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2019 IL App (4th) 170468-U

NO. 4-17-0468

FILED
August 6, 2019
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
KELLY DOUGHERTY,	)	No. 16CF230
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Holder White and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not abuse its discretion in sentencing defendant to six years in prison.

¶ 2 In January 2017, defendant, Kelly Dougherty, pleaded guilty to one count of unlawful possession of a controlled substance. The trial court sentenced her to six years in prison. The court later granted defendant's motion to reconsider her sentence and held a new sentencing hearing. In May 2017, the court again sentenced defendant to six years in prison.

¶ 3 On appeal, defendant argues her six-year prison sentence is excessive. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2016, the State charged defendant by information with one count of unlawful possession with intent to deliver (count I) (Class X felony) (720 ILCS 570/401(a)(1)(A) (West 2016)), alleging she knowingly possessed with the intent to deliver more than 15 grams of a substance containing heroin. The State also charged her with one count of unlawful possession

of a controlled substance (count II) (Class 1 felony) (720 ILCS 570/402(a)(1)(A) (West 2016)), alleging she knowingly possessed more than 15 grams of a substance containing heroin.

¶ 6 In January 2017, the trial court conducted a plea hearing. Defendant agreed to plead guilty to count II, and the State agreed to dismiss count I. The court admonished defendant as to the minimum and maximum sentences and the trial rights she would be giving up by pleading guilty. In its factual basis, the State indicated a police officer executed a traffic stop of defendant's vehicle on Interstate 55 on October 5, 2016. A search of defendant's shoe revealed 15.62 grams of heroin. The court found defendant knowingly and voluntarily entered her plea of guilty.

¶ 7 At the April 2017 sentencing hearing, the trial court admitted the presentence investigation report without objection. In setting forth the circumstances of this offense, the report indicated defendant was driving a vehicle with two passengers on Interstate 55 when an officer initiated a traffic stop. Defendant's license had been suspended and her insurance had expired. After a canine detected the presence of drugs in the vehicle, defendant denied there was anything illegal inside. An officer later found multiple bags containing a white powder located in her right shoe. Defendant stated a passenger, Robert Simpson, told her to put the bags in her shoe, a claim Simpson denied. Defendant also had marijuana, a pipe, and a bag of white powder in her purse. Defendant told the police she was aware the purpose of the trip to Chicago was to obtain drugs, and she admitted the bag of heroin in her purse belonged to her.

¶ 8 The report indicated defendant was born in 1975 and has had a "history of victimization and unhealthy relationships," including with "individuals who are controlling, abusive and who have histories of violent crimes and substance abuse." Defendant's "life started to spin out of control after her friend and partner, Joe Burgess, died in July 2016[,]" and, soon

thereafter, she began using heroin. She had not been employed for 15 years and had been receiving disability income since 2004. Defendant suffers from an assortment of ailments, including myasthenia gravis, hypothyroidism, hepatitis C, and seizures. She has also been diagnosed with depression, anxiety, and bipolar disorder. The report stated defendant was found to be appropriate for Treatment Alternatives for Safe Communities (TASC) services and her likelihood for rehabilitation was strong.

¶ 9 In recommending an eight-year prison term, the State argued defendant, while only charged with a Class 1 felony of possessing over 15 grams of a controlled substance, "had almost 30 grams in her shoe," which "would qualify as an unusually large amount" for Livingston County. Defense counsel asked for a sentence of TASC probation. Counsel argued defendant has been in "very poor health," had no prior criminal history, and her actions in this case "were the result of a poor period in her life when she was especially addicted to the use of heroin and drugs and in a downward spiral."

¶ 10 In her statement of allocution, defendant asked for a chance to get the help and counseling she needed "to deal with the situation" she had been "avoiding for years." She also asked for "the chance to get the trusting relationship back with [her] kids."

¶ 11 The trial court noted the charged crime was a "very serious offense" and included "a significant amount of drugs." In fact, the court stated "30 grams in Livingston County is a considerable amount of drugs" and heroin is "a huge problem in this community." The court sentenced defendant to six years in prison.

¶ 12 Defense counsel filed a motion to reconsider the sentence, arguing the trial court failed to properly consider all mitigating factors and improperly considered certain aggravating factors. Counsel contended the court focused on the transportation of drugs into the community

with the intent to sell, when defendant pleaded guilty to only possessing the drugs. Moreover, counsel stated the court erred in relying on the State's argument that the weight of drugs recovered totaled 30 grams, as the State's factual basis indicated the amount found in defendant's shoe amounted to 15.6 grams of heroin.

¶ 13 During the hearing on the motion, the trial court stated it was concerned that it "was under the misapprehension" that the offense involved 30 grams of heroin instead of 15.6 grams. Given the wrong impression and the "huge difference" between the weights at issue, the court granted defendant a new sentencing hearing.

¶ 14 At the May 2017 sentencing hearing, the parties had no objection to the trial court's consideration of the presentence investigation report. The State then introduced a lab report indicating 15.6 grams of powder from 70 items were analyzed and found to contain heroin, while 9.6 grams of powder from 24 items were not analyzed. The State also introduced two photographs, including one showing 4 plastic bags and the other containing 94 small plastic Baggies containing a white powdery substance.

¶ 15 Called by the State, Livingston County Detective Sergeant Jeff Hamilton agreed the Illinois State Police crime lab typically only analyzes that portion of a suspected controlled substance necessary "to get to [the] highest criminal amount" possible. He also agreed defendant was found with 94 Baggies of individually packaged heroin in her shoe and stated that amount would be worth approximately $2000 in Chicago and $5000 in Pontiac.

¶ 16 In making its sentencing recommendation, the State asked for a six-year sentence, stating defendant's case involved "94 bags of heroin." Defense counsel objected, arguing the State did not test 94 bags of heroin and defendant only agreed to possessing 15.6 grams. The trial court overruled the objection. Defense counsel argued defendant was not convicted of

possession with intent to deliver heroin and should not be sentenced for that offense. Counsel asked the court to impose TASC probation.

¶ 17 In her statement in allocution, defendant admitted "it was a large quantity in [her] shoe" and "it was in small [B]aggies that's [*sic*] usually distributed in the streets for selling." Defendant stated she had "two grown men in [her] car that were seriously addicted" and she put the drugs in her shoe. Defendant continued on in rambling fashion, commenting about seeing women bring drugs into the jail and how "people dwell on people that are not users, get them addicted, [and] then they don't know how to control it." She also stated addiction "takes over your mind" and "takes over everything that you even believe in because you forget what you believe in."

¶ 18 The trial court indicated it considered the factors in aggravation and mitigation. The court stated "94 individually packaged [B]aggies of heroin is a lot of heroin," it was "a big deal," and, even though the possession offense was a Class 1 felony, it was "still a considerable amount" with "a high value." In noting the "reality of heroin addiction," the court unfortunately believed the chances were good that defendant would continue using drugs. While the court noted defendant did not have a criminal record and the conduct did not cause physical harm, it did state "the deterrence factor in this case is so strong because it's an unusually high amount for possession" and a term of probation "would deprecate the serious nature of these particular charges." The court sentenced defendant to six years in prison and stated the prior sentencing judgment would remain in effect through *nunc pro tunc*.

¶ 19 Defense counsel filed a second motion to reconsider the sentence, arguing the sentence was excessive. Counsel claimed the trial court abused its discretion when it referred to defendant's possession of 94 bags of heroin, even though not all of the bags were analyzed by

the crime lab, and when it failed to sentence her to TASC probation. The court denied the motion. This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 Defendant argues her six-year prison sentence is excessive because it is both greatly at variance with the spirit and purpose of the law and manifestly disproportionate to the nature of her offense. We disagree.

¶ 22 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. Mendez*, 2013 IL App (4th) 110107, ¶ 38, 985 N.E.2d 1047 (quoting *People v. Shaw*, 351 Ill. App. 3d 1087, 1093-94, 815 N.E.2d 469, 474 (2004)).

¶ 23 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. [Citation.]" (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)).

¶ 24 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 'fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.' " *People v. Lawson*, 2018 IL App (4th) 170105, ¶ 28, 102 N.E.3d 761 (quoting *People v. Ramos*, 353 Ill. App. 3d 133, 137, 817 N.E.2d 1110, 1115 (2004)). 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)).

¶ 25 In the case *sub judice*, defendant pleaded guilty to one count of unlawful possession of more than 15 grams of a substance containing heroin, a Class 1 felony. 720 ILCS 570/402(a)(1)(A) (West 2016). A person convicted of a Class 1 felony is subject to a sentencing range of 4 to 15 years in prison. 730 ILCS 5/5-4.5-30(a) (West 2016). As the trial court's sentence of six years in prison was within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 26 In her brief, defendant points out simple possession of less than 15 grams of a substance containing heroin is a Class 4 felony (720 ILCS 570/402(c) (West 2016)) and punishable by 1 to 3 years in prison (730 ILCS 5/5-4.5-45(a) (West 2016)), whereas simple possession of 15 or more grams but less than 100 grams of a substance containing heroin is a Class 1 felony (720 ILCS 570/402(a) (West 2016)) and punishable by 4 to 15 years in prison (730 ILCS 5/5-4.5-30(a) (West 2016)). Defendant states the crime lab report indicated she only had between 15.6 grams of a substance containing heroin or, at most, considering the untested items, 21 grams. She thus argues the weight is only slightly above the Class 1 felony threshold of 15 grams and her six-year sentence is excessive when less than 15 grams would yield one to three years in prison.

¶ 27 We find this argument without merit. Defendant has offered no case law to show there are different gradations in the particular felony class penalties depending on the low or high ends of the relevant weight ranges. The legislature has determined the possession of more than 15 grams of a substance containing heroin carries a sentencing range of 4 to 15 years in prison, and given the other considerations that are involved at sentencing, we will not read into the statute a requirement that a slight amount above the minimum weight requires the imposition of the minimum penalty.

¶ 28 In connection with the weight of the heroin and the charged offense, defendant points out the trial court noted there were 94 bags of heroin recovered. Defendant, however, argues this fact is irrelevant because for simple possession, "it is the weight of the substance containing heroin that controls the sentencing range, not the packaging in which it was seized." We find defendant has failed to develop this argument and also note a sentencing court is permitted to comment on the circumstances of the offense. See *People v. Robinson*, 391 Ill. App. 3d 822, 842, 909 N.E.2d 232, 252 (2009) (stating "a trial court may consider the nature and circumstances of the offense, including the nature and extent of each element of the crime that the defendant committed").

¶ 29 Defendant also argues her sentence is excessive considering her addiction, her "demonstrated vulnerability to manipulative men," and the heavy toll prison will take on her, considering her 14-year-old child and her "multitude of diagnosed medical conditions." See 730 ILCS 5/5-5-3.1(a) (West 2016) (stating mitigating factors include a defendant's lack of prior criminal activity, the hardship imprisonment would entail to a defendant's dependents, and that the criminal conduct was induced or facilitated by someone other than the defendant). She asks this court to reduce her sentence to four years in prison.

¶ 30 "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"). The trial court is also not required to view drug addiction as a mitigating factor. *People v. Madej*, 177 Ill. 2d 116, 139, 685 N.E.2d 908, 920 (1997); *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 105, __ N.E.3d __.

¶ 31 Here, the trial court mentioned defendant did not have a prior record and was not a danger to the community. However, given defendant's drug dependency, the court believed she was likely to use again because that is "the reality of heroin addiction." The court stated it understood "the bad place" defendant was in at that point in her life, but this was "not a typical possession case" given the "considerable amount" of heroin. Moreover, the court stated "the deterrence factor in this case is so strong because it's an unusually high amount for possession." We have found a trial court may properly conclude a "defendant's drug addiction lessened [the] rehabilitative potential, increased the seriousness of the offense, increased the need to protect society, and increased the need for deterrence." *Sturgeon*, 2019 IL App (4th) 170035, ¶ 108. Given the serious nature of the offense and the need to deter others, we find the sentence of six years in prison for the Class 1 felony offense of unlawful possession of a controlled substance 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.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court's judgment.

¶ 34 Affirmed.