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2013 IL App (3d) 110589-U

Order filed February 7, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 21st Judicial Circuit,
Plaintiff-Appellee,)	Iroquois County, Illinois,
)	
v.)	Appeal No. 3-11-0589
)	Circuit No. 10-CF-84
)	
JOSHUA D. CARMAN,)	Honorable
)	Gordon L. Lustfeldt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion when it sentenced defendant.

¶ 2 Defendant, Joshua D. Carman, pled guilty to aggravated robbery (720 ILCS 5/18-5(a) (West 2010)). The trial court sentenced defendant to a term of imprisonment of eight years. Defendant appeals, arguing that the trial court abused its discretion when it imposed an eight-year sentence and refused to recommend impact incarceration. We affirm.

¶ 3 **FACTS**

¶ 4 On September 2, 2010, the State charged defendant with armed robbery (720 ILCS 5/18-2(a)(1) (West 2010)), financial institution robbery (720 ILCS 5/16H-40 (West 2010)), theft (720 ILCS 5/16-1(a)(1)(A) (West 2010)), and aggravated robbery (720 ILCS 5/18-5(a) (West 2010)). The State alleged that defendant and a codefendant drove a car to the Federated Bank in Chebanse, Illinois. Once there, defendant entered the bank with an air rifle that looked like an AK-47 assault rifle. He pointed the gun at the tellers and demanded money. The tellers handed over \$10,175, and defendant left the bank and drove away.

¶ 5 On May 2, 2011, defendant pled guilty to aggravated robbery, and the remaining charges were dismissed. At the time defendant pled guilty, there was no agreement as to defendant's sentence. On June 6, 2011, the trial court held a sentencing hearing. At the hearing, the State requested a 12-year prison term. It argued that defendant caused intentional financial harm and that the crime threatened physical harm because the air rifle looked like a real gun. Further, the State noted that approximately \$5,000 was still missing and defendant had not offered any excuse or apology for his conduct. Defense counsel requested probation, arguing that defendant had not previously committed a felony and that he robbed the bank at a time when he was unable to financially support his family. Defendant made a statement claiming he was sorry and that his actions were wrong and cowardly.

¶ 6 The court sentenced defendant to eight years in prison. While pronouncing its sentence, the court stated that it had considered the evidence presented, as well as all of the factors in mitigation and aggravation. It noted that defendant had caused stress to bank employees and customers who did not know that the air rifle was not a real gun, and that there could have been actual physical harm if someone had shot a real gun in response to defendant's display of the air

rifle. The court stated that it was concerned that giving defendant probation would send the wrong message and that the sentence needed to deter violent crime. The court did find defendant's lack of a criminal history to be a mitigating factor.

¶ 7 After the sentence was pronounced, defense counsel requested that the court recommend impact incarceration. The court responded that it was too late to make such a request and recommended that counsel file a motion to reconsider sentence that included the request. A timely motion to reconsider was filed. At a hearing on the motion, defense counsel argued that impact incarceration should be considered and that the eight-year sentence was excessive. The court found that the initial failure to request impact incarceration was not fatal; however, it declined to make the recommendation, stating that the 120 to 180 days defendant would spend in boot camp was not enough time for him to understand why he had committed the offense. Therefore, defendant's motion to reconsider was denied. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues that the trial court abused its discretion when it sentenced him to eight years in prison and failed to recommend impact incarceration. It is well settled that the trial court is in a better position than a reviewing court to fashion an appropriate sentence. *People v. Gossage*, 338 Ill. App. 3d 1066 (2003). A trial court's sentencing decision involves considerable judicial discretion and will not be reversed unless we find that the court abused that discretion. *People v. Stacey*, 193 Ill. 2d 203 (2000).

¶ 10 Defendant first contends that his eight-year sentence is excessive because the court did not properly consider factors in mitigation and his potential for rehabilitation. The Illinois Constitution mandates that all penalties be determined both according to the seriousness of the

offense and with the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11. However, in fashioning a sentence, the seriousness of the crime is the most important factor for a court to consider. *People v. Gutierrez*, 402 Ill. App. 3d 866 (2010). A sentence that falls within the statutory range does not amount to an abuse of discretion unless it is manifestly disproportionate to the nature of the offense. *People v. Jackson*, 375 Ill. App. 3d 796 (2007).

¶ 11 Here, defendant pled guilty to aggravated robbery. Aggravated robbery is a Class 1 felony (720 ILCS 5/18-5(b) (West 2010)) punishable by a sentence of not less than 4 years and not more than 15 years (730 ILCS 5/5-4.5-30(a) (West 2010)). The trial court sentenced defendant to a midrange sentence of eight years. There is a presumption that the trial court properly considered all mitigating factors and a defendant's rehabilitative potential, and the burden is on the defendant to affirmatively show the contrary. *People v. Brazziel*, 406 Ill. App. 3d 412 (2010). Here, defendant has not shown that the trial court failed to consider any factors in mitigation or his potential for rehabilitation. Defendant's argument is speculative and in no way shows that the trial court acted improperly. Therefore, we do not find that the trial court failed to consider factors in mitigation or defendant's rehabilitative potential. Defendant's midrange sentence was not an abuse of discretion.

¶ 12 Defendant further contends that the court abused its discretion when it failed to recommend impact incarceration. Specifically, defendant argues that impact incarceration was appropriate because he was an ideal candidate and it would have provided him with enough time to think about his actions. Pursuant to section 5-8-1.1(a) of the Unified Code of Corrections, a trial court may approve an offender for placement in impact incarceration by so stating in the sentencing order. 730 ILCS 5/5-8-1.1(a) (West 2010). By its use of the word "may," the

legislature made it clear that impact incarceration is an option for the trial court to consider, and not a mandatory placement for all qualified candidates. See *People v. Ullrich*, 135 Ill. 2d 477, 484 (1990) (use of the word "may" indicates something is discretionary rather than mandatory). Therefore, a decision to recommend impact incarceration is completely within the discretion of the trial court.

¶ 13 Here, the trial court considered and rejected defendant's request that he be placed in a program that lasted for a period of only 120 to 180 days. See 730 ILCS 5/5-8-1.1(f) (West 2010). The trial court was in the best position to make this determination, and we find no reason to second-guess the trial court's judgment. Therefore, we conclude that the trial court did not abuse its discretion when it failed to recommend impact incarceration.

¶ 14

CONCLUSION

¶ 15 The judgment of the circuit court of Iroquois County is affirmed.

¶ 16 Affirmed.