

2018 IL App (1st) 170242-U

No. 1-17-0242

Order filed on December 11, 2018.

Second Division

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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 9459
)	
SAMUEL WHITE,)	The Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* On remand, the trial court properly sentenced defendant to 18 years in prison for armed violence but erroneously imposed an extended-term sentence for possession of a controlled substance.

¶ 2 This matter comes before us for the second time. Following a bench trial, defendant Samuel White was convicted and sentenced to concurrent 18-year prison terms for being an

armed habitual criminal and for committing two counts of armed violence. On direct appeal, we vacated his armed habitual criminal conviction and one conviction for armed violence. We also ordered the trial court to impose a sentence on defendant's previously unsentenced conviction for possession of N-Benzylpiperazine. Given these modifications to the trial court's judgment, we further directed the court to consider whether defendant's sentence remained the appropriate one.

¶ 3 On appeal, defendant asserts the trial court abused its discretion on remand by again finding that 18 years in prison was the appropriate sentence for the remaining armed violence conviction. Defendant further asserts that the trial court erred in imposing an extended-term sentence of six years' imprisonment for possession of a controlled substance. We reduce the six-year sentence to a three-year term and affirm the trial court's judgment in all other respects.

¶ 4 I. Background

¶ 5 A detailed recitation of the facts can be found in our prior decision. *People v. White*, 2015 IL App (1st) 131111. Briefly stated, the evidence showed that on the night of March 21, 2012, three police officers responded to a call of shots fired in the area of 6535 South California Avenue. The officers saw defendant and another man in the courtyard outside the building next door to that address. Officer Brian McDevitt, with his gun drawn, approached the men and saw defendant retrieve a "small silver handgun" from his waistband. As defendant walked toward the building, another officer ordered defendant to stop but he continued walking and threw the gun inside the door. Officer McDevitt then retrieved a loaded, silver .22-caliber handgun from the floor. A subsequent custodial search of defendant revealed various controlled substances, including N-Benzylpiperazine. The State also submitted certified copies of defendant's prior convictions for first-degree murder and domestic battery.

¶ 6 Barbara Taylor and Fairy Stennis testified on defendant's behalf. According to Taylor and Stennis, they were sitting in a car with Diane Walton outside the courtyard where defendant was sitting. They heard no shots being fired. Furthermore, Stennis did not see defendant approach the door to the building, and Taylor did not see him throw a gun inside. Defendant, testifying on his own behalf, similarly denied that he threw a gun into the hallway or that Officer McDevitt found contraband on his person. As stated, defendant was found guilty of several counts, and the trial court imposed concurrent 18-year prison terms for being an armed habitual criminal and for two counts of armed violence.

¶ 7 On appeal, we rejected defendant's challenge to the credibility of the State's evidence but agreed that his prior domestic battery conviction did not qualify him to be an armed habitual criminal and vacated the latter offense. We also vacated defendant's armed violence conviction predicated on the possession of N-Benzylpiperazine, finding that the relevant statute did not authorize multiple convictions for underlying felonies that occur simultaneously. Additionally, we ordered the trial court to impose a sentence for possession of the same substance. Finally, we declined to consider defendant's sentencing challenge: "On remand, the trial court will have the opportunity to consider whether 18 years remains an appropriate sentence for the remaining armed violence conviction."

¶ 8 At a hearing on September 16, 2016, the trial court and the parties discussed our remand. With respect to the remaining armed violence conviction, the court stated as follows:

"And what was the sentence on it? Because when I sentence people I sentence them individually with respect to each offense based on that offense. I don't do some type of conglomerate or split across different offenses. I do each one as though that was the only one."

The court also stated:

“I really don’t know what there is for me to consider. It’s all before the appellate court. But we will review the updated PSI and transcript and hear argument and we’ll see.”

¶ 9 At a hearing on October 14, 2016, the State argued that the presentence investigation report [PSI] showed the original 18-year sentence was appropriate in light of defendant’s violent criminal history, which included two convictions for domestic battery, a conviction for domestic battery involving bodily harm and a murder conviction. Defendant also had a juvenile disposition of supervision for a narcotics offense. Additionally, the present case involved a weapon and his violent history showed he did not respect the law: “He has an affinity for weapons, and he’s not allowed under any circumstance to possess any sort of weapon.” The State argued that based on his history and the facts of this case, a significant sentence was warranted, “not just for this defendant to accept the responsibility for his actions, but also for the protection of the public and to deter others from committing these same sorts of violent crime[s].”

¶ 10 Following the State’s argument, the court commented:

“So the Court has already sentenced him on the [armed violence] count, which is why I don’t understand why even if they believed that it was one act, one crime, or that the underlying offense for the armed habitual could not stand, he was already sentenced.”

Nonetheless, the court told defense counsel to proceed with mitigation.

¶ 11 Defense counsel argued that it was prudent for the reviewing court to remand for resentencing “because of the situation as a whole,” and noted that the trial court needed to sentence defendant for possession of a controlled substance. In addition, counsel argued that defendant was only 17 years old when convicted of murder and he subsequently worked with the

church, obtained paralegal certification and had a job at McDonald's Restaurant. Defendant, now 39 years old, had also become a carpenter and supported his girlfriend and her children.

Furthermore, he had his own adult children and grandchildren. Defense counsel asked the court to impose the minimum 15-year-sentence.

¶ 12 The trial court then imposed a sentence:

“All right, for purposes of sentencing, the Court has considered the evidence at trial, the gravity of the offense, the [PSI], the financial impact of incarceration, all evidence, information, and testimony in aggravation and mitigation, any substance abuse issues and treatment, the potential for rehabilitation, the possibility of sentencing alternatives, and all hearsay presented and deemed relevant and reliable

When the Court originally sentenced the defendant, it took into consideration each separate count individually and separate based on their own merits, not as a conglomerate.”

The court “re-sentenced” defendant to 18 years in prison for armed violence and sentenced him to a concurrent, extended term of 6 years in prison for possession of a controlled substance. The trial court subsequently denied defendant's motion to reconsider. Once more, defendant appeals.

¶ 13 II. Analysis

¶ 14 A. Armed Violence

¶ 15 Defendant first asserts that the trial court abused its discretion in imposing an 18-year prison term for armed violence for the second time. He also contends, however, that the trial court failed to follow our mandate. See *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 352 (2002) (reviewing *de novo* whether the supreme court's mandate required the trial court to allow the plaintiff's motion to amend the complaint).

¶ 16 A trial court must obey a reviewing court's clear and unambiguous directions given in a mandate. *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 123. When an appellate court decision does not give specific instructions for how to proceed on remand, the trial court's judgment is abrogated, leaving the case as if no proceeding had occurred. *People ex rel. Department of Transportation v. Firststar Illinois*, 365 Ill. App. 3d 936, 939 (2006). A reviewing court's decision to remand for resentencing should not be construed as a mandate to impose a lesser sentence, however. *People v. Colter*, 237 Ill. App. 3d 486, 488 (1992).

¶ 17 In our prior decision, we merely instructed the trial court to consider whether an 18-year prison term for the remaining armed violence conviction was still appropriate in light of our decision to vacate defendant's armed habitual criminal conviction and other armed violence conviction. See *People v. Figures*, 216 Ill. App. 3d 398, 404 (1991) (remanding for a new sentencing hearing where it was unclear whether the vacated conviction may have influenced the defendant's sentences for his remaining convictions); *People v. Olsen*, 161 Ill. App. 3d 945, 915 (1987) (remanding for resentencing on the defendant's remaining conviction where the reviewing court could not ascertain whether the now vacated convictions influenced the sentence for the remaining conviction). We did not instruct the trial court to impose a lesser sentence or otherwise suggest that it do so.

¶ 18 Consistent with our mandate, the trial court indicated that the now-vacated convictions did not impact the original 18-year prison term for armed violence because the court considered the sentence for each conviction separately rather than considering defendant's case as a whole. We reject defendant's conclusory assertion that the initial imposition of three concurrent 18-year terms undermines the court's representation. More importantly, the court ordered a new PSI and proceeded with a new sentencing hearing at which both the State and defense counsel presented

arguments. The court then enumerated multiple factors it had considered and imposed an 18-year sentence. We reject defendant's assertion that our mandate required more. *Cf. Colter*, 237 Ill. App. 3d at 488 (finding that where the reviewing court had previously held eight mitigating factors were present, the trial court on remand was not entitled to disagree with that determination); *People v. Willis*, 231 Ill. App. 3d 1056, 1060 (1992) (finding the trial court abused its discretion by imposing the same sentence on remand where the reviewing court had told the court to consider one less aggravating factor at resentencing); *People v. McCumber*, 148 Ill. App. 3d 19, 21-22 (1986) (finding an abuse of discretion where, after the reviewing court remanded for resentencing due to the trial court's consideration of an improper aggravating factor, the defendant received the same prison terms on remand). We now consider whether the 18-year term imposed by the trial court was appropriate in its own right.

¶ 19 While Illinois Supreme Court Rule 615(b)(4) authorizes a reviewing court to reduce a sentence, that sentence cannot be altered absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000) (citing Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967)); see also *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (stating that Rule 615(b) should be used cautiously and sparingly). The trial court's discretion in imposing a sentence is broad and its determination is accorded great deference, as the trial court is generally better situated than the reviewing court to determine what sentence is appropriate. *Stacey*, 193 Ill. 2d at 209. In addition, penalties are to be determined according to the seriousness of the offense and goal of restoring the defendant to useful citizenship. *People v. Robinson*, 2015 IL App (1st) 130837, ¶ 87. To that end, in sentencing a defendant, courts consider all aggravating and mitigating factors, including the defendant's age, habits, demeanor, credibility, mentality, criminal history, general moral

character, education and social environment, as well as the circumstances of the crime and the defendant's role in it. *Id.*

¶ 20 A reviewing court may not substitute the trial court's judgment with its own merely because it would have weighed sentencing factors differently. *Alexander*, 239 Ill. 2d at 213. Conversely, a sentence within statutory limits is excessive and an abuse of discretion where it greatly varies from the law's spirit and purpose or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36.

¶ 21 Our legislature has determined that “[a] person commits armed violence when, while armed with a dangerous weapon, he commits any felony,” other than certain enumerated exceptions not applicable here. 720 ILCS 5/33A-2(a) (West 2012). Armed violence with a category I weapon, which includes handguns and other small firearms, is a Class X felony. 720 ILCS 5/33A-3(a), (c) (2) (West 2012). While Class X felonies ordinarily carry a sentence of between 6 and 30 years in prison (730 ILCS 5/5-4.5-25 (West 2012)), a “[v]iolation of Section 33A-2(a) with a Category I weapon is a Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 15 years” (720 ILCS 5/33A-3(a) (West 2012)). The legislature has found that “[i]n order to deter the use of firearms in the commission of a felony offense, the General Assembly deems it appropriate for a greater penalty to be imposed when a firearm is used or discharged in the commission of an offense than the penalty imposed for using other types of weapons and for the penalty to increase on more serious offenses.” 720 ILCS 5/33A-1(b) (1) (West 2012).

¶ 22 Defendant does not dispute that his 18-year sentence was a mere 3 years greater than the minimum 15-year sentence available and was 12 years less than the greatest sentence available for armed violence. *Cf.* 730 ILCS 5/5-5-4(a) (West 2016) (stating that the trial court shall not

impose a more severe sentence on resentencing unless the new sentence is based on the defendant's conduct after the original sentencing hearing). Additionally, the record supports the trial court's determination that at least some aggravating factors existed. Defendant had a criminal history and continued to reoffend. He possessed a firearm that he was not supposed to possess.

¶ 23 Defendant nonetheless argues, and the State agrees, that the crime was not violent. See *People v. Haron*, 85 Ill. 2d 261, 269-70 (1981) (finding the armed violence statute did “not require that the presence of a weapon facilitate the predicate offense”); *People v. Pace*, 100 Ill. App. 3d 213, 218 (1981) (stating that the penalty of the armed violence statute was directed at the commission of both violent and non-violent felonies). Additionally, defendant argues the record showed defendant had steady employment prior to his incarceration and furthered his education by obtaining a paralegal certificate. He became a carpenter. Moreover, he was only a teenager when he committed murder. See *People v. Davis*, 2014 IL 115595, ¶ 19 (recognizing that juveniles are immature).

¶ 24 That being said, we cannot agree that the mitigating factors required the court to give no weight to the aggravating ones, as would be the case if the court imposed the minimum sentence. Additionally, the sentence imposed is consistent with the legislature's concern with individuals having firearms while committing felonies and is particularly appropriate given that defendant was a felon who was required to stay away from firearms. We find no abuse of discretion. *Cf. Stacey*, 193 Ill. 2d at 209-11 (finding, where the sentencing range was between 6 and 30 years in prison, that the defendant's consecutive 25-year prison terms were manifestly disproportionate to his acts of briefly grabbing the breasts of two fully clothed, young girls, and making lewd gestures and remarks); *People v. Oravis*, 81 Ill. App. 3d 717, 719 (1980) (finding the defendant's

six-year sentence for burglary was excessive where he was a first-time offender and neither threatened nor caused physical harm).¹

¶ 25 B. Possession of a Controlled Substance

¶ 26 Next, defendant asserts that the trial court erred in imposing an extended-term sentence of six years' imprisonment for his Class 4 possession of a controlled substance conviction because defendant had already been convicted of, and sentenced for, the more serious Class X felony of armed violence. The State agrees, as do we. See *People v. Jordan*, 103 Ill. 2d 192, 205-06 (1984). That being said, we must determine what relief is appropriate here.

¶ 27 In defendant's opening brief, he asked that this court either vacate the extended-term sentence "and impose the minimum *or an appropriately-reduced term within the Class 4 felony sentencing range of one to three years' imprisonment*, or remand for a new sentencing hearing." (Emphasis added.) See 730 ILCS 5/5-4.5-45(a) (West 2012) (setting forth the appropriate sentencing range). Thus, defendant has invited this court to remand for resentencing or reduce his sentence to one, two or three years in prison.

¶ 28 In response, the State contends that remand is unnecessary because we "may infer the lower court's intent to 'heavily punish' defendant here, and thus impose the maximum Class 4 penalty without remand." Indeed, reviewing courts have taken this approach before. *People v. Simpson*, 178 Ill. App. 3d 1091, 1096 (1989); *People v. Phillips*, 159 Ill. App. 3d 483, 493 (1987) (overruled on other grounds by *People v. Ferguson*, 132 Ill. 2d 86, 99 (1989)). Given that the trial court originally sentenced defendant to the highest available extended-term sentence for

¹In light of our determination, it follows that trial counsel was not ineffective at resentencing. See *People v. Wilber*, 2018 IL App (4th) 170328, ¶ 17 (stating that to sustain an ineffective assistance of counsel claim, the defendant must show both that counsel's performance was deficient and that as a result, a reasonable probability exists that the result of proceedings would have been different but for the deficiency).

possession of a controlled substance, the record supports the State's assertion that the court intended to heavily punish defendant. See 730 ILCS 5/5-4.5-45(a) (West 2012) (providing an extended-term range between three and six years).

¶ 29 Defendant's reply brief, however, challenges the propriety of reducing his sentence to three years. It is well settled that a defendant may not request that we proceed in one manner and later argue that to do so would be error. See *People v. Harding*, 2012 IL App (2d) 101011, ¶ 17. We reject defendant's late attempt to narrow the relief requested. Similarly, defendant has forfeited his contention, raised for the first time in his reply brief, that a three-year prison term would be excessive. Ill. S. Ct. R. 341(h) (7) (eff. May 25, 2018).

¶ 30 Here, the trial court abused its discretion by imposing a six-year prison term that fell outside the permissible statutory range. Accordingly, we reduce defendant's sentence for possession of a controlled substance to three years in prison. Ill. S. Ct. 615(b) (4) (eff. Jan. 1, 1967).²

¶ 31 III. Conclusion

¶ 32 Having considered defendant's arguments, we affirm his 18-year sentence for armed violence and reduce his sentence for possession of a controlled substance to three years in prison.

¶ 33 Affirmed as modified.

²In light of our determination, we need not consider defendant's argument that trial counsel was ineffective for failing to object to the imposition of an extended-term sentence below.