2016 IL App (1st) 141209-U

FOURTH DIVISION
March 31, 2016

No. 1-14-1209

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. 12 CR 5232
	)	
BRANDON GREEN,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 30-year sentence affirmed over claims that that the court impermissibly considered factors inherent in the offense, and failed to give proper weight to the mitigating factors.

¶ 2 Following a bench trial, defendant, Brandon Green, was convicted of two counts of armed robbery with a firearm and two counts of aggravated unlawful restraint in connection with the 2011 robbery of a store in Chicago. Defendant was sentenced to a total of 30 years' imprisonment—15 years for the armed robbery, plus a 15 year mandatory enhancement for being armed with a firearm during the commission of the offense. In this court, defendant contends that

his sentence was excessive because the trial court impermissibly considered in aggravation factors inherent in the offense, and because the court failed to give proper weight to certain mitigating factors.

¶ 3 The record shows that defendant was charged with two counts of armed robbery with a firearm in violation of 720 ILCS 5/18-2(a)(2) (West 2010), and two counts of aggravated unlawful restraint in violation of 720 ILCS 5/10-3.11(a) (West 2010). Codefendant, Faison Jackson, who is not a party to this appeal, was also charged with armed robbery. Defendant and codefendant were tried in simultaneous but separate trials—codefendant being tried by jury and defendant opting for a bench trial.

¶ 4 At trial, the State presented the testimony of Majdi Harb and Steven Jones, who were working at J&J Food Market at 2422 West Marquette in Chicago on November 21, 2011, at approximately 7:30 p.m. Harb was behind the front counter assisting a customer, while Jones was standing near the front door of the store looking outside. Jones testified that he saw defendant, codefendant, and Rashee Wyrick walk past the store towards 67th Street and Artesian Avenue. Jones was familiar with the three men as they patronized the store and spent time in the neighborhood.

¶ 5 Approximately 25 minutes later, the same three individuals came into the store wearing hats, hooded sweatshirts with the hoods up, and bandanas which covered their faces from the bridge of their noses and below. The three men walked in with guns drawn, and someone yelled "everybody get down" multiple times.

¶ 6 Codefendant was the first to walk in the door. He went behind the counter near Harb and knocked Harb's cell phone out of his hand and forced him to the ground. Codefendant put his foot on Harb's back and attempted to open the cash register. When the register would not open,

codefendant pulled Harb back up and demanded that he open the register and put the money into a bag for him. Harb gave codefendant the bag of money, and codefendant then patted down Harb's pants, but did not find anything to take.

¶ 7 Meanwhile, Jones, who had dropped to the floor after the men entered, stared at defendant who was standing nearby and studied his face for two or three minutes. At one point, defendant noticed that Jones was staring, and he forced Jones's head to the floor, placed a gun to the back of his head, and said "don't move your head or else I'm going to shoot you." Defendant then went through Jones's pockets and took a $100 Android phone and $40 in cash.

¶ 8 Co-offender Wyrick stood a few feet behind Jones and defendant through the course of the robbery. After approximately 10 to 15 minutes, the three men exited the store, ordering Harb and Jones not to get up as they left.

¶ 9 After the offenders left, Harb called the police. Harb and Jones subsequently identified defendant and codefendant in separate photo arrays and physical lineups.

¶ 10 Harb testified that he had known codefendant since he was a child, and codefendant frequented the store, generally three or four times per week. Sometimes codefendant came into the store with defendant or co-offender Wyrick. During those visits, codefendant would buy pop and chips and sit in the store and talk briefly with Harb or Jones. Although codefendant was wearing a bandana over the lower part of his face during the robbery, Harb and Jones were able to identify him as the one who took money from the register by the exposed parts of his face and his voice. Jones also identified co-offender Wyrick based on previous observations of him in the store with codefendant.

¶ 11 Harb and Jones testified that they also knew defendant as a patron of the store, and that they were able to recognize him during the robbery by the exposed parts of his face. Jones,

specifically, had been able to see defendant's face during the robbery as he was lying on the ground. Jones testified that he also knew defendant because they had lived in the same apartment building in 2010, and he had seen and interacted with him occasionally in the two years leading up to the offense.

¶ 12 Glenda Rodriguez testified for the defense that she was a close friend of defendant, and on the evening of November 21, 2011, defendant was watching her children at her home while she went out to a movie with friends. Rodriguez was gone from approximately 5:30 to 8:30 p.m., and when she returned, defendant was still at her home watching television with her children.

¶ 13 After closing arguments, the trial court found defendant guilty on all counts. The court ordered a pre-sentence investigation report (PSI) which revealed that defendant was 18 years old at the time of the offense, and 21 years old at the time of sentencing. The PSI also showed that he had prior convictions for robbery as a juvenile, for which he received probation; and attempted aggravated robbery as an adult, for which he received boot camp.

¶ 14 In aggravation, the State argued that defendant's PSI showed a "clear pattern of activity from Defendant," and that defendant's previous sentences of probation and boot camp had "failed." The State requested "a substantial sentence" based upon the "background, facts, and evidence presented at trial."

¶ 15 In mitigation, defense counsel argued that defendant was young and "only [had] a 9th grade education, and that does not leave much in terms of *** his ability to reason." Counsel pointed out that the PSI showed that defendant suffered from depression and admitted to drug and alcohol use. Counsel asked that the court "consider his age, his social history, [and] his lack of education" and requested that the court give him "minimum time."

¶ 16 Defendant then read the following statement in allocution:

"Good afternoon, your Honor. I am here today asking you to believe in me. These last two years have caused me to realize the life I have been living is not the life I want to continue to live. I have had a lot of chances to reflect upon the choices that I have made. I have come to realize that prison is not a place where I would like to spend the rest of my life. I now know my place is not here in prison but to be out with my family and a law-abiding citizen working towards bettering my community instead of tearing it down.

My mother was in the hospital, my sister had graduated from high school and I was not there to experience these moments with them, and it is not because of someone else's doing. I am the one who chose to live my life in a manner, unlawful, unprofessional, detrimental to myself and others and did result in others being harmed directly and indirectly from my actions.

I note that I have made mistakes. I want to change and better myself. I do not want to live my life in and out of prison. I ask your Honor to please give me a chance to prove and show to my family and society that I want a different life.

Thank you."

¶ 17 In imposing sentence for armed robbery, the trial court stated:

"I have had the opportunity to review the Pre-Sentence Investigation, the Defendant's criminal history, social, educational

> background, his alcohol and drug usage. I have considered the facts in this case, all factors in aggravation and mitigation. I have considered the Defendant's capacity for rehabilitation.
>
> It is very concerning to me that the Defendant has—in the short time that he has been on this earth he has received probation for a robbery as a juvenile. He received Boot Camp for an attempt aggravated robbery as an adult while he was on post release for the Boot Camp. He committed this armed robbery, and there has been a steady escalation in your conduct, your willingness to take property by force from other people. You go into a store where there are people you know, and you put a gun in their face and take the property from them. It makes me think you are dangerous.
>
> After considering all the factors in aggravation and mitigation, judgment is entered on the findings on Counts 1 and 2. The Court finds an appropriate sentence to be 15 years, plus the 15-year enhancement, for 30 years Illinois Department of Corrections."

¶ 18 Defendant filed a motion to reconsider sentence, alleging that the 30-year sentence was excessive in light of his background and participation in the offense, and that the court improperly considered in aggravation factors implicit in the offense. Defendant also claimed that his sentence was improperly disparate compared to that of his codefendant, who had been found guilty of armed robbery and sentenced to 35 years' imprisonment. Defendant's motion to reconsider was denied, and this appeal follows.

¶ 19 In this appeal, defendant maintains that the 30-year sentence imposed on his convictions is excessive. He does not dispute that the sentence falls within the proper range available to the court, but claims that the court impermissibly considered factors inherent in the offense in imposing sentence—namely, that he took property by force and used a gun during the offense. Defendant also contends that the court failed to adequately consider certain mitigating factors including his youth and potential for rehabilitation. The State first points out that defendant was given a sentence that is 15 years below the statutory maximum, and argues that the trial court properly considered the nature and circumstances of the offense as well as all of the aggravating and mitigating factors in fashioning defendant's sentence.

¶ 20 The imposition of sentence is a matter of judicial discretion, and the trial court's sentencing decision is entitled to great deference and weight. *People v. Perruquet*, 68 Ill. 2d 149, 154 (1977). Where, as here, a sentence falls within the statutory range for the offense of which defendant was convicted, a reviewing court may not modify that sentence absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). This standard recognizes the trial court's superior position to determine the appropriate sentence based on its personal observation of defendant and the proceedings, and its opportunity to weigh the relevant sentencing factors including defendant's credibility, demeanor, moral character, mentality, social environment, habits and age. *People v. Alexander*, 239 Ill. 2d 205, 213 (2010).

¶ 21 Defendant first claims that the trial court improperly reconsidered factors inherent in the offense, namely that he took property by force and used a gun during the offense, when imposing sentence. He points to the following comments made by the court to support that contention: "You go into a store where there are people you know, and you put a gun in their face and take the property from them. It makes me think you are dangerous."

¶ 22 As an initial matter, the State contends that defendant has forfeited review of this claim. It acknowledges that defendant filed a motion to reconsider sentence alleging that the court "improperly considered in aggravation matters that are implicit in the offense," but points out that he failed to contemporaneously object at the sentencing hearing to the comment of which he now complains. See *People v. Hillier*, 237 Ill. 2d 539, 544 (2010) ("It is well settled that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required." citing *People v. Bannister*, 232 Ill. 2d 52, 76 (2008)).

¶ 23 In his initial brief, defendant contends that he preserved the issue by filing his motion to reconsider sentence but he cites no authority which would indicate that a sentencing claim may be properly preserved without a contemporaneous objection. In his reply brief, defendant maintains that his issue is adequately preserved, citing *People v. Saldivar*, 113 Ill. 2d 256, 266 (1986) for the proposition that "it is not necessary for counsel to interrupt the judge and point out that he was considering wrong factors in aggravation."

¶ 24 In *Saldivar*, the defendant was found guilty of voluntary manslaughter. At the sentencing hearing, the court mentioned that the defendant's conduct caused death and that a human life was taken, and found " 'the terrible harm that was caused to the victim' " to be the primary statutory factor in aggravation. *Id.* at 264. The defendant appealed his seven year sentence, arguing the trial court impermissibly considered an element of the offense as an aggravating factor at sentencing. *Id*. at 260. In rejecting the State's argument that the defendant had waived his claim by failing to contemporaneously object or raise the issue in a posttrial motion, the supreme court focused on defense counsel's argument at the sentencing hearing, in which counsel had preemptively argued that the victim's death is inherent in the offense. The court thus found that

Saldivar was not "a proper case for the application of the waiver rule. *** To preserve any error of the court made at that time, it was not necessary for counsel to interrupt the judge and point out that he was considering wrong factors in aggravation, *especially in light of the argument that had preceded the ruling.*" *Id.* at 266 (emphasis added).

¶ 25 Since *Saldivar*, the supreme court has repeatedly confirmed the general rule that preserving a claim of sentencing error requires both a contemporaneous objection and a written postsentencing motion (*Hillier*, 237 Ill. 2d at 544; *Bannister*, 232 Ill. 2d at 76), and described *Saldivar* as one of a few cases with "extraordinary circumstances" in which an objection "would have fallen on deaf ears" (*People v. McLaurin*, 235 Ill. 2d 478, 488 (2009)). In this case, there were no "extraordinary circumstances" like in *Saldivar* which would have led to the conclusion that a contemporaneous objection would have been futile. We thus find *Saldivar* distinguishable from the case at bar and conclude that defendant's claim is forfeited.

¶ 26 In anticipation of the finding of forfeiture, defendant requests that this court review the issue as a matter of plain error. The plain error doctrine allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). Specifically, in the sentencing context, a defendant must show either that (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545 (citing *People v. Hall*, 195 Ill. 2d 1, 18 (2000)). However, before we can determine whether an error fits under either of the above categories, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 27 Although a factor inherent in an offense should not also be used as an aggravating factor at sentencing (*People v. Conover*, 84 Ill. 2d 400, 404 (1981)), the trial court may properly consider the particular circumstances of each case, including the nature and extent of each element of the offense committed by defendant, in imposing sentence (*Saldivar*, 113 Ill. 2d at 268-69). The trial court is not required to refrain from any mention of the factors which constitute elements of an offense, and the mere reference to the existence of such a factor is not reversible error. *People v. Jones*, 299 Ill. App. 3d 739 (1998). In reviewing whether a sentence is properly imposed, this court should not focus on a few words or sentences of the trial court, but should consider the record as a whole. *People v. Estrella*, 170 Ill. App. 3d 292, 298 (1988).

¶ 28 Applying these principles here, we find no error in the court's comments. It is clear that the court was not reconsidering an element of the offense, but was simply commenting on proper factors, including the nature and extent of the offense committed by defendant. *Perruquet*, 68 Ill. 2d at 154-56. We thus find no improper reliance by the trial court on a factor inherent in the offense when making its sentencing decision. Because we find no error, there can be no plain error to excuse defendant's forfeiture of this issue. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 29 Defendant next contends that the 30-year sentence was excessive in light of certain mitigating factors, namely his "youth, his potential for rehabilitation, and his remorse and expressed desire to improve himself." We note however, that these same factors were presented to the trial court, and it is not our prerogative to rebalance those factors differently and independently conclude that the sentence imposed by the court is excessive. *People v. Burke*, 164 Ill. App. 3d 889, 902 (1987). Where mitigation evidence is before the court, it is presumed the court considered that evidence absent some contrary indication other than the sentence

imposed. *People v. Smith*, 214 Ill. App. 3d 327, 339 (1991) (citing *People v. Willis*, 210 Ill. App. 3d 379 (1991)). Here, the transcript of the sentencing hearing clearly shows that the court referred to its consideration of the PSI, and the factors in aggravation and mitigation in imposing sentence. We find no abuse of discretion in the sentence imposed, and thus have no basis to disturb it. *People v. Almo,* 108 Ill. 2d 54, 70 (1985).

¶ 30 Defendant cites a number of secondary sources regarding the brain development of young people in support of his claim that "youthful offenders cannot fairly be expected to be capable of the same level of control over their own behaviors as adult offenders, and should be viewed as having more rehabilitative potential than adult offenders." The secondary sources cited by defendant are not relevant authority on appeal (*People v. Heaton*, 266 Ill. App. 3d 469, 476 (1994)), and insofar as they constitute an attempt to integrate expert opinion evidence into the record, which was not subject to cross-examination by the State or considered by the trier of fact, this court will not consider them (*People v. Mehlberg*, 249 Ill. App. 3d 499, 531-32 (1993)).

¶ 31 Defendant also contends that his sentence is "improperly disparate to his co-defendant's sentence." He points out that his sentence was "only five years less" than his codefendant's sentence, "in spite of the fact that [codefendant] was clearly the ringleader, as characterized by the State." Defendant observes that codefendant was the first offender to enter the store and "the one who went behind the counter and forced the owner to open the register." Defendant also attempts to distinguish himself from codefendant by pointing out that codefendant "had more education than [defendant]—a high school equivalence credential versus [defendant's] 9th grade education" and codefendant "had an aggravated unlawful use of a weapon conviction in his background for which he was sentenced to boot camp, as well as a string of four juvenile

residential burglaries." Defendant thus argues that he "should have received an even lesser sentence when compared with [codefendant] based on these factors."

¶ 32 In general, an arbitrary and unreasonable disparity between the sentences of codefendants who are similarly situated is impermissible. *People v. Caballero*, 179 Ill. 2d 205, 216 (1997). Although similarly situated defendants should not receive grossly disparate sentences, a mere disparity in the sentences, in and of itself, is not sufficient to constitute a violation of fundamental fairness. *People v. Spriggle*, 358 Ill. App. 3d 447, 455 (2005). However a disparity in sentences will not be disturbed when it is warranted by the difference in the nature and extent of each defendant's participation in the offense (*Caballero*, 179 Ill. 2d at 216), and may be justified by a defendant's degree of culpability, potential for rehabilitation, or criminal history (*Spriggle*, 358 Ill. App. 3d at 455).

¶ 33 Generally, claims of disparate sentencing arise in cases where a defendant is complaining that he or she received a sentence that is unreasonably greater than the sentence received by his or her codefendant. See *Caballero*, 179 Ill. 2d at 216; *People v. Godinez*, 91 Ill. 2d 47, 55 (1982); *People v. Bares*, 97 Ill. App. 3d 728, 738 (1981). In this case, however, defendant recognizes that he actually received a lesser sentence than his codefendant. In essence, he complains that his sentence should have been even lower. Defendant has pointed to no authority in which a defendant's lesser sentence has been found to be disparate to a codefendant's greater sentence, and this court is aware of no such authority. Nonetheless, we are unpersuaded by defendant's attempts to compare himself and his codefendant. The evidence at trial showed that both defendant and codefendant were active participants in the offense. Both men entered the store with guns, which they held to the heads of Jones and Harb respectively. We find no

disparity in the sentences of defendant and codefendant which would justify any relief for defendant.

¶ 34 Before closing, we note that defendant's 30-year sentence falls in the low to mid range of the 21- to 45-year range of sentences he could have received. 730 ILCS 5/5-4.5-25(a) (West 2010); 720 ILCS 5/18-2(a)(2), (b) (West 2010). Based on its examination and consideration of the aggravating and mitigating factors, the court concluded that a term of 15 years' imprisonment, in addition to the 15-year mandatory firearm enhancement, was appropriate. It is not our prerogative to rebalance these same factors differently and independently conclude that defendant's sentence is excessive. *Burke*, 164 Ill. App. 3d at 902. We thus find no abuse of discretion by the trial court, and have no basis to disturb the sentence imposed. *Almo*, 108 Ill. 2d at 70.

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.