2017 IL App (1st) 151523-U

No. 1-15-1523

Order filed December 14, 2017

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 314
	)	
LARRY SANDRIDGE,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction and sentence for delivery of a controlled substance affirmed over his contentions that counsel was ineffective and his sentence was excessive.

¶ 2 Following a jury trial, defendant Larry Sandridge was convicted of delivery of a controlled substance (720 ILCS 570/401(c)(1) (West 2012)), and sentenced to 11 years' imprisonment. On appeal, defendant contends that defense counsel was ineffective for failing to request a jury instruction regarding the use of prior inconsistent statements, and his sentence is

excessive or unconstitutionally disproportionate to his offense. For the following reasons, we affirm.

¶ 3 Because defendant does not challenge the sufficiency of the evidence, we recite only those facts necessary to our disposition. Defendant and co-defendant, Virginia Melton, were charged with delivery of a controlled substance.[1] The defense theory at trial was that defendant was misidentified as the narcotics seller. The evidence established that Chicago police officer Kelvin Sellers was part of a narcotics division team conducting an ongoing narcotics purchasing operation in the vicinity of the 4400 block of West Van Buren Street. On September 27, 2012, around 9 a.m., Sellers was acting as an undercover officer to purchase narcotics in that area. A woman, later identified as Melton, approached Sellers's unmarked vehicle and asked what he wanted. Sellers asked for eight "blows," which he explained was a common street term for bags of heroin. Defendant was standing alone nearby at the mouth of an alley. He was wearing a blue hooded sweatshirt with a white t-shirt protruding from the bottom, a baseball cap, dark pants, and gray and green gym shoes. Melton turned in defendant's direction and yelled "eight." Defendant disappeared from Sellers's view for "a minute or two" and then returned from the alley.

¶ 4 Defendant walked to Sellers's vehicle and gave him eight tin foil bags in exchange for $80 in pre-recorded funds. Following the transaction, Sellers and defendant had a brief conversation, wherein defendant gave Sellers his telephone number and told Sellers his name was Hook. Defendant instructed Sellers to call that number to purchase narcotics in the future. Defendant stood at the driver's side of Sellers's vehicle the entire time, and Sellers could see his face.

[1] Co-defendant Virginia Melton pled guilty and was sentenced to 3 years' imprisonment. She is not a party to this appeal.

¶ 5 After securing the packets of heroin, Sellers drove away and radioed his team to inform them of the purchase. He gave a brief description of the individuals involved and their approximate location. After a few minutes, his team notified him that they had detained several people and Sellers relocated back to the scene to potentially identify the offenders. Approximately 30 minutes had passed between his purchasing the narcotics and relocating back to the scene. He could not return right away because it would have compromised his safety as an undercover officer to return so soon after the purchase.

¶ 6 Back at the scene, Sellers observed from his vehicle that the enforcement officers, Sergeant Peter Arpaia and Officer Brian Kane, had detained four people, including defendant. He immediately identified defendant as the person who sold him narcotics, and related that information via radio to Arpaia and Kane. Sellers then returned to the police station to complete paperwork and inventory the purchased narcotics. Later in the investigation, Sellers identified both defendant and Melton in separate photographic arrays.

¶ 7 Defendant was not arrested that day for several reasons. The team was conducting an ongoing operation at the scene, arresting defendant that day could have compromised the undercover officer's anonymity, the arrest might have stopped others from selling narcotics at that location, and sometimes the team attempted to get more than one purchase from a particular individual.

¶ 8 On cross-examination, Sellers acknowledged that the narcotics team did not use video surveillance for the controlled narcotics purchase, and did not recover from defendant the prerecorded funds used to purchase narcotics. He believed that, at some point, the police attempted to find out whose number defendant gave to Sellers. Sellers performed a record search

of the number in an effort to find out to whom the number was registered, but he acknowledged that this action was not reflected in any police reports.

¶ 9 Sellers acknowledged that his police report stated that the offender was wearing a blue hooded sweatshirt and black pants, but did not state that the offender was wearing a baseball cap, white shirt, or gym shoes. He further acknowledged the report did not state that defendant was missing his front teeth. He could not recall whether the offender was missing teeth because he was focused on the narcotics purchase, as well as watching for danger and the surrounding area while he was undercover. Although he received training in how to write police reports, he was not trained to be as specific as possible in writing reports.

¶ 10 Sellers could not tell if the detainees were handcuffed when he returned to the scene in his vehicle. Apart from defendant, Ethel Day and Eric Carter were also detained, along with one woman. Carter was also wearing a blue hooded sweatshirt and dark pants. Sellers acknowledged that there were no narcotics recovered from defendant on that date, and the enforcement officers did not search defendant for pre-recorded funds. However, defendant and the other detainees were not free to go. When defense counsel asked whether the police patted down the four individuals after stopping them, Sellers responded, "They pat down their outer garment for weapons and contraband. You can only be searched if you are in custody. They were not in custody."

¶ 11 Sellers acknowledged that neither Carter's nor Day's photographs were contained in the photographic array where he identified defendant. He did not search the alley that defendant walked into prior to selling him narcotics. He further did not send the purchased narcotics for fingerprints or DNA evidence testing.

¶ 12 Chicago police officer Brian Kane testified that he was an enforcement officer with the narcotics division on September 27, 2012. He was working with a team on an operation where they set up surveillance and sent an officer to purchase narcotics. In certain operations, they make arrests that day, or, in longer-term operations, they contact the individuals involved, document the activity, and arrest them on a different day.

¶ 13 That day, Kane was in the enforcement vehicle with Sergeant Peter Arpaia, while Sellers was undercover and Officers Freeman and Mills were working surveillance. Kane was in plain clothes and an unmarked vehicle, but was wearing a bulletproof vest and his "duty rig," which held his gun, handcuffs, star, an extra magazine, and radio. Kane parked a block and a half away from the 4400 block of West Van Buren, which was a known narcotics-trafficking area. After receiving a radio dispatch from Sellers, Kane relocated to the 4400 block of West Van Buren, but did not relocate immediately. Because the team was engaged in a longer-term narcotics operation, he waited to relocate to help ensure the safety of the undercover officer and protect the operation in general.

¶ 14 Sellers described the individuals involved in the transaction, and Kane observed four individuals in the area, including defendant. He spoke with the individuals, but did not handcuff them. Kane also did not search them for drugs or money because none of them posed a threat and they were all cooperative. If he had looked for pre-recorded funds, he would have compromised the safety of the undercover officer. Kane detained the individuals for identification purposes. He obtained the individuals' identities to create contact cards with their information. On defendant's contact card, he wrote that defendant was wearing a black baseball cap, blue hooded sweatshirt

with white t-shirt poking out, and gray and green gym shoes. Without placing anyone into custody, Kane then returned to the police station and inventoried the contact cards.

¶ 15 On cross-examination, Kane testified that he relocated to the scene approximately 25 to 30 minutes after Sellers reported the purchase. He did not recall whether defendant was missing his front teeth, but acknowledged that his contact card indicated defendant was missing "at least some" front teeth. When asked whether the detained individuals were free to leave, he responded, "It wasn't an issue whether they were free to leave. It was just a conversation." Kane interviewed Eric Carter, and the contact card that he created for Carter indicated that he was also wearing a blue hooded sweatshirt and dark pants. To Kane's knowledge, no one searched the alleyway that defendant walked down.

¶ 16 Naeemah Powell, an expert in the field of forensic chemistry, testified that she worked for the Illinois State Police Forensic Science Center. She analyzed the inventoried tin foil packets and, based on her expert opinion, five of the eight packets tested positive for 1.2 gram of heroin.

¶ 17 The defense presented no evidence. During closing arguments, in relevant part, defense counsel argued that Officer Sellers lied. Counsel contended Sellers's description of defendant–wearing a blue hooded sweatshirt with a white t-shirt poking out, a baseball hat, dark pants, and green and gray gym shoes–was based on Officer Kane's contact card, whereas Sellers's police report described only a blue sweatshirt and dark pants. Counsel argued that Sellers also claimed to see defendant's face up close, but failed to notice that he was missing front teeth, although it was his job get a description of the narcotics seller. Counsel emphasized the inconsistencies and omissions between Sellers's police report, and his testimony regarding the description of defendant, and argued that Sellers changed his description to match Kane's contact card. Counsel

further argued that Sellers's original description of the offender did not match defendant, and instead matched Eric Carter, who was also described as wearing a blue hooded sweatshirt and dark pants. The jury subsequently found defendant guilty of delivery of a controlled substance.

¶ 18 Following trial, a different defense attorney than defendant's trial counsel filed a motion for a new trial. Defendant also filed a *pro se* "Motion for a *Krankel* Hearing," alleging trial counsel was ineffective for failing to (1) call available defense witnesses, (2) prepare for trial, and (3) introduce physical evidence. After conducting a full hearing on defendant's motion, the court found defendant received "better than average representation" and denied both the motion for a new trial and defendant's *pro se* motion.

¶ 19 At sentencing, defendant's girlfriend, Verdonna Williams, testified that she had been in a relationship with defendant for over 30 years. Williams and defendant did not have children together, but they each had their own children and defendant helped raised them. Defendant additionally acted as a caretaker for Williams's 83-year-old mother, who had dementia. Defendant helped keep her in the house and cooked for her. He also helped the entire neighborhood with maintenance and cutting grass. Williams testified that defendant volunteered at church and cooked on the holidays, but she acknowledged that defendant had not had a job in three years. She also acknowledged paying defendant's bond on an unrelated case from February 2012.

¶ 20 In aggravation, the State argued that defendant had an extensive criminal history, including two manufacture and delivery of a controlled substance convictions in 1998 and 2006, for which he received three and six year sentences, respectively. He also had four convictions for possession of a controlled substance, in 1995, 2001, 2003, and 2005, with sentences ranging

from 18 months to 4 years. Further, he had a 1988 conviction for armed robbery for which he received a 10-year sentence and 1981 conviction for voluntary manslaughter. Based on his history, the State argued defendant engaged in a life of crime, had not used previous opportunities afforded to him, and had failed to conform his actions to those of a lawful citizen. Finally, the State argued that defendant committed the instant offense while out on bond for an unrelated narcotics offense.

¶ 21 In mitigation, defense counsel argued that defendant's prior convictions were largely nonviolent, apart from the voluntary manslaughter conviction which resulted from a bar fight gone wrong. Counsel further argued that, although defendant did not have a job, he contributed to his household in other ways, such as acting as a handy man in the community and taking care of Williams's mother.

¶ 22 Following arguments, the court sentenced defendant as a Class X offender to 11 years' imprisonment. In imposing sentence, the court stated it considered the nature and circumstances of the offense, defendant's character and background, and the presentence investigation report (PSI). The court further noted that it considered the aggravating evidence, including defendant's lengthy criminal history, as well as mitigating evidence, including defendant's family support, his prior work history, the hardship his incarceration would impose on his family, his long history of substance abuse, and that the instant offense was nonviolent. However, it found the sentence was necessary to punish defendant. Defense counsel filed a motion for reconsideration of sentence, which the court denied. This appeal followed.

¶ 23 On appeal, defendant first contends that trial counsel was ineffective for failing to request Illinois Pattern Instruction (IPI) 3.11, which instructs the jury on the use of prior inconsistent

statements as impeachment and substantive evidence, despite having repeatedly impeached Sellers, the State's sole eyewitness. Specifically, defendant claims that Sellers's testimony was inconsistent with his police report because at trial his description of the offender was more specific than his description in his police report, which matched the description of Eric Carter. Defendant additionally claims that Sellers's report failed to note that the offender was missing teeth and that the police attempted to trace the cell phone number that the offender provided Sellers. Defendant argues that he was denied a fair trial because the State's case rested on Sellers's credibility and the jury was not properly instructed in this regard.

¶ 24 To demonstrate ineffective assistance of counsel, defendant must show that (1) his attorney's performance was deficient, and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 25 IPI 3.11 is an instruction pertaining to prior inconsistent statements and provides as relevant here:

> "The believability of a witness may be challenged by evidence that on some former occasion he [made a statement] that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom.

> [However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when
>
> * * *
>
> [2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of; and
>
> [a] the statement was written or signed by the witness. [or]
>
> [b] the witness acknowledged under oath that he made the statement.
>
> * * *
>
> It is for you to determine [whether the witness made the earlier statement, and, if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000).

¶ 26 IPI 3.11 is " '[a]ppropriately given when two statements are inconsistent on a material matter. * * * [T]he materiality of the prior inconsistent statement is an issue for the trial court to determine.* * * [A]n issue is material when the contradiction reasonably tends to discredit the testimony of the witness on such facts.' " *People v. Carmona-Olvara*, 363 Ill. App. 3d 162, 169 (2005) (quoting *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001)).

¶ 27 Here, we need not determine whether counsel's performance was deficient because we conclude that defendant cannot demonstrate he was prejudiced by counsel's failure to request IPI 3.11. See *People v. Graham*, 206 Ill. 2d 465, 476 (2003) (noting that if an ineffective assistance of counsel claim can be disposed of on the grounds that the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient). Although the parties dispute

the materiality of the alleged inconsistencies, there is no dispute that they were brought to the attention of the jury. Defense counsel cross-examined Officer Sellers about his failure to include the entirety of defendant's physical description in his police report and whether he attempted to trace the cell phone number given to him by the narcotics seller. In addition, counsel also brought to the jury's attention the fact that Sellers did not notice defendant's missing teeth, and that his description of the offender also matched Eric Carter. Defense counsel emphasized these differences in Sellers's testimony and police report during closing argument, reminding the jury that Sellers's police report omitted additional details of defendant's identification that Sellers's description was based on Officer Kane's contact card.

¶ 28 Although the jury did not receive IPI 3.11, we do not find that they were left without adequate guidance as to how to evaluate Officer Sellers's testimony. Among the instructions that the jury did receive was IPI 1.02, which provides:

> "Only you are the judges of the believability of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe, his age, his memory, his manner while testifying, any interest, bias, or prejudice he may have, and the reasonableness of his testimony considered in light of all of the evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000).

¶ 29 Illinois courts have previously found that a failure to instruct the jury in accordance with IPI 3.11 is not cause for reversal where the other jury instructions correctly and sufficiently covered the applicable legal principles. See, *e.g.*, *People v. Cannon*, 150 Ill. App. 3d 1009, 1018-20 (1986) (finding that the trial court's failure to instruct the jury on prior inconsistent statements

did not amount to error where the jury was provided instructions in accordance with IPI 1.02); *People v. Larry*, 218 Ill. App. 3d 658, 666-67 (1991) (same); see also *People v. Luckett*, 273 Ill. App. 3d 1023, 1035 (1995) (finding no error in failing to provide the jury with IPI 3.11 because the jury was not left without adequate guidance as to how to evaluate inconsistent statements given that " '[i]t is obvious to the layman that any contradiction of a witness'[s] testimony calls into question the accuracy of that testimony, and if that testimony is disbelieved as to one matter, the veracity of the remainder is cast into doubt.' " (quoting *People v. McClellan*, 62 Ill. App. 3d 590, 596 (1978))).

¶ 30 Thus, because the jury was informed of the differences between Sellers's testimony and his police report and instructed on how to evaluate the testimony of the trial witnesses in accordance with IPI 1.02, we do not find that defendant was prejudiced by counsel's failure to request instruction 3.11. Accordingly, we conclude that defendant was not denied effective assistance of counsel.

¶ 31 Defendant next contends his 11-year sentence is excessive because (1) it is disproportionate to the nature of the offense, (2) the trial court failed to consider mitigating evidence, including defendant's drug addiction and the harm his imprisonment will cause his family, and (3) it serves little rehabilitative purpose.

¶ 32 We accord great deference to a trial court's sentence and will not reverse it absent an abuse of discretion. *People v. Butler*, 2013 IL App (1st) 120923, ¶ 30 (citing *People v. Stacey*, 193 Ill. 2d 203, 209-10 (2000)). "A sentence which falls within the statutory range is not an abuse of discretion unless it is manifestly disproportionate to the nature of the offense." *People v. Jackson*, 375 Ill. App. 3d 796, 800 (2007). In determining an appropriate sentence, the trial court

considers such factors as "a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment." *People v. Hernandez*, 319 Ill. App. 3d 520, 529 (2001). Absent some affirmative indication to the contrary, other than the sentence itself, we presume the trial court considered all mitigating evidence before it. *People v. Jones*, 2014 IL App (1st) 120927, ¶55. Because the trial court, having observed the proceedings, is in the best position to weigh the relevant sentencing factors (*People v. Arze*, 2016 IL App (1st) 131959, ¶121), we do not substitute our judgment for that of the trial court simply because we would have balanced the appropriate sentencing factors differently (*People v. Alexander*, 239 Ill. 2d 205, 213 (2010)).

¶ 33 Nothing in the record indicates that the trial court abused its discretion. See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38 (A defendant "must make an affirmative showing that the sentencing court did not consider the relevant factors."). Defendant was sentenced as a Class X offender to 11 years' imprisonment, well within the statutory range of 6 to 30 years. See 730 ILCS 5/5-4.5-25(a) (West 2014) (for Class X felonies, the sentence range is 6 to 30 years' imprisonment). We therefore presume his sentence was proper, absent some indication otherwise. *Burton*, 2015 IL (1st) 131600, ¶ 36. Moreover, the trial court stated on the record that, in imposing sentence, it considered defendant's PSI, hardship on defendant's family, his long-time drug abuse, the factors in aggravation and mitigation, defendant's criminal history, as well as arguments from counsel. Notably, defendant had six prior convictions for possession and delivery of narcotics. See, *e.g.*, *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (a defendant's criminal history alone may warrant a sentence substantially above the minimum).

¶ 34 Although defendant claims the trial court failed to consider mitigating factors at sentencing, nothing in the record supports this contention or demonstrates that the sentence is manifestly disproportionate to his offense. Rather, the record reflects that the trial court carefully considered all mitigating factors, including defendant's work history, the nonviolent offense, his family support, the hardship on his family, and the mitigation witness's testimony regarding defendant's care for her mother. The record further reflects that the court explicitly stated that it considered defendant's PSI. See *People v. Babiarz*, 271 Ill. App. 3d 153, 164 (1995) ("Where the sentencing court examines a presentence report, it is presumed that the court considered the defendant's potential for rehabilitation.")

¶ 35 With regard to defendant's drug addiction, the record reflects that the trial court was aware of his background. The court considered the PSI, which reported defendant's addiction, knew of defendant's prior drug convictions, and explicitly referenced defendant's drug addiction in imposing sentence. More importantly, however, the trial court was not required to accord defendant's addiction the weight he urges. See *People v. Montgomery*, 192 Ill. 2d 642, 674 (2000) ("[T]estimony about a defendant's history of alcohol and drug abuse is not necessarily mitigating. Although a defendant might urge this evidence in mitigation, as an explanation for his misconduct, the sentencer is not required to share the defendant's assessment of the information").

¶ 36 We are similarly unpersuaded by defendant's contention that the trial court failed to consider the financial impact of his incarceration on the State of Illinois. The court is required to consider the financial impact of defendant's incarceration on the State based on the financial impact statement filed by the Department of Corrections with the clerk of the court. 730 ILCS

5/5-4-1(a)(3) (West 2014). However, the court is not obligated to recite and assign a value to every factor that it considers (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)) and, absent evidence to the contrary, we presume the trial court considered the financial impact prior to sentencing defendant (*People v. Acevedo*, 275 Ill. App. 3d 420, 426 (1995)). Here, although the court did not explicitly refer to the financial impact of defendant's incarceration, the record shows that the court thoroughly considered the relevant sentencing factors. Moreover, defendant has failed to show evidence indicating that the court failed to consider the financial impact to the State. Thus, we presume the court considered financial impact prior to sentencing. Accordingly, we find the court did not abuse its discretion in sentencing defendant to 11 years' imprisonment.

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

¶ 38 Affirmed.