

NOTICE
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2013 IL App (4th) 120291-U

NO. 4-12-0291

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 23, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
LISA R. ELLZEY,)	No. 10CF1606
Defendant-Appellant.)	
)	Honorable
)	Jeffrey B. Ford,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant, as defendant's sentence was not excessive.

¶ 2 In September 2010, the State charged defendant, Lisa R. Ellzey, with unlawful possession of a controlled substance, a Class 4 felony (720 ILCS 570/402(c) (West 2010)). In February 2011, defendant pleaded guilty, and the trial court sentenced defendant to 30 months' drug court probation. Defendant violated her probation, and in April 2011, the State filed a petition to revoke defendant's probation. In July 2011, defendant admitted the petition, and in August 2011, the court resentenced her to a five-year prison term. Defendant filed a motion to reconsider sentence, and the court denied her motion.

¶ 3 Defendant appeals, arguing her five-year sentence is excessive because it is manifestly disproportionate to the nature of the offense. We disagree and affirm.

¶ 4

I. BACKGROUND

¶ 5 On September 20, 2010, the State charged defendant, Lisa R. Ellzey, with unlawful possession of a controlled substance. On February 17, 2011, defendant pleaded guilty in exchange for the State's agreement not to seek imprisonment. At the guilty plea hearing, the State presented a factual basis for the charge, as follows: On September 9, 2010, defendant was a passenger in a vehicle suspected to be involved in a drug transaction. After the vehicle was stopped, a drug-alert canine performed a free-air sweep of the vehicle and alerted to the presence of narcotics. The police searched defendant and found a "crack pipe on her person inside a cigarette package." The "crack pipe" field tested positive for cocaine.

¶ 6 On April 11, 2011, the trial court sentenced defendant to 30 months' drug court probation. During sentencing, the court noted "[i]t is very clear that [defendant's] primary problem and the reason she comes back into court over and over is her addiction." The court also warned defendant drug court was her "last shot."

¶ 7 Later the same day, defendant appeared in drug court and the court informed her of the terms of her probation. The court ordered defendant to report to drug court every Monday. On April 18, 2011, defendant appeared in drug court, and the court released defendant. The court ordered defendant to report to Prairie Center the next morning and to report back to court the following Monday. On April 25, 2011, defendant did not appear in drug court.

¶ 8 On April 29, 2011, the State filed a petition to revoke defendant's probation. On July 18, 2011, defendant appeared in drug court and admitted the allegations in the State's petition.

¶ 9 On August 29, 2011, defendant appeared for resentencing. At the sentencing

hearing, the trial court stated it had considered "the reports, recommendations of counsel, statement of the defendant, and factors in aggravation and mitigation." Before resentencing defendant, the court reflected on defendant's failure to comply with probation, her drug addiction, and her need for treatment. The court resentenced defendant to five years' imprisonment.

¶ 10 Defendant filed a motion to reconsider sentence, alleging in relevant part (1) the sentence was excessive, and (2) the trial court resentenced her based on her poor conduct after being placed on probation. On March 5, 2012, the trial court held a hearing on defendant's motion. The court specifically addressed defendant's allegation the court resentenced defendant based on her poor conduct on probation. The court stated it did not sentence defendant based on her poor conduct on probation. "The court considered the poor conduct to go to [defendant's] rehabilitative potential, having been given the chance to clean her life up, to turn her life around. She did not do the things that she needed to do." The court denied defendant's motion.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues her sentence is excessive because it is manifestly disproportionate to the nature of the offense. We disagree.

¶ 14 A. Forfeiture

¶ 15 The State argues defendant has forfeited this argument because she did not include it in her posttrial motion. See *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997) (finding forfeiture of an argument where the defendant did not include such argument in his posttrial motion). Defendant's motion to reconsider sentence alleged her sentence was excessive, but did not specifically allege her sentence was excessive because it was manifestly

disproportionate to the nature of offense, which is what defendant now contends on appeal.

Thus, defendant has in a sense forfeited the argument based on her failure to allege, with greater specificity, why her sentence was excessive. Defendant did allege her sentence was excessive, so we choose to address the merits of her argument.

¶ 16 B. Excessive Sentence

¶ 17 The trial court is afforded great deference in sentencing because it is in a better position to appropriately sentence a defendant. *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 629 (2000). "A sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense." *People v. Pearson*, 324 Ill. App. 3d 622, 629, 756 N.E.2d 438, 445 (2001). We review a defendant's sentence for an abuse of discretion. *Stacey*, 193 Ill. 2d at 209, 737 N.E.2d at 629.

¶ 18 Unlawful possession of less than one gram of cocaine is a Class 4 felony (720 ILCS 570/402(c) (West 2010)) and is normally punishable by up to three years' imprisonment (730 ILCS 5/5-4.5-40(a) (West 2010)). However, because defendant was extended-term eligible, defendant was subject to a sentencing range of three to six years' imprisonment (720 ILCS 5/5-4.5-40(a) (West 2010)). The trial court originally sentenced defendant to drug court probation on the State's recommendation. Defendant violated her probation two weeks later, and the court resentenced her to a five-year prison term—a term within the applicable sentencing range.

¶ 19 Defendant argues her sentence was excessive because it was manifestly disproportionate to the nature of the offense. More specifically, defendant contends the sentence was manifestly disproportionate because (1) defendant only possessed the "residue found in crack

cocaine" when she was arrested, and (2) the trial court found defendant's crack addiction and need for treatment was more important than the nature of the offense.

¶ 20 Defendant cites no authority in support of her argument her sentence was manifestly disproportionate because she only possessed "residue." Defendant pleaded guilty to the offense of unlawful possession of less than one gram of cocaine, and the factual basis for defendant's guilty plea indicated the "crack pipe" in defendant's possession field tested positive for cocaine. Whether defendant possessed a quarter gram of cocaine, half gram of cocaine, or the "residue found in crack cocaine" is irrelevant. The legislature has determined the possession of *any* amount of cocaine, up to one gram, is punishable by a term of imprisonment. The legislature has further determined defendants with prior criminal felony histories may be subject to extended-term sentencing. We conclude the trial court properly resentenced defendant within the applicable sentencing range, and the sentence was not excessive.

¶ 21 We also disagree defendant's sentence was manifestly disproportionate because the trial court found defendant's crack addiction and need for treatment was more important than the nature of the offense. The record does not show the court focused solely on defendant's addiction and need for treatment, or that the foregoing was the "reason" the court imposed a five-year sentence. At the sentencing hearing, the court stated it had considered "the reports, recommendations of counsel, statement of the defendant, and factors in aggravation and mitigation." Absent an affirmative showing to the contrary, we are to assume the court properly considered all the relevant factors in fashioning a sentence. *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001).

¶ 22 The court's commentary also reflects the trial court considered defendant's failure

to comply with probation and reflected on defendant's drug use and need for treatment in the context of her rehabilitative potential. The court properly did so. See *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005) ("The court may consider the defendant's conduct while on probation in reassessing his rehabilitative potential."); *People v. Wyatt*, 305 Ill. App. 3d 291, 298-99, 712 N.E.2d 343, 348-49 (1999) (considering the defendant's addiction and failed attempts at treatment in imposing a prison sentence). The record does not show the court gave these factors undue weight when resentencing defendant. We conclude defendant's sentence was not excessive because it was not manifestly disproportionate to the nature of the offense, and the court did not abuse its discretion in resentencing defendant.

¶ 23

III. CONCLUSION

¶ 24 We affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 25 Affirmed.