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2018 IL App (3d) 160328-U

Order filed September 12, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 13th Judicial Circuit, Bureau County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-16-0328
JUAN M. FLORES,)	Circuit No. 15-CF-126
Defendant-Appellant.)	Honorable Marc P. Bernabei, Judge, Presiding.

PRESIDING JUSTICE CARTER delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* The court properly considered the evidence of defendant's uncharged criminal conduct as a factor in aggravation.
- ¶ 2 Defendant, Juan M. Flores, appeals his sentence of 6½ years' imprisonment, arguing that the court erred in considering in aggravation evidence of uncharged criminal conduct that was presented at trial. We affirm.

¶ 3 **FACTS**

¶ 4 After a jury trial, defendant was found guilty of unlawful delivery of a controlled substance in that he delivered less than one gram of heroin to another. 720 ILCS 570/401(d)(i) (West 2014). At trial the evidence established that, on October 3, 2015, Jennifer Terry was arrested for failing to pay a fine or appear in court. She had previously been convicted for possessing heroin. While at the Bureau County jail, she was approached by Deputy Sherry Barto who worked with the TRIDENT drug task force. Barto asked Terry if she would like to make some money. Terry was a known heroin addict in the area. Barto told Terry that she would be paid \$50 for every controlled buy she assisted with.

¶ 5 On October 5, 2015, Terry was released from jail. Later that day, she called defendant and asked if he could sell her a couple bags of heroin. Barto, Officer Jake Foster, and Officer Bradley Martin were present while Terry made the phone call. Terry was friends with defendant and had known him for about 10 years. Defendant agreed to sell Terry three bags of heroin for \$60 and told her to meet him at the Dollar General store. Barto searched Terry and determined that she did not have any drugs, paraphernalia, money, or weapons on her person. Martin gave Terry \$60 of prerecorded money and Foster drove her to the Dollar General. Barto and Martin followed in a separate vehicle. While they were en route, defendant called Terry and told her to meet him inside the store, instead of the parking lot. When they arrived at the store, Terry walked inside and saw defendant with his girlfriend near the back of the store. Martin followed Terry and stood at the end cap of an adjacent aisle. Terry handed defendant the \$60, and then defendant handed her three plastic bags containing a substance, but defendant took one of the bags back. Terry left the store, with Martin following her, and showed Foster what she had purchased. They then drove away and met Barto and Martin at another location. Terry handed Barto the plastic bags, and Barto searched her again. Barto field tested the substance contained in the bags and it

tested positive for heroin. The crime laboratory tested the bags and confirmed that they contained heroin, 0.2 gram in one bag and 0.4 gram in the other bag.

¶ 6 During her testimony, Terry mentioned that defendant had taken one of the bags of heroin back because Terry owed him money. On cross-examination, Terry stated that defendant had not loaned her money, but that she owed him money “[f]or bags that he fronted to [her].” Later during cross-examination, Terry was asked what “fronted” meant. Terry stated, “He gave me a bag of heroin, [and] in return I [would] pay him back later.” Terry stated that she was to pay defendant \$15 later, but forgot that she owed him money until they were at Dollar General. Later, Terry was asked, “You didn’t owe [defendant] \$200?” Terry stated, “Um, we talked about it, but he wasn’t really like precise on getting it.” She further stated, “It slowly built up to \$200, like, over the months.” Terry stated that defendant sold to her, “I don’t know, a few times. Enough to have the [\$]200. So, like, I don’t know, 10 times.” On redirect, Terry stated that defendant would charge her \$25 per bag of heroin. She agreed that to equal \$200 at \$25 per bag, defendant would have had to have given her eight bags of heroin.

¶ 7 Defendant testified that he never used or sold heroin. He did not agree to sell Terry heroin. Instead, defendant said that he had loaned her \$200 over a period of time, and Terry had called him to pay him some of the money that she owed. Defendant testified that he told Terry he was going grocery shopping and she could meet him at the store. When they met at Dollar General he gave Terry some cigarettes; Terry gave him \$60, but still owed him \$140. Defendant testified that since that day Terry did not owe him the whole \$140, as she had “given [him] little bits here and there.” Defendant said, “I don’t remember the exact amount [that she owes me], and I only seen her periodically after that. She only gave me like [\$]20 here and [\$]20 there. I didn’t expect a lot because I knew she was broke.”

¶ 8 At the sentencing hearing, the State said that defendant had recently pled guilty to unlawful possession of cannabis. Two character witnesses testified that defendant was employed and was a reliable, hard worker. Defendant made a statement in allocution, stating in part, “I made an error in judgment. I truly believe that the person that I was getting this stuff for I was just trying to help them out.” The State requested that defendant receive the maximum sentence of seven years. The State recited defendant’s extensive criminal history. Defendant asked for probation or a three-year sentence.

¶ 9 In sentencing defendant, the court noted that it considered the evidence from trial, the presentence investigation report, the financial impact of incarceration, the evidence and information offered by the parties in aggravation and mitigation, the arguments, and defendant’s statement. The court went through each of the factors in mitigation, finding that defendant’s conduct did not cause or threaten serious physical harm to another. The court further stated that it gave some weight in mitigation to the potential that defendant’s children could be losing some financial support, defendant suffered from back pain that might be exacerbated in prison, defendant had some drug or substance abuse issues, there was a job waiting for defendant, and defendant’s family provided a support system.

¶ 10 The court then went through each of the factors in aggravation, noting, “The factors in aggravation in total in this case are far more weighty than the factors in mitigation are. The balance is tipped dramatically towards the factors in aggravation here.” The court then stated:

“[Defendant] has a very serious history of prior delinquency and criminal activity, both convictions and uncharged offenses, because the evidence at trial, which the Court accepts to be true, is that this was not a one-time delivery to the informant in this case; that there had been previous deliveries to her. Those are

uncharged. There [are] no convictions, but they have been satisfactorily proven to the Court because I believe the witness; I simply believe her in that regard. This was not a one-time deal. And that is pretty obvious as to how quickly it happened and how easily she was able to secure the deal, in addition to her testimony. That corroborates that.”

The court found that the sentence was necessary to deter others and “necessary to deter this defendant because he [has been] repeating criminal conduct over the years, and he’s dealt heroin more than the one time for which he [was] convicted of as to this informant that testified hereto.” The court then stated that it considered defendant’s perjury at trial as a “very, very serious factor in aggravation” as defendant denied selling the drugs at trial, but then said in his statement of allocution that he had just been trying to help Terry out by selling her the drugs. The court sentenced defendant to 6½ years’ imprisonment. Defendant filed a motion to reconsider sentence, which was denied.

¶ 11

ANALYSIS

¶ 12

On appeal, defendant argues that the court erred by considering, in aggravation, evidence of uncharged criminal conduct (defendant’s previous drug transactions with Terry) that was presented at trial. Specifically, defendant argues (1) he was not informed that the uncharged-crimes evidence would be considered in aggravation and did not have an opportunity to challenge the evidence at sentencing, and (2) Terry’s testimony that defendant had previously sold her heroin was unreliable. We find that the court did not abuse its discretion in considering the other-crimes evidence presented at trial as a factor in aggravation as Terry’s testimony was part of the trial record, defendant had the opportunity to cross-examine and rebut the testimony at trial, and Terry was a credible witness.

¶ 13 Section 5-4-1 of the Unified Code of Corrections sets forth a list of considerations for the court during sentencing, including that the court shall “consider the evidence, if any, received upon the trial.” 730 ILCS 5/5-4-1 (West 2014). The court may also consider evidence of other criminal conduct perpetrated by a defendant, even if the defendant has not been criminally charged or convicted. *People v. English*, 353 Ill. App. 3d 337, 339 (2004). “Evidence of other criminal conduct should be presented by witnesses, who can be confronted and cross-examined *** so that the defendant has an opportunity to rebut the testimony.” *Id.* The court has broad discretion in hearing the evidence and determining an appropriate sentence. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992). In fashioning a sentence “relevance and reliability are the important factors in the consideration of evidence.” *Id.* A sentencing decision by the circuit court will not be disturbed absent an abuse of discretion. *People v. Thomas*, 178 Ill. 2d 215, 249 (1997).

¶ 14 First, defendant contends that he was not informed that the uncharged-crimes evidence (defendant’s previous drug transactions with Terry) would be considered in aggravation and did not have the opportunity to challenge the evidence at sentencing. Terry testified at trial that she had owed defendant money so he had only given her two bags of heroin for \$60 instead of the three they had agreed on. On cross-examination, the defense elicited from Terry that the money she owed defendant was from heroin that he had fronted her previously. At sentencing, the court, as a factor in aggravation, considered Terry’s testimony that defendant had previously sold her heroin. There is no doubt that the court, during sentencing, was required to consider the evidence introduced at trial, including Terry’s testimony. See 730 ILCS 5/5-4-1 (West 2014) (stating that “the court shall” consider the trial evidence at sentencing). Thus, as the testimony was contained in the trial record, defendant was on notice that it would be considered at sentencing. Moreover, at trial defendant had the opportunity to, and actually did, cross-examine Terry. In fact, the very

