2013 IL App (2d) 111274-U
No. 02-11-1274
Order filed June 25, 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-1129
	)	
ROGELIO NAVA,	)	Honorable
	)	Kathryn E. Creswell,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Eighteen-year sentence for aggravated driving while under the influence was not an abuse of discretion where sentence was in the middle of the sentencing range for the offense and the trial court properly considered relevant aggravating and mitigating factors.

¶ 2 I. INTRODUCTION

¶ 3 Defendant, Rogelio Nava, was charged with aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501 (West 2010)) and driving with a revoked license (DWR) (625 ILCS 5/6-303 (West 2010)). Defendant was found guilty of all three charges. Defendant had been

previously convicted of DUI five times. This being his sixth DUI conviction, it was automatically elevated to a Class X felony (625 ILCS 5/11-501(d)(2)(E) (West 2010)). Defendant was sentenced to concurrent 18-year and 3-year prison terms. Defendant filed a motion to reconsider sentence, and the trial court denied his motion. Defendant now appeals, arguing that the 18-year sentence is excessive because the trial court failed to consider his potential for rehabilitation and abused its discretion while sentencing. We disagree, and, for the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 On August 31, 2011, a jury found defendant guilty of aggravated DUI and DWR. At trial, officer Donald Darby testified as follows. On May 16, 2010, defendant was driving his vehicle at approximately 1:05 a.m. Darby noticed defendant make an improper stop at a traffic light. When Darby turned on his emergency lights, defendant continued driving at 15 miles per hour. After making several turns, defendant pulled his vehicle into the driveway of his home. Once Darby made contact with defendant, he noticed defendant's eyes were red and glossy and there was an odor of alcohol coming from defendant. Defendant stated he had two beers while at his girlfriend's house. Darby asked defendant to exit his vehicle, and an assisting officer who arrived on the scene performed a field sobriety test on defendant, which he failed. Defendant was arrested and taken to the police station. He agreed to a breath test, which showed that defendant's blood-alcohol level was 0.127.

¶ 6 On December 6, 2011, the trial court sentenced defendant to 18 years' and 3 years' imprisonment to be served concurrently. Mitigating testimony from defendant's sister, Jessica Nava, was heard at the sentencing hearing. Ms. Nava testified that defendant was 12 years older than her and had taken care of her emotionally and financially. Defendant had developed psychological

problems and his drinking increased when their father committed suicide in front of him. There was no evidence offered that defendant had ever been psychologically evaluated. Defendant made a statement to the court in mitigation, apologizing to his family and the court. He continued by explaining to the court that the reason he was driving the night of his DUI was because someone had pulled a gun on him and he had no choice but to drive home instead of walk or take a taxi. During sentencing, the court noted, "Your history demonstrates that you pose a serious threat to the public safety," and "I find that a long sentence is necessary to deter others and for the protection of the public."

¶ 7 Defendant filed a motion to reconsider sentence. The motion alleged that (1) the trial court failed to give proper weight to mitigating evidence, and (2) three years prior to the instant DUI, defendant was found guilty of his fifth DUI by the same court and was sentenced to only 60 days in jail. At the motion hearing, the Judge explained that the prior sentence for defendant's fifth DUI was an agreed sentence and added that she had given proper weight to the mitigating and aggravating factors in the instant case. The judge further reiterated that defendant had no regard for the law and a lengthy prison sentence was necessary because defendant posed a threat to public safety. The motion to reconsider was denied. This appeal followed.

¶ 8 III. ANALYSIS

¶ 9 On appeal, defendant argues his 18-year sentence is excessive. Defendant asserts the trial court failed to consider his potential for rehabilitation and abused its discretion while sentencing. We disagree.

¶ 10 A trial court's sentence is accorded great deference because the trial court is in a better position than a reviewing court to assess the circumstances of the case and weigh aggravating and

mitigating factors. *People v. Streit*, 145 Ill. 2d 13, 15 (1991). A sentence within the statutory range will not be deemed excessive unless it is in contrast with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense committed. *People v. Visor*, 313 Ill. App. 3d 567, 573 (2000). The purpose and spirit of the law are upheld when the sentence reflects the gravity of the offense and adequately gives consideration to the rehabilitative potential of the defendant. *People v. Wyatt*, 186 Ill. App. 3d 772, 779 (1989). It is true that under the Illinois Constitution, a trial judge must consider the rehabilitation as a factor in sentencing and, in fact, rehabilitation must be an objective of a given sentence. *People v. Treadway*, 138 Ill. App. 3d 899, 904 (1985). However, rehabilitative potential is not entitled to greater weight than the seriousness of the crime and the protection of the public. *People v. Cord*, 239 Ill. App. 3d 960, 968 (1993). In determining whether a sentence is excessive, we apply the abuse-of-discretion standard of review. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). An abuse of discretion occurs only if no reasonable person could agree with the trial court's decision. *People v. Walston*, 386 Ill. App. 3d 598, 601 (2008). There is a rebuttable presumption that a sentence is proper, and the burden is on a defendant to affirmatively demonstrate an error in the record. *See People v. Hernandez*, 319 Ill. App. 3d 520 (2001).

¶ 11 Aggravated driving while under the influence of alcohol is a Class 4 felony (625 ILCS 5/11-501(d)(2)(A) (West 2010)). However, because this is defendant's sixth such violation, the offense becomes a class X felony (625 ILCS 5/11-501(d)(2)(E) (West 2010)). Section 5-8-1(a)(3) of the Unified Code of Corrections states, "The sentence of imprisonment for a Class X felony shall be a determinable sentence not less than six years and not more than thirty years" (730 ILCS 5/5-8-1(a)(3) (West 2010)). The trial court sentenced defendant to 18 years.

¶ 12 Defendant points out that the court was required to consider his rehabilitative potential. See *People v. Wendt*, 163 Ill. 2d 346, 352-53 (1994) ("A sentencing court must not only consider rehabilitative factors in imposing a sentence, it must also make rehabilitation an objective of the sentence."). While this is true, a sentencing court is not required to give greater weight to the rehabilitative potential of a defendant than to the seriousness of the offense or other aggravating factors. *People v. Fort*, 229 Ill. App. 3d 336, 341-42 (1992). Further, a sentencing judge is presumed to have considered all relevant mitigating and aggravating evidence presented, unless the record affirmatively shows contrary. *Hernandez*, 319 Ill. App. 3d at 529. The record reflects the trial judge properly considered all the factors in aggravation and mitigation. With regards to defendant's psychological problems as a result of his father's suicide, the court stated, "The defendant was committing crimes and a lot of crimes before that ever happened." The court continued, "Although his sister speculates that he might have some mental health issues, there is no mental health history reflected in the [presentence] report." It added that "defendant's never sought or been Court ordered into treatment."

¶ 13 A defendant must point to something beyond the sentence itself to show that mitigating evidence was not considered. *People v. Dominguez*, 255 Ill. App. 3d 995, 1004 (1994). The record does not show the court gave the mitigating factors insufficient weight when sentencing defendant. Defendant's repeated rejection of attempts by his family to get him treatment for his alcoholism, his lengthy criminal history, and his disregard for the law were several aggravating factors that had to be accounted for in striking a balance of punishment and rehabilitation that, defendant argues, the Illinois Constitution requires. *People v. Lang*, 366 Ill. App. 3d 588, 589 (2006). While defendant received only 60 days in jail for his fifth DUI conviction, that was an agreed sentence. The trial

judge explained her earlier sentence by suggesting the State's evidence against defendant may not have been strong in that case and thus the sentence of two months in jail was appropriate.

¶ 14 Defendant has not made an affirmative showing from the record indicating that the trial court abused its discretion in sentencing him and thus has not met the burden of demonstrating error. Defendant's sentence of 18 years in prison is in the middle of the statutory range of 6 to 30 years (730 ILCS 5/5-8-1(a)(3) (West 2010)). That a sentence falls in the middle of the applicable range is a factor weighing against finding a sentence excessive. See, *e.g.*, *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 61. Furthermore, the existence of mitigating factors does not obligate the trial court to impose the minimum sentence. *People v. Adamcyk*, 259 Ill. App. 3d 670, 680 (1992). Defendant argues his sentence should be mitigated because of the uneventful circumstances of the actual crime. We recognize defendant was cooperative when arrested and that the crime itself was a rather typical DUI. However, we cannot say that those facts are entitled to such great weight as to render the trial court's decision an abuse of discretion in light of all of the requisite considerations noted herein.

¶ 15 IV. CONCLUSION

¶ 16 In light of the foregoing, the judgment of the circuit court of Du Page County is affirmed.

¶ 17 Affirmed.