2019 IL App (2d) 160171-U
No. 2-16-0171
Order filed January 24, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 14-CF-1184
WILLIE B. BURNETT JR.,	)	Honorable Fernando L. Englesma,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Hudson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to a total of 65 years' imprisonment for murder and possession of a firearm: the court properly relied in aggravation on defendant's long history of drug-dealing (and the need to deter same), the court presumably considered but reasonably discounted the allegedly mitigating factors, and we could not consider defendant's policy arguments against the efficacy or fairness of very long sentences for murder with a firearm.

¶ 2 Defendant, Willie B. Burnett Jr., appeals from his conviction of first-degree murder by personally discharging a firearm with intent to kill (720 ILCS 5/9-1(a)(1) (West 2014); 730 ILCS 5/5-8-1(d) (West 2014)), unlawful possession of a firearm by a felon (720 ILCS5/24-1.1(a)

(West 2014)), and possession of a firearm without having a firearm owner's identification card (430 ILCS 65/2(a)(1) (West 2014)). He also appeals from his sentence of 35 years' imprisonment plus a 25-year firearm add-on for the murder and his consecutive sentence of 5 years' imprisonment for unlawful possession of a firearm by a felon. He asserts that, on his motion to suppress his confession, defense counsel was ineffective for failing to call a clinical psychologist that examined defendant when his fitness was at issue and who suggested that defendant had experienced "a brief psychotic episode." He further asserts that his sentences were excessive. We affirm the convictions and the sentences. We hold that the record does not establish that counsel's failure to call the psychologist was unreasonable. We further determine that the sentences were not an abuse of discretion.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged in a nine-count indictment with seven counts of first-degree murder, one count of unlawful possession of a firearm by a felon, and one count of possession of a firearm without having a firearm owner's identification card. The first-degree murder charges all related to the May 5, 2014, shooting death of James Tilson.

¶ 5 Police arrested defendant as a suspect in Tilson's murder on May 15, 2014. He was in jail on May 19, 2014, when he told a corrections officer that he "need[ed] to do the right thing and get this off [his] shoulders." He made what amounted to a full confession of his guilt and admitted that Tilson had not been armed during the incident that resulted in Tilson's death.

¶ 6 On May 30, 2014, defense counsel asked the court to order a fitness evaluation of defendant based on what counsel described as the jail staff's observation of "unusual behavior" by defendant and counsel's own observations of his interactions with defendant. For instance, counsel stated that defendant "at one point [had sung] a children's tune rather than answering

questions" from counsel. The court ordered the evaluation and appointed Terrance G. Lichtenwald, a clinical psychologist, to perform the evaluation. Lichtenwald concluded that defendant was fit, but noted that defendant had "self-reported a *** time during which he heard voices and was paranoid." Lichtenwald concluded that defendant "more likely than not underwent a brief psychotic episode," which was possibly the result of Xanax withdrawal, but that defendant was no longer reporting psychotic symptoms.

¶ 7 On October 1, 2014, the court granted leave for defendant to replace defense counsel. That change also resulted in the case's assignment to a new judge. New defense counsel moved to suppress defendant's confession. On February 23, 2015, she told the court that she would "reach out" to Lichtenwald to get his opinion on defendant's competence to waive his right to remain silent. On March 2, 2015, she told the court that she had spoken to Lichtenwald and, on his advice, had since been in contact with a different potential expert witness. On March 16, 2015, counsel told the court that she had again spoken with Lichtenwald, who had told her that the potential witness he had recommended was not willing to take on that role. Counsel said that she would proceed with the suppression motion without expert testimony. The court ultimately denied the motion.

¶ 8 The evidence adduced at trial is not at issue in this appeal. Defendant was 33 years old at the time of the shooting and lived with his wife and children in a house in Rockford. Defendant, Tilson, and a mutual friend, Terrance Bell, were all drug dealers. Bell sold marijuana; defendant and Tilson sold crack. The day before the shooting, Bell and defendant had been together at Bell's house, where they had been betting with each other on video games. Tilson also came to Bell's house, but arrived later than defendant. Tilson owned a car, a Buick Park Avenue, which was at a repair shop that day. He did not have the money to pay for the repairs, and he asked

Bell and defendant for help paying the bill. The request resulted in defendant and Tilson getting into an argument that the two pursued in a series of texts. Defendant showed Bell a text from Tilson that said, "[M]an, lately I've been feeling like killin' a mother fucker or some shit like that." Tilson eventually came up with the money on his own.

¶ 9 The three friends rented a room at a Howard Johnson's motel. They used the room as a recording studio and as a base for their drug dealing. They were together in the room on May 3, 2014, and on into May 4, 2014. Kenyatta Brown, defendant's girlfriend, was also present. She had been drinking heavily. Bell and defendant had been using Xanax and cough syrup with codeine all day. Early in the morning of May 4, all four went on a drug run. They took two vehicles. Bell and Brown were in defendant's Tahoe, and Tilson and defendant were in Tilson's Buick. They drove to an abandoned house at 4211 Crandall Avenue in Rockford. Tilson parked the Buick in the driveway, and Brown parked the Tahoe on the street nearby. Bell and Brown heard several gunshots, then saw defendant exit the passenger side of the Buick and run toward them. They both denied that defendant had handed them a gun.

¶ 10 Police officers found Tilson dead in his car; the cause of death was two gunshot wounds to the right side of his head. The police recovered six .38-caliber bullets from the scene and from Tilson's body. The markings on the bullets suggested that all had been fired from the same gun. The police recovered a .38-caliber handgun from Bell; it did not produce markings that matched the bullets. Consistent with defendant's statement to the police that he had thrown the murder weapon in the river, the police never recovered a gun that produced matching markings.

¶ 11 The State introduced a copy of defendant's conviction of delivery of more than 1, but less than 15, grams of cocaine.

¶ 12 Defendant elected to testify. He told the jury that Tilson had pulled a gun on him, that he grabbed it, and that he then shot Tilson. He ran from the car and gave the gun to Bell; the gun the police took from Bell was the gun he had taken from Tilson. He did not remember making his statement to the police. He believed that he was in an altered mental state when he gave it.

¶ 13 The jury received instructions on both self-defense and second-degree murder. It found defendant guilty on all counts before it.

¶ 14 At sentencing, the court ruled that neither the statutory factors in mitigation nor the statutory factors in aggravation had a great deal of weight in this case. "[I]n terms of actual factors in aggravation," there is "a prior history of criminality." But, "as both counsels point out it's not extensive."

Further:

> "There isn't a lot of mitigation other than what I've already mentioned in terms of the prior record and that cuts both ways. I think that's a natural [*sic*] at best. So there isn't a lot in mitigation really."

However, it deemed that defendant's involvement in the drug trade was a prime reason that defendant needed to receive a sentence that would be a deterrent to others:

> "And I'm being asked to deter other young people out there from engaging [in] drug trafficking and the ills that come as a result of it. *** I think deterrence is important *** because [of] the whole underlying drug trafficking evidence that was presented so a sentence is necessary.
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> * * *
>
> *** The best I can assess is that it had something to do with money. And part of the whole *** drugs [*sic*] dealer's thing that was going on here. ***

> The best you can come up with is that [it was] some kind of financial thing that involved drugs. ***
>
> I believe in this case I can say with some certainty that but for the fact that the 3 main actors in this case, I include the witness in this, Mr. Bell, but [for] the fact that they're dealing drugs this wouldn't have happened. There's something about it that tells me that. That this wasn't a[n] argument over the rap music business ***. ***
>
> *** I don't know where 14 year old [defendant] *** decided that I think selling drugs is an okay thing. *** I don't know what it's going to take to send a message, if you will, I don't know as a deterrent that somehow instill [in] the younger members of this community that, no, this is not normal life. ***
>
> Selling drugs leads to beatings, shootings, overdoses."

¶ 15 The court imposed a sentence for the murder of 35 years' imprisonment plus a 25-year firearm add-on; the court imposed the minimum add-on on the basis that defendant had no history of gun crime. It noted that this sentence was to be served at 100%. Finally, it imposed a consecutive sentence of five years' imprisonment for unlawful possession of a firearm by a felon.

¶ 16 Defendant moved to reconsider the sentences, arguing primarily that the court had abused its discretion by giving unbalanced weight to factors in aggravation over factors in mitigation. The court stood by its weighing of the factors:

> "I did consider the factors of aggravation and mitigation although, as I indicated earlier, starts to deter [*sic*] the offense of first degree murder, the factual circumstances of this case, the underlying drug trafficking that was involved, the very nature of the killing in this case, I believe meritted [*sic*] a 35-year sentence."

¶ 17 Defendant timely appealed.

¶ 18 II. ANALYSIS

¶ 19 On appeal, defendant argues (1) that counsel was ineffective for failing to present testimony from Lichtenwald in support of his motion to suppress his confession as involuntary and (2) that the "trial court abused its discretion in sentencing [defendant] to a combined sentence of 65 years, where no penological goals [were] advanced by any sentence over the minimum and [defendant] had a non-violent criminal history as well as a music career indicative of rehabilitative potential." The State responds (1) that the record is consistent with counsel having taken reasonable steps to investigate whether Lichtenwald would be a proper witness and (2) that the sentence was justified by the murder's "premeditated and brutal" nature and its link to the drug trade. We reject both of defendant's claims.

¶ 20 We determine that the record fails to support defendant's claim that counsel was ineffective. Counsel represented to the court that she had spoken to Lichtenwald regarding the suppression hearing, so we can assume that her choice not to call Lichtenwald as a witness was strategic. To succeed on a claim of ineffective assistance of counsel, a defendant must present evidence to satisfy both prongs of the standard set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Thus, a defendant must show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. A court decides whether the performance of a defendant's attorney was deficient using an objective standard of competence grounded in prevailing professional norms. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000). To establish that counsel's performance was deficient, a defendant "must overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy." *Richardson*, 189 Ill. 2d at 411. Here, defendant argues that,

although counsel consulted with Lichtenwald during the suppression proceedings, "[t]he record fails to show why Lichtenwald himself was not called to testify at the suppression hearing, at least in regard to his conclusion that [defendant] suffered a brief psychotic episode while in custody for this case." Further, "counsel's failure to support the motion to suppress with an expert psychiatric [*sic*] opinion stating, at a minimum, that [defendant] underwent a 'brief psychotic episode' around the time of his custodial confession, was objectively unreasonable." Defendant thus asks us to assume that Lichtenwald's testimony would have straightforwardly replicated Lichtenwald's conclusions in the fitness report. Based on the record as it currently exists, we cannot determine that. As cases such as *Richardson* teach, absent evidence that counsel lacked a proper strategic basis for her decision, we must assume that she had a proper basis and did not act arbitrarily. If such evidence exists, it is not a part of the record in this appeal.

¶ 21 On the question of the proper sentences, defendant argues that "[g]iven [his] age at the time of the offense (33 years old), and the severe range of penalties authorized by statute, imposing the minimum on each count would still require [him] to be imprisoned until the age of 79." He further argues that a total sentence above an already-high minimum is not a plausible deterrent to others and "will consume scarce state resources and ensure that [defendant] will die in prison."

¶ 22 We determine that the court did not abuse its discretion when it imposed sentences 2 and 15 years above the statutory minimums. We do not reduce a sentence imposed by the trial court unless it is "clearly evident that the sentence was improperly imposed." *People v. Ward*, 113 Ill. 2d 516, 526 (1986). In deciding the propriety of a sentence, we consider the record as a whole, not isolated statements by the trial court. *Ward*, 113 Ill. 2d at 526-27. We may not reduce a

sentence that is within the statutory range, as defendant concedes his sentences are, "unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense" (*People v. Horta*, 2016 IL App (2d) 140714, ¶ 40), such that it constitutes an abuse of discretion by the trial court (*People v. Alexander*, 239 Ill. 2d 205, 212 (2010)). Within the applicable sentencing range, a trial court has great latitude in sentencing a defendant, but it may neither ignore relevant mitigating factors nor consider improper factors in aggravation. *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003). Furthermore, a "reviewing court must not substitute its judgment for that of a sentencing court merely because it would have weighed the factors differently." *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 23 Here, the court placed great weight on defendant's being a career drug dealer. That was a proper consideration. A sentencing court may consider evidence of unprosecuted criminal conduct if that evidence is reliable. *E.g.*, *People v. Hudson*, 157 Ill. 2d 401, 452 (1993). Further, the court may inquire into a defendant's "general moral character *** [and] natural inclination or aversion to commit crime." *People v. Arze*, 2016 IL App (1st) 131959, ¶ 120. "This inquiry is limited only by the prerequisite that the information considered be accurate and reliable as determined by the trial court within its sound discretion." *Arze*, 2016 IL App (1st) 131959, ¶ 120. Defendant does not suggest that the court abused its discretion by *considering* his nearly two decades of drug dealing—a history that is not in question. His dispute is with *how* the court used that evidence, and particularly the court's emphasis on deterrence of others—that it wanted to "instill [in] the younger members of this community that, no, [drug dealing] is not normal life." It was not an abuse of discretion to consider drug dealing to be an aggravating factor. To be sure, the court's reasoning on this issue was not particularly clear. (Apparent transcription errors do not help matters.) However, the court *was* clear in stating that it was treating

defendant's history of drug dealing as an aggravating factor, which it clearly was. Moreover, the record does not suggest that the court ignored any mitigating factors. It assessed defendant's conviction record as neither particularly mitigating nor aggravating. Defendant asserts, with minimal argument, that his music career suggests rehabilitative potential unconsidered by the court. We must presume that the court considered it but reasonably gave it minimal weight. See *People v. Neasom*, 2017 IL App (1st) 143875, ¶ 48 ("The trial court is presumed to have considered all relevant factors and any mitigation evidence [citation], but has no obligation to recite each factor and the weight it is given at a sentencing hearing.").

¶ 24 Defendant argues that very long sentences such as his neither deter nor rehabilitate and we should therefore reduce his total sentence. We disagree. It is a deliberate feature of our statutory sentencing scheme that firearm-based murders will be punished more severely than other murders. Defendant implies that only the lower portion of the available sentencing range is penologically legitimate. As defendant's argument applies to any defendant convicted of the same offense, we deem that the argument is a challenge to the wisdom of the sentencing provision and thus is properly addressed to our legislature, not to a reviewing court.

¶ 25 Defendant argues that the minimum total sentence for his offenses, 20 years plus 25 years plus 2 years, would allow him to be released at the age of 79—as opposed to the age of 95—and that that is a basis for reducing his sentence. Although this argument at least relates to an individual characteristic of his, his age, it is at heart the same argument against the sentencing range for murder with a firearm that we have just addressed. A defendant would have to both be very young and receive a sentence near the minimum to be released before old age or near old age. Thus, defendant again argues that part of the sentencing scheme for firearm-based murders should not be used—the same policy argument we have rejected.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 28 Affirmed.