

THIRD DIVISION
May 20, 2015

No. 1-13-1216

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 19195
)	
FRANK JEMISON,)	The Honorable
)	Mary Colleen Roberts,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court did not improperly rely on defendant's race as an aggravating factor in sentencing where reference was fleeting and court based its opinion on proper factors. 50-year sentence was not excessive where nothing in the record rebuts the presumption that trial court considered mitigating evidence before it.

¶ 2 Following a jury trial, defendant Frank Jemison was found guilty of attempted first degree murder and aggravated battery with a firearm. The trial court sentenced Jemison to 50 years in prison, including a mandatory 25-year enhancement based on personally discharging a firearm, causing great bodily harm. Jemison contends that: (i) the trial court improperly considered his race during sentencing; (ii) his sentence is excessive in light of his rehabilitative potential; and (iii) his mittimus is in error. We affirm, and correct the mittimus. We conclude the

trial court did not improperly rely on defendant's race as a factor in aggravation and did not abuse its discretion in sentencing defendant to 50 years' imprisonment. We also find that the mittimus conflicts with the trial court's oral pronouncement.

¶ 3 Background

¶ 4 At trial, Larry Price testified that he left a party with his brother and a friend on September 13, 2008. As they returned to their car, a large group of men followed them from the party. The men swarmed around both Price and his brother and beat them. As Price tried to help his brother, Jemison blocked his path and pointed a gun in his face. Price slapped the gun down and it fired, hitting him in the leg. He grabbed at Jemison and Jemison shot him a second time in the abdomen. Price then tried to run away, but collapsed in the street. The gun fired at least four more times, hitting Price once in the buttocks. His brother picked him up and ran with him down the street.

¶ 5 The jury found Jemison guilty of attempted first degree murder and aggravated battery with a firearm. At the sentencing hearing, his presentence investigation report described Jemison as an unemployed high school drop-out, who smoked marijuana daily. The State argued that Jemison caused serious bodily harm to Price, had a prior conviction, and committed a new felony offense while on probation. The State also presented a victim impact statement in which Price wrote that "[a]s a young black man shooting people makes all black men look bad. It makes society look at us with a different pair of eyes."

¶ 6 In mitigation, defense counsel argued that Jemison was only 18 years old at the time of the offense, had one prior felony conviction for a non-violent offense, and had the support of family members. In addition, Jemison had worked at a corner store, had no drug or alcohol abuse issues beyond his marijuana use, had taken GED classes during his incarceration, and planned to

earn his GED and enroll in a trade school. Jemison declined to speak in allocution.

¶ 7 After arguments, the trial court discussed the injuries Jemison inflicted on Price as well as the "terror" that Price, his brother, and their friend had felt. The trial court stated that Jemison showed an "utter disregard for life" by bringing a firearm to a large group of people and then using that firearm on three individuals while "surrounded by 12 of [his] friends." The trial court concluded that Jemison posed "a danger to our society and our society needs to be protected from [defendant]" and stated:

"Mr. Price is right, [your] using a gun that night did more damage to the African-American community and the community in which you live than anything else that could have happened that night. You have a responsibility to act as a law-abiding citizen and you disregarded that responsibility and you almost killed one man and possibly three."

The court sentenced Jemison to 25 years' incarceration with a 25-year enhancement based on his discharge of a firearm that caused great bodily harm to the victims. It merged the aggravated battery count into the attempted murder count.

¶ 8 Analysis

¶ 9 On appeal, Jemison makes three separate but related contentions: (i) the trial court improperly considered his race during sentencing; (ii) given his rehabilitative potential, the sentence was excessive; and (iii) the mittimus improperly reflects a 25-year term of incarceration for the attempted murder charge and a consecutive 25-year term based on the aggravated battery.

¶ 10 Race as Aggravating Factor during Sentencing.

¶ 11 Jemison argues that the court "held [him] to a higher standard because he is black." He argues that the trial court commented on his race, even though race had no relevance whatsoever to his crime. Jemison zeros in on the trial court's reference to Jemison having harmed the black community and that he had "a responsibility on the night to act as a law-abiding citizen." The

State responds that the record does not indicate that the trial court relied on Jemison's race in fashioning the sentence.

¶ 12 We review a trial court's determination of a defendant's sentence for an abuse of discretion. *People v. Johnson*, 347 Ill. App. 3d 570, 573-74 (2004). The trial court's consideration of an improper factor in aggravation constitutes an abuse of discretion. *People v. McAfee*, 332 Ill. App. 3d 1091, 1096 (2002). A reviewing court presumes that the trial court considered only competent and proper evidence in determining a sentence. *People v. Ashford*, 168 Ill. 2d 494, 508 (1995). Defendant bears the burden of establishing that the trial court based a sentence on improper considerations. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9.

¶ 13 A trial court's discussion of "some personal observations does not necessarily rise to an abuse of discretion." *People v. Primm*, 319 Ill. App. 3d 411, 426 (2000). In *Primm*, the trial court made numerous references to the Ku Klux Klan, including that the black defendant had killed "more black folks than the Ku Klux Klan ever will." *Id.* at 425. The trial court also stated "I went through this once or twice yesterday. Young black man kills another black man." *Id.* The appellate court held that the observations were of "no consequence" where the judge "otherwise considered proper sentencing factors." *Id.* at 426.

¶ 14 The singular observation here is far more innocuous than that at issue in *Primm*. The trial court agreed with Price's victim statement which observed that Jemison's actions had harmed the "African-American community" and the community where Jemison lived. The court made no further statements raising race. While Jemison suggests the trial court held Jemison to a higher standard because of his race, nothing in the record supports this allegation. The trial court, without reference to race, merely indicated that Jemison bore the same responsibility every individual bears: the responsibility "to act as a law-abiding citizen." While pronouncing sentence, the trial court focused on the harm to Price, his brother, and his friend, and the danger

Jemison posed to society. Therefore, as in *Primm*, the trial court's fleeting reference to race had no bearing on sentencing. Accordingly, the trial court's statement does not evidence an abuse of discretion.

¶ 15 Excessiveness of Sentence

¶ 16 Next, Jemison objects to the length of his sentence. Jemison emphasizes that he was only 18 years old at the time of the crime and the sentence does not adequately reflect his potential for rehabilitation. Jemison took GED courses while incarcerated, maintained strong family ties, and had a work history. Jemison argues that the trial court's sentence went well above the minimum possible sentence, and therefore, the trial court did not adequately weigh mitigating factors. The State responds that the sentence was within the statutory guidelines and thus presumed proper.

¶ 17 All sentences must reflect the seriousness of the offense committed and the objective of rehabilitating offenders to useful citizenship. *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996). The trial court must consider the factors of mitigation as well as aggravation. *People v. Quintana*, 332 Ill. App. 3d 96, 109 (2002). A reviewing court presumes the sentencing court considered all mitigating evidence, absent some contrary indication from the record. *People v. Cagle*, 277 Ill. App. 3d 29, 32 (1996). A reviewing court may only reduce a sentence when the record shows that the trial court abused its discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Martin*, 2012 IL App (1st) 093506, ¶ 47. The reviewing court may not reverse the sentencing court just because it would have weighed the factors differently. *Streit*, 142 Ill. 2d at 19.

¶ 18 Attempted first degree murder generally has a sentencing range of 6 to 30 years. See 720 ILCS 5/8-4(c)(1) (West 2008); 730 ILCS 5/5-4.5-25 (West 2008). Because Jemison personally discharged a firearm that caused great bodily harm to a victim, he faced a mandatory sentence enhancement of between 25 years and natural life. 730 ILCS 5/5-8-1(d)(iii) (West 2008). A

sentencing decision falling within the statutory range receives great deference, *People v. Hill*, 408 Ill. App. 3d 23, 29 (2011), and will not be overturned unless it is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill. 2d 48, 54 (1999).

¶ 19 Jemison's sentence falls within the statutory guidelines of an aggregate minimum of 31 years to a maximum of natural life. Jemison fails to rebut, through the record, the presumption that the trial court considered all the mitigating and aggravating factors before it. While Jemison was young, had supportive family members, and professed academic goals, he had also already earned a felony conviction, committed attempted murder while on felony probation, and caused serious harm to Price. Given the crime's seriousness, its impact on Price, and the conflicting evidence of Jemison 's rehabilitative potential, a 50-year sentence cannot be said to be at great variance with the spirit of the law or manifestly disproportionate to the offense. We will not reverse the sentencing court just because the factors could have been weighed differently. *Streit*, 142 Ill. 2d at 19. We find that the trial court did not abuse its discretion in sentencing Jemison to 50 years in prison.

¶ 20 Mittimus

¶ 21 Finally, Jemison contends that his mittimus erroneously reflects separate convictions for attempted first degree murder and aggravated battery with a firearm, each with a 25-year sentence. The State concedes that this conflicts with the trial court's oral pronouncement. Where the mittimus conflicts with a court's oral pronouncement, the reviewing court may correct the mittimus without remand. *People v. Jones*, 376 Ill. App. 3d 372, 395 (2007). The record indicates that the trial court merged the aggravated battery count into the attempted murder count and sentenced Jemison to one 50-year term of incarceration. Accordingly, we order the mittimus be corrected to reflect a single conviction for attempted first degree murder.

¶ 22 Accordingly, we affirm the judgment of the circuit court of Cook County and order the clerk of the circuit court to correct Jemison 's mittimus to reflect a single conviction of attempted first degree murder with a single sentence of 50 years' imprisonment.

¶ 23 Affirmed; mittimus corrected.