2012 IL App (1st) 110885-U

SIXTH DIVISION
November 21, 2012

No. 1-11-0885

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 10014
	)	
TYRONE MEEKS,	)	Honorable
	)	Catherine M. Haberkorn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's conviction of burglary affirmed over his claims that trial counsel rendered ineffective assistance during plea negotiations, and that the trial court abused its sentencing discretion; mittimus modified.

¶ 2 Following a jury trial, defendant Tyrone Meeks was found guilty of burglary, then sentenced as a Class X offender to 26 years' imprisonment. On appeal, defendant contends that trial counsel rendered ineffective assistance by providing erroneous and misleading advice about the terms of a plea offer, that the trial court abused its discretion in sentencing him to 26 years'

imprisonment for burglary after a jury trial, and that he is entitled to 30 days of additional credit for time spent in presentence custody.

¶ 3 The record shows, in relevant part, that defendant was charged with one count of burglary in that, on or about May 19, 2009, he knowingly and without authority entered the Lutz Café & Pastry Shop at 2458 West Montrose Avenue, in Chicago, with the intent to commit a theft therein. At a pretrial status hearing on August 7, 2009, defense counsel informed the trial court that the State had made defendant an offer of five years in exchange for a plea to attempted burglary, but that defendant would not accept that offer. The following exchange then occurred:

> "THE COURT: If you are found guilty of burglary, I would have to sentence you to 6 to 30 years in the Illinois Department of Corrections, Class X sentencing. The State is offering to reduce the case to attempt burglary so that it would take you out of the Class X sentencing, and that's for today and today only. State, what is your offer, to reduce it to attempt burglary and how many years?
>
> MR. ALBANESE [assistant State's Attorney]: Judge, it was supposed to be five years IDOC on an attempt.
>
> THE COURT: So the offer is for today and today only. Otherwise, you will still stand charged with burglary with a possible 6 to 30. Do you choose to accept the offer?
>
> THE DEFENDANT: Yes, ma'am. Your Honor, I want to know if I can have house arrest?
>
> THE COURT: Are you taking the offer of five years?
>
> THE DEFENDANT: No.
>
> THE COURT: That's what I just asked you if you were taking it and you said yes.

THE DEFENDANT: I thought you said if I understood what you said.

THE COURT: So the State is not offering you this any more then. If you are found guilty of burglary, you can get 6 to 30 Class X time. You understand that, correct?

THE DEFENDANT: Yes, ma'am.

THE COURT: No, you cannot have house arrest."

¶ 4 Thereafter, defendant opted to be tried by a jury, and the case was set for trial on January 11, 2011. On that date, defendant was given another opportunity to accept the State's offer, and the following colloquy occurred between the court, defendant, and defense counsel:

"THE COURT: This is Tyrone Meeks. You have two cases here, 09-10014 and 09-20863, wherein the defendant is charged with the offense of burglary in each matter.

The jury – there is almost like 90 persons ready for jury selection in the jury room. Before I call them down here, I just wanted to make sure, Mr. Meeks, that you are clear on your offer and that it's only available prior to the jury.

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The State is offering you for today and today only – and I said I would go along with it today, only before jury selection – that you would be charged with attempt burglary which takes you out of the mandatory Class X sentencing. So, I would not have to sentence you to 6 to 30 years.

And they have offered you 5 years in the Illinois Department of Corrections on an attempt burglary. On each case the 5 years would run concurrent, meaning at the same time with one another.

You would get credit for 594 days time served. And I would give you day-for-day good time followed by a 1-year mandatory supervised release also known as parole.

Do you choose to accept that offer?

DEFENDANT MEEKS: You said time served?

THE COURT: You would get 594 days time served. And I would give you day-for-day good time and a 1-year parole versus a 3-year parole.

DEFENDANT MEEKS: How much time do I got to do off the 5 years?

THE COURT: I would give you day-for-day good time. You can ask your lawyers to approximately calculate that for you.

MS. GARCIA [defense counsel]: About 90 percent.

THE COURT: But once – if you were to turn down this offer, I don't have any choice if you are found guilty after a jury, I have – I can't – I can't go any lower than 6 to 30.

DEFENDANT MEEKS: No, ma'am.

THE COURT: Okay. Do you choose to accept the offer?

DEFENDANT MEEKS: No, ma'am.

THE COURT: Okay. Then the jury is called, and the offer is removed. And if found guilty, the defendant can get up to 30 years in the Illinois Department of Corrections and a 3-year parole."

¶ 5 A jury trial commenced on the following day where the State presented evidence that in the early morning hours of May 19, 2009, Chicago police sergeant Gary Ohlson responded to a call of a burglary in progress at the Lutz Bakery, 2458 West Montrose Avenue. When he arrived there, he observed that the glass front door was shattered, then entered the bakery, heard a

"loud banging noise," and saw defendant behind the bakery counter smashing the cash register on the floor. He called out, "Police, stop," and defendant stood up, turned around, and fled through a door behind him, then out through the back door of the bakery. Sergeant Ohlson gave chase and attempted to use a taser on defendant, but his taser malfunctioned and defendant eventually got away. He then radioed other units in the area to set up a perimeter around the bakery and called for a canine unit. A police dog eventually found defendant lying alongside a pile of firewood in a yard at 4430 North Artesian Avenue, about three doors north of the bakery.

¶ 6 The jury returned a verdict finding defendant guilty of burglary, and the case proceeded to sentencing. In aggravation, the State called Chicago police detective Leonard Muscolino, who was assigned to investigate the May 2009 burglary of Element MultiSport, at 2754 North Clybourn Avenue, in Chicago. This involved the theft of a bicycle, two GPS watches, five pairs of sunglasses, a backpack, and $1,149 in United States currency. Detective Muscolino testified that security video footage from that night showed an individual resembling defendant break in, damage the store, and leave with a bicycle. He also testified that biological material recovered from the handlebar of a bicycle inside the store was processed for DNA evidence at the Illinois State Police Crime Lab and led to a CODIS hit for defendant, at which point he arrested defendant for burglary. In addition to the detective's testimony, the parties stipulated that Lynette Wilson, a forensic scientist with the Illinois State Police Crime Lab, received swabs of a bicycle handlebar from inside Element MultiSport which contained defendant's DNA profile.

¶ 7 The State argued in aggravation that defendant has a "multitude of felony convictions" in Illinois and California and is a "one-person crime wave." The State also argued that notwithstanding his drug problem, defendant has had "many, many, many opportunities to turn his life around, to get job training, to get drug treatment, to get education, to find a skill, to

do something that would aid him in becoming a member of society that contributes to it instead of taking from it as he did" when he broke into the Lutz Bakery. The State thus requested that defendant receive a sentence of more than 20 years to protect the public and their businesses from defendant.

¶ 8 In mitigation, defense counsel noted that the burglary of Element MultiSport was a pending charge, not a conviction. She then argued that defendant had a troubled childhood, that he has a drug and alcohol problem as reflected in his criminal history, that he retired his gang membership in 1992, and that all of his prior convictions were non-violent offenses. She also highlighted his employment history, including working for Earnfare in order to receive public aid, as a maintenance worker, and in short-term temporary agency positions. Defendant declined the opportunity to speak in allocution.

¶ 9 In announcing sentence, the court noted defendant's nine felony convictions in the previous 20 years, and told him that "it's shocking that you're only 39 years of age with this very extensive criminal activity." The court also highlighted the numerous rehabilitative opportunities defendant had been given to no avail, including drug rehabilitation on two occasions, public aid, job assistance, and probationary terms, then stated:

> "The people of this state are trying to help you so that you can get a job so that you can take care of yourself; instead, you go out and buy drugs and continue to use drugs up until this event and continue to use alcohol up until this event. You are in no community involvement whatsoever. It says you can't mention any clubs, any groups, no community activities at all. So in your entire adult life of 20 years, all you have done is drugs, gangs, and crime. That you have been given numerous opportunities through the

> system to change your ways, to do something for yourself, to be a productive citizen, to give back to society. Instead, you keep breaking into the people's businesses who are trying to do something for themselves and their families."

¶ 10 In sum, the court found:

> "[D]efendant has used nothing in a positive manner throughout the entire court system or his life to further his education, to further any job skills, to give back to the community, to even be involved with anything in the community. He's lived a life of gangs, of drugs, of alcohol and crime, and I feel that he is a danger to the society, that – of hard-working people that try to make a living and try to better themselves."

The court then sentenced defendant as a Class X offender to 26 years' imprisonment.

¶ 11 In this appeal from that judgment, defendant first contends that trial counsel rendered ineffective assistance by providing him erroneous and misleading advice about the terms of the State's plea offer. He specifically claims that counsel erroneously advised him that he would have to serve 90% of the five-year term offered by the State, *i.e.*, four and a half years, when in actuality he would only have had to serve about 10 months. He claims that there is a reasonable probability that he would have accepted the State's plea offer if counsel had properly advised him of the correct terms of the offer, and requests this court to remand the cause for the resumption of plea negotiations.

¶ 12 The State responds that the record is ambiguous as to whether counsel's advice was incorrect. The State also responds that the record refutes defendant's claim that he would

have pleaded guilty absent the allegedly incorrect advice where he was insistent on going to trial and rejected the State's plea offer on previous court dates.

¶ 13 We observe that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if defendant subsequently receives a fair trial. *People v. Curry*, 178 Ill. 2d 509, 518 (1997). To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense (*Strickland*, 466 U.S. at 687), *i.e.*, a reasonable probability that, absent counsel's deficient advice, he would have accepted the plea offer (*Curry*, 178 Ill. 2d at 531). Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 14 The record shows that defendant faced a mandatory Class X sentence of 6 to 30 years' imprisonment on a charge of burglary, and that he was twice offered the opportunity to enter a guilty plea to a reduced charge of attempted burglary in exchange for a sentence of five years' imprisonment. The first time the offer was made defendant rejected it outright and indicated that he was hoping to receive house arrest. The second time, the court advised defendant that he would receive 594 days credit for time served and be eligible for day-for-day good time credit. When defendant asked, "How much time do I got to do off the 5 years," the court told him that his attorney could calculate that for him, and counsel immediately responded, "About 90 percent." At that point, defendant rejected the offer again.

¶ 15 Although defendant claims that he was erroneously advised as to the terms of the State's plea offer, we note that he does not dispute that the State's plea offer, *i.e.*, five years on a reduced charge of attempted burglary, with 594 days credit for time served and eligibility for day-

for-day good time credit, was accurately communicated to him. Rather, he solely claims that "counsel failed to accurately explain to [him] the terms of the State's offer" where she calculated that he would have to serve 90% of the proposed sentence, when, assuming his good conduct, he would only have had to serve 319 days (about 17 %).

¶ 16 We initially point out that the record is not entirely clear as to what counsel's 90% figure actually represents, and that counsel's calculation is ambiguous under the circumstances. The record shows that the court clearly communicated to defendant that he was eligible for day-for-day good conduct credit under the State's plea offer, and a most cursory calculation would indicate that he would have to serve at most 50% of his term assuming his good conduct. Counsel, however, immediately responded that defendant would have to serve 90% of that time when told to make this calculation for defendant. There is no indication in the record of how counsel arrived at that figure, no question was raised concerning it, and we will not speculate as to how that figure could have been reached.

¶ 17 That said, we find that this allegedly erroneous advise provides no basis for relief. The failure to inform defendant of a consequence of a guilty plea is material only if it is a direct consequence of the plea, and a collateral consequence provides no basis for reversal. *People v. Powers*, 2011 IL App (2d) 090292, ¶ 9. A direct consequence is one that is definite, immediate, and largely automatic in its effect on defendant's punishment, whereas a collateral consequence does not relate to the length of the sentence imposed. *Powers*, 2011 IL App (2d) 090292, ¶ 9. In making this distinction, the focus is on the sentence imposed, rather than the sentence ultimately served; and, generally, collateral consequences are matters beyond the court's control. *Powers*, 2011 IL App (2d) 090292, ¶ 9.

¶ 18 Given the nature of defendant's claim, we find this court's decision in *Powers* dispositive. In *Powers*, 2011 IL App (2d) 090292, ¶¶ 3, 6, defendant filed a post-conviction

petition alleging that trial counsel was ineffective for incorrectly advising him that he would have to serve 85% of his sentence under the State's plea offer, when, in fact, he was eligible for day-for-day good conduct credit. The circuit court dismissed his petition; and, on appeal, this court affirmed, finding that defendant had failed to make a substantial showing of a constitutional violation where counsel informed him of the State's plea offer, and the matter of good-conduct credit involved a consequence that was collateral to the issue of the sentence offered. *Powers*, 2011 IL App (2d) 090292, ¶¶ 4, 11.

¶ 19 In the instant case, defendant's claim is nearly indistinguishable from the one found insufficient in *Powers* in that he does not dispute that he was accurately apprised of the State's offer, but claims that counsel incorrectly advised him as to the amount of time he would have had to serve thereunder. As in *Powers*, we likewise find that the time to be served under the State's plea offer was a consequence collateral to the issue of the sentence offered; and, therefore, conclude that counsel's failure to accurately inform defendant of that consequence neither constitutes ineffectiveness nor provides a basis for reversal. *Powers*, 2011 IL App (2d) 090292, ¶ 11.

¶ 20 Furthermore, even assuming, *arguendo*, that defendant could establish counsel's deficient performance, we find that he has nonetheless failed to establish prejudice. The record shows that defendant was twice-offered a sentence of five years' imprisonment in exchange for a guilty plea to attempted burglary, which would have allowed him to serve one year less than the minimum he faced under mandatory Class X sentencing on his burglary charge. He twice rejected this offer, however, and even indicated on one occasion that he was hoping to receive house arrest. It is clear from these circumstances that defendant proceeded to trial because he wished to avoid serving even the minimum sentence, and simply lost his gamble upon being convicted. *People v. Miller*, 393 Ill. App. 3d 629, 637 (2009). Although he now claims the

record demonstrates a reasonable probability that he would have accepted the State's plea offer where he asked how much time he would have to serve, the fact that he was willing to forego a sentence below the minimum he was facing at the risk of receiving a 30-year term belies this assertion, and without more does not persuade us that he would have acted differently on the relevant date. *Miller*, 393 Ill. App. 3d at 637. We thus find that defendant has failed to meet his burden under *Strickland*, and that his ineffective assistance of counsel claim fails. *Flores*, 153 Ill. 2d at 283.

¶ 21 In reaching this conclusion, we have considered *Curry* and *People v. Brown*, 309 Ill. App. 3d 599 (1999), cited by defendant, and find his reliance on those cases to be misplaced. In both, defendant was misadvised during plea negotiations as to the potential sentence he faced, which is a direct consequence of a plea offer. *Curry*, 178 Ill. 2d at 516, 528; *Brown*, 309 Ill. App. 3d at 605. Here, on the other hand, defendant was properly advised as to the potential sentence he faced, and counsel's alleged miscalculation of the amount of time he would have to actually serve under the State's five-year plea offer is a collateral consequence, and thus is an insufficient basis for reversal. *Powers*, 2011 IL App (2d) 090292, ¶ 11.

¶ 22 We also reject defendant's claim that the trial court "exacerbated [his] misunderstanding as to the terms of the State's offer when it failed to correct counsel's erroneous advice." He has cited no authority imposing a duty upon the trial court to independently verify trial counsel's calculation of the amount of time that he would serve under a plea offer, and we will not impose such a duty here.

¶ 23 Defendant next contends that the trial court abused its discretion in sentencing him to 26 years' imprisonment on a single count of burglary. He claims that sentence was not proportionate to the offense, and was nothing more than a punishment for exercising his right to a jury trial.

¶ 24 The State responds that defendant's sentence should not be disturbed where the record shows that the trial court properly considered defendant's crime and character in pronouncing its judgment. The State also responds that defendant's claim that he was punished for exercising his right to a jury trial is unsupported by the record.

¶ 25 It is well-settled that a reviewing court will not disturb the sentence imposed by the trial court absent an abuse of discretion. *People v. Cabrera*, 116 Ill. 2d 474, 494 (1987). Where, as here, the sentence falls within the prescribed statutory limits, it will not be disturbed unless it is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense. *Cabrera*, 116 Ill. 2d at 493-94. A sentence will not be found disproportionate where it is commensurate with the seriousness of the crime, and adequate consideration was given to any relevant mitigating circumstances, including the rehabilitative potential of defendant. *People v. Perez*, 108 Ill. 2d 70, 93 (1985).

¶ 26 Here, defendant claims that "a 26-year prison term was considerably more than was necessary" where the instant crime was a non-violent offense, did not result in great financial loss to the victim, and was likely committed for the purpose of supporting his drug addiction. He also claims that his extensive criminal history "should not have so dominated the trial court's consideration" where those crimes were "non-violent offenses spanning over the 20-year history of [his] battle with drug addiction." In other words, defendant does not dispute that the trial court considered the proper factors in aggravation and mitigation, but rather, he is essentially asking this court to re-balance those factors and independently conclude that his sentence is excessive; that is not our function, however. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987), citing *People v. Cox*, 82 Ill. 2d 268, 280 (1980).

¶ 27 In this case, defendant was convicted of the Class 2 felony of burglary (720 ILCS 5/19-1(b) (West 2008)), but subject to mandatory Class X sentencing because of his criminal

history (730 ILCS 5/5-5-3(c)(8) (West 2008)). The 26-year sentence imposed by the trial court fell within this prescribed range, and we cannot say that it was disproportionate to the offense given defendant's criminal history, his consistent failure to take advantage of the rehabilitative opportunities offered to him prior to his commission of a ninth felony in 20 years, and the deleterious effect of his conduct on society at large Accordingly, we find no abuse of discretion in the term imposed to permit any modification by this court. *People v. Almo*, 108 Ill. 2d 54, 70 (1985).

¶ 28 Defendant also claims that the court imposed the sentence as a punishment for exercising his right to a jury trial. Citing *People v. Dennis*, 28 Ill. App. 3d 74 (1975), he claims this to be a proper inference where the court "failed to explain why [he] should be sentenced to 26 years, 21 years more than what [it] would have sentenced him to pursuant to the plea deal," and where "the court appeared to discourage [him] from taking a jury trial prior to trial." We disagree.

¶ 29 First, we note that defendant's assertion that the court "appeared" to discourage him from taking a jury trial is nothing more than an acknowledgment that no actual evidentiary support for this claim exists. *People v. Taylor*, 237 Ill. 2d 68, 76 (2010). Second, contrary to his claim, the record shows that the court provided a thoughtful and detailed explanation of its reasoning for imposing a 26-year sentence. That explanation, as set forth above, distinguishes the instant case from *People v. Dennis*, 28 Ill. App. 3d 74, 78 (1975), where the reviewing court found "nothing in the record to indicate why the court found appropriate the imposition of an extremely harsh sentence after petitioner's jury trial." *Dennis*, therefore, provides no basis for disturbing the sentence imposed in this case.

¶ 30 Defendant lastly contends that he is entitled to 30 days of additional credit for time spent in presentence custody, and the State concedes that he is so entitled. The record

shows that defendant was taken into custody on May 19, 2009, and sentenced on February 15, 2011. Excluding the day of sentencing (*People v. Williams*, 239 Ill. 2d 503, 510 (2011)), he spent 637 days in presentence custody, but was only credited with 607 days of presentence credit. We therefore agree that defendant is entitled to the additional credit requested (730 ILCS 5/5-4.5-100(b) (West 2008)), and pursuant to our authority under Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999)), we direct the clerk to modify his mittimus to reflect 637 days of presentence credit.

¶ 31 For the reasons stated, we order the clerk to modify defendant's mittimus as indicated, and affirm the judgment in all other respects.

¶ 32 Affirmed; mittimus modified.