2017 IL App (1st) 151518-U

No. 1-15-1518

Order filed March 29, 2017

Third Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 8122
	)	
CHRISTOPHER HENRY,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: In sentencing defendant to 40 years' imprisonment for aggravated vehicular hijacking committed while armed with a firearm, allegedly improper factor – the court noted the absence of an allocution by defendant – was a minimal part of the court's sentencing analysis.

¶ 2 Following a jury trial, defendant Christopher Henry was convicted of aggravated vehicular hijacking and sentenced to 40 years' imprisonment including a 15-year firearm enhancement. On appeal, defendant contends that the trial court improperly considered as an

aggravating sentencing factor defendant's decision not to allocute or address the court. For the reasons stated below, we affirm.

¶ 3 Defendant and codefendant Charles McGowan were charged with aggravated vehicular hijacking for, on or about April 10, 2012, allegedly taking a motor vehicle from Virthsell Williams, Dion Haggard, Jessica Warren, and Aracellys Menendez by force or threat of force while armed with a firearm.

¶ 4 Codefendant was convicted upon a 2014 negotiated guilty plea, whereby the charges were amended to replace the allegation of a firearm with a dangerous weapon, and sentenced to 15 years' imprisonment.

¶ 5 The evidence at defendant's 2014 trial was that Williams's parked car was occupied by Haggard, Warren, and Menendez while Williams was in a store. As Williams returned to his car, defendant pointed a gun at his face and told him to walk away. Warren and Menendez exited the car as directed by codefendant standing on the other side of the car; codefendant was not visibly armed. Haggard "was stuck in the car" due to a child safety lock. Defendant told Haggard that he would shoot if he did not exit the car on a count of three. Haggard told defendant that he could not exit, so defendant opened the door for him. After Haggard exited, defendant pointed his gun at Haggard's face until Haggard walked away. Defendant left the scene in another car, while codefendant drove away in Williams's car.

¶ 6 A short time after the incident, Williams's car was recovered and defendant and codefendant were arrested. In addition to identifying defendant at trial, Williams and Haggard identified defendant and codefendant in a showup shortly after they were detained. The evidence included security video of the hijacking and events preceding and immediately following it. Codefendant's fingerprints were found in Williams's car, and defendant could not be excluded as

a source of DNA found in Williams's car. On this evidence, and having been instructed that being armed with a firearm was an element of the offense, the jury found defendant guilty of aggravated vehicular hijacking.

¶ 7 The pre-sentencing investigation report (PSI) stated that defendant had convictions in 2005 for aggravated robbery, 2010 for domestic battery, 2011 for violating an order of protection, and 2011 for a felony cannabis offense. He also had juvenile dispositions for multiple controlled substance offenses and a cannabis offense. He was born in January 1986 and raised by his mother as the youngest of four siblings, with no abuse or neglect. He attended but did not complete high school. He was unemployed since his 2012 release from prison and last held a job in 2003. He is married with one child, has two other children, and spent his free time with his children. He was in a streetgang until he quit in 2005 at age 19. He has an untreated disease causing infrequent seizures and denied receiving mental health treatment. He was offered, but refused, "mood stabilizers or anti-anxiety pills" by jail medical staff. He admitted drinking alcohol daily and occasionally smoking marijuana, and while he denied "problems in his life" due to alcohol admitted that he had "some experience with drug or alcohol treatment."

¶ 8 At sentencing, neither party had any correction or addition to the PSI. The State argued in aggravation defendant's juvenile and criminal history and his role in the instant offense including threatening to shoot Haggard. The State noted that the sentencing range with the firearm enhancement was 21 to 45 years and requested a sentence near the maximum. Defense counsel argued that, because the jury's verdict did not mention a firearm, the applicable sentencing range was 6 to 30 years. Counsel also argued defendant's family ties as described in the PSI. The court asked defendant if he wished to say anything before being sentenced, and he declined.

¶ 9 The court announced its findings:

> "I am going to take into account the evidence that was presented at trial, which I have a distinct recollection of. Two – actually, four people getting together to have an evening out on the town. The defendant confronted the victim in this case with a second young man[, codefendant]. I mention [codefendant] because from the age standpoint, a criminal history standpoint, and from every other standpoint, [codefendant] had a much less serious background. He entered a plea in this case in exchange for a sentence of [15] years in the Illinois Department of Corrections. In that reduction – the State reduced his case because of his youth. But by the same token, I'll note right now that it's my viewpoint that within this enterprise, [defendant] was most assuredly the leader."
>
> "I'm going to consider the [PSI] which I have before me. It shows many arrests. It also shows a troubled and difficult childhood that I did take into account. But it importantly shows that he's got a prior incidence of violence against another person for gain – financial or property gain. I will consider the evidence offered in aggravation and mitigation, the statutory factors in aggravation and mitigation, the financial impact of incarceration, the arguments of the attorneys here today. And most importantly – or lastly, I should say, the defendant's allocution which he had really didn't offer much. This is a very serious case by a person with a very serious background."

The court sentenced defendant to 25 years plus the 15-year firearm enhancement for a sentence of 40 years' imprisonment. The court noted that the jury found that defendant was armed with a firearm during the offense as that was an element in the instructions.

¶ 10 Defendant's written post-sentencing motion claimed that his sentence was excessive, the jury did not find the firearm enhancement, the court improperly considered in aggravation matters implicit in the offense, and his sentence improperly penalized him for exercising his right

to trial. The motion did not claim that the court improperly considered in aggravation his decision not to allocute. The motion was denied without argument immediately after sentence was pronounced, and this appeal followed.

¶ 11 On appeal, defendant contends that the trial court at sentencing improperly considered as an aggravating factor his decision not to allocute.

¶ 12 The parties agree that defendant did not preserve this claim because he did not raise it in the trial court, but defendant argues that we may review it under plain error. Defendant's failure to raise this claim below deprived the trial court of the opportunity to clarify the weight it gave the matter at issue relative to other sentencing factors. That said, "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). The first step in plain error analysis is determining whether there was error at all. *People v. Downs*, 2015 IL 117934, ¶ 15.

¶ 13 Aggravated vehicular hijacking is a Class X offense punishable by 6 to 30 years' imprisonment; if committed while armed with a firearm, 15 years must be added so that the total range is 21 to 45 years. 720 ILCS 5/18-4(a)(4), (b); 730 ILCS 5/5-4.5-25(a) (West 2014). A sentence within statutory limits is reviewed on an abuse of discretion standard, so that we may alter a sentence only when it varies greatly from the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Snyder*, 2011 IL 111382, ¶ 36. So long as the trial court does not consider incompetent evidence or improper aggravating factors, or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the applicable range. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 56. This broad discretion means that we cannot substitute our judgment simply because we may weigh the sentencing factors differently. *Id.*, citing *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). Even where the court

considers an improper aggravating factor, which is generally an abuse of its discretion, we need not remand for resentencing if we determine that the trial court put minimal weight or emphasis on the improper factor. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 152.

¶ 14 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *Jones*, ¶ 56, citing *Alexander* at 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *Snyder*, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *Jones*, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the severity of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Id.*, citing *Alexander* at 214.

¶ 15 Defendant cited *People v. Pace*, 2015 IL App (1st) 110415, for the proposition that the trial court cannot use a defendant's decision not to allocute as an aggravating factor in sentencing. However, as defendant notes in his reply brief, *Pace* was vacated as directed by our supreme court. *People v. Pace*, No. 120097 (Ill. Nov. 23, 2016). It was then disposed of in an unpublished order. *People v. Pace*, 2017 IL App (1st) 110415-U.

¶ 16 Here, we find no plain error because we find no error. Whether or not the absence of an allocution is an improper aggravating factor, a remand for resentencing is unnecessary because the absence of an allocution was a minimal part of the court's sentencing decision. The court remarked at length on the offense and the evidence that defendant had a much more significant

role in it than codefendant and was indeed the "leader" of the hijacking. The court noted defendant's extensive criminal and juvenile history including a prior offense of violence for property gain. The court also stated that it took defendant's troubled childhood into account. We take at face value that the court misspoke and was referring to allocution as the last factor rather than the most important, especially since the court addressed the factors it considered in procedural chronological order: the trial evidence, the PSI information, and allocution.

¶ 17 Accordingly, the judgment of the circuit court is affirmed.

¶ 18 Affirmed.