2018 IL App (1st) 152704-U

No. 1-15-2704

Order filed January 29, 2018

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 18633
	)	
ROBERT TRUELL,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's 20-year sentence for unlawful use or possession of a weapon by a felon was not excessive, as the record establishes that the trial court considered the circumstances of the case and all appropriate factors; (2) defendant's sentences for aggravated unlawful use of a weapon vacated where the convictions were based on the same physical act as his conviction for unlawful use or possession of a weapon by a felon.

¶ 2 Following a bench trial, defendant Robert Truell was convicted of unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2012)) and four counts

of aggravated unlawful use of a weapon (AUUW) (720 ILCS 5/24-1.6(a)(1), (2) (West 2012)) and sentenced to concurrent terms of 20 years' imprisonment on each count. On appeal, defendant contends that (1) his sentence is excessive and disproportionate to the offense, and (2) his convictions for AUUW should be vacated as they violate the one-act, one-crime rule and two of the convictions violate the second amendment. For the following reasons, we vacate defendant's AUUW sentences and otherwise affirm the judgment of the trial court.

¶ 3 Defendant was charged with one count of armed habitual criminal, one count of UUWF and four counts of AUUW. At trial, Chicago police officers Shawn Berry and Paul Gentile testified that, on July 26, 2012, at approximately 1:48 a.m., they responded to a call of a person with a gun in the area of 6900 South Morgan Street, described as "a male black with a black t-shirt and tan shorts at 69th and Morgan." As they were approaching the area in their vehicle, they observed a man matching the description running toward them, about one half of a block away. The man was later identified as defendant.

¶ 4 The officers first chased defendant in their squad car, then Berry got out and chased him on foot. Defendant ran into a vacant lot and Berry observed him remove a handgun from his right side and throw it to the ground. Berry immediately recovered the handgun and continued chasing after defendant. Berry lost sight of defendant as he approached an alleyway. About five minutes later, Gentile found defendant in a vacant lot and detained him. The recovered handgun was a two-tone Smith & Wesson .380 that was uncased, loaded with seven live rounds, and immediately accessible. Defendant was placed into custody and the handgun was inventoried.

¶ 5 The State admitted a certification form from the Illinois State Police certifying that, on the date of the offense, defendant had not been issued a firearm owner's identification (FOID)

card. The parties stipulated to certified copies of defendant's previous convictions for armed robbery in 06 CR 1337101 and 06 CR 1337803. The court denied defendant's motion for a directed finding.

¶ 6 Michael Truell testified that, on July 26, 2012, at approximately 1:00 a.m., he was with his cousin, defendant. They were walking to the store from another cousin's house located at 69th and Carpenter Streets. Truell stood at the end of an alleyway while defendant went into the alley to use the bathroom in the bushes. The police "pulled up with their guns drawn out" on Truell. A female officer put him into a police car while a male officer proceeded down the alley. The officers "eventually released" Truell and he then saw defendant in the back of a police car. Truell testified that he never saw defendant with a gun or saw him run from police that night.

¶ 7 The parties stipulated that defense Exhibit No. 7 was a recording of the call that "OEMC" dispatcher Michael Tracy dispatched on July 26, 2012, at approximately 1:30 a.m.[1]

¶ 8 The court found defendant guilty of UUWF and four counts of AUUW and not guilty of armed habitual criminal. The court denied defendant's motion for a new trial.

¶ 9 The case proceeded to sentencing. The presentence investigation report (PSI) showed that defendant was previously convicted for two cases of armed robbery with a firearm (2002, 2009), for which he served six and nine years' in prison. The PSI also showed that defendant had strong family support and he noted that his family had not been adversely affected by his current arrest. The State argued in aggravation that despite defendant's four prior felony convictions and imprisonment for armed robbery with a firearm, he was found with a loaded gun in this case. It

[1] The recording was played in open court, but not transcribed into the record.

asserted that defendant "has not reformed his life in any way, shape, or form and clearly thinks that the laws don't apply to him because he keeps arming himself with guns."

¶ 10 The State argued that there were no mitigating factors, as defendant did not commit this crime because he was threatened by someone or any sort of serious harm. There were no substantial grounds for justifying or excusing his conduct. The State also pointed out that defendant was identified as a member of the "Black Gangster" street gang. It noted that his PSI did not note any alcohol or drug abuse that defendant needed to be treated for.

¶ 11 The State asked the court to impose a sentence that would protect the public and deter defendant and others from committing similar crimes. The State requested a maximum sentence of 30 years' imprisonment. It noted that defendant's prior history made him a Class X offender and if he had been found guilty of armed habitual criminal, he would have been "natural life mandatory."

¶ 12 In mitigation, defense counsel argued that defendant was being sentenced for only a possessory offense and there were no allegations that he brandished the weapon or pointed it at anyone. Counsel noted that defendant was 38 years old at sentencing and had been working as a home healthcare provider. He had obtained his GED and held other jobs prior to that. Defendant was 1 of 11 children and was raised by his mother. Counsel argued that defendant had very strong ties with his large family, and helped support them. Counsel also stated defendant maintained a close relationship with his adult children and grandchildren, many of whom wrote letters on his behalf.

¶ 13 Counsel indicated that defendant was currently under doctor's care for hypertension and asthma-related issues. Counsel also addressed defendant's alleged gang affiliation, indicating

that defendant denied being involved in any street gangs and, even if he was, it would have been "many years" ago. Counsel requested that defendant receive a sentence "closer to the minimum."

¶ 14 In allocution, defendant stated that he was a good person who made sure he could provide for his children, to ensure they did not go down the wrong path. He aspired to be a good role model for his children and grandchildren and expressed a strong desire to be involved in their lives. He requested the minimum sentence.

¶ 15 The court sentenced defendant to concurrent 20-year terms of imprisonment on the one count of UUWF and four counts of AUUW.[2] In imposing sentence, the court stated that defendant's PSI indicated that he did not believe his time away adversely affected his family. But, it noted, each of defendant's prior periods of incarceration had to have negatively impacted his family, as shown by the letters it had received from his family members. The court also noted the negative effect on defendant's own life, stating "at 40, this can't be getting any easier," and yet he chose to consistently make similar decisions. The court noted that defendant had a prior reckless conduct case, which was originally a domestic battery case, which made the court unsure of defendant's ability "to change." It explained that it would not impose the maximum sentence of 30 years, but would not impose the minimum sentence either because defendant failed to understand that, as a convicted felon, he "can never" possess a gun. The court denied defendant's motion to reconsider sentence. This appeal followed.

[2] The mittimus lists all five convictions with a 20-year sentence for each. It does not reflect that the sentences would be served concurrently. The trial court did not specify on the record that the terms would be concurrent. However, in pronouncing sentence, it told defendant "it is on Count 2 through 6, *** it is a finding of guilty. I'm sentencing you to 20 years Illinois Department of Corrections, three years mandatory supervised release." As the court sentenced defendant to only a single term, the terms are necessarily concurrent.

¶ 16 On appeal, defendant first contends that his 20-year sentence is excessive and disproportionate to the offense, which involved no violence and resulted in no injuries, and where he had a GED, support from his family, and was gainfully employed. Defendant requests that we reduce his sentence to "no more than 14.5 years."

¶ 17 A trial court's sentencing decision is reviewed under an abuse of discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A sentence is considered to be an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* The trial court has broad discretionary powers in imposing a sentence, and its sentencing decisions are entitled to great deference because the trial judge, having observed the defendant and the proceedings, is in a much better position to consider factors such as the defendant's credibility, demeanor, moral character, mentality, social environment, habits, and age. *Id*. at 212-13.

¶ 18 A sentence that falls within the statutory range is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Defendant was convicted of a non-probational Class 2 felony UUWF based on a prior forcible felony conviction, with a sentencing range of 3 to 14 years, followed by 2 years of mandatory supervised release (MSR). 720 ILCS 5/24-1.1(e) (West 2012); 730 ILCS 5/5-5-3(c)(2)(F) (West 2012) (Class 2 non-probational offenses); 720 ILCS 5/2-8 (West 2012) (defining "forcible felony).[3] However, defendant's background made him a Class X offender, subject to a sentencing range of 6 to 30 years for each offense. 730 ILCS 5/5-4.5-95(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Thus, the 20-year prison term is presumed to

[3] Defendant was also found guilty of four counts of AUUW. Given our conclusion that the sentences on the AUUW convictions should be vacated (see infra ¶ 27), we address only the sentence on the UUWF conviction.

be proper, as it falls well within the statutory guidelines for a Class X felony. *Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 19 Nevertheless, defendant argues that the seriousness of the offense, which he asserts was nonviolent and resulted in no injuries, does not support a 20-year sentence. A sentence should reflect both the "seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Jones*, 2015 IL App (1st) 142597, ¶ 38. However, the seriousness of an offense, and not mitigating evidence, is the most important factor in sentencing. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. The trial court is presumed to consider "all relevant factors and any mitigation evidence presented" (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but "has no obligation to recite and assign value to each factor" (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Rather, a defendant "must make an affirmative showing the sentencing court did not consider the relevant factors" where, as here, it is essentially argued that the court failed to take factors into consideration. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 20 Defendant cannot make such a showing. The trial court heard the evidence at trial, including the circumstances surrounding defendant's possession of a loaded handgun and, therefore, knew the offense was nonviolent. See *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011) ("[t]he trial judge heard the evidence adduced at trial and is presumed to know violence was not involved in this case"). But, it also knew from defendant's criminal history presented at the sentencing hearing that this was not defendant's first felony conviction involving the possession of a firearm. Rather, defendant was previously convicted of and served prison terms on two cases

of armed robbery with a firearm. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) ("criminal history alone" may "warrant sentences substantially above the minimum").

¶ 21 Defendant argues that the court gave "controlling weight" to his prior convictions and did not afford the proper weight to his family support, education, employment, and the "fact that [his] term is more than double his previous longest period of incarceration." The court heard testimony and arguments regarding these factors and defendant's PSI set forth this mitigating evidence in detail. The trial court is presumed to have considered the mitigating evidence contained in the record. *People v. Anderson*, 325 Ill. App. 3d 624, 637 (2001). Further, the court specifically noted defendant's age and the impact of his conduct on his family, as reflected in letters from his family, thus demonstrating it considered this mitigating evidence. Consequently, we cannot say the court ignored or overlooked the factors in mitigation defendant now raises on appeal. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 20 (presuming that the trial court considered mitigating evidence presented, including factor mentioned in the PSI).

¶ 22 When the court considered defendant's criminal history of felony convictions involving a firearm, it expressly found that defendant failed to understand that, as a convicted felon, he can never possess a gun. The court noted it was unsure of defendant's ability to change. Despite receiving more lenient prison sentences for his prior convictions, defendant continued to reoffend. The court did not abuse its discretion in therefore imposing a sentence in the approximate middle of the sentencing range, given defendant was clearly "not deterred by previous, more lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13.

¶ 23 Defendant having failed to affirmatively show the trial court failed to adequately consider the mitigating factors in sentencing, we will not substitute our judgment by reweighing them on

review. *Jones*, 2015 IL App (1st) 142597, ¶ 40 (declining to reweigh factors considered at sentencing). Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to 20 years' imprisonment, a sentence well within the statutory range.

¶ 24 Defendant next argues, and the State concedes, that all of his convictions for AUUW should be vacated under the one-act, one-crime rule. Defendant did not raise his one-act, one-crime challenge in the trial court and, therefore, forfeiture applies. *People v. Harvey*, 211 Ill. 2d 368, 388-89 (2004). However, one-act, one-crime violations are subject to review under the second prong of plain error. *Id*. at 389. Therefore, if we find a one-act, one-crime error occurred at trial, the plain error exception to the forfeiture rule applies. *In re Samantha V.*, 234 Ill. 2d 359, 378-79 (2009). A conviction challenged under the one-act, one-crime rule presents a question of law, which we review *de novo*. *People v. Almond*, 2015 IL 113817, ¶ 47. We find the one-act, one-crime rule was violated in this case and thus find plain error.

¶ 25 Under the one-act, one-crime rule, a defendant may not be convicted of multiple offenses based on the same physical act. *People v. West*, 2017 IL (1st) 143632, ¶ 24. Accordingly, where two convictions arise from the same physical act, the sentence should be imposed on the more serious offense, and the less serious offense vacated. *Id.* As the State correctly concedes, defendant's convictions, as charged in this case, are all clearly premised on the same physical act of possessing the handgun. They therefore violate the one-act, one-crime rule and defendant should be sentenced on only the most serious offense. *Id.* ¶¶ 24-25.

¶ 26 To determine which offense is the most serious, we look to the intent of the legislature as expressed in the plain language of the statutes involved. *In re Samantha V.*, 234 Ill. 2d at 379.

"[C]ommon sense dictates that the legislature would prescribe greater punishment for the offense it deems the more serious." *Id.*

¶ 27 Here, defendant was convicted of a non-probational Class 2 felony UUWF based on a prior forcible felony conviction, with a sentencing range of 3 to 14 years, followed by 2 years of MSR. 720 ILCS 5/24-1.1(e) (West 2012); 730 ILCS 5/5-5-3(c)(2)(F) (West 2012); 720 ILCS 5/2-8 (West 2012). He was also convicted of four counts of AUUW, which are non-probational Class 2 felony offenses based on defendant's prior felony convictions with a sentencing range of 3 to 7 years, followed by 2 years of MSR. 720 ILCS 5/24-1.6(d)(3) (West 2012). Given that the maximum penalty for UUWF is double that for AUUW, UUWF is the more serious offense. Accordingly, we vacate the sentences for the AUUW convictions.

¶ 28 Defendant asserts, and the State disagrees, that we should remand for resentencing on the UUWF conviction. We agree with the State. As there is nothing in the record to demonstrate that the four AUUW convictions had any effect on defendant's UUWF sentence, we find it unnecessary to remand for resentencing. See *People v. James*, 2017 IL App (1st) 143036, ¶ 59. Given these determinations, we need not address defendant's remaining argument.

¶ 29 For the foregoing reasons, we vacate defendant's four sentences for AUUW and affirm the trial court's judgment in all other respects.

¶ 30 Affirmed in part and vacated in part.