2016 IL App (2d) 140614-U
No. 2-14-0614
Order filed March 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 13-CF-2608
TOMMY D. MOORE,	)	Honorable John R. Truitt,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* (1) The trial court did not abuse its discretion in sentencing defendant to 5½ years' imprisonment (on a 1-to-6 range) for possession of heroin: despite the small amount of heroin involved and the other mitigating factors, the sentence was justified by defendant's lengthy criminal history; (2) as defendant's one-year sentence for a Class A misdemeanor exceeded the statutory maximum of 364 days, we reduced it to that maximum.

¶ 2 After a jury trial, defendant, Tommy D. Moore, was convicted of (1) unlawful possession of less than 15 grams of a substance containing heroin (possession), a Class 4 felony (720 ILCS 570/402(c) (West 2012)) with a nonextended sentencing range of one to three years' imprisonment (see 730 ILCS 5/5-4.5-45(a) (West 2012)); and (2) resisting a peace officer

(resisting), a Class A misdemeanor (see 720 ILCS 5/31-1(a) (West 2012)). Owing to past convictions, defendant was eligible for an extended-term sentence of as much as six years for possession (see 730 ILCS 5/5-5-3.2(b)(1) (West 2012)). He received an extended-term sentence of five years and six months, and a concurrent one-year sentence for resisting.

¶ 3 On appeal, defendant argues that (1) his sentence for possession is excessive; and (2) his sentence for resisting exceeds the statutory maximum of 364 days (see 730 ILCS 5/5-4.5-55(a) ((West 2012)). The State confesses error on the second issue. We affirm defendant's sentence for possession and reduce his sentence for resisting to 364 days.

¶ 4 We summarize the pertinent trial evidence. On the evening of September 12, 2013, a Rockford police officer stopped a car for a traffic violation. Defendant's girlfriend, Tyvesha Brown, was driving, and defendant was in the front passenger seat. Two officers arrived to assist. Brown consented to a search of the car. She and defendant exited the car. After the search revealed a gun in the glove box, the assisting officers handcuffed Brown and defendant. Defendant began to pull away and ignored warnings to stop. The first officer tripped him to the ground. After defendant was taken to jail, officers found a bag of brown powder in his coat. Tests showed that the powder weighed 0.7 grams and contained heroin.

¶ 5 The pretrial service report, which the trial court used at sentencing, revealed the following. Defendant was born April 29, 1986. As a juvenile, he was adjudicated delinquent in March 2000, based on aggravated battery, and received five years' probation. In September 2000, he was again adjudicated delinquent, based on manufacturing or delivering a look-alike substance, and was given probation for 4 years, 4 months, and 21 days. In 2001, defendant was adjudicated delinquent, based on aggravated battery; his probation was continued. In 2002, he

was again adjudicated delinquent, based on aggravated battery, and received probation for 2 years, 6 months, and 5 days.

¶ 6 Defendant's adult record included the following (we omit some misdemeanors and numerous traffic offenses, to which the trial court gave minimal weight). In 2006, he was convicted of 2 counts of aggravated unlawful use of a weapon (60 days in jail) and, in a separate proceeding, resisting a peace officer, criminal trespass to land, and interfering with a report of domestic violence (concurrent terms of 90 days in jail and 12 months of probation). In 2007, defendant was convicted of aggravated unlawful use of a weapon and received 180 days in jail and two years' probation. He was also convicted of criminal trespass to state land and obstruction of justice, for which he received 86 days in jail. In 2012, defendant was convicted of aggravated fleeing, manufacturing or delivering cannabis, and aggravated battery with a weapon (based on conduct occurring in 2010 and 2011) and was sentenced to three years and six months in prison. According to the report, defendant was currently on mandatory supervised release (MSR), which he had started on March 1, 2013. His probation officer stated that defendant had been "semi-compliant" with the conditions of MSR.

¶ 7 The report stated that defendant reported being treated for bipolar disorder but was not currently taking any medication. Also, he said that he had used heroin, cannabis, and cocaine; had attended treatment earlier in 2013 (he could not remember where); was not currently involved in a substance-abuse program; and believed that he had "a drug or alcohol problem."

¶ 8 On June 19, 2014, the trial court held a sentencing hearing. Gene Bell testified as follows. He was the deacon of defendant's church and had known defendant since the latter was a child. Defendant was faithful, respectful, and very patient. Also, as defendant was now a

father for the first time, he needed a second chance. Defendant had good support from the community and his family, which would help him to make the needed changes in his life.

¶ 9 The State argued as follows. Defendant was eligible for one to six years' imprisonment for possession. The State requested the maximum on that conviction and on the Class A misdemeanor of resisting. Defendant's juvenile and criminal records were substantial, going back to 2000. The conviction of possession was his seventh felony. He had been given probation several times before and had never completed it successfully. While in jail, defendant had committed aggravated battery by beating a fellow inmate with a chain. Further, he had been on MSR when he committed the present offenses.

¶ 10 Defendant contended that a shorter sentence, perhaps probation, was proper, as he had possessed a minuscule amount of heroin while "on a date with his girlfriend." Also, defendant had a new son and strong support from his family and his church. Defendant was wearing green, "which is the color you wear when you are doing well in jail." "[A] jail minister" had written a "very positive letter" about defendant's "participation in Jail Ministries."

¶ 11 In allocution, defendant expressed willingness to accept responsibility for his actions and change, in part for the good of his new son.

¶ 12 The trial judge stated as follows. In mitigation, defendant's criminal conduct had neither caused nor threatened serious physical harm to others. Defendant's statement in allocution was "some evidence that his character and attitude might indicate that he [was] unlikely to commit another crime," and his imprisonment might entail hardship to his son.

¶ 13 In aggravation, "the greatest factor" was defendant's lengthy history of delinquency and crime. Although he agreed with Bell that "people in life deserve a second chance," defendant had had "four second chances on juvenile probation and four chances on adult probation." He

had been "involved in the system at various times almost consistently since the age of 14," about half of his life. After reviewing defendant's history of delinquency and crime, the judge noted that the possession offense was defendant's seventh felony conviction. In 2006, while on probation, defendant tested positive for THC and was referred to drug treatment, but he missed his intake appointment and did not reengage in the treatment program. Defendant also tested positive for THC in 2008, but, because he was arrested soon afterward, he stayed in jail until the end of his probation term and was discharged unsuccessfully from probation. The judge also noted that, although defendant's attorney had argued that defendant and Brown had merely been "out on a date" on September 12, 2013, the evidence showed that they had been smoking marijuana, an offense for which defendant had not been charged.

¶ 14 The judge stated that defendant was not an appropriate candidate for probation. The State had argued for the maximum sentences, which "would absolutely be justified." However, the judge decided to "give some reduction from the maximum based upon the testimony and the argument with regard to the child" and pronounced concurrent sentences of five years and six months' incarceration for possession and one year for resisting. After his motion to reduce the sentences was denied, defendant timely appealed.

¶ 15 On appeal, defendant contends first that his sentence for possession is excessive. Defendant emphasizes that the amount of heroin that he possessed was small and that, although the street value was not the subject of any evidence or discussion in the trial court, it must have been relatively modest. Defendant acknowledges that his juvenile and criminal records are substantial, but he maintains that, nonetheless, a sentence only six months short of the maximum for any such offense, including possession of a far greater amount, cannot reasonably be reconciled with the circumstances of this case. The State responds that the amount of heroin that

defendant possessed need not determine the length of his sentence and that, in view of his substantial juvenile and criminal record, the sentence is not excessive.

¶ 16 The trial court's sentencing decision is entitled to great deference, and we shall not disturb a sentence absent an abuse of the court's broad discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000). We may not substitute our judgment for that of the trial court merely because we might have weighed the various factors in aggravation and mitigation differently. *Id.* at 209. Given these standards, we decline to disturb defendant's sentence for possession.

¶ 17 Defendant does not contend that the trial judge considered any improper factors or failed to consider proper ones. He argues only that the sentence did not strike the proper balance among all of the pertinent considerations. However, defendant concedes that his record as a repeat offender, both juvenile and adult, is substantial. We note, as did the trial judge, that defendant's conviction was his seventh felony conviction in approximately 14 years as an adult, and that, as a juvenile, he was repeatedly adjudicated delinquent and given probation without successfully completing it. Defendant's criminal record did not merely qualify him for an extended-term sentence; it gave the trial court ample reason to impose a lengthy sentence.

¶ 18 Defendant stresses that the amount of heroin that he possessed was relatively small. While this is true, it is not dispositive. Defendant invokes the familiar precept that the punishment should fit the crime; but our courts have recognized that "punishment should fit the offender and not merely the crime." *People v. La Pointe*, 88 Ill. 2d 482, 496 (1981). In other drug-possession cases, our courts have held that the amount of drugs involved need not determine the sentence imposed. See *People v. Averett*, 381 Ill. App. 3d 1001, 1021 (2008); *People v. Foules*, 258 Ill. App. 3d 645, 661 (1993). We cannot say that defendant's sentence,

which took into account his expressions of remorse and the well-being of his infant child, was an abuse of discretion.

¶ 19 Defendant argues second that his one-year sentence for resisting exceeds the statutory maximum of 364 days for a Class A misdemeanor (see 730 ILCS 5/5-4.5-55(a) (West 2012)), and he requests that we reduce his sentence to 364 days. The State confesses error. We agree with the parties, and we modify defendant's sentence for resisting to 364 days.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Winnebago County is affirmed as modified. 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).

¶ 21 Affirmed as modified.