FOURTH DIVISION
June 30, 2015

No. 1-13-2204



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 3945 |
| | ) | |
| MONTRELL BANKS, | ) | Honorable |
| | ) | Nicholas R. Ford, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Defendant's aggregate 85-year sentence for first-degree murder and attempted armed robbery affirmed where defendant could not show trial court abused its discretion in imposing defendant's sentence.

¶ 2 Following a jury trial, defendant Montrell Banks was found guilty of first-degree murder in the shooting death of Adrian Thompson and guilty of attempted armed robbery with a firearm. Defendant was sentenced to 50 years in prison for first-degree murder with a 31-year enhancement for personally discharging the firearm that killed Thompson and a consecutive term of 4 years in prison for attempted armed robbery. Defendant's aggregate sentence was 85 years in

prison. On appeal, defendant contends: (1) his sentence was excessive in light of his lack of a criminal history and his educational and employment background; and (2) his mittimus should be corrected to accurately reflect the crimes of which he was convicted.

¶ 3 At trial, the State presented evidence that defendant and codefendant, Timothy Sinico, who is not a party to this appeal, had planned a robbery of Thompson, a reputed cannabis dealer. On the evening of April 23, 2009, defendant and codefendant had a mutual friend call Thompson. The friend told Thompson that codefendant wanted to buy cannabis and told Thompson to come to the friend's grandmother's house where defendant and codefendant were located. Multiple witnesses stated that defendant and codefendant made statements that they intended to rob Thompson once he arrived.[1]

¶ 4 When Thompson appeared at the house, defendant and codefendant entered Thompson's vehicle and attempted to rob him of both cannabis and money. When Thompson refused to give them what they wanted, defendant, now outside the vehicle, pointed a gun at Thompson and said multiple times, "I'm a Four Corner Hustler. Empty everything in your pockets." Thompson began to leave his vehicle but then quickly shut the door and put the vehicle in gear. Defendant shot Thompson once in his back. Thompson's vehicle began to speed away in reverse and eventually crashed into a utility pole. Defendant and codefendant fled the scene.

¶ 5 After argument and deliberations, the jury found defendant guilty of first-degree murder and attempted armed robbery.

[1] Codefendant's appeal is pending before this court in No. 1-13-2164.

¶ 6 A presentence investigation was prepared in this case, which indicated that defendant's prior criminal history consisted only of a misdemeanor reckless conduct conviction for which he received one year of supervision.

¶ 7 At defendant's sentencing hearing, the State presented two witnesses who worked at the Cook County jail. Each testified that they observed defendant engage in acts of violence against other inmates. The State further argued that defendant had a solid upbringing, no diagnosed psychological disorders, and no alcohol or drug abuse problems that could help explain his behavior. Instead, the State argued that defendant consciously chose to join a street gang and murder Thompson. The State argued that defendant engaged in a "cold and calculated" crime where he lured Thompson, a person with whom he was acquainted, to a mutual friend's grandmother's house in order to rob him. When Thompson did not comply with defendant's demands, defendant shot him point blank.

¶ 8 In mitigation, defendant presented a letter from his mother that stated defendant was "well behaved" prior to the incident and had attended technical school. Defendant further argued that he lacked a criminal background and had a solid support system in his family, with many members attending the entire trial. Furthermore, when defendant's aunt, with whom he lived starting at 17 years of age, was diagnosed with lung cancer, defendant would constantly ask his trial counsel to provide updates about her health and pass along well wishes.

¶ 9 The trial court stated it considered the evidence of the crime, the evidence provided during the sentencing hearing in aggravation and mitigation, the presentence investigation, and the financial impact of incarcerating defendant. Among the "ample aggravation," the trial court considered particularly aggravating "the manner and mechanism by which the offense was

planned over a period of hours" that involved robbing a person defendant knew. The court noted that defendant fled the scene after the crime and "that during [his] period of incarceration[,] [defendant] had been involved in additional acts of violence." Accordingly, the trial court sentenced defendant to a consecutive term of 50 years in prison for first-degree murder with a 31-year enhancement for personally discharging the firearm that killed Thompson, and 4 years for attempted armed robbery.

¶ 10 Defendant first contends that his sentence was excessive because he was a first-time felon with an educational and employment background that demonstrates the potential for rehabilitation. Both parties agree, as do we, that defendant has forfeited his excessive sentencing claim because he failed to file a written motion to reconsider the sentence. Defendant asks us to review his sentence for plain error. Alternatively, defendant argues that, even if we cannot review his sentence under the plain-error doctrine, any forfeiture of his claim resulted solely from his trial counsel's ineffective assistance where he failed to file a posttrial motion to reconsider defendant's sentence.

¶ 11 In the sentencing context, a defendant alleging the application of the plain-error doctrine must show either "the evidence at the sentencing hearing was closely balanced" or "the error was so egregious as to deny the defendant a fair sentencing hearing." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The doctrine is narrow and limited, to be invoked only when "a clear or obvious error occurs." *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The defendant bears the burden of persuasion under either prong. *Hillier*, 237 Ill. 2d at 545. The first step in a plain-error review is to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 12 A reviewing court owes great deference to a trial court's sentencing decisions, because the trial court observes the defendant and the proceedings as a whole and is in a superior position to weigh the relevant factors that go into the sentencing decision, compared to a reviewing court relying on a "cold record." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). A reviewing court must proceed with "great caution" and may not substitute its judgment for that of the trial court, even if we would have weighed the factors differently. *Id*. The trial court may appropriately consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, as well as any mitigating and aggravating factors advanced by the parties, when sentencing a defendant. *Id*.; *People v. Willis*, 409 Ill. App. 3d 804, 815 (2011). But as long as a sentence is within the statutory range, it may not be reversed absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995).

¶ 13 In this case, the sentences defendant received were within the statutory ranges for each offense. The sentencing range for first-degree murder was between 20 and 60 years (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)), and defendant received 50 years. The sentencing enhancement for a defendant being armed with a firearm that he personally discharged, resulting in great bodily harm or death, was between 25 years and life imprisonment (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)), and defendant received a 31-year enhancement. Finally, the sentencing range for attempted armed robbery, a Class 1 felony, was between 4 and 15 years in prison (720 ILCS 5/8-4(c)(2), 18-2 (West 2008)), and defendant was sentenced to the minimum 4 years. Because each sentence was within the applicable statutory range, our inquiry is limited to whether the trial court abused its discretion in the sentences it imposed. *Jones*, 168 Ill. 2d at 373-74.

¶ 14 The minimum sentence defendant could have received was 49 years (20 for murder, 25 for the enhancement, and 4 for attempted armed robbery). Instead, he received 85 years. Of that sentence, 81 of those years (the murder with the gun enhancement) must be served in full. 730 ILCS 5/3-6-3(a)(2)(i) (West 2013); *People v. Alvarado*, 2013 IL App (3d) 120467, ¶¶ 20-21 (enhancement to first-degree murder conviction for personal discharge of firearm leading to death was part of same sentence as murder conviction and, like murder sentence itself, was required to be served in full). The 4-year sentence for attempted armed robbery was the minimum defendant could have received, and even though it was imposed consecutively to, not concurrently with, the murder sentence, it is a minor detail compared to the murder sentence; either way, defendant would not leave prison until he was over the age of 100. And the mandatory firearm enhancement, which could have been anywhere from 25 years to life, was far closer to the lower end at 31 years. The primary focus of defendant's argument is on the sentence for first-degree murder, for which defendant received 50 years, well beyond the 20-year minimum.

¶ 15 The record indicates that the trial court considered the evidence presented at trial, the presentence investigation report, the evidence in aggravation and in mitigation, and the financial considerations of incarcerating defendant. Defendant argues, however that the trial court did not give sufficient weight to his mitigating factors, such as his lack of a criminal background, his education and employment history, and the fact that, overall, he had significant rehabilitative potential. Specifically, defendant argues the trial court did not sufficiently weigh such mitigating factors as defendant's 3.4 grade point average in high school despite needing special education

classes, or that he attended technical college, or that he worked continuously since high school other than the period of time he attended to his ailing aunt.

¶ 16 We agree that all of these facts could be viewed as mitigating circumstances, but we disagree that the trial court failed to consider them. These factors were discussed and considered at length at the sentencing hearing. Both the State and defense counsel—in fact, the State more so than the defense—discussed these mitigating factors regarding defendant's lack of a significant criminal history and his education and employment history. The trial court also noted that it took this information into account. The trial court is not required to assign or recite a value to each sentencing factor. *People v. Beasley*, 314 Ill. App. 3d 840, 847 (2000). And where the trial court examines the presentence report, which the record indicates occurred here, there is a presumption that it took into account the defendant's potential for rehabilitation. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010).

¶ 17 We recognize that defendant received a very long sentence notwithstanding these mitigating factors, but that does not mean that the trial court ignored those factors or gave undue weight to them. The trial court made it clear that it was imposing a sentence above the minimum sentence for first-degree murder primarily based on the facts of the crime itself—that the murder resulted from a premeditated robbery in which defendant lured an acquaintance to the alley under the guise of buying cannabis, resulting in the victim's murder only after the victim refused to turn over his money and other possessions. " '[A] defendant's rehabilitative potential is not entitled to greater weight than the seriousness of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 214 (2010) (quoting *People v. Coleman*, 166 Ill.2d 247, 261 (1995)). Moreover, this mitigating evidence must be weighed against the significant evidence in aggravation, including not only the

circumstances of the offense but also defendant's continued violence while incarcerated. The trial court is not required to elevate mitigating factors above the aggravating factors. *Gutierrez*, 402 Ill. App. 3d at 902.

¶ 18 We find no abuse of discretion in the trial court's balancing of the mitigating and aggravating factors. We find no reason to conclude that the trial court failed to consider any required factors, and its sentences fell within the ranges prescribed by law. Because we do not find any error occurred, there cannot be plain error. See *Thompson*, 238 Ill. 2d at 613.

¶ 19 Defendant argues in the alternative that any procedural default in reconsidering his sentence was solely due to his trial counsel's ineffective assistance in failing to file a posttrial motion to reconsider his sentence. To establish ineffective assistance of counsel, a defendant must show that his representation was deficient and that because of the deficiency, he suffered prejudice. *People v. Pugh*, 157 Ill. 2d 1, 14 (1993); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Defendant must satisfy both the "deficient representation" and "prejudice" prongs to prevail on an ineffectiveness claim. *People v. Henderson*, 2013 IL 114040, ¶ 11; *People v. Patterson*, 217 Ill.2d 407, 438 (2005). To show prejudice, defendant must demonstrate that "the result of the proceeding would have been different." *Henderson*, 2013 IL 114040, ¶ 11. As we have explained above, the trial court did not abuse its discretion in sentencing defendant to 85 years in prison for his crimes. As a result, defendant cannot establish that, had his trial counsel properly filed a posttrial motion to reconsider his sentence, the result of the proceeding would have been different. Accordingly, defendant cannot demonstrate prejudice.

¶ 20 Defendant next contends, the State concedes, and we agree that his mittimus must be corrected to reflect the actual crimes for which he was convicted. Defendant's mittimus states

that he was convicted of "MURDER/INTENT TO KILL/INJURE," "MURDER/STRONG PROB KILL/INJURE" and "ARMED ROBBERY/ARMED W/FIREARM."

¶ 21 With regard to the murder conviction, the trial court stated during sentencing that counts seven through nine, which alleged three different theories of first-degree murder, would merge. Both counts seven and eight are reflected on the current mittimus. When the oral pronouncement of the trial court is in conflict with the mittimus, the oral pronouncement controls. *People v. Smith*, 242 Ill. App. 3d 399, 402 (1993). Only the most serious crime committed should remain after the merger. See *People v. Cardona*, 158 Ill. 2d 403, 411 (1994). With regard to the attempted armed robbery conviction, the mittimus incorrectly states defendant was convicted of "ARMED ROBBERY/ARMED W/FIREARM" when he was actually convicted of attempted armed robbery.

¶ 22 When the mittimus contains an error, the reviewing court should order that the mittimus be corrected to reflect the actual conviction. *People v. Gordon*, 378 Ill. App. 3d 626, 641 (2007). Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999) and our ability to correct a mittimus without remand (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we order the clerk of the circuit court to correct defendant's mittimus to reflect defendant's actual convictions. Thus, the mittimus should be corrected to reflect that defendant was convicted of one count of first-degree murder in which he intended to kill or do great bodily harm to Thompson (see 720 ILCS 5/9-1(a)(1) (West 2008)), and sentenced to 50 years in prison with a 31-year enhancement for personally discharging the firearm that killed Thompson. Additionally, the mittimus should be corrected to reflect that defendant was convicted of attempted armed robbery. For the reasons stated above, we affirm the judgment of the circuit court of Cook County in all other respects.

¶ 23 Affirmed; mittimus corrected.