

2014 IL App (2d) 121159-U  
No. 2-12-1159  
Order filed April 10, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04-CF-420
	)	
NOEL QUEVEDO,	)	Honorable
	)	James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

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PRESIDING JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not abuse its discretion in sentencing defendant to 35 years' imprisonment (on a 20-to-60 range) for first-degree murder: on remand for resentencing, the judge did not need to defer to the original judge's indication that he had been inclined to impose the minimum sentence, and, despite the mitigating factors and the financial cost of incarceration, which the judge presumably considered, the new sentence was justified by the brutality of the offense and new prison disciplinary reports.

¶ 2 Defendant, Noel Quevedo, appeals the judgment of the circuit court of Kane County, contending that his sentence, upon remand, of 35 years in prison was excessive. He requests that we either reduce his sentence or vacate it and remand for resentencing. Because the trial court

did not abuse its discretion in sentencing defendant, the sentence was not excessive, and we affirm.

¶ 3

### I. BACKGROUND

¶ 4 Defendant was indicted on four counts of first-degree murder arising out of the death of his eight-month-old son, Alex. Count I alleged that defendant shook Alex knowing that such acts created a strong probability of death (720 ILCS 5/9-1(a)(2) (West 2004)). Count II alleged that defendant shook Alex with the intent to do great bodily harm (720 ILCS 5/9-1(a)(1) (West 2004)). Count III alleged that defendant shook Alex knowing that such acts would cause death (720 ILCS 5/9-1(a)(1) (West 2004)). Count IV alleged that defendant shook Alex knowing that such acts created a strong probability of great bodily harm (720 ILCS 5/9-1(a)(2) (West 2004)).

¶ 5 The evidence at the bench trial can be summarized as follows. Defendant and his wife had two sons, Noel, Jr., and Alex. On March 1, 2004, after spending time at his cousin's home, where defendant drank four beers, he and his family returned to their basement apartment in his brother-in-law's home.

¶ 6 While his wife was upstairs washing baby bottles, defendant changed Alex's diaper. Alex was crying both before and after his diaper was changed. As defendant held him, Alex stopped crying and was unable to breathe. Defendant and his brother-in-law called 911. Alex was taken by ambulance to Mercy Hospital in Aurora. Alex was placed on a respirator and flown by helicopter to the pediatric intensive care unit at Lutheran General Hospital. Alex died on March 3, 2004.

¶ 7 Defendant gave incriminating statements to the police, including that he had shaken Alex several times and, in doing so, caused his injuries. The State's medical experts opined that Alex died from being shaken. Defendant's medical expert testified that Alex died from a seizure that

resulted from his having had neonatal meningitis several months earlier. The trial court found defendant not guilty of counts I, II, and III but found him guilty of count IV.

¶ 8 The trial court sentenced defendant to natural life imprisonment, because defendant did not receive the death penalty and was 17 years of age or older and Alex was under 12 years old. See 730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 2004). Defendant appealed both his conviction and his sentence.

¶ 9 On appeal, this court affirmed his conviction but vacated his sentence, because the sentence was imposed pursuant to a void statutory provision. See *People v. Quevedo*, 403 Ill. App. 3d 282, 298 (2010). In doing so, we noted that the sentencing hearing was “perfunctory,” because the parties understood that section 5-8-1(a)(1)(c)(ii) obviated the need to present evidence and argument on aggravation and mitigation. *Quevedo*, 403 Ill. App. 3d at 300. We recognized that “the trial court unambiguously expressed a desire to impose the minimum term of 20 years’ imprisonment” had it not been required to impose a natural life sentence. *Quevedo*, 403 Ill. App. 3d at 300. In that regard, we observed that the court was “free to exercise its discretion and impose the minimum sentence on remand if such a sentence [was] warranted.” *Quevedo*, 403 Ill. App. 3d at 300. We remanded to the trial court for resentencing.

¶ 10 Before the resentencing, the trial judge retired. A new judge was assigned and conducted the resentencing.

¶ 11 At the resentencing hearing, the trial court considered the presentence investigation report (PSR). The PSR showed no juvenile adjudications. Defendant’s only conviction was for operating an uninsured motor vehicle. Defendant had been employed as a masonry worker when he was arrested.

¶ 12 The PSR included two disciplinary reports from the Department of Corrections. One, dated March 2009, stated that defendant was disciplined for having possessed an ink pen that had been modified into a “homemade weapon with a sharpened wire sticking out of the end.” The other, dated August 2011, stated that defendant was disciplined for an incident wherein he was “not getting along” with his cellmate and told a corrections officer that he “was going to beat the [cellmate’s] ass.”

¶ 13 Defendant presented one witness at the resentencing hearing, his sister, who had recently moved to the United States. She lived with defendant in Mexico until she was 13 years old, at which time he moved to the United States. According to her, defendant did field work in Mexico. While she was still in Mexico, defendant would telephone and talk to her about his two sons. He seemed very concerned about his children and would talk about Alex being sick. Defendant’s parents attended the resentencing but did not testify.

¶ 14 Defendant, in allocution, denied committing the offense. According to him, he lied when he admitted shaking Alex, because he was pressured by the police to change his story. Defendant asked for a second chance, because his parents and son needed him.

¶ 15 In imposing sentence, the trial court stated that it had read the trial transcripts. It considered the arguments of both parties as well as the factors in aggravation and mitigation.

¶ 16 The court noted that it had read the previous judge’s comments about “the legislature taking the discretion away from the court and his desire to make this a minimum case.” Having said that, the court stated that it was now the sentencing court and that it “read the case differently.” The court added that, because the victim was only eight months old and the degree of harm was “particularly brutal,” this was “more than a minimum case.” Therefore, the court imposed a 35-year term of imprisonment.

¶ 17 Defendant filed a motion to reconsider his sentence, which was denied. He then filed this timely appeal.

¶ 18

## II. ANALYSIS

¶ 19 On appeal, defendant contends that his sentence was excessive, because the trial court did not give appropriate weight to the previous judge's finding that were it not for the required sentence of natural life he would have sentenced defendant to the statutory minimum of 20 years in prison. Defendant argues that the only new evidence at his resentencing, the two prison disciplinary reports, did not justify an additional 15 years in prison. Defendant further asserts that the court failed to give adequate weight to the significant mitigating factors of his lack of a criminal record and his history of consistent employment. Defendant posits that the circumstances of the offense, which did not show premeditation, but rather "poor judgement [*sic*], fueled by alcohol, in his efforts to calm down his son," did not justify a sentence that is 15 years over the minimum. Finally, he argues that the court failed to adequately consider the financial costs of his incarceration. See 730 ILCS 5/5-4-1(a)(3) (West 2004)

¶ 20 Trial courts have broad discretion in sentencing, and a sentence within the applicable statutory range may not be disturbed on appeal absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Such an abuse of discretion occurs when the sentence greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 21 In our case, defendant's sentence fell within the applicable statutory range of 20 to 60 years in prison. See 730 ILCS 5/8-1(a)(1)(a) (West 2004). Therefore, we give the trial court's sentencing decision great deference and consider whether it was an abuse of discretion. See *People v. Null*, 2013 IL App (2d) 110189, ¶ 55.

¶ 22 All sentences should reflect the seriousness of the crime and the objective of returning the offender to useful citizenship. *Null*, 2013 IL App (2d) 110189, ¶ 56. Careful consideration must be given to all mitigating and aggravating factors, including the defendant’s age, habits, and mentality, along with the need for deterrence and the potential for rehabilitation. *Null*, 2013 IL App (2d) 110189, ¶ 56. Even though a reviewing court might weigh the sentencing factors differently than the trial court, that does not warrant altering the sentence. *Null*, 2013 IL App (2d) 110189, ¶ 56.

¶ 23 Where the record shows that the trial court acknowledged the PSR, there is a presumption that it considered both the mitigation evidence contained therein and the rehabilitative potential of the defendant. *People v. Colbert*, 2013 IL App (1st) 112935, ¶ 25. Similarly, where mitigating evidence was before the trial court, it is presumed that the trial court considered it, absent some indication to the contrary, other than the sentence itself. *People v. Benford*, 349 Ill. App. 3d 721, 735 (2004). Moreover, there is generally a rebuttable presumption that a sentence was proper, and a defendant has the burden to affirmatively demonstrate that an error occurred. *People v. Burdine*, 362 Ill. App. 3d 19, 26 (2005).

¶ 24 We first address defendant’s contention that the trial court did not give proper weight to the previous judge’s “finding”<sup>1</sup> that he would have sentenced defendant to the statutory minimum of 20 years’ imprisonment had he not been bound to sentence him to natural life. In his reply brief, defendant concedes that a new sentencing judge is “allowed to make independent assessments” but asserts that he should give the original judge’s findings “at least some

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<sup>1</sup> It is arguable that such a comment was not a finding. We characterized the trial court’s remark as nothing more than “express[ing] a desire” to impose the minimum sentence. *Quevedo*, 403 Ill. App. 3d at 300.

deference.” Defendant does not cite to any authority that would require a new judge at a resentencing to defer to the findings of the prior judge at the original sentencing. Nor have we found any such authority. Rather, on remand the sentencing judge should consider the matter anew and independently assess the appropriate aggravating and mitigating factors. *People v. Tompkins*, 179 Ill. App. 3d 887, 889 (1989). When we vacated defendant’s sentence, we effectively wiped the slate clean, and the resentencing occurred as though no previous sentencing had taken place. In that regard, we observed that upon remand the parties would have the opportunity to present new or additional evidence and that the trial court would be free to impose the minimum sentence *if* it was warranted. *Quevedo*, 403 Ill. App. 3d at 300. Therefore, although the new judge recognized the previous judge’s “finding,” he was not obligated to defer, or give any weight, to it.

¶ 25 Defendant argues that the only new evidence, of the two prison disciplinary reports, was insufficient to justify an additional 15 years in prison. Of course, it was entirely proper for the trial court to have considered the two reports in aggravation. See *People v. Willis*, 361 Ill. App. 3d 527, 531 (2005) (prison discipline reports may be considered in aggravation); see also *People v. McGowan*, 2013 IL App (2d) 111083, ¶ 12 (failure to follow prison rules is relevant aggravating evidence). However, as the court explained, the increase was primarily based on the court’s view of the brutality of the crime. Thus, the record does not show that the court gave the disciplinary reports undue weight in fashioning defendant’s sentence.

¶ 26 We turn next to defendant’s contention that the trial court failed to give sufficient mitigating weight to his lack of a criminal record and his employment history. It is evident that the court considered the PSR, which included defendant’s minimal criminal record and indicated that he was working before being arrested in this case. Additionally, the court heard defendant’s

sister's testimony that he was employed in Mexico before coming to the United States. We presume that the court considered the mitigating evidence, and there is no indication to the contrary. See *Benford*, 349 Ill. App. 3d at 735. That we might weigh the mitigating evidence differently does not justify altering the sentence. See *Null*, 2013 IL App (2d) 110189, ¶ 56.

¶ 27 We are not persuaded by defendant's assertion that the circumstances of the offense did not justify a sentence that is 15 years over the minimum. The trial court stated that it carefully reviewed the entire record. After doing so, it concluded that the harm to the victim was significant and that the act was "particularly brutal." We too have reviewed the record and agree with the court's characterization of the offense. The court did not overstate the nature of the offense, or give it undue weight, as it arrived at a sentence that was below the midpoint of the applicable sentencing range.

¶ 28 That leaves defendant's contention that the trial court failed to consider adequately the financial cost of his incarceration. Section 5-4-1(a)(3) of the Unified Code of Corrections (730 ILCS 5/5-4-1(a)(3) (West 2004)) requires a trial court to consider the financial cost of incarceration. It is well settled, however, that a trial court is not required to specify on the record its reasons for a sentence. *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24. Therefore, absent contrary evidence, it is reasonable to presume that the court considered the financial impact of incarceration before imposing the sentence. *Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 24. Here, defendant has pointed to nothing that overcomes the presumption that the court considered the financial impact of sentencing him to 35 years in prison. Thus, we reject that contention.

¶ 29 Defendant's sentence of 35 years' imprisonment is within the applicable sentencing range. Therefore, we give the trial court great deference and consider whether that sentence was

an abuse of discretion. See *Null*, 2012 IL App (2d) 110189, ¶ 55. When the evidence is viewed in its totality, we cannot say that the sentence, which was below the midpoint of the sentencing range, varied greatly with the spirit and purpose of the law or was manifestly disproportionate to the nature of the offense. See *Alexander*, 239 Ill. 2d at 212. Thus, we decline to reduce the sentence or vacate and remand for resentencing.

¶ 30

### III. CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Kane County sentencing defendant to 35 years in prison.

¶ 32 Affirmed.