2018 IL App (1st) 153365-U

Fourth Division
August 9, 2018

No. 1-15-3365

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

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 CR 5203
	)	
CURTIS McGHEE,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Burke and Justice McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's nine-year sentence for burglary is affirmed over his contention that it is excessive in light of his mostly non-violent criminal history and the nature of the offense. Defendant's fines, fees and costs order is modified.

¶ 2 Following a bench trial, defendant Curtis McGhee was found guilty of burglary (720 ILCS 5/19-1(a)) (West 2014)), and sentenced to nine years' imprisonment. On appeal, defendant contends that his sentence is excessive in light of the seriousness of the offense, his background, and his rehabilitative potential. He also contends that we should correct his fines, fees and costs

order to fully account for his $5 *per diem* pre-sentence incarceration credit. We affirm defendant's sentence and correct the mittimus.

¶ 3 BACKGROUND

¶ 4 Defendant was charged by information with a single count of burglary. Before trial, the State offered defendant a plea deal, whereby defendant would plead guilty to the reduced charge of attempted robbery in exchange for a five-year sentence. Defendant rejected the offer, and the case proceeded to a bench trial.

¶ 5 At trial, Chicago Police Sergeant James Johnson testified that on March 11, 2014, he responded to a call at an alley at 7238 South Mozart Street and began looking for a man in a red hooded sweatshirt in a detached garage. When he arrived, Sergeant Johnson and his partner, Officer Jack Stanley, saw a bicycle with a child carrier attached to it. The child carrier contained "a bunch of power tools." Sergeant Johnson then looked at the garage, at which point he saw defendant poke his head out of the service door before retreating into the garage. Sergeant Johnson ordered defendant to exit the garage. Defendant complied and was placed into custody. According to Sergeant Johnson, as he was being arrested, defendant said, "I was just scrapping so I could feed my family."

¶ 6 Martin Arguijo testified that he lived at 7238 South Mozart Street. Around 11 a.m. on March 11, 2014, he heard noises and saw police officers in his backyard. When Arguijo went outside to speak to the police, he saw defendant being taken into custody. Arguijo then noticed that there was a bicycle in the alley with a child carrier attached, and that Arguijo's toolbox, sander, weed cutter, hedge cutter, and drill—items which he had last seen on his garage floor a day or two earlier—were inside the bicycle's child carrier. Arguijo told the police that he saw

defendant riding the bike approximately ten minutes before they arrived. Arguijo testified that he did not know defendant and did not give him permission to enter his garage.

¶ 7 Detective Ronald Skrip testified that he spoke to defendant in the processing area at the police department. According to Detective Skrip, after defendant was read his rights, defendant stated that he had been riding his bike "looking for scrap items" when he "encountered an open service door at the garage at the location of this incident." Detective Skrip stated that defendant told him that he "went into the garage on two occasions and both times removed items and placed it into a bike carrier that was affixed to the bicycle he was driving."

¶ 8 The State then rested. Defendant did not testify or call any witnesses. After closing arguments, the court found defendant guilty. The case then proceeded to sentencing.

¶ 9 At sentencing, the court heard arguments in aggravation and mitigation. In aggravation, the State argued that defendant should receive a "substantial period of imprisonment given his background," which qualified him for Class X sentencing. In mitigation, defense counsel argued that defendant should "be sentenced to the minimum." Defense counsel pointed out that both of defendant's parents were drug addicts, and that after he was removed from their custody at age 12 because of neglect, he lived with his grandmother, who abused him. Defense counsel also argued that defendant was kicked out of high school in the ninth grade, and that defendant "did have a drug habit for periods of time." In addition, counsel mentioned that defendant stopped drinking alcohol on his own, that defendant has "new insight into his addiction" since completing the West Care Drug Program, and that he has remained clean since he has been in custody.

¶ 10 Defendant's PSI report indicated that he (1) was expelled from high school, (2) had no "prior employment experience," and (3) was diagnosed with bi-polar disorder when he was twelve. Defendant stopped taking medication for his disorder when he was 18 and had resumed taking medication following his arrest for this offense. The PSI report also reflected that defendant had a lengthy criminal history. In 1996, defendant was adjudicated delinquent for unlawful use of a weapon. In 1999, defendant was convicted of aggravated vehicular hijacking, a Class X felony, and sentenced to seven years' imprisonment. In 2002, defendant was convicted of possessing a stolen motor vehicle, a Class 2 felony, and sentenced to three years' imprisonment. In 2006, defendant was convicted of Class A misdemeanor theft, and sentenced to 53 months' imprisonment. In 2007, defendant was convicted of possessing a stolen motor vehicle, a Class 2 felony, and sentenced to seven years' imprisonment. In 2007, defendant was also convicted of Class A misdemeanor retail theft, and sentenced to 32 days' imprisonment. In 2010, defendant was convicted of Class 2 felony retail theft, and sentenced to 30 months' imprisonment. Defendant was also convicted of misdemeanor retail theft in 2013, in the State of Michigan, where he was sentenced to nine months' probation.

¶ 11 In announcing the sentence, the circuit court noted that it had "to take into consideration a lot of different factors" and that it had "to craft a sentence that's fair to you what we call commensurate with the crime you committed, and your background, as well as take into effect this crime upon society and any deterrent effect." The court then described defendant's criminal history of "several felony convictions," which it characterized as mostly theft-related. The court specifically mentioned that "there is a vehicle hijacking in the past, albeit that is about 16 years ago." It then acknowledged that defendant's childhood "was something that obviously no child

should have to go through." In addition, the court mentioned that defendant has never been employed during his adult life, and that it would have otherwise considered employment in mitigation. Finally, the court stated "[a]t some point in time this has got to end, sir. You can't be doing whatever you want to do to whoever you want to do it with," and that "I don't believe the minimum is in fact mandated based on your background. And frankly your blatant disregard for the law as here doing this out in open daylight." The court then sentenced defendant to nine years' imprisonment and imposed $409 in fines, fees, and costs. Defendant filed a motion to reconsider sentence, which the court denied. This appeal followed.

¶ 12 ANALYSIS

¶ 13 We first consider defendant's argument that his nine-year sentence was excessive in light of the nature of the offense, his nonviolent criminal background, his drug addiction, his possible mental illness, his rehabilitative potential, and the fact that the State had offered a negotiated sentence of only five years. It is well settled that the trial court has broad discretionary powers in imposing a sentence, and the trial court's sentencing decision is entitled to great deference. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court affords such deference because the trial judge, having observed the defendant and the proceedings, has a far better opportunity to consider factors relevant to sentencing. *People v. Fern*, 189 Ill. 2d 48, 53 (1999).

¶ 14 When imposing a sentence, the circuit court must strike a balance between the seriousness of the offense and the defendant's rehabilitative potential. Ill. Const. 1970, art. 1, § 11; *People v. Lee*, 379 Ill. App. 3d 533, 539 (2008). To strike that balance, the circuit court must consider a host of aggravating and mitigating factors: the nature and circumstances of the crime, the defendant's conduct in the commission of the crime, and the defendant's personal history,

including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. The seriousness of the crime is considered the most important factor in fashioning an appropriate sentence. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 123.

¶ 15 A reviewing court will not reweigh sentencing factors and may not substitute its judgment for the trial court merely because it might have weighed them differently. *Knox*, 2014 IL App (1st) 120349, ¶ 46. When evidence in mitigation is presented to the circuit court, the court is presumed to have considered it. A defendant can rebut that presumption only by presenting evidence, other than the fact of the sentence itself, which establishes that the court did not consider the evidence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). A sentence within the statutorily prescribed sentencing range will not be disturbed unless the trial court has abused its discretion. *Id.* at 157. An abuse of discretion occurs if the trial court imposes a sentence that is greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense. *Id.*

¶ 16 Here, we find that the trial court did not abuse its discretion in sentencing defendant to nine years' imprisonment. Defendant was convicted of burglary. The sentencing range for burglary, a Class 2 felony, is three to seven years' imprisonment. 720 ILCS 5/19-1(b) (West 2014); 730 ILCS 5/5-4.5-35 (West 2014). However, because of his criminal background, defendant was subject to the Class X sentencing scheme, which mandates a sentencing range of 6 to 30 years' imprisonment. See 730 ILCS 5/5-4.5-95(b) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). Because defendant's nine-year sentence was within statutory range, it is presumptively proper.

¶ 17 Defendant does not dispute that his sentence was within the statutory range. Rather, he argues that his sentence "is excessive and constitutes an abuse of discretion in light of the petty nature of the crime, [his] essentially nonviolent felony background, his drug addiction, possible mental health issues, rehabilitative potential, and the financial impact his imprisonment will have upon this state." However, evidence regarding all of these factors was presented to the circuit court, either through defense counsel's argument or defendant's PSI report. We must therefore presume that the court took these considerations into account when it sentenced defendant. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51 ("We presume, in the absence of evidence to the contrary, that the sentencing court considers mitigation evidence when it is presented."). To rebut this presumption, "defendant must make an affirmative showing that the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant has failed to make such a showing.

¶ 18 Nor could he. When it pronounced its sentence, the trial court noted that it has "to take into consideration a lot of different factors" and that it has "to craft a sentence that's fair to you what we call commensurate with the crime you committed, and your background, as well as take into effect this crime upon society and any deterrent effect." And the court specifically acknowledged that defendant had a rough childhood, and that defendant's criminal history involved mostly theft crimes.

¶ 19 Given this record, defendant is essentially asking this court to reweigh the sentencing factors and substitute our judgment for that of the trial court. This we cannot do. See *Stacey*, 193 Ill. 2d at 209 ("the reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently"). As the trial court is presumed

to have considered all evidence in mitigation, and the record shows that it did, we find that the circuit court's sentencing decision was not an abuse of discretion.

¶ 20 Defendant repeatedly describes his crime as "removing tools" that "were quickly returned," that it was a "momentary taking of tools," and that his crime "did not harm or threaten anyone." The fact that the tools were only "momentarily" "removed," however, is just another way of saying that defendant was caught in the act of stealing them. And while there was no violence or threats of violence involved in this crime, defendant was not charged with any such violence or threats, either. This was not the crime of the century, but defendant entered someone's private property to steal their belongings, and the fact that he was caught immediately, or that he did not physically harm or threaten anyone in the process, does not compel the conclusion that a sentence three years over the minimum was an abuse of discretion.

¶ 21 We decline defendant's invitation to compare his sentence to the sentences imposed in *People v. Busse*, 2016 IL App (1st) 142941 and *People v. Center*, 198 Ill. App. 3d 1025 (1990). It is well established that Illinois courts do not engage in the practice of comparative sentencing. See *Fern*, 189 Ill. 2d at 62 (rejecting use of comparative sentencing from unrelated cases as basis for claiming that specific sentence is excessive or that sentencing court abused its discretion). We affirm the sentence imposed in this case.

¶ 22 We next consider defendant's argument that the trial court improperly imposed fees, and that in calculating defendant's *per diem* presentence credit against defendant's fines, the trial court incorrectly categorized some assessments as "fees" instead of "fines." Defendant first argues that the trial court incorrectly assessed the $5 "Electronic Monitoring Fee" (705 ILCS 105/27.3e (West 2014)). "Such fee shall be paid by the defendant in any traffic, misdemeanor,

municipal ordinance, or conservation case upon a judgment of guilty or grant of supervision." 705 ILCS 105/27.3e (West 2014). Because defendant's case did not involve a traffic, misdemeanor, municipal ordinance, or conservation law violation, we vacate defendant's "Electronic Monitoring Fee."

¶ 23 Defendant next challenges the imposition of various fees, arguing that these assessments are not fees, but are in fact fines that his presentence $5 *per diem* custody credit offsets. See 725 ILCS 5/110-14(a) (West 2014) ("Any person incarcerated on a bailable offense who does not supply bail and against whom a fine is levied on conviction of such offense shall be allowed a credit of $5 for each day so incarcerated upon application of the defendant. However, in no case shall the amount so allowed or credited exceed the amount of the fine"). Such a credit only applies to fines, not fees or costs. *People v. Littlejohn*, 338 Ill. App. 3d 281, 283 (2003).

¶ 24 Defendant first argues that the $15 assessment for "Automation (Clerk)" (705 ILCS 105/27.3a-1 (West 2014)), the $15 assessment for "Document Storage (Clerk)" (705 ILCS 105/27.3c(a) (West 2014)), and the $25 assessment for "Court Services (Sheriff)" (55 ILCS 5/5-1103 (West 2014)), are all fines. However, this court has already held that these "fees" are in fact fees. *People v. Tolliver*, 363 Ill. App. 3d 94, 97 (2006).

¶ 25 Defendant next argues that two separate $2 assessments for "Public Defender Records Automation" (55 ILCS 5/3-4012 (West 2014)) and "State's Attorney Records Automation" (55 ILCS 5/4-2002.1(c) (West 2014)) are fines. In *People v. Camacho*, 2016 IL App (1st) 140604, a panel of this court concluded that these "fees" are actually fines. See *id.* ¶¶ 47-56. Nonetheless, the vast weight of authority from this court holds that the public defender and State's Attorney records automation fees are in fact fees. See *People v. Brown*, 2017 IL App (1st) 150146, ¶ 38

("[T]he bulk of legal authority has concluded that [the Public Defender and State's Attorney records automation charges] are fees rather than fines."). We decline to follow *Camacho*. See *People v. Jones*, 2017 IL App (1st) 143766, ¶ 53 (declining defendant's "invitation to digress from the weight of established precedent by classifying the records automation fees as fines").

¶ 26 Defendant next argues that the $190 assessment for "Felony Complaint Filed, (Clerk)" (705 ILCS 150/27.2a(w)(1)(A) (West 2014)) is a fine. Recently, we affirmed our holding in *Tolliver* that the charge imposed on a defendant for the filing of a felony complaint is a fee. *People v. Bingham*, 2017 IL App (1st) 143150, ¶ 42 (citing *Tolliver*, 363 Ill. App. 3d at 96-97). Accordingly, the $190 assessment for "Felony Complaint Filed, (Clerk)" is a fee.

¶ 27 Finally, defendant argues, the State concedes, and we agree, that the $15 assessment for "State Police Operations Fee" (705 ILCS 105/27.3a-1.5 (West 2014)) is in fact a fine. See *People v. Milsap*, 2012 IL App (4th) 110668, ¶ 31.

¶ 28 CONCLUSION

¶ 29 We affirm defendant's nine-year sentence for burglary. We correct defendant's mittimus to reflect $309 in fines, fees, and costs.

¶ 30 Affirmed; mittimus corrected.