No. 2—09—0649
Order filed February 1, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 07—CF—2196
NAKIYA A. GRIFFIN,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Schostok and Birkett concurred in the judgment.

ORDER

Held: Where the trial court did not give disproportionate weight to an improper factor when sentencing defendant, his nine-year term of imprisonment was affirmed.

After a jury trial, defendant, Nakiya A. Griffin, was found guilty of delivery of a controlled substance within 1,000 feet of a park (720 ILCS 570/407(b)(2) (West 2006)) and sentenced to nine years' imprisonment. On appeal, defendant argues that at his sentencing hearing, the trial court placed significant weight on an improper factor - his prior arrests - in imposing a nine-year sentence. We affirm.

I. BACKGROUND

The following evidence was adduced at defendant's February 2009 jury trial. On July 28, 2007, Aurora police officer Steve Stemmet and his partner, Officer Thomas Maguire, were on patrol in an unmarked car. At 10:20 p.m., they saw a "blue beater-type minivan" in the parking lot of a of a bar and liquor store named LaVillita. The driver of the van was a male Hispanic, defendant was the passenger, and a third man, Israel Williams, stood outside the van at the passenger-side window. Officer Stemmet then drove into the parking lot and positioned his vehicle close enough to the minivan to hear and see what was occurring. From there, the officers observed Williams give money to defendant and defendant pass small packages back to Williams. The officers believed the packages to be narcotics. During the exchange, Officer Stemmet saw Williams look at the packages and then ask "if he could get five for 40."

At this point, the officers got out of their vehicle, and Officer Stemmet approached the van on defendant's side. Williams walked away from the van as defendant opened the door and attempted to "push past" Officer Stemmet. Following a brief chase, defendant was apprehended and placed under arrest. Officer Stemmet next told Williams, who was standing in front of LaVillita, to stop. Williams then threw four baggies of cocaine into a nearby bush, which formed the basis of the instant charge. Williams was arrested, and the van driver got away. Two additional baggies of cocaine were found in the parking lot where the passenger side of the van had been. Defendant was not charged in relation to those baggies.

Williams admitted purchasing $40 worth of crack cocaine from defendant that day while he was standing outside of the van. He also admitted throwing four baggies of cocaine when approached by police. It was undisputed that the distance from the parking lot to a forest preserve was 533 feet.

Defendant's version of events was that he went to LaVillita to buy liquor. When he got there, defendant saw a van owned by a drug dealer he knew as "Hector." Defendant got into Hector's van to see if he could purchase $10 worth of marijuana. As defendant talked to Hector in the van, Williams approached on the passenger side, talked to Hector, and reached inside the van and handed money to Hector. From between his legs, Hector withdrew several bags, which he handed to Williams. Williams walked away, and defendant never touched the money or the drugs. After defendant learned that Hector had no marijuana, he exited the van to return to LaVillita. At this time, a black SUV pulled in behind the van, and several people began yelling and running away. Defendant also ran but was tackled by police.

The jury found defendant guilty of possession with the intent to deliver within 1,000 feet of a park. Defendant subsequently moved for a new trial, and this motion was denied on April 8, 2009. A sentencing hearing immediately followed.

At the sentencing hearing, the State did not present any witnesses. It pointed out that the instant offense was a Class 1 felony with a sentencing range of 4 to 15 years (see 730 ILCS 5/5—4.5—30 (West 2008)). According to the State, aggravating factors included: (1) defendant's criminal history spanning 12 years which consisted of five felony convictions, misdemeanors, drug offenses, and crimes of violence like domestic violence; (2) a sentence that would deter others; and (3) the fact that the current felony offense was committed while defendant was out on bail for another felony offense. A mitigating factor was that defendant's imprisonment would be a hardship to his dependents, although the State did not believe it was an "excessive hardship." The State further argued that defendant's letter to the court failed to take responsibility for the offense but

instead stated that he was at the wrong place at the wrong time. For all of these reasons, the State urged the court to impose a sentence in the middle of the sentencing range.

Defendant did not present any witnesses but relied on his written statement to the court and a letter from his daughter. In terms of mitigating factors, defendant argued that the current drug offense did not cause or threaten serious physical harm; that he did not contemplate that his actions would cause or threaten serious physical harm; that his character and attitude demonstrated that he was unlikely to reoffend; and that his imprisonment could cause excessive hardship to his children. Aware that this same court had sentenced him in his prior case, defendant reminded the court to consider his family history and lack of parental support. Defendant requested a sentence close to the minimum of the sentencing range.

In determining what sentence to impose, the court reasoned as follows. Despite three eyewitnesses who testified against defendant at his trial, defendant persisted in denying that he committed the offense. The court agreed that defendant had a "sad family background" of never seeing his biological father, losing his mother, who also struggled with drugs, to AIDS, and having a brother and stepfather in prison. The court noted that defendant had three children,[1] and he considered the financial impact of defendant's imprisonment. In addition, the court noted that defendant had suffered a gunshot wound and appeared to have an alcohol and drug addiction.

Regarding the presentence investigation (PSI) report, the court "counted up 35 charges. [Defendant] had acquired more charges than he has years on earth." The court noted that defendant also had "new charges" including "[o]perating an uninsured motor vehicle, registration, permitting an unauthorized person to drive, seat belt required passenger, aggravated battery, resisting a peace

[1]The PSI report indicates that one of defendant's children is deceased.

officer, unlawful possession of a controlled substance; and for that, he received a sentence to the Illinois Department of Corrections." The court further commented that defendant's "record before that" included:

> "[r]obbery, criminal trespass to land, resisting a peace officer, criminal trespass to land, operating an uninsured motor vehicle, operating an uninsured motor vehicle, fleeing and attempting to elude police, operating an uninsured motor vehicle, other amount of narcotics, schedule one and two, criminal damage to government property, loss or repair, for which he received a sentence to the Illinois Department of Corrections; criminal trespass to land, domestic battery, bodily harm, criminal trespass to property, retail theft, for which he received a sentence to the Illinois Department of Corrections; police officer, disobeyed a traffic offense, criminal trespass to land, possession of a controlled substance, obstructing justice, obstructing justice, resisting or obstructing police for which he received a three-year sentence to the Illinois Department of Corrections; criminal trespass to land, criminal trespass to land, operating an uninsured motor vehicle, operating an uninsured motor vehicle, criminal trespass to property. [Defendant] has been incarcerated three times and was paroled February 19, 2009."

The court continued that defendant had been committing crimes for the past 12 years, an "extensive criminal history," which included crimes of violence and drug crimes.

Overall, the court agreed with the State's aggravating factors. Regarding the mitigating factors, the court disagreed with defendant that his conduct neither caused nor threatened serious physical harm to another, or that defendant did not contemplate that his conduct would cause or threaten serious physical harm to another. According to the court, drugs were dangerous, and

defendant sold cocaine to Williams, a drug addict. Based on his "lifetime of criminal convictions," the court also disagreed that defendant's character and attitude indicated that he was unlikely to commit another crime The court did agree that defendant's young children created a mitigating factor. Based on all of the factors, the court sentenced defendant to nine years' imprisonment.

Defendant moved to reconsider his sentence, arguing among other things that the trial court improperly weighed the evidence of his past criminal conduct. While conceding that the court's "reliance on this figure" of 35 charges was "accurate" based on the PSI report, defendant nevertheless argued that the court failed to take into account that out of those 35 charges, 11 did not result in convictions, 2 resulted in *ex parte* judgments; and 1 did not contain any information as to the outcome. The trial court denied defendant's motion to reconsider his sentence. According to the court, "what hurt [defendant], and he did not present well, he's a 29-year-old young man who has already been to the Illinois Department of Corrections three times and has 35 criminal charges." The court reiterated its previous ruling regarding factors in aggravation and mitigation, noting that defendant had been "committing and getting caught and convicted of crimes for 12 years." In light of defendant's "very extensive criminal history," which would have justified a maximum sentence, the court felt that it imposed a sentence closer to the lower part of the spectrum rather than the upper part of the spectrum.

II. ANALYSIS

Defendant's sole argument on appeal is that the trial court erred by giving disproportionate weight to the 35 arrests chronicled in his presentence report. He argues that "bare arrests and pending charges" may not be used in aggravation of a sentence, and that the State presented no live

testimony to substantiate the information relied on by the court. As a result, defendant requests this court to vacate his nine-year sentence and remand the case for a new sentencing hearing.

A trial court's sentencing decision is presumed to be legally correct, and it will not be disturbed absent an abuse of discretion. *People v. Robinson*, 391 Ill. App. 3d 822, 842-43 (2009). An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court. *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004). Nevertheless, consideration of an improper factor can be an independent basis for reversal. *Robinson*, 391 Ill. App. 3d at 843. "Bare arrests and pending charges may not be utilized in aggravation of a sentence." *Johnson*, 347 Ill. App. 3d at 575. Conversely, criminal conduct unrelated to the offense of which the defendant has been convicted may be considered at sentencing. *Id.* at 575. While arrests not resulting in convictions normally may not be considered in determining the appropriate length of a sentence to be imposed, a sentencing court may consider evidence of criminal conduct for which no prosecution or conviction ensued, provided that evidence is both relevant and reliable. *People v. Gomez*, 247 Ill. App. 3d 68, 73-74 (1993). Absent evidence of reliability, however, the trial court's consideration of a mere arrest is prejudicial error unless the record demonstrates that the weight placed on the improper factor by the court was insignificant. *People v. Williams*, 272 Ill. App. 3d at 868, 879 (1995).

When reviewing the transcript of the sentencing hearing, it is evident that the trial court went through the entire PSI report and read the charges aloud. Beginning with the "newest charges," the PSI report reflected two charges connected to a March 2007 incident, and two charges connected to a May 2007 incident, one of which resulted in a conviction. For another March 2007 incident, defendant was charged with six offenses, one of which resulted in a conviction. The court read

through these recent charges and then noted that one of them had resulted in a prison sentence. The remainder of the PSI report showed 22 more offenses, 21 of which resulted in a conviction, and 1 of which the outcome was unclear. For 1 of these 21 incidents, defendant was charged with four offenses but pled guilty to only one count. The trial court correctly noted that, in all, the PSI contained 35 charges. Though the court did not explicitly state that 23 of the 35 charges resulted in convictions, the court, in reading defendant's entire adult record, pointed out the three occasions in which defendant received prison sentences.

Defendant concedes that the court read from the entire list of charges, whether convictions were entered or not, but concludes that the court did so "without considering that the law does not permit a sentencing judge to aggravate a sentence based on simple arrests." However, as previously mentioned, we presume the trial court knew it was not to consider defendant's bare arrests as an aggravating factor, and we assume that the court applied the law correctly. See *People v. Pendleton*, 279 Ill. App. 3d 669, 678 (1996); see also *Gomez*, 247 Ill. App. 3d at 74 (although it would have been preferable for the court to affirmatively state that it was not relying on those arrests, the reviewing court presumed that the trial court knew the law and applied it correctly). Defendant essentially argues that because the court mentioned twice that defendant had 35 charges - once during the sentencing hearing and once during defendant's motion to reconsider - that this court cannot presume that the improper factor was not taken into account in fashioning his sentence. We disagree. A reviewing court should not focus on a few words or statements made by the trial court but must consider the record as a whole. *People v. Sims*, 403 Ill. App. 3d 9, 24 (2010). The trial court's mention of defendant's 35 charges in this case (with 23 convictions) does not equate to reliance on arrests without convictions. See *Gomez*, 247 Ill. App. 3d at 74 (rather than demonstrating

reliance on the defendant's prior arrests, the record indicated that the court merely mentioned them while considering his criminal history).

Our examination of *People v. Thomas*, 111 Ill. App. 3d 451, 453 (1983), cited by defendant, does not change our conclusion. In that case, the defendant made the same argument that defendant makes here, which is that the trial court erred by considering his prior arrests which did not result in conviction where there was no evidence produced at sentencing to support the allegations, other than the PSI report. The critical distinction between this case and *Thomas*, however, is that the trial court in *Thomas* stated that it would consider those arrests in regard to the length of the defendant's sentence as well as its terms and conditions. *Thomas*, 111 Ill. App. 3d at 453. Here, the trial court did not say that it was relying on defendant's mere arrests in imposing a sentence; instead, it relied on defendant's 12-year criminal history which included multiple convictions. Putting aside the "bare arrests" and pending charges in this case, the fact remains that defendant had 23 convictions spanning 12 years. Such a record supports the trial court's finding that defendant had a "very extensive" criminal history. See *Williams*, 272 Ill. App. 3d at 879 (the trial court could have properly concluded from the PSI report that the defendant had a history of violence without consideration of the "bare arrests").

In sum, defendant has not shown that the trial court relied on mere arrests and pending charges as an improper factor in aggravation. The trial court's decision to impose a nine-year sentence is amply supported by defendant's extensive criminal history, which included a violent crime and drug crimes; his failure to take responsibility for the instant offense despite three eyewitnesses (see *Johnson*, 347 Ill. App. 3d at 576); and the fact that he committed this felony offense while out on bail for another felony offense. As the State points out, with a sentencing range

of 4 to 15 years, defendant's 9-year sentence was under the midpoint sentence of 9½ years' imprisonment. Indeed, the trial court stated when ruling on defendant's motion to reconsider his sentence that his criminal history alone warranted a maximum sentence.

III. CONCLUSION

For the aforementioned reasons, the judgment of the Kane County circuit court is affirmed.

Affirmed.