2013 IL App (2d) 111110-U
No. 2-11-1110
Order filed February 8, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 10-CF-840
VIRGIL H. DEAN,	)	Honorable Blanche H. Fawell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

Held: Defendant's sentence is not an abuse of discretion. However, we vacate certain fines. Affirmed in part and vacated in part.

¶ 1 On July 22, 2011, defendant, Virgil H. Dean, age 36, pleaded guilty to possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)). The trial court sentenced defendant to 6½ years' imprisonment and denied defendant's motion to reconsider the sentence. Defendant appeals. We affirm in part and vacate in part.

¶ 2 I. BACKGROUND

¶ 3 The factual basis for defendant's plea was as follows. At around 2:30 a.m. on April 7, 2010, defendant and another person were in a 2002 Chevrolet Camero; defendant was driving. The Camero had previously been on the lot of Chicago Motor Sports of West Chicago; the keys had been in Chicago Motor Sports' possession and no one had permission to take the car. When police officers tried to effectuate a traffic stop, defendant accelerated and led the officers on a chase, with speeds up to 110 miles per hour. Defendant lost control of the vehicle, swerved, and struck a fence on Clarendon Hills Road in Darien. The officers approached the vehicle and told defendant to stay where he was. Instead, defendant slid to the passenger side of the vehicle, climbed over the passenger, and fled on foot. After a chase, defendant was apprehended and arrested.

¶ 4 Defendant stipulated to the aforementioned evidence. The trial court accepted the factual basis for the plea and found that defendant entered into the plea knowingly and voluntarily. There was no agreement regarding sentence.

¶ 5 On October 12, 2011, defendant appeared for sentencing. The court heard a statement wherein defendant admitted to, and explained the circumstances surrounding, his 1998 commission of murder. In sum, defendant received a basketball scholarship and attended one year of college in Kansas. However, defendant's young child in Chicago became sick and his coach made him choose between the child and playing basketball; defendant returned to Chicago. Thereafter, defendant was at a gas station when some "gang bangers" began "messing with him" and tried to steal his car radio. Later, while smoking marijuana and drinking beer with members of a rival gang (defendant was not, himself, in a gang), defendant discussed his experience at the gas station. Knowing one of the persons he was with had obtained a gun, defendant, in his own car, and the person with a gun, who

got into a van, caravanned, looking for rival gang members. When defendant and his passenger identified someone in a car from the rival gang, defendant sped up and placed his car in front of that vehicle, forcing the gang member to stop. The van pulled up, blocking the gang member between defendant's car and the van; defendant signaled to the van with his vehicle's lights that the person in the car was a gang member. Persons from within the van then pulled up and shot and killed the gang member. Defendant confessed to his involvement, with no promises given in exchange for his confession. After his guilty plea, defendant was sentenced to 20 years' imprisonment. He was released in 2008, and he was on mandatory supervised release when he committed the instant offense.

¶ 6 Defendant's fiancé, Titania Ridley, testified that she and defendant have a two-year-old child, and that she also has a four-year-old daughter from a prior relationship. Ridley testified that defendant participates in both children's lives and is the breadwinner of the family. Specifically, defendant had worked three jobs (at a veterinary hospital, AT&T, and a car dealership) to care for the two children in their household, as well as the three children he had fathered in a prior marriage. Defendant also spoke to youth groups about his life experiences in an attempt to give young people "a positive outlook on life instead of going the way that he went before." Ridley is unemployed, and she and the children have been evicted from their home and are now living (all in one room) with her family. Ridley testified that defendant is "the best. He is a great dad. He loves his kids and participated as much as he can[.] He's a real great dad. He just, you know, shows them all the love and affection that he has, as well as me."

¶ 7 The presentence report reflected that, while incarcerated, defendant took courses through Lakeland College in Mattoon, earning 45 credits and achieving a 3.2 grade-point average, and that

he obtained Basic Auto Certificates I and II. His employer at the veterinary hospital stated, "I really liked [defendant]; he was respectful, took criticism and compliments well, hard worker, pleasant and would hire him again if he were able to get his priorities straight." Since losing a job at Alamo Car Rental in December 2009 (defendant reports the company was sold), he had experienced increased stress and anxiety, depression, and sleep problems; his use of alcohol and drugs increased. Defendant would drink at the end of the day; he would consume straight vodka until he passed out. The night of the instant offense, defendant had been drinking jello shots and vodka. Defendant began smoking marijuana at age 16, and used that drug daily until his 1998 incarceration. Due to stress, he resumed smoking marijuana in December 2010, shortly before his arrest. Defendant indicated that his arrests have been substance-abuse related, that he believes he is addicted to both alcohol and marijuana, and that he has been seeking treatment.

¶ 8 Defense counsel argued for a 3½ year sentence. The trial court noted that it was concerned that defendant fled the police at 110 miles per hour, lost control of the vehicle, crashed and then ran away, and noted, between the murder and the high-speed chase, it had an obligation to protect the public. The court then directly addressed defendant, noting the "really impressive" statement from his veterinary-clinic employer, and that "you've been before me—let's see—a year and four months now. You've been coming up and so I see you every month, and you always seem intelligent. You seem almost charming to me when you're in court. So I really want to know what happened."

¶ 9 Defendant explained that, after he lost his job with Alamo, he got behind in bills, became "very stressed out" and began drinking, after the kids were asleep, to help him sleep. On the night in question, he went out with a few people with whom he does not usually associate because he knew they would be drinking, and he got drunk. Defendant stated that he did not steal the car. However,

the person who was supposed to drive everyone home passed out drunk, and defendant was the only person who knew how to drive stick shift. His companions offered him $50 to drive them home, and he "made a bad decision." Defendant told the court that he knows he "messed up" and should not have been driving. He explained that he had tried to work and become "the best daddy I possible could," reiterating that he loves his family. As for why he drove 110 miles per hour, defendant explained that he was scared, and the first thing that came into his mind was:

> "I'm going back to jail. I won't see my kids. I won't see my wife. I was scared. I'm thinking like, you know, what they going to do without me? You know, my family need[s] me. And then I'm out here and I get into a situation that I fought so hard not to get into. You know, I don't go out. I don't kick with anybody, as they say. The only time I go out is with my cousin and my fiancé. I just happened to go this night and that's where the problems began. *** I got stressed out and I started drinking and that's when the problems really began."

Defendant apologized, asked the court for forgiveness and mercy, and thanked his family for its support.

¶ 10 Before announcing its sentence, the court remarked that "it's sad. You know, I agree with what the woman [at the veterinary clinic] said. You seem like a great person. And if you can turn your life around, I think you've got a ton of potential." Still, the court noted the murder, stating that "it almost gets no worse than that," and then reiterated the fact that defendant was on parole for murder when the instant offense occurred. Accordingly, the court stated that it thought that the public needed protection from defendant. It sentenced defendant to 6½ years imprisonment.[1] The

[1]Although the charge to which defendant pleaded guilty is a class 2 felony (625 ILCS 5/4-

court ordered credit for the 294 days defendant spent in custody awaiting trial. The court found that the offense was committed as a result of the use of, abuse of, or addiction to alcohol or another controlled substance, and further recommended that defendant be placed in a facility where he may receive substance abuse treatment. Finally, the court imposed various fines and ordered that defendant submit to DNA testing.

¶ 11 On November 3, 2011, the court denied defendant's motion to reconsider, stating that it had spent a lot of time considering the information before it because it seemed defendant: could have a great future; was a nice guy, and was "eloquent." But, the court determined, the sentence was appropriate because of defendant's "bad decision" to knowingly drive a stolen car 110 miles per hour and, when the police caught up with him, to run away. "And based on that the concern that I had is I kept going through my head it seems like a harsh sentence for that crime. But when I go back and read the murder conviction, when I consider the murder conviction and that you were on parole for that, I think that the decision I made was correct." Defendant appeals.

¶ 12 II. ANALYSIS

¶ 13 A. Sentence Not Excessive

¶ 14 We address first defendant's argument that his sentence is excessive. Defendant argues that the trial court gave undue weight to his murder conviction, for which he served his sentence, and it

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103(b) (West 2010)), defendant was non-probationable due to his 1998 first-degree murder conviction. Further, because of the prior conviction and the fact that defendant was on mandatory supervised release for that conviction, defendant was extended-term eligible (730 ILCS 5/5-5-3.2 (West 2010)). Accordingly, the sentencing range for defendant's offense was 3 to 14 years (730 ILCS 5/5-8-2 (West 2010); 730 ILCS 5/5-4.5-35(a) (West 2010)).

did not give adequate weight to the fact that, while on parole, he was working to turn his life around. Defendant points to evidence that he was the breadwinner of his family, that he worked three jobs to support his children and his fiancé, and that he was a "true family man." Further, he acknowledges that the stress of losing a job and looming bills caused him to stray from the path he had been following while on parole, but that he took responsibility for his actions, admitted that he made a bad decision and "messed up," and acknowledged that he needed alcohol and drug treatment. Defendant also acknowledges that murder is a most serious offense, but notes that it is his only prior offense (except for a few traffic violations), he served his time for that offense, and, since on parole, he has done everything society expects of him "as a useful citizen—working, raising his family, adjusting to parole, and keeping his nose clean. The resulting sentence, therefore, was both excessive and unjust." Finally, defendant notes that he was not charged with reckless driving, and, while he drove at an extreme rate of speed, it was 2:30 a.m. and very few people were likely around who might have been injured. For the following reasons, we disagree and affirm defendant's sentence.

¶ 15 Illinois Supreme Court Rule 615(b)(4) (eff. Aug. 27, 1999) gives reviewing courts the power to reduce a sentence; however, that power should be used carefully and sparingly. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We may not alter a sentence unless the trial court abused its discretion, *i.e.*, where the sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id.* (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). A trial court's sentencing decision is entitled to great deference, and we may not substitute our judgment for the trial court's merely because we might have weighed the sentencing factors differently. *Id.* As long as the court does not consider improper aggravating

factors or ignore pertinent mitigating factors, it has wide latitude in sentencing a defendant to any term within the statutory range. *People v. Hernandez*, 204 Ill. App. 3d 732, 740 (1990). Where the sentence is one within the statutory limits, we may not disturb it absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995).

¶ 16 Defendant's sentence falls in the middle of the 3-to-14 year sentencing range. Accordingly, in keeping with the above standards, we must give the court great discretion. Defendant argues that the sentence may still reflect an abuse of discretion, even if it falls in the middle of the sentencing range, if it is inappropriate and unjust. That may theoretically be true, but, giving deference to the trial court, nothing here convinces us that the sentence it imposed is either inappropriate or unjust. For example, defendant does not argue that the court considered improper aggravating factors or ignored mitigating factors; rather, he simply disagrees with the weight the court gave to each. Again, however, we will not alter the sentence simply because we might weigh the factors differently. The "balance which is to be struck amongst the aggravating and mitigating factors is a matter of judicial discretion which should not be disturbed on review absent an abuse of that discretion." *Hernandez*, 204 Ill. App. 3d at 740.

¶ 17 The court considered all of the evidence before it and reviewed the presentence report. It was aware of defendant's status as a father and fiancé, and that he had worked three jobs to support his family. Indeed, the court's consideration of mitigating factors, including defendant's rehabilitative potential, is apparent from the record, where it found "impressive" the statement from defendant's employer, and it acknowledged that defendant had "a lot of potential" and was a "nice guy." However, the court stated that it had weighed heavily the decision to nevertheless impose, in its own words, "a harsh sentence." The court explained that weighing against the aforementioned mitigating

factors was the fact that defendant was on parole for murder when he made the decisions to drink, drive a stolen car, evade police, engage in a high-speed chase, drive 110 miles per hour during that chase, and then, when stopped, flee the police on foot.

¶ 18 We cannot conclude that the court's decision, after considering both mitigating and aggravating factors, to impose a sentence in the middle of the sentencing range, as opposed to a minimum sentence, constitutes an abuse of discretion. See *e.g.*, *People v. Williams*, 303 Ill. App. 3d 264, 269 (1999) (finding no abuse of discretion where trial court properly considered as factors in aggravation the defendant's criminal history and the need for deterrence and imposed a sentence in the middle of the sentencing range). The court was not required to give *greater* weight to defendant's rehabilitative potential than to the seriousness of the offense or other aggravating factors. *People v. Tye*, 323 Ill. App. 3d 872, 890 (2001). We finally note that we find speculative and misplaced defendant's suggestion that, because few people were likely out at 2:30 a.m. when he drove at extreme speeds, his offense was not very serious. In sum, while we applaud defendant's efforts to support his family and better his life (and we sincerely hope he will continue those efforts after serving the instant sentence), we cannot conclude the trial court abused its discretion in finding the seriousness of defendant's bad decision required the sentence it imposed. Accordingly, we affirm defendant's sentence.

¶ 19 B. Fines

¶ 20 Defendant next argues that, while he was assessed a total of $485 in fines, fees, and costs: (1) $40 in fines (for mental health court and children's advocacy) were not offset by $5 for each day he spent in presentence incarceration, and, as application of that credit totals an amount that exceeds the fines, those fines must be vacated; and (2) $200 in fees for DNA analysis must also be vacated

because he submitted a DNA sample on a prior occasion. The State confesses error and agrees that: (1) defendant is entitled to credit against his fines for time served in presentence custody; and (2) the fee imposed for DNA testing must be vacated. We also agree.

¶ 21 Defendant is entitled to the $5-per-day credit toward his fines (725 ILCS 5/110-14(a) (West 2010)), and, as the total credit ($5 multiplied by the 294 days he spent in custody equals $1,470) exceeds the fine, we vacate the mental health court and children's advocacy fines (*i.e.*, $40). Further, it is undisputed that a DNA sample was previously collected from defendant in connection with his murder conviction, which obviates the need for him to submit another sample. See *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Accordingly, we vacate the $200 fee imposed for purposes of collecting defendant's DNA sample.

¶ 22 III. CONCLUSION

¶ 23 Accordingly, the judgment of the circuit court of Du Page County is affirmed in part and vacated in part.

¶ 24 Affirmed in part and vacated in part.