2019 IL App (3d) 170342-U

Order filed July 10, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-17-0342
v.	)	Circuit No. 16-CF-1527
	)	
SAMUEL L. MAYS,	)	Honorable
	)	Edward A. Burmila Jr.,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Schmidt concurred in the judgment.
Justice McDade specially concurred.

ORDER

¶ 1 *Held*: The court did not err in sentencing defendant.

¶ 2 Defendant, Samuel L. Mays, appeals his sentence of six years' imprisonment, arguing that he was subjected to an improper double enhancement, the court considered an improper factor, the court failed to consider a mitigating factor, and his sentence was excessive. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged with aggravated battery (720 ILCS 5/12-3.05(f)(1) (West 2016)) and domestic battery (*id.* § 12-3.2(a)(1)). The domestic battery charge stated,

> "defendant, having previously been convicted of Domestic Battery, under case number 2010 CF 733 in Will County, Illinois, knowingly, without legal justification, caused bodily harm to Jacqueline Mays, a family or household member, in the said defendant struck Jacqueline Mays about the head, and pursuant to Chapter 725, Act 5, Section 111-3(c) of the Illinois Code of Criminal Procedure of 1963 as amended, the defendant is hereby placed on notice that it is the intent of the People of the State of Illinois to seek an enhanced Class 4 sentence based upon the defendant's prior conviction for Domestic Battery in Will County, case number 2010 CF 733, in violation of Chapter 720, Section 5/12-3.2(a)(1)."

¶ 5 Defendant entered an open plea of guilty to the domestic battery charge, in exchange for the State dismissing the aggravated battery charge. As a factual basis for the plea, the State said that the evidence would establish that Jacqueline told officers that defendant was her husband and that he "had argued with her and then struck her in the face with a cast iron frying pan and punched her in the face. She was taken to the ER and treated for her injuries." The State further said that defendant had "previously been convicted for domestic battery in Case Number 10 CF 733 out of Will County." The court accepted the plea.

¶ 6 The case proceeded to a sentencing hearing. The presentence investigation report (PSI) showed that defendant had an extensive criminal history, including two Class 4 felony domestic battery convictions in case Nos. 10-CF-733 and 06-CF-1568. Jacqueline's victim impact

statement said that defendant had symptoms of attention deficit hyperactivity disorder or bipolar disorder, but "he would not follow through on seeing a doctor and getting *** diagnosed." The statement further said, "We, as a family, wish for [defendant] to receive help from professionals to be diagnosed and treated for this behavior with no diagnosis. He should be held accountable by seeking mental help so that he can have a chance at being a better person." The State said that defendant was extended-term eligible and asked that an extended term be assessed. Defendant argued that, based on his undiagnosed mental health illness, he "used bad judgment, couldn't control his impulses and lashed out at his wife." Defendant asked for a period of intensive probation, noting that incarceration would not provide him with the opportunity to be rehabilitated. Defendant additionally asked for a mental health evaluation. Defendant made a statement in which he said, "I just need help. I need to go to classes and stuff, I need help. And I'm sorry for what I did, but I need help." The court said,

> "I've heard every single thing that [defense counsel] had to say and I heard you say to me well, I need help. And that's an accurate statement, but it's not something that came into being recently. Unfortunately, you've needed help for some period of time, and the people that know you best who've set out that information in that victim impact panel have also said the same thing. Now, they care about you and they don't want to see anything bad happen to you, but in looking at your [PSI] it's hard to imagine that in a relatively short period of time you have 17 traffic convictions or some form of those offenses, some of them you got court supervision on; 14 misdemeanor convictions and six felony convictions and you've already been to the Department of Corrections [(DOC)] three times. And the shocking part to the Court is the last two were also felony domestic

batteries with two different victims. So you victimized three different women feloniously in a relationship three times now.

And how much is too much? That's the issue that I'm confronted with now. Do we just lock you away and hope after you get out of the [DOC]—like, I agree with [defense counsel], they're not going to do anything for you other than warehouse you, okay. But you won't be hurting any women in that period of time with your lack of impulse control. And I appreciate the fact that you say you need help, but there's no magic pill, you're the one that has to do it. And I'm sorry to say about another human being, you don't appear capable of doing it."

The court commented on defendant's request for intensive probation, stating, "I can't make your family your jailer." The court asked for the files for defendant's two other domestic battery convictions and took the matter under advisement.

¶ 7 The parties reconvened the next day. Defense counsel stated that the State and defense counsel had "come to the conclusion that *** an appropriate sentence for [defendant] is 30 months in the [DOC]." The court said,

"I greatly appreciate the effort that the State and [defense counsel] went to to arrive at an agreed disposition, but, of course, it's not binding on the Court.

And I had an opportunity, as I said I would yesterday, to review these files as well as his previous felony cases of 06 CF 1568 and 10 CF 733. ***

I would note that the victims in each of these cases were different individuals so there are at least three women in a relatively short period of time when we take out the time spent in the [DOC] that [defendant] has feloniously assaulted.

And I also notice in the disposition of the 10 CF case, there was another felony matter that alleged a felony domestic battery that was dismissed as part of the plea agreement.

So we have at least four instances of felonious assaults on women as a result of domestic circumstances.

We look at [defendant's] [PSI]. He has had multiple incarcerations in the [DOC]. He has also been placed on probation, conditional discharge, and court supervision. Many of those were terminated unsatisfactorily or were revoked.

So I think that the likelihood that another sentence of probation is going to be helpful to [defendant] or a nonextended term sentence in the [DOC] which would be the equivalent of the last sentence that he served does not send the appropriate message either to [defendant] or the community, that a person can continually feloniously assault women, different women, and remain either in the community actively on probation or serve what I believe is a minimal sentence in the [DOC], is not the appropriate disposition in this case.

So I reject the agreed disposition of the parties and [defendant] is sentenced to an extended term of six years in the [DOC]."

¶ 8 Defendant filed a motion to reconsider sentence, arguing that the court failed to consider the mitigating evidence and erred in considering a case that had been dismissed. The court denied the motion, stating,

"[T]he point that I was trying to make was that that case was dismissed as part of a plea agreement. And the point that I was trying to make, and maybe I could have been more artful in making it, was the defendant had had opportunities in the

past to have his conduct addressed in a fashion that the cases were either dismissed or he could be admitted to probation, that because of all those other instances, that I did not think that probation was the appropriate disposition in this case.

While [defense counsel] is correct in saying that I can't take that into account, the Illinois the Supreme Court case, [*People v. La Pointe*, 88 Ill. 2d 482, 496 (1981)], says that anything could be taken into account, as long as it's accurate. And I did note for the record that that case was dismissed. I didn't say that I was holding it against him. And perhaps what I should have said, that there were four different women who alleged that he had committed domestic battery. And just so that the record is clear, I did not treat that case as a conviction. And as I said, specifically noted, that it was dismissed. So, I knew that. It wasn't erroneous on my part.

And I think that taking the record as a whole, and noting [defense counsel's] argument, the sentence was the correct one ***."

¶ 9 II. ANALYSIS

¶ 10 On appeal, defendant contends that (1) he "was subjected to an improper double enhancement where the same prior conviction for domestic battery was used first to elevate the seriousness of the charged offense from a misdemeanor to a Class 4 felony and was then used a second time at sentencing to impose an extended-term sentence"; (2) the court considered an improper factor in aggravation; (3) the court failed to consider mitigating evidence; and (4) his sentence was excessive. We find that defendant was properly sentenced, where he had two separate prior convictions, the court did not consider an improper factor, the court properly

considered his mental health, and his sentence was not greatly at variance with the spirit and purpose of the law.

¶ 11 A. Double Enhancement

¶ 12 Defendant first contends that he was subjected to an improper double enhancement. Defendant admits that he forfeited this issue by failing to raise it in the circuit court, but asks that we consider this issue under the second prong of the plain error doctrine. The first step in the plain error doctrine is to determine whether a plain error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010); *People v. Piatkowski*, 225 Ill. 2d 551, 564-65 n.2 (2007).

¶ 13 Using the same factor twice to elevate the severity of the offense is referred to as "double enhancement." *People v. Guevara*, 216 Ill. 2d 533, 545 (2005); *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). Double enhancement is prohibited unless "the legislature clearly intends to enhance the penalty based upon some aspect of the crime, and such an intention is clearly expressed." *Phelps*, 211 Ill. 2d at 15. As the double enhancement rule is one of statutory construction, we apply *de novo* review. *Id.* at 12.

> "It is clear from the case law that, where a prior felony is used to enhance a misdemeanor to a felony, and then that same prior felony is used to impose an extended-term sentence on the enhanced felony, the extended-term sentence is improper. [Citations.] It is also clear that when one crime is used to enhance a misdemeanor to a felony, and then a separate offense is used to impose an extended-term sentence, the extended-term sentence is proper and no improper double enhancement has occurred." *People v. Fish*, 381 Ill. App. 3d 911, 916 (2008).

¶ 14 We find *Fish* to be instructive. In *Fish*, the defendant was convicted of aggravated driving while under the influence of alcohol (DUI). *Id.* at 912. He had previously been convicted of two counts of reckless homicide in one case, where defendant crashed his car into another vehicle and killed two of its occupants. *Id.* Therefore, the misdemeanor DUI was enhanced to a Class 3 felony. *Id.* The defendant was then sentenced to an extended-term sentence of 10 years' imprisonment. *Id.* at 913. On appeal, the defendant argued "that since the basis for the upgrade on the DUI from misdemeanor to Class 3 felony was his prior convictions for reckless homicide, to use those same reckless homicide convictions, which arose from the same act, as a basis for an extended-term sentence would be an impermissible 'double enhancement.' " *Id.* This court found that "defendant's two convictions for reckless homicide constitute two separate offenses and that one of the convictions can be used for the enhancement from misdemeanor to felony and the other conviction can be used to impose an extended term sentence." *Id.* at 917.

¶ 15 Here, defendant had two separate convictions in two separate cases. The State expressly used one of the convictions to enhance the charge from a misdemeanor to a felony. Like *Fish*, the other conviction could be used to impose an extended-term sentence. Therefore, defendant was properly sentence to an extended term.

¶ 16 In coming to this conclusion, we reject defendant's contention that "section 12-3.2(b) of the Criminal Code [of 2012 (Code)] requires that both of [defendant's] convictions be considered to have been used to enhance the instant domestic battery from a Class A misdemeanor to a Class 4 felony, regardless of what the State wrote in the charging instrument." Section 12-3.2(b) states in part:

> "Domestic battery is a Class 4 felony if the defendant has one or 2 prior convictions under this Code for domestic battery ***, or one or 2 prior convictions under the law of another jurisdiction for any offense which is substantially similar. Domestic battery is a Class 3 felony if the defendant had 3 prior convictions under this Code for domestic battery ***, or 3 prior convictions under the law of another jurisdiction for any offense which is substantially similar. Domestic battery is a Class 2 felony if the defendant had 4 or more prior convictions under this Code for domestic battery ***, or 4 or more prior convictions under the law of another jurisdiction for any offense which is substantially similar." 720 ILCS 5/12-3.2(b) (West 2016).

Defendant argues:

> "[B]ecause defendant had two prior convictions for domestic battery, the instant offense is a Class 4 felony. Both convictions are used to come to this conclusion. Assuming *arguendo* that defendant had three prior convictions for domestic battery, the instant offense would be a Class 3 felony; all three prior convictions would be used to enhance the class of the offense. If defendant had four prior domestic battery convictions, the instant offense would be a Class 2 felony; all four prior convictions would be used to enhance the class of the offense. The plain language of section 12-3.2(b) illustrates that the legislature intended that all of a defendant's prior domestic battery convictions—however many there may be—be used when enhancing the class of a domestic battery."

We disagree with defendant's interpretation. The State has discretion in charging a defendant. See *People v. Hubbard*, 2012 IL (2d) 120060, ¶ 23. If a defendant had four prior domestic

battery convictions, like in defendant's hypothetical, the State would have the discretion to charge the defendant with a lesser class felony, if they chose to do so. "[T]he State's Attorney is vested with exclusive discretion in the initiation and management of a criminal prosecution. That discretion includes the choice of which charges shall be brought. A criminal defendant does not have the right to choose his or her prosecution or punishment." *People v. Ceja*, 204 Ill. 2d 332, 362 (2003). Such discretion includes, like here, using one prior conviction to enhance the offense and another for an extended-term sentence.

¶ 17 B. Improper Factor

¶ 18 Defendant next contends that the court erred in considering as aggravation the dismissed charge of domestic battery in his 2010 case. The circuit court has broad discretion in imposing a defendant's sentence. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). There is a strong presumption that the circuit court based its sentencing determination on proper legal reasoning, and we review the court's sentencing decision with great deference. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). However, we cannot affirm a sentence based on an improper factor, unless we "determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). The issue of whether a court relied on an improper factor in imposing a sentence presents a question of law that we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

> " 'A sentencing body " ' "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information [it] may consider, or the source from which it may come" [citations].' " [Citation.] The evidence considered by the sentencing body must be both relevant and reliable [citations],

> the determination of which lies within the sound discretion of the trial judge [citations]. In Illinois, evidence of other criminal conduct has been admitted as relevant to the question of the defendant's character. [Citation.]' " *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004) (quoting *People v. Morgan*, 112 Ill. 2d 111, 143 (1986), quoting *People v. Owens*, 102 Ill. 2d 88, 111 (1984)).

¶ 19 First, we cannot say that the evidence relied on by the court regarding defendant's dismissed charge of domestic battery was unreliable. The court specifically asked for and reviewed the file for the 2010 case. Defendant has not provided the file for the 2010 case on appeal, so we are unable to see what the court reviewed. See *People v. Lopez*, 229 Ill. 2d 322, 344 (2008) ("any doubts that arise from the incompleteness of the record will be resolved against the appellant"). Moreover, "[t]he circuit court is presumed to know the law and apply it properly, absent an affirmative showing to the contrary in the record." *In re N.B.*, 191 Ill. 2d 338, 345 (2000). Second, the record shows that the court, multiple times, stated that it knew the charge was dismissed, was not considering it as a conviction, and was not holding it against defendant. The court solely used the allegation contained in the dismissed domestic battery charge to illustrate its point that defendant continued to assault multiple different women, and the court had been lenient with him in the past. Third, even accepting defendant's argument that the court should not have even mentioned the dismissed charge, we find that the weight placed on it was insignificant. The court stated that defendant had assaulted multiple women in a short period of time. This was true regardless of whether the court considered the allegation from the fourth victim.

¶ 20 C. Mitigating Evidence

¶ 21 Next, defendant contends that the court failed to consider his mental health as a mitigating factor. It is up to the circuit court "to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). The court cannot ignore a pertinent mitigating factor (*People v. Burnette*, 325 Ill. App. 3d 792, 808-09 (2001)), although the weight to be given each factor depends on the facts and circumstances of each case. *People v. Gross*, 265 Ill. App. 3d 74, 80 (1994). It is not our duty on appeal to reweigh the factors involved in the circuit court's sentencing decision. *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995).

¶ 22 Here, defendant's potential mental health issues were presented to the court through the victim impact statement, defendant's comments, and arguments from defense counsel. The only point advanced by defendant in support of this argument is the assertion that the court did not explicitly mention defendant's mental health. However, "[a] sentencing court is not obligated to recite and assign value to each factor it is relying upon." *People v. McCain*, 248 Ill. App. 3d 844, 854 (1993). When mitigating evidence is before the circuit court, it is assumed that the court considered it, unless the record indicates otherwise. *People v. Burton*, 184 Ill. 2d 1, 34 (1998). "[A] defendant 'must make an affirmative showing that the sentencing court did not consider the relevant factors.' " *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11 (quoting *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38). Defendant fails to do so.

¶ 23 D. Excessive Sentence

¶ 24 Lastly, defendant argues that his sentence was excessive. Specifically, defendant states,

> "In light of the parties' agreement that a 30-month prison sentence was appropriate in this case, defendant's mental-health issues, the victim's belief that professional mental-health assistance would give defendant a chance to be a better

person, and defendant's acknowledgement that he needed help, defendant's 6-year sentence—the statutory maximum—is greatly at odds with the purpose and spirit of the law ***."

¶ 25 A circuit court's sentencing decisions are entitled to great deference and will not be altered by a reviewing court absent an abuse of discretion. *People v. Jackson*, 375 Ill. App. 3d 796, 801 (2007). The circuit court is granted great deference by reviewing courts because it is in a better position to determine the appropriate sentence since it has the opportunity to weigh factors like "the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense or greatly at variance with the spirit and purpose of the law. *People v. Alexander*, 239 Ill. 2d 205, 215 (2010).

¶ 26 We note that defendant's six-year sentence was within the applicable extended-term range. 730 ILCS 5/5-4.5-45(a) (West 2016). The court was not required to accept the parties' sentencing recommendation or a negotiated plea. *People v. Streit*, 142 Ill. 2d 13, 21-22 (1991); *People v. Henderson*, 211 Ill. 2d 90, 103 (2004). The record shows that the court considered the evidence before it. The court noted that defendant had an extensive criminal history, had been given multiple breaks from the court in the past, and had been unsuccessful on probation. The court further noted that the 30-month sentence recommended by the parties would be the same prison term he was sentenced to for his last indiscretion. Thus, the court did not believe that probation or a light sentence would be helpful to defendant or act as a deterrent. Moreover, the court noted the seriousness of the offense, particularly considering the fact that defendant had committed the same offense, multiple times, in a short time period. Though defendant may

believe the mitigating factors should have been given more weight, the court was not required to agree. "[T]he seriousness of an offense, and not mitigating evidence, is the most important factor in sentencing." *Wilson*, 2016 IL App (1st) 141063, ¶ 11. Viewed in totality, we cannot say that defendant's sentence was "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 27 III. CONCLUSION

¶ 28 The judgment of the circuit court of Will County is affirmed.

¶ 29 Affirmed.

¶ 30 JUSTICE McDADE, specially concurring:

¶ 31 I concur in the decision to affirm the six-year sentence imposed on the defendant, Samuel Mays, because I agree with the majority that the sentence was not "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." Fern, 189 Ill. 2d at 54.

¶ 32 Nonetheless, I write separately to underscore what I believe to be the impropriety of the trial court's consideration of defendant's dismissed felony domestic violence charge for any purpose and to disagree with the majority's seeming approval of that consideration.

¶ 33 The trial court attempted to justify its consideration of the dismissed charge as one of "at least four instances of felonious assaults on women as a result of domestic circumstances" by pointing out that it "was dismissed as part of a plea agreement." Supra ¶¶ 7-8. The fact of the dismissal, for whatever reason, on whatever basis, means the State has not been required to prove defendant guilty of the crime with which he was charged in a court of law. Until that happens, he remains cloaked with a presumption of innocence, not a presumption of guilt as the trial court appears to have believed.

¶ 34 Given the opportunity at the hearing on the motion to reconsider to retreat from any reliance on the dismissed charge, the court instead doubled down on its justification for considering it. See supra ¶ 8. In approving the trial court's persistence in considering the dismissed charge, this court has reached an equivocal position on this issue which culminates, in my opinion, in bad law. First, the majority finds that the trial court's personal review of the file, without any adversarial testing, somehow gives the dismissed charge an aura of reliability. Then it layers on the presumption that the trial court knew the law, which it clearly did, and applied it properly, which, to my thinking, it clearly did not. Second, the majority says in one sentence that the court "stated that it knew the charge was dismissed, was not considering it as a conviction, and was not holding it against defendant." Supra ¶ 19. Then in the very next sentence it notes that the trial court "solely used the allegation contained in the dismissed domestic battery charge to illustrate its point that defendant continued to assault multiple different women ***." (Emphasis added.) Id. That sounds amazingly like defendant stands convicted in the eyes of the trial judge and that the majority is okay with a conclusion that in this case an allegation has the same legal weight as a conviction. Third, and finally, the majority says "even accepting defendant's argument that the court should not have even mentioned the dismissed charge" as though the argument was actually meritless, and it concludes the weight placed on it by the court to have been "insignificant." Id. Had the trial court not been so insistent on using this unproven and unnecessary fourth felonious domestic battery to buttress and justify its imposition of the six-year sentence, I could agree with that conclusion. As it stands, however, I disagree with the majority's resolution of the issue of the trial court's consideration of an improper factor.