2017 IL App (1st) 152156-U

No. 1-15-2156

Order filed September 27, 2017

Third Division

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. 13 CR 6284
	)	
OSCAR MARMOLEJO,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Cobbs and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Sentence of 15 years' imprisonment for residential burglary with mandatory Class X sentencing not excessive. Fines and fees order corrected.

¶ 2 Following a 2015 bench trial, defendant Oscar Marmolejo was convicted of residential burglary and sentenced as a mandatory Class X offender to 15 years' imprisonment. On appeal, he contends that his sentence is excessive and that his fines and fees order should be corrected. We correct the order assessing fines and fees, and otherwise affirm the judgment.

¶ 3 In January 2014, the parties and the court held a plea conference at defendant's behest. After the conference, the court spread of record that it "recommended 12 years." When defendant went to trial in June 2015, a different judge was presiding.

¶ 4 Briefly stated, the evidence at trial was that defendant broke into the home of Nancy Su on March 1, 2013. Su came home that morning to find a window screen broken open and defendant exiting her bedroom. She saw his face and clothing before he fled, and she called the police. She learned that some of her property, including two computers and some money, was missing. The police found defendant and some of Su's property within a half-hour of the burglary, and she identified him at that time as the burglar. The police returned some of her missing property after defendant's arrest. At the police station, defendant gave a statement that "he was sorry" but "they were Chinese. They have money, they live good" while "it was hard for him out there. It's hard for him to get a job." The court found defendant guilty of residential burglary. 720 ILCS 5/19-3 (West 2012).

¶ 5 The presentencing investigation report (PSI) showed that defendant, born in 1972, had multiple prior convictions. He was sentenced in 2009 for residential burglary to nine years in prison, in 2005 for burglary to 30 days in jail, in 2004 for criminal trespass to residence with one year of probation, in 1998 for possession of burglary tools to one year in prison, and in 1995 for burglary to three years in prison. Defendant also had convictions for armed robbery and aggravated battery with seven-year and three-year prison sentences in 1991, aggravated battery with a five-year prison sentence in 1995, a drug offense with a two-year prison sentence in 2007, battery with a nine-day jail sentence in 2006, and a drug offense with a three-day jail sentence in 2004.

¶ 6 The PSI also stated that defendant was raised by his grandparents for his first 11 years and his parents thereafter, and had a good childhood with no abuse. He claimed a good relationship with both parents and a close relationship with his four siblings. He completed grade school and left high school in the second year "when he began to have contact with the criminal justice system." He was a special-education student due to a learning disability, and got along with his teachers and fellow students. Defendant professed his intent to seek his GED. He stated that he is skilled as a general laborer and pipe-fitter, and professed his intent to learn and practice the trade of bricklaying or carpentry. He worked "in the 1990s" for six months as a pipe-cutter until the employer closed. Defendant also worked in 2000 in a meatpacking plant for two months until he was laid-off and as a laborer for four months until his arrest on a prior offense. He was in a streetgang from when he was 13 until he was 35, but denied holding any rank in the gang. He claimed good physical health except for low blood pressure being treated with medication. Defendant saw mental health professionals since age 27 and was diagnosed with bipolar disorder and depression, treated with medication while in jail. He drank alcohol since age 14, used PCP daily until age 27, and experimented with marijuana and cocaine. When asked about the instant offense, he replied "I feel sad for the victims, but I did not commit this crime."

¶ 7 At the sentencing hearing, the State argued that defendant was a Class X offender based on his record and was on parole for his prior residential burglary conviction when he committed this offense. Defense counsel argued that defendant was neither violent or threatening during this offense nor a dangerous person in general, and asked for leniency within the Class X range. Defendant addressed the court, apologizing that "the victims had to go through – that it happened to them" but maintaining that he did not commit the offense.

¶ 8 The court stated that it considered PSI and trial evidence in light of the statutory aggravating and mitigating factors and nonstatutory mitigating factors, and evaluated defendant's "chances of rehabilitation." The court then sentenced defendant to 15 years' imprisonment with fines and fees, adding that he was a mandatory Class X offender.

¶ 9 Defendant filed a motion to reconsider his sentence, arguing that his 15-year prison sentence was excessive in light of his background and participation in the offense. Defendant claimed that the court considered in aggravation a matter implicit to the offense and penalized him for exercising his right to a trial. The motion did not challenge his fines or fees. The motion was denied without oral arguments or further findings by the court.

¶ 10 On appeal, defendant first contends that his 15-year prison sentence is excessive. In particular, he claims that the court penalized him for exercising his right to a trial and failed to explain its reasoning in imposing the sentence.

¶ 11 Residential burglary is a Class 1 felony. 720 ILCS 5/19-3(b) (West 2012). When a defendant over 21 years old is convicted of a Class 1 or 2 felony, having two prior and separate felony convictions of Class 2 or greater, he or she must be sentenced as a Class X offender with a range of 6 to 30 years' imprisonment. 730 ILCS 5/5-4.5-25(a), -95(b) (West 2012). A sentence within statutory limits is reviewed for abuse of discretion, and we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. The trial court's broad discretion means that we cannot substitute our judgment merely because we would weigh the sentencing factors differently. *People v. Wilson*, 2016 IL App (1st) 141063, ¶¶ 10-11 (citing *People v. Alexander*, 239 Ill. 2d 205, 212-213 (2010)). The trial court has a superior opportunity

to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, 2011 IL 111382, ¶ 36.

¶ 12 In imposing sentence, the trial court must consider both the seriousness of the offense and the defendant's rehabilitative potential. *Wilson*, 2016 IL App (1st) 141063, ¶ 11 (citing Ill. Const. 1970, art. I, § 11). While the court may not disregard mitigating evidence, it may determine the weight of such evidence. *People v. Brown*, 2017 IL App (1st) 142877, ¶ 63. A defendant's criminal history alone may warrant a sentence significantly above the minimum, especially where it shows that he or she has not been deterred by more lenient prior sentences. *Wilson*, 2016 IL App (1st) 141063, ¶ 13. The most important sentencing factor is the seriousness of the offense, and the court is not required to give greater weight to mitigating factors than to the severity of the offense. *Brown*, 2017 IL App (1st) 142877, ¶ 63; *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 17 (citing *Alexander*, 239 Ill. 2d at 214); *Wilson*, 2016 IL App (1st) 141063, ¶ 11.

¶ 13 The Code of Corrections provides that the "sentencing judge in each felony conviction shall set forth his or her reasons for imposing the particular sentence entered in the case." 730 ILCS 5/5-4.5-50(c) (West 2012). However, our supreme court has held that this provision is permissive rather than mandatory despite the "shall" therein.[1] *People v. Davis*, 93 Ill. 2d 155, 162 (1982). Since *Davis*, we have held that the trial court may impose sentence without stating its reasoning or reciting how the factors in aggravation and mitigation applied in a particular case. See, e.g., *Bryant*, 2016 IL App (1st) 140421, ¶¶ 25-35 (Hyman, J. specially concurring) (exhorting trial court to make sentencing findings while acknowledging, based on *Davis* and various appellate cases, that a lack of such findings is not reversible error). The court does not

[1] More precisely, *Davis* analyzed an earlier and substantively identical version of this provision, Ill. Rev. Stat. 1979, ch. 38, par. 1005-8-1(b).

need to expressly assign a weight to each aggravating and mitigating factor or otherwise outline its reasoning for sentencing. *Bryant*, 2016 IL App (1st) 140421, ¶ 16; *Wilson*, 2016 IL App (1st) 141063, ¶ 11. We presume that the court considered all mitigating factors on the record, and did not consider any inappropriate aggravating factors, absent an affirmative indication to the contrary other than the sentence itself. *Brown*, 2017 IL App (1st) 142877, ¶ 64; *Bryant*, 2016 IL App (1st) 140421, ¶ 16; *Wilson*, 2016 IL App (1st) 141063, ¶ 11.

¶ 14 While the trial court may not punish a defendant for exercising his or her right to a trial by imposing a longer sentence than if he or she had pled guilty, we find no error unless the record clearly establishes that the court imposed the longer sentence at least in part as punishment for demanding a trial. *People v. Means*, 2017 IL App (1st) 142613, ¶ 21.

¶ 15 Here, the court stated at sentencing that it reviewed the PSI as well as the trial evidence, and that it considered the statutory mitigating factors and defendant's rehabilitative potential. We must presume in the absence of an affirmative remark by the court to the contrary that it gave due consideration to all mitigating factors in the PSI, including those defendant argued below and argues on appeal, and that punishment for defendant electing a trial did not motivate the court's sentence. Regarding the latter, we note again that two different judges presided over defendant's 2014 plea conference with its 12-year recommendation and his 2015 trial and resulting 15-year sentence. We find ample grounds for the court to impose a sentence firmly in the middle of the applicable 6 to 30 year range. Defendant's long criminal history includes multiple burglaries and related offenses and demonstrates that more lenient sentences in the past have not deterred him. Notably, he did not challenge below or here the State's argument that he was on mandatory supervised release for his 2009 residential burglary conviction when he committed this offense, a most palpable demonstration of his recidivist tendencies. While

defendant's instant offense was indeed not marred by violence or the threat thereof, as he has emphasized below and here, his record is not so pristine as it includes armed robbery, aggravated battery, and battery. In sum, we find that the court did not abuse its considerable discretion when it imposed a 15-year sentence here.

¶ 16 Defendant also contends that his fines and fees order must be corrected to vacate an erroneous fee and award presentencing detention credit for his fines. The State agrees that the vacatur is appropriate, as is credit for some but not all of the charges claimed by defendant.

¶ 17 Before addressing the merits, we note that defendant did not raise these issues in the trial court and thus forfeited them. However, the State does not argue defendant's forfeiture and has thus forfeited a forfeiture challenge. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 16. While it is preferable for the trial court to resolve such issues, we shall address them.

¶ 18 We agree with the parties that the $5 electronic citation fee must be vacated because defendant's offense is a felony but the fee applies only in traffic, misdemeanor, ordinance and conservation cases. 705 ILCS 105/27.3e (West 2012). We so order.

¶ 19 Defendant's 853 days of presentencing custody entitle him to up to $4265 credit against his fines. 725 ILCS 5/110-14(a) (West 2012) ($5 credit against fines for each day of presentencing custody). The parties correctly agree that defendant is due credit on $65 of his charges that are fines: $50 for the court system and $15 for State Police operations. 55 ILCS 5/5-1101(c); 705 ILCS 105/27.3a(1.5) (West 2012). We so order.

¶ 20 The parties dispute whether various other charges are fines or fees. We have held that the $190 charge for filing a felony complaint with the circuit court clerk (705 ILCS 105/27.2a(w)(1)(A) (West 2012)), the $25 court services fee for the sheriff (55 ILCS 5/5-1103 (West 2012)), and the charges of $15 each for the circuit court clerk for automation and

document storage (705 ILCS 105/27.3a(1), 27.3c (West 2012)) are all fees. *People v. Brown*, 2017 IL App (1st) 150146, ¶ 39. As the same statutes authorize the same fees in civil cases, where they are clearly not fines, we see no reason not to follow *Brown*. We have also held that the records automation charges of $2 each for the Public Defender and State's Attorney (55 ILCS 5/3-4012, 4-2002.1(c) (West 2012)) are fees, and in particular the Public Defender charge is a fee for a defendant who was represented by the Public Defender. *Brown*, 2017 IL App (1st) 150146, ¶ 38; *Murphy*, 2017 IL App (1st) 142092, ¶¶ 19-21; but see *People v. Camacho*, 2016 IL App (1st) 140604, ¶¶ 47-56. Defendant was represented by the Public Defender, and we see no reason not to follow *Brown* and *Murphy*.

¶ 21 In sum, we direct the clerk of the circuit court to correct the fines and fees order to reflect vacatur of the $5 electronic citation fee, and $65 credit. We affirm the judgment of the circuit court in all other respects.

¶ 22 Affirmed in part, vacated in part, and order corrected.