2015 IL App (1st) 131969-U

FIRST DIVISION
June 29, 2015

No. 1-13-1969

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. 11 C6 60347
	)	
MICHAEL BILLUPS,	)	Honorable
	)	Anna Helen Demacopoulos,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's 20-year sentence was not excessive where trial court was presumed to consider all mitigating factors before it and did not consider improper factors in aggravation. Trial court was not required to conduct a *sua sponte* inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984), where defendant never complained about trial counsel's performance.

¶ 2 Following a bench trial, defendant Michael Billups was found guilty of burglary and sentenced as a Class X offender to 20 years in prison. On appeal, defendant contends that his

sentence is excessive because the trial court failed to adequately consider mitigating factors and considered improper factors in aggravation. He also contends that the trial court erred when it failed to *sua sponte* hold an inquiry pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), after defendant claimed during the sentencing hearing that police officers had coerced his statements. We affirm.

¶ 3 Defendant was charged with four counts of burglary based on the burglaries of a credit union and three other businesses located in Chicago Heights from February through March 2011. After a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 1997), before Judge James Rhodes, defendant agreed to plead guilty to all four counts in return for a sentence of four, concurrent seven and a half year terms of incarceration. As the court admonished and questioned him, defendant stated:

> "I understand what is going on. The case with the bank, the burglary to the bank, and by my admission, your Honor, I allowed the State – I was allowed to stay out of the federal prison if I take a couple other cases. So that's what I did on my own admission."

He also stated that the detectives said that he would go to federal prison until his "kids get old" if he did not plead guilty. Following defendant's statements, the trial court expressed doubt that his confessions and pleas were voluntary. The court continued defendant's case to give him time to confer with his attorney and allow defense counsel time to consider filing a motion to suppress defendant's statements.

¶ 4 At a subsequent court date, defense counsel indicated that defendant wished to plead guilty only to the burglary count involving the credit union. In response, the State changed its election to a separate burglary count concerning a different business.

¶ 5 On the day that case was set for trial, the State informed the court that it had been unable to agree on an expected stipulation with defendant, and was unable to proceed to trial. Consequently, the State changed its election back to the count regarding the credit union. Defendant then stated, "I would like to demand a date, but I pleaded guilty in a court of law in front of you on that case already." The court responded that the plea had not been accepted because defendant did not want to plead to all four cases. It stated:

> "I don't know why it's being changed to a case that he's already said he was willing to plead to. But let's have a trial. I don't even know if they could prove the case that you wanted to plead to. Maybe they can't even prove the case."

Defense counsel then demanded trial.

¶ 6 At a bench trial before Judge Anna Demacopoulus, Chicago Heights police officer Leo Garza testified that he responded to a burglar alarm at a credit union in the early morning on March 21, 2011. Garza climbed to the credit union's roof and saw a pair of gloved hands clinging to the inside of an opened air conditioning unit. When Garza ordered the individual to come out, the hands disappeared into the building. Later, Garza saw other officers take defendant into custody. Chicago Heights police officer Vaughns testified that he also responded to the credit union's alarm. Looking through the front door, Vaughns saw a man walking towards the back of the credit union. Later, he saw defendant in custody.

¶ 7 Detective Mikal El-Amin testified that he interrogated defendant following his arrest. Defendant initially refused to speak with El-Amin, but later gave a written statement in which he admitted to breaking into the credit union because he "needed money."

¶ 8 The trial court found defendant guilty of burglary.

¶ 9 At defendant's sentencing hearing, El-Amin testified that while he investigated the credit union burglary he also investigated three other burglaries in Chicago Heights. He spoke with a club owner, a restaurant owner, and a department store owner. All three stated that their buildings had been broken into through the roof and that property had disappeared. El-Amin questioned defendant about the three burglaries, and he confessed to committing all three. The State introduced three written statements from the defendant describing how he broke into the buildings.

¶ 10 The State noted that defendant had five prior burglary convictions, and had been "on parole" for the most recent conviction during the credit union burglary. It also noted that in defendant's presentence investigation ("PSI") he had said he attended Lincoln College until he left for medical reasons. Lincoln College indicated they had no record of defendant. Defendant also stated he attended "the National Technical School" and earned a welding certificate, but the existence of the school could not be verified.

¶ 11 In mitigation, defense counsel argued that defendant had repeatedly attempted to plead guilty and a Rule 402 conference had been held where the previous judge had made an offer of seven and a half years in prison. Counsel also asserted that defendant had worked as a welder for 18 years without any convictions, but a car accident caused him to stop working and begin using heroin. The drug addiction subsequently led to his criminal conduct. The trial court noted that the PSI did not mention heroin or a car accident.

¶ 12 Counsel then repeated that defendant wanted to plead guilty, but the trial court interrupted, saying:

"He would not accept Judge Rhodes' offer. I want to be very clear on the record. He rejected Judge Rhodes' 402 offer. He chose to go to trial. *** I don't want to punish him. I just want to make sure the record is clear. The rejection was Mr. Billups' decision."

When defense counsel again asserted that defendant had pleaded guilty to the credit union burglary, the trial court again stated that he had not pleaded guilty, but had chosen to go to trial.

¶ 13 Speaking in allocution, defendant read from a letter that he stated he had written to Judge Rhodes in June 2011. The letter thanked the judge for allowing defendant to enter a drug treatment program and stated that he was benefitting from the program. Defendant also stated that he had pleaded guilty to the credit union burglary but had not committed the other three burglaries. He asserted:

"A detective and another detective told me that I would go to federal penitentiary unless I cooperated with them. He wrote everything down and kept me up for four days in jail with no food and a cup of coffee. They would come get me and wouldn't let me sleep. They would come get me and try and get me to sign these papers. I asked for an attorney and I asked to call my wife. They wouldn't let me make a phone call or let me talk to my attorney."

¶ 14 After arguments in aggravation and mitigation, the trial court stated that it had considered the PSI and commented that:

"It's two completely different people based on what the Defense is presenting today and what is in the [PSI]." In explaining the inconsistencies, the court stated "[I]t is very clear that [defendant] makes statements that benefit him at certain times. For example, the letter that he wrote to Judge Rhodes that he recited here today indicating that he had benefitted from the program, that he had only been in the program since June of 2011, for

> two and a half months. He is already claiming that he had learned his lesson and that the program is helping him out already."

The court discussed defendant's 18 years of employment without criminal conviction and his multiple convictions since 1998. It found El-Amin's testimony about the other three burglaries credible. The court concluded that defendant could not be rehabilitated and sentenced him to 20 years' incarceration.

¶ 15 At the end of the hearing, the trial court addressed comments that defendant and his counsel had made indicating he had pleaded guilty:

> "I have reviewed the half sheets, the common-law record, and there is absolutely nothing on there that indicates that there was either a 402 conference and that the defendant plead guilty. We went to trial. There was a trial on this case."

Defense counsel indicated that he understood that a plea was never completed, but wanted to inform the court that defendant had "told the court, 'I did this.' " The court asked defense counsel if defendant had decided not to go forward with the plea and counsel responded affirmatively.

¶ 16 The trial court denied defendant's post-sentencing motion. Defendant appeals.

¶ 17 Defendant first contends that his 20-year sentence is excessive because the trial court inadequately considered mitigating factors. He notes that the credit union burglary was nonviolent in nature and that he worked for 18 years before being convicted of any criminal activity. He argues that his drug addiction led to his criminal activity and he had shown progress in addressing that addiction. Finally, he notes that he expressed a desire to plead guilty repeatedly and argues the court erroneously believed he was lying about that desire. The State responds that defendant's sentence was proper because the trial court considered all relevant mitigating and aggravating factors.

¶ 18 All sentences must reflect the seriousness of the offense committed and the objective of rehabilitating offenders to useful citizenship. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). A reviewing court may only reduce a sentence when the record shows that the trial court has abused its discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Martin*, 2012 IL App (1st) 093506, ¶ 47. The reviewing court may not reverse the sentencing court just because it could have weighed the factors differently. *Streit*, 142 Ill. 2d at 19

¶ 19 The sentencing court must consider all factors of mitigation and aggravation. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). However, the court need not explicitly indicate each mitigating factor that it has considered. *People v. Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. Furthermore, we presume that a trial court considered all relevant factors in fashioning a sentence; a presumption that cannot be overcome without affirmative evidence in the record that the trial court failed to consider mitigating factors. *Id.*

¶ 20 Typically, burglary is punishable by three to seven years' imprisonment. 730 ILCS 5/5-4.5-35(a) (West 2010). Due to defendant's criminal history, he was subject to Class X sentencing. See 730 ILCS 5/5-4.5-95 (b) (West 2010). As such, defendant faced a sentencing range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a) (West 2010). A sentencing decision that falls within the statutory range is entitled to great deference. *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011). Such a sentence will not be overturned unless it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 21 The trial court explicitly mentioned defendant's 18 years of work as mitigation. However, following that 18 years, defendant was convicted of burglary five separate times, and had been "on parole" for one of those convictions during the commission of the credit union burglary.

Similarly, the trial court addressed defendant's argument that he had accepted responsibility for his crime. Each time that defense counsel argued that defendant had tried to plead guilty, the trial court recognized that a Rule 402 conference had occurred and noted, correctly, that defendant had not in fact completed a plea of guilty. While he argued at sentencing and argues now on appeal that he only went to trial because the State refused to give him the plea deal he desired, that does not negate the fact that he did choose to proceed to trial. The trial court did not "completely dismiss" defendant's acceptance of responsibility, as he now argues, but rather clarified the factual underpinnings of defense counsel's argument. Unlike with the other factors, the trial court never explicitly stated that it had considered the nonviolent nature of the crime or defendant's drug treatment; however, it was not required to make such a statement. See *Halerewicz*, 2013 IL App (4th) 120388, ¶ 43. Defendant has not presented any affirmative evidence that the trial court failed to consider any factor in mitigation, and thus we presume it considered all relevant factors.

¶ 22 Defendant's 20-year sentence is within the statutory range. While there was some evidence introduced of defendant's rehabilitative potential and contrition, there was also substantial evidence of defendant's prior criminal activity and demonstrated recidivism. Given defendant's criminal history and the trial court's consideration of all relevant factors, a 20-year sentence is not greatly at variance with the law or manifestly disproportionate to his offense. Therefore, we find his sentence was not excessive.

¶ 23 Defendant argues that the trial court erroneously believed his letter to the previous judge was evidence of his dishonesty. After reviewing the record, we believe this is a mischaracterization of the trial court's comments. The trial court did not imply that defendant had not made progress in his drug treatment. Instead, the court noted that after only a short period of

time in the treatment program defendant was making large claims about his progress and rehabilitation. In light of this and the multiple inconsistencies between the information in defendant's PSI and his representations in court, the trial court reasonably concluded that defendant tended to make self-serving statements. Contrary to defendant's assertion on appeal, this is not affirmative evidence of the trial court's refusal to consider his rehabilitative potential, but rather a reasoned and expressed doubt of defendant's credibility.

¶ 24 Defendant next argues that the trial court improperly considered the three untried burglaries. He notes that the proof of these burglaries relies on El-Amin's testimony regarding defendant's statements and argues that the testimony was unreliable.

¶ 25 The sentencing court may consider evidence of past criminal conduct without conviction in aggravation where it is based upon reliable evidence. *People v. Deleon*, 227 Ill. 2d 322, 340 (2008). A reviewing court must give due consideration to the fact that a trial court is able to see and hear the witnesses. *People v. Ortiz*, 196 Ill. 2d 236, 267 (2001). The trial court's determination of credibility is entitled to great deference. *Id.*

¶ 26 Defendant argues that the evidence of the three other burglaries was unreliable because his account of the confessions contradicts El-Amin's testimony. The trial court heard both individuals testify. It explicitly found El-Amin to be reliable while expressing doubt in defendant's credibility. We defer to the trial court's credibility determination. Because El-Amin's testimony provides reliable evidence that defendant committed the three other burglaries, the trial court did not err in considering them in aggravation.

¶ 27 As the trial court did not fail to consider factors in mitigation and properly considered the three other burglaries, we find that the court did not abuse its discretion in sentencing defendant to 20 years' incarceration.

¶ 28 Defendant also asserts in his reply brief that the State failed to dispute certain specific arguments he made in his opening brief regarding whether the trial court adequately considered mitigating factors, and thus has conceded error by the trial court, citing *In re Deborah S.*, 2015 IL App (1st) 123596. In *In re Deborah S.*, the State "failed to respond to or address [the issues] in any way in its brief" and the reviewing court determined that the State had "essentially conceded" them on appeal. *Id.* In the current case, defendant claims the trial court inadequately considered factors in mitigation and the State responds that the court considered all relevant mitigating factors before it. *In re Deborah S.* does not support defendant's apparent contention that an opposing party must address every minor subpoint contained in a party's brief. We find that the State has adequately responded to defendant's claims and has not conceded the issue.

¶ 29 Defendant next contends that the trial court erred when it failed to *sua sponte* investigate defendant's claim pursuant to *People v. Krankel,* 102 Ill. 2d 181 (1984), after defendant alleged during the sentencing hearing that police officers had coerced his statements. Defendant argues that his statements provided the court with a clear basis to suspect that trial counsel was ineffective for not challenging their admissibility. The State responds that a hearing was not required where defendant never claimed ineffectiveness or complained about his attorney.

¶ 30 Under *Krankel,* when a defendant raises a *pro se* posttrial claim of ineffective assistance of counsel, the trial court must examine the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). The defendant need only “bring his or her claim to the trial court's attention." *Id.* at 79. In the absence of a sufficient claim of ineffective assistance of counsel by the defendant, an inquiry is not required. *People v. Taylor*, 237 Ill. 2d 68, 77 (2010). A claim may be insufficient where it is overly vague or does not reference an attorney. See *id.* ("[T]here is nothing in defendant's statement specifically informing the court that defendant is complaining

about his attorney's performance. Indeed, defendant does not mention his attorney.") If the court fails to conduct the necessary preliminary examination of the defendant's allegations, the case must be remanded for the limited purpose of allowing the court to do so. *People v. Serio*, 357 Ill. App. 3d 806, 819 (2005). The question of whether defendant's statement constituted a *pro se* claim of ineffective assistance sufficient to trigger the court's duty to inquire is reviewed *de novo*. See *Taylor*, 237 Ill. 2d at 75.

¶ 31 Defendant acknowledges that he did not claim ineffective assistance of counsel or complain about trial counsel before the trial court. Instead, he asserts that the trial court had a *sua sponte* duty to investigate where there is a clear basis for ineffective assistance of counsel, citing *People v. Williams*, 224 Ill. App. 3d 517, 524 (1992). In *Williams*, the defense counsel informed the court that he had not called two witnesses who would have supported defendant's alibi defense despite his knowledge of their existence. *Id.* at 521-23. The trial court rejected defense counsel's claim that these witnesses constituted new evidence, referring to counsel's argument as " 'ridiculous.' " *Id.* at 522. On appeal, this court noted that the trial court's strong comments to counsel indicated its awareness of counsel's possible neglect. *Id.* at 524. The court held that where the record presents a "clear basis" for an allegation of ineffective assistance of counsel, a trial court is required to hold *Krankel* inquiry. *Id.*

¶ 32 We find *Williams* inapposite to the current facts. This court has repeatedly considered *Williams* and narrowly confined its ruling to its facts. See *People v. Steele*, 2014 IL App (1st) 121452, ¶ 49 (2014); see also *People v. Henney*, 334 Ill. App. 3d 175, 190 (2002); *People v. Gillespie*, 276 Ill. App. 3d 495, 502 (1995). The catalyst for an inquiry in *Williams* was the trial attorney's admissions and the trial court's awareness of possible neglect. In the current case, defense counsel did not indicate error in his representation and the trial court did not express any

doubt in counsel's competency. Defendant does not reference his attorney once in the statements in question, nor does the record indicate defendant ever complained of counsel's recommendation. If defendant's statements without reference to his attorney "were deemed sufficient to require a Krankel inquiry, few statements would be insufficient." See *Taylor*, 237 Ill. 2d at 77. Under these circumstances, we find no error by the trial court in failing to conduct a *sua sponte Krankel* inquiry.

¶ 33 For the foregoing reasons we find the trial court did not abuse its discretion in sentencing defendant to 20 years' incarceration. We also find that the court was not required to conduct a *sua sponte Krankel* inquiry based upon defendant's allegation of police coercion. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.