2017 IL App (1st) 152586-U

No. 1-15-2586

November 15, 2017

Third 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. 12 CR 18471
	)	
CALVIN BUCHANAN,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's sentence over his contention the trial court abused its discretion in imposing a 22-year sentence and failed to articulate its reasoning for the sentence. Fines and fees order modified to reflect proper presentence custody credit to offset fines.

¶ 2 Following a bench trial, defendant Calvin Buchanan was convicted of armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)) and sentenced to 22 years' imprisonment. On appeal, defendant argues his sentence is excessive, the trial court failed to articulate its reasoning

for the sentence, and he is entitled to additional presentence custody credit to offset various fines imposed. For the reasons set forth below, we affirm defendant's sentence and modify his fines and fees order to reflect the proper presentence custody credit to offset his fines.

¶ 3 Defendant was charged by information with one count of armed habitual criminal and one count of unlawful use of a weapon by a felon (UUWF) stemming from acts occurring on September 2, 2012, in Chicago. We briefly recite the evidence presented at trial as defendant does not challenge the sufficiency of the evidence supporting his conviction.

¶ 4 Mary McClure testified that she was at the home she shared with her grandfather, Danny Collins, when Collins and his girlfriend, Shannon Redmond, got into a fight. Redmond left but returned a couple hours later with two other men, one of whom was defendant. Defendant asked McClure where Collins was, and pulled a black revolver with gray duct tape from his pants. McClure responded that Collins was not at the home, despite the fact that he was in the basement. Defendant entered the basement, and McClure told her sister to alert Collins that defendant was "coming to look for him." Collins then came upstairs and locked himself in a room containing two children.

¶ 5 Defendant returned upstairs through the front of the basement holding the gun. Defendant pointed the gun at McClure's face and told her that if she did not get Collins, he would shoot her. McClure yelled to her sister to call the police, which prompted Redmond to tell defendant that they needed to leave. Defendant ran out of the house. McClure then spoke with a police officer that her uncle had flagged down and described what had happened.

¶ 6 Chicago police detective John Zalewski testified that he was flagged down by a woman, later identified as Mary McClure, who spoke with him and pointed to a silver car. Zalewski

curbed the vehicle and observed a man, identified in court as defendant, as one of the passengers. Zalewski then left the scene in order to continue his work on another assignment.

¶ 7 Chicago police officer Chris Gacek testified that he responded to a call to assist Zalewski. When Gacek arrived, he observed an individual, identified in court as defendant, as a passenger inside the vehicle. After the passengers were removed, Gacek searched under the hood of the vehicle and recovered a loaded blue steel revolver under an air filter vent.

¶ 8 The trial court found defendant guilty of armed habitual criminal and UUWF and proceeded to sentencing. The presentence investigation report (PSI) indicated defendant had at least eight prior felony convictions. These included a 1982 conviction for robbery, for which he later violated the probation he was given and was sentenced to four years' in the Illinois Department of Corrections (IDOC). He also had a 1982 conviction for aggravated battery for which he received four years' imprisonment, and a 1989 conviction for armed violence for which he received six years' imprisonment in the IDOC. Defendant had 1995, 1996, and 2000 convictions for drug-related offenses, for which he received three, one, and six years' imprisonment, respectively. He had 1996 and 2000 convictions for UUWF, for which he received four and two years' imprisonment in the IDOC, respectively. Defendant also had misdemeanor convictions for unlawful use of a weapon in 1987, battery in 2000, disorderly conduct in 2012, and driving with a revoked or suspended license in 2014.

¶ 9 Further, the PSI indicated that defendant lost a kidney from being shot during an attempted robbery in 1989. While being hospitalized for this injury, defendant contracted Hepatitis C, and he currently suffers "some liver problems."

¶ 10 In aggravation, the State noted defendant's nine previous felony convictions.[1] It argued these convictions showed that "defendant is a menace to society" because numerous convictions involved a gun and one conviction involved aggravated battery to a police officer. The State asked for an appropriate sentence based on defendant's criminal history.

¶ 11 In mitigation, defense counsel acknowledged defendant's nine felony convictions but noted that he has "people that care about him," including his wife and mother. Counsel asserted that defendant does not have a drug problem or any emotional or personal problems. He argued that defendant is 50 years old and had "spent a tremendous amount of time in jail." Counsel stated defendant had "allegedly done a violent act in this case" but "no one was hurt." He asked the court to consider "the least amount of time possible."

¶ 12 In allocution, defendant stated he works with "Cease Fire" and has been on CNN news. He asserted, with respect to McClure, that he had "never seen this girl in [his] life." He further stated he had "never seen these people" and that "they brought me out there and set me up."

¶ 13 The trial court merged the UUWF count into the armed habitual criminal count and imposed a 22-year prison sentence. It also assessed fines and fees in the amount of $894, with credit for 210 days spent in presentence incarceration. The court stated:

> "For purposes of sentencing, the Court has considered the evidence at trial, the gravity of the offense, the presentence investigation report, the financial impact of incarceration, all evidence, information, and testimony in aggravation and mitigation, any

[1] The State also argued defendant had a felony conviction for aggravated battery of a police officer in 1992, for which he received four years in the IDOC. This felony is reflected as a 1993 conviction in the State criminal history, which is incorporated in the PSI, but is not listed under "History of Delinquency and Criminality" contained on pages 3 and 4 of the PSI. However, the parties agreed in the trial court that defendant had nine prior felonies and no one has contested this issue on appeal.

> substance abuse issues and treatment, potential for rehabilitation, the possibility of sentencing alternatives, the statement of the defendant, and all hearsay presented and deemed relevant and reliable."

¶ 14 Defendant filed a written motion to reconsider sentence, which the trial court denied. Defendant filed a timely notice of appeal. He then filed a petition for writ of *mandamus*, arguing he was entitled to additional credit for days spent in presentence custody. The trial court denied *mandamus* relief but gave defendant credit for an additional 191 days, for a total of 401 days credit spent in presentence custody.

¶ 15 On appeal, defendant argues (1) the trial court abused its discretion in sentencing him to 22 years' imprisonment, (2) the trial court failed to articulate its reasoning for imposing the 22-year sentence, and (3) the fines and fees order should be corrected to reflect credit for 401 days spent in presentence incarceration.

¶ 16 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the range provided by statute, it will not be altered absent an abuse of discretion. *People v. Arze*, 2016 IL App (1st) 131959, ¶¶ 120-21. An abuse of discretion exists where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000) (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). Because of its personal observation of defendant and the proceedings, the trial court is in the superior position to determine an appropriate sentence. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, social environment, age, mentality, and moral character. *People v. Snyder*, 2011 IL 111382, ¶ 36. It is

presumed that when mitigating evidence is presented to the trial court, the court considered it absent some indication to the contrary, other than the sentence itself. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 17 We find the trial court did not abuse its discretion in imposing a 22-year prison sentence for the armed habitual criminal conviction. The offense of armed habitual criminal is a Class X felony, punishable by 6 to 30 years' imprisonment. 720 ILCS 5/24-1.7(b) (West 2012); 730 ILCS 5/5-4.5-25(a) (West 2012). The 22-year sentence falls within this statutory range, and we therefore presume it is proper. *People v. Williams*, 2017 IL App (1st) 150795, ¶ 43.

¶ 18 Defendant argues his 22-year prison sentence is disproportionate to the serious of the offense. Specifically, he argues that no injuries or harm resulted from his actions and he did not discharge the firearm. He further points out that while armed habitual criminal is a serious offense, the legislature already considered this in making it a Class X offense.

¶ 19 A sentence must reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. *People v. Neasom*, 2017 IL App (1st) 143875, ¶ 48; Ill. Const. 1970, art. I, § 11. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 12. Here, the trial court heard the evidence presented at trial, which showed that defendant pointed a gun in the face of McClure and threatened to shoot her if she did not do what he said. Given the inherent danger involved in pointing a hand gun in the face of a person while demanding her compliance, the trial court adequately considered the seriousness of the offense. Indeed, the offense of armed habitual criminal was created by the legislature "to help protect the public from the threat of

violence that arises when repeat offenders possess firearms." *People v. Davis*, 408 Ill. App. 3d 747, 750 (2011).

¶ 20 Defendant argues that the trial court placed "undue focus" on defendant's prior felony convictions and failed to consider the 12-year period where defendant did not engage in criminal activity. We disagree. Defendant had an extensive criminal history, including nine prior felony convictions and other misdemeanor convictions. These convictions included weapons-related offenses, drug-related related offenses, as well as battery. While defendant argues a prior UUWF and drug-related conviction were already taken into account in through his conviction for armed habitual criminal, he also had several other felony convictions. Further, while the trial court was aware that 12 years had passed since defendant's last felony conviction, it also knew defendant had more recent misdemeanor convictions. In light of defendant's history of violence, we cannot say the trial court abused its discretion in imposing a sentence of 22 years' imprisonment, especially when he "was not deterred by previous, more lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13.

¶ 21 Defendant further argues his age weighs in favor of a lesser sentence as he was 50 years old at the time of sentencing and will be over 68 years old after serving his sentence. However, the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors." *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant makes no such showing here. The trial court was well aware of defendant's age as it presided over the trial and sentencing, and defense counsel explicitly stated that defendant was 50 years' old. Moreover, defendant's age was contained in the PSI, which the trial court stated it had considered. There is no basis to conclude the trial court failed to consider defendant's age.

¶ 22 Defendant next argues that the trial court failed to adequately consider his Hepatitis C illness and the associated financial impact of incarceration before imposing sentence. However, the trial court stated it had considered the PSI, which contained defendant's Hepatitis C medical history and the circumstances surrounding it. See *Burton*, 2015 IL App (1st) 131600, ¶ 38 (the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors"). As this mitigating evidence was presented to the trial court, it is presumed that the court considered it absent some indication to the contrary. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19. Further, 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 2012). Here, the trial court explicitly stated it "considered the financial impact of incarceration" prior to imposing sentence. Defendant therefore cannot point to anything in the record suggesting the trial court did not consider his medical history or the financial impact of his incarceration prior to sentencing him.

¶ 23 Defendant argues that the support from his family, including his wife and mother, shows his potential for rehabilitation. However, the trial court heard about defendant's wife and mother from his attorney in mitigation. The trial court therefore adequately considered this factor. See *People v. Hambrick*, 2012 IL App (3d) 110113, ¶ 23 ("[w]e note *** that any prison sentence entails hardship to the defendant and the defendant's family").

¶ 24 Defendant next contends that his sentence should be vacated because the trial court "committed a procedural error" by failing to articulate its reasons for imposing a 22-year prison sentence in accordance with section 5-4.5-50(c) of the Uniform Code of Corrections. The State argues that defendant has forfeited the issue by failing to raise it in the trial court. Defendant, in

his reply brief, argues that even if we find the issue is forfeited, we should review the issue under the plain-error doctrine.

¶ 25 In order to obtain relief under the plain-error doctrine with respect to sentencing, the defendant must show "(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." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). However, we must first determine whether any error occurred at all. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 71.

¶ 26 Section 5-4.5-50(c) of the Uniform Code of Corrections states:

> "The sentencing judge in each felony conviction shall set forth his or her reasons for imposing the particular sentence entered in the case, as provided in Section 5-4-1 (730 ILCS 5/5-4-1). Those reasons may include any mitigating or aggravating factors specified in this Code, or the lack of any such factors, as well as any other mitigating or aggravating factors that the judge sets forth on the record that are consistent with the purposes and principles of sentencing set out in this Code." 730 ILCS 5/5-4.5-50(c) (West 2012).

¶ 27 Defendant acknowledges that our supreme court precedent does not require a trial court to articulate the reasons for a particular sentence imposed. See *People v. Davis*, 93 Ill. 2d 155, 162-63 (1982). However, he argues the supreme court's reasoning in *Davis* is "fundamentally flawed." In *Davis*, the defendants in two consolidated cases argued the trial court was required to state the reasons for imposing a particular sentence. *Id.* at 157. The defendants noted that the sentencing statutes, which directed judges to state the reasons for a sentence, contained the word "shall." See *id.* at 157-58 (citing Ill. Rev. Stat. 1979, ch. 38, ¶¶ 1005-4-1(c), 8-1(b)). On appeal,

this court held that the defendants failed to request the sentencing judges explain their reasoning and thus, had waived the issue. *Id.* at 158-59.

¶ 28 On further appeal to our supreme court, the court noted that, generally, the use of the word "shall" indicates a mandatory requirement. *Id.* at 162. However, the court found that reading the statute as mandatory would render it unconstitutional as it would amount to an encroachment by the legislature on the "inherent power of the judiciary" to determine a particular sentence. *Id.* Therefore, the court found "shall" to be permissive, rather than mandatory, and held that trial courts need not explain their reasoning for imposing a particular sentence. *Id.* at 162-63.

¶ 29 In his dissent, Justice Simon argued that the statutes did not "affect the ability of a trial judge to pronounce the sentence he feels is most appropriate" but only required that the "reasons for the sentence must be made a part of the record." *Id.* at 166 (Simon, J., dissenting). By not stating the reasons for a sentence, "the sentencing procedure, more than any other aspect of a criminal trial, may appear to be arbitrary and capricious." *Id.* at 168. After *Davis*, we have held that trial courts need not articulate the reasons for a particular sentence imposed. See, *e.g.*, *People v. Gordon*, 2016 IL App (1st) 134004, ¶ 51; *People v. Bryant*, 2016 IL App (1st) 140421, ¶ 16; *Sauseda*, 2016 IL App (1st) 140134, ¶ 22; *Wilson*, 2016 IL App (1st) 141063, ¶ 11.

¶ 30 Defendant relies on the dissent in *Davis* and cites the special concurrence in *People v. Bryant*, 2016 IL App (1st) 140421, ¶¶ 25-35. He argues that every case that relies on *Davis* for the proposition that judges do not have to articulate the reasons for a particular sentencing is "infirm." Defendant further points to the United States Sentencing Guidelines and decisions of the federal courts in interpreting and treating those guidelines.

¶ 31 However, *Davis*, as an Illinois Supreme Court decision, is controlling authority and binding on all lower courts in the state. See *People v. Artis*, 232 Ill. 2d 156, 164 (2009) ("The appellate court lacks authority to overrule decisions of [the supreme court], which are binding on all lower courts"). While decisions by federal courts are persuasive authority, we are bound by decisions of our supreme court. *People v. Jenk*, 2016 IL App (1st) 143177, ¶ 26. Accordingly, based on *Davis*, the trial court did not have to articulate the reasons for defendant's 22-year prison sentence. Having found no error, there can be no plain error. *People v. Reed*, 2016 IL App (1st) 140498, ¶ 11.

¶ 32 Defendant next requests a $5 *per diem* credit for the 401 days he spent in presentence incarceration. A defendant incarcerated on a bailable offense who does not post bail and against whom a fine is imposed is allowed a $5 credit for each day spent in presentence custody. 725 ILCS 5/110-14(a) (West 2012). While defendant did not raise this issue in the trial court, claims for statutory monetary credit pursuant to section 110-114 of the Code of Criminal Procedure of 1963 may be raised at any time, and we therefore are able to address this issue. *People v. Caballero*, 228 Ill. 2d 79, 88 (2008); *People v. Brown*, 2017 IL App (1st) 150203, ¶¶ 36-38.

¶ 33 Here, defendant was originally given credit for 210 days spent in presentence custody credit. He filed a petition for a writ of *mandamus*, which the trial court construed as a motion to correct the mittimus, and was awarded an additional 191 days credit. However, the fines and fees order does not reflect defendant's credit for 401 days spent in presentence custody. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we direct the clerk of the circuit court to modify the fines and fees order accordingly.

¶ 34 For the reasons set forth above, we affirm defendant's conviction and sentence and direct the clerk of the circuit court to modify the fines and fees order to reflect credit for 401 days spent in presentence custody credit.

¶ 35 Affirmed; fines and fees order corrected.