2012 IL App (1st) 102284-U

SIXTH DIVISION
APRIL 13, 2012

No. 1-10-2284

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. 05 CR 18000
	)	
BRIAN WALKER,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices Garcia and Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: The sentencing court did not abuse its discretion in its consideration of defendant's youth, education, and good conduct during sentencing. However, there is nothing in the record to show whether the sentencing court considered defendant's subjective belief that he shot the victim in self-defense, which is a statutory mitigating factor in sentencing only in a felony murder case. As a result, defendant's sentence is vacated and the case is remanded for resentencing for the sentencing court to consider defendant's belief.

¶ 2 Defendant Brian Walker, age 20, was convicted by a jury of felony murder for the

shooting death of victim Dehombre Barnett during an attempted armed robbery and was sentenced to 60 years in the Illinois Department of Corrections: 35 years for felony murder plus a mandatory 25-year enhancement for killing the victim with a firearm. On appeal, we affirmed defendant's conviction but remanded the case to the trial court for a new sentencing hearing because the trial court improperly considered defendant's killing by use of a firearm as an aggravating factor when it was necessarily implicit in the offense. *People v. Walker*, 392 Ill. App. 3d 277, 302 (2009). After a new sentencing hearing before a different judge, defendant was sentenced to 53 years in the Illinois Department of Corrections: 28 years for felony murder plus the mandatory 25-year enhancement for killing the victim with a firearm. Defendant now appeals his new sentence, claiming that the trial court failed to properly consider mitigating factors that should have reduced his sentence to the statutory minimum. For the reasons that follow, we vacate defendant's sentence and remand the case to the sentencing court for resentencing.

¶ 3 BACKGROUND

¶ 4 A detailed recitation of the facts and trial testimony in this case can be found in our previous decision. See *Walker*, 392 Ill. App. 3d at 280-85. Here, we relate only the facts necessary for analysis of defendant's arguments in the instant appeal.

¶ 5 I. Trial

¶ 6 Defendant was convicted of felony murder for the shooting death of the victim, a barber shop owner. Based on the evidence presented at trial, on the evening of July 8, 2005, the victim was shot while in his barber shop. The shop was empty at the time of the shooting, but two

witnesses – a shop employee and the victim's cousin – had encountered defendant and another man in the shop shortly before the shooting, heard two gunshots, and observed defendant and the other man running down the street immediately after they heard the gunshots; they also observed the victim lying on the floor with blood around him. Both witnesses identified defendant in a police lineup.

¶ 7 During defendant's trial, evidence was presented that a forensic investigator with the Chicago police discovered a 22-caliber semiautomatic handgun under a folding chair at the barber shop. The handgun contained one magazine, which contained nine live rounds of ammunition. A firearms examiner with the Illinois state police crime laboratory examined the handgun and determined that the handgun was working, except for "an issue with one of the safeties that did not work quite right." The firearms examiner testified on cross-examination that it was possible for the gun to make a clicking sound without actually being fired and for the trigger to be pulled without the gun discharging.

¶ 8 Defendant's statement was also read to the jury. In it, defendant stated that he went to the barber shop on July 8, 2005, to purchase marijuana from the victim, which defendant had done several times in the past. After leaving because people were present inside the shop, defendant met Matthew Moss. Moss went into the shop and returned a few minutes later, stating to defendant that he was upset because the victim would not give him a haircut for $10. Moss told defendant that he intended to rob the victim and defendant told Moss to be careful because the victim usually carried a gun. Defendant had a gun and assumed that Moss had a gun, since he intended to rob the victim.

¶ 9 Defendant entered the shop and walked with the victim to the back room, where defendant gave the victim $10 in exchange for some marijuana. When defendant walked back into the main area of the shop, he observed Moss. He knew that Moss planned to rob the victim and stated that "it was Matt's plan to rob [the victim], but [defendant] would take any of the money or weed [the victim] gave to Matt if Matt was willing to give him some of the money or weed." Defendant put his hand on his gun, and saw the victim pull out a small gun and wave it toward Moss and defendant. A click came from the victim's gun, but it did not fire. Defendant then pulled out his gun and "panicked and fired the gun," firing two shots at the victim. Defendant then ran out of the barber shop, to the river, where he threw his gun before running home and changing his clothes.

¶ 10 In the defense's closing argument, defense counsel argued that defendant entered the barber shop to purchase marijuana from the victim and that the victim pulled his gun first. Defense counsel also argued that the State had failed to establish how many guns were present, how many shots were fired, and which shots, if any, were attributable to defendant.

¶ 11 The jury found defendant guilty of felony murder and also found that defendant personally discharged the firearm that proximately caused the victim's death. The trial court sentenced defendant to 35 years for the felony murder, plus a mandatory 25-year enhancement for killing with a firearm, for a total of 60 years in the Illinois Department of Corrections.

¶ 12 II. First Appeal

¶ 13 Defendant appealed, claiming: (1) that the trial court abused its discretion by allowing the State to proceed on solely a felony murder charge, thereby precluding defendant from seeking

jury instructions on self-defense and second-degree murder; (2) that the trial court erred by refusing to allow the defense to present evidence that a co-offender was not charged; (3) that the trial court erred by refusing to give defendant's issues instruction concerning armed robbery; and (4) that defendant's sentence was both excessive and improper, because the trial court considered in aggravation matters that were implicit in the offense and facts unsupported by the evidence.

¶ 14 On appeal, we affirmed defendant's conviction but remanded the case for resentencing. *Walker*, 392 Ill. App. 3d at 302-03. When considering defendant's claims concerning sentencing, we noted that the jury found defendant guilty of first-degree murder for personally discharging a firearm during the course of an attempt armed robbery. We found persuasive defendant's argument that the trial court improperly considered the killing by use of a firearm, a factor necessarily implicit in the offense for which defendant was convicted, as an aggravating factor in sentencing. We found that "the trial court considered not a particular degree of harm, but simply the harm itself, which was already the subject of a sentencing enhancement." *Walker*, 392 Ill. App. 3d at 301. Consequently, we remanded the case for resentencing, with instructions to the sentencing court not to consider the killing by a firearm as an aggravating factor. *Walker*, 392 Ill. App. 3d at 302.

¶ 15 III. New Sentencing Hearing

¶ 16 On May 18, 2010, a different judge conducted defendant's new sentencing hearing. The judge stated that he had reviewed the transcript of the initial sentencing hearing. The State argued that defendant was young but had been convicted of multiple crimes within a short period of time, beginning in 2000 and continuing up to the time of the shooting in the instant case. The

State noted that defendant had been adjudicated delinquent several times for drug possession offenses and had violated his probation each time, followed by several adult drug convictions and one adult weapons possession conviction. The State argued that the sentence imposed by the previous judge was "satisfactory" and asked for a similar sentence.

¶ 17 The defense emphasized that defendant's criminal record, "although accumulated at a relatively young age," was for relatively minor offenses and noted that in the appellate court opinion, defendant's criminal record was referred to as a reason to give defendant a more lenient sentence, since defendant did not display aggressive or violent behavior prior to the instant offense or since then. The defense also pointed to defendant's young age at the time of the offense and noted that defendant had demonstrated his willingness and ability to be rehabilitated through completion of his GED. The defense further noted that defendant voluntarily supported his three minor children and maintained close contact with them and the rest of his family.

¶ 18 The defense also noted:

> "DEFENSE COUNSEL: Judge, as the court knows from the review of the trial transcripts, as well as a review of the sentencing hearing that the defendant maintains he was acting in self-defense at the time that this occurred. As the court is aware [the victim,] Mr. Barnett, although possibly a business man, may have also been engaged in some nefarious business as well, Judge, because he was shown during the course of the trial to have been in possession of a handgun at the time that he was shot. The pictures

> that were displayed to the jury and that were adduced at trial demonstrate very clearly that the gun that Mr. Barnett was in possession of was found mere inches from his hand.
>
> THE COURT: Under a chair as I recall.
>
> DEFENSE COUNSEL: Correct, Judge. Obviously that issue has been decided in the first instance by the first reviewing court but I certainly will maintain that it's a colorable issue going forward."

¶ 19 The defense stated that the "main reason" for resentencing was that the appellate court had determined that the previous judge "put more than passing weight" on the fact that a firearm was used in the commission of the offense. The defense argued that "based on Mr. Walker's demonstrated background at the time, both criminal and social, *** he is a reasonable risk for someone that could be rehabilitated through his time in the Department of Corrections," pointing out that defendant had demonstrated himself to be a "model prisoner" by not obtaining any tickets while incarcerated. The defense asked the judge to impose the minimum sentence required by law.

¶ 20 Defendant did not make any statement in allocution.

¶ 21 The judge stated that he had read the appellate court opinion and observed the reasons for the criticism of the way the original judge had sentenced defendant. The judge continued:

> "I've read the sentencing hearing. I didn't read the entire trial but I took the facts and I understand what the facts were. The

> Appellate Court commented on the facts, the fact that there was another weapon found on the scene, which was unimportant because the felony murder statute -- the felony murder -- felony murder does not allow for the whole self-defense concept. The defendant and his cohort set in motion a series of events that the jury found constituted a step toward the commission of the offense of attempt armed robbery I believe it was and so -- and the Appellate Court approved the procedure in this case whereby the State nolle'd all charges but the felony murder charge."

The judge noted that defendant was only 20 at the time he committed the crime but his criminal history also began at a young age; defendant had committed three crimes as a minor, "he committed his first adult offense as soon as he had the opportunity to," and eight to nine months after being released from prison, he committed the instant offense.

¶ 22 The judge concluded:

> "I've reviewed all of the factors in aggravation and mitigation. Certainly the -- I can't say that he didn't contemplate that his criminal conduct would cause or threaten serious physical harm. He certainly, you know, he and his cohort set this motion -- set this whole course of events in motion when they went there to rob the man with a gun. There's nothing tending to excuse or justify his criminal conduct. His criminal conduct was not induced

> or facilitated by someone else. He is not going to be able to compensate the victim for his criminal conduct. The victim is dead.
>
> He does have a history of prior delinquency and criminal activity so I can't say that he's led a law-abiding life for a substantial period of time. It looks to me that when he was old enough to get out there and start committing crime he did. And frankly because of his history I cannot say that his criminal conduct was the result of circumstances unlikely to recur. He may now, having been sentenced to sixty years in the Illinois Department of Corrections, be possessed of an attitude that he's resolved not to commit another crime but as noted in the opinion if I impose the same sentence as Judge Schultz imposed he'll be eighty years old when he gets out of the penitentiary.
>
> When I look at all that I know about this case, and that includes the facts of the case as outlined in the opinion, everything that was done at the first sentencing hearing, everything that the parties have argued here today, I believe that the appropriate sentence for this murder is twenty-eight years in the Illinois Department of Corrections."

In addition to the 28 years for the murder, the judge imposed the mandatory 25-year enhancement

for the killing by use of a firearm, for a total sentence of 53 years in the Illinois Department of Corrections.

¶ 23 Defendant filed a motion to reconsider the sentence, claiming that the sentence was excessive in light of defendant's background and the nature of his participation in the offense. The motion was denied, and defendant now appeals his new sentence.

¶ 24 ANALYSIS

¶ 25 On appeal, defendant argues that his sentence should be reduced to the minimum required by law because the sentencing court failed to consider his belief in the need for self-defense as a mitigating factor and also failed to afford the proper weight to defendant's youth, education, and good conduct since being incarcerated. The Illinois Constitution requires penalties to 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. Balancing these retributive and rehabilitative purposes of punishment "requires careful consideration of all factors in aggravation and mitigation, including, *inter alia*, the defendant's age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education, as well as the nature and circumstances of the crime and of defendant's conduct in the commission of it." *People v. Center*, 198 Ill. App. 3d 1025, 1033 (1990). However, the mere fact that a reviewing court might have weighed the factors differently than the trial court does not justify an altered sentence. *People v. Grace*, 365 Ill. App. 3d 508, 512 (2006).

¶ 26 Instead, a trial court's sentencing decisions are entitled to great deference and will not be disturbed absent an abuse of discretion. *People v. Spicer*, 379 Ill. App. 3d 441, 465 (2008)

(quoting *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007)). " 'A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense.' " *Spicer*, 379 Ill. App. 3d at 465 (quoting *Jackson*, 375 Ill. App. 3d at 800).

¶ 27 In the case at bar, defendant was convicted of first degree murder, which is punishable by a term of imprisonment between 20 and 60 years. 730 ILCS 5/5-8-1(a)(1)(1) (West 2008). The sentencing court sentenced defendant to 28 years. His sentence also included a mandatory 25-year enhancement for personally discharging a firearm that killed the victim (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)), resulting in a total sentence of 53 years. On appeal, defendant asks for his sentence to be reduced to the minimum 20-year sentence, for a total sentence of 45 years in the Illinois Department of Corrections.

¶ 28 We first consider defendant's argument that the sentencing court failed to afford proper weight to defendant's youth, education, and good conduct since being incarcerated. Defendant argues that these factors should have resulted in the sentencing court imposing the minimum sentence. We do not find defendant's argument persuasive.

¶ 29 All three factors were argued by the defense in mitigation, and the State also highlighted defendant's youth when arguing in aggravation. Moreover, the record demonstrates that the sentencing court noted defendant's young age, but further noted that his criminal history also began at a young age; the court stated that "[i]t looks to me that when he was old enough to get out there and start committing crime he did." The sentencing court also pointed out that while defendant was currently "possessed of an attitude that he's resolved not to commit another

crime," defendant would not be released from prison for a long while. Defendant argues that the court only focused on defendant's criminal record and not on his potential for rehabilitation. We disagree. The sentencing court's comments indicate that it considered defendant's rehabilitative potential but weighed his criminal history more heavily. We also note that the sentencing court imposed a sentence of 28 years, only 8 years above the minimum 20-year sentence for first degree murder and 7 years less than the sentence imposed at the first sentencing hearing. The sentencing judge adequately considered the mitigating and aggravating factors concerning defendant's youth, education, and good conduct since being incarcerated, and it is not our duty to reweigh these factors involved in his sentencing decision. See *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995) (citing *People v. Pittman*, 93 Ill. 2d 169, 178 (1982)). Thus, we cannot find that the sentencing court abused its discretion concerning these factors.

¶ 30 Next, we consider defendant's argument that the sentencing court failed to consider defendant's belief in the need for self-defense as a mitigating factor. Section 5-5-3.1 of the Unified Code of Corrections (the Code) (730 ILCS 5/5-5-3.1 (West 2008)) lists a number of factors that "shall be accorded weight in favor of withholding or minimizing a sentence of imprisonment." Since this language is mandatory and not directory, a sentencing court " 'may not refuse to consider relevant evidence presented in mitigation.' " *People v. Calhoun*, 404 Ill. App. 3d 362, 386 (2010) (quoting *People v. Heinz*, 391 Ill. App. 3d 854, 865 (2009)). However, while it may not refuse to consider the evidence, the sentencing court is permitted to determine the weight afforded mitigating evidence and "[t]hus, the existence of mitigating factors does not automatically oblige the trial court to reduce a sentence from the maximum allowed." *People v.*

Markiewicz, 246 Ill. App. 3d 31, 55 (1993). "Where relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself." *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994) (citing *People v. McCain*, 248 Ill. App. 3d 844, 853 (1993)).

¶ 31 In the case at bar, defendant argues that the sentencing court failed to consider his belief in the need for self-defense as required by the fourth mitigating factor, which asks whether "[t]here were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(4) (West 2008). In support, defendant points to two statements made by the court. First, when discussing our previous opinion, the sentencing court noted: "The Appellate Court commented on the facts, the fact that there was another weapon found on the scene, which was unimportant because the felony murder statute -- the felony murder -- felony murder does not allow for the whole self-defense concept." Second, when reviewing the mitigating factors, the court stated:

> "I've reviewed all of the factors in aggravation and mitigation. Certainly the -- I can't say that he didn't contemplate that his criminal conduct would cause or threaten serious physical harm. He certainly, you know, he and his cohort set this motion -- set this whole course of events in motion when they went there to rob the man with a gun. *There's nothing tending to excuse or justify his criminal conduct.*" (Emphasis added.)

Defendant claims that the two statements together demonstrate that the sentencing court did not

consider self-defense as a mitigating factor because the court believed that self-defense was not applicable in a felony murder case. The State, on the other hand, focuses on the fact that defense counsel pointed out that defendant maintained he was acting in self-defense and that the sentencing court stated that it had "reviewed all of the factors in aggravation and mitigation."

¶ 32 After closely examining the transcript of the sentencing hearing, we agree with defendant that the sentencing court did not consider defendant's belief in self-defense as a mitigating factor when the court stated that self-defense was not applicable in a felony murder case. As noted, "[w]here relevant mitigating evidence is before the court, it is presumed that the court considered it absent some indication in the record to the contrary other than the sentence itself." *Dominguez*, 255 Ill. App. 3d at 1004 (citing *McCain*, 248 Ill. App. 3d at 853). Here, there is an indication in the record that the sentencing court thought self-defense was not a factor to be considered in sentencing in a felony murder case.

¶ 33 As the State points out, defense counsel reminded the sentencing court that defendant had claimed to have been acting in self-defense and that there was evidence that the victim had a gun; the sentencing court was clearly familiar with the claim, since it recalled that the gun was found under a chair. However, the court's only reference to the claim of self-defense was in recounting our earlier opinion that the presence of the other weapon was "unimportant because *** felony murder does not allow for the whole self-defense concept." Thereafter, the sentencing court reviewed the statutory mitigating factors and concluded that "[t]here's nothing tending to excuse or justify his criminal conduct." Thus, it is not clear whether the sentencing court understood that defendant's belief in self-defense was required to be considered as a mitigating factor despite

its unavailability as a defense to felony murder. Accordingly, we remand the case to the sentencing court to consider defendant's claim of self-defense as a mitigating factor. See *People v. Dover*, 312 Ill. App. 3d 790, 800 (2000) (vacating sentences and remanding since sentencing court erroneously believed consecutive sentences were mandatory instead of discretionary under statute); *People v. Hausman*, 287 Ill. App. 3d 1069, 1072 (1997) (vacating sentence and remanding since sentencing court's misstatement of the minimum sentence "arguably influenced the judge's sentencing decision"). We express no opinion as to the proper weight to be afforded to defendant's claim, but since defendant has presented it, the sentencing court must consider it.

¶ 34 CONCLUSION

¶ 35 For the reasons set forth above, we find that the sentencing court did not abuse its discretion in considering defendant's youth, education, and good conduct in imposing its sentence. However, since the sentencing court did not consider defendant's belief in the need for self-defense, a statutory mitigating factor, we vacate defendant's sentence and remand the case to the sentencing court for resentencing after considering that factor.

¶ 36 Sentence vacated; cause remanded with instructions.