

2013 IL App (2d) 120369-U
No. 2-12-0369
Order filed June 6, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-199
)	
DAVID S. PRESCOTT,)	Honorable
)	Sharon L. Prather,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in resentencing defendant to the same 10-year sentence it had previously imposed after the class of crime of which defendant was convicted had been reduced from a Class X to a Class 1 felony, and the record reflects that the trial court considered new mitigating evidence in imposing the sentence; affirmed.

¶ 2 In this appeal, defendant, David S. Prescott, comes before this court following a resentencing upon remand. Defendant's sole issue on appeal is that his 10-year sentence is excessive. Defendant provides two supporting reasons for his argument: (1) the class of crime of which defendant was convicted had been reduced from a Class X to a Class 1 felony, which should have led to a reduced sentence, and (2) the trial court did not consider new mitigating evidence. We affirm.

FACTS

¶ 3 After a jury trial, defendant was convicted of driving while under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2006)) and driving with a revoked license (DWLR) (625 ILCS 5/6-303(a) (West 2006)). Defendant was originally sentenced as a Class X felon under section 11-501(c-16) of the Illinois Vehicle Code (Code) (625 ILCS 5/11-501 (c-16) (West 2006)) because he had at least five prior convictions of DUI.

¶ 4 Defendant appealed, arguing that his conviction must be reduced to a Class 1 felony based on an irreconcilable conflict between two public acts. *People v. Prescott*, No. 2-10-0392, slip op. at 2 (2011) (unpublished order under Supreme Court Rule 23). We agreed with defendant that section 11-501(c-16) did not apply and that defendant's offense was actually a Class 1 felony because of an irreconcilable conflict between Public Act 94-114, §5 (eff. Jan. 1, 2006) and Public Act 94-116, §5 (eff. Jan. 1, 2006). *Id.* We thus affirmed defendant's convictions of DUI and DWLR but specified that defendant's conviction of DUI was pursuant to section 11-501(c-1)(4) and not section 11-501(c-16). Accordingly, we vacated his sentence for DUI and remanded the cause for resentencing on his conviction of DUI. *Id.*, slip op. at 3.

¶ 5 On remand, a new sentencing hearing was held. At that hearing, defendant highlighted a letter he had written to the court in which he acknowledged the negative impact of his drinking and took responsibility for his actions. Defendant also informed the court that he regularly had been attending Alcoholics Anonymous meetings in the McHenry County jail one time per week. Additionally, defendant notified the court that, while incarcerated, he had suffered a third heart attack. Defendant requested that the court take into consideration that his offense is a Class 1 felony, as opposed to a Class X, and give him a reduction in the term that he was to serve. Defendant asked

the court to sentence him to a term that the court deemed appropriate under “what is now being a Class 1 felony.”

¶ 6 In imposing sentencing, the trial court acknowledged reading defendant’s letter but noted that his “criminal record is probably one of the worst that [it] has seen.” Defendant had 7 prior “trips” to the Department of Corrections (DOC), 9 prior felony charges, and had been arrested at least 10 times on charges of DUI. The court further observed that, even though the classification of the offense for which he had been sentenced had been changed, it was “still of the opinion that the sentence previously imposed” was appropriate, and that defendant’s past criminal history was the most serious aggravating factor of the case. Thereafter, the trial court resentenced defendant to concurrent prison terms of 10 years for DUI and 3 years for DWLR.

¶ 7 Defendant filed a motion to reconsider his 10-year sentence for DUI, noting that the court sentenced him to the same amount of time on the Class 1 felony as it had on the Class X felony after it had been vacated by this court on appeal. The court denied the motion, and this timely appeal followed.

¶ 8 ANALYSIS

¶ 9 Defendant contends on appeal that his 10-year sentence is excessive because he presented new mitigating evidence, which the court failed to consider, and the reduction in the class of DUI of which he was convicted should have led to a reduced sentence.

¶ 10 In reviewing the appropriateness of a sentence we must defer to the trial court, which is uniquely qualified to weigh the pertinent sentencing factors. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). The trial judge is responsible for balancing the relevant factors and providing a reasoned punishment according to the facts of a particular case. *People v. Latona*, 184 Ill. 2d 260, 272 (1998).

We will not disturb a sentence within the statutory guidelines unless the trial court abused its discretion. *Id.* A sentence within the statutory limits is excessive and an abuse of discretion if it “is greatly at a variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.” *Stacey*, 193 Ill. 2d at 210.

¶ 11 In this case, defendant was convicted of DUI, which, because defendant had been convicted of DUI more than five times in the past, was a Class 1 felony. 625 ILCS 5/11-510(c-1)(4) (West 2006). A defendant convicted of a Class 1 felony faces a prison term between 4 and 15 years. 730 ILCS 5/5-8-1(a)(4) (West 2006). Defendant’s 10-year sentence was well within the range of 4 to 15 years.

¶ 12 Defendant argues that the trial court failed to consider new mitigating evidence in resentencing him. However, this is contrary to the record. Defendant’s new circumstances were presented to the court by defense counsel and through defendant’s letter, which the court stated that it had read. During argument at the sentencing hearing, defendant informed the trial court that he was participating in Alcoholics Anonymous once a week. Defendant also informed the trial court that he had suffered a heart attack while in jail. It is presumed that a sentencing judge considered all evidence before him and considered all relevant factors in mitigation. *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009); *People v. Torres*, 200 Ill. App. 3d 253, 267 (1990) (citing *People v. Foreman*, 153 Ill. App. 3d 346, 358 (1987)). Defendant’s argument is not supported by the record.

¶ 13 Moreover, the trial court is not required to recite and assign a value to each mitigating factor, and the existence of mitigating factors does not obligate the trial court to impose the minimum sentence. *People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1994). The trial court does not abuse its

discretion when it weighs mitigating evidence presented and imposes a sentence largely based on the defendant's criminal history. See *People v. Perrequet*, 68 Ill. 2d 149, 156 (1977).

¶ 14 In this case, any potential for rehabilitation presented was outweighed by the seriousness of the offense. The evidence showed that defendant had 11 previous DUI convictions. Additionally, defendant had been convicted of various other charges throughout his life. He had seven prior trips to the DOC and had nine felony charges. When speaking to defendant at the sentencing hearing, the court noted that defendant's "criminal record is probably one of the worst" that it had seen. Seriousness of the offense is the most important factor and the "defendant's rehabilitation potential need not be given greater weight." *People v. Brazziel*, 406 Ill. App. 3d 412, 435 (2010).

¶ 15 Defendant argues that the trial court abused its discretion by imposing the same sentence even though the class of the offense was reduced. The Unified Code of Corrections prohibits the trial court from imposing a more severe sentence on remand, unless circumstances are brought to the attention of the court which occurred after the original sentencing. 730 ILCS 5/5-5-4 (West 2006). There is no rule that on resentencing the defendant must receive a lower sentence. The court is not mandated to impose a lesser sentence on remand, even when a case is remanded for resentencing on a lesser class offense. *People v. Raya*, 267 Ill. App. 3d 705, 709 (1994); see *People v. Moore*, 159 Ill. App. 3d 1070, 1074-75 (1987). The sentencing range for a Class X offense is 6 to 30 years. 730 ILCS 5/5-8-1(a)(3) (West 2006). The sentencing range for a Class 1 felony is 4 to 15 years. 730 ILCS 5/5-8-1(a)(4) (West 2006). The record shows that the trial court understood the applicable sentencing range, and it deemed the 10-year sentence to be appropriate. We find no abuse of discretion given defendant's extensive criminal history and that the sentence is within the appropriate sentencing range.

¶ 16 Defendant relies on *Pepper v. United States*, ___ U.S. ___, 131 S. Ct. 1229 (2011), to support his argument that post-sentencing evidence is relevant for a new sentence on remand. However, there is no evidence that the trial court failed to consider the new mitigating evidence presented by defendant at the resentencing hearing.

¶ 17 We further find *People v. Smith*, 258 Ill. App. 3d 633 (1994), also distinguishable from the facts of this case. There, the defendant was diagnosed as having cancer after her sentence and commitment to the DOC. However, the defendant's medical condition was unknown to the judge at the time of the original sentencing hearing. Although the First District Appellate Court determined that the 12-year sentence was a proper exercise of discretion by the trial judge, it affirmed the conviction but remanded the cause to the trial court for the purpose of a hearing to determine the current state of the defendant's health and treatment in fashioning a sentence. *Smith*, 258 Ill. App. 3d at 645. Here, unlike in *Smith*, the trial court sentenced defendant with knowledge of his medical condition. Moreover, noting that it is well-settled case law that the trial court is the proper forum for determining a sentence, the *Smith* court did not order the trial court to reduce the sentence but rather consider what effect, if any, the defendant's medical condition should have on the appropriate sentence after receiving the information about the current state of the defendant's health and treatment. *Id.*

¶ 18 In sum, as the trial court sentenced defendant to 10 years' imprisonment, a sentence within the appropriate sentencing range, no abuse of discretion occurred.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, we affirm the trial court's judgment.

¶ 21 Affirmed.