2012 IL App (1st) 110052-U

THIRD DIVISION
February 22, 2012

No. 1-11-0052

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. 09 CR 14571
	)	
TOMMY FERGUSON,	)	The Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Salone concurred in the judgment.

O R D E R

¶ 1 Held: The circuit court's imposition of a nine-year prison sentence for aggravated arson was upheld on appeal despite defendant's contention that the circuit court improperly considered a factor inherent in the offense--the serious harm that his conduct threatened.

¶ 2 Following a bench trial, Tommy Ferguson, the defendant, was found guilty of aggravated

arson and residential arson, and was sentenced to a nine-year prison term for aggravated arson to be served concurrently with a one-year prison term in a different case involving a conviction for aggravated driving under the influence (aggravated DUI). On appeal, defendant contends that the trial court erred during sentencing when it considered, as an aggravating factor, the serious harm threatened by his conduct, because the threat of serious harm was implicit in the crime of aggravated arson.

¶ 3 The State's trial evidence established the following. In July 2009, defendant resided with his girlfriend, Shana Turner, in an apartment at 7505 South Emerald Avenue in Chicago. The two-story building contained apartments on the first and second floors as well as in the basement. On July 24, 2009, Turner's birthday, Turner and defendant were drinking and arguing at Turner's mother's house. Turner's sister, Aletha Robinson, did not drink, and her brother told her to take defendant home. Robinson, accompanied by her husband, Earl Ford, drove defendant to 7505 South Emerald. During the ride to Turner's apartment, defendant acted "[m]ad with rage" and stated, "'I'm going to burn this mother f _____ down, I'm a wake the whole block up.'" Robinson tried to calm defendant down, but he kept repeating his profanity and threats to burn the building down. When they reached the building at 7505 South Emerald, defendant stated that he was "cool" and "okay" and that Robinson could leave. Robinson saw defendant walk up the stairs, open the screen door, and use the key to open the apartment door. Robinson then drove back to her mother's house, where she received a telephone call from defendant, who told her to tell her sister that he was "right here watching her mother-f_____ house burn down.'" Defendant was seen standing alone by the building, smoking a cigarette and looking up.

¶ 4 Samantha Steele, Turner's next-door neighbor, called 911 at approximately 1:30 a.m. Steele's children were home with her. Steele saw firefighters remove a burning mattress from Turner's apartment.

¶ 5 According to Lee Hooper, the assistant commander of the Chicago fire department's office of fire investigations, the fire had been intentionally set, it originated in an interior hallway and stairwell, and it was caused by a match or a lighter applied to the fabric of the mattress or the box spring.

¶ 6 Defendant testified at trial that, to his knowledge, all of the apartments at 7505 South Emerald were occupied.

¶ 7 The presentence investigative report (PSI) disclosed, *inter alia*, the following: defendant was born in 1977; he was unemployed; he was single; he had two children; and he never contributed to their financial support, but he abused alcohol (up to two pints of whiskey or more) on a daily basis. He also used marijuana and Ecstasy, and he was under the influence of all three of those substances when he was arrested in this case.

¶ 8 Defendant had five prior convictions: convictions in 2007 and 2008 for criminal trespass to state land; a conviction in 2003 for domestic battery; a narcotics conviction in 1996; and a cannabis conviction in 1995. He also had a pending case for aggravated DUI (without insurance or a driver's license).

¶ 9 Defendant had no future educational plans; he had no future employment plans; and he had no prior employment experience. He said that his family or friends had always supported him.

¶ 10 According to the PSI, defendant was not currently suffering from any health problems and

he did not have any serious illnesses, injuries, or communicable diseases, but the Chicago police department's arrest report reveals that defendant reported to the police that he was diabetic, taking medication, and receiving treatment. The PSI also reveals that defendant had been involved with a gang in the past and that he had been shot on three occasions. He recovered from all three wounds and did not suffer lasting damage. The PSI indicated that defendant was not taking medication, and he was not under a doctor's care, contrary to the police arrest report. The PSI further indicated that defendant had never been treated by a mental health professional, that did not feel the need to speak with one, and that he had never taken any psychotropic medication.

¶ 11 During the sentencing hearing, the assistant State's Attorney argued in aggravation that "defendant's conduct clearly threatened serious harm here" because he had set fire to an occupied building in the middle of the night. The assistant State's Attorney argued that defendant had risked the lives of the firefighters. She argued that if the next-door neighbor had not smelled smoke and had not called for help right away, there could have been much more damage and possibly injuries or death to people who were sleeping. She argued that defendant admitted he knew the building was occupied and that people probably would be asleep at 1:30 a.m. She reviewed his criminal background, and she recommended a substantial prison sentence to deter others from committing similar crimes.

¶ 12 Defense counsel argued in mitigation that defendant had turned 33 while incarcerated. His niece and his sisters were present in court. One of them referred to defendant as "the uncle who does everything." Defendant was the uncle whom everyone liked. He helped out his relatives if anything needed to be done, such as driving children to school or basketball, moving furniture, picking up

medication, and running errands. Defendant's sisters and niece said that defendant's nieces and nephews all looked up to him. Defendant also had two daughters, one of whom was deaf, and he played a role in their lives. Defendant's use of alcohol was what brought him to court. Defense counsel did not believe that defendant had ever had treatment for his drinking. Defendant was not beyond redemption, and could quickly be restored to being a useful citizen after his sentence. The minimum sentence of six years would not offend justice. There was property damage to the building, but the building was not completely destroyed, and no one was injured. Defense counsel recommended the minimum sentence.

¶ 13 During allocution, defendant apologized to Turner, her neighbors, and the landlord for the property damage that he caused. On his release, he was prepared to make restitution to Turner and to her landlord with his "talent, time and treasure." He described his conduct as reckless and careless, and he said that he accepted full responsibility, but he blamed his conduct on his addiction to alcohol and drugs, which he called a coping strategy to get from day to day. He requested treatment for his addiction and counseling for his anger. He said that he had two children, one of whom was very special (presumably the deaf child), and he asked for mercy and compassion.

¶ 14 The circuit court sentenced defendant to a nine-year prison term. The court observed as follows. It had to balance many factors in determining the sentence, including societal interest, the need to protect society, the need not to deprecate the seriousness of the offense, the individual's interest, the effect of the sentence on the individual, the individual's past life, the individual's likely future life, and the effect of the sentence on family members who rely on defendant. The offense was "extraordinarily serious" and the only way to appreciate the seriousness of the offense was for

an individual to imagine someone, in a drunken rage, setting fire to the apartment building where the individual's child or other loved one resided. The crime posed "the potential for horrific disasters ***," "the potential to kill instantly," and the "potential to kill completely innocent people, unintended victims, and first responders ***, "and that was why the legislature had classified it as a Class X felony and a crime requiring defendant to serve 85% of his sentence. Firefighters do not always come out of the burning buildings they enter, and it was only by "the Grace of God" that no one in this case was injured. Defendant's family regarded him as an individual who would not normally want to hurt anyone or "cause horrific damage," but defendant was intoxicated "a good portion of every day." People who relied on and loved defendant had written letters to support him. The letters, which were not included in the record on appeal, were "impressive and in some ways heartbreaking." Defendant's statement in allocution would have a significant effect on his sentence because he finally admitted that he had a problem and was finally accepting responsibility. Defendant was "like a time-bomb" because he was driving people around without a driver's license and while he used alcohol and drugs, and it was fortunate no one was hurt in the fire or in the DUI automobile accident case, but "the potential is there for an enormous amount." Defendant's situation elicited the court's sympathy because defendant did not intend to harm or to kill anyone, but his conduct was not completely excusable because he did commit an arson, did damage property, and did know that people resided there. The court imposed a lesser sentence than it originally had intended to impose before it heard defendant's mitigating statement in allocution.

¶ 15 On appeal, defendant contends that his sentence should be reduced, or that the cause should be remanded for resentencing, because the nine-year sentence was excessive and the trial court

improperly considered, as an aggravating factor, the serious harm that defendant's conduct threatened, which was inherent in the offense of aggravated arson. He observes that his sentence was three years more than the mandatory minimum sentence, and that there were strong mitigating factors of remorse and family ties. He maintains that *de novo* review is applicable, and he requests reduction of his sentence or remandment for resentencing.

¶ 16 Defendant does not dispute that his nine-year prison term fell within the lower end of the statutory sentencing range of not less than 6 years and not more than 30 years for the Class X felony of aggravated arson (see 720 ILCS 5/20-1.1(a)(1), 5/20-1.1(b) (West 2010); 730 ILCS 5/5-4.5-25(a) (West 2010)), but he contends that his sentence was improperly based on the possible serious harm threatened by his conduct. He maintains that this was improper because serious harm was implicit in the offense of aggravated arson.

¶ 17 The trial court is vested with considerable discretion in imposing a sentence, and a sentence will not be modified on appeal in the absence of an abuse of that discretion. *People v. Perruquet*, 68 Ill. 2d 149, 153 (1977). A sentence within the statutory range is entitled to great deference on appeal. See *People v. Garcia*, 296 Ill. App. 3d 769, 781 (1998). The trial judge is presumed to have considered mitigating evidence (*People v. Hampton*, 149 Ill. 2d 71, 110 (1992)), including the defendant's rehabilitative potential (*Garcia*, 296 Ill. App. 3d at 781), and is not required to accord greater weight to the defendant's potential for rehabilitation than to the seriousness of the crime. *People v. Johnson*, 206 Ill. App. 3d 542, 551 (1990); *People v. Tatum*, 181 Ill. App. 3d 821, 826 (1989); *People v. Shumate*, 94 Ill. App. 3d 478, 485 (1981). The seriousness of the crime is the most important consideration. *People v. Marsan*, 238 Ill. App. 3d 470, 473 (1992). The trial court

is in a better position than a court of review to determine an appropriate sentence (*People v. Brooks*, 297 Ill. App. 3d 581, 585 (1998)) and to consider such factors as credibility, demeanor, moral character, mentality, social environment, habits, age, and inclination or aversion to commit crime. See *People v. McCain*, 248 Ill. App. 3d 844, 850 (1993); *Marsan*, 238 Ill. App. 3d at 473; *People v. Riddle*, 175 Ill. App. 3d 85, 92 (1988). A court of review will not disturb a sentence that falls within the statutory range unless the trial court abused its discretion, even if the reviewing court would have weighed the evidence differently. *Brooks*, 297 Ill. App. 3d at 585.

¶ 18 It is generally improper to consider factors implicit in an offense as aggravating factors during sentencing. *People v. Lake*, 298 Ill. App. 3d 50, 57 (1998).

¶ 19 In *People v. Gonzalez*, 243 Ill. App. 3d 238, 241 (1993), the defendant tried to burn a building down because the occupants owed him $50. He was convicted of aggravated arson and sentenced to a 10-year prison term. *Gonzalez*, 243 Ill. App. 3d at 239. On appeal, the sentence was reduced to a 6-year prison term because the trial court improperly "relied on the fact that defendant's actions threatened the lives of others," a factor implicit in the crime, as an aggravating factor for sentencing purposes, rather than rely on the nature and extent of the offense. *Gonzalez*, 243 Ill. App. 3d at 244-46. In *Gonzalez*, the court observed that a sentencing decision requires a balancing of protecting society and rehabilitating the defendant, and a careful consideration of all of the aggravating and mitigating factors. *Gonzalez*, 243 Ill. App. 3d at 245.

¶ 20 In *People v. Hunter*, 101 Ill. App. 3d 692, 694-95 (1981), the defendant's 10-year prison sentence for aggravated arson was upheld on appeal where the trial court noted not only the serious harm that the defendant's aggravated arson presented, but also the defendant's motivation to collect

insurance proceeds, and the court did not depend on the threatened serious harm in determining the sentence.

¶ 21 In *People v. Smith*, 258 Ill. App. 3d 633, 644 (1994), the court said that, to uphold an aggravated arson conviction, the State is required to prove the following: (1) the defendant knowingly damaged a building while committing an arson, (2) at that time, the defendant knew or should have known that one or more than one person was present in the building, or anyone suffers great bodily harm, permanent disability, or disfigurement from the fire or explosion, or (3) the fire or explosion injures a firefighter or a police officer. The court found that the danger threatened to firefighters and police officers is not an element of the crime of aggravated arson, and:

> "It is therefore not reversible error for the trial judge to have considered the danger posed to firemen in imposing sentence on defendant." *Smith*, 208 Ill. App. 3d at 644.

¶ 22 Moreover, the trial court's sentencing decisions deserve "great weight and deference." *Smith*, 258 Ill. App. 3d at 645.

¶ 23 In *People v. Beals*, 162 Ill. 2d 497, 509 (1994), the trial court remarked that the defendant's conduct had "caused the ultimate harm. It caused the loss of a human life." The Illinois Supreme Court held that this "was simply a general passing comment based upon the consequences of the defendant's actions," because the trial court never indicated that it had "considered" the victim's death as a factor in aggravation. *Beals*, 162 Ill. 2d at 509. The supreme court observed that even if the remark was improper, the record revealed that the trial court had placed little, if any, weight upon the victim's death, and the supreme court stated:

> "Where it can be determined from the record that the weight placed upon the improperly considered aggravating factor was insignificant and that it did not lead to a greater sentence, remandment is not required." *Beals*, 162 Ill. 2d at 509-10.

¶ 24 Here, the trial court noted that defendant's conduct had threatened potentially serious harm to others. The context of most of the remarks was an explanation of why the legislature had classified the offense as a Class X felony and had required defendant to serve 85% of his sentence. Even if the remarks may have been improper under *Gonzalez*, rather than permissible under *Hunter* or *Smith*, the record discloses that the trial court in this case explicitly said that it was balancing many factors in mitigation and in aggravation. The court proceeded to comment on those factors. Read as a whole rather than as isolated remarks (see *People v. Ward*, 101 Ill. 2d 443, 454 (1984)), the record establishes that the trial court explicitly relied on numerous other factors in determining defendant's sentence for aggravated arson: the PSI, the letters submitted on defendant's behalf from his friends and his deaf daughter, the facts of the case, the statutory factors in aggravation and mitigation, defendant's acceptance of responsibility and his expression of remorse during allocution, defendant's assistance to his relatives, and defendant's criminal history. The trial court expressly indicated that it was imposing a lesser sentence than it originally had intended because defendant was accepting responsibility. Thus, defendant received a more lenient sentence than he originally would have received even though, in a drunken rage, he set fire to a residential building in the middle of the night after an argument with his girlfriend on her birthday. Given these circumstances, any weight the trial court placed on the possible serious harm to others threatened by defendant's conduct

was insignificant, therefore, we find that the trial court did not abuse its sentencing discretion. We would reach the same result even under a *de novo* standard of review. Accordingly, we reject the defendant's argument that we must remand for resentencing and affirm the judgment of the circuit court. See *Beals*, 162 Ill. 2d at 510.

¶ 25 Affirmed.