

No. 1-14-1053

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 5589
	)	
BRANDON MELTON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE GORDON delivered the judgment of the court.  
Presiding Justice Reyes and Justice Lampkin concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's nine-year sentence for aggravated battery predicated on discharge of a firearm was not improper because the trial court did not consider a factor inherent in the offense at sentencing.

¶ 2 Following a bench trial, defendant Brandon Melton was convicted of aggravated battery predicated on discharge of a firearm and sentenced to nine years' imprisonment. On appeal, defendant contends that the trial court improperly utilized the fact that he shot the victim to aggravate his sentence even though that factor was inherent in the charged offense. We affirm.

¶ 3 The evidence at trial established that Jonathon Reddick, the victim, lived across the street from defendant and had known him since childhood. After midnight on September 29, 2011, Reddick had a drink with defendant and told him "you know who killed Little Tone and you're not doing shit about it." Afterwards, Reddick walked to a gas station. When he returned about an hour later, defendant waved and called to him from across the street. Reddick approached defendant, and when they were approximately six feet apart, defendant drew a gun and shot him four times in the legs. As defendant fired, he said "[y]ou're going to die like my brother."

¶ 4 The court found defendant guilty of aggravated battery predicated on discharge of a firearm. At sentencing, the State observed that defendant had a prior conviction from 2010 for unlawful possession of a handgun but "did not learn anything from that involvement with the Criminal Justice System in which a gun was used." In the 2010 case, the court initially sentenced defendant to boot camp but later resentenced him to 15 months' imprisonment. In the present case, the State asked the court to impose a prison term in the "upper range."

¶ 5 In mitigation, defense counsel observed that defendant, age 21 at sentencing, had "to quit" high school to support his child and aspired to earn a construction or automotive degree. According to counsel, defendant's actions reflected "immaturity and potentially \*\*\* peer pressure." Counsel acknowledged the present offense "tend[s] to show that [defendant is] a potentially violent individual," but that his time in presentence custody "definitely changed and altered his mindset." Counsel submitted the minimum sentence would deter defendant from bad conduct in the future.

¶ 6 The presentence investigation report (PSI) indicated that defendant has five stepsiblings, including a brother, Antonio, who was shot to death in 2010. Defendant has one biological child with his girlfriend and stopped attending high school during his junior year to help watch the

baby. He worked at a grocery store from some time in 2009 to January 2010, and worked in construction from January 2011 to August 2011. He denied gang involvement, although the Chicago police department reported that defendant belonged to the New Breed street gang. Defendant drank alcohol about twice a month starting at age 17, but limited his drinking to "a couple of shots," and denied receiving treatment for substance abuse or mental health issues. Defendant thanked the court when offered the opportunity to speak in allocution.

¶ 7 The court sentenced defendant to nine years' imprisonment, stating:

"The Court having considered the evidence presented at trial, [and] presentence investigation report \*\*\* [and] the evidence offered in aggravation and mitigation[.] [T]he Court has carefully considered the statutory factors in aggravation and mitigation, the financial impact of incarceration, [and] the arguments of counsel as to what they believe the appropriate sentencing [is]. In this case it is a mandatory 6 to 30 years in the penitentiary and the defendant did elocute in this case. It is a serious case. Somebody could have been murdered, but for the grace of God, the person survived. There's no doubt the defendant pumped a few bullets in the victim in this particular case.

\*\*\*

The defendant seems to like guns \*\*\*. His only brush with the law prior to this was an unlawful possession of a gun back in 2010.<sup>[1]</sup>

[The court in that case] saw fit to give him boot camp. He didn't tow the line of that, got 15 months in IDOC. Sentence of this Court is nine years in the Department of Corrections."

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<sup>1</sup> The criminal history report also showed that defendant had a juvenile adjudication for unlawful use of a weapon.

¶ 8 Immediately after sentencing, defense counsel filed a motion to reconsider sentence, which alleged that defendant's sentence was excessive in view of his background and the circumstances of the offense. The motion also claimed that defendant's sentence violated the United States Constitution, but did not allege that any improper aggravating factors were considered at sentencing. The court denied the motion and the following colloquy occurred:

“THE COURT: This Motion alleges that based on [defendant's] criminal background the sentence is too severe, coupled with the circumstances alleged, [but] the Court disagrees. He faces 6 to 30. He had a weapons offense in his background. Circumstances allege that he pumped bullets on [sic] the victim on the streets of Chicago.

\*\*\* Do you have any facts that I violated the U.S. Constitution?

DEFENSE COUNSEL: No, Judge.

THE COURT: All right. Motion to Reconsider Sentence is denied.”

¶ 9 On appeal, defendant contends that the trial court improperly utilized the fact that he shot the victim as an aggravating factor in sentencing. Defendant argues that the court made no reference to either the nature or circumstances of the offense at the sentencing hearing, but rather, sentenced him based "solely" on the observation that he "pumped a few bullets in the victim." Defendant submits this consideration significantly affected his sentence because, despite mitigating evidence of his family ties and employment history, the court imposed a prison term three years above the statutory minimum.

¶ 10 As an initial matter, the State alleges, and defendant correctly concedes, that he forfeited review of this issue by failing to raise the allegedly improper aggravating factor in his motion to reconsider sentence. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) (“to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising

the issue are required"). Defendant urges this court may consider the issue as a matter of plain error or ineffective assistance of counsel. However, the first inquiry before determining whether there was a plain error is to determine whether there was a clear and obvious error. *People v. Eppinger*, 2013 IL 114121, ¶ 19. Absent an error, there can be no plain error and defendant's forfeiture will be honored. *Eppinger*, 2013 IL 114121, ¶ 19. For the following reasons, no error occurred.

¶ 11 Sentencing is generally a matter of judicial discretion (*People v. Patterson*, 217 Ill. 2d 407, 448 (2005)), but whether a court relied on an improper factor in imposing a sentence presents a question of law to be reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49. The defendant must affirmatively establish that the sentence was based on improper considerations, and a reviewing court will not reverse a sentence unless "it is clearly evident the sentence was improperly imposed." *Bowen*, 2015 IL App (1st) 132046, ¶ 49. We consider the record as a whole when determining whether the trial court improperly imposed a sentence, and will not focus on isolated statements. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30 (citing *People v. Ward*, 113 Ill. 2d 516, 526-27 (1986)). While the trial court may not consider a factor implicit in the underlying offense as an aggravating factor in sentencing, it may consider the nature and circumstances of the offense, including the nature and extent of each element of the offense committed by the defendant. *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 55. The trial court is not required to refrain from mentioning the factors which constitute elements of an offense, and "the mere reference to the existence of such a factor is not reversible error." *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15.

¶ 12 Moreover, a sentence within the statutory range is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Aggravated battery predicated on discharge of a firearm is a

Class X felony, which has a sentencing range from 6 to 30 years. 720 ILCS 5/12-3.05(e)(1), (h) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010). Accordingly, defendant's nine-year sentence is presumed proper.

¶ 13 After reviewing the trial court's comments in the context of the entire sentencing hearing, we conclude that the fact defendant shot the victim was not considered as an aggravating factor by the trial court at sentencing. In delivering defendant's sentence, the court stated that it had considered the trial evidence, PSI, the financial impact of incarceration, defendant's allocution, and that defendant had previously failed boot camp for a prior conviction of unlawful possession of a gun, resulting in 15 months' imprisonment. The court also noted that it had considered the evidence and statutory factors in aggravation and mitigation. While making these observations, the court noted “[t]here's no doubt the defendant pumped a few bullets in the victim in this particular case.” This comment was not error, as the court may use “descriptive language to illustrate” an offense during sentencing (*Bowen*, 2015 IL App (1st) 132046, ¶ 52), and is not prohibited from commenting on the seriousness of a crime (see *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 57). Additionally, the fact that defendant was sentenced to nine years' imprisonment, despite mitigating evidence regarding his family ties and employment history, does not indicate that the court considered an improper aggravating factor in fashioning the sentence. *People v. Jackson*, 2014 IL App (1st) 123258, ¶¶ 52-53 (despite defendant's employment and family ties “the seriousness of an offense is considered the most important factor in determining a sentence”). To the contrary, the sentence is presumed proper because it is just three years above the minimum term (*Knox*, 2014 IL App (1st) 120349, ¶ 46), and in this case, defendant has made no showing that the trial court considered the fact that he shot the victim to be an aggravating factor in imposing the sentence. *People v. Thompson*, 234 Ill. App.

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3d 770, 777 (1991) (presuming the trial court considered only proper factors at sentencing).

Because we find no error, we need not consider defendant's claim of ineffective assistance of counsel.

¶ 14 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 15 Affirmed.