

No. 1-13-2060

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. 10 C6 61195
)	
JOSE GOMEZ,)	Honorable
)	Michele M. Simmons,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 **Held:** We affirm defendant’s 10-year sentence for aggravated driving under the influence of alcohol (DUI). This was defendant’s sixth DUI conviction. The sentence fell within the statutory range and was not excessive in view of the defendant’s background and work history.

¶ 2 Following a bench trial, defendant Jose Gomez was convicted of aggravated driving under the influence of alcohol and sentenced to 10 years’ imprisonment. On appeal, defendant contends that his sentence is excessive in light of certain mitigating factors. We affirm.

¶ 3 The undisputed evidence revealed that a tow truck driver, Randall Gilliam, stopped to help when he observed defendant attempting to change a car tire on I-57 between 130th Street

and 135th Street at approximately 3:30 p.m. on August 13, 2010. Gilliam called for police assistance because he noticed defendant smelled of alcohol and repeatedly stumbled around the scene. State Trooper Edward Nowak and his partner arrived, activated his car's audio and video equipment, and interviewed defendant. A video of the interaction was entered into evidence.

¶ 4 Defendant told Nowak that he consumed approximately six beers between 9 a.m. and 11 a.m. Defendant's speech was slurred, his eyes were bloodshot, and his breath smelled of alcohol. Defendant failed three field sobriety tests (a horizontal gaze nystagmus test, the one-leg-stand test, and the walk-and-turn test). Nowak administered a preliminary breath test and arrested defendant. A subsequent breath test revealed a blood alcohol content of .175.

¶ 5 The court found defendant guilty of aggravated driving under the influence of alcohol and driving while his license was revoked. At sentencing, the parties and the court established that the present offense was his 6th DUI conviction, with the 5 prior DUI convictions ranging from 1985 through 1999. The State then observed that defendant was driving while "incredibly" intoxicated on a Friday afternoon about 3:30 p.m. on a very busy expressway near the start of rush hour. Defendant was found in the middle of a traffic lane trying to change a tire and that conduct endangered his own life and everyone else on the road. The State further argued that defendant has repeatedly demonstrated that he cannot be deterred from drinking and driving, and noted his extensive criminal background, including his five prior DUIs which now made him a Class X offender.

¶ 6 In mitigation, defense counsel observed that defendant was 46 years old and admitted that his driving record was poor. The same attorney had represented defendant for over 25 years and represented him in all the other DUI matters. Defense counsel argued that alcohol has been the basis of all defendant's problems, and that defendant had not been in trouble for about 14 years,

was very hardworking, had a good family, including his parents, a second wife, and two children, who lived with his first wife. Defendant attended school through the 10th grade, then dropped out and did not get a GED. Defendant ultimately was injured in an industrial job by inhaling vapors from an acid bath and that injury destroyed the lining of his lungs. According to the presentence investigation report (PSI), defendant worked as a roofer when he left high school until he was 35 years old. In 2007, defendant took a job in a chemical company where the industrial accident occurred. Defendant began receiving social security disability and has not been able to return to work since the accident. The PSI also indicated that defendant previously attempted alcohol treatment. Defendant declined the court's invitation to speak in allocution.

¶ 7 In imposing a sentence, the court stated it had considered all factors in aggravation and mitigation, and also thoroughly read the PSI. The court saw defendant as a hard-working individual and a rather young person to have such an extensive background. Defendant had prior convictions for burglary and domestic battery, and most importantly, five prior DUIs. The court commented that defendant had no business driving when he received the sixth DUI and stated:

“[Y]ou clearly are on your way to either killing yourself or killing somebody. This is dangerous, what you're doing. It is dangerous.

That is why you're being sentenced as a Class X offender.

It's because of your criminal history. It's not the prior felonies.

It's the driving under the influence of alcohol cases.”

The court imposed concurrent prison terms of 10 years for aggravated driving under the influence of alcohol and 3 years for driving with a revoked license. Defendant did not file a written post-sentencing motion to reconsider sentence.

¶ 8 On appeal, defendant contends that his sentence is excessive in light of his history of steady employment and lack of significant criminal history beyond that caused by an alcohol problem. Defendant observes that he had no prior Class X offense and this sentence was his first commitment to prison.

¶ 9 As an initial matter, defendant acknowledges that he forfeited review of this issue because he failed to file a written motion to reconsider sentence. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1970); *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). Defendant urges our review under the plain error doctrine. *Id.* The first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Id.* For the reasons that follow, we find no error.

¶ 10 We review sentences under an abuse-of-discretion standard. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). A sixth conviction for aggravated driving under the influence of alcohol is a Class X felony, punishable by 6 to 30 years' imprisonment. 625 ILCS 5/11-501(d)(2)(E) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). A sentence falling in the statutory range can be excessive if it contradicts the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). However, we give great deference to a trial court's sentencing determination because that court is best positioned to weigh aggravating and mitigating factors and create a sentence that balances the need to protect society with the rehabilitation of the defendant. *Id.* at 209; *People v. Visor*, 313 Ill. App. 3d 567, 573 (2000). A reviewing court will not substitute its judgment merely because it would have weighed the aggravating and mitigating factors differently. *Stacey*, 193 Ill. 2d at 209.

¶ 11 We find no error, as defendant’s sentence is not excessive. The 10-year term falls near the minimum of the sentencing range for a Class X felony and is not disproportionate for a sixth conviction for driving under the influence of alcohol. The trial court, noting that defendant is “clearly on the way to either killing [himself] or killing somebody,” formulated a sentence that reflects the seriousness of intoxicated driving and protects the public, and defendant, from defendant’s repeated unlawful conduct. In addition, defendant’s alcohol-related incidents spanned 25 years from his first DUI in 1985 to this DUI in 2010, with no signs of rehabilitation despite attempts at alcohol treatment, as indicated in the PSI. Further, the trial court reviewed the PSI and considered each of the mitigating factors now argued by defendant on appeal, including his 20-year history as a roofer before working at a chemical company and suffering a career-ending injury in 2007. The court also considered the role of alcohol in defendant’s criminal history and the absence of prior Class X convictions. *People v. Scott*, 2015 IL App 130222, ¶ 56 (declining plain-error review where the court imposed incarceration “well below the maximum sentence and based significantly on defendant’s extensive criminal history and prior delinquency”); *People v. Alvarez*, 2012 IL App 092119, ¶ 61 (upholding sentence that fell in the middle of the permissible range where the circuit court considered all of the evidence, the factors in mitigation, and defendant’s pattern of conduct); *People v McGee*, 398 Ill. App. 3d 789, 795 (declining to find error where the court considered defendant’s criminal history, the nature of the crime, and defendant’s drug addiction). In light of this record, we cannot say that the trial court abused its discretion.

¶ 12 For the foregoing reasons, we affirm the sentence of the trial court.

¶ 13 Affirmed.