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Carla Bender
4th District Appellate
Court, IL

2015 IL App (4th) 130882-U

NOS. 4-13-0882, 4-13-0883, 4-13-0884 cons.

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
DAVID JONES,	)	Nos. 13CF342
Defendant-Appellant.	)	12CF1156
	)	13CF5
	)	
	)	Honorable
	)	John Casey Costigan,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Pope and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not abuse its discretion in sentencing defendant to consecutive terms of imprisonment for an aggregate sentence of 11 years' imprisonment because the court properly considered all relevant mitigating factors and evidence, including the defendant's potential for rehabilitation.

¶ 2 In January 2013, defendant, David Jones, pleaded guilty to (1) one count of retail theft of property over $300, a Class 3 felony, in McLean County case No. 12-CF-1156; and (2) one count of retail theft, a Class 4 felony because it was a subsequent offense, in McLean County case No. 13-CF-5. 720 ILCS 5/16-25(a)(1) (West 2012). In April 2013, defendant pleaded guilty to one count of unlawful delivery of a controlled substance, a Class 2 felony, in McLean County case No. 13-CF-342. 720 ILCS 570/401(d)(i) (West 2012). The trial court sentenced defendant to three years in the Illinois Department of Corrections (DOC) in case No. 12-CF-

1156, two years' imprisonment in case No. 13-CF-5, and six years' imprisonment in case No. 13-CF-342. The sentences in all three cases were to run consecutively, for an aggregate sentence of 11 years' imprisonment.

¶ 3 Defendant appeals, arguing his sentence is excessive given the nature of his offenses and is inconsistent with the objective of returning him to useful citizenship. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Pleas of Guilty

¶ 6 In November 2012, a McLean County grand jury indicted defendant for retail theft of property over $300, a Class 3 felony, in case No. 12-CF-1156. 720 ILCS 5/16-25(a)(1) (West 2012). The charge arose from an October 2012 incident in which defendant stole a television from Wal-mart. Following his arraignment, defendant was released on bond.

¶ 7 While released on bond in case No. 12-CF-1156, in January 2013, defendant was charged by information with retail theft—a Class 4 felony due to defendant's prior conviction of the same offense—in McLean County case No. 13-CF-5. 720 ILCS 5/16-25(a)(1) (West 2012). This charge alleged, in December 2012, defendant entered the Quick-N-EZ on North Main Street in Normal, Illinois, and stole two bottles of Grey Goose vodka.

¶ 8 That same month, the State and defendant entered into an agreement providing defendant would enter open pleas in case Nos. 12-CF-1156 and 13-CF-5. Defendant was eligible for extended-term sentencing in both cases due to his prior record. In case No. 12-CF-1156, defendant faced a minimum possible sentence of probation or conditional discharge, or 2 to 10 years' extended-term imprisonment, with a one-year period of mandatory supervised release, and a fine up to $25,000. In case No. 13-CF-5, defendant faced a minimum possible sentence of one

to six years' extended-term imprisonment, with a one-year period of mandatory supervised release, and a fine up to $25,000. Additionally, any sentence in case No. 13-CF-5, committed while released on bond, was to run consecutively to any sentence imposed in No. 12-CF-1156. 730 ILCS 5/5-8-4(d)(8) (West 2012). Pending his April 2013 sentencing hearing, the trial court released defendant on his own recognizance.

¶ 9 In March 2013, defendant was indicted for unlawful delivery of a controlled substance, a Class 2 felony, in McLean County case No. 13-CF-342. 720 ILCS 570/401(d)(i) (West 2012). The Bloomington Vice Unit conducted a controlled buy in February 2013, wherein defendant sold $50 worth of cocaine to a confidential source.

¶ 10 Due to defendant's new charge, the parties continued the April sentencing hearing date. On April 25, 2013, defendant entered into an agreement with the State providing defendant would enter an open plea in case No. 13-CF-342. Defendant faced a sentence of 3 to 14 years' extended-term imprisonment, with a two-year period of mandatory supervised release, and a fine up to $25,000. The court also advised defendant the sentence in case No. 13-CF-342 would run consecutive to the sentences in case Nos. 12-CF-1156 and 13-CF-5, for a possible aggregate sentence of 6 to 30 years' imprisonment. In exchange for defendant's guilty plea, the State agreed to dismiss two other felony charges in case Nos. 13-CF-340 and 13-CF-341.

¶ 11 B. Sentencing Hearing

¶ 12 In June 2013, the three cases proceeded to sentencing. The State did not present any evidence in aggravation. The State did note defendant acted as an informant for a vice unit, conducting a cannabis buy that resulted in pending charges against another defendant. Defendant sent the trial court a letter prior to sentencing, which was submitted in mitigation.

¶ 13 Defendant's letter detailed his years-long struggle with drug addiction and his periods of solid work history when sober, and he expressed his desire to overcome his addiction and become a contributing member of society. Defendant requested he be referred to drug court or be sentenced to intensive probation or Treatment Alternatives for Safe Communities (TASC) probation.

¶ 14 The presentence-investigation report (PSI) shows defendant was married in 1988, separated from his wife in 2007, and a divorce was pending at the time of sentencing. Defendant has two children, ages 23 and 19. The PSI also indicates defendant completed intensive adult day treatment for cocaine addiction through Advocate Bromenn in 2006. In 2007, he received addiction treatment from West Care while in DOC. However, the PSI also shows defendant failed to engage at any treatment provider included on a list of long-term care facilities he requested during the preparation of a prior PSI.

¶ 15 The PSI details defendant's criminal history, including convictions for: (1) a January 1987 felony burglary; (2) a June 1989 unlawful possession of a controlled substance; (3) an August 1998 possession of a controlled substance with intent to deliver; (4) a November 2004 felony credit card fraud; (5) an April 2007 felony possession of stolen property; (6) a July 2007 felony robbery; and (7) a December 2007 felony robbery. Defendant was on mandatory supervised release for the latter three convictions when he was arrested on the charges in case No. 12-CF-1156.

¶ 16 The State argued defendant's significant criminal history and his addiction as factors in aggravation. In case No. 12-CF-1156, retail theft of property over $300, the State recommended an extended-term sentence of six years' imprisonment. In case No. 13-CF-5, retail theft committed while released on bond in case No. 12-CF-1156, the State recommended an

extended-term sentence of six years' imprisonment. In case No. 13-CF-342, unlawful delivery of a controlled substance committed while released on bond in the other two cases, the State recommended an extended-term sentence of 12 years' imprisonment. Because the sentences must run consecutively, the State recommended an aggregate sentence of 20 years.

¶ 17 Defendant argued his crimes did not cause or threaten serious physical harm and were all related to his drug addiction. Counsel noted defendant was not eligible for drug court. Counsel also noted defendant was desperate to receive structured long-term treatment for his addiction. Defendant asked for the minimum sentence on all convictions for an aggregate sentence of six years. Defendant gave a statement in allocution, accepting responsibility for his actions and reiterating his desire for substance-abuse treatment.

¶ 18 The trial court stated it considered the factual basis for the pleas, the PSI, defendant's history, character, attitude, and statement in allocution. The court explained defendant was not eligible for drug court or TASC probation. The court also considered in mitigation defendant's cooperation acting as an informant for the police, defendant's commitment to fighting his addiction, and the fact the crimes did not physically harm anyone. In aggravation, the court noted defendant committed two additional offenses while out on bond. The court further noted defendant appeared for sentencing on his sixth, seventh, and eighth felonies, so it was time "to draw a line in the sand and say enough is enough."

¶ 19 The trial court sentenced defendant to consecutive DOC sentences of three years in case No. 12-CF-1156, two years in case No. 13-CF-5, and six years in case No. 13-CF-342. In addition, the court stated:

> "The [c]ourt will make a finding that the box on the IDOC order where the offenses were the result of drugs and alcohol

> should be checked. [Defendant], that will get you most likely into a program in IDOC. That will make you eligible for a program that addresses those issues with regard to the substance[-]abuse issues that are indicated here, and that's what the [c]ourt feels it can do for you with regard to addressing these issues."

The appropriate boxes were checked on defendant's written sentencing orders.

¶ 20 Defendant subsequently filed a motion to reconsider. Defendant also sent the trial court another letter expressing his desire for treatment and asking the court to reduce his sentence because the DOC facility to which he was transferred did not provide drug-abuse classes. Defendant's minister also sent the court a letter speaking to defendant's character and work ethic when sober and expressing his hope defendant will receive extensive drug counseling. In denying the motion to reconsider, the court entered a written order indicating it reconsidered all the evidence in mitigation and aggravation, the nature of the charges, defendant's past experience with drug treatment, his rehabilitative potential, and his criminal history. The court further pointed out the State requested a 20-year sentence and found the original aggregate sentence of 11 years appropriate.

¶ 21 This appeal followed. The appeal of case No. 12-CF-1156 was docketed as case No. 4-13-0883, the appeal of case No. 13-CF-5 was docketed as case No. 4-13-0884, and the appeal of case No. 13-CF-342 was docketed as case No. 4-13-0882. In February 2015, this court allowed defendant's motion to consolidate the appeals.

¶ 22 II. ANALYSIS

¶ 23 Defendant argues his 11-year aggregate sentence is excessive in light of the nature of his offenses and is inconsistent with the constitutionally mandated objective of returning him

to useful citizenship. Because treatment is unavailable to him in DOC, defendant asks this court to reduce his sentence in case No. 13-CF-342 to three years so he can enter into drug treatment upon release.

¶ 24 We afford a trial court's sentencing decision substantial deference. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. A reviewing court will disturb a sentence within the statutory limits for the offense only if the trial court abused its discretion. *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010). A trial court abuses its discretion only when imposing a sentence "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000).

¶ 25 The sentences imposed were neither greatly at variance with the spirit or purpose of the law nor manifestly disproportionate to the nature of the offenses. Defendant pleaded guilty to a Class 3 retail-theft felony committed while on mandatory supervised release, a Class 4 retail-theft felony committed while released on bond for the Class 3 felony, and a Class 2 delivery-of-a-controlled-substance felony committed while released on bond for the Class 3 and Class 4 felonies. The sentences must run consecutively. 730 ILCS 5/5-8-4(d)(8), (9) (West 2012). Thus, the aggregate statutory minimum for these offenses is 6 years' imprisonment, while the aggregate maximum is 30 years' imprisonment. The State requested an aggregate sentence of 20 years. We note defendant's extensive criminal history, which includes five prior felony convictions. Moreover, defendant committed the instant offenses while on mandatory supervised release and while released on bond on felony charges. Given these circumstances, a sentence closer to the lower end of the statutory guidelines—such as the 11-year sentence imposed in this case—is not manifestly disproportionate to the nature of the offenses or greatly

at variance with the spirit and purpose of the law. *Stacey*, 193 Ill. 2d at 210, 737 N.E.2d at 629. We turn now to defendant's claim the sentence is inconsistent with the constitutionally mandated goal of returning defendant to useful citizenship.

¶ 26 The Illinois Constitution of 1970 mandates, "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. Sentencing decisions must be based on a consideration of all relevant factors and the specific circumstances of each case. *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (1999). The court must not ignore relevant mitigating factors. *Flores*, 404 Ill. App. 3d at 157, 935 N.E.2d at 1154. "[A]bsent some affirmative indication to the contrary (other than the sentence itself), we must presume that the court considered all mitigating factors on the record." *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55, 8 N.E.3d 470. The trial court, having observed the defendant and the proceedings, is better able to consider these factors, and a reviewing court must not reweigh the factors or substitute its judgment for that of the trial court. *Id.*

¶ 27 The trial court expressly stated it considered the relevant factors and evidence in sentencing defendant. Further, the judge specifically addressed and credited defendant's desire to seek treatment for his drug addiction, stating, "I am taking that into consideration because I do believe you when you say that it is time to change and that you are willing to make some efforts towards that change. So I believe that, and I believe that you are willing to work at it." The court noted defendant was ineligible for drug court or TASC probation but told defendant he was going to recommend a treatment program in DOC. Moreover, the judge entered a thoughtful written order denying defendant's motion to reconsider after taking the matter under advisement following a hearing. In that order, the court considered defendant's past experiences with drug

treatment, the fact he failed to follow up on treatment facilities recommended by the probation officer who completed his initial PSI, his potential for rehabilitation, and his criminal history. The record clearly shows the court carefully considered all relevant factors, including defendant's potential for rehabilitation. We conclude the court did not abuse its discretion in sentencing defendant to an aggregate term of 11 years' imprisonment.

¶ 28 Defendant argues the court should have reduced defendant's sentence upon learning drug treatment was unavailable to defendant at his DOC facility. We disagree. The record plainly shows the court considered defendant's potential for rehabilitation. However, the court is not required to give that potential for rehabilitation greater weight than the seriousness of the offenses. *People v. Anderson*, 325 Ill. App. 3d 624, 637, 759 N.E.2d 83, 95 (2001). Defendant also argues the court had a duty to ensure the imposed sentence addressed the objective of returning him to useful citizenship upon learning drug treatment was unavailable to defendant in DOC. The court's response that it had attempted to provide defendant with drug treatment by checking the appropriate box on the written sentencing was adequate. Given (1) defendant's past unsuccessful experiences with drug treatment, (2) the fact defendant requested and received drug treatment information at the time of his initial PSI and failed to follow through on seeking treatment, and (3) thereafter committed unlawful delivery of a controlled substance, we cannot say the court abused its discretion in refusing to reduce the sentence based on the unavailability of treatment in DOC.

¶ 29 While it is unfortunate defendant is not receiving any sort of drug-abuse treatment while incarcerated, that is a circumstance unrelated to the trial court's exercise of discretion in sentencing. The record shows the court carefully considered *all* relevant circumstances, including his prior criminal history, his addiction, the availability of treatment options (or lack

thereof), his potential for rehabilitation, and the seriousness of the offenses. We conclude the court did not abuse its discretion and affirm the judgment.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed.