2011 IL App (2d) 100129-U
No. 2-10-0129
Order filed September 2, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-32
DeMICHAEL S. FOAT,	)	Honorable Ronald J. White,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in sentencing defendant to 75 years' imprisonment (including a 25-year firearm enhancement) for first-degree murder: defendant did not submit specific evidence that his impulsiveness would decrease with age, and the impulsive, minimally premeditated nature of the offense was not inherently mitigating.

¶ 1 Defendant, DeMichael S. Foat, appeals from his 75-year sentence for a conviction of first-degree murder (730 ILCS 5/5-8-1(a)(1) (West 2008)). The conviction stems from defendant's shooting of Jermaine Malone, and the sentence includes a 25-year enhancement based on defendant's

having personally discharged a firearm that caused the death (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)). The record shows no abuse of discretion, and we therefore affirm the sentence.

¶ 2 I. BACKGROUND

¶ 3 As the propriety of the sentence is the only issue in this appeal, we discuss only those parts of the record that relate the nature of the crime and defendant's personal traits.

¶ 4 Defendant was 18 at the time of the offense. During pretrial proceedings, the State requested that the court order an evaluation of defendant's fitness to stand trial. The request was based on reports that defendant had a low IQ and had at one time been hospitalized for treatment of a psychosis. The court granted the request, and the evaluator opined that defendant was fit, finding that defendant's functioning was higher than expected given the reports that had led the State to request the evaluation.

¶ 5 Defendant had a jury trial. The only facts in dispute were those that related to defendant's motive for the shooting.

¶ 6 The trial testimony showed that, at around 4 a.m. on January 1, 2008, a car driven by Lakeisha Hill, who was drunk, collided on a curve with a car driven by defendant's cousin, Jermaine Foat. In Hill's car were two passengers, one of whom was Jermaine Malone. In Foat's car were several passengers, one of whom was defendant's brother, who was paralyzed as the result of a gunshot wound. Traveling behind Foat's car was a van in which defendant was one of at least six passengers.

¶ 7 When the collision occurred, the van stopped behind Foat's car. People began to get out of all three vehicles. Defendant got out of the van to check the condition of his brother.

¶ 8 According to defendant's testimony, he found his brother obviously seriously injured but also clearly alive. Other testimony showed that the brother had a compound fracture of one leg and was bleeding from his mouth. The brother's own testimony suggested that he lost consciousness shortly after the crash. One witness heard defendant saying things that suggested that he believed that his brother was dead. Another witness described defendant as becoming agitated after seeing his brother and yelling, "What the fuck is wrong with my brother." Several of the passengers from the van carried the brother from the car into the van shortly after the crash.

¶ 9 Also shortly after the crash, Hill smelled something that made her think that her car was catching fire. She decided that she should move her car away from the other and backed it up a short distance.

¶ 10 Others at the scene, including Foat and possibly defendant, noticed Hill's car moving and yelled that Hill should not leave the scene. Foat went up to the driver's-side window of Hill's car and removed the keys from the ignition.

¶ 11 At some point, Malone got out of Hill's car. Witnesses variously described him as checking on the conditions of those in the other car and shouting at Hill, berating her for her stupidity. Several witnesses said that Malone had a liquor bottle in his hand. (The pathology report said that he had no alcohol in his blood. No report was made of his stomach contents. Hill testified that, after the crash, she started throwing bottles out of the car to reduce the evidence of drinking.)

¶ 12 Defendant testified that Malone was brandishing the bottle as a weapon; one witness described him drinking from it.

¶ 13 Foat and Malone confronted one another. Foat said something suggesting that he thought that he ought to punch Malone. Foat may have started walking away. Defendant walked up to

Malone and, in most accounts, raised a handgun (a .22-caliber revolver) to Malone's forehead and shot him. In the opinion of the pathologist who testified at the trial, the discharge had occurred when the gun's muzzle was no more than two inches from Malone's head. One witness said that defendant hit Malone once with the gun before shooting him. Defendant testified that he believed that Malone was swinging the bottle at Foat. In response, he struck Malone on the head with the gun, causing it to discharge.

¶ 14 Defendant and another witness both testified that defendant had the gun with him at a party he attended before the accident. Defendant testified that he had gotten the gun from "an associate" after having been involved in a dispute while at the party.

¶ 15 After the shooting, defendant and others got back into the van; the van was going to take defendant's brother to the hospital. Defendant asked to be let out on a street corner along the way.

¶ 16 The court instructed the jury on second-degree murder and involuntary manslaughter as well as first-degree murder. It also gave instructions on defense of another.

¶ 17 In its closing, the State argued that defendant was motivated by rage at his brother's injury.

¶ 18 The jury convicted defendant of first-degree murder under multiple theories; it further found that defendant had personally discharged the firearm that caused the death.

¶ 19 The presentence report showed that defendant had a significant history of juvenile offenses including residential burglary. He had received several sentences of probation and had consistently been completely noncompliant with the terms. He was also chronically truant and frequently a runaway. Attempts at mental-health interventions had been frustrated by defendant's failure to come to his appointments.

¶ 20 Defendant presented mitigation testimony from his mother and father, a grandmother, a sister, and a cousin. His cousin said that defendant claimed to be a gang member, but he had not been initiated. His father testified that defendant was similar to him in that they both heard voices and had nightmares, which the father said he had been taught to think of as "demons messing with you." His father also said that he felt that he had abandoned defendant by moving to Pennsylvania when defendant was young. Defendant's mother testified that defendant was one of nine children; he received Social Security disability because he heard voices. She was unable to answer questions about much of his mental health and criminal history. A minister with a long acquaintance with defendant also testified as a mitigation witness. She said that she thought that the size of his family made it hard for his mother and grandmother to supervise him.

¶ 21 The court noted defendant's long and unsatisfactory history with the juvenile justice system. It described him as having a complete disregard for authority. It sentenced him to 75 years' imprisonment, a sentence that included a 25-years enchantment based on defendant's use of a firearm to commit the murder. Defendant moved for reconsideration of his sentence, the court denied the motion, and defendant timely appealed.

¶ 22 II. ANALYSIS

¶ 23 "[T]he trial court is the proper forum to determine a sentence and the trial judge's decision in sentencing is entitled to great deference and weight." *People v. Latona*, 184 Ill. 2d 260, 272 (1998). "It is the province of the trial court to balance relevant factors and make a reasoned decision as to the appropriate punishment in each case." *Latona*, 184 Ill. 2d at 272. A reviewing court should neither reweigh factors that the trial court considered (*People v. Pippen*, 324 Ill. App. 3d 649, 653 (2001)) nor disturb a sentence that is within the statutory limits for the offense unless the trial court

abused its discretion (*People v. Coleman*, 166 Ill. 2d 247, 258 (1995)). A sentence is an abuse of discretion only if it "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).

¶ 24 The Illinois Constitution requires that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, §11. The seriousness of the offense is the most important sentencing factor. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007).

¶ 25 In this appeal, defendant argues that his sentence was excessive (1) because the court failed to take adequate account of the likelihood, based on neurological research, that defendant's impulsiveness would decrease with age and (2) because it did not give sufficient weight to the impulsive, minimally premeditated nature of defendant's action. The State argues simply that the sentence was nevertheless within the court's discretion. The parties agree that the sentence was within the statutory sentencing range: 20 to 60 years for first-degree murder (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)) with the firearm enhancement allowing an increment of 25 years to life (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008)). We consider each of defendant's arguments in turn; we deem neither to be persuasive.

¶ 26 Defendant argues that, as a general matter of policy, based on what neurological science has learned about the maturation of judgment and impulse control, sentencing courts should treat the youth of an offender as an important marker of good rehabilitative potential. He further argues that this marker is "particularly applicable" to him, given the evidence that he had a low IQ and mental illness.

¶ 27 To the extent that defendant is making a generalized policy argument, asking this court to *require* consideration of youth and impulsivity as two mitigating factors that necessarily would require a reduction in defendant's sentence, he is asking the court to give more weight to particular factors than others in aggravation. The General Assembly has specified certain factors that a sentencing court must consider in mitigation and aggravation. 730 ILCS 5/5-5-3.1, 3.2 (West 2008). Defendant gives no justification or authority for a reviewing court being required to assign particular weight to these two factors over others. See *People v. Dorsey*, 136 Ill. App. 3d 1037, 1040 (1985); *People v. Darnell*, 94 Ill. App. 3d 830, 838 (1981).

¶ 28 To the extent that defendant is arguing that he in particular has high rehabilitative potential, he has not supported that argument. To properly make such an argument, defendant would need to provide acceptable evidence that his specific personal characteristics, as documented in the record, correlate with improvement with age in judgment or impulse control. Defendant has provided nothing that is relevant to his particular condition or traits—his possible low IQ, his history of hearing voices, his oppositional attitudes. On young adults' potential for maturation, defendant has cited only one source: *Cruel and Unusual Punishment: The Juvenile Death Penalty, Adolescence, Brain Development and Legal Culpability* (ABA Juv. Just. Center Crim. Just. Sec. Newsl, Washington. D.C.), Jan. 2004, available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf. This article supports the general proposition that young adults have not reached their full capacity to exhibit good judgment and impulse control. However, the article is an overview and says nothing about how generally applicable its findings are. As a result, even if we accept the proposition that *most* people of defendant's age will gain judgment

and impulse control, we have nothing to tell us how fully that proposition applies to a person with defendant's particular traits, given his lengthy juvenile history and complete lack of cooperation with authority despite opportunities for treatment and help.

¶ 29 Defendant also argues that the circumstances of his shooting of Malone were mitigating in a way to which the court did not give sufficient weight. Specifically, he asserts that "[a] lack of premeditation and evidence of provocation or excuse, though insufficient to amount to a complete defense, provide a basis for finding mitigation, and consequently a reduced sentence." We first examine defendant's argument that the court gave insufficient weight to the statutory mitigating factor that a "defendant acted under a strong provocation" (730 ILCS 5/5-5-3.1(a)(3) (West 2008)). We disagree that the evidence at trial supported the conclusion that the shooting was provoked. Even if he was upset by his brother who was paralyzed being injured in the accident, the evidence points to defendant having known that Hill, not Malone, was the driver and the one who injured his brother. Thus, his shooting of Malone was not provoked.

¶ 30 Defendant also asserts that his "lack of premeditation," should have been given more weight as a mitigating circumstance. He contends that he had seen his brother, the victim of a serious car accident, become paralyzed, and he felt his brother needed protecting. Defendant argues that, while he overreacted, his actions were impulsive rather than premeditated. We disagree. " 'Premeditation' is 'a legal term of art meaning nothing more than '"having made the choice to kill." ' *People v. Romero*, 387 Ill. App. 3d 954, 979 (2008), quoting *People v. Williams*, 193 Ill. 2d 1, 29 (2000). In *Romero*, the defendant did not plan the killing in advance, and the stabbing was a spontaneous act; we nevertheless said it was premeditated in the sense that it was calculated. *Romero*, 387 Ill. App. 3d at 979. Here, too, defendant's act in shooting the victim in the head at point blank range was a

calculated act showing that defendant made the choice to kill. In that sense, the killing was premeditated.

¶ 31 Defendant cites five cases, *People v. Treadway*, 138 Ill. App. 3d 899 (1985), *People v. Steffens*, 131 Ill. App. 3d 141 (1985), *People v. Maldonado*, 240 Ill. App. 3d 470 (1992), *People v. Nolan*, 291 Ill. App. 3d 879 (1997), and *People v. Newell*, 196 Ill. App. 3d 373 (1990), as supporting the proposition that lack of "premeditation" is mitigating. None of these cases is apposite. In *Treadway*, the case upon which defendant principally relies, the offenses were perpetrated on a stranger in a fleeting moment of rage, when the defendant was intoxicated. *Treadway*, 138 Ill. App. 3d at 905. The record in *Treadway* also disclosed that the defendant had only a minor criminal history, had addressed his alcohol problem, and had earned his G.E.D. high school diploma. *Treadway*, 138 Ill. App. 3d at 905. These facts are unlike the facts in our case where defendant showed a total unwillingness to use the resources available to him to address his behavioral problems resulting in what the trial court termed a complete disregard for authority. In *Steffens*, the court pointed out that the confrontation between the defendant and the victim was initiated by the victim, even though the defendant returned to the scene apparently to cause some kind of trouble. *Steffens*, 131 Ill. App. 3d at 152. In *Maldonado*, the court contrasted the killing, where the defendant fired shots at a fleeing station wagon during an unexpected confrontation between gangs, with a "planned execution," treating the defendant's behavior as the much less serious crime. *Maldonado*, 240 Ill. App. 3d at 486. In *Nolan*, the victim was the aggressor and the defendant was trying to extricate himself from the situation. *Nolan*, 291 Ill. App. 3d at 887. In *Newell*, the defendant, who suffered from significant mental retardation, was a marginal participant in events, someone else having

brought the gun, which the defendant did not know about in advance. *Newell*, 196 Ill. App. 3d at 383.

¶ 32 As demonstrated, the evidence in this case does not support defendant's contentions that he has rehabilitative potential, was provoked by the victim, or that the killing was not premeditated. Consequently, we conclude that the circumstances do not warrant a reduction in his sentence.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we conclude that defendant's sentence was not an abuse of discretion and we therefore affirm it.

¶ 35 Affirmed.