2011 IL App (1st) 101197-U

THIRD DIVISION
December 28, 2011

No. 1-10-1197

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. 08 CR 14093
	)	
JERRY COLEMAN,	)	Honorable
	)	William T. O'Brien,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

O R D E R

Held: Where defendant had multiple previous convictions making him eligible for sentencing as a Class X offender, his 20-year sentence for residential burglary, which was well within the statutory guidelines, did not constitute an abuse of discretion, despite the mitigation evidence offered; defendant's sentence was affirmed.

¶ 1 Following a jury trial, defendant Jerry Coleman was convicted of residential burglary and was sentenced as a Class X offender to 20 years in prison. On appeal, defendant contends the trial court did not consider various factors in mitigation of his sentence, including the fact that he did not cause or threaten physical harm or use a weapon. Defendant also challenges the

imposition of various fines and fees. We affirm defendant's sentence but vacate the imposition of several fines and fees and also award defendant monetary credit for time spent in custody.

¶ 2 The following trial testimony is relevant to defendant's arguments on appeal. Chicago police detective Michael McDonough testified that on July 15, 2008, he and another detective were investigating several reported burglaries in the Edgewater neighborhood when they observed defendant wearing a heavy flannel jacket and carrying a bag. The detectives followed defendant and observed him enter the back door of a second-floor apartment. About 20 minutes later, defendant came outside carrying a TV and other items, which he placed on the porch as he returned inside. Defendant then moved those items back inside the residence as police watched, and defendant took refuge inside the apartment when he realized he was being observed by the detectives and additional police officers who had been called to the scene.

¶ 3 Police entered the apartment and arrested defendant, who had filled a bag with electronics, jewelry and other items. The apartment's residents identified the items in defendant's bag as their property. Defendant admitted to police he had a drug problem and that he sought items to sell to obtain money to buy drugs.

¶ 4 At defendant's sentencing hearing, the State presented evidence of his nine previous convictions for residential burglary, burglary and theft dating back to 1978. Detective McDonough also testified that when he questioned defendant about his role in the instant crime, defendant admitted participating in another burglary several days earlier, acting as a lookout while two other people entered a residence and took money, credit cards and keys to a vehicle.

¶ 5 In mitigation, the defense argued that defendant maintained his innocence as to the previous crime testified to by Detective McDonough and pointed out defendant did not cause any physical harm to police in the instant offense. Counsel also argued defendant was 49 years old, had been abused as a child and struggled with mental health issues and substance abuse. Defendant also addressed the court in allocation, stating he had been "getting high for 23 years."

Defendant admitted he had made mistakes but denied committing the "crime that I am charged with."

¶ 6 In imposing defendant's 20-year sentence, the trial court reviewed defendant's previous criminal convictions on the record. The court then addressed defendant as follows:

> "That's what you do, Mr. Coleman. You are a thief and a burglar and you have done it most of your life. The legislature ranks this as a Class 1 offense, one of the more serious offenses in the criminal code, and the reason they do is because when you commit these crimes you violate the security and sanctity of a person's home, which is one of the most serious things that you can do, and you do it for your own selfish means. It does bring harm to these people.
>
> So I have considered the presentence investigation report, the facts of this case, I am not even considering the other charge that you are charged with, but just this one in which the sentencing range is six to 30 years because you will be sentenced as a Class X offender based upon this prior criminal background[.] I have also considered the factors in mitigation as laid out in the statute, as well as the factors in aggravation that have been laid out in the statute[.]"

¶ 7 Defendant was convicted of residential burglary, which is a Class 1 felony carrying a prison term of between 4 and 15 years in prison. 720 ILCS 5/10-3(b) (West 2008); 730 ILCS 5/5-8-1(a)(4) (West 2008). Because defendant's criminal background included at least two previous Class 2 or greater felony convictions, the court was required to sentence defendant as a Class X offender. 730 ILCS 5/5-5-3(c)(8) (West 2008) (mandating Class X sentencing for a

defendant convicted of a Class 1 or Class 2 felony who has twice been convicted of a Class 2 or greater felony). A Class X offender is eligible for a term of between 6 and 30 years in prison. 730 ILCS 5/5-8-1(a)(3) (West 2008). Defendant was sentenced to 20 years in prison. Therefore, defendant's sentence was within the applicable statutory range.

¶ 8 On appeal, defendant contends the trial court abused its discretion in imposing a 20-year sentence by failing to give proper weight to various mitigating factors. Defendant points out he did not threaten or cause any physical harm in committing this offense and that no weapons were involved. He also emphasizes he has no history of violence and that he is 50 years old and suffers from physical and mental problems.

¶ 9 The trial court has broad discretion in determining an appropriate sentence and, as defendant acknowledges, a sentencing decision is to be disturbed only where the trial court has abused that discretion. *People v. Patterson*, 217 Ill. 2d 407, 447-48 (2005); see also *People v. Willis*, 409 Ill. App. 3d 804, 815 (2011). A sentence within the statutory range does not constitute an abuse of discretion unless it varies greatly from the purpose of the law or is manifestly disproportionate to the nature of the offense. *Willis*, 409 Ill. App. 3d at 815.

¶ 10 The sentencing decision of the trial court is entitled to great deference and weight because a trial judge is in a far better position than an appellate court to fashion an appropriate sentence. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). Thus, the trial court has wide latitude in determining and weighing factors in aggravation and mitigation, which includes defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. *People v. Hayes*, 409 Ill. App. 3d 612, 629 (2011). Here, the trial court expressly stated that it considered the evidence presented in mitigation in arriving at defendant's 20-year term.

¶ 11 Defendant emphasizes he did not threaten or cause any physical harm in committing this offense or use a weapon. However, no evidence was presented that any residents were present

when defendant entered the apartment in question; thus, it was not shown that defendant encountered any person who he could have threatened with harm or caused harm, other than the police. The trial court noted the serious nature of defendant's crimes and that his commission of residential burglary "does bring harm" to the victims. See *People v. Dean*, 363 Ill. App. 3d 454, 465 (2006) (residential burglary is a serious criminal offense that involves a high risk of harm to members of the public). The trial court is not required to give greater weight to the rehabilitative potential of a defendant than to the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261 (1995); *Hayes*, 409 Ill. App. 3d at 629.

¶ 12 As to defendant's emphasis of his age and physical and mental difficulties, those factors were set out in the presentence investigation report received by the court. There is a presumption that the trial court considered all relevant factors in determining a sentence, and that presumption will not be overcome without explicit evidence from the record that the trial court did not consider mitigating factors. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). This court has no basis to disturb defendant's 20-year sentence, which was well within the applicable range.[1]

¶ 13 We next consider defendant's arguments relating to the imposition of fines and fees. Defendant contends, and the State correctly agrees, that the $200 DNA analysis fee (730 ILCS 5/5-4-3(j) (West 2008)) should not have been charged because his DNA profile was submitted to the Illinois State Police DNA Indexing Laboratory in 2003 in connection with a previous conviction. Where a DNA sample was already on file, defendant was not required to submit a

[1] Both the State and defendant compare and contrast defendant's 20-year term with sentences imposed in other cases. Though we note that the State initiated this exercise in its brief, defendant joins in by contrasting his actions to those of the defendants in other cases and comparing the length of their sentences. This method of challenging the excessiveness of a defendant's sentence by comparing it to sentences of other offenders was soundly rejected by the Illinois Supreme Court more than a decade ago in *People v. Fern*, 189 Ill. 2d 48, 53-56 (1999).

new sample, and therefore the fee should not have been imposed. See *People v. Marshall*, 242 Ill. 2d 285, 301-02 (2011). Accordingly, the $200 DNA analysis fee is vacated.

¶ 14 The State also correctly agrees that the $25 Violent Crime Victims Assistance Fine (725 ILCS 240/10(c)(1) (West 2008)) should not have been imposed because only $40 in other fines were assessed against defendant, namely the $30 Children's Advocacy Center fine and the $10 Mental Health Court fine. The State agrees that a $4 charge should have been assessed instead pursuant to another subsection of that statute. See 725 ILCS 240/10(b) (West 2008).

¶ 15 Defendant's final assertion is that he should receive a $5-per-day credit against his fines for the days spent in custody prior to his sentencing. The mittimus states that defendant spent 637 days in custody before sentencing. See *People v. Williams*, 239 Ill. 2d 503, 510 (2011) (day on which sentencing occurred is counted as a day of defendant's sentence, not as a day of pre-sentence custody). Those 637 days render defendant eligible for $3,185 in credit against his fines. However, as defendant acknowledges, he was assessed only $40 in fines against which that credit can be applied, namely the $30 Children's Advocacy Center fine and the $10 Mental Health Court fine.

¶ 16 In conclusion, we affirm the trial court judgment as modified and we vacate several fines and fees. Defendant was assessed $620 in fees and fines. Because we have vacated the $200 DNA analysis fee, reduced the Violent Crime Victims Assistance Fine from $25 to $4, and awarded defendant credit toward all of his $40 in fines, we order that the mittimus be corrected to reflect a reduced monetary judgment against defendant of $359. The trial court's judgment is affirmed in all other respects.

¶ 17 Affirmed as modified; vacated in part.