2016 IL App (1st) 140136-U

SIXTH DIVISION
April 29, 2016

No. 1-14-0136

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. 11 CR 18165
	)	
DARRYL UPCHURCH,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice DELORT concurred in the judgment.

O R D E R

¶ 1 *Held*: Judgment entered on defendant's convictions of aggravated discharge of a firearm and aggravated unlawful use of a weapon affirmed over defendant's contention that his sentence on the aggravated discharge of a firearm conviction was excessive; mittimus corrected to reflect an additional two days of presentence custody credit.

¶ 2 Following a bench trial, defendant Darryl Upchurch was found guilty of aggravated discharge of a firearm and aggravated unlawful use of weapon (AUUW), then sentenced to concurrent, respective terms of 10 and 3 years' imprisonment. On appeal, defendant does not

contest the sufficiency of the evidence to sustain his convictions; rather, he contends that the trial court abused its discretion in sentencing him to 10 years' imprisonment on the aggravated discharge of a weapon charge. He also contends that his mittimus should be corrected to reflect an additional two days of presentence custody credit.

¶ 3 Defendant was charged with first degree murder, attempted murder, aggravated battery with a firearm, aggravated discharge of a firearm, and AUUW arising out of the shootings which took place in the early morning hours of November 1, 2009, in the area of 5360 West Division Street in Chicago. Prior to trial, defendant filed a motion to suppress statements, alleging that he was initially arrested in November 2009, but released, then re-arrested on September 28, 2011. The evidence at the suppression hearing showed that defendant was initially arrested on November 24, 2009, that the interrogation which followed was video recorded, and that he was released the next day without being charged. The court denied the motion, and the case proceeded to trial.

¶ 4 At trial, Amber Boyd testified that on Halloween night in 2009, she went to a party at Hau't, a store in the strip mall at Division Street and Long Avenue in Chicago. When she arrived, a security guard searched everyone before entering. At 1:50 the next morning, she was still at the party with 20 other people when an altercation took place when a security guard struck a patron on the head with his gun, and removed him from the premises. At that point, the owner of the store asked everyone to leave.

¶ 5 As the people moved toward the back of the store, Boyd heard someone kicking on the front door, which the security guard was trying to keep closed. Boyd testified that she then heard three gunshots, immediately felt a sharp pain in her foot and fell to the ground. Shortly

thereafter, police and paramedics arrived, and while she was in the ambulance, Boyd learned that she had been shot in the foot. Boyd did not see who fired the gun. The parties later stipulated that a bullet was removed from Boyd's left heel.

¶ 6 Raymond Albritton testified that he spent Halloween night 2009 with defendant, whom he has known for five years. At 8 p.m. they drove to Chicago in his SUV, then went to a liquor store where they purchased vodka. After that, they picked up Takia, and her friend, Yvette. Albritton then drove to two more liquor stores, and after drinking some more, Takia took over the driving because Albritton was too intoxicated. On their way back to Takia's house, they heard gunshots, and saw a "whole bunch of people" at Division Street and Pine Avenue. Someone approached them and told them that D.C. was hurt. Albritton testified that he did not know anyone there, but then stated that he had known D.C. for a couple of years. Defendant and Albritton exited the SUV and checked on D.C., who was on the ground.

¶ 7 Albritton testified that defendant ran across the street to find out what happened to D.C. The next time he saw defendant, he was running back to the SUV, and heard eight gunshots which appeared to come from two different guns. Takia started to drive them away from the area, but police pulled them over, and defendant exited the vehicle running. Albritton testified that police found a gun in his vehicle, but it did not belong to him. He could not say whether or not defendant had a gun on him that evening.

¶ 8 Chicago police officer Danny Fleischhacker testified that on Halloween night 2009, he was working with his partner Officer Andrew Lammick. At 2 a.m., they monitored a call of a person shot at Long Avenue and Division Street, and when they were about a block and a half away, Officer Fleischhacker observed a crowd of people on the southwest corner of Division

Street and Long Avenue. He also saw two men walking a few feet apart from one another in the middle of Division Street, firing guns in the direction of the nearby strip mall. Officer Fleischhacker identified defendant in court as one of them. The men then turned and went south on Long Avenue from Division Street. Defendant got into an SUV and drove westbound into the south alley of Division Street, as did the other man, and Officer Fleischhacker pursued the SUV. When the vehicle was stopped at 1120 North Pine Avenue, defendant exited and fled.

¶ 9 Officer Fleischhacker testified that he searched the SUV and found a .357 revolver in the glove box, which had four spent shell casings and two live rounds. On November 25, 2009, he viewed a lineup and identified defendant in that lineup as the person he saw fleeing from the SUV. The parties later stipulated that defendant had never been issued a Firearm Owner's Identification card.

¶ 10 The parties also stipulated that Angela Howard would testify that she arrived at the party at 12:30 a.m. with Jennifer Clark and two others, and at 1:15 a.m. she heard gunshots. A few unknown black males came to the door, but were denied entry, and a fight erupted at the door. Someone yelled, "they got a gun," and everyone ran to the back of the store. When she heard someone say there was no gun, she and Clark walked to the front of the store, but then gunshots were fired through the windows. Howard felt a burning sensation in her neck, and was helped to the rear of the store. Clark was fatally shot in the chest.

¶ 11 The parties further stipulated that Angela Horn is employed by the Illinois State Police as a forensic scientist and an expert in firearms analysis. She received the Ruger model GP100 357 Magnum revolver, two unfired 357 Magnum cartridges and four fired 357 Magnum cartridges which were recovered from the glove box of Albritton's SUV in November 2009. The handgun

was in working order. She also received three fired bullet jackets recovered from the interior of a Cricket telephone store, which could not be identified or eliminated as having been fired from the recovered handgun.

¶ 12 Horn also received one fired bullet jacket fragment from the pavement of Division Street at the south entrance to the parking lot of the strip mall, which could not be identified or eliminated as having been fired from the recovered handgun. This bullet, however, was not fired from the same handgun as the fired bullet fragments recovered from the sidewalk in front of the Hau't store, the body of the victim, Clark, or from the interior of the Hau't store. Those fragments were all from a .38 caliber firearm.

¶ 13 Defendant testified that at 2 a.m. on November 1, 2009, he was with his "cousin" Albritton and two women, Takia and Yvette. The four were in Albritton's vehicle and as they approached the intersection of Division Street and Long Avenue, defendant heard four gunshots coming from the strip mall. Takia stopped the vehicle, and defendant exited with nothing in his hands. Defendant, however, also testified that he exited the vehicle with a handgun.

¶ 14 Defendant testified that he noticed "some activity" near the Hau't store in the strip mall, and saw D.C., whom he also knew as Carvale Eckford, kicking at the door of the Hau't store. Defendant saw someone exit the store with a shotgun, and shoot in the direction of Eckford. Defendant went to the parking lot of the strip mall, and when he was 25 feet away from the Hau't store, he pulled out his gun and fired four times in the direction of the unknown man. Defendant testified that he fired his gun in defense of Eckford, but did not shoot his gun at the unknown person, but, rather, at the Cricket store because he did not want to kill the unknown person. His purpose was to stop that man from shooting. After firing his gun, defendant got back into the

SUV, and when stopped by police, he fled, because he had an outstanding warrant for not filing "some military papers," after his discharge on "even terms."

¶ 15 Defendant also testified that at 11 a.m. on November 2, 2009, he was interviewed by detectives Carney and Xanos. He told them that a person named Ra-Ra fired the shots along with Terrell Houston, not him. Defendant testified that he lied to police because he did not want them to think that he shot anyone. Defendant, however, then told the detectives that he fired his gun.

¶ 16 Defendant stated that he was originally arrested for this incident on November 24, 2009, at which time several videotaped statements were made over the course of two days. On November 24, 2009, defendant told the detectives that he was a couple of houses down the street from where the incident occurred, did not shoot the gun, and did not know there was a gun in Albritton's vehicle. Defendant also told police that he heard five gunshots, and was in Albritton's vehicle when he saw his friend Eckford fall to the ground on Division Street, but did not see anyone shooting in the parking lot of the strip mall. Defendant claimed that he walked up to Eckford to check on him.

¶ 17 On November 25, 2009, defendant was still in police custody and asked to speak to the detective. During a videotaped statement, he told police that he had a gun on him during the incident, that he went up to Eckford, and started shooting his gun because he thought Eckford was shot, and was "just being stupid, s**t, f****d up my life." Defendant fired his gun towards the nearby Cricket store and not the Hau't store. Defendant then told police that he heard gunshots coming from the store, but there was a crowd of people running from the store, and he did not see the person from the store shooting his gun. Defendant also told them that he did not

see anyone shooting in front of the Hau't store. Defendant acknowledged that he was released from custody without being charged.

¶ 18 Almost two years later, on September 28, 2011, defendant was again arrested in connection with this case. At that time, he told police that he fired his gun because he believed people were shooting at his friend, Eckford, but that no one was out there shooting at him. He also stated that Houston started shooting first.

¶ 19 A video of the incident was played in court. A copy of this video was not included in the record filed on appeal.

¶ 20 At the close of evidence, the court found defendant guilty of aggravated discharge of a firearm and AUUW. In doing so, the court stated that defendant was not acting in defense of himself or others, including Eckford. The court noted that the video of the incident showed that the threat was that of the presumed bouncer, who stuck his head and body outside the window of the Hau't store, fired his gun, and immediately went back inside. The court found that defendant fired his gun in retaliation and not self-defense.

¶ 21 At the sentencing hearing, the State noted that defendant had a pending case for aggravated battery, and in this case chose to endanger everyone at the strip mall by shooting in the parking lot where there were people spilling out of the Hau't store. The State asserted that there was no question that the person who was inside the party chose to take out a gun and shoot it outside in response to a person attempting to break down the door, but defendant took it upon himself to place quite a few people in danger by shooting in a crowded area. The State then noted that defendant had no adult convictions, but did have juvenile convictions for arson and

battery; and although defendant indicated in his presentence investigation report that he did not drink, the evidence at trial showed that he chose to drink while armed that night.

¶ 22 Defense counsel initially noted that defendant had been a member of the Army National Guard, but "received a discharge other than honorable." In mitigation, counsel stated that "it was not [defendant's] intent to kill anybody else, other than the individual who was shooting at him," and he did not hit any of the victims. Counsel also noted that defendant had two young children, had been working part time at Home Depot for almost a year, and had just received an associate degree from Lincoln College of Technology and obtained a job pursuant to that degree at a manufacturing company. Counsel also pointed out that defendant had no adult convictions, and the juvenile arson conviction was 15 years ago.

¶ 23 The court sentenced defendant to concurrent terms of 10 years' imprisonment for aggravated discharge of a firearm and 3 years' imprisonment for AUUW. In doing so, the court noted that defendant was not being held responsible for the murder and shooting of someone else, but that his offenses were "very serious." The court stated that it considered the information contained in the presentence investigation report, looked at the factors in aggravation and mitigation, including defendant's lack of adult history, and listened to the arguments of counsel. However, it found that a sentence of 10 years' imprisonment for aggravated discharge of a firearm and 3 years' imprisonment for AUUW was appropriate in this case.

¶ 24 Defense counsel presented an oral motion to reconsider sentence, contending that a sentence of 10 years on the aggravated discharge conviction was excessive where defendant committed a probational offense and this was defendant's first adult conviction. The court denied the motion.

¶ 25 On appeal, defendant first contends that the 10-year sentence imposed for aggravated discharge of a firearm was an abuse of discretion in light of the facts that he had no prior adult convictions, his last juvenile offense was 10 years ago, and his employment and education history demonstrated his rehabilitation potential. Defendant also argues that the circumstances of the offense did not warrant a sentence more than double the minimum.

¶ 26 As an initial matter, we observe that in order to preserve a sentencing issue for review, defendant must make a contemporaneous objection and raise the matter in a written post-trial motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010); *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant did not raise the issue in a written post-trial motion, but, rather, in an oral motion to reconsider the sentence. However, because the State did not object to the oral motion, the written motion requirement is waived, and we may address his sentencing issue. *People v. Davis*, 356 Ill. App. 3d 725, 731 (2005).

¶ 27 Turning to the merits of defendant's appeal, we observe that the 10-year sentence for aggravated discharge of a firearm fell within the statutory sentencing range of 4 to 15 years' imprisonment (720 ILCS 5/24-1.2(b) (West 2012); 730 ILCS 5/5-8-1 (West 2012)), for this class of offense. As a result, we may not disturb that sentence absent an abuse of discretion. *People v. Bennett*, 329 Ill. App. 3d 502, 517 (2002).

¶ 28 The record shows that the court considered the aggravating and mitigating factors presented by the parties, including defendant's lack of adult convictions, but found that the offenses in question were "very serious." It is well-settled that a trial court is not required to give greater weight to defendant’s rehabilitative potential than to the seriousness of the offense

(*People v. Phillips*, 265 Ill. App. 3d 438, 450 (1994)), nor specify on the record the reasons for its sentence (*People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶24).

¶ 29 The evidence presented in this case showed that defendant fired a gun into a strip mall where people were leaving a party after shots had been fired. Although the bullets and fragments that were recovered from the scene, and possibly fired from defendant's gun, were found in the vicinity of the Cricket store, next to the Hau't store, a bullet fragment, which was also possibly fired from defendant's gun, was found on the pavement of Division Street at the south entrance to the parking lot of the strip mall. Thus, defendant's actions in shooting the gun under the circumstances described in the record was, contrary to defendant's contention, a very serious matter, as recognized by the court.

¶ 30 We further observe that the trial court was cognizant of defendant's mitigating factors, but found that a term of 10 years' imprisonment was warranted. It is not our prerogative to reweigh the factors presented to the sentencing court and independently conclude that the sentence is excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987). We find no abuse of sentencing discretion by the court in imposing the 10-year term, and thus have no basis for interfering with the determination entered. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 31 Defendant next contends that he is entitled to an additional two days of presentence custody credit for the two days he was arrested and in police custody in November 2009. The State responds, without citation to authority, that presentence custody credit is not provided for police interrogations that occur during the course of an investigation and before defendant is charged with an offense.

¶ 32 We initially observe that a defendant arrested for an offense is "in custody" for that offense before he is formally charged. *People v. Roberson*, 212 Ill. 2d 430, 439 (2004). Here, defendant was arrested for the incident that occurred on Halloween night 2009, and was in custody for a period of less than 48 hours before he was released without being charged, then rearrested in 2011 and convicted in the same case.

¶ 33 Under the pertinent statute, a defendant shall be given credit on the determinate sentence or maximum term and the minimum period of imprisonment for the number of days spent in custody *as a result of the offense for which the sentence was imposed*. (Emphasis added.) 730 ILCS 5/5-4.5-100(b) (West 2012). Our review of whether defendant is entitled to an additional two days of presentence custody credit for the 2009 detention period is *de novo*. *People v. Jones*, 2015 IL App (4th) 130711, ¶12.

¶ 34 After considering the plain language of the presentence custody credit statute (*People v. McClure*, 218 Ill. 2d 375, 382 (2006)), we find that although defendant was not charged in the case until 2011, he was in custody in 2009 as a result of the offenses for which his sentence was imposed. Accordingly, we conclude that defendant is entitled to an additional two days of presentence custody credit for the time spent in custody as a result of these offenses.

¶ 35 In light of the foregoing, we affirm the judgment of the circuit court of Cook County, and order the mittimus corrected to reflect an additional two days of presentence custody credit. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 36 Affirmed; mittimus corrected.