FIRST DIVISION
April 24, 2017

No. 1-15-0891
2017 IL App (1st) 150891-U

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. 11 CR 13465
KENYADA CLAIR,	)	No. 11 CR 13466
	)	
	)	Honorable
Defendant-Appellant.	)	Rosemary Higgins-Grant
	)	Judge Presiding.

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant received a fair sentencing hearing where the trial court properly conducted a *Krankel* hearing after defendant's allegations of ineffective assistance of counsel, and where the trial court was not prejudiced in formulating defendant's sentence.

¶ 2 Following a bench trial, defendant Kenyada Clair was convicted of armed robbery, aggravated possession of a stolen motor vehicle, possession of a stolen motor vehicle, and aggravated unlawful use of a weapon. Defendant was sentenced to a 30-year term of

imprisonment for armed robbery, a 15-year concurrent term for aggravated possession of a stolen motor vehicle, and a 7-year concurrent term for possession of a stolen motor vehicle. The trial court denied defendant's motion to reconsider and defendant now appeals, arguing that he did not receive a fair sentencing hearing. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was tried together with two codefendants – Michael Pryor and Michael Golden. However, neither of the codefendants are a party to this appeal. The evidence presented at trial showed that defendant and his codefendants robbed the victim at gunpoint. They took his shoes and shorts. They also took his house key, car keys, and wallet. The victim called the police and eventually viewed a lineup where he identified defendant and Golden. The victim denied ever picking a third person out of the lineup besides defendant and Golden. Later that day, defendant and codefendants came back and took the victim's car, using the keys they had previously stolen. The victim's cousin saw it happen and identified Golden as the person she saw stealing the car. The officers who had responded to the scene saw a car matching the description of the stolen vehicle and activated the emergency lights. A chase ensued, and eventually ended in the arrest of defendant and codefendants. One of the officers identified defendant as the driver of the car. Defendant was found guilty of the charged offenses beyond a reasonable doubt. Defense counsel Dennis Doherty then filed a motion for judgment of acquittal, or in the alternative, for a new trial. Defendant subsequently filed a motion for substitution of attorneys, and Kent Delgado replaced Doherty as defense counsel. The trial court continued the case to allow new defense counsel to supplement the motion for a new trial.

¶ 5 Defense counsel then filed an amended motion for a new trial, arguing that Doherty's "Failure to file a pre-trial motion to suppress the line-up identification, the in-court identification

and to attack the credibility of the identification confrontation" amounted to ineffective assistance of counsel. The trial court stated that it would need to hear testimony from Doherty before it could rule on the motion. Doherty was called to testify. Defense counsel objected, stating that the allegations of ineffective counsel dealt with matters in the record and "I think there's an attorney-client privilege" between Doherty and defendant. The trial court responded, stating that once defendant made a claim of ineffective assistance of counsel, "there is no longer an attorney-client privilege." The trial court continued that while it could consider the facts in the record, "I need to determine what [Doherty's] reasoning was for not filing a motion [to suppress]." Doherty then testified.

¶ 6 Doherty was then asked if he was aware in preparing for trial that a lineup was conducted in which the defendant and "co-arrestees" who were in the car with him, were put in the lineup. Doherty responded that he did know, and that he did not file a motion to suppress that lineup identification because he did not see anything wrong with the lineup. He stated that "there were conformities in the original description and I would have tipped my hand to the prosecution." He additionally stated that in this particular lineup situation, "the [victim] picked someone * * * that was a filler, so I wanted the circumstances of the line-up in." Doherty claimed that he would be "nutty" to exclude such lineup evidence. Doherty additionally testified that there was nothing to indicate that the lineup was suggestive. Doherty testified that filing a motion to suppress would have been a waste of time and would potentially have excluded evidence beneficial to the defense.

¶ 7 The trial court found "that the issues that the Defense has presented here in allegation of Mr. Doherty's ineffectiveness do go to strategy. In fact moreover, there certainly isn't any real evidence here that there would have been any real difference in the results if he had actually ***

filed a Motion to Suppress the Identification." The trial court stated that it disagreed "that there is any real evidence as to suggestiveness in [the lineup] photograph." The trial court further stated that Doherty established a "very credible" strategic reason for not wanting to suppress the identification, which was that the victim identified a "filler" instead of defendant.

¶ 8 The trial court then asked defendant if he would like to say something on his behalf and he stated:

> "Your Honor, my lawyer, Dennis Doherty, he knew I was young and he was telling me things that I didn't know about court. I didn't know nothing about this. My momma don't know nothing about this. He was telling us things just to say it and we was believing him, but he wasn't really doing the things he was saying. He never sent out a [*sic*] investigator. He never went over the case with me. He never read nothing with me telling me nothing about the case. I didn't know. We went to trial without knowing nothing.
>
> I asked him can I testify, let me testify. I was telling him about some pictures, about the shorts we took, the same shorts in the picture before robbery, before the robbery, days before the robbery. The same shorts. And he never let me present the pictures. They brung [*sic]* the pictures I had friends of mine bring the pictures. I got found guilty of it. And when I went back to the County, the Sheriffs they asked me – They asked me one day – They came and they asked me if you get some guns off the street, we can get you a lesser sentence and I got them seven guns off the street. I got them seven guns off the street and they promised me a lower sentence.

* **. I got the guns for them and they didn't keep up with the deal. They looking at me like I'm working for them and then that put my family in danger and me in danger because I got the guns off the street. ***.

They told me and promised we going to get you the lesser sentence. Don't you want six years[?] You will get the minimum without the gun enhancement and I got them seven gun. I felt like – I got found guilty. I didn't even did it. They identified me for nothing, just off my dreds. I didn't rob this man. ***.

I was trying to tell [Doherty] can I testify because it's two sides to the story. He never let me testify. He always brushed me off on everything I had to say. Everything. My momma pay him money. He never let me do nothing. I didn't know nothing about this. I was young. I didn't know nothing about court or none of that. He was telling me anything and I didn't know nothing."

¶ 9 The trial court stated that now there was an additional allegation of ineffectiveness that was not included in defendant's motion – that Doherty refused to allow defendant to testify. The trial court asked Doherty to come back to testify and Doherty stated that at no time did he indicate to defendant that he was not allowed to testify or that he would not allow defendant to testify. The following colloquy then took place after Doherty was asked if defendant ever indicated to him that he wanted to testify:

"Q. He told me that he was down on the other corner after Golden had robbed –

MR. DELGADO: Judge, I am going to object. I don't think that answers the question. The question is simply did he ever tell him not to testify. Not to go into narrative conversations he had.

THE COURT: Overruled. Counsel is entitled to give his explanation because the defendant no longer has a privilege, so he may answer exactly what his strategy was.

THE WITNESS: What happened is Golden was seen running with the car keys, jumped in the car. The people on the porch saw Golden split with the car and then all of a sudden we have a video of [defendant] driving. So I said, well, what happened here? [Defendant] said he was down on the other corner, Golden picked him up, he jumped in the car, they switched placed, and [defendant] took off driving. He also said he did the armed robbery. So I don't know what he would testify to other than the confession to the crimes here.

He never said he wanted to testify, but I don't know. I would be a little incompetent if I had him testify as to what he told me. I am certainly not going to tell him to lie under oath."

¶ 10 Doherty stated that after defendant was convicted, defendant told Doherty he had a picture on his computer of him wearing the victim's shorts. Doherty stated that he called defendant's mother after that and said he thought defendant was going "stir crazy or something."

¶ 11 The trial court then stated that it did not find any credibility in defendant's statement that Doherty failed to explore other avenues of investigation to support his claim of innocence, or that Doherty coerced defendant not to testify. The trial court found that based on defendant's statement, Doherty advised defendant not to testify, but that it was ultimately defendant's choice.

¶ 12 Defendant was then sentenced to 30 years in prison – 15 years for armed robbery, plus 15 years' enhancement for armed robbery with a firearm.

¶ 13 Defense counsel filed a motion to reconsider sentence. At the hearing on that motion, the trial court stated:

> ¶ 14 "[N]ot only did you commit this crime with a gang of other people; although, gang involvement wasn't specifically proven or alleged by the state in this case, but in your own Pretrial Services Report you had indicated that you had a leadership role and even a name in the gang; although, you had some friends who were in the gang who followed the law or who were law abiding.
>
> ¶ 15 I find that that sentence was necessary in order to send a message to those gangs that are out there committing armed robberies and vehicular hijacking, stealing personal property and people's belongings, and then coming back to get their car the next day.
>
> ¶ 16 Those crimes are crimes that really seriously jeopardize the safety of the public, and because they jeopardize the safety of the public and because of the other circumstances that I have already stated, I found that it's necessary to give that sentence in order to send a message to your gang and to others about what not to do when they decide to go into the streets."

¶ 17 The trial court denied the motion to reconsider sentence, and defendant now appeals.

¶ 18 ANALYSIS

¶ 19 On appeal, defendant contends that he did not receive a fair sentencing hearing where the trial court elicited "calamitous and unnecessary" testimony from Doherty that: (1) violated the attorney-client privilege, and (2) prejudiced the defendant as evidenced by a sentencing disparity.

¶ 20 Both parties acknowledge that a trial court has broad discretion in sentencing. *People v. Patterson*, 217 Ill. 2d 407, 448 (2005). The trial court is granted such deference because it is

generally in a better position than the reviewing court to determine the appropriate sentence. *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. The reviewing court must not substitute its judgment for that of the trial court merely because it would have weighed those factors differently. *Id*. A reviewing court must not alter a defendant's sentence absent an abuse of discretion where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *Id*.

¶ 21 Attorney-Client Privilege

¶ 22 Defendant first claims that the trial court abused its discretion during the sentencing hearing by erroneously allowing Doherty to testify as to matters protected by the attorney-client privilege. The State responds that defendant's allegations of ineffective assistance of counsel properly triggered a hearing under *People v. Krankel*, 102 Ill. 2d 181, 187-89 (1984).

¶ 23 Under *Krankel*, and its progeny, where defendant makes a *pro se* posttrial allegation of ineffective assistance of counsel, the trial court should conduct an adequate inquiry into the factual basis of the claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). To invoke this rule, the defendant must make some allegation of ineffective assistance of counsel for the court to consider and provide some factual specificity of the reason for the allegation. *People v. Cunningham*, 376 Ill. App. 3d 298, 204 (2007). In *Moore*, our supreme delineated three methods in which a trial court conduct its inquiry: (1) the trial court may have the trial counsel answer questions and explain the facts and circumstances surrounding the defendant's allegations; (2) the trial court may discuss the allegations with the defendant; and (3) the trial court can base its evaluation of the defendant's *pro se* allegations of ineffective assistance on its knowledge of

defense counsel's performance at trial and the insufficiency of the defendant's allegations on their face. *Moore*, 207 Ill. 2d at 78-79.

¶ 24 In the case at bar, this is exactly what happened. During allocution, defendant exercised his right to speak, at which time he made claims that his counsel was ineffective for not allowing him to testify, and for not introducing a picture of defendant wearing the same shorts the victim claimed were stolen from him, days before the robbery took place. The trial court then had Doherty answer questions and explain the facts and circumstances surrounding defendant's allegations. Doherty testified that after defendant was convicted, defendant told Doherty that he had a picture on his computer "wearing the victim's shorts just like the same shorts this guy in the lineup was wearing." Doherty claimed that when he asked defendant how it would help that defendant was "wearing the dude's shorts also, he didn't respond." Doherty also testified that he would have been incompetent if he had defendant testify, because defendant told him that Golden had picked him up, he jumped in the car, and they switched places. Doherty said that defendant also "said he did the armed robbery," so he did not know what defendant would have testified to other than a confession.

¶ 25 The trial court found, based on the questioning as well as its observations of Doherty's performance at trial, that there was no indication that defendant was forced not to testify. Accordingly, we find that the trial court did not abuse its discretion in making such a finding.

¶ 26 To the extent that defendant is arguing that Doherty violated the attorney-client privilege when answering the trial court's questions, we find such argument to be without merit. "Where a defendant has asserted ineffective assistance of counsel and thereby put in issue the substance of communications between [himself] and [his] attorney, the defendant has waived the attorney-

client privilege, and it is not in error for the trial court to allow counsel to testify as to conversations with the defendant." *People v. O'Banner*, 215 Ill. App. 3d 778, 791 (1991).

¶ 27 We find defendant's reliance on *People v. Gerold*, 265 Ill. 448 (1914), to be unpersuasive. In *Gerold*, the defendant objected to the appearance of the prosecuting attorney because the attorney had represented him in the past. *Gerold*, 265 Ill. at 453. The jury eventually returned a guilty verdict and the defendant appealed. *Id*. at 476. The reviewing court found that the defendant failed to raise an objection to the attorney's testimony regarding confidential communications that he received from the defendant, and therefore it need not be considered. However, the court found that had it been preserved, the defendant waived the point because while the general rule is that all confidential communications between attorney and client made because of their relationship are privileged from disclosure, the client himself can waive such privilege. *Id*. at 481. In that case, the court found that the client did so where he voluntarily testified himself as to confidential communications between himself and his attorney. *Id*. We find *Gerold* to be wholly inapposite to this case, where here defendant waived the attorney-client privilege by claiming ineffective assistance of counsel.

¶ 28 Defendant nevertheless maintains that Doherty testified as to matters beyond the scope needed to answer the trial court's questions. Specifically, defendant contends that Doherty only needed to answer yes or no to the question of whether he refused to allow defendant to testify. While Doherty responded that he did not force defendant not to testify, he further explained that he advised against it considering what defendant had told him in regards to his role in the robbery. As mentioned above, the trial court can have trial counsel answer questions and explain the facts and circumstances underlying the defendant's allegations. *Moore*, 207 Ill. 2d at 78-79. The information provided by Doherty simply explained the circumstances surrounding

defendant's choice not to testify. For these reasons, we find that the trial court did not abuse its discretion during the sentencing hearing by asking Doherty questions after defendant made a claim of ineffective assistance of counsel, and that Doherty did not violate the attorney-client privilege.

¶ 29 Prejudice

¶ 30 Defendant's next argument in regards to sentencing is that the testimony that was elicited from Doherty was prejudicial and resulted in an excessive sentence that was disproportionate to the sentence of his co-offender, Golden. Defendant claims that the "only reason" for the sentence disparity was that the trial court was prejudiced against defendant and motivated by vindictiveness because of what Doherty had said about him.

¶ 31 Defendant was convicted of armed robbery while armed with a firearm. 720 ILCS 5/18-2(a)(2) (West 2012). A violation of subsection (a)(2) is a Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court. 720 ILCS 5/18-2(b) (West 2012). The sentence of imprisonment for a Class X felony shall not be less than six years and not more than 30 years. 730 ILCS 5/5-4.5-25(a) (West 2012). Accordingly, the total sentence range for this offense was from 21 to 45 years. Defendant was sentenced to 30 years in prison.

¶ 32 Where a sentence falls within the statutorily mandated guidelines, it is presumed to be proper and will be overturned only where there is an affirmative showing that the sentence departs significantly from the intent behind the law, or is manifestly violative of constitutional guidelines. *People v. Boclair*, 225 Ill. App. 3d 331, 335 (1992). Defendant's 30-year sentence is well within statutory guidelines and is therefore presumed to be proper. Additionally, as previously noted, a trial court is ordinarily in the best position to make a reasoned decision as to the appropriate punishment in each case, and its determination is therefore entitled to great

deference. *Stacey*, 193 Ill. 2d at 210. The trial judge has the opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. "The defendant's history, character, rehabilitative potential, the seriousness of the offense, the need to protect society and the need for deterrence and punishment are all factors to be considered in fashioning a sentence." *People v. Donath*, 357 Ill. App. 3d 57, 72 (2005). As long as the court does not consider incompetent evidence, improper aggravating factors, or ignore the pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range prescribed by the offense. *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990). Deterrence is a valid factor for courts to consider in sentencing.

¶ 33 Here, in formulating its sentence, the trial court stated in pertinent part:

> "[L]ooking at the pre-sentence investigation, which does reflect that the defendant had a prior adjudication for robbery, taking into account the fact that he was young and perhaps inexperienced, but he had two probations terminated unsatisfactorily. He has the misdemeanor or the adjudication of delinquency for theft as agreed upon by the parties that occurred just months before this crime.
>
> And I find that this crime was quite serious and that the effect that it had on the public and what occurred in the public streets where defendant held a weapon, a semi-automatic weapon, an extended clip as did his co-defendants, and forcibly took the personal belongings of the victim from him on the public street, and that defendant who was engaged in this conduct with other individuals, for whom he is accountable and they are accountable for his conduct. It was serious and a serious breach of the public trust and peace and a serious danger to society.

This defendant does have no felony convictions as an adult. He is 21 years of age. And in looking at his pre-sentence investigation, he does not report any major difficulties. He had a good relationship with his mother, didn't know his biological father, got along with his siblings, had or has some kind of a learning disability and collected Social Security disability for this, not married. He spends his leisure time traveling and rapping, going downtown, attended church once a month with his grandmother.

According to this he stated he had been a Black Disciple for four years. You asked me not to consider that, although * * * by his own account he reported he had a rank as co-minister and that his street name was Drew. Now, I wasn't taking into account whether this was on the police reports and their allegations, but the report he gave certainly can be considered by the Court. That is his own interview with the pre-trial services officers * * *. He also says he had some friends that are law-abiding.

He had no present or past mental health issues. He's never been treated or hospitalized. He does not feel he had an alcohol abuse problem. He's never been treated for any abuse prior to this arrest. * * *.

He's had a lot of opportunities. He has a mother who's been here and supported him, who he got along with. I find no justification for the acts that he committed in this case. This is a serious crime and I find that he did it * * * while armed with a firearm. His sentence will be 30 years * * *."

¶ 34 Defense counsel filed a motion to reconsider. At the hearing on defendant's motion to reconsider, the trial court stated:

> "I find that that sentence was necessary in order to send a message to those gangs that are out there committing armed robberies and vehicular hijacking, stealing personal property and people's belongings, and then coming back to get their car the next day.
>
> Those crimes are crimes that really jeopardize the safety of the public, and because they jeopardize the safety of the public and because of the other circumstances that I have already stated, I found that it's necessary in order to send a message to your gang and to others about what not to do when they decide to go into the streets."

¶ 35 There is simply nothing in the record to indicate that the trial court was prejudiced against defendant, or that it was motivated by vindictiveness, or that it gave the sentence it did because of Doherty's testimony. The trial court considered proper factors in both mitigation and aggravation, and sentenced defendant within the statutory sentencing range. We cannot find an abuse of discretion in this case.

¶ 36 Defendant nevertheless maintains that his sentence was improper due to the disparity between his sentence of 30 years, and his co-offender Golden's sentence of 21 years. Fundamental fairness and respect for the law require that defendants who are similarly situated should not receive grossly disparate sentences. *People v. Fern*, 189 Ill. 2d 48, 58 (1999). Improper sentence disparity occurs when equally culpable defendants with similar backgrounds are given substantially different sentences or when equally culpable defendants with different backgrounds, ages, and criminal propensities are given the same sentence. *People v. Smith*, 214 Ill. App. 3d 327, 342 (1991). Accordingly, to prevail on a claim of disparate sentencing, a defendant must demonstrate that he and his codefendant were similarly situated with respect to

background, prior criminal history, and potential for rehabilitation. *People v. Curry*, 296 Ill. App. 3d 559, 569 (1998).

¶ 37 The sole argument that defendant makes in this section of his brief on appeal is that "the State presented aggravation that defendant had 3 juvenile adjudications for probation. The mitigation presented was that defendant was 18 years old at the time of the offense with no adult criminal history and that Golden was older than defendant, equally culpable and had felony convictions." This sentence has no citations to the record. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (argument must contain contentions of the appellant and reasons therefor, with citation to authorities and pages of record relied on); *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 638 (2007) (party's failure to comply with Rule 341 is grounds for disregarding arguments on appeal based on unreferenced statement of facts). We cannot say that defendant has carried his burden of showing that he and Golden were similarly situated with respect to background, prior criminal history, and potential for rehabilitation. There are simply no facts in the brief, with citations to the record, that explain what Golden's circumstances were. We found where defense counsel argued in mitigation that, "I believe Golden's sentence was 21 years on this case for the same facts and for the same offenses. And my client is younger." However, we do not know if Golden was a member of a gang or if he had the potential for rehabilitation, or what factors were offered during mitigation and aggravation at Golden's sentencing hearing. Furthermore, there was no discussion of Golden's sentence during the hearing on defendant's motion to reconsider sentence. We therefore cannot find that the trial court abused its discretion in sentencing defendant based on the mere fact that defendant and Golden received different sentences.

¶ 38 Defendant's reliance on *People v. Connor*, 177 Ill. App. 3d 532 (1988), does not convince us otherwise. In *Connor,* the defendant was charged with armed robbery and the trial court sentenced him to 17 years in prison. The defendant appealed, arguing that his sentence was disproportionate to his codefendant's sentence, who was sentenced to only 6 years in prison. *Connor*, 177 Ill. App. 3d at 534. The codefendant held a gun to the victim's head while the defendant went through the victim's pockets. *Id*. The defendant had no criminal record, while his codefendant did have a record. The court found that there was no justification for disparate sentences, as their "participation was not disproportionate." *Id*. at 540. The court found that in view of the codefendant's sentence, the trial court abused its discretion in imposing a 17-year sentence on the defendant. *Id*.

¶ 39 Defendant fails to explain how the case at bar is similar. Rather, he merely contends that the only reason for disparate sentences was vindictiveness, but as stated above, does not cite to any facts in the record to support this contention. We are not willing to find, based solely on these unsupported allegations by defendant, that the trial court abused its discretion.

¶ 40 CONCLUSION

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

¶ 42 Affirmed.