2019 IL App (4th) 170255-U

NO. 4-17-0255

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 10, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
GLENN ELLIS WILLIAMS,	)	No. 16CF1057
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's conviction and 16-year sentence but modified his drug-treatment assessment.

¶ 2 In December 2016, defendant, Glenn Ellis Williams, pleaded guilty to one count of unlawful delivery of a controlled substance. The trial court sentenced him to 16 years in prison and imposed numerous fines and fees, including a $3000 drug-treatment assessment.

¶ 3 On appeal, defendant argues (1) the trial court abused its discretion in sentencing him to 16 years in prison and (2) his drug-treatment assessment must be reduced. We affirm as modified.

¶ 4 I. BACKGROUND

¶ 5 In September 2016, a grand jury indicted defendant on two counts of unlawful delivery of a controlled substance within 1000 feet of a church (counts I and III) (720 ILCS

570/407(b)(1) (West 2016)) and two counts of unlawful delivery a controlled substance (counts II and IV) (720 ILCS 570/401(c)(2), (d)(i) (West 2016)).

¶ 6 In December 2016, defendant agreed to plead guilty to count II, which alleged he knowingly and unlawfully delivered to a Bloomington Police Department confidential source more than 1 gram but less than 15 grams of a substance containing cocaine. As charged, count II was a Class 1 felony (720 ILCS 570/401(c)(2) (West 2016)), but defendant was subject to mandatory Class X sentencing due to his prior record (730 ILCS 5/5-4.5-95(b) (West 2016)). The State agreed to dismiss counts I, III, and IV. Following the State's factual basis, the trial court found defendant's plea to be knowing and voluntary.

¶ 7 At the sentencing hearing, the prosecutor noted defendant had been "in and out of prison multiple times" and continues to sell drugs. Given his lack of "real rehabilitative potential" and the need to "protect the community from the defendant's criminal conduct," the prosecutor recommended a sentence of 20 years in prison. Recommending a term of six to eight years in prison, defense counsel admitted defendant has a "substantial criminal background," but not one involving "any violence," other than an aggravated battery conviction, and no weapons offenses.

¶ 8 In his statement of allocution, defendant mentioned his employment difficulties, homelessness, and negative drug test. He stated he participated in drug court and did not test positive for drugs during the program.

¶ 9 The trial court indicated it considered the amended presentence report, the recommendations of counsel, defendant's statement in allocution, and the factors in aggravation and mitigation. In aggravation, the court noted defendant's criminal history, the need to deter others, and the fact defendant was on probation at the time of this offense. In mitigation, the

court found defendant's criminal conduct did not cause or threaten serious physical harm to another. The court also noted defendant was 57 years old. It did not know whether defendant was an addict but found he had been "dealing drugs on several occasions." The court stated defendant "has absolutely no accountability or responsibility for his own actions." Given his history of 14 felony offenses and 5 misdemeanor offenses, the court sentenced defendant to 16 years in prison. The court also imposed numerous fines and fees, including a $3000 drug-treatment assessment.

¶ 10 In February 2017, defendant filed a motion to reconsider his sentence, arguing it was excessive. At the hearing on the motion, defense counsel argued defendant's prior convictions did not involve violence but consisted of drug offenses, retail thefts, and forgeries. Counsel suggested a sentence of 12 years would have been more appropriate, considering defendant "has struggled for over 30 years with drug addiction." The trial court denied the motion. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Defendant's Sentence

¶ 13 Defendant argues the trial court abused its discretion in sentencing him to 16 years in prison, where it failed to adequately consider mitigating factors, including his age, homelessness, drug addiction, and lack of violent criminal history. We disagree.

¶ 14 Initially, we note the State questions whether defendant has forfeited review of this issue on appeal. See *People v. Reed*, 177 Ill. 2d 389, 393, 686 N.E.2d 584, 586 (1997) (stating sentencing issues must be raised in the trial court to preserve those issues for review on appeal). Although defendant filed a postplea motion to reconsider his sentence and claimed it was excessive, the State contends the motion was nonspecific and did not raise the claim the trial

court failed to properly consider mitigating factors in imposing sentence. However, although the motion did not go into detail on the underlying claim of error, the motion did raise the issue of an excessive sentence. Moreover, at the hearing on the motion, defense counsel argued for a reduced sentence based on defendant's nonviolent criminal history, his age, and his drug addiction. Thus, as defendant gave the court an opportunity to review his claim of sentencing error, we find the issue has been preserved for appeal. See *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008); *People v. Valadovinos*, 2014 IL App (1st) 130076, ¶ 51, 22 N.E.3d 114.

¶ 15 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)). However, "a defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense." *People v. Shaw*, 351 Ill. App. 3d 1087, 1093-94, 815 N.E.2d 469, 474 (2004).

¶ 16 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character,

> mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004), quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

¶ 17 When a sentence falls within the statutory range of sentences possible for a particular offense, it is presumed not to be arbitrary. *People v. Moore*, 41 Ill. App. 3d 3, 4, 353 N.E.2d 191, 192 (1976). An abuse of discretion will not be found unless the court's sentencing decision is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 26, 82 N.E.3d 693. Also, an abuse of discretion will be found "where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 18 In the case *sub judice*, defendant pleaded guilty to the offense of unlawful delivery of a controlled substance, a Class 1 felony (720 ILCS 570/401(c)(2) (West 2016)). However, because of his prior record, defendant was subject to sentencing as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2016)). A person subject to Class X sentencing is subject to a range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a) (West 2016). As the trial court's sentence of 16 years in prison was within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 19 The amended presentence report indicated defendant's criminal history included 14 felony convictions, including manufacture/delivery of a controlled substance (1985, 2015, and 2016), possession of cocaine (1993), criminal possession of a forgery instrument and theft (2003), and retail theft (2013). The report also stated he had five misdemeanor convictions and three traffic offenses. In addition, defendant reported having arthritis in his back, using cocaine and crack "off and on" for over 30 years, working over 40 jobs in his life, and residing at the Salvation Army without any income.

¶ 20 At the sentencing hearing, the trial judge indicated he considered the amended presentence report, the recommendations of counsel, defendant's statement in allocution, and the factors in aggravation and mitigation. As factors in aggravation, the judge noted defendant's criminal history, the need to deter others, and the fact defendant was on probation at the time of this offense. As a factor in mitigation, the judge found defendant's criminal conduct did not cause or threaten serious physical harm to another. Along with noting defendant was 57 years old, the judge stated as follows:

> "I may be wrong, but I don't think I'm going to be, and reason is this: Listening to you and your statement in allocation, I just hear

> and see an individual who has absolutely no accountability or responsibility for his own actions. It's everybody else's fault but your own. It appears that your entire life has been an amazing set of unfortunate circumstances, totally outside of your control. And that's indeed unfortunate. That's not the truth, but that is what you want people to believe.
>
> What's facts or what are facts are this: You have a prior criminal history of 14 felony offenses and [5] misdemeanor offenses. You were on two terms of probation in McLean County when you committed the present offense. And, yes, you were given a golden opportunity with drug court which you threw in the garbage."

¶ 21 In his brief, defendant argues the trial court failed to consider his rehabilitative potential; disregarded his advanced age, poverty, and homelessness; characterized him as a drug dealer when he was nothing more than a "poor and desperate addict," not a "violent drug dealer"; and "fixated" on his number of prior convictions.

¶ 22 "Where mitigating evidence has been presented, it is presumed that the trial court considered it." *People v. Lundy*, 2018 IL App (1st) 162304, ¶ 24, 118 N.E.3d 1246. However, "the existence of mitigating factors does not obligate the trial court to reduce a sentence from the maximum allowable." *People v. Williams*, 317 Ill. App. 3d 945, 955-56, 742 N.E.2d 774, 783 (2000). Moreover, "a defendant's rehabilitative potential and other mitigating factors are not entitled to greater weight than the seriousness of the offense." *Shaw*, 351 Ill. App. 3d at 1093-94, 815 N.E.2d at 474; see also *People v. Malin*, 359 Ill. App. 3d 257, 265, 833

N.E.2d 440, 447 (2005) (stating the sentencing court is not obligated to place greater weight on mitigating factors "than on the need to deter others from committing similar crimes").

¶ 23 Here, defendant's lengthy criminal history shows little potential for rehabilitation. Defendant has committed 15 felony offenses, and his 2 prior drug convictions occurred when he was in his mid-fifties. Regardless of his employment history, defendant has consistently committed crimes since 1982, and his poverty does not explain his propensity to commit those crimes. While defendant argues his history of substance abuse should have been considered a mitigating factor, "[s]imply because the defendant views his drug abuse history as mitigating does not require the sentencer to do so." *People v. Shatner*, 174 Ill. 2d 133, 159, 673 N.E.2d 258, 270 (1996). Given the nature of the offense, defendant's criminal history, and his inability to refrain from criminal conduct while on probation, we find the sentence of 16 years in prison was not " 'greatly at variance with the spirit and purpose of the law,' " nor was it " 'manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 215, 940 N.E.2d at 1067 (quoting *Stacey*, 193 Ill. 2d at 210, 737 N.E.2d at 629). Accordingly, we hold the court did not abuse its discretion.

¶ 24 B. Drug-Treatment Assessment

¶ 25 Defendant argues the $3000 drug-treatment assessment must be reduced to $2000 because, although he was sentenced as a Class X offender, his conviction remained a Class 1 felony offense. We agree.

¶ 26 Initially, again, the State argues defendant forfeited review of this issue by failing to raise it in the trial court. Moreover, although conceding the $3000 assessment was imposed in error, the State argues it does not rise to the level of second-prong plain error. However, despite defendant's failure to raise the issue in the trial court, "forfeiture is a limitation on the parties, not

the court, and we may exercise our discretion to review an otherwise forfeited issue." *People v. Curry*, 2018 IL App (1st) 152616, ¶ 36, 100 N.E.3d 482; see also *People v. Carter*, 208 Ill. 2d 309, 318, 802 N.E.2d 1185, 1190 (2003) (stating "waiver is a limitation on the parties not on the court"). Thus, because the issue is clear and simple, we exercise our discretion to consider it now on direct appeal.

¶ 27 Section 411.2(a) of the Illinois Controlled Substances Act (720 ILCS 570/411.2(a) (West 2016)) provides as follows:

> "Every person convicted of a violation of this Act, and every person placed on probation, conditional discharge, supervision or probation under Section 410 of this Act, shall be assessed for each offense a sum fixed at:
>
> (1) $3,000 for a Class X felony;
>
> (2) $2,000 for a Class 1 felony;
>
> (3) $1,000 for a Class 2 felony;
>
> (4) $500 for a Class 3 or Class 4 felony;
>
> (5) $300 for a Class A misdemeanor;
>
> (6) $200 for a Class B or Class C misdemeanor."

¶ 28 In this case, defendant pleaded guilty to a Class 1 felony. Although defendant was sentenced as a Class X offender because of his prior convictions, his conviction in this case remains a Class 1 felony. See *People v. Thomas*, 171 Ill. 2d 207, 224, 664 N.E.2d 76, 85 (1996) (stating enhanced sentencing does not elevate the class of a crime); *People v. Rivera*, 362 Ill. App. 3d 815, 817, 841 N.E.2d 532, 534 (2005) (stating that although the defendant was subject

to Class X sentencing because of his prior convictions for Class 2 or greater felonies, it did "not change the classification of the offense with which defendant has been charged and convicted"). As defendant was only charged and convicted of a Class 1 felony, the drug-treatment assessment should have been set at the Class 1 felony amount.

¶ 29 As noted, the State concedes the $3000 assessment was imposed in error, and we agree with that conclusion. Thus, we reduce defendant's drug-treatment assessment to $2000. See Ill. S. Ct. R. 615(b)(4) (eff. Jan. 1, 1967) (permitting the reviewing court to "reduce the punishment imposed by the trial court"); *People v. Schillaci*, 171 Ill. App. 3d 510, 527, 526 N.E.2d 871, 882 (1988) (reducing the fine imposed by the trial court pursuant to Rule 615(b)(4)).

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm defendant's conviction and sentence and reduce his drug-treatment assessment to $2000. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 32 Affirmed as modified.