

No. 1-12-1451

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 10178
)	
JEFFREY BARNES,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

ORDER

- ¶ 1 *Held:* In imposing a six-year prison sentence for delivery of a controlled substance, the trial court substantially complied with the probation statute, did not abuse its discretion concerning mitigating factors, and defendant's sentence, which was the same as his co-defendant's, was not excessive; judgment affirmed.
- ¶ 2 Following a bench trial, defendant Jeffrey Barnes was convicted of delivery of a controlled substance and sentenced to six years in prison. On appeal, defendant seeks to have his sentence reduced, contending that the trial court did not comply with the probation statute and failed to properly consider certain mitigating factors. Additionally, defendant contends he

should not have been sentenced to the same prison term as his co-defendant because they were not similarly situated. We affirm.

¶ 3 The evidence revealed that 54-year-old defendant and his 46-year-old co-defendant, Charles Armstrong (Armstrong), worked together to deliver 0.1 gram of heroin to an undercover police officer on June 9, 2011, in the area of Superior and Lavergne in Chicago. While the police officers who testified agreed that defendant and Armstrong worked in concert, the officers' accounts differed as to their respective roles.

¶ 4 At trial, Officer Daniel Nunez testified that while working as a surveillance officer on June 9, 2011 at approximately noon, he observed Armstrong conduct what appeared to be several hand-to-hand narcotics transactions in the area of Superior and Lavergne. Officer Nunez radioed his team, and a few minutes later, Officer Sherry Odunsi (Odunsi), working undercover, arrived in a vehicle and had a brief conversation with Armstrong. After Armstrong pointed west, Officer Odunsi drove to a residence at approximately 5020 West Superior. Once she arrived, defendant approached the vehicle from the stairs of the residence, engaged in what appeared to be a hand-to-hand transaction, and then returned to the residence. Approximately 15 to 20 minutes later, defendant came out of the residence, but ran back inside after seeing police officers arrive. On cross-examination, Officer Nunez admitted that in his report of the incident, he had written that it was Armstrong who had come off the porch of the residence and later ran back inside.

¶ 5 Officer Odunsi testified that, as the undercover officer assigned to buy narcotics on June 9, she drove to Superior and Lavergne after she was notified of suspected narcotics transactions. There, she told defendant she needed some "blows," a street term for heroin, and in response, defendant asked "how many." When Officer Odunsi replied "one," defendant placed a call, directed Officer Odunsi westbound, and said, "my man will meet you." During his call,

defendant had noted the kind of vehicle Officer Odunsi was driving and the quantity of drugs she wanted. When she arrived at approximately 5020 West Superior, Armstrong approached her vehicle and handed her a yellow tinted bag containing suspected heroin, and in exchange, Officer Odunsi handed him a \$10 bill whose serial number had been prerecorded. After driving to a safer location, Officer Odunsi informed her team members of the transaction.

¶ 6 Officer Joseph Mirus testified that he was an enforcement officer on June 9. When he arrived at 5020 West Superior, he observed Armstrong flee up the stairs and inside the residence. After pursuing him, Armstrong was detained, along with defendant, who had been outside. Pursuant to a search, the \$10 bill with the prerecorded serial number was recovered from Armstrong. No drugs, money, or a cell phone was recovered from defendant.

¶ 7 The parties entered a stipulation that if a forensic chemist at the Illinois State Police Crime Lab were called to testify, she would testify that according to tests she conducted on the item she received from the Chicago Police Department, the contents were positive for the presence of heroin and its actual weight was 0.1 gram.

¶ 8 For the defense, defendant's cousin, Denise Cherry (Cherry), testified that defendant had lived with her for eight years. Cherry was the payee for defendant's Social Security check and paid defendant's bills. Cherry stated that defendant did not have a cell phone and she did not know of defendant using another person's cell phone.

¶ 9 The trial court found that Officer Odunsi encountered defendant in the area where Officer Nunez suspected that illegal narcotics sales were occurring, and she and defendant had a verbal exchange "with respect to what she wanted." Defendant "told her***that his guy down the street will take care of her." After Officer Odunsi went to the location, "low and behold***Armstrong [appeared] with her exact order from defendant***" Additionally, the trial court stated:

"There is no question in my mind that defendant***and Armstrong were working in concert***to sell and deliver narcotics, illegal narcotics on the street. And that they did so in relation to their interaction and contact with Officer Odunsi.

The fact that defendant***did not have any illegal narcotics on his person or that he did not have the***funds on his person or that he did not have a cell phone on his person, though important considerations, were not at all dispositive and [do] not affect the credibility of Officer Odunsi and Mirus."

Defendant and Armstrong were found guilty of delivering a controlled substance.

¶ 10 A presentence investigation report (PSI) revealed that defendant had five prior convictions: a 2005 conviction for disorderly conduct for which he was sentenced to 30 days in jail, a 2001 conviction for theft for which he was sentenced to 24 months in prison, a 1999 conviction for theft for which he was sentenced to 30 months in prison, a 1985 conviction for aggravated criminal sexual assault for which he was sentenced to eight years in prison, and a 1975 conviction for burglary for which he was sentenced to two years of probation. The PSI further revealed that defendant was single, had never been married, and had four children. Defendant withdrew from high school during his sophomore year, but passed the tests for General Educational Development (GED) while incarcerated in 1986 and received a culinary arts degree in 1988. Although defendant did not have a regular employment history, he worked at International House of Pancakes (IHOP) in 2007. Defendant reported that he first used heroin at the age of 23 and last used the substance about two to three days prior to his arrest. Defendant stated he needed treatment and had never participated in any type of treatment for substance

abuse. Defendant was part of the Living Word Christian Center Church, and since 2009, had received a monthly Social Security check due to depression.

¶ 11 At sentencing, the State noted defendant's three prior felony convictions, including the 1985 conviction for aggravated criminal sexual assault, a Class X offense, and advocated for a sentence closer to the maximum than the minimum for both defendants. The trial judge confirmed that defendant was not Class X mandatory and not extendable.

¶ 12 In mitigation, defense counsel stated that defendant was nearly 55 years old, a life-long resident of Chicago, and had substantial ties to the community. Defendant's mother was 72 years old and very ill, and defendant had been "active in his mother's care for the entire time [he has] been out." Defense counsel also noted that defendant's last conviction was in 2001 and that defendant had been polite, calm, and respectful during their interactions. Since being in custody for the past 317 days, defendant had made efforts to better himself, and had received completion certificates for two parts of the Deliverance Through Recovery program and attended church services weekly. Defense counsel asked for a sentence of probation. Defendant "[had] not been in trouble for over 10 years," was not a threat to the community, and had taken steps to better himself while incarcerated.

¶ 13 Defense counsel presented and described three letters that were written on defendant's behalf. The staff chaplain for the church prison ministry wrote that she had seen "great spiritual growth and transformation in [defendant]." He attended church services every Sunday and Bible classes on Mondays and Thursdays, assisted with set up for chapel, taught Bible classes, and played a major role in the men's gospel choir. The chaplain believed that defendant would be a good candidate for probation. The chairman of Monument Outreach Services wrote to certify defendant's participation in the Deliverance Through Recovery behavior modification program, in which defendant was enthusiastically involved. The chairman had observed defendant

cooperatively respond to suggested lifestyle changes, and believed he was "well on his way to changing the previous direction of his life," "[recognized] the value of***productive activities," and that defendant's ["']new focus'["] was sincere. Defendant's brother wrote that defendant was "an upstanding citizen and an awesome son and brother," and should be given probation.

Defendant's brother further wrote that during his incarceration, defendant's frequent attendance at church services had "completely transformed his life." Defendant's brother also related that defendant was his inspiration while he was on medical leave from work and nearly homeless, and "always provided***an encouraging, positive word." Defendant's brother additionally wrote that he "[sees] the change in [his] brother," and needed defendant's assistance with their mother, as defendant "cooks, [cleans], and takes care of her personal needs" and "is a great part of her support system."

¶ 14 In allocution, defendant stated that he participated in the Deliverance Through Recovery program "through a desire in [his] heart to allow God to change [his] life." Defendant stated he was "not the man [he] was 27 years ago when [he] made that mistake and betrayed a friend's trust," and was "not even the man [he] was 11 years ago when [he] was incarcerated for what [he] did." Defendant took responsibility "for [his] actions of being out there that morning" and "slipping back into that lifestyle, using drugs." The week of the incident, defendant informed his mother he was using drugs again. He had tried to enter a treatment program every day, but the program was full. Defendant stated he had not "had a case for 11 years," and noted that with help, "when [he] [comes] back over here, God will be using [him] to share a message."

¶ 15 As to Armstrong, the State noted in aggravation that he had four prior felony convictions: a 2008 conviction for delivery of a controlled substance, a 1998 conviction for delivery of a controlled substance, and two 1998 convictions for possession of a controlled substance. Due to

his background, Armstrong was required to be sentenced as a Class X offender. Armstrong had been on parole when he was arrested for this incident.

¶ 16 Counsel for Armstrong argued that he was 46 years old, a high school graduate, and had lived at his residence at 5020 West Superior for the past 40 years. Armstrong had a good relationship with all three of his daughters, and for the past 10 years, he had worked sporadically as "a building demolition and renovator." Additionally, Armstrong had high blood pressure and "an out of control drug habit." Armstrong's counsel asked the court to consider imposing the minimum Class X sentence of six years "after all he's gone through and the advanced age that he has," and noted that Armstrong was on the "low end of the totem pole [of] the drug distribution scheme," having sold "dime bags from his home," partially to help support his drug habit. Counsel additionally noted that Armstrong had no history of violent weapons and had never received drug treatment. He asked the trial court to recommend drug treatment in prison and argued that if "[Armstrong] got his drug addiction under control[,] he might not be back in front of judges like you in the future."

¶ 17 In allocution, Armstrong stated that he took responsibility for his actions. However, he stated that "throughout all, God has brought me through," and "God has opened up my eyes so much***" Armstrong further maintained that "[r]egardless of what happened, God has restored me back to my senses," reiterated that he was sorry for his mistake, and asked for mercy.

¶ 18 In sentencing defendant and Armstrong, the trial court stated:

"For purposes of sentencing, the Court has considered the evidence at trial, the gravity of the offense, the pre-sentence investigation report, the financial impact of incarceration, all evidence, information, testimony in aggravation and mitigation, any substance abuse issues and treatment, potential for

rehabilitation, the possibility of sentencing alternatives, the statement of the defendant, and any impact statements and all hearsay presented and deemed relevant and reliable."

Defendant and Armstrong¹ were both sentenced to six years in prison with a recommendation for drug treatment.

¶ 19 Defendant filed a motion to reconsider his sentence, arguing, in part, that the trial court failed to consider certain factors in mitigation and the sentence was excessive "in view of the defendant's background and the nature of his participation in the offense." During the hearing on defendant's motion, defense counsel noted that defendant was eligible for probation, which was the most appropriate sentence in light of the mitigation evidence that was presented and the length of time defendant had gone without a felony conviction. The trial court denied the motion without argument from the State.

¶ 20 On appeal, defendant argues that the trial court did not comply with the probation statute because the record does not indicate that the trial court was of the opinion that imprisonment was necessary to protect the public or because probation would diminish the seriousness of the offense.

¶ 21 Defendant was eligible for probation because he was not convicted of a Class 2 or greater felony in the 10 years leading up to the instant offense. 730 ILCS 5/5-5-3(c)(2) (West 2010). The Unified Code of Corrections states that, except where specifically prohibited, a court shall impose a sentence of probation or conditional discharge unless, "having regard to the nature and circumstance of the offense, and to the history, character, and condition of the offender, the court is of the opinion that: (1) imprisonment is necessary for the protection of the public or (2)

¹ Armstrong's separate appeal has been completed through an agreed motion for summary disposition to correct his fines, fees, and costs order. *People v. Armstrong*, 2013 IL App (1st) 121622 (dispositional order).

probation or conditional discharge would deprecate the seriousness of the defendant's conduct and would be inconsistent with the ends of justice." 730 ILCS 5/5-6-1(a)(1), (2) (West 2010). Whenever a sentence of imprisonment is imposed, the record must indicate that the judge is of the opinion that one of the two conditions above exists. *People v. Cox*, 82 Ill. 2d 268, 281 (1980). However, recitation of the precise words of the statute is not necessary if the record indicates that trial court substantially complied—that is, it reviewed and considered all relevant factors presented at the sentencing hearing. *People v. Binkley*, 176 Ill. App. 3d 539, 543 (1988); *People v. Van Kampen*, 147 Ill. App. 3d 181, 186-87 (1986). Additionally, the trial court may substantially comply with the statute by discussing the presentence report or the factors presented at the sentencing hearing. *People v. McPherson*, 136 Ill. App. 3d 313, 315 (1985); *People v. Roberts*, 115 Ill. App. 3d 384, 389 (1983).

¶ 22 Here, the record indicates that the trial court substantially complied with the probation statute. Prior to announcing defendant's sentence, the trial court stated it considered numerous factors, including the evidence at trial, the gravity of the offense, the PSI, "testimony in aggravation and mitigation," the "possibility of sentencing alternatives," and defendant's potential for rehabilitation. The trial court's comments demonstrate that it reviewed and considered the relevant factors presented, and so substantially complied with the probation statute.

¶ 23 Further, the trial court's comments here stand in contrast to those in *People v. Turner*, 110 Ill. App. 3d 519 (1982). There, the record was "completely silent as to the judge's reasoning in not imposing a sentence of probation," and although the trial court received a presentence investigation report and heard factors in aggravation and mitigation, the trial court did not discuss any of them. *Turner*, 110 Ill. App. 3d at 524. Here, however, far from being completely silent, the trial court explicitly stated that it had considered numerous relevant factors, including,

of note, the possibility of sentencing alternatives. Because the record indicates that the trial court reviewed and considered all relevant factors at the sentencing hearing, it substantially complied with the statute. Compare *Van Kampen*, 147 Ill. App. 3d at 187 (sentencing court substantially complied where the defendant's age, the nature of the defendant's conduct, and the defendant's criminal record were presented to and considered by the sentencing court, and so further recital of section 5-6-1(a) factors was unnecessary), and *McPherson*, 136 Ill. App. 3d at 314, 315 (1985) (although it did not expressly recite the basis on which probation was denied, the trial court substantially complied with the probation statute when it found particular factors in mitigation and aggravation to be applicable), with *People v. Free*, 112 Ill. App. 3d 449, 456 (1983) (the trial court did not substantially comply with the probation statute where it made no findings, its only remarks were directed to negating the State's request that a particular term be imposed, and it did not give any explanation for the defendant's sentence).

¶ 24 Defendant next argues that the trial court abused its discretion in sentencing him to six years imprisonment because it failed to properly consider significant mitigating factors, including that only a small amount of drugs was involved, he had not been convicted of a felony in over 10 years, he had a GED and a culinary arts degree, and he had demonstrated remorse, tried to seek help for his drug problem, and demonstrated significant self-improvement and effort during his presentence incarceration. Additionally, defendant notes that he presented evidence of his substantial community ties, strong family support, and his role in caring for his mother.

¶ 25 A sentence will be disturbed on appeal only if the sentencing court abused its discretion. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). The trial court's sentencing decision is entitled to great deference because the trial court is generally in a better position than the reviewing court to determine the appropriate sentence, having the opportunity to weigh such

factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court may not substitute its judgment for that of the trial court merely because it would have weighed these factors differently. *Id.* Further, a sentence within the statutory limits will not be considered excessive unless it greatly varies with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Brazziel*, 406 Ill. App. 3d 412, 433-34 (2010). Where mitigating evidence was presented, it is presumed the trial court considered it, absent some contrary indication other than the sentence imposed. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). While the sentencing court may not ignore evidence in mitigation, it may determine the weight to attribute to it. *Id.* The seriousness of the crime is the most important factor in determining a sentence, and a defendant's rehabilitation potential need not be given greater weight. *Brazziel*, 406 Ill. App. 3d at 435.

¶ 26 Here, defendant cannot demonstrate that the trial court failed to consider the mitigating factors presented. During sentencing, the trial court stated it had considered:

"the evidence at trial, the gravity of the offense, the pre-sentence investigation report, the financial impact of incarceration, all evidence, information, testimony in aggravation and mitigation, any substance abuse issues and treatment, potential for rehabilitation, the possibility of sentencing alternatives, the statement of the defendant, and any impact statements and all hearsay presented and deemed relevant and reliable."

Other than noting his six-year prison sentence, defendant has not established that the trial court ignored the mitigating evidence that was presented. Indeed, the trial court referenced specific mitigating evidence, including the testimony in mitigation, defendant's statement, and his

substance abuse issues and potential for rehabilitation. The trial court is not required to recite and assign a value to each fact presented at the sentencing hearing. *People v. Partin*, 156 Ill. App. 3d 365, 373 (1987). Additionally, the sentencing range for defendant's offense, a Class 2 felony, is three to seven years. 720 ILCS 570/401(d) (West 2010); 730 ILCS 5/5-4.5-35(a) (West 2010). Although defendant received one year below the maximum sentence, the trial court's recommendation for drug treatment suggests that it considered evidence in mitigation.

¶ 27 We reject defendant's analogy to *People v. Pinchott*, 55 Ill. App. 3d 593 (1977) to argue his sentence should be reduced. There, in finding that the defendant was arbitrarily denied probation, the court noted that the defendant was a "runner" in a drug transaction in which the amount sold was small, the defendant was pursuing higher education, he admitted in his PSI that "[]dealing dope is stupid,[]" and a local drug abuse organization had recommended him as a good candidate for probation based on his progress since his arrest. *Pinchott*, 55 Ill. App. 3d at 598. Although there are similarities between the circumstances of the defendant in *Pinchott* and defendant here, the propriety of a defendant's sentence cannot be properly judged by comparing the sentence to one given in another, unrelated case. *People v. Fern*, 189 Ill. 2d 48, 56 (1999). A sentence must be based on the particular circumstances of each individual case. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). As such, we decline to alter defendant's sentence on the basis of the outcome in *Pinchott*. Ultimately, defendant's argument amounts to a request that we reweigh the relevant factors differently, which we cannot do. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987).

¶ 28 Lastly, defendant contends his sentence is excessive because he received the same sentence as his co-defendant despite Armstrong's more extensive recent criminal history and more culpable conduct in carrying out the offense. Defendant argues that because he and Armstrong were not similarly situated, he should not have received the same prison term.

¶ 29 The State argues that defendant has forfeited review of this issue because he failed to properly preserve it in his motion seeking a reduced sentence or raise the issue in his arguments at the hearing on the motion. To preserve a sentencing issue for appeal, a written post-sentencing motion must be made in the trial court. *People v. Reed*, 177 Ill. 2d 389, 391 (1997). Here, defendant's motion to reconsider his sentence argued, in part, that his sentence was excessive "in view of the defendant's background and the nature of his participation in the offense." Accordingly, we find that defendant properly preserved the issue for review.

¶ 30 Nonetheless, we find that defendant's sentence was not excessive because defendant's and Armstrong's backgrounds and the nature of their participation were not so substantially different as to require different sentences. We recognize that there can be an abuse of discretion when two co-defendants are given the same sentence, despite having different criminal records or roles in a particular crime, and have different mitigating and aggravating factors. *People v. Klimawicze*, 352 Ill. App. 3d 13, 31 (2004). The factors which should most be considered by the trial court during the sentencing process are: (1) the nature of the particular crime, (2) the defendant's role in committing the crime, and (3) the defendant's history and character, including his age, prior record, family situation, employment, and other related factors. *People v. Stambor*, 33 Ill. App. 3d 324, 326 (1975).

¶ 31 Here, the trial court found that defendant and Armstrong:

"were working in concert to***sell and deliver narcotics, illegal narcotics on the street. And that they did so in relation to their interaction and contact with Officer Odunsi."

Further, defendant and Armstrong each had prior convictions. Defendant had three prior felony convictions, the most recent in 2001 for theft and the oldest in 1985 for aggravated criminal sexual assault. He had been attempting to seek assistance for his drug problem, expressed

remorse, and provided evidence of his progress during his presentence incarceration. Armstrong was a Class X offender with four prior felony convictions, the most recent in 2008 for delivery of a controlled substance and the oldest in 1998 for possession of a controlled substance. In addition, Armstrong was on parole at the time of this offense. Armstrong also had a drug problem, and in mitigation, his attorney argued he was on the "low end of the totem pole" in drug operations. Armstrong did not have a history of violent offenses and, like defendant, took responsibility for his actions.

¶ 32 Based on the sentences both Armstrong and defendant received, it appears that the trial court considered their equal participation in the crime to be a critical factor. The two worked together to sell heroin, with defendant taking the order and Armstrong completing the transaction. The trial court may have viewed defendant and Armstrong's backgrounds as not so significantly different as to justify different sentences. Although defendant had different mitigating factors than Armstrong, including a longer span of time since his last conviction, his rehabilitation potential was not entitled to greater weight than the seriousness of the offense, the protection of the public, and punishment. *Klimawicze*, 352 Ill. App. 3d at 31.

¶ 33 We are not persuaded by defendant's reliance on *People v. House*, 26 Ill. App. 3d 330 (1975). There, the court reduced a sentence where one defendant was 19 years old, had only one prior conviction, for forgery, and was described as a good candidate for probation, and the other defendant was 28 years old, had a substantial criminal history, and was explicitly not recommended for probation. *House*, 26 Ill. App. 3d at 333-34. In reducing the 19-year-old defendant's sentence, the court noted that disparity can result when two defendants guilty of equal participation are given the same sentence, but have "substantially different prospects for rehabilitation," varying age, and an "indicated variance in continuing criminal propensities." *Id.* at 333. Here, both defendant and Armstrong had multiple prior felony convictions, were 54 and

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46 years old, respectively, and expressed remorse. Defendant and Armstrong's criminal backgrounds and prospects for rehabilitation were not so substantially different as to require that defendant's sentence be reduced. Under these circumstances, we find that defendant's sentence was not excessive.

¶ 34 For the foregoing reasons, the judgment of the trial court is affirmed.

¶ 35 Affirmed.