2018 IL App (1st) 160407-U

No. 1-16-0407

Order filed November 21, 2018

Sixth 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. 11 CR 14795
	)	
BRIAN GIBSON,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion when it sentenced defendant to a total of 40 years in prison for attempt first degree murder.

¶ 2 Following a jury trial, defendant Brian Gibson was found guilty of attempt first degree murder (720 ILCS 5/8-4(a) (West 2010); (720 ILCS 5/9-1(a)(1) (West 2010)), aggravated battery (720 ILCS 5/12-3.05(e)(1) (West 2010)), and unlawful use or possession of a weapon by a felon (UUWF) (720 ILCS 5/24-1.1(a) (West 2010)). The trial court merged the counts and sentenced

defendant on attempt first degree murder to 40 years in prison, which included 25 years for personally discharging a firearm that proximately caused great bodily harm. Defendant contends the court abused its discretion in sentencing him to 40 years because it failed to adequately consider the mitigation evidence and mistakenly relied on his perceived lack of remorse as an aggravating factor. We affirm.

¶ 3 Defendant's conviction arose from an incident on July 10, 2011, in which defendant shot Ronnie Howard. The State charged defendant with 14 counts, but ultimately proceeded to a jury trial on single counts of attempt first degree murder with personal discharge of a firearm causing great bodily harm, aggravated battery, and UUWF. Defendant chose to represent himself at trial.

¶ 4 Howard testified that he was with Danielle Kimble and Parishell Kimble in front of Parishell's apartment building on July 10, 2011.[1] Howard lived around the corner with his mother and siblings. At about 11 p.m., defendant, whom he identified at trial, drove up in a Ford truck and parked. Howard did not know defendant personally but knew him through family and had seen him about 20 or 25 times. Howard walked to defendant's truck and told him that he heard defendant had been bullying some young men on the block and to leave them alone. Defendant did not respond. Howard continued to talk to him "politely, no threats, no nothing." He asked defendant to pull over so they could talk and defendant told him, "I'll be right back." Defendant drove off and Howard went back to talk to Danielle and Parishell.

¶ 5 About 5 or 10 minutes later, on his way to a nearby restaurant, Howard saw defendant "looking un-polite" and walked over to him. Howard asked him, "Is you okay?" and said, "I was just telling you to leave the young guys alone on the block." Defendant said "F*** you" and

[1] Parishell Kimble and Danielle Kimble share the same last name. We will therefore refer to them by their first names.

"[y]ou ain't running nothing around here." Howard responded "F*** you" and a "little" verbal argument ensued. When Howard turned his head, defendant shot him in the side, stomach, and arm. Defendant was "[r]ight in front" of Howard, "so close" Howard "could have kissed him." Defendant ran away and Howard ran to get help, ultimately collapsing on his mother's porch.

¶ 6 Later at the hospital, Howard identified defendant in a photographic array as the person who shot him. At the police station the next month, he identified defendant in a lineup. As a result of the shooting, surgeons removed a foot of his intestines and a piece of his colon. Howard lost feeling in three fingers and had scars.

¶ 7 Frederic Starr, an expert in trauma critical care medicine, testified that Howard arrived in the trauma unit in critical condition. Howard had five gunshot wounds: two to the left forearm, two to the left lower abdomen, and one to the buttocks. He also had numerous holes in his small intestines, two holes in his colon, and a fractured hip bone caused by a bullet. Howard's injuries were typically fatal if not treated.

¶ 8 Parishell testified that when the Ford Explorer drove up, Howard walked over and talked with the person inside for about five minutes. Howard came back a little upset and then left. Parishell heard a gunshot, saw Howard collapse on his porch, and heard him shout "Brian" shot him. Vonsheila Howard, Howard's sister, testified Howard came to her front porch bleeding.[2] He told her defendant, whom she had known all his life, had shot him.

¶ 9 Police officers testified that Howard identified defendant as the person who shot him in a photographic array at the hospital and in a line-up at the police station. Three cartridge cases found at the scene had been fired from the same firearm. The parties stipulated that defendant

[2] Vonsheila Howard shares the same last name as Ronnie Howard. We will therefore refer to her by her first name.

had a prior felony conviction for aggravated battery with a firearm, which was a qualifying conviction for UUWF.

¶ 10 Dean Rushin testified for the defense that, on July 10, 2011, Howard, his uncle, came to the house shot and bleeding. Rushin did not ask Howard who shot him.

¶ 11 The jury found defendant guilty of attempt first degree murder, aggravated battery with a firearm, and UUWF. The trial court subsequently appointed counsel for defendant and denied his motion for a new trial.

¶ 12 At sentencing, neither party had any corrections or additions to the presentence investigation report. The report showed defendant's prior 2003 conviction for aggravated battery with a firearm, for which he was sentenced to seven years and six months in prison, as well as defendant's family, education, work, and social histories. Defendant reported he was stabbed in jail on four occasions while awaiting trial, and denied having a drug or alcohol problem. The State argued in aggravation that defendant's prior conviction also involved him shooting someone. It argued that, only a few years later, defendant was "back" shooting "with a firearm in his hand" at an innocent victim who was trying to settle his dispute without any force or violence. The State requested 50 years in prison based on the nature of the case and defendant's prior history.

¶ 13 In mitigation, defense counsel argued that defendant had been a productive member of society, was employed for over three years prior to the shooting, and had earned his high school diploma as well as college credits. Counsel informed the court that, when defendant was in jail waiting for trial, he had been stabbed at least four times. Noting the minimum sentence was 31

years in prison, counsel requested that the court sentence defendant to as close to the minimum as possible.

¶ 14 In allocution, defendant told the court he did not "do this crime" and "the system is corrupt." He stated "I put in a *** substitution of judge, everything. I feel like the system is corrupt. They wrongly — and political corrupted. I didn't do this. I didn't do this. So I don't got anything to say. That's it."

¶ 15 The court merged the aggravated battery and UUWF counts into the attempt first degree murder count and sentenced defendant to 15 years plus 25 years for the firearm enhancement, for a total sentence of 40 years in prison.

¶ 16 The court stated that it was "aware of all the factors in aggravation and mitigation" and it took "into consideration, obviously, the facts I heard during the trial as well as the presentence investigation, the arguments of both attorneys in front of me." The court acknowledged defendant's statement that "he did not do this," but found the evidence "that he did do it was overwhelming," which the jury "obviously" also found. After explaining the sentencing ranges for attempt first degree murder and the firearm enhancement, the court noted, "[a]lso, this Court finds that you have a total lack of remorse in this case." Defendant responded: "How could I have remorse for something I didn't even do? I didn't do any — I didn't do this crime, like I said." The court responded that the evidence of defendant's guilt was overwhelming. It told defendant the 40-year sentence was based on his behavior and attempt to kill the victim.

¶ 17 Defendant contends on appeal that his 40-year sentence was excessive because the trial court did not adequately consider the mitigation evidence or his rehabilitative potential. He also

contends that, when the court sentenced him, it improperly relied on his perceived lack of remorse as an aggravating factor.

¶ 18 Defendant acknowledges he did not file a motion to reconsider his sentence in the circuit court and thus did not preserve the issues, but asserts that we may review his claim under the plain error doctrine. *People v. Heider*, 231 Ill. 2d 1, 15 (2008) (to preserve sentencing issues for review, they must be raised in a postsentencing motion). We agree that we may review defendant's sentencing challenge for plain error. See *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. To obtain relief, defendant must show that a clear or obvious error occurred and that either (1) the evidence at the sentencing hearing was closely balanced or (2) the error was so egregious that defendant was denied a fair sentencing hearing. *Sauseda*, 2016 IL App (1st) 140134, ¶ 11. Defendant has the burden under both prongs. *Id.* However, before we apply the plain error rule, we must first determine whether any error occurred at all. See *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 19 A trial court has broad discretionary powers in imposing a sentence. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). On review, we give great deference to the trial court's decision because it is in a better position to consider the relevant sentencing factors. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The most important factor in sentencing is the seriousness of an offense, not the mitigation evidence. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11. We will not modify a sentence absent an abuse of discretion. *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 50. When a sentence falls within the prescribed statutory limit, we will not find that a court abused its discretion unless the sentence is "greatly at variance with the purpose and spirit of the

law or is manifestly disproportionate to the offense." *People v. Means*, 2017 IL App (1st) 142613, ¶ 14.

¶ 20 Attempt first degree murder is a Class X felony (720 ILCS 5/8-4(c)(1) (West 2010)) with a sentencing range of 6 to 30 years in prison (730 ILCS 5/5-4.5-25(a) (West 2010)). However, because defendant was found to have personally discharged a firearm that proximately caused great bodily harm, he was subject to an additional prison term of 25 years to natural life (720 ILCS 5/8-4(1)(D) (West 2010)). The court sentenced defendant to 15 years in prison plus 25 years for the firearm enhancement for a total of 40 years in prison, a term well within the permissible statutory range. We therefore presume that the sentence is proper. See *Wilson*, 2016 IL App (1st) 141063, ¶ 12 (a sentence that falls within the statutory guidelines is presumed proper).

¶ 21 Nevertheless, defendant asserts that his sentence is excessive because the court did not adequately consider the mitigating factors, specifically his education, employment, rehabilitative potential, and that he had been a productive member of society. When mitigating evidence is presented to the trial court, absent some indication to the contrary other than the sentence itself, we presume that the court considered it. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. Where, as here, it is essentially argued that the court failed to consider relevant factors, a defendant must make an affirmative showing that the court did not consider those factors. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. The sentencing factors a trial court considers include the particular circumstances of the case and the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Fern*, 189 Ill. 2d at 53. Other factors include the

nature of the crime, the protection of the public, deterrence and punishment, and the defendant's rehabilitative prospects. *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 14.

¶ 22 Defendant has not met his burden of affirmatively showing that the court failed to properly consider the mitigating factors. Before the court pronounced its sentence, it expressly stated that it considered the attorneys' arguments, facts of the case, factors in aggravation and mitigation, and presentence investigation report (PSI). The PSI included information about the mitigating factors defendant recites here, including his criminal history, education, and employment. Because the PSI was before the court and the court expressly stated that it considered it, we presume the court considered the mitigating factors contained therein and defendant's rehabilitative potential. See *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) (when the court examines a PSI, we presume it considered the defendant's potential for rehabilitation). Further, defense counsel orally presented these same mitigating factors to the court, telling the court defendant had been a productive member of society, earned his high school diploma and college credits and had been employed for three years. Again, as this mitigation evidence was before the court, we presume it considered it. See *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004).

¶ 23 Defendant points out that the court did not mention any of the relevant mitigating factors, or explain on the record how it balanced the aggravation and mitigation evidence. However, the court was not required to recite and assign value to each sentencing factor. *Bryant*, 2016 IL App (1st) 140421, ¶ 16. Nor was it required to articulate the process it used to determine the appropriateness of defendant's sentence. See *People v. Wright*, 272 Ill. App. 3d 1033, 1046 (1995).

¶ 24 Accordingly, the record shows that the court considered the relevant mitigating factors and defendant's rehabilitative potential, and defendant has not met his burden of showing otherwise.

¶ 25 Defendant also contends that the trial court abused its sentencing discretion because it improperly characterized his allocuted claim of innocence as a lack of remorse, and relied upon his lack of remorse as an aggravating factor. He asserts that the court's sentencing decision was improperly influenced by his claim of innocence.

¶ 26 A trial court may properly consider lack of remorse when determining a sentence. *People v. Ward*, 113 Ill. 2d 516, 529 (1986). However, the court should not "automatically and arbitrarily" apply lack of remorse as an aggravating factor, but instead must evaluate it "in light of all the other information the court has about the defendant." *Ward*, 113 Ill. 2d at 529. Further, the court must not impose a more severe sentence if a defendant refuses to abandon his claim of innocence. *People v. Byrd*, 139 Ill. App. 3d 859, 865 (1986); *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984).

¶ 27 To determine whether sentencing was improperly influenced by a defendant's failure to admit his guilt, we focus on whether the trial court either expressly or impliedly indicated that there would have been better treatment on sentencing if the defendant had abandoned his claim of innocence. *Speed*, 129 Ill. App. 3d at 350. If a trial court considers an improper factor in aggravation, it abuses its discretion. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. It is a defendant's burden to affirmatively establish that the court's sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). Our review of whether a

trial court relied on an improper sentencing factor is *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 28 The court did not improperly consider defendant's claim of innocence or lack of remorse as an aggravating factor. At sentencing, the court remarked that it found that defendant showed "a total lack of remorse." This was an appropriate factor for the court to consider. See *Ward*, 113 Ill. 2d at 529-31. Nothing in the record indicates that the court implicitly or expressly considered or imposed a more severe sentence because defendant claimed he was innocent. Nor does the record show that the court would have given him better treatment if he had abandoned his claim of innocence. Rather, read as a whole, the record demonstrates that the court properly considered defendant's lack of remorse in conjunction with the circumstances of the offense, "overwhelming" evidence against defendant, and mitigating and aggravating evidence.

¶ 29 Moreover, the seriousness of the offense is the most important factor at sentencing. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. Where defendant shot the unarmed Howard multiple times at close range, leaving him with lasting injuries and nearly killing him, we do not find the 40-year sentence disproportionate to the offense. The court did not abuse its discretion when it imposed a 40-year sentence for attempt first degree murder. There is therefore no sentencing error and, thus, there can be no plain error. Defendant's sentencing challenges remain forfeited.

¶ 30 Affirmed.