2016 IL App (2d) 140338-U
Nos. 2-14-0338 & 2-14-0339 cons.
Order filed June 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE D. JENKINS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 13-CF-346 Honorable Kathryn E. Creswell, Judge, Presiding

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THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GEORGE D. JENKINS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. Nos. 13-CF-19 Honorable Kathryn E. Creswell, Judge, Presiding

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JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in sentencing defendant to six years' imprisonment for heroin delivery: in deeming aggravating defendant's delivery of "seven bags," the court was not deeming aggravating the amount of the substance, which was established as less than three grams, very near the bottom of the range for the offense; (2) the trial court's imposition of a six-year sentence for the less serious offense of possession of buprenorphine was supported by the record.

¶ 2 Defendant, George D. Jenkins, appeals from his sentences for two drug offenses: a heroin-delivery offense and a buprenorphine-possession offense. As to the heroin-offense sentence, he asserts that the trial court used as aggravating what he calls a factor inherent to the offense—the amount of heroin sold—when it treated as aggravating the circumstance that defendant had sold six bags of heroin. As to the buprenorphine-based sentence, defendant asserts that the court failed to properly address the relative mildness of the offense in imposing the same sentence as for the heroin offense. Concerning the heroin offense, we hold that the record does not support the contention that the court used the quantity of heroin as aggravating; we therefore affirm the sentence for the heroin offense. Concerning the buprenorphine offense, we hold that the record supports the trial court's six-year sentence.

¶ 3 I. BACKGROUND

¶ 4 In case No. 13-CF-346, defendant was charged with unlawful possession of less than 15 grams of a substance containing buprenorphine (720 ILCS 570/402(c) (West 2012)). In case No. 13-CF-19, he was charged with unlawful delivery of more than 1 and less than 15 grams of a substance containing heroin (720 ILCS 570/401(c)(1) (West 2012)). He entered a blind guilty plea to both offenses. The court explained that the offenses were probationable. The heroin-delivery offense otherwise bore a minimum sentence of 4 years' imprisonment and a maximum sentence of 15 years' imprisonment. 730 ILCS 5/5-4.5-30 (West 2012). The buprenorphine-possession offense, given defendant's prior felony record, bore a minimum sentence of 1 year of imprisonment and a maximum sentence of 6 years' imprisonment (730 ILCS 5/5-4.5-45(a) (West

2012)): the court told him that "that possible penalty includes an extended term range which you're eligible for, based upon the fact that you have a prior felony conviction within the last 10 years."

¶ 5 According to the factual basis for the heroin charge, defendant had sold a substance containing heroin to an undercover agent. The street value of the contraband transferred was $130. After the State presented that basis to the court, defendant said that he believed that "the State would further stipulate that the heroin in 13 CF 19 was *** less than three grams," and the State agreed to that stipulation. According to the factual basis for the buprenorphine offense, a police officer had stopped defendant for erratic driving, and, in searching defendant's vehicle, he found two pills of Suboxone, which defendant said he took for pain in his knees. The State "guess[ed]" that the street value of the two pills was $200. The court asked defendant if Suboxone was "like methadone," and defendant responded, "Yeah, it's like you won't be dope sick."

¶ 6 At sentencing, Jason Scott, an officer with the Wheaton police, testified that defendant had come to the attention of the police through an informant who had identified him as someone willing to sell heroin. In March 2012, Scott and the informant went to meet defendant at a McDonald's, and the informant purchased heroin. Scott continued contact with defendant to discuss drug purchases. He set up another purchase for August 3, 2012. Scott agreed to purchase six bags for $100. That transaction took place, and defendant told Scott that he could get "anything [Scott] needed." Defendant also said that he would "make 100 percent profit" from this sale because he had gotten the heroin for free. He also said that he was selling drugs to help his sister catch up on her mortgage payments.

¶ 7 Thomas Maguire, an officer with the Aurora police, testified that he made the traffic stop involved in the buprenorphine offense. Defendant did not have his license with him when Maguire stopped him. Maguire told him that he would therefore need to post bond. Defendant said that he could not, and Maguire asked him to step out of the vehicle. At that point, defendant started swearing at Maguire. Maguire warned him that he was resisting arrest, and defendant continued swearing; defendant physically resisted being removed from his vehicle when backup arrived. When arrested, defendant told the police that the Suboxone was for knee pain, but he stated at sentencing that it was to keep him from becoming "dope sick." The court sentenced him to 24 months' TASC probation with periodic imprisonment.

¶ 8 Later, the State petitioned to revoke defendant's probation on the basis that he had used marijuana and had failed to complete mandated drug treatment. Defendant admitted the violation, and the court set the cases for resentencing.

¶ 9 At the new sentencing hearing, defendant apologized for claiming that his marijuana use had been inadvertent. He had told his probation officer that his marijuana use had occurred at a family gathering when someone offered him a cigarette; he did not realize that it was marijuana until "after the third puff." He now admitted that, when his uncle told him where to find some cigarettes, he noticed a marijuana cigarette and decided to smoke it.

¶ 10 The State highlighted defendant's criminal history and history of failure to get away from the conditions that led to his offending. It asked that the court impose a six-year sentence for the heroin offense and a concurrent four-year sentence for the buprenorphine offense.

¶ 11 Defendant pointed out to the court that, when he lost his place in his first drug-treatment program, he found a second one that would accept him and completed that. He expressed confusion at the claim that he had missed probation appointments, suggesting that the State's

claim was the result of his asking for times that were not in conflict with his drug-treatment program. Defendant, in allocution, told the court that his first drug-treatment program dropped him only because his insurance would not pay for it and that personnel at the first program urged him to go into the second program.

¶ 12 The presentencing report showed that defendant had been convicted of battery, theft, unlawful restraint, unauthorized use of a weapon, obstructing justice, resisting and obstructing a police officer, and multiple counts of driving on a suspended or revoked license. He had received a sentence of a year's imprisonment on the obstruction conviction. Defendant told probation services that he received social security disability benefits because he had knee and elbow issues.

¶ 13 The court's comments on aggravating factors are at issue in this appeal. These were brief. It stated, "[Defendant] sold seven [*sic*] bags of Heroin to an undercover police officer. Those facts are aggravating." It also stated that defendant's criminal history was "extremely aggravating." It noted that defendant had a prior felony conviction and "a lot of misdemeanor charges." The court sentenced defendant to concurrent six-year prison terms. The court did not discuss its reasoning for imposing the six-year sentence for the buprenorphine conviction.

¶ 14 Defendant filed a motion for reconsideration of his total sentence, asserting that it was excessive and failed to give proper weight to his rehabilitative potential. He further asserted that the court failed to specify why his incarceration was necessary for the public's protection. Finally, he noted that his primary probation violation, marijuana use, appeared to be an isolated incident. At the hearing on the motion, the court noted, "with respect to the delivery, the facts are aggravating." The court denied the motion and defendant timely appealed.

¶ 15 II. ANALYSIS

¶ 16 On appeal, defendant first argues that the court erred as a matter of law when it considered "facts inherent in the delivery offense" as aggravating. He argues that the "quantity" of heroin delivered was part of the definition of the offense—that is, the provision uses a weight range to define the level of the offense. Defendant thus asserts that the court erred in using quantity as an aggravating factor. The State argues that the record does not support defendant's claim that the court used the weight of the substance sold as a factor in aggravation. It does, however, argue that "it was not improper for the trial court to consider the amount of heroin involved in the in the transaction." Neither defendant nor the State addresses the stipulation that the heroin weighed less than three grams. As to the buprenorphine offense, defendant argues that the court failed to explain why a maximum sentence was appropriate. The State argues that the sentence was justified based on defendant's criminal record and his poor attitude as demonstrated in his violation of probation.

¶ 17 We presume that a trial court's sentencing decision is legally correct, and we will not disturb a sentence unless the defendant demonstrates that error occurred. *People v. Robinson*, 391 Ill. App. 3d 822, 842-43 (2009). Further, we presume that a sentence within the statutory guidelines is proper. *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992). Generally, a sentence is an abuse of discretion only if it is at great 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 (2000). However, when a trial court gives weight to an improper factor, that error is, standing alone, a basis to disturb the sentence: it is not within the court's discretion to consider an improper factor. *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001). Barring such improprieties, "[i]t is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case" (*People v. Latona*, 184 Ill. 2d

260, 272 (1998)), and the reviewing court may not substitute its judgment for that of the trial court merely because it might weigh the pertinent factors differently (*Stacey*, 193 Ill. 2d at 209).

¶ 18 We start by considering the sentence for the heroin offense. We conclude that defendant has failed to present a persuasive argument that the court considered as an aggravating factor a factor inherent in the offense. Defendant argues that the court improperly considered the quantity of heroin, something that we would not necessarily deem improper. However, we need not address the propriety of such consideration, as the record does not support defendant's contention that it occurred.

¶ 19 Here, the quantity of heroin involved in the offense was fixed by the factual basis as being at the lower end of the range for the offense; the weight was established as more than one but less than three grams. We presume a sentencing judge to have considered all relevant factors unless the record affirmatively shows otherwise. *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Thus, lacking anything to show the contrary, we presume that, although the court commented on defendant's delivery of "seven bags" as aggravating, it considered that the weight of the heroin involved was less than three grams. Thus, we deem that the court was not considering the quantity of heroin involved when it addressed the aggravating circumstances of the delivery. The court's comment concerning "seven bags" did not relate to the weight of the substance but the fact that it was prepackaged for sale to others in individual bags. In any event, the court could not have considered the "seven bags" to be a major aggravating factor, as it gave defendant a sentence near the lower end of the 4-to-15-year range.

¶ 20 We now turn to the sentence for the buprenorphine offense. Defendant argues both that the court stated no basis for imposing a maximum sentence and that the offense, as it involved a small amount of narcotic frequently prescribed for use much like methadone, was mild. While

the possession offense involved a small amount of controlled substances and was certainly less serious than the delivery, there was aggravation specific to that offense. At resentencing, the trial court stated that it was considering the facts of the underlying charges and found them to be aggravating. During defendant's arrest where the buprenorphine was discovered, he was verbally abusive to the police, physically resisted, and had to be forcibly removed from his vehicle by two officers. This aggravation would certainly support increasing defendant's sentence on the lesser offense. See *People v. Synnott*, 349 Ill. App. 3d 223, 228 (2004) (refusal to exit vehicle at officer's command constitutes the offense of obstructing a peace officer).

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm defendant's sentences for both the heroin offense and the buprenorphine offense. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 23 Affirmed as modified.