

2013 IL App (1st) 113032-U

FIFTH DIVISION
July 12, 2013

No. 1-11-3032

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 2933
)	
SEAN WILSON,)	Honorable
)	Frank G. Zelezinski,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* In imposing a 49-year sentence for first degree murder, the trial court did not consider improper aggravating factors and considered the mitigating factors presented; judgment affirmed.
- ¶ 2 Following a jury trial, defendant Sean Wilson was convicted of first degree murder and sentenced to 49 years in prison, which included a 25-year mandatory firearm enhancement. On appeal, defendant challenges his sentence, contending the trial court considered three improper factors in aggravation: (1) a prior misdemeanor judgment for which defendant received court

supervision, (2) a factor inherent in his offense, and (3) a mistake of fact. Additionally, defendant argues the trial court failed to consider factors in mitigation. We affirm.

¶ 3 The undisputed evidence revealed 39-year-old defendant shot and killed Brian Briggs at the J and D Junkyard at 13715 Sacramento in Blue Island on the morning of January 21, 2009. Defendant worked at the junkyard and Briggs was the junkyard's night watchman, and lived there in his van. Defendant claimed at trial that he shot Briggs in self-defense.

¶ 4 Luther Watson, a tow truck driver who knew defendant and Briggs from the junkyard, testified that on January 21, he was at the junkyard fixing the lights on top of his tow truck. He was about 15 feet away from Briggs's van, where he observed defendant and Briggs arguing about defendant's tools. Defendant told Briggs he wanted his tools back, to which Briggs responded, "We might as well get this over with." As Briggs headed toward defendant, defendant pulled a gun from his coat and shot Briggs in the chest. Briggs walked toward a ditch and fell to the ground. After defendant walked around for about five minutes, he shot Briggs a second time. Defendant walked around for another 5 or 10 minutes, spoke to a mechanic, Lonnie Primous, and then left. Watson maintained that Briggs did not have anything in his hands during this encounter. The next day, Watson told James Crum, the manager of the junkyard, what had transpired, and Crum called the police.

¶ 5 Lonnie Primous, who had known defendant and Briggs for a few years, testified that on January 21, he went to work at the junkyard at around 9:30 or 10 a.m. When he arrived, he saw defendant at the front of the junkyard and Briggs near his van. Primous left the junkyard, and when he returned around 11 or 11:30 a.m., he saw defendant near Briggs's van. Defendant approached Primous with "somewhat of a concerned look on his face," and left.

¶ 6 Aaron Adkisson, a self-described "junkman" who exchanges scrap metal for money, testified that he had met Briggs four years ago and had known defendant since he was a child.

On January 21, Adkisson was at the junkyard, and left with Primous to get some firewood and gas. When Adkisson returned, he saw defendant leaving. Defendant "didn't look normal" and "had a bad look on his face."

¶ 7 The State also presented evidence that Briggs's body was found down an embankment, lying down in a creek just beyond the property of the junkyard, and that a discharged cartridge casing was found on the main road that led into the junkyard. Two .22 caliber bullets were recovered from Briggs's body. These bullets were fired from the same firearm, which could have been a revolver, semiautomatic weapon, or rifle. An assistant medical examiner for Cook County testified that evidence of Briggs's injuries included one gunshot wound to the left side of the chest, one gunshot wound to the upper right side of the back, and abrasions on the face and leg. The cause of death was determined to be multiple gunshot wounds. There was no evidence of close-range firing for either gunshot wound.

¶ 8 Defendant testified that he shot Briggs in self-defense. Defendant had met Briggs through the junkyard, and they had known each other for seven or eight months. They had a civil, cordial relationship, but at one point, defendant began to see Briggs as a bully, recalling an incident when Briggs attacked a 68-year-old man in the summer of 2008. Defendant then described a series of altercations. In December 2008, defendant suspected that Briggs had stolen tools from the trunk of defendant's car. On January 3, 2009, when defendant tried to recover his tools, Briggs threatened him with a rifle. On January 6, when defendant went to the junkyard to purchase a car, defendant discovered that all of that car's windows had been shot out. On January 18, defendant went to the junkyard to pick up some parts with his girlfriend, Monique Turner, and their daughter. On defendant's way out, Briggs pointed a rifle at defendant and Turner's car.

¶ 9 On January 21, defendant went to the junkyard at around 9:30 a.m. to purchase a door. As defendant went towards the car that had the door he wanted, Briggs exited his van with a rifle in his hand and said, "[I'll] kill you." The two men met by the tow truck, where Briggs referenced an earlier transaction in which defendant had sold Briggs some rims, and told defendant he wanted his money back. Defendant replied that he wanted his tools and everything that Briggs had taken out of his trunk. Briggs asked if defendant was calling him a thief, to which defendant responded, "We both know what you are." Defendant was walking away when Briggs confronted him with a rifle. Briggs tried to shove the rifle in defendant's mouth, and said, "This is what I make bitches do." Defendant and Briggs began to fight. When Briggs tried to cock his gun, defendant pulled out his own gun and shot once. Defendant tried to shoot again, but the gun only clicked as the two men continued to struggle. Then, defendant's gun fired into Briggs's back. Briggs ran to a nearby van and defendant went to the front of the junkyard, where he saw Primous and Adkisson, and told them he had shot Briggs. Primous and Adkisson left to talk to Watson while defendant stayed at the front of the yard, smoking cigarettes. Defendant then told Primous that somebody needed to call the police. Defendant stayed about 30 minutes before leaving, and called the junkyard that afternoon. When defendant left, he did not think Briggs was dead. On January 22, defendant learned the police were looking for him, and the next morning, he turned himself in.

¶ 10 James Crum, manager of the J and D junkyard, testified that he allowed Briggs to live in the junkyard, in his van, in exchange for monitoring the junkyard at night. Crum knew that Briggs had a rifle and a handgun, and Crum had seen Briggs exhibit a quick temper on two occasions, when he fought with two men. Monique Turner testified that when she went to the junkyard on January 18, 2009 with defendant and their daughter, Briggs pointed a rifle at their car as they were leaving.

¶ 11 In rebuttal, the State presented two witnesses who testified about whether defendant said that Briggs had a rifle at the time of the incident on January 21. Detective Tony Padron from the Riverdale Police Department testified that initially, defendant told him that Briggs had a rifle during the incident, but later admitted that Briggs did not have a rifle at that time. During a reenactment at the junkyard, defendant said Briggs had come at him with his hands. Paul Quinn, an assistant State's Attorney, testified that when he spoke to defendant about the incident, defendant did not state that Briggs approached him with a rifle.

¶ 12 The jury found defendant guilty of first degree murder and that during the commission of that offense, defendant personally discharged a firearm that proximately caused the death of another person.

¶ 13 A presentence investigation report revealed that defendant's criminal record consisted of a 1991 unlawful use of a weapon charge for which defendant received supervision, and two 2005 charges relating to driving on a suspended license. As to his social history, the report stated that defendant was raised by both parents and his grandmother. Growing up, his home did not have alcohol or drug use problems and he had a good relationship with his parents and three siblings. He grew up attending church with his parents and had never been a member of a street gang. Defendant has an ex-wife and three children, who he saw frequently. His highest level of education is ninth grade, and in the 1990s, he attended Lincoln Tech for awhile. The report also detailed defendant's employment history, including informal employment as an automobile mechanic, and positions at a Sears Distribution Center, Paramount Plastics, a steel processing plant, electrical supply business, oil change business, and Zenith plant. He also worked for several years at his grandfather's auto repair business. Through his employment, he was supporting himself and his children. Neither defendant nor the State had any changes, deletions, or admissions to the presentence investigation report.

¶ 14 In aggravation, the State argued that defendant was found guilty of a "really senseless, ludicrous, incredibly violent crime." On the day of the crime, Briggs was defenseless and defendant "shot him dead, to die like some animal on a frozen creek in the middle of winter[.]" The State noted that defendant "does not have much of a criminal background," but argued more than the minimum sentence was merited due to the offense's "extremely violent and senseless nature." The State contended that defendant is a danger to the community because he is easily provoked and has "a trigger finger."

¶ 15 In mitigation, defendant argued the incident was a fight initiated by Briggs, who had clearly been known to pick fights in the past, and defendant "was driven to the point of enough." Defendant disagreed with the State's characterization of him as "a cold-hearted killer." While noting the jury had considered the issue, defendant stated Briggs was armed. Defendant also cited his long-term relationship, and that he "was working and doing the best he could" to support himself, his girlfriend, and his children. He had worked at Sears and the junkyard. In addition, defendant noted his family circumstances, including his two loving parents, and stated he was an active member of his church. Defendant also pointed out that he had no problems during his incarceration at the Cook County jail. Defendant argued for the minimum sentence of 45 years.

¶ 16 In sentencing defendant, the trial court stated:

"The Court has heard the evidence at trial as well as I have heard all matters in aggravation and mitigation. I have, in fact, reviewed the Presentence Investigation Report. There are factors in aggravation as well as mitigation to be considered.

In mitigation, there are numerous factors here, because the [d]efendant, in fact, did gainfully hold a job, and for the most part,

he did not have a serious criminal background in any way because there are no felony convictions in his background.

He does have aggravating factors. He does have unlawful use of a weapon in which he received court supervision from 1991, and some driving on a suspended license charges, but nothing of any great magnitude.

The Court does note, however, that this case involved the [d]efendant shooting the victim who, ultimately, was found down a ravine towards a creek a day later. And at that point it was determined the nature of the gunshots to his body, and the [d]efendant neither stayed around after the shooting and just simply left the location, leaving the victim at that point. "

Defendant was sentenced to 49 years in prison. The court subsequently denied defendant's motion to reconsider his sentence, which alleged, in relevant part, that the sentence "is excessive in view of [defendant's] background and the nature of his participation in the offense," and that the trial court "improperly considered in aggravation matters that are implicit in the offense."

¶ 17 On appeal, defendant contends the trial court considered three improper factors in aggravation. Specifically, the trial court considered (1) defendant's 1991 unlawful use of a weapon charge for which he received supervision, (2) the fact that a death occurred, which is a factor inherent in the offense, and (3) a mistake of fact when it stated that defendant simply left the junkyard.

¶ 18 As a threshold matter, defendant contends these claims were forfeited because they were not properly preserved and, therefore, urges review under the plain error doctrine or, alternatively, under the theory of ineffective assistance of counsel for failing to properly preserve

these claims. In its response, the State explicitly asserts that defendant did *not* forfeit these claims. In his reply brief, defendant inexplicably and incorrectly insists that the State contends he has forfeited these claims. Contrary to defendant's position, the State never advanced the affirmative defense of forfeiture in this appeal and these claims are subject to our review. See, e.g., *People v. Somers*, 2013 IL 114054, ¶ 10 (the State opted to forego its right to argue forfeiture); *People v. Beachem*, 229 Ill. 2d 237, 241 n.2 (2008) (forfeiture is an affirmative defense that the State may raise, waive, or forfeit); *People v. De La Paz*, 204 Ill. 2d 426, 433 (2003) (the State can waive forfeiture).

¶ 19 In determining an appropriate sentence, the trial court can review numerous facts that tend to aggravate or mitigate the offense, including the defendant's general moral character, mentality, habits, social environment, age, and propensity to commit crime, as well as his life, family, occupation, and record. *People v. LaPointe*, 88 Ill. 2d 482, 495 (1981) (quoting *People v. Adkins*, 41 Ill. 2d 297, 300-01 (1968)). Additionally, evidence showing defendant's commission of other crimes or acts of misconduct is admissible during sentencing even though the defendant was not prosecuted or convicted for them. *People v. Edgeston*, 157 Ill. 2d 201, 246 (1993).

¶ 20 Nonetheless, defendant incorrectly asserts that his 1991 unlawful use of a weapon charge should not have been considered because, under section 5-6-3.1(f) of the Unified Code of Corrections (730 ILCS 5/5-6-3.1(f) (West 2008)), "discharge and dismissal upon a successful completion of a disposition of supervision shall be deemed without adjudication of guilt and shall not be termed a conviction for purposes of disqualification or disabilities imposed by law upon conviction of a crime." However, use of a prior disposition of supervision as an aggravating factor in sentencing is not a "disqualification or disability imposed by law." *People v. Coleman*, 111 Ill. 2d 87, 97 (1986). This phrase encompasses rights that are lost as a matter of

law by criminal convictions, such as the right to hold public office and possess a firearm. *Id.* Section 5-6-3.1(f) permits later use of a supervision disposition as aggravation evidence of criminal behavior relevant to a criminal charge. *People v. Johnson*, 128 Ill. 2d 253, 287 (1989). In sentencing, admissible evidence is not limited to crimes that resulted in adjudications of guilt. *Id.* The guiding principle is whether the evidence is reliable and relevant. *Id.*

¶ 21 Here, the evidence of defendant's unlawful use of a weapon charge meets both of these criteria. The charge was contained in defendant's presentence investigation report, a source which has been held to generally be a reliable source for inquiring into a defendant's criminal history. *People v. Williams*, 149 Ill. 2d 467, 491 (1992). Further, defendant's criminal history is relevant to a determination of his propensity to commit crime, a factor that can be reviewed during sentencing. See *LaPointe*, 88 Ill. 2d at 498. Thus, it was not improper for the court to consider defendant's 1991 unlawful use of a weapon charge.

¶ 22 Defendant next asserts that the trial court relied on a factor inherent in the offense—specifically, that a death occurred. We disagree. Defendant correctly notes that a trial court may not aggravate a defendant's sentence based on a factor that is implicit in the crime. *People v. Conover*, 84 Ill. 2d 400, 404 (1981). In this case, it would be impermissible for the trial court to aggravate defendant's sentence because he caused the victim's death, because death is inherent in the offense of murder. *People v. Benford*, 349 Ill. App. 3d 721, 734 (2004). However, the trial court may consider in aggravation that the defendant's conduct caused or threatened serious harm. 730 ILCS 5/5-5-3.2(a)(1) (West 2008). In applying this factor, the trial court may consider the force employed and physical manner in which the victim's death occurred, as well as the nature of the circumstances of the offense. *People v. Major*, 244 Ill. App. 3d 1013, 1022 (1993). Merely mentioning that someone died does not constitute reversible error. *Benford*, 349 Ill. App. 3d at 735.

¶ 23 Here, the trial court stated:

"The Court does note, however, that this case involved the [d]efendant shooting the victim who, ultimately, was found down a ravine towards a creek a day later. And at that point it was determined the nature of the gunshots to his body and the defendant neither stayed around after the shooting and just simply left the location, leaving the victim at that point."

The trial court's comments describe the physical manner in which Briggs died—the defendant shot him—and the circumstances of Briggs's death—after he was shot, he was found the next day in a ravine. The trial court's comments stand in stark contrast to the trial courts' explicit statements in *People v. Joe*, 207 Ill. App. 3d 1079, 1085 (1991), that a factor in aggravation was that the defendant "engaged in a course of conduct which threatened serious harm, indeed did cause serious harm to the victim," and *People v. Dowding*, 388 Ill. App. 3d 936, 941 (2009), that a factor in aggravation was "that the [d]efendant's conduct caused or threatened serious harm." Here, the trial court focused on the manner and circumstances of Briggs's death, rather than the death itself, as a factor in aggravation. Under these circumstances, no error occurred.

¶ 24 Defendant next asserts that the trial court considered a mistake of fact when it said that defendant simply slipped away after he shot Briggs. Defendant misrepresents the trial court's statement. The trial court stated "[d]efendant] neither stayed around after the shooting and just simply left the location, leaving the victim at that point." Primous and Adkisson testified that defendant left the junkyard shortly after they returned from their errand, probably around 11 or 11:30 a.m. Defendant himself testified that he left the junkyard about 30 minutes after telling Primous and Adkisson that he had shot Briggs. By all accounts, defendant left Briggs and the junkyard after the shooting. He may have felt remorse for his actions, and may not have

believed that Briggs was dead, but he left Briggs and the junkyard nonetheless. The trial court's characterization of defendant's actions after the shooting was not improper.

¶ 25 Defendant next asserts that his sentence was too harsh in light of his rehabilitative potential because the trial court failed to consider the many matters presented in mitigation, including his minimal criminal history, family and social circumstances, and employment history. Additionally, defendant argues that the trial court did not consider evidence that was favorable to him at trial.

¶ 26 A trial court has broad discretionary powers in choosing the appropriate sentence a defendant should receive. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). The trial court is granted great deference in sentencing because it is generally in a better position than the reviewing court to determine the appropriate sentence, having had the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence will be disturbed on appeal only if the sentencing court abused its discretion. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A sentence within statutory limits will be deemed excessive and the result of an abuse of discretion where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Stacey*, 193 Ill. 2d at 210. It is presumed that the trial court properly considered all mitigating factors and rehabilitative potential presented, and the burden is on the defendant to affirmatively show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010). The seriousness of the crime is the most important factor in determining an appropriate sentence, not the presence of mitigating factors such as the lack of a prior record, and the absence of aggravating factors does not require that the minimum sentence be imposed. *Quintana*, 332 Ill. App. 3d at 109. We will not substitute our judgment for that of the trial court

merely because we would have weighed the factors presented differently. *Stacey*, 193 Ill. 2d at 209.

¶ 27 Defendant fails to show that the trial court did not consider the mitigating factors before it. At sentencing, the trial court stated:

"The [c]ourt has heard the evidence at trial as well as I have heard all matters in aggravation and mitigation. I have, in fact, reviewed the Presentence Investigation Report. There are factors in aggravation as well as mitigation to be considered.

In mitigation, there are numerous factors here, because the [d]efendant, in fact, did gainfully hold a job, and for the most part, he did not have a serious criminal background in any way because there are no felony convictions in his background."

Although the trial court only explicitly listed two mitigating factors, it also stated there were "numerous factors" in mitigation and that it had heard the evidence adduced at trial and reviewed the presentence investigation report, which detailed defendant's family and social history, as well as his minimal criminal history. The trial court noted that defendant did not have a serious criminal background, saying that defendant had "nothing of any great magnitude" after discussing defendant's previous criminal record. It is not necessary for the trial court to recite and assign value to each factor presented at a sentencing hearing. *Brazziel*, 406 Ill. App. 3d at 434. The sentencing range for defendant's offense is 45 to 85 years—20 to 60 years for first degree murder (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)) and an additional 25 years because he discharged a firearm that proximately caused Briggs's death (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)). That defendant's sentence is at the lower end of this range further suggests that

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the trial court considered the many mitigating factors presented. Examining the record, we find that the trial court did not abuse its discretion in sentencing defendant to 49 years in prison.

¶ 28 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 29 Affirmed.