FIFTH DIVISION
March 4, 2016

No. 1-13-3813

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 7351
	)	
TUWANAN JOHNSON,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Reyes and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant failed to establish that trial counsel was constitutionally ineffective for failing to use an arrest report as impeachment where he could not establish prejudice resulted from counsel's allegedly deficient performance; defendant's 15-year sentence for being an armed habitual criminal was not excessive.

¶ 2 Following a bench trial, defendant Tuwanan Johnson was convicted of being an armed habitual criminal, armed violence and unlawful possession of a weapon by a felon, and sentenced to concurrent 15-year prison sentences on all three convictions. On appeal, defendant contends

that: (1) his trial counsel was ineffective for failing to use an arrest report to impeach one of the testifying police officers at trial; and (2) his sentence for being an armed habitual criminal was excessive. For the reasons that follow, we affirm.

¶ 3 At trial, the evidence showed that on March 15, 2012, at approximately 2 a.m., Officers Fietko and Folino of the Chicago police department were in a police vehicle when they observed a green Ford Escort "traveling at a high rate of speed" in an alley parallel to the street they were on. As the car exited the alley, it failed to stop, and consequently, the officers pulled the car over. Fietko exited his vehicle and approached the rear passenger side of the Ford while Folino exited and approached the driver. Fietko could see inside the car "for the most part" because the streetlights and his vehicle's spotlights illuminated the car.

¶ 4 Inside the car, Fietko observed four individuals: a male driver, a female in front, a female in back and defendant in back, sitting on the passenger side. Fietko believed everyone in the car's attention was directed at Folino. Folino asked the driver for his driver's license, but he did not have one. As a result, Folino asked the driver to exit the car, walk toward the back of the car and place his hands on the trunk. Folino also performed a quick protective patdown of the driver. Meanwhile, Fietko, now next to the rear passenger side door, maintained his focus on the remaining occupants of the car. Folino next asked the female in front to exit the car, walk toward the back of the car and place her hands on the trunk. As she complied with Folino's orders, Fietko observed defendant "reach in his waistband area," "remove a dark object" with his right hand and "slide it underneath his right thigh area." Fietko could not identify the object, but noted it was approximately four inches long and a little larger than defendant's hand. Up until this

point, defendant had not looked in Fietko's direction. Concerned for his safety, Fietko unholstered his weapon, pointed it at defendant and ordered defendant to show his hands. Defendant lifted his hands up from near his legs. While this occurred, Folino was in the process of ordering the female in the backseat out of the car. After she exited and placed her hands on the trunk, Folino engaged defendant and similarly ordered him out of the car. Defendant grabbed a red cup that was beside his leg and said, "I was just drinking." Folino again ordered defendant out of the car, and he complied "slid[ing]" from the passenger side to the driver side and then out of the car. After exiting the car, defendant again told the officers he was just drinking.

¶ 5 With the car empty, Fietko and Folino observed a firearm on the bench of the car where defendant had been sitting. Folino placed defendant in handcuffs, and he exclaimed "[t]hat's my gun, just put me in the f*** squad car," which the officers did. Folino recovered the firearm, a semiautomatic handgun with a loaded magazine, but acknowledged the weapon was not sent to be tested for fingerprints or DNA. Around this time, the officers allowed the two female passengers to leave because they had not committed a crime. Eventually, other officers arrived and transported the driver to the police station to issue him driving-related citations.

¶ 6 In the police vehicle, Folino gave defendant his *Miranda* warnings, and during the drive to the police station, defendant told the officers he had the firearm for protection because "they were shooting near his dope tip." Fietko explained this was a street term for a location where people sell narcotics. None of defendant's statements were reduced into a written version signed by him. Once they arrived at the police station, Fietko searched defendant and found two plastic

bags containing suspect cocaine in one of his socks, which the parties stipulated weighed 0.1 grams and tested positive for cocaine.

¶ 7 Sadora Freeman, defendant's friend, testified on his behalf. On the day in question, she was sitting in the backseat of the car with defendant while Laquita Bedenfield was in front and Fabian Satterfield was driving. After the police pulled the car over, the officers approached it with their weapons already drawn and immediately ordered everyone out of the car. All four of them exited simultaneously and stood outside the car for a few minutes while the officers searched the car. Freeman denied that any officer asked her to stand anywhere specific or do anything with her hands. She also denied seeing a weapon at any time in the car. Freeman, along with Bedenfield, also had to go to the police station. Freeman explained that one of the officers drove their car to the police station while she was transported to the station in a police vehicle. There, Freeman and Bedenfield remained in a waiting room while the officers interviewed Satterfield.

¶ 8 Defendant testified that he was sitting in the backseat of the car when the police pulled it over. As the officers approached the car, they ordered everyone to put their hands up and exit the car. After everyone else exited, defendant slid out of the car. Defendant denied having a gun or making any statements about a gun to the officers. He, however, admitted to holding a cup filled with alcohol while in the car.

¶ 9 In rebuttal, and for impeachment purposes, the State presented certified copies of defendant's four previous drug convictions.

¶ 10 After argument, the trial court found defendant guilty of being an armed habitual criminal, armed violence and unlawful possession of a weapon by a felon, in addition to another count of unlawful possession of a weapon by a felon and possession of a controlled substance. The court stated that the case hinged on credibility and found the officers' unimpeached version the most credible because the orderly process of removing the occupants from the car would best ensure officer safety. The court also did not believe Freeman's account of how she was transported to the police station.

¶ 11 At sentencing, the State argued in aggravation that defendant had a lengthy criminal history, including a total of seven prior felony convictions, and admitted to possessing the firearm to protect his "drug spot." Additionally, the State observed that defendant had a prior affiliation with a street gang and a "spotty" employment history. Finally, the State highlighted that at 33 years old, defendant was "well into adulthood" when he committed the instant offenses.

¶ 12 In mitigation, defense counsel argued that defendant had substance-abuse issues and while he had prior convictions, none of them were violent in nature. Additionally, counsel noted defendant had maintained some employment, including at the United Parcel Service and "maintenance" firms. Finally, counsel indicated there was no "verifiable information" that defendant "runs a drug spot."

¶ 13 Tommy Johnson, defendant's father, spoke on his behalf, noting that defendant has two children who now would grow up without a father. He also stated that defendant "was doing great until this incident." Defendant also spoke, admitting he had not been "perfect" or a "saint"

during his life, but stated he was "honestly innocent" of the instant offenses. He concluded by saying he wanted to be able to care for his children.

¶ 14 According to defendant's presentence investigation report, in 1997, defendant was charged in North Carolina and eventually convicted of possession of stolen goods and larceny. Then, from 2000 to 2008, defendant was convicted of five felony drug offenses in Illinois, in which his sentences ranged from impact incarceration (commonly known as Boot Camp) and probation to four years in prison.

¶ 15 In sentencing defendant, the court noted it considered its notes from trial, the circumstances presented in mitigation and aggravation by the parties, the statutory mitigating and aggravating factors, and the presentence investigation report. The court highlighted that defendant's father was a positive influence on defendant, trying to guide him on the right path. It observed, however, that defendant's case was not about being in the "wrong place at the wrong time," but rather "making choices." The court subsequently entered concurrent 15-year sentences for being an armed habitual criminal, armed violence and unlawful possession of a weapon by a felon, and merged the remaining counts. Defendant moved the court to reconsider its sentence, but the court denied the motion. This appeal followed.

¶ 16 Defendant first contends that his trial counsel was ineffective for failing to impeach Officer Fietko with his arrest report. Specifically, defendant argues that the arrest report is inconsistent with the officers' trial testimony regarding how they ordered the occupants of the car, including defendant, to exit the car. In relevant part, the arrest report states:

> "As [the officers] approached the vehicle they observed the right back seat passenger, [defendant], produce a black unknown object with his right hand from his wasteband [*sic*] and place it under his right leg. Upon asking all occupants of the car to exit the vehicle, [defendant] pulled out a red plastic cup and stated 'I was just drinking officer.' After securing [defendant] and all occupants of the vehicle [Officer Folino] recovered a black sig sauer P239 hand gun *** in the area [defendant] was sitting."

Defendant asserts that these statements supported his theory at trial of a chaotic scene where the officers ordered everyone out of the car simultaneously, not the orderly process described by the officers at trial. Therefore, he argues, after everyone was already out of the car, the police found a firearm and simply pinned its possession on defendant.

¶ 17 We evaluate claims of ineffective assistance of counsel under the two-prong approach set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Givens*, 237 Ill. 2d 311, 330-31 (2010). Under *Strickland*, the defendant must show that his counsel was deficient and the deficiency prejudiced him. *Id.* at 331. Specific to an ineffective assistance claim for failing to impeach, defendant must show that it was objectively unreasonable to not impeach Fietko with his arrest report and that but for this error, there was a reasonable probability the outcome of defendant's trial would have been different. See *People v. Campbell*, 332 Ill. App. 3d 721, 729-30 (2002).

¶ 18 Under the first prong of *Strickland*, there is a strong presumption that counsel's actions or inactions were reasonable trial strategy. *People v. Carlisle*, 2015 IL App (1st) 131144, ¶ 72. While the decision to impeach and cross-examine a witness is considered a matter of trial

strategy (*People v. Johnson*, 2015 IL App (1st) 123249, ¶ 55), "the failure to use significant impeaching evidence against an important witness is deficient representation." *People v. Rogers*, 2015 IL App (2d) 130412, ¶ 71. Under the second prong of *Strickland*, a reasonable probability that the outcome of a trial would be different is "a probability sufficient to undermine confidence in the outcome" or rather "the result of the trial [was] unreliable or the proceeding [was] fundamentally unfair." *People v. Evans*, 186 Ill. 2d 83, 93 (1999). A failure to establish either prong precludes a finding of ineffective assistance of counsel (*People v. Henderson*, 2013 IL 114040, ¶ 11), and the defendant bears the burden of demonstrating the ineffectiveness. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 52. A reviewing court may proceed directly to the prejudice component of *Strickland* without determining first whether trial counsel's performance was deficient if it determines that the defendant did not suffer prejudice (*id.* ¶ 70), which is how we proceed in the instant case.

¶ 19 Even if the arrest report could be characterized as impeaching evidence, the minor impeachment value from the report would not have changed the outcome of defendant's trial because the evidence of his guilt was overwhelming. Critically, defendant twice admitted to ownership of the firearm, once right after the officers observed the weapon and a second time in the police vehicle where he explained to the officers he needed the firearm for protection. Furthermore, Officer Fietko observed defendant remove a dark object slightly bigger than his hand from near his waistband and move the object underneath his thigh. After defendant exited the car, Fietko observed a firearm where defendant had been sitting. The minor discrepancies highlighted by defendant on appeal between the arrest report and Fietko's trial testimony would

not have destroyed Fietko's credibility on these crucial observations. See *People v. Reed*, 80 Ill. App. 3d 771, 780 (1980) (stating "[m]inor discrepancies in the testimony of an eye witness do not destroy his credibility"). Officer Folino, who would not have been impeached by the arrest report, also observed the firearm where defendant had been sitting. Moreover, when the trial court found defendant guilty, it specifically observed that it did not find his or Sadora Freeman's testimony credible. Therefore, defendant has not demonstrated the outcome of his trial was unreliable or fundamentally unfair as a result of his trial counsel's alleged error in order to establish prejudice and meet the second prong of *Strickland*.

¶ 20 In reaching this conclusion, we reject defendant's reliance on *People v. Williams*, 329 Ill. App. 3d 846 (2002) and *People v. Skinner*, 220 Ill. App. 3d 479 (1991), as cases with "less striking discrepancies" than the instant case. In *Williams*, the court found the defense counsel was ineffective for failing to impeach the victims of an aggravated robbery where the case was "close," and the potential impeachment of their testimony could have seriously undermined the State's ability to prove the elements of the offense. *Williams*, 329 Ill. App. 3d at 850, 52-53, 55-56. Here, the potential impeachment argued by defendant did not affect an element of the offense, and as mentioned, there was overwhelming evidence of defendant's guilt. In *Skinner*, the court found the defense counsel was ineffective for, *inter alia*, failing to impeach an eyewitness who did not identify the defendant until six months after the crime where the potential impeachment could have seriously undermined the identification of defendant as the perpetrator of the crime. *Skinner*, 220 Ill. App. 3d at 484-85. Here, there are no issues of identification, and defendant admitted to ownership of the firearm twice.

¶ 21 Accordingly, because defendant cannot demonstrate prejudice from his counsel's failure to use the arrest report to impeach Fietko, his claim of ineffective assistance of counsel fails. See *Henderson*, 2013 IL 114040, ¶ 11.

¶ 22 Defendant next contends that his 15-year sentence for being an armed habitual criminal was excessive and asks us to reduce his sentence to 9 years. In response, the State initially argues defendant's contention is moot because even if we reduce defendant's sentence, he still would have to serve two other 15-year sentences for armed violence and unlawful use of a weapon by a felon.

¶ 23 Under general mootness principles, reviewing courts will not decide issues " 'where the result will not be affected regardless of how the issues are decided.' " *People v. Campa*, 217 Ill. 2d 243, 270 (2005) quoting *Barth v. Reagan*, 139 Ill. 2d 399, 419 (1990). "An appeal is moot when intervening events have rendered it impossible for the reviewing court to grant effectual relief to the complaining party." *In re Commitment of Hernandez*, 239 Ill. 2d 195, 201 (2010).

¶ 24 Although the trial court sentenced defendant to three concurrent 15-year sentences, because of the truth-in-sentencing law (730 ILCS 5/3-6-3 (West 2012)), the potential minimum time he is required to spend in prison for the offenses is not identical. If defendant is ultimately given all potential good time credits, he will only be required to serve 50 percent of his sentences for armed violence and unlawful use of a weapon by a felon (730 ILCS 5/3-6-3(a)(2.1) (West 2012)), while he would still serve 85 percent of his sentence for being an armed habitual criminal. 730 ILCS 5/3-6-3(a)(2) (West 2012). Therefore, if we give defendant his requested

relief, his potential sentence could be shorter as a practical matter, and consequently, it is not impossible to render effectual relief for him by addressing the merits of his sentencing challenge.

¶ 25 On the merits, defendant argues his sentence was excessive because of his "nonviolent [criminal] record," the offense did not result in injuries to anyone, and since his last conviction, he found employment despite chronic back pain and worked to overcome substance-abuse issues.

¶ 26 In determining the proper sentence to give a defendant, trial courts are given broad discretionary powers. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence will not be reversed absent an abuse of that discretion. *People v. Geiger*, 2012 IL 113181, ¶ 27. A reviewing court gives such deference to the trial court because it "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). The reviewing court presumes the trial court considered all of the defendant's relevant mitigating factors unless there is affirmative evidence to the contrary. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The reviewing court will not reverse a sentence merely because it would have weighed the factors differently. *Id.* ¶ 28.

¶ 27 When a sentence is within the statutory range, it is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. A sentence within the statutory range for the offense may only be "deemed excessive and the result of an abuse of discretion" where it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Stacey*, 193 Ill. 2d at 210. The spirit and purpose of the law are furthered if the trial

court's sentence reflects both the seriousness of the offense and gives sufficient consideration to the defendant's rehabilitative potential. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 31.

¶ 28 In the instant case, defendant was convicted of being an armed habitual criminal, which is a Class X felony with a sentencing range between 6 and 30 years in prison. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Therefore, defendant's 15-year sentence was within the statutory range, and it is presumed proper. Furthermore, the trial court specifically referenced its consideration of defendant's presentence investigation report, which included many of the mitigating circumstances identified by defendant on appeal, such as his employment history, his non-violent criminal record and his substance-abuse treatment. By acknowledging its review of the presentence investigation report, it is presumed the trial court considered defendant's rehabilitative potential, absent contrary evidence (see *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 25), which the record fails to demonstrate. Additionally, there is no indication in the record that the trial court considered any improper factors in rendering defendant's sentence or failed to consider the seriousness of the offense. Therefore, we cannot find that defendant's sentence greatly varied from the spirit and purpose of the law or that it was manifestly disproportionate to the nature of the offense. See *Stacey*, 193 Ill. 2d at 210. Consequently, defendant's 15-year sentence was not excessive.

¶ 29 Nevertheless, defendant further argues that we should find his 15-year sentence for being an armed habitual criminal sentence excessive because the sentence was in the middle of the applicable sentencing range (see 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012)), while his 15-year sentence for armed violence was the minimum sentence. See

720 ILCS 5/33A-2(a), 3(a) (West 2012). The trial court specifically stated that even if defendant had not been convicted of armed violence, his 15-year sentence for being an armed habitual criminal was appropriate, indicating it considered defendant's sentence for being an armed habitual criminal separate from its sentence on armed violence. Moreover, defendant has not cited to any authority mandating a minimum sentence on one conviction merely because a trial court gave a minimum sentence on another conviction, or that this gives a reviewing court a reason to find a sentence excessive.

¶ 30 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 31 Affirmed.