2018 IL App (1st) 153036-U

No. 1-15-3036

Order filed March 19, 2018

First Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 14548
	)	
VERSIE GILMORE,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Simon concurred in the judgment.
Justice Mikva dissented in part.

ORDER

¶ 1 *Held*: Defendant's sentence is affirmed where it was proportionate to the crime committed and he was not punished for invoking his right to trial; defendant's *mittimus* is corrected to reflect 1139 days of pre-sentence credit.

¶ 2 Following a bench trial, defendant Versie Gilmore was found guilty of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and burglary (720 ILCS 5/19-1(a) (West 2012)). The court sentenced defendant to 28 years' imprisonment for the armed robbery plus an

additional mandatory 15 years for a firearm enhancement. Defendant was credited with 1039 days of pre-sentence incarceration credit. On appeal, defendant contends that his sentence is excessive and his amount of pre-sentence credit was miscalculated. We affirm defendant's sentence, and order the clerk of the circuit court to correct his *mittimus* to reflect 1139 days of pre-sentence custody credit.

¶ 3 Defendant and codefendant James Bennie were charged with armed robbery with a firearm of Andrea Humphrey and the burglary of her vehicle. Bennie was also charged with armed violence, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. In August 2013, Bennie pleaded guilty to armed robbery with a firearm in exchange for a 26-year sentence. Defendant elected a bench trial after which the trial court found him guilty of armed robbery with a firearm and burglary, and sentenced him to 43 years in prison. Defendant does not challenge the sufficiency of the evidence to sustain his conviction, so we do not discuss in detail the evidence presented at trial.

¶ 4 At trial, Andrea Humphrey testified that, at 4:00 a.m. on July 19, 2012, she made a purchase at a store on Central Park Avenue and Roosevelt Road. As she returned to her car, she heard someone say "Don't move bitch." She turned around and saw a man, later identified as co-defendant Bennie, pointing a silver gun at her. Humphrey stepped out of her sandals and started running eastbound down Roosevelt Road. She ran in a zig-zag pattern because she feared being shot. She heard the gunman yell out, "catch that bitch." She turned around to see if someone was chasing her and saw a man, identified in court as defendant, chasing her. He kept chasing her and "taunting" her, continuously yelling "don't run from me bitch, stop running from me."

¶ 5 Humphrey made it to the intersection of St. Louis Avenue and Roosevelt Road, where vehicles started stopping because they saw her running. Defendant veered off and ran through a lot south of her location and went back west. Humphrey testified that he was wearing a purple shirt. Police officers assisted Humphrey and brought her back to her car, where she saw her purse, digital camera, and four cell phones were missing.

¶ 6 When police brought Bennie back to the scene within 5 to 10 minutes of the robbery, Humphrey identified him as the man holding the gun. Fifteen minutes after the robbery, police brought defendant back to the scene. He was wearing the same purple shirt seen by Humphrey earlier, and she identified him as the man who chased her. Police subsequently returned Humphrey's purse, camera, and two of her phones. In court, Humphrey identified a photograph of Bennie as the gunman.

¶ 7 Shaquille Latimer testified that he was working at the store Humphrey visited on the night of the incident. After Humphrey purchased soda, Latimer saw her walk to her car and a man approach her from behind with what looked like a gun. He saw Humphrey run off and the man go into her car after she ran. When Latimer went outside the store, the man was walking towards him carrying a purse or bag. The man had his hands in his pocket and told Latimer, "I wouldn't do that if I was you. Back up, back up." Latimer saw Humphrey running with a man chasing her, a few feet behind her. The man with the gun pointed it at Latimer and then ran towards Central Park. Latimer identified the gunman when police brought him back to the scene, but could not identify the man chasing Humphrey because he could not see his face. Shown a photograph of Bennie, Latimer identified him in court as the gunman.

¶ 8 Chicago police officer Lisa Melendez testified that she responded to a robbery-in-progress call on July 19, 2012, with her partner Officer Caballero. On South Menard Avenue, she saw a man with what appeared to be a bag in his arm. She saw the man throw the bag and a handgun to the ground about two blocks from the scene of robbery. She arrested the man, who she identified as Bennie, and recovered both items. The gun was loaded with two live rounds. Melendez brought Bennie to the scene of the robbery, where the victim was located. She then continued touring the area for the second offender, who had been described as a man in a purple shirt. She stopped a man matching the description, identified in court as defendant, and placed him in custody.

¶ 9 After Melendez's testimony, the State rested. Defense counsel filed a motion for directed finding, which the court denied. A police officer and a detective testified that, when they interviewed Humphrey, she appeared to have been drinking but was not intoxicated. Defendant rested.

¶ 10 The trial court found that the State proved beyond a reasonable doubt that defendant was guilty of armed robbery while armed with a firearm and burglary. Defendant filed a motion for a new trial, which was denied. The court denied the State's petition to sentence defendant to natural life as a habitual criminal and proceeded to sentencing.

¶ 11 The presentence investigation report (PSI) stated that defendant was 60 years old when sentenced. He had a good childhood, was expelled from high school for fighting, but obtained his GED while incarcerated. Prior to being arrested, he was employed by the Put Illinois Back to Work Program. He denied having any substance abuse problems.

¶ 12 The PSI also listed defendant's lengthy criminal record. Defendant had previously been convicted of: not having a State identification (1971 – 1 year probation); battery and theft (1972 – 6 months Cook County Department of Corrections); theft (1973 – 1 year probation); rape and armed robbery (1974 – 15 years Illinois Department of Corrections (IDOC)); armed violence (1981 – 8 years IDOC); burglary twice (1986 – 4 years IDOC; 1989 – 7 years IDOC); and armed robbery and unlawful use of a firearm by a felon (1996 – 30 years and 6 years IDOC, respectively).

¶ 13 The State requested the maximum sentence. In aggravation, it argued that defendant had chased Humphrey while she was fleeing from a man armed with a gun. Defendant was accountable for his codefendant's possession of the firearm and, thus, a mandatory firearm enhancement raised the statutory sentencing range from 6 to 30 years' to 21 to 45 years' imprisonment. The State argued that defendant had been convicted of voluntary manslaughter, rape, armed robbery, and two burglaries in the past 40 years. He had been out of custody for only a limited time over the past 40 years because, when released, he committed more violent crimes.

¶ 14 In mitigation, defense counsel argued that defendant was 61 years old, had a long-term relationship, and had used his time effectively while incarcerated by obtaining his high school diploma. Counsel argued that defendant did not possess a firearm during the offense and his only action was to chase Humphrey, "not very effectively," after the robbery had been committed. Defense counsel requested the minimum sentence.

¶ 15 The trial court sentenced defendant to 43 years' imprisonment. It told defendant, "it's frankly a troubling evaluation of life that you have spent most of it in custody, and upon your release, you just pick something new to do. *** [Y]ou truly are a danger to yourself and others."

Stating it had considered the factors in aggravation and mitigation and the PSI, the court sentenced defendant to 28 years in the IDOC plus the 15-year mandatory add-on for using a firearm. Defendant filed a motion to reconsider sentence, which the court denied, then filed a notice of appeal.

¶ 16 On appeal, defendant contends that his 43-year sentence is excessive because of the limited harm suffered by the victim and because his sentence was harsher than the 26-year sentence Bennie, his "more culpable" codefendant, received on his guilty plea. Defendant claims he was improperly punished for exercising his constitutional right to trial.

¶ 17 As an initial matter, the State claims defendant has forfeited this issue by not objecting to his sentence at his sentencing hearing. Generally, to preserve a sentencing issue for review, a defendant must object at the sentencing hearing and in a postsentencing motion. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). However, where the trial court had an opportunity to review the same essential claim that is later raised on appeal, there is no forfeiture. *People v. Heider*, 231 Ill. 2d 1, 18 (2008). Defendant's motion to reconsider sentence set forth essentially the same arguments that are brought on appeal, namely that the sentence is excessive in light of defendant's background and his participation in the offense, the court improperly considered matters in aggravation, and he was improperly penalized for invoking his right to trial. Therefore, defendant's arguments are not forfeited, and we will review his sentence.

¶ 18 The trial court has broad discretion in imposing an appropriate sentence, and a sentence falling within the statutory range will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the

nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). When balancing the retributive and rehabilitative aspects of a sentence, a court must consider all factors in aggravation and mitigation including, *inter alia*, defendant's age, criminal history, character, education, and environment, as well as the nature and circumstances of the crime and the defendant's actions in the commission of that crime. *People v. Raymond*, 404 Ill. App. 3d 1028, 1069 (2010). The trial court is not required to explain the value it assigned to each factor in mitigation and aggravation; rather, it is presumed the trial court properly considered all relevant factors and mitigating evidence presented and it is the defendant's burden to show otherwise. *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (2010).

¶ 19 We find the trial court did not abuse its discretion in imposing the 43-year sentence. Defendant was convicted of armed robbery with a firearm, a Class X felony for which a mandatory 15-year firearm enhancement increases the sentencing range from 6 to 30 years' to 21 to 45 years' imprisonment. 720 ILCS 5/18-2(a)(2), (b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). Defendant's 43-year sentence falls within this statutory range, and we therefore presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 20 Nevertheless, defendant argues the 43-year sentence is excessive compared to the "limited harm suffered by the victim," where she suffered no physical injury and her property was returned.

¶ 21 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.

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 a factor into consideration. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant fails to make that affirmative showing here.

¶ 22 As defendant points out, the first statutory aggravating factor set forth in the Code of Corrections is whether "the defendant's conduct caused or threatened serious harm." 730 ILCS 5/5-5-3.2(a)(1) (West 2012). He argues that, because neither his nor his codefendant's conduct caused Humphrey serious harm, a minimum sentence was warranted. We disagree with defendant's characterization of the offense, as his chasing after a woman who is fleeing from his gun-wielding accomplice could certainly be considered a threat of serious harm. Humphrey escaped serious harm because she managed to escape, not because of any beneficent conduct by defendant.

¶ 23 Further, the record shows the trial court considered all relevant factors in aggravation and mitigation. It specifically stated that it considered these factors and the information in the PSI. The court was aware of the circumstances of the offense and defendant's role therein from the evidence presented at trial. It heard defense counsel's argument that a minimum sentence was warranted because defendant's only participation in the offense was "to chase after, not very effectively, the complaining witness in this case after the robbery had been completed." Therefore, as the mitigating evidence regarding the seriousness of the offense was presented to the trial court, we presume the court considered it. See *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Defendant is asking this court to improperly reweigh the sentencing factors already considered by the trial court, which we will not do. *People v. Coleman*, 166 Ill. 2d 247, 262

(1995) (it is not the duty of a reviewing court to reweigh the mitigating and aggravating factors involved in sentencing).

¶ 24 Moreover, the trial court made clear that it found the near maximum sentence warranted by defendant's pattern of recidivism, finding him to be "a danger *** to others." Defendant's lengthy history of felony convictions and incarceration alone may warrant a sentence "substantially above the minimum." *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). In sum, defendant has failed to affirmatively show that the trial court did not adequately consider the mitigating factors in sentencing and we will not substitute our judgment for that of the trial court by reweighing them on review. See *Jones*, 2015 IL App (1st) 142597, ¶ 40.

¶ 25 Defendant also argues that the court improperly imposed the "excessive" sentence as punishment for his invoking his constitutional right to trial. He points to the more lenient sentence imposed on Bennie, his "more culpable" codefendant, pursuant to Bennie's guilty plea. Defendant claims that "no proper sentencing factor can explain such a deep disparity" between his 43-year sentence and Bennie's 26-year sentence, where defendant did not possess the firearm "and thus never posed a deadly threat to the victim." Defendant argument fails for multiple reasons.

¶ 26 First, defendant has not pointed to anything in the record that suggests that the court determined his sentence as punishment for invoking his right to trial. The trial court may not punish a defendant who has exercised his right to trial by imposing a longer sentence than it would have had the defendant agreed to plead guilty. *People v. Moriarty*, 25 Ill. 2d 565, 567 (1962). However, to support the claim that he was punished for going to trial, the record at sentencing must clearly establish that the trial court imposed the greater sentence as punishment

for demanding a trial. *People v. Means*, 2017 IL App (1st) 142613, ¶ 21. The trial court made no reference to any such impetus for the sentence here, and defendant has not shown otherwise.

¶ 27 Second, even though Bennie held the firearm, defendant chased after Humphrey at Bennie's direction and was found guilty under an accountability theory. At sentencing, a defendant found guilty by accountability is no less culpable than his codefendant. *People v. Williams*, 262 Ill. App. 3d 734, 746 (1994).

¶ 28 Third, although an arbitrary and unreasonable disparity between the sentences of similarly situated codefendants is generally impermissible, a disparity in sentences does not, by itself, establish a violation of fundamental fairness. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 58 (citing *People v. Caballero*, 179 Ill. 2d 205, 216 (1997)). Here, defendant was sentenced following a trial, whereas Bennie was sentenced following a guilty plea. "A sentence imposed on a codefendant who pleaded guilty as part of a plea agreement does not provide a valid basis of comparison to a sentence entered after a trial." *Caballero*, 179 Ill. 2d at 217). It is entirely proper to grant sentencing concessions to a defendant who pleads guilty, "since the public interest in the effective administration of criminal justice is served." *Gordon*, 2016 IL App (1st) 134004, ¶ 58 (citing *Caballero*, 179 Ill. 2d at 218). Unlike defendant, Bennie acknowledged his guilt, showed his willingness to assume responsibility for his conduct, and made a public trial unnecessary. *Id.* ¶ 60.

¶ 29 Lastly, putting aside the fact that Bennie's sentence was the product of a plea agreement, we find defendant's criminal history provides ample support for a sentence higher than that imposed on Bennie. As defendant notes, the trial court focused on his criminal history in fashioning the sentence, and his criminal history is a proper aggravating sentencing factor. 730

ILCS 5/5-5-3.2(a)(3) (West 2012). "When determining whether a sentence is excessive in light of a lesser sentence imposed on a co-defendant, consideration is to be given to the differences in criminal background and the degree of participation by each defendant in the commission of the offense." *People v. Martin*, 81 Ill. App. 3d 238, 245 (1980). A disparate sentence may be supported by a more serious criminal record or greater participation in the offense. *People v. Connor*, 177 Ill. App. 3d 532, 540 (1988). Additionally, trial courts are entitled to consider similar convictions in the years leading up to the offense. *Means*, 2017 IL App (1st) 142613, ¶ 19.

¶ 30 While both defendant and codefendant Bennie have extensive criminal histories, defendant's is lengthier and more serious.[1] Defendant has five Class X felonies, compared to Bennie's two, and had been sentenced to approximately eight years' imprisonment more than Bennie. Further, defendant has two prior armed robbery convictions, one of which was his most recent prior conviction, for which he was sentenced to 30 years' imprisonment in 1996. Thus, he committed the instant 2013 armed robbery not long after completing his 30-year sentence for the same offense. In contrast, Bennie's most recent conviction was for a Class 4 retail theft valued at less than $150, for which he was sentenced to 18 months in 2009. Given defendant's more serious criminal record, almost immediate recidivism, and active participation in chasing down the woman he and Bennie had just robbed at gunpoint, the trial court could properly sentence

[1] Although Bennie's criminal history is not included in the record on appeal, his prior convictions are a matter of public record of which we may take judicial notice. *People v. Sanchez*, 404 Ill. App. 3d 15, 17 (2010). Bennie's Illinois Department of Corrections Inmate Status page shows the following prior convictions and IDOC sentences: retail theft (2009 - 18 months), attempt murder and armed robbery (1996 - 22 years), possession of a controlled substance (1994 - 3 years), residential burglary (1988 and 1983 - 12 years and 10 years, respectively), escape from a penal institution (1980 - 3 years), robbery and aggravated kidnapping (1980 - 6 years), and burglary (1979 and 1978 - 3 years each). (Information available at https://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx by searching inmate last name "Bennie.")

him to a longer term than Bennie. Accordingly, we find that the trial court did not abuse its discretion in sentencing defendant to 43 years' imprisonment.

¶ 31 Finally, defendant argues that he is entitled to 1138 days of pre-sentence incarceration as opposed to the 1039 days with which he was credited at sentencing. The State agrees that defendant's *mittimus* should be corrected, but states that he is entitled to 1139 days of credit. The question of whether a defendant's *mittimus* should be amended is a purely legal issue, which we review *de novo*. *People v. Harris*, 2012 IL App (1st) 092251, ¶ 34. Defendant is entitled to credit for every day spent in custody from the day of arrest, until the day the sentencing court issues a *mittimus*. *Id.* at ¶ 36; 730 ILCS 5/5-4.5-100(b). The day of sentencing is not included when calculating pre-sentence credit. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 71. The appellate court may correct the *mittimus* rather than remanding the case to the trial court. *Id.*

¶ 32 Defendant was arrested on July 19, 2012, and sentenced on September 1, 2015. He remained in custody from the time of his arrest through the entirety of trial. Therefore, his pre-sentence incarceration started to run on July 19, 2012, and ended the day before sentencing, on August 31, 2015—a total of 1139 days. However, the trial court only credited him with 1039 days. Gilmore is therefore entitled to an additional 100 days credit, for a total of 1139 days. The *mittimus* should be corrected accordingly.

¶ 33 For the foregoing reasons, we affirm the decision of the trial court, and order the clerk of the circuit court to correct defendant's *mittimus*.

¶ 34 Affirmed, *mittimus* corrected.

¶ 35 Mikva, J., dissenting in part:

¶ 36 I respectfully dissent from this court's ruling that the trial court did not abuse its discretion when it sentenced Mr. Gilmore to 43 years in prison. I concur in and join in the court's order that the clerk correct the *mittimus* to reflect 1139 days of presentence custody credit.

¶ 37 Although the trial court is vested with wide discretion in sentencing, such discretion is not without limitation. Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967) grants us, as the reviewing court, the power to reduce the sentence imposed by the trial court. I believe that this power should be used to reduce the sentence in this case.

¶ 38 There can be no dispute that 43 years in prison for Mr. Gilmore's secondary role in this crime, in which no one was injured and minimal property was taken, is a long sentence. Our constitution mandates "that penalties be determined according to the seriousness of the offense." *People v. Stacey*, 193 Ill. 2d 203, 211 (2000) (citing Ill. Const. 1970, art. I, § 11). As the supreme court recognized in *Stacey*, "a sentence within statutory limits will be deemed excessive and the result of an abuse of discretion by the trial court where the sentence is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id.* at 210.

¶ 39 Mr. Gilmore's codefendant, Mr. Bennie, who was the only individual who wielded a gun and the one who actually took the victim's property, received a sentence that was 17 years less than Mr. Gilmore's sentence. For Mr. Gilmore, who is now 63 years old, 17 years likely represents the difference between dying in jail and dying with his friends and family.

¶ 40 The majority justifies this much lengthier sentence for the less culpable party by the fact that Mr. Bennie pleaded guilty instead of going to trial and had a slightly less extensive record of

criminal convictions. While I agree with the majority that the trial court is entitled to grant sentencing concessions to a defendant who pleads guilty and that criminal history is relevant to sentencing decisions, the significant discrepancy in this case, where the *more* culpable participant got a significantly *less* severe sentence, is strong circumstantial support for Mr. Gilmore's argument that he is being unconstitutionally punished for exercising his right to trial. Unless a trial court judge were to make a very careless remark, the difference in these sentences is probably as strong a case as any defendant can make out to support an argument that he or she paid a high price for exercising a constitutional right to hold the State to its burden of proof.

¶ 41 I agree that we must defer to the discretion properly accorded to the trial judge who had the difficult and thankless job of imposing an appropriate sentence. As the majority points out, citing *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56, as long as the sentence is within the statutory range, that court has wide latitude in sentencing. But I would exercise the power that we have as appellate justices under Supreme Court Rule 615(b)(4) to reduce Mr. Gilmore's 43-year sentence to a period of incarceration that was no longer than the 26-year sentence imposed on Mr. Bennie.