*, 189 Ill. 2d at 62.

¶ 17 Moreover, we find *Nelson* and *Kosanovich* factually distinguishable from the case at bar. In *Nelson*, 106 Ill. App. 3d at 839, defendants were convicted of armed robbery and unlawful restraint of the victims and sentenced to 25 years' imprisonment. On appeal, this court reduced their sentences to 10 years' imprisonment, after noting that each defendant had only one prior nonviolent conviction. *Nelson*, 106 Ill. App. 3d at 847. Here, unlike *Nelson*, defendant had five prior violent convictions, the last of which took place only three years before the instant offense.

¶ 18 In *Kosanovich*, 69 Ill. App. 3d at 749, defendant was convicted of, in relevant part, armed robbery and sentenced to 10 to 15 years' imprisonment. On appeal, this court remanded for resentencing, after noting that defendant had a very unstable family life, completed three years of high school, voluntarily sought medical help for drug addiction and mental health issues, had a mostly nonviolent criminal history, and on the day of the incident had found her brother-in-law dead in his apartment. *Kosanovich*, 69 Ill. App. 3d at 751-52. This court found no factors contraindicative to defendant's potential for drug rehabilitation and that a long period of confinement had little, if any, value in rehabilitative strategy. *Kosanovich*, 69 Ill. App. 3d at 752. Here, unlike *Kosanovich*, defendant did not voluntarily seek treatment for his alcohol and mental health issues prior to being incarcerated, did not suffer a traumatic event on the date of the incident, and had an extensive, violent criminal history dating from 1997 to the current 2008 offense.

¶ 19 Defendant, nonetheless, maintains, further relying on *Kosanovich*, that where he suffers from mental illness and addiction, a lengthy sentence will not help effect rehabilitation. We observe, however, that it is defendant's rehabilitative potential that the court must consider and not whether the Illinois prison system will help or hinder his rehabilitation. See *Williams v. Thompson*, 111 Ill. App. 3d 145, 148-49 (1982). Here, the court was aware of, and gave specific consideration to these factors, and we have no reason to disturb the 35-year sentence imposed by the trial court on the factors before it. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 20 In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.

1-11-2793