2015 IL App (1st) 133661-U

SIXTH DIVISION
November 13, 2015

No. 1-13-3661

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 22352
	)	
TABARE HAYES,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

O R D E R

¶ 1 *Held*: We affirmed defendant's 16-year sentence for delivery of a controlled substance as a Class X offender over defendant's objection that the sentence was excessive.

¶ 2 Following a bench trial, defendant Tabares Hayes was convicted of delivery of a controlled substance and sentenced as a Class X offender to a mandatory sentence of 16 years' imprisonment. On appeal, defendant argues that his sentence is excessive. We affirm.

¶ 3 Defendant was charged by indictment with one count of delivery of a less than one gram of heroin on September 27, 2012.

¶ 4 At trial, Chicago police officer Sheri Odunsi testified that on September 27, 2012, she was working undercover in the vicinity of 43rd Street and Michigan Avenue. At that time, the officer was wearing a video recording device and a surveillance radio device. Around 1:45 p.m., Officer Odunsi observed Laprice Green, someone from whom she had purchased drugs in the past. She asked Mr. Green if he had any heroin. Mr. Green said he did not have any heroin but that he did have "C," the street term for crack cocaine. Mr. Green offered to take Officer Odunsi to find some heroin. At one point Mr. Green pointed at defendant across the street in front of an auto body shop and said: "there you go my man right here." Mr. Green told defendant: "my girl need two." Officer Odunsi, Mr. Green, and defendant then walked around the corner to an alley next to the auto body shop. Defendant was holding a clear plastic bag containing several smaller Ziplock bags which contained a white powdery substance suspected to be heroin. Defendant gave two of the smaller bags to the officer in exchange for $40 of prerecorded funds. Officer Odunsi then radioed to other surveillance officers that she had made a narcotics purchase from Mr. Green and defendant, described the two men by their clothing, height and weight, but informed the other officers that she had never seen defendant before. When she returned to her vehicle, she again radioed a description of the two men as black males wearing long black t-shirts and black jogging pants with stripes running down the side.

¶ 5 Officer Joseph Mirus testified that on September 27, 2012, he and his partner, Officer Calvo, were in plain clothes working undercover as part of a team conducting a controlled narcotics purchase in the area of 43rd Street and Michigan Avenue. At around 1:45 p.m., Officer Mirus received a communication from Office Odunsi that she had made a narcotics purchase and

she described the persons who sold her the narcotics. Officers Mirus and Calvo subsequently detained four men at 4256 South Michigan Avenue, including Mr. Green and defendant.

¶ 6 From "a safe distance," Officer Odunsi identified defendant as the man who sold her narcotics. The police, however, released all four men, including defendant. At the police station, Officer Mirus presented a photographic array to Officer Odunsi. Officer Odunsi identified defendant as the man who sold her narcotics from one of those photographs. Defendant was not arrested until January 23, 2013.

¶ 7 The trial court listened to an audio recording of the narcotics purchase made by Officer Odunsi. The parties stipulated that a chain of custody was maintained as to the two packets of suspect heroin and that one of the packets tested positive for 0.1 grams of heroin.

¶ 8 Shaun Clemones testified that he is defendant's friend and was his coworker as a union beer vendor for sports teams. On September 27, 2012, he and defendant were scheduled to work at a Green Bay Packers game in Green Bay, Wisconsin which started at 7:30 p.m. Mr. Clemones also testified that he lives on 79th Street and that he had arranged to meet defendant at 41st Street and Michigan Avenue. Mr. Clemones further testified that, when he saw defendant at the corner of 43rd Street and Michigan Avenue, the police were not present. Defendant told Mr. Clemones that he was late because he had just been stopped by the police. Ten minutes later, at around 3 p.m., the two men drove to Green Bay.

¶ 9 On cross-examination, Mr. Clemones testified that he remembered speaking to Cook County State's Attorney investigator Cheryl Jackson on August 12, 2013, but did not remember telling her that on September 27, 2012, he was working as a vendor for the Chicago White Sox. Mr. Clemones also testified that, as soon as defendant got into the car, he told Mr. Clemones that

the police were bothering him. Mr. Clemones further testified that, although the Green Bay Packers were not playing that night, he and defendant had to stock beer for an upcoming game. Mr. Clemones said that he has not spoken to defendant since his arrest.

¶ 10 Warren Gaines testified that, on September 27, 2012, he gave defendant a ride from defendant's residence at 82nd Street and Martin Luther King Drive and arrived at 43rd Street and Michigan Avenue at around 1 or 1:30 p.m. Mr. Gaines testified that he and defendant were standing there for approximately 5 to 10 minutes and then they walked to the corner store. Shortly thereafter, they were detained by the police. Mr. Gaines testified that the police asked him for identification and created a contact card for him, but did not handcuff him or pat him down. He further testified that defendant was never alone, never walked into an alley, and did not speak to nor give anything to any woman.

¶ 11 Defendant testified that, on September 27, 2012, he worked for three different companies: Aaron Brothers Moving Company, Vendors Union, Sweet Treats, and Liquid Concessions. In September 2012, he was working nearly every day of the week. On September 27, 2012, defendant was working at Lambeau Field with Mr. Clemones restocking beer. Defendant testified that Mr. Gaines picked him up at his residence at 7959 S. Vernon Avenue in Chicago and drove him to 43rd and Michigan Avenue around 2:15 p.m. Defendant then waited for Mr. Clemones in front of a pizzeria there. He testified that he knew Mr. Green from the neighborhood because he used to live there. Defendant stated that he only spoke to Mr. Green briefly. When the police pulled up, defendant was standing with one group near a furniture store and Mr. Green was standing with another group about 20 feet away. The police called to Mr. Green, but detained defendant and the group he was standing with. Defendant stated that on that

date, he was wearing his work clothes: a black jacket, a white, short-sleeve shirt, and black pants. Defendant stated that he never stood alone near the car repair shop across the street. Defendant did not speak to any women, walk into an alley with any woman, or give anything to any woman at that time.

¶ 12 In rebuttal, Cook County State's Attorney investigator Cheryl Jackson testified that on August 12, 2013, at around 4 p.m., she went to 4143 South Michigan Avenue to speak with Mr. Clemones. Investigator Jackson said that Mr. Clemones is a longtime friend of defendant. Mr. Clemones told the investigator that on September 27, 2012, the two men were on their way to work at U.S. Cellular Field as vendors for the Chicago White Sox.

¶ 13 The trial court found defendant guilty of delivery of a controlled substance. Defendant filed a motion for a new trial. Following arguments, the trial court denied the motion for a new trial and proceeded immediately to sentencing.

¶ 14 At the sentencing hearing, the parties and the court reviewed defendant's presentencing investigation report (PSI). The PSI shows that defendant was born in 1976, raised by his mother as an only child, and described as having a "good" childhood without abuse or neglect. In 2005, his twin sons were born and he has lived with their mother since 2010. Defendant attended but did not complete high school. He obtained a high school equivalency certificate in 2005. Defendant was employed from 2010 through 2013 as a stadium vendor, in a liquor store, and as a truck driver for Aaron Brothers Moving Company. He denied any physical or mental health issues nor any alcohol or illegal drug use. Defendant admitted to being a member or "foot soldier" of the Mafia Insane Vice Lords street gang from 1990 to 2005 and to having a gang tattoo. The PSI showed eighteen arrests and seven convictions.

¶ 15 Without objection, the State asked that the PSI be amended to reflect an additional prior conviction: unlawful use of a weapon by a felon in 2002 with a sentence of four years' imprisonment. Defendant sought to amend the PSI to show that he had been "together" with his girlfriend for 22 years.

¶ 16 In aggravation, the State argued that defendant's lengthy criminal record includes multiple convictions for violent offenses and possession of weapons and; crimes "commonly associated with the narcotics trade." The State informed the court that defendant's history of drug charges began in 1996. As to violent offenses, defendant's 1995 robbery conviction involved punching a man in the back of his head. In 1997, while free on bond, defendant shot a rival gang member in the back; the gunshot broke the victim's ribs and punctured his lung. Defendant was subsequently convicted of aggravated battery with a firearm and sentenced to 6 ½ years' imprisonment. In 2002, defendant was arrested after brandishing a pistol on a public way and fleeing when the police arrived. In 2004, defendant was arrested for loitering in a park where, when approached by the police, he clutched at his side, threw down a semiautomatic handgun, and fled. In 2005, defendant was convicted of aggravated unlawful use of a weapon based on a prior conviction and sentenced to seven years' imprisonment.

¶ 17 The State asserted that defendant admitted to police, after various arrests from 1990 to 2013, that he was a member of the Conservative Vice Lords or the Imperial Insane Vice Lords street gangs.

¶ 18 The State subsequently sought a prison sentence of 17 years' imprisonment, noting that defendant is eligible for a Class X sentence.

¶ 19 In mitigation, trial counsel argued that defendant ended his gang affiliation in 2005, has had no felony arrests since that time, and that the instant offense was nonviolent and an aberration as demonstrated by the fact that Officer Odunsi did not recognize him at the time of the offense. Since his sons were born in 2005, defendant has turned around his life. He has been employed and working two or more jobs simultaneously. The mother of his children was present during the sentencing hearing. Defendant sought a sentence at the low end of the statutory range so he could return to his family.

¶ 20 The State responded that because defendant received a sentence of seven years' imprisonment in 2005 and was not paroled until mid-2010 "at best, [he] can point to two years" of defendant having no contact with the criminal justice system. The State presented certified copies of defendant's two prior convictions which required that he be sentenced as a Class X offender.

¶ 21 When he addressed the court, defendant asked for mercy, and admitted that "a lot of these things that [the court] has read about me are true." However, defendant asserted that he was gainfully employed since his parole ended in 2007.

¶ 22 The trial court stated:

> "[C]onsidering the evidence at trial, the gravity of the offense, the [PSI], the financial impact of incarceration, all evidence, information, and testimony in aggravation and mitigation, any substance abuse issues and treatment, the potential for rehabilitation, the possibility of sentencing alternatives, the statement of *** defendant, and all hearsay presented and deemed relevant and reliable."

The trial court sentenced defendant as a Class X offender to 16 years' imprisonment and admonished defendant of his appeal rights, including the requirement of a written post-sentence motion in raising the issue of his sentence. Defendant failed to file a post-sentence motion, and this appeal timely followed.

¶ 23 On appeal, defendant contends that his 16-year prison sentence is excessive.

¶ 24 The State argues that defendant has forfeited this claim by failing to raise it in a motion to reduce his sentence. 730 ILCS 5/5-4.5-50(d) (West 2012). Defendant responds that trial counsel was ineffective for not filing a post-sentence motion and that his excessive sentence constitutes plain error which overcomes forfeiture. *People v. Hillier*, 237 Ill. 2d 539, 546 (2010). However, trial counsel is not ineffective where a defendant is not prejudiced, nor is there plain error where we find no error. *Id*. at 549.

¶ 25 Delivery of less than one gram of heroin is a Class 2 felony. 720 ILCS 570/401(d) (West 2012). A defendant, who is over 21 years of age, who is convicted of a Class 1 or Class 2 felony, after two separate and sequential convictions for felonies of Class 2 or greater, must be sentenced as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2009)), with a prison term of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2012)).

¶ 26 A reviewing court may modify a defendant's sentence only if it finds an abuse of discretion (*People v. Snyder*, 2011 IL 111382, ¶ 36), or when the sentence varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id*. "So long as the trial court does not ignore pertinent mitigating factors or consider either incompetent evidence or improper aggravating factors, it has wide latitude in sentencing a defendant to any term within the applicable statutory range." *People v. Jones*, 2014 IL App (1st)

120927, ¶ 56 (citing *People v. Perkins*, 408 Ill.App.3d 752, 762-63 (2011). "This broad latitude means that this court cannot substitute its judgment simply because it might have weighed the sentencing factors differently." *Id.* (citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010)).

¶ 27 "In imposing a sentence, the trial court must balance relevant factors, such as the nature of the offense, the protection of the public, and the defendant's rehabilitative potential." *Id.* ¶ 55 (citing *Alexander*, 239 Ill. 2d at 213)). The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36. The trial court does not need to expressly outline its reasoning for sentencing, and we presume that it considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Jones*, 2014 IL App (1st) 120927, ¶ 55. Because the most important factor in sentencing is the seriousness of the offense, the trial court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors require either a minimum sentence, or preclude a maximum sentence. *Id.* (citing *Alexander*, 239 Ill. 2d at 214).

¶ 28 Here, defendant does not challenge the fact that he was subject to a mandatory class X sentence with a minimum sentence of six years' imprisonment. Defendant, instead, argues that he sold less than one gram of heroin, a non-violent offense, only to help his friend Mr. Green and the fact that he no longer deals in narcotics is demonstrated by the undercover officer's inability to recognize him. Defendant also argues that his rehabilitative potential is demonstrated by his work history, strong family ties, continued education, and expression of remorse. Defendant further argues that he had renounced his gang affiliation, received his high school equivalency degree, and went to work in 2005 after his sons were born.

¶ 29 At the sentencing hearing the evidence, including defendant's allocution and PSI, disclosed these factors. and defendant's trial counsel duly argued them at sentencing. Thus, the trial court was free to weigh them appropriately. Additionally, in challenging defendant's claim that he renounced his gang affiliation in 2005, the State asserted at sentencing that defendant made admissions to gang affiliation after 2005 and, in fact, as recent as his 2013 arrest. Beyond reiterating his 2005 renunciation of gangs, defendant did not below and does not here challenge the veracity of the State's claims.

¶ 30 The record shows that the trial court did consider the evidence and factors in both aggravation and mitigation. Under these circumstances, we cannot find that the trial court abused its discretion by sentencing defendant to 16 years' imprisonment, the mid-range of the applicable sentencing range.

¶ 31 In that there was no error as to defendant's sentence, we find there was no ineffectiveness of counsel and no plain error.

¶ 32 Accordingly, the judgment of the circuit court is affirmed.

¶ 33 Affirmed.