2015 IL App (1st) 133302-U

FIRST DIVISION
November 9, 2015

No. 1-13-3302

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. 12 CR 1923
	)	
DERRICK JOHNSON,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LIU delivered the judgment of the court.
Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant, who was subject to Class X sentencing based on history of recidivism, to 12 years' imprisonment for burglary, after considering the aggravation and mitigation factors.

¶ 2 Following a jury trial, defendant Derrick Johnson, who was a Class X offender, was convicted of burglary and possession of burglary tools and sentenced to respective, concurrent terms of 12 and 3 years' imprisonment. On appeal, defendant contends that the trial court abused its discretion in sentencing him to 12 years for burglary where such a lengthy term was disproportionate to the severity of the offense, and harmed his chances of being restored to useful

citizenship. Defendant also contended in his opening brief that the mittimus did not accurately reflect the number of days he spent in presentence custody, but withdrew that argument in his reply brief and conceded he received all the credit to which he was entitled. We affirm.

¶ 3 The evidence at trial showed that former Chicago Police Officer Christopher Lappe received a police dispatch and drove to a vacant house located at 1218 North Mayfield Avenue in Chicago on January 6, 2012. Lappe entered the back door of the house, which had pry marks on it, and went into the basement where he saw exposed copper and galvanized pipes. Defendant, who, according to the manager of the subject property, Nicholas Chupein, did not have permission to enter the property, was standing near the piping, a crowbar, an empty green canvas bag, and a black bag filled with tools that could be used to remove piping. Lappe announced his office and defendant fled through front door where Officers Paul Lauber and Susan Fagan were located. Lauber chased, tasered, and arrested defendant.

¶ 4 Defendant's wife, Lesha Barber-Johnson, testified that she and defendant lived a few blocks from the subject property. She told defendant to leave their house following an argument on January 6, 2012. She recalled that at the time that defendant left, he had nothing in his hands and was wearing a coat because it was a cold day. Lesha acknowledged that many of defendant's relatives lived nearby. She explained, however, that these relatives were not usually home and defendant did not have keys to their homes. She also acknowledged there were several churches in the neighborhood.

¶ 5 After the trial, the jury found defendant guilty of burglary and possession of burglary tools, and the trial court ordered a presentence investigation report (PSI). The PSI showed that the 43-year-old defendant was married, had one child, earned a GED, and was previously a member of the Vice Lords gang. Defendant indicated that he had a $40 per day heroin habit, was

never treated for drug abuse, and did not feel he needed treatment. Prior to his incarceration, defendant had performed odd jobs to support himself, and estimated that he earned $200 per week. During periods of unemployment, his family supported him. Regarding his past criminal history, the record showed that defendant had two prior juvenile adjudications for burglary, and, as an adult, was convicted of residential burglary in 1989 and 1992, armed robbery in 1997, possession of a controlled substance in 2008, and retail theft in 2010.

¶ 6 At the sentencing hearing, the parties presented aggravating and mitigating factors for the court's consideration. In aggravation, the State highlighted defendant's criminal history, noting that he was Class X mandatory based on his prior convictions for armed robbery and residential burglary.

¶ 7 In mitigation, the defense presented the testimony of defendant's wife Lesha Barber-Johnson. She testified that defendant was a kind, caring husband and father to their five-year-old son, and that his absence caused her pain and difficulty around the house. The defense also asserted that defendant had completed a janitorial cleaning course and received his GED while he was in custody. Counsel explained that defendant's difficulties were likely the result of his untreated heroin addiction, emphasized that no damage was done to the subject vacant property, and requested the minimum sentenced allowed by statute because defendant was not a danger to the public, and a minimum sentence would serve both as a penalty and for rehabilitation.

¶ 8 The trial court stated that it considered all of the factors in aggravation and mitigation, as well as the PSI. The court acknowledged defendant did not damage the property, but found that defendant simply did not have time to complete the crime because the police responded immediately. Moreover, although defendant obtained his GED, instead of using it for a good purpose, he continued to lead a life a crime. Based on his criminal history, defendant was Class

X mandatory. The court noted it did not believe the minimum or maximum sentence was appropriate in this case, and sentenced defendant to 12 years' imprisonment on the burglary conviction and a concurrent 3-year term for possession of burglary tools. The court subsequently struck the sentence after defendant indicated he wanted to speak in allocution. Defendant apologized and stated he wanted to be there for his son. The court indicated it took defendant's statement into consideration, imposed the same sentence, and recommended he receive drug treatment. Defendant filed a motion to reconsider his sentence, which was denied.

¶ 9 On appeal, defendant contends the trial court abused its discretion in sentencing him to 12 years in prison for burglarizing a vacant house, where a growing consensus of research has shown that lengthy periods of incarceration for non-violent offenses yield uncertain benefits while imposing large social, financial, and human costs. He requests that this court exercise its authority under Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999), and reduce his sentence to the minimum of six years.

¶ 10 A trial court has broad discretion to determine an appropriate sentence, and a reviewing court may reverse only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). "A reviewing court gives substantial deference to the trial court's sentencing decision because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, environment, habits, and age." *People v. Snyder*, 2011 IL 111382, ¶ 36, citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). Consequently, the reviewing court should not substitute its judgment for that of the trial court simply because it would have balanced the appropriate sentencing factors differently. *Alexander*, 239 Ill. 2d at 214-15. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the

spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)).

¶ 11 Defendant was convicted of the Class 2 felony of burglary. 720 ILCS 5/19-1 (West 2012). However, he was subject to mandatory Class X sentencing, *i.e.*, 6 to 30 years, because of his criminal history. 730 ILCS 5/5-4.5-25 (West 2012).

¶ 12 At defendant's sentencing hearing, the trial court stated that it had considered the information presented in mitigation and aggravation, along with the presentence investigation report and defendant's criminal history. The court also noted that defendant "is Class X mandatory based on his background," and sentenced defendant to 12 years' imprisonment for burglary and three years' imprisonment for possession of burglary tools, with the terms to run concurrently. In explaining its decision, the court stated as follows:

> "I did listen to [defendant's] wife. And as I said, I'm taking into consideration all the factors in aggravation and mitigation. And as much as she wants to say it's just the defendant looking for shelter, the jury found him guilty of the burglary and possession of burglary tools.
>
> And I understand, [defense counsel], you're saying that there was no damage to the inside. The copper pipes weren't taken. The officers responded immediately. There was a lock broken and a bag full of burglary tools. So because just a matter of time, it was an opportunity and he didn't get the opportunity to complete that crime.
>
> You also say that the fact that he has to be sentenced as a Class X offender takes into consideration his background, and it does do that with

> regard to him being sentenced as a Class X offender. But you have got to look at the history with [defendant] and I have to look at rehabilitation.
>
> I think it's great that he got his GED while he was incarcerated, but instead of using that for a good purpose, instead he leads a life of crime. He makes choices. And instead of being [a] productive member of society, he continued to just commit crime after crime.
>
> He *** has a five-year old son and I would like to think that he would try to get a job and be there for his son, but instead, he gets arrested and convicted of this burglary and possession of burglary tools.
>
> I don't think that the minimum sentence is appropriate in this case, but I also don't think that the maximum sentence is appropriate. So on Count 1 he is sentenced as a Class X offender. I hereby sentence the defendant to 12 years in the Illinois Department of Corrections, and on Count 2, he is sentenced to three years in the Illinois Department of Corrections. Those sentences shall run concurrently with each other."

¶ 13 Defendant then told the court he had something to say. The court struck the sentence, allowing him to speak in allocution. After defendant apologized, the court stated it was "going to take that into consideration." The court reinstated the same sentence and recommended drug treatment for defendant.

¶ 14 From these statements, it appears that the trial court thoughtfully weighed the appropriate mitigating and aggravating factors and sentenced defendant to a term within the permissible sentencing range. We are not persuaded by defendant's argument that his sentence should be reduced because his drug addiction, which is a mitigating factor (*People v. Walcher,* 42 Ill. 2d

159, 166 (1969)), explains his criminal history. We initially note that although sentencing courts may not disregard mitigating evidence, they retain discretion to assign how much weight it carries, and, accordingly, the existence of mitigating factors does not automatically oblige the trial court to reduce a sentence from the maximum allowed. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). Where mitigating factors are presented to the trial court, it is presumed, absent some indication to the contrary, other than the sentence itself, that the court considered it. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). After reviewing the record, we cannot conclude that the sentence imposed by the trial court "is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 212 (quoting *Stacey*, 193 Ill. 2d at 210).

¶ 15 We find that the court did not abuse its discretion. Here, the record shows the trial court emphasized defendant's extensive criminal history in sentencing him. Defendant, however, stresses that the PSI shows prior adult felony convictions of a non-violent nature, *i.e.*, retail theft in 2010 and possession of a controlled substance in 2008. Defendant acknowledges that his criminal record reveals a past history of potentially violent felonies which include residential burglaries in 1989 and 1992, and armed robbery in 1997. He asserts, nonetheless, that these convictions were already considered by virtue of the fact a Class X sentence was mandated. Defendant further argues that the felony convictions date back more than 18 years, and are less predictive of his current risk of recidivism. Similarly, defendant points out that his juvenile adjudications date back 30 years, and he urges the court to consider the research and studies showing that juvenile offenders, unlike adult offenders, suffer from immaturity and susceptibility to negative influences and peer pressure. As a result, defendant implies, the court should not place great or equal value on his past juvenile adjudications. As support, defendant urges us to

observe some of the studies from the National Research Council regarding the incapacitation and deterrent effects of incarceration. We decline to substitute our judgment for that of the trial judge by giving greater weight to the cited studies than to the specific nature and circumstances of juvenile offenses in defendant's record that the trial court specifically considered here.

¶ 16 Defendant next highlights that he earned his GED, performed odd jobs to support his family, completed a janitorial cleaning services course while incarcerated, and the fact that the house he burglarized was vacant. In making these arguments, defendant is asking this court to reweigh the aggravating and mitigating factors presented because he is not pleased with the sentencing decision, an act this court is prohibited from undertaking. *Alexander*, 239 Ill. 2d at 214-15. We thus decline to reweigh the aggravating and mitigating factors and reiterate that the trial court did not abuse its discretion in sentencing defendant to 12 years' imprisonment for burglary.

¶ 17 Defendant also argues that in imposing the sentence, the court failed to meaningfully consider the financial impact of incarceration on the State. See 730 ILCS 5/5-4-1(a)(3) (West 2012) (sentencing court "shall" consider the financial impact of incarceration based on the financial impact statement filed with the clerk of the court). However, a trial court is not required to specify on the record the reasons for a defendant's sentence, and, absent evidence to the contrary, the trial court is presumed to have performed its obligations and considered the financial impact statement before sentencing a defendant. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24. Here, defendant points to nothing in the record to rebut the presumption that the trial court considered the financial impact statement before sentencing him, and we thus presume the court acted in accordance with the law when it sentenced him.

¶ 18 Finally, defendant further maintains that his sentence is on par with those imposed in cases where far more serious crimes have occurred. See, *e.g.*, 720 ILCS 5/11-1.30(a)(2),(d)(1) (West 2012) (aggravated criminal sexual assault involving the infliction of bodily harm is a Class X felony with a six-year minimum); 720 ILCS 5/10-2(a)(3),(b) (West 2012) (aggravated kidnaping involving the infliction of bodily harm is a Class X felony with a six-year minimum). However, as defendant indicated in the following paragraph in his brief, "the legislature chose to require Class X sentencing for less serious offenses on basis of recidivism alone." See 720 ILCS 5/5-4.5-95(b) (West 2012). Therefore, any comparison to the sentencing range for offenses like aggravated criminal sexual assault and aggravated kidnaping is misplaced. We are not persuaded by defendant's related argument that recidivism alone did not validate the court's decision to impose a sentence twice the Class X minimum, particularly where his sentence was closer to the minimum than the maximum range allowed by statute.

¶ 19 The other issue that defendant raised in his appeal was that the mittimus did not accurately reflect the number of days he spent in presentence custody. While this argument was made in his opening brief, defendant ultimately conceded, in his reply brief, that he did receive all the credit to which he was entitled. Therefore, the argument is withdrawn, and we need not address it.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 21 Affirmed.