2012 IL App (2d) 110249-U
No. 2-11-0249
Order filed July 5, 2012

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. 09-CF-1490
DIJON R. GRISSETTE,	)	Honorable Thomas Mueller,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion in imposing a six-year prison term for aggravated battery of a corrections officer.

¶ 1 A jury convicted defendant, Dijon R. Grissette, of aggravated battery of a corrections officer (720 ILCS 5/12-4(b)(18) (West 2010)), and the trial court imposed a six-year prison sentence. Defendant appeals the sentence only, arguing that the trial court committed reversible error by considering in aggravation the results of a search unrelated to the aggravated battery charge. The search disclosed cocaine and defendant was charged with a drug offense, but the charge was later

dropped. At sentencing in this case, the trial court emphasized that it gave little weight to the challenged evidence. We conclude that the trial court's sentencing decision was not an abuse of discretion.

¶ 2 I. FACTS

¶ 3 Defendant was convicted of aggravated battery based on evidence that he knowingly made physical contact of an insulting or provoking nature with a corrections officer, in that he pushed, shoved, and struck the officer, knowing that the officer was engaged in the execution of his official duties. See 720 ILCS 5/12-4(b)(18) (West 2010). The conviction arose from an incident between defendant and a corrections officer while defendant was an inmate in the Kane County jail on May 20, 2009. Defendant appeals only the sentence.

¶ 4 The State introduced four exhibits at the sentencing hearing. Three exhibits documented defendant's prior convictions of mob action in 1991 (720 ILCS 5/25-1(a)(1) (West 2010)), unlawful possession of a weapon by a felon in 1993 (720 ILCS 5/24-1.1(a) (West 2010), and possession of a controlled substance with the intent to deliver in 2000 (720 ILCS 570/402 (West 2010)).

¶ 5 The fourth exhibit provided evidence of a 2007 crime for which defendant was charged but not convicted because the State subsequently dismissed the charges. The exhibit consisted of materials related to the search of the residence of Blanca Ortiz-Garza, who was defendant's girlfriend at the time of the search. While executing a search warrant, the police found cocaine in, among other places, a car in the driveway and a grill in the yard. The police also found large amounts of cash, ammunition, and defendant's identification card. The police took statements from Blanca, and from her brother Jose Ortiz. Blanca stated that the cocaine found in her car was not hers and might be defendant's drugs. Jose said that defendant kept cocaine in a grill and gave Jose cocaine to sell. All

four of the exhibits, including the exhibit related to the 2007 search, were introduced without objection by defendant's counsel.

¶ 6 Defendant argued for mitigation based on substantial hardship to his family, including his 15-year-old son, who has suffered depression and whose grades have decreased significantly during the time defendant was incarcerated. Defendant introduced evidence from his former employer and a minister to show that defendant had kept a job and had a "tremendous desire to *** provide a decent life for his family." Finally, defendant asserted that no one was injured by the battery at issue in this case.

¶ 7 Aggravated battery of a corrections officer (720 ILCS 5/12-4(b)(18) (West 2010)) is a Class 2 felony (720 ILCS 5/12-4(e)(2) (West 2010)). The offense ordinarily is punishable by 3 to 7 years' imprisonment, but eligibility for an extended term increases the range to 14 years. 730 ILCS 5/5-4.5-35(a) (West 2010). Defendant was not eligible for probation due to his prior convictions. The State asked the court to sentence defendant to an 11-year term, but the court imposed a 6-year term, which is a sentence within the non-extended sentencing range. In explaining the shorter sentence, the court found that defendant did not "threaten[] serious physical harm" (see 730 ILCS 5/5-5-3.1(a)(1) (West 2010)) and that "the nature of this offense itself isn't egregious enough for this Court to be able to consciously find that it's appropriate for extended term." The court acknowledged the hardship faced by defendant's family, but found that this hardship might well have been the result of neglect and defendant's failure to turn his life around. The court cited defendant's criminal record as an aggravating factor supporting the six-year sentence. The court noted defendant's conviction of mob action that was allegedly gang-related, as well as defendant's conviction of possession with intent to deliver a controlled substance, which resulted from a search

that uncovered weapons as well as drugs. Noting the 2007 search and seizure at issue in this appeal, the court stated as follows:

> "And then we come all the way up to 2007 after he's incarcerated for that drug and gun charge, he's now *** living with [Blanca] on Lawndale and they execute a search warrant at that residence based on some surveillance and there they find cocaine, large sums of cash, a scale, and again ammunition."

¶ 8 The court further noted that the 2007 incident showed that defendant was "in the same place in terms of his behavior, none of which is very paternal, being a drug dealer and a weapons—or in that case ammunition owner." The court also justified the six-year sentence as a deterrent.

¶ 9 Defendant filed a motion to reconsider the sentence, arguing that the court erred by placing too much weight on the evidence concerning the dismissed 2007 charge, which defendant claimed was unreliable. Specifically, defendant argued that (1) he was not living at 356 Lawndale at the time, (2) the contraband found at that address belonged to Blanca and not to defendant, and (3) Jose's statements implicating defendant were fabricated to "keep himself [Jose] out of trouble." Defendant argued that the exhibit was "not the best evidence to present" in support of a longer sentence because it consisted of unreliable hearsay. The trial court denied the motion to reconsider and explained its consideration of the 2007 incident:

> "[T]he Court in not giving [defendant] an extended sentence certainly did not place that much weight on the facts of the particular situation that he was not charged with. I simply analogized it or brought it up to point out that [defendant] wasn't learning lessons very quickly in that he had already been convicted of a similar situation and then was found to be in a house with the same factors and same dangerous circumstances."

¶ 10 Defendant's timely notice of appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant appeals his sentence, arguing that the trial court placed too much weight on the State's evidence that the search of Blanca's home in 2007 led to the discovery of drugs and ammunition attributable to defendant. At the sentencing hearing, defendant failed to object to the exhibit. Defendant raised the issue for the first time in the motion to reconsider, and he renews his argument here. It is axiomatic that both a contemporaneous objection and a written posttrial motion are required to preserve an issue for review (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), and defendant's failure to object at the sentencing hearing results in forfeiture of the issue. See *People v. Blair*, 215 Ill. 2d 427, 444 n. 2 (2005) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)) (forfeiture is the " 'failure to make the timely assertion of the right' ").

¶ 13 Forfeiture aside, we conclude that the trial court did not err in imposing the six-year sentence. Sentencing decisions fall within the trial court's discretion, and a reviewing court will not disturb a trial court's sentencing decision absent an abuse of this discretion. *People v. Streit*, 142 Ill. 2d 13, 19 (1991). A reviewing court shows great deference to the trial court's sentencing decision and may not overturn the decision merely because it would have weighed the relevant factors and evidence differently and imposed a different sentence. *Streit*, 142 Ill. 2d at 18-19.

¶ 14 At sentencing, a court may consider evidence that would not be admissible under the rules of evidence for the guilt-determination phase of the trial so long as the evidence presented is relevant and reliable. *People v. Hudson*, 157 Ill. 2d 401, 449-50 (1993). A court may consider reliable hearsay evidence that a defendant committed other crimes even if the defendant was not charged or convicted of those crimes. *Hudson*, 157 Ill. 2d at 449-50. Such evidence may be considered even

if it does not prove beyond a reasonable doubt that the defendant was guilty of those crimes. *Rose*, 384 Ill. App. 3d at 945-46. Hearsay evidence may be found reliable if it is corroborated by other evidence. *Harris*, 375 Ill. App. 3d at 409. However, a trial court must "exercise care to insure the accuracy of information considered and to shield itself from what might be the prejudicial effect of improper materials." *People v. Adkins*, 141 Ill. 2d 297, 300 (1992). Evidence is not reliable if it is based upon "prejudice, speculation, or conjecture," (*People v. Zapata*, 347 Ill. App. 3d 956, 964 (2004)), but a trial court is generally presumed to have based its sentencing decision on sound legal reasoning, especially when the court's sentence falls within the permissible statutory range (*People v. Csaszar*, 375 Ill. App. 3d 929, 950 (2007)).

¶ 15 Defendant argues that the trial court improperly relied on the State's exhibit that summarized the investigation at Blanca's home. Defendant does not argue that the exhibit was irrelevant, but instead claims the exhibit was unreliable and should not have been considered in aggravation. The State responds that the court did not consider the exhibit as an aggravating factor, but considered it only in response to defendant's mitigation evidence. We disagree with the State. The trial court made a record of the reasons for imposing the six-year term, and the court specifically cited the 2007 search as a factor in aggravation.

¶ 16 Defendant asserts that the exhibit is unreliable for four reasons. First, defendant argues that the evidence implicating defendant in the 2007 offense was unreliable simply because the charges were dropped. However, the mere dismissal of the charge did not bar the trial court from considering the exhibit. See *Hudson*, 157 Ill. 2d at 449-50 (a sentencing court may consider evidence of crimes of which a defendant was not convicted).

¶ 17 Second, defendant argues that the exhibit needed corroboration because it is possible that the charges were dropped because the police falsified the evidence. Specifically, defendant asserts that the State was required to produce corroborating evidence to establish the reliability of the confidential informant upon whose information the search warrant application was based. However, the allegation of falsified evidence is based solely on defendant's own self-serving speculation. The absence of evidence to corroborate the confidential informant does not render the exhibit so unreliable that the court was barred from considering it at all, especially where defendant has offered no evidence to support his allegation of falsification.

¶ 18 Third, defendant argues that the exhibit is unreliable because it consisted of hearsay statements that implicated defendant to protect Blanca and Jose, the declarants, from prosecution. Outstanding indictments or other criminal conduct for which there has been no prosecution or conviction may be considered in sentencing, but such evidence should be presented by witnesses who can be confronted and cross-examined, rather than by hearsay allegations in the presentence report, and the defendant should have an opportunity to rebut the testimony. *People v. Jackson*, 149 Ill. 2d 540, 548 (1992). However, it is well settled that hearsay evidence of other crimes is admissible at sentencing (*Hudson*, 157 Ill. 2d at 449-50)), and whether evidence is hearsay goes to its weight rather than its admissibility (*Rose*, 384 Ill. App. 3d at 946).

¶ 19 The exhibit contains police documents showing that Blanca and Jose implicated defendant. Unlike defendant, Blanca and Jose ultimately were convicted of drug offenses as a result of the search, but even if a motive to fabricate allegations undermined the statements' reliability, the results of the search were consistent with the statements implicating defendant. Thus, the remaining

evidence in the exhibit is not so unreliable as to render the court's sentencing decision an abuse of discretion.

¶ 20 Fourth, defendant argues that the trial court misstated "crucial facts" by finding that defendant lived at Blanca's residence, where the search disclosed the criminal activity. Defendant argues that, when viewed in light of the alleged unreliability of the other evidence implicating defendant in the 2007 criminal activity, the court's finding that he lived at the residence unduly influenced the sentencing decision. We disagree.

¶ 21 Defendant contends that the evidence fails to show he lived at the address. The State presented a police officer's affidavit and a police report stating that defendant lived at Blanca's home. However, the report's statements provided by Blanca and Jose do not say that defendant lived at the residence. Moreover, defendant's identification card was found in a car at Blanca's address, but the address on the card does not match Blanca's address. This, of course, does not establish that defendant did not live at the address at the time of the search, because defendant could have lived with Blanca even though his identification card listed another address.

¶ 22 Even if defendant did not live at the residence as he claims, it is undisputed that the search disclosed drugs, ammunition, and defendant's identification card at his girlfriend's home. As argued by the State and found by the trial court, this evidence showed a connection between defendant and a place where criminal activity involving drugs and guns was occurring. Corroborating evidence would have strengthened the State's case, but the sentence imposed is consistent with the evidence presented.

¶ 23 Furthermore, the cases that defendant cites in support of a reversal are factually distinguishable. First, defendant argues that this case is similar to *People v. Wallace*, 145 Ill. App.

3d 247 (1986), where we ordered a new sentencing hearing because the trial court abused its discretion in imposing a 20-year sentence based in part on a sexual assault charge in South Carolina. *Wallace*, 145 Ill. App. 3d at 249, 256. We held that "[b]are arrests and pending charges may not be utilized in aggravation of a pending sentence. [Citations omitted.] This is in contrast to evidence of criminal conduct unrelated to the offense of which a defendant has been convicted, which may be considered at sentencing." *Wallace*, 145 Ill. App. 3d at 255-56. In *Wallace*, the trial court failed to consider the evidence from a prior rape charge aside from the existence of the charge itself. *Wallace*, 145 Ill. App. 3d at 255-56. The trial court's decision to disregard the underlying facts of the prior charge suggested that the court found the evidence to be too unreliable to consider as an aggravating factor in sentencing. We held that the court abused its discretion by considering evidence that it had already found unreliable or evidence consisting only of the charge itself, which is not in itself evidence of prior criminal conduct. *Wallace*, 145 Ill. App. 3d at 255-56.

¶ 24 We agree with the State that *Wallace* is factually distinguishable from this case. In *Wallace*, the trial court found that the evidence related to the prior charge was unreliable, but considered it anyway. Here, the trial court considered the existence of the prior charge but also the underlying facts, which were contained in the exhibit, and found them to be reliable.

¶ 25 Second, defendant cites *People v. Holloman*, 304 Ill. App. 3d 177 (1999), in which the appellate court ordered a new sentencing hearing after the trial court imposed a sentence based on incorrect information in the presentence report. *Holloman*, 304 Ill. App. 3d at 178-79, 185. The report stated that the defendant previously had been convicted of controlled substance trafficking as well as two other felonies. *Holloman*, 304 Ill. App. 3d at 185. In fact, the defendant did have three prior felonies, but he had never been convicted of controlled substance trafficking. *Holloman*, 304

Ill. App. 3d at 185. The appellate court rejected the State's argument that the error was immaterial and that the trial court would have made the same sentencing decision even if it had the correct information. *Holloman*, 304 Ill. App. 3d at 185. In granting the defendant a new sentencing hearing, the appellate court concluded that the trial court's reliance on the errant information was "potentially significant." *Holloman*, 304 Ill. App. 3d at 185.

¶ 26 *Holloman* is distinguishable from this case. While the trial court in *Holloman* relied on information that was undisputably false, there is no evidence that the underlying facts of defendant's criminality in the exhibit in this case are false. On the contrary, the trial court had accurate information about the investigation and underlying facts of the 2007 charge, which allowed the court to assess the exhibit's reliability and assign it the appropriate weight.

¶ 27 Third, defendant cites *People v. Johnson*, 227 Ill. App. 3d 800 (1992), in which the appellate court ordered a new sentencing hearing after the trial court imposed a sentence based, in part, on the unsupported belief that the murder was drug-related. *Johnson*, 227 Ill. App. 3d at 816-17. In *Johnson*, the only evidence in the record supporting an inference that the murder was drug-related was (1) the offense occurred in a community where there were "problems *** associated with drugs" and (2) the defendant was recently convicted of possession of a controlled substance. *Johnson*, 227 Ill. App. 3d at 816-17.

¶ 28 *Johnson* is distinguishable from this case, where drugs, ammunition, cash, and defendant's identification card were found at the home of defendant's girlfriend. This evidence supports the inference that defendant had some connection with criminal activity at that address. This case would be more like *Johnson* if there were no evidence in the record to support the trial court's conclusion that defendant was involved in criminal activity at Blanca's home in 2007. Unlike in *Johnson*, the

trial court here relied on actual evidence in concluding defendant was involved in criminal activity rather than on speculation about defendant's involvement in such activity based on his prior convictions or the neighborhood where his conduct occurred.

¶ 29 Finally, even if we were to accept defendant's contention that the exhibit was unreliable, any error was harmless beyond a reasonable doubt. See *People v. Banks*, 237 Ill. 2d 154, 196 (2010) ("the admission of improper aggravation evidence during a sentencing proceeding is subject to harmless-error analysis and reversal is not mandated in every instance"). In denying the motion to reconsider the six-year sentence, the trial court acknowledged the alleged unreliability of the exhibit and explained that it gave very little weight to it. In contrast, the court gave strong weight to defendant's prior convictions, especially his 2000 conviction, and to the importance of deterring prisoners from committing aggravated battery against corrections officers in potentially volatile prison environments. The court placed minimal weight on the 2007 incident and much greater weight on other factors based on reliable evidence. Thus, the court imposed a sentence within the statutory range, and cited ample evidence in aggravation to support it. We hold that any potential error in considering the challenged exhibit was harmless beyond a reasonable doubt and that defendant suffered no prejudice from its admission. See *Banks,* 237 Ill. 2d at 197.

¶ 30 III. CONCLUSION

¶ 31 For the preceding reasons, the judgment of the circuit court of Kane County is affirmed.

¶ 32 Affirmed.