2015 IL App (3d) 150135-U

Order filed December 7, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-15-0135 Circuit No. 12-CF-2083
JASON R. RYMUT,	)	
Defendant-Appellant.	)	Honorable Daniel J. Rozak, Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in sentencing defendant to a term of nine years' imprisonment.

¶ 2 Defendant, Jason R. Rymut, pled guilty to aggravated driving under the influence (DUI) (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2012)), and was sentenced to a term of nine years' imprisonment. On appeal, defendant does not challenge his conviction, but maintains that his sentence constituted an abuse of the trial court's discretion. Specifically, defendant contends that the trial court erred in failing to consider certain mitigating factors in determining the sentence.

Defendant also argues that the court considered a number of incorrect or improper aggravating factors, including defendant's use of a cellular phone at the time of the accident. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant with aggravated DUI (625 ILCS 5/11-501(a)(1), (d)(1)(F) (West 2012)). The indictment alleged that defendant's blood alcohol concentration (BAC) was over 0.08 at the time he was involved in a motor vehicle accident that proximately caused the death of Brian Bulger. On April 18, 2013, defendant pled guilty to the charged offense without a recommended sentence from the State.

¶ 5 The factual basis for the plea provided that on August 8, 2012, Bulger and a passenger were in a vehicle stopped at a four-way intersection. The vehicle driven by defendant struck Bulger's vehicle from behind. The impact from that collision pushed Bulger's vehicle into the intersection where it struck a third car, which was crossing in the perpendicular direction. Bulger died at the scene of the accident. Subsequent investigation determined that there was no evidence of defendant applying his brakes prior to striking Bulger's vehicle. Defendant admitted to drinking "a few beers" earlier in the day, and forensic testing determined that defendant's BAC was 0.121. The court accepted defendant's guilty plea.

¶ 6 At sentencing, Will County Sheriff's Deputy Steven Kirsch testified that he performed a reconstruction of the accident. Kirsch retrieved data from the crash data terminal in defendant's vehicle. That data indicated that defendant's vehicle was traveling at 86 miles per hour five seconds before impact. The same vehicle was traveling at 83 miles per hour one second before impact. Kirsch testified that the posted speed limit in the area was 55 miles per hour. The data also indicated that defendant did not apply his brakes before the collision. This information was consistent with Kirsch's observations of a lack of skid marks on the road.

¶ 7 Kirsch further testified that he had obtained defendant's cellular phone records in order to determine if defendant had been texting or using his phone at the time of the accident. Kirsch testified that defendant had made a 79-second phone call at 10:13 p.m. According to Kirsch, the accident occurred at approximately 10:14 p.m.

¶ 8 James Grimmet of the Orland Park police department testified that he encountered defendant more than a decade earlier on August 1, 2001, when he was dispatched to the scene of a one-vehicle accident involving defendant's vehicle. When Grimmet arrived at the scene at approximately 1:20 a.m., he observed that a vehicle had hit a parked vehicle before leaving the roadway, crashing through a fence and damaging some landscaping stones. The vehicle had traveled through a yard in a residential area and come to a stop on the edge of a driveway approximately 20 yards off the road. The posted speed limit in the area was 20 miles per hour.

¶ 9 Country Club Hills Deputy Chief Brian Zarnowski testified that in a separate incident in 2002 he observed defendant driving 61 miles per hour in an area with a speed limit of 40 miles per hour. Defendant was arrested for DUI, speeding, and following too closely. Zarnowski administered a breath test, which revealed that defendant had a BAC of 0.117. Defendant pleaded guilty and received court supervision.

¶ 10 Defendant's driver's abstract was admitted into evidence at sentencing. The abstract showed that defendant had been ticketed five times for speeding violations between 2006 and 2011. The most recent of those citations, issued on November 16, 2011, was issued for speeding between 26 and 30 miles per hour over the posted limit.

¶ 11 In mitigation, defendant introduced evidence of a lawsuit Bulger's parents had filed against defendant, explaining that this provided the family with an opportunity to collect money for funeral and hospital bills. He also submitted evidence of his insurance policy, which had a

$100,000 limit at the time of the accident. Defendant presented to the trial court 111 character letters outlining his good character, strong family and community ties, and remorse for the accident. At the time of sentencing, defendant was 32 years old and had a fiancé and a two-year-old son.

¶ 12 The court announced its sentencing decision on August 8, 2013. Before doing so, the court meticulously discussed the statutory factors in aggravation and mitigation. See 730 ILCS 5/5-5-3.2(a), 3.1(a) (West 2012).

¶ 13 Among the statutory factors in mitigation that the court found not to apply to defendant's case was factor six—that defendant has or will compensate the victim for the injury sustained. 730 ILCS 5/5-5-3.1(a)(6) (West 2012). The court reasoned that "[t]here is no way you can compensate the victim for his or her death." The court stated that it had considered the wrongful death suit filed by Bulger's family, but concluded that any monetary judgment in that suit would compensate the estate, rather than the victim himself, and therefore would not trigger factor six.

¶ 14 The court also found that mitigation factor seven—that a "defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime" (730 ILCS 5/5-5-3.1(a)(7) (West 2012))—did not apply. The court noted defendant's prior DUI charge, as well as his numerous speeding tickets. In regard to the speeding violations, the court explained: "Probably in the 99-plus percent of these cases where *** we see something like traffic violations, like speeding or running a stop sign, we really don't pay too much attention to those, but in this particular case, I think they certainly do have a relevance[.]"

¶ 15 The court also found that the speeding violations were relevant to mitigation factors eight and nine. Factor eight calls for mitigation where a defendant's criminal conduct is unlikely to

recur (730 ILCS 5/5-5-3.1(a)(8) (West 2012)), while factor nine calls for mitigation where a defendant's character and attitude indicate it is unlikely he will commit another crime (730 ILCS 5/5-5-3.1(a)(9) (West 2012)). In discussing these factors, the court opined that the evidence from the 2001 incident in Orland Park indicated that speed was a factor. The court noted that defendant's most recent speeding ticket was for the most severe speed, indicating that defendant "didn't learn from the first four speeding tickets or the incident in 2001." Additionally, the court noted that defendant's prior DUI involved high speeds, and that the speed in the present case—31 miles per hour over the posted limit—would be a Class B misdemeanor.

¶ 16 In discussing factors eight and nine, the trial court also considered defendant's alcohol consumption:

> "Now, looking at the two BACs I have from the first DUI and this DUI, that's also increased. It's not a huge increase, but the BAC in this case is greater than the BAC in his prior DUI. So, once again, he didn't learn from his mistake and, in fact, things got worse. The alcohol content increased."

¶ 17 The court found that the many character letters written on defendant's behalf would ordinarily indicate that defendant is a person who learns quickly from his mistakes. However, the court concluded that "the history regarding the speed, alcohol[,] and accidents shows me no proof of that, whatsoever, to date." Accordingly, the court found that factors eight and nine did not apply.

¶ 18 In reference to other mitigating factors, the court found that a sentence of probation would deprecate the seriousness of the offense and that while imprisonment of defendant would entail a hardship on defendant's child, this hardship would not be excessive. The court stated

that it would consider, as a nonstatutory mitigating factor, that defendant had pled guilty and taken full responsibility.

¶ 19 In aggravation, the court found that factor three—whether a defendant has a history of prior criminal activity (730 ILCS 5/5-5-3.2(a)(3) (West 2012))—applied to defendant. The court noted that it had already covered defendant's criminal history while discussing mitigating factors. The court also found that a sentence of imprisonment necessary to deter others (factor seven (730 ILCS 5/5-5-3.2(a)(7) (West 2012))) and that defendant was traveling more than 20 miles per hour over the posted speed limit (factor 20 (730 ILCS 5/5-5-3.2(a)(20) (West 2012))).

¶ 20 As nonstatutory aggravating factors, the trial court considered defendant's blood-alcohol level, noting that "[t]his was not a low BAC." The court also considered that defendant was on his cellular phone at the time of the accident, stating: "[A]t the very least, it was an added distraction, and that may be part of the reason why we don't find any evidence of breaking, whatsoever, in this case."

¶ 21 The court sentenced defendant to a term of nine years' imprisonment. Defendant filed a motion to reconsider the sentence. The trial court denied the motion, reiterating many of the findings it had made at the initial sentencing.

¶ 22 On defendant's first direct appeal, we remanded the cause for further postplea proceedings, including the filing of a new postplea motion and the filing of a Rule 604(d) certificate. *People v. Rymut*, No. 3-13-0633 (May 15, 2014) (dispositional order). We ordered that a *de novo* hearing on the postplea motion be allowed. *Id*.

¶ 23 On remand, defendant filed a second motion to reconsider sentence. In his motion, defendant argued that the trial court had failed to give appropriate weight to statutory factors in aggravation and mitigation. Defendant also contended that he was not speaking on his cellular

phone at the time of the accident. Additionally, defendant argued that additional mitigating evidence existed that had not been available at the time of sentencing.

¶ 24 With respect to defendant's contention that he was not on his cellular phone at the time of the accident, defendant attached a number of exhibits. These exhibits included a report from the Manhattan fire department indicating that an alarm in this case was initiated at 10:11:46 p.m., as well as a document from his cellular provider that indicated defendant had made a phone call at 10:13 p.m. Also attached was an affidavit from defendant's fiancé in which she swore that defendant called her immediately after the accident.

¶ 25 At the hearing on defendant's motion to reconsider sentence, defendant detailed the positive steps he had taken since the time of sentencing. He had attended numerous alcohol awareness programs in prison, completed a first responder course, and worked in the prison healthcare unit helping disabled inmates. Defendant testified that he had no disciplinary problems while in prison. Defendant also apologized to Bulger's family for his actions.

¶ 26 The trial court denied defendant's motion. The court opined that it had given proper weight to each of the factors in aggravation and mitigation. The court accepted defendant's argument that he had not been on his cellular phone at the time of the accident. Nevertheless, the court reasoned that it had not placed significant weight on that fact, noting that it had only referred to it as "an added distraction." The court concluded: "I never said it was a proximate cause of the collision; therefore, removing it from the equation, I don't think is any great change."

¶ 27 Finally, the court acknowledged that defendant had taken positive steps while in prison. Those steps, however, were not sufficient grounds to alter defendant's sentence. In explaining why defendant's new mitigating evidence—as well as the fact that defendant had not been on his

cellular phone—did not affect defendant's sentence, the court likened defendant's sentence to a heap of sand. If one removes one or two grains of sand, the court explained, a heap of sand remains. How many grains of sand must be removed in order for the heap to no longer be a heap is, in the court's words, "a matter of interpretation." The court continued: "It's a matter of discretion, and the law leaves me a lot of discretion. So if I take out no cell phone, and I add in he's done good in [the Department of Corrections], is there a substantial change in this case that would justify a reduction in sentence? Using my discretion, the answer is no. So the nine years will stand."

¶ 28 ANALYSIS

¶ 29 On appeal, defendant argues that the trial court failed to consider applicable factors in mitigation. Relatedly, defendant insists that the sentence of nine years' imprisonment was excessive in light of the additional mitigating evidence that existed at the time of the hearing on the second motion to reconsider. Defendant also contends that the trial court erroneously considered that certain aggravating factors applied, including defendant's purported use of a cellular phone during the accident. We disagree with each of defendant's positions.

¶ 30 It is well-settled that a trial court has broad discretion in imposing a defendant's sentence, and we review the trial court's sentence with great deference. *E.g., People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "The trial court is granted such deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Id.* Accordingly, we may not

alter defendant's sentence absent an abuse of discretion by the trial court. *Alexander*, 239 Ill. 2d at 212.

¶ 31 I. Factors in Mitigation

¶ 32 Section 5-5-3.1(a) of the Unified Code of Corrections (Code) sets forth a list of 14 "grounds [that] shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." 730 ILCS 5/5-5-3.1(a) (West 2012). Because the language in the Code is mandatory rather than discretionary, the sentencing court may not refuse to consider relevant evidence presented in mitigation. *People v. Calhoun*, 404 Ill. App. 3d 362, 386 (2010). In the present case, the record clearly demonstrates that the trial court meticulously considered each mitigation factor listed in the Code. The court's determination as to the degree to which each factor applied, if at all, is thus a matter of the court's sound discretion. See *Stacey*, 193 Ill. 2d at 209.

¶ 33 A. Statutory Factors

¶ 34 Defendant contends first that the trial court erred in finding mitigation factor six inapplicable. Under the Code, whether a defendant "has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained" shall be considered in mitigation. 730 ILCS 5/5-5-3.1(a)(6) (West 2012). While the trial court found that a victim cannot be compensated for his own death, defendant maintains that "compensation [may be] paid indirectly to the victim via his estate."

¶ 35 We reject defendant's position. First, the Code plainly contemplates only compensation to the victim for damage or injury received by the victim. See 730 ILCS 5/5-5-3.1(a)(6) (West 2012). Defendant has cited no case law in support of his position that the statute should be expanded to include "indirect" compensation. Further, even assuming, *arguendo*, that payment

to the estate could be considered compensation under the Code, the existence of an insurance policy and a still-pending lawsuit do not stand as sufficient proof that defendant "will compensate" the estate for the damages stemming from Bulger's death. Consequently, the trial court acted within its discretion in finding that mitigation factor six did not apply to defendant. While the decedent victim's estate was also a victim and suffered damages, we do not believe that mitigation factor six applies to cases where defendant's criminal conduct results in the death of a victim. How can one compensate a decedent?

¶ 36 Defendant next contends that the trial court erred in finding that mitigation factor seven did not apply. Under the Code, a trial court shall consider in mitigation whether a defendant "has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime." 730 ILCS 5/5-5-3.1(a)(7) (West 2012). Defendant insists that the trial court failed to consider that he had led a law-abiding life for a substantial period of time, pointing out that his prior DUI occurred more than 10 years prior to the instant offense.

¶ 37 Defendant received five speeding tickets between 2006 and 2011. This includes a citation for driving 26 to 30 miles per hour over the posted limit in 2011, less than a year before committing the present offense. The trial court explained that in most cases, traffic infractions are not considered relevant in aggravation or mitigation. Here, however, where defendant's speed was a significant factor in the offense, the court found defendant's numerous and escalating speeding infractions particularly relevant. For the purposes of mitigation factor seven, the period of time for which defendant had led a law-abiding life was approximately nine months. The trial court did not abuse its discretion in refusing to find that period to be a mitigating factor.

¶ 38 Finally, defendant argues that the trial court erred in finding inapplicable mitigation factors eight—that defendant's "criminal conduct was the result of circumstances unlikely to recur"—and mitigation factor nine—that the "character and attitudes of the defendant indicate that he is unlikely to commit another crime." 730 ILCS 5/5-5-3.1(a)(8), (9) (West 2012). Defendant contends that his work in Alcoholics Anonymous, his remorse, and his willingness to take responsibility for the offense are facts that should lend significant weight to those mitigation factors.

¶ 39 In concluding that mitigation factors eight and nine did not apply, the court pointed out that this was not the first time defendant had been driving while under the influence of alcohol, and not the first time he had been speeding. The two most apparent causes of the accident—speed and alcohol—were circumstances that had recurred for defendant, despite previous run-ins with the law.[1] The court's conclusion that this pattern of behavior outweighed defendant's remorse and alcohol treatment was within the court's discretion.

¶ 40 B. Nonstatutory Factors

¶ 41 Defendant next argues that the change in circumstances from his initial sentencing to the hearing on his second motion to reconsider—namely, his educational efforts, rehabilitation efforts, and disciplinary record in prison—warrant a lesser sentence. Defendant does not argue that the trial court failed to consider this evidence in mitigation, but only that the court did not

[1]Defendant argues that the trial court was speculative in concluding that defendant was speeding during the 2001 Orland Park incident and in concluding that his BAC was higher during the present offense than in his 2002 DUI. Even assuming, *arguendo*, that defendant is correct, the two purported instances of speculation were superfluous to the court's conclusion that defendant had issues with speed and alcohol.

weigh it properly. Thus, defendant contends, the nine-year sentence of imprisonment is excessive.

¶ 42 A sentence that falls within statutory limits will not be deemed excessive unless it is manifestly disproportionate to the nature of the offense or at great variance with the spirit and purpose of the law. *People v. Little*, 2011 IL App (4th) 090787, ¶ 22. Pursuant to the subsection under which defendant was charged, aggravated DUI is a Class 2 felony with a prescribed sentencing range of 3 to 14 years' imprisonment. See 625 ILCS 5/11-501(a)(1), (d)(1)(F), (d)(2)(G) (West 2012).

¶ 43 In the present case, the trial court sentenced defendant to a term of nine years' imprisonment. The sentence is in the middle of the prescribed range for the offense. Given the seriousness of the offense, defendant's prior history with alcohol and speeding, and the deference due to the trial court, we cannot say that a term of imprisonment falling in the middle of the sentencing range is manifestly disproportionate to the nature of the offense or at great variance with the spirit and purpose of the law. See *Little*, 2011 IL App (4th) 090787, ¶ 22.

¶ 44 Further, we note that the trial court explicitly considered the positive steps defendant had taken while in prison. In the court's sound judgment, however, those steps did not carry weight significant enough to justify altering defendant's sentence. Defendant's contention on appeal that those steps do require an alteration of his sentence is no more than an invitation for this court to reweigh the sentencing factors and substitute our own judgment for that of the trial court. We cannot and will not do so. *Stacey*, 193 Ill. 2d at 209.

¶ 45 II. Factors in Aggravation

¶ 46 Defendant also argues that a number of the factors in aggravation—both statutory and nonstatutory—were considered erroneously by the trial court. Specifically, defendant argues that

the trial court erred in considering that he had a history of prior criminal activity. Defendant further contends that the court relied upon incompetent evidence in concluding that defendant's cellular phone usage played a role in the accident, and that such fact should not have been applied in aggravation.

¶ 47 Section 5-5-3.2(a)(3) of the Code provides that a defendant's history of prior criminal activity shall be accorded weight in aggravation at sentencing. 730 ILCS 5/5-5-3.2(a)(3) (West 2012). As discussed above, the trial court here concluded that defendant's escalating pattern of speeding was relevant, as was his prior DUI. As it was when the court discussed mitigating factors, this conclusion was well within the trial court's discretion. See *supra* ¶¶ 36-37.

¶ 48 Defendant also contends that the trial court considered incompetent evidence when it noted his cellular phone usage as a factor in aggravation. We cannot affirm a sentence based on an improper factor, unless we "determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008).

¶ 49 In the case at hand, the trial court cured any potential error when, at the hearing on defendant's motion to reconsider, it concluded that defendant had not actually been using his cellular phone at the time of the accident. The court then reasoned that this fact was a proverbial drop in the bucket, the removal of which was not significant enough to warrant an alteration of defendant's sentence. Thus, the record here could not possibly be more clear: the trial court *explicitly stated* that this factor was so insignificant that it did not lead to a greater sentence. *Id.* at 21. Accordingly, we affirm defendant's sentence.

¶ 50 CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 52 Affirmed.