2017 IL App (1st) 150211-U

No. 1-15-0211

Order filed April 10, 2017

First Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 12753
	)	
DENARDO BARNES,	)	Honorable
	)	Jorge Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for possession of a controlled substance with intent to deliver affirmed over his contention that the State failed to prove his guilt beyond a reasonable doubt. Defendant's nine-year sentence affirmed where the sentence was within the statutory sentencing range and the trial court considered relevant aggravating and mitigating factors.

¶ 2 Following a bench trial, defendant Denardo Barnes was convicted of possession of a controlled substance with intent to deliver (720 ILCS 570/401(c)(1) (West 2012)) and sentenced to nine years' imprisonment and two years mandatory supervised release (MSR). On appeal, defendant contends that insufficient evidence supported his conviction and that the trial court abused its discretion by imposing an excessive nine-year sentence. For the following reasons, we affirm defendant's conviction and sentence.

¶ 3 Defendant was charged with possession of a controlled substance with intent to deliver and delivery of a controlled substance. At trial, officer Wilfredo Roman testified that on June 13, 2012 at approximately 11 p.m., he was part of a narcotics surveillance team near 804 North Lavergne Avenue in Chicago. The team consisted of himself and officers Roberto Ruiz, Gregory Young, and Calvin Jones. Roman was on foot and the other officers were in a vehicle nearby. The intersection of Lavergne and Chicago Avenue was well-lit and known for narcotics activity. Roman observed defendant standing on the street corner yelling, "blows." The parties stipulated that "blows" is a street term for heroin.

¶ 4 After yelling "blows," Roman observed another man, later identified as Kevin Bland,[1] walk up to defendant. Bland gave defendant money in exchange for a small item that defendant retrieved from his mouth. Roman observed the exchange from across the street, approximately 50 to 60 feet away. However, Roman was unable to see the amount of money or the small item that the two men exchanged. Based on his experience and training, Roman believed the exchange was a narcotics transaction and called his team to give a description of defendant and Bland. Roman observed defendant and Bland walk northbound on Lavergne.

[1] Kevin Bland was arrested with defendant. However, no probable cause was found and he was later released.

¶ 5 Officers Young, Ruiz, and Jones picked Roman up in an unmarked police vehicle. Roman did not lose sight of defendant and Bland after entering the vehicle. After driving to where defendant and Bland were located, the officers exited the vehicle. Roman was seated in the backseat on the driver's side of the car. By the time he exited the vehicle and walked around to defendant and Bland, the other officers had detained the two men. It took approximately two to five seconds for Roman to walk around the vehicle. Roman did not see the initial search of defendant and did not see either defendant or Bland drop anything.

¶ 6 The combined testimony of officers Gregory Young and Calvin Jones established that they were both enforcement officers in a narcotics surveillance team on June 13, 2012 at approximately 11 p.m. Young and Jones were in an unmarked police car with officer Roberto Ruiz near the intersection of Lavergne and Chicago Avenue, a known high narcotics trafficking area. The officers received a radio communication from Roman, who was conducting surveillance on foot. Roman gave a description of two individuals, later identified as defendant and Bland, who were involved in a suspected narcotics transaction. Ruiz, Young, and Jones picked Roman up and drove southbound on Lavergne. The officers all exited the vehicle near where defendant and Bland were walking.

¶ 7 Young testified that as he approached the men for a field interview, he observed defendant spit a plastic bag from his mouth. Young placed defendant in custody and recovered the plastic bag from the ground. The bag contained five ziplock bags with Batman logos, and each contained a tin foil packet with suspect heroin. Young thereafter performed a custodial search of defendant and recovered a cell phone, a wallet, and $426 in cash. He inventoried the suspected narcotics and the other evidence recovered from defendant. Jones approached Bland

and recovered from him a small plastic bag with a Batman logo on it, also containing tin foil and suspect heroin. The bag recovered from Bland was identical to the bags that defendant spit out of his mouth. On cross-examination, Young acknowledged that he did not see Bland drop anything.

¶ 8 Jones testified that he approached Bland to detain him. He observed Bland drop a small item to the ground, which Jones never lost sight of and recovered. The item was a ziplock bag with a Batman logo on it, containing a tin foil packet and suspect heroin. Jones retained the bag until he took it to the police station later to be inventoried.

¶ 9 On cross-examination, Jones acknowledged that he did not see defendant spit anything. Jones further stated that the Batman ziplock bag was common in that neighborhood for advertising heroin.

¶ 10 The parties stipulated that if called, Soretta Patton, a forensic chemist, would testify that she tested the contents of the 5 ziplock bags recovered and inventoried by Young, and they contained 1.1 grams of heroin. Further, the bag recovered and inventoried by Jones, in identical packaging, contained .2 of a gram of heroin.

¶ 11 Defendant did not testify or present any evidence. Following arguments, the court acquitted defendant of the delivery charge but found him guilty of possession of a controlled substance with intent to deliver. The court found that, taken together, the evidence was sufficient to establish that defendant possessed the narcotics and intended to deliver them. In finding defendant guilty, the court noted Roman's testimony regarding the delivery to Bland, and that defendant was yelling "blows" and was in possession of money.

¶ 12 On October 30, 2014, defendant filed a motion for a new trial, arguing, *inter alia*, that he was not proven guilty beyond a reasonable doubt. The court denied his motion and proceeded to

sentencing, noting that defendant was eligible for probation. In aggravation, the State argued that defendant had prior convictions for murder and possession of a controlled substance.

¶ 13 In mitigation, defense counsel argued that defendant had received a college degree while imprisoned for murder. Counsel further noted that defendant was previously employed by Blue Cross but was terminated after a background check revealed his prior murder conviction. Defendant attempted to work as a shoe salesman, but developed a drug addiction, which destroyed his life. Defendant is married and has children.

¶ 14 In allocution, defendant took responsibility for his actions and stated, "Sometimes we make mistakes." He also reiterated his educational background and his struggle with addiction.

¶ 15 Before imposing sentence, the trial court stated that it considered defendant's presentence investigation report (PSI), the financial impact of incarceration, as well as factors in aggravation and mitigation, including defendant's criminal history, and listened to counsels' arguments and defendant's statement in allocution. The court found that probation would be inconsistent with the ends of justice and that it was necessary to protect the public from defendant. Further, the court noted that, "Mr. Barnes states that people make mistakes and that, of course, is true, but Mr. Barnes has made the sort of mistakes in the past that result in people getting murdered." The court thereafter sentenced defendant to 10 years' imprisonment in the Illinois Department of Corrections with 2 years of MSR.

¶ 16 The court then stated the following.

> "I will point out that he was arrested twice while this case was pending on other charges. He was out for most of the time that he was on this case, and twice he was arrested. Of course, he was not convicted on those charges. He was arrested on another drug case and

was arrested on a retail theft also. Of course, he is presumed innocent. Those cases went away, and they are not being considered as anything other than an arrest in the case."

¶ 17 On November 24, 2014, defendant filed a motion to reconsider sentence. He argued that the trial court placed too much emphasis on his prior murder conviction in imposing sentence and not enough weight on his potential for rehabilitation. Following arguments at a hearing on defendant's motion, the trial court noted that the sentence was well within the statutory range of 4 to 15 years but nevertheless reduced defendant's sentence to 9 years' imprisonment with 2 years of MSR. This appeal followed.

¶ 18 On appeal, defendant first challenges the sufficiency of the evidence. He contends that the evidence at trial was insufficient to prove him guilty of possession of a controlled substance with intent to deliver because the officers' testimony was improbable, unconvincing, and contrary to human nature, and the quantity of heroin was consistent with personal use, and not intent to deliver. The State responds that when viewed as a whole, the evidence at trial is sufficient to sustain defendant's conviction.

¶ 19 On a challenge to the sufficiency of the evidence, we inquire " 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (Emphasis omitted.) *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). In so doing, we draw all reasonable inferences in favor of the State (*Davison*, 233 Ill. 2d at 43) and we do not retry the defendant, (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)). The State must prove each element of an offense beyond a reasonable doubt. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224 (2009). It is within the province of the trier of fact "to determine the

credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve any conflicts in the evidence." *Id.* at 228. A defendant's claim that a witness was not credible, standing alone, is insufficient to reverse a conviction. *Id.* We will not overturn a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." *People v. Givens*, 237 Ill. 2d 311, 334 (2010).

¶ 20 To prove possession of a controlled substance with intent to deliver, the State was required to prove beyond a reasonable doubt that defendant: (1) had knowledge of the presence of the narcotics; (2) had immediate possession or control of the narcotics; (3) and intended to deliver the narcotics. 720 ILCS 570/401(c)(1) (West 2012).

¶ 21 Here, defendant's main contention appears to be that the evidence was insufficient to prove intent to deliver beyond a reasonable doubt. Nevertheless, we note that the knowledge and possession elements were proved where the evidence established that defendant had ziplock bags containing heroin in his mouth and spit them out when police officers approached him. See 720 ILCS 570/401(c)(1) (West 2012); see also *People v. Harden*, 2011 IL App (1st) 092309, ¶ 27 (knowledge may be proved if the defendant knew narcotics existed in the place where they were recovered, and constructive possession is established if a defendant was aware of, and exercised control over, the narcotics). Moreover, we find unavailing defendant's assertion that the officers' testimony regarding him spitting the narcotics was incredible and improbable. It is the responsibility of the trier of fact to evaluate witness credibility, (*Siguenza-Brito*, 235 Ill. 2d at 228) and here, the trial court apparently found the officers credible. Further, we find nothing in the record that supports defendant's claim that the officers' testimony was not credible. *Id.* ("A

reviewing court will not reverse a conviction simply because *** the defendant claims that a witness was not credible.").

¶ 22 We therefore turn to whether the evidence was sufficient to show intent to deliver. Direct evidence of intent to deliver is rare. *People v. Bush*, 214 Ill. 2d 318, 324 (2005); *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 16. Thus, intent to deliver is frequently proven by circumstantial evidence. *Bush*, 214 Ill. 2d at 324; *People v. Branch*, 2014 IL App (1st) 120932, ¶ 10. Illinois courts have considered several factors to determine whether the circumstantial evidence supports an inference of intent to deliver, including: (1) whether the quantity of drugs possessed is too large to be reasonably viewed as being for personal consumption; (2) the degree of drug purity; (3) the possession of any weapons; (4) possession and amount of cash; (5) possession of police scanners, beepers or cellular telephones; (6) possession of drug paraphernalia commonly associated with narcotics transactions; and (7) the manner in which the drug is packaged. *People v. Ellison*, 2013 IL App (1st) 101261, ¶ 14. This list of factors is neither exhaustive nor inflexible. *Id.* "[W]hen only a small amount of drugs is found, in order to establish the intent to deliver, the minimum evidence a reviewing court needs to affirm a conviction is that the drugs were packaged for sale, and at least one additional factor tending to show intent to deliver." *People v. Blakney*, 375 Ill. App. 3d 554, 559 (2007).

¶ 23 Defendant argues that the amount of heroin recovered from him was consistent with personal use. Defendant further argues that a single transaction is insufficient to establish an intent to deliver and that when the trial court acquitted defendant of delivery it expressly discounted the evidence of that transaction. We find it unnecessary to discuss whether a single transaction demonstrates intent to deliver or whether we should disregard that transaction

entirely because defendant was acquitted of delivery. We find the remaining evidence sufficient to establish an intent to deliver. The evidence showed that defendant yelled "blows," the street term for heroin, spit out five pre-packaged bags containing 1.01 grams of heroin, and possessed $426 in cash and a cell phone at the time of his arrest. This circumstantial evidence was sufficient to support an inference of intent. *Bush*, 214 Ill. 2d at 324. Accordingly, we find that a rational trier of fact could have found beyond a reasonable doubt that defendant had unlawfully possessed a controlled substance with the intent to deliver it.

¶ 24 Defendant next contends that the trial court abused its discretion by imposing an excessive nine-year sentence based on various improper sentencing considerations. We first address whether defendant's sentence was an abuse of discretion.

¶ 25 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30 (citing *People v. Stacey*, 193 Ill. 2d 203, 209-210 (2000)). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). In determining an appropriate sentence, the trial court considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment." *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Absent some affirmative indication to the contrary, other than the sentence itself, we presume the trial court considered all mitigating evidence before it. *People v. Jones*, 2014 IL App (1st) 120927, ¶55. Because the trial court, having observed the proceedings, is in the best position to weigh the relevant sentencing factors, (*People v. Arze*, 2016 IL App (1st) 131959, ¶121) we do not substitute our judgment for

that of the trial court simply because we would have balanced the appropriate sentencing factors differently (*People v. Alexander*, 239 Ill. 2d 205, 214 (2010)).

¶ 26 Here, defendant was sentenced to 9 years' imprisonment, well within the statutory range of 4 to 15 years. See 730 ILCS 5/5-4.5-30(a) (West 2014)). The trial court stated on the record that, in imposing sentence, it considered defendant's PSI, the financial impact of incarceration, the factors in aggravation and mitigation, defendant's criminal history, as well as arguments from counsel and defendant's statement in allocution. Nothing in the record indicates that the trial court abused its discretion. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38 (A defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors."); see also *Jones*, 2014 IL App (1st) 120927, ¶55. Because his sentences were within the applicable range, the burden is on defendant to establish that the alleged improper sentencing considerations led to a greater sentence. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49. We conclude defendant has not met this burden.

¶ 27 Defendant argues that his sentence was improper because the court overly relied on his prior murder conviction and gave minimum consideration to mitigating factors, including his drug addiction and the financial burden to the State of Illinois. We are unpersuaded by these contentions. First, the trial court could properly consider defendant's prior murder conviction. 730 ILCS 5/5-5-3.2(a)(3) (West 2014) (listing the defendant's history of criminal activity as a factor for sentencing courts to consider in aggravation). Further, given the prior murder conviction and defendant's two additional prior convictions, it was not improper for the court to impose a sentence above the minimum. See, *e.g.*, *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (a defendant's criminal history alone may warrant a sentence substantially above the

minimum). Thus, even if we would have attributed less weight to defendant's prior murder conviction, we do not find that the trial court "overly relied" on it in imposing sentence. See *Alexander*, 239 Ill. 2d at 214.

¶ 28 With regard to defendant's drug addiction, the record reflects that the trial court was aware of his background. The court listened to defendant's allocutory statement, considered the PSI, and knew of defendant's prior drug convictions. More importantly, however, the trial court was not required to accord defendant's addiction the weight he urges. See *People v. Montgomery,* 192 Ill. 2d 642, 674 (2000) ("[T]estimony about a defendant's history of alcohol and drug abuse is not necessarily mitigating. Although a defendant might urge this evidence in mitigation, as an explanation for his misconduct, the sentencer is not required to share the defendant's assessment of the information").

¶ 29 We are similarly unpersuaded by defendant's contention that the trial court failed to consider the financial impact of his incarceration on the State of Illinois. The court is required to consider the financial impact of defendant's incarceration on the State based on the financial impact statement filed by the Department of Corrections with the clerk of the court. 730 ILCS 5/5-4-1(a)(3) (West 2014). However, the court is not obligated to recite and assign a value to every factor that it considers (*People v. Perkins,* 408 Ill. App. 3d 752, 763 (2011)) and, absent evidence to the contrary, we presume the trial court considered the financial impact prior to sentencing defendant (*People v. Acevedo,* 275 Ill. App. 3d 420, 426 (1995)). Here, the trial court explicitly stated that it considered the financial impact of his incarceration prior to imposing defendant's sentence. *Jones,* 2014 IL App (1st) 120927, ¶55.

¶ 30 Finally, in challenging his sentence, defendant asserts that the trial court improperly relied on two arrests while he was out on bond that did not result in conviction. The State responds that defendant forfeited this argument because he failed to raise it during sentencing or in his motion to reconsider sentence. In reply, defendant contends that he filed a motion to reconsider sentence and asks that we review the issue for plain error. See *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010) (noting that a reviewing court may consider a plain-error argument raised for the first time in a defendant's reply brief).

¶ 31 Sentencing issues are forfeited for review unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). Nevertheless, forfeited sentencing issues may be reviewed for plain error. *Powell*, 2012 IL App (1st) 102363, ¶ 7 (citing *Hillier*, 237 Ill. 2d at 545). To obtain relief under the plain error doctrine in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. Before we consider application of the plain error doctrine, we must determine whether any error occurred. *Id.*

¶ 32 "Bare arrests" may not be used to aggravate a sentence. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 55. However, the mere fact that a trial court has knowledge of prior arrests before imposing sentence does not amount to reversible error because the trial court is presumed to have disregarded incompetent evidence. *Id.* To justify reversal, " 'the record must affirmatively disclose that the arrest or charge was considered by the trial court in imposing sentence.' " *Id.* (quoting *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984)). "[T]he question of whether a court

relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d), 111053, ¶ 8. When potential consideration of improper sentencing factors is at issue, "the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). In considering whether reversible error occurred, a reviewing court should make its decision based on the record as a whole, rather than focus on a few words or statements of the trial court. *People v. Miller*, 2014 IL App (2d) 120873, ¶ 37.

¶ 33 After reviewing the record, we find that the trial court did not improperly rely on defendant's prior arrests at sentencing. Although we acknowledge that the trial court, after imposing sentence, noted that defendant was twice arrested during the pendency of the current case, we find no error because we presume the trial court knows the law. *People v. Kliner*, 185 Ill. 3d 81, 174 (1998) ("[W]hen the trial judge is the sentencer, it is presumed that the trial judge based his decision upon competent and reliable evidence."). Additionally, the record as a whole indicates that the court did not consider the prior arrests. *Miller*, 2014 IL App (2d) 120873, ¶ 37. Critically, the court acknowledged the arrests did not result in convictions and that defendant was presumed innocent. Moreover, the court previously stated it considered proper sentencing factors, including the PSI and counsels' arguments in aggravation and mitigation. In light of the record as a whole, we cannot say that the court relied on defendant's prior arrests at sentencing. Because we find no error, there is no plain error. *Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 35 Affirmed.