2016 IL App (2d) 140563-U
No. 2-14-0563
Order filed November 1, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DANIEL CRUZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Boone County. No. 12-CF-83 Honorable C. Robert Tobin III, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 8 years' imprisonment (on a 1-to-12 range) for aggravated DUI: despite the mitigating evidence, defendant's sentence was justified by the seriousness of the offense; the court committed no reversible error in its assessment of the aggravating and mitigating factors.

¶ 2 Defendant, Daniel Cruz, pleaded guilty in the circuit court of Boone County to two counts of aggravated driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(d)(1)(C) (West 2012)). In exchange for defendant's plea, the State nol-prossed other charges. There was no agreement, however, as to defendant's sentence. Concluding that the two counts of

aggravated DUI merged with one another, the trial court entered a judgment of conviction on a single count of aggravated DUI and sentenced defendant to an eight-year prison term. Defendant argues on appeal that his sentence is excessive. We affirm.

¶ 3 The factual basis for defendant's guilty plea, the evidence admitted at defendant's sentencing hearing, and the presentence investigation report establish the following facts. On May 7, 2012, defendant, an army veteran, was employed as an officer with the Rockford police department. Shortly after 9 p.m., while off duty, defendant was driving a van south on Beloit Road in Boone County. The van collided with an SUV that defendant was attempting to pass in a no-passing zone. Lynn Acker was driving the SUV and Sara Cernohaus, Kim Hawkinson, and Mary Danielson were passengers. The van and the SUV were approaching an uphill curve in a portion of the road that consisted of one lane in each direction. Defendant's attempt to pass the SUV put his van in the path of a northbound pickup truck that was hauling a trailer. After being struck by the van, the SUV left the road and rolled over two or three times. After the SUV came to a rest, a man in a blue shirt approached the vehicle and said "Oh, I guess everybody is okay in there?" Acker and Cernohaus responded that they were not okay. At sentencing, Cernohaus identified defendant as the man in the blue shirt. Acker and Cernohaus did not see where the man went after the encounter.

¶ 4 Firefighter Frank Perez was among the emergency personnel who responded to the incident. At sentencing, he testified that, when he arrived at the scene, he observed defendant walking past his vehicle. Perez asked defendant if he was involved in the accident. Defendant said "no." However, after learning a description of the driver of the van, Perez suspected that the driver was defendant. Perez drove south on Beloit Road and spotted defendant, who was walking fast, about three quarters of a mile away. Defendant was speaking on a cell phone,

evidently asking someone to pick him up. Perez instructed defendant not to leave the scene. Defendant identified himself as a Rockford police officer. Perez contacted his dispatcher and requested assistance from the Boone County sheriff's department.

¶ 5 Sheriff's deputy Tim Oberholtzer, who was at the scene of the accident, responded to Perez's request. When Oberholtzer first arrived at the scene, defendant had pointed toward the area where the SUV had come to rest. When Oberholtzer subsequently encountered defendant with Perez, defendant admitted that he had been driving the van, but he denied leaving the scene. Defendant had a strong odor of an alcoholic beverage on his breath as he spoke with Oberholtzer. Defendant admitted that he had consumed some alcohol. He was taken to a hospital in Rockford and his blood was drawn and tested for the presence of alcohol. The testing revealed a blood alcohol content of 0.14 grams per deciliter.

¶ 6 Acker cut her hand during the accident and Cernohaus suffered a neck strain. Hawkinson sought medical attention for pain on her side and pain while breathing. Danielson was unresponsive at the scene of the accident. She had suffered a spinal cord injury that left her paralyzed from the neck down. Defendant settled a civil lawsuit brought against him by Danielson.

¶ 7 As evidence in mitigation, defendant presented the testimony of police officers who had worked with defendant. They attested to positive qualities as a colleague, a mentor, a friend, and a father to his children. They also attested to defendant's remorse. On cross-examination, one of the officers testified that, even when off-duty, members of the police force are still law enforcement officers with an obligation to serve and protect. Following the incident, defendant lost his job with the Rockford police department. He subsequently studied for a master's degree

in business and international management. Two of his fellow students testified that he helped them with their studies.

¶ 8 At the time of sentencing, defendant was separated from his wife. They had two children, who were six and eight years old. Defendant was living with his girlfriend and her three children, who were 9, 11, and 12 years old. Defendant and his wife shared custody of their children. Defendant supported his children financially and emotionally. They resided with him three to four days a week and he would take them back and forth to school. Defendant's girlfriend testified that he was very involved in her children's lives. She also testified that defendant's incarceration would be a financial hardship for her.

¶ 9 In pronouncing the eight-year sentence, the trial court found that evidence in aggravation included the harm caused by defendant's conduct; defendant's obligation as a police officer to prevent the offense that he committed; that defendant attempted to flee from the scene of the accident after having been told that the occupants of the SUV were not alright; and that defendant improperly tried to "better the situation" by telling emergency personnel that he was a police officer. The trial court emphasized that the sentence was necessary to deter others from committing the same crime. With respect to mitigating factors, the trial court concluded that, by settling Danielson's lawsuit against him, defendant was entitled to "some partial credit" for compensating Danielson for the harm she suffered. The court stressed, however, that it was "impossible to physically put everybody back in the same position" as before the incident. The trial court noted that defendant had no history of prior or subsequent criminal activity, that defendant's conduct was the result of circumstances unlikely to recur, that defendant's character and attitude indicated that he was unlikely to commit another crime, and that defendant was likely to comply with the terms of probation. The trial court also noted that a prison sentence

would be a hardship for defendant's children, but the court did not believe that defendant's situation "[was] any different than anybody with kids that stands in [defendant's] position." The trial court indicated that defendant's military service was a mitigating factor.

¶ 10 It is well established that "[a] sentence within the statutory limits for the offense will not be disturbed unless the trial court abused its discretion," which occurs when "the trial court imposes a sentence that is greatly at variance with the spirit and purpose of the law, or is manifestly disproportionate to the crime." *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. "A trial court has wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *People v. Roberts*, 338 Ill. App. 3d 245, 251 (2003).

¶ 11 Section 5-5-3.1(a) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.1(a) (West 2012)) sets forth various factors in mitigation to be "accorded weight in favor of withholding or minimizing a sentence of imprisonment." That "[t]he defendant has compensated or will compensate the victim of his criminal conduct for the damage or injury that he sustained" (730 ILCS 5/5-5-3.1(a)(6) (West 2012)) is one of those factors. Here, defendant settled a personal injury lawsuit brought by Danielson. Defendant argues that the trial court erred by concluding that the settlement entitled defendant only to "partial credit"[1] for compensating Danielson for the harm done to her. The trial court remarked that "[i]t is impossible to physically put everybody back in the same position." Defendant argues that "[t]he goal of a civil lawsuit is to compensate the victim for harm caused by the defendant." Defendant therefore maintains that "because he agreed to a settlement of the lawsuit, [he] should receive 'full credit'

[1] We take this to mean that this mitigating factor received less weight than it would have had compensation been adequate.

for this mitigating factor." According to defendant, "[i]n the [trial] judge's analysis, only the impossible ability to 'undo' the accident would warrant full consideration of [compensation to the victim]." Defendant's argument assumes that all criminal defendants, regardless of the degree and nature of the harm they inflict, are entitled to the opportunity to earn "full credit" for compensating victims to the fullest extent possible. There is simply no basis for this assumption. It is well established that "[t]he weight to be attributed to each factor in aggravation and in mitigation depends upon the particular circumstances of the case." *People v. Chirchirillo*, 393 Ill. App. 3d 916, 927 (2009). The adequacy or inadequacy of compensation is a relevant circumstance, regardless of whether the offender could have done more to mitigate the harm to the victim.

¶ 12 Pursuant to section 5-5-3.1(a)(11) of the Code (730 ILCS 5/5-5-3.1(a)(11) (West 2012)), it is a mitigating factor that "[t]he imprisonment of the defendant would entail excessive hardship to his dependents." With respect to this factor, the trial court told defendant, "Clearly, the fact that you have dependents gives you some credit for that, but I don't know how your situation is any different than anybody with kids that stands in your position." Defendant argues that, because of his "active participation" in the lives of his two young children, "the hardship to his dependents should not be considered the same as 'anybody with kids.' " According to defendant, the trial court did not make an individualized determination of the hardship to his dependents. Defendant's interpretation of the trial court's remarks—that the hardship-to-dependents factor applies identically to "anybody with kids"—is unnecessarily literal. A considerably more reasonable interpretation is that "anybody with kids" was simply shorthand for "the typical parent," such that the trial court simply meant that the hardship to defendant's children would be inherently no greater than to other children with involved parents providing

financial and other support. It bears emphasis that section 5-5-3.1(a)(11) of the Code directs the trial court to consider not whether imprisonment will entail hardship to dependents, but whether it will entail *excessive* hardship. Although not all children in a comparable situation would necessarily suffer as much hardship as defendant's children would, the record does not compel a finding that the hardship to defendant's children would be "excessive." *Id.*

¶ 13 Defendant also argues that defendant's eight-year sentence was unwarranted given his background of service in the military and as a police officer; his lack of a criminal history; his remorse; his efforts to train for a new career; and the support he provided to his girlfriend, her children, and his own children. We note, however, that "[b]ecause the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence." *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123. Because defendant's aggravated DUI conviction was predicated on his involvement in a motor vehicle accident that resulted in great bodily harm and permanent disability or disfigurement to another (625 ILCS 5/11-501(d)(1)(C) (West 2012)), the authorized prison term ranged from 1 to 12 years (625 ILCS 5/11-501(d)(2)(F) (West 2012)). The midpoint of the sentencing range is 6½ years. Defendant's eight-year sentence, which is closer to the midpoint than to the maximum, was not disproportionate to the seriousness of the offense.

¶ 14 Defendant's next argument pertains to the trial court's assessment of the evidence in aggravation. Section 5-5-3.2(a) of the Code (730 ILCS 5/5-5-3.2(a) (West 2012)) sets forth various factors in aggravation to be "accorded weight in favor of imposing a term of imprisonment" or that "may be considered by the court as reasons to impose a more severe

sentence." Under section 5-5-3.2(a)(4) (730 ILCS 5/5-5-3.2(a)(4) (West 2012)), it is a factor in aggravation that "the defendant, by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice." The trial court expressed uncertainty as to whether this factor was applicable. However, the trial court told defendant, "I think one of your friends testified that, under cross, that you were a police officer 24/7. So to the extent that what was designed [*sic*], I would apply it to that." Defendant argues that "[his] decision to drive under the influence of alcohol had nothing to do with his position as a police officer," so section 5-5-3.2(a)(4) does not apply. According to defendant, "nothing in the statute suggests that a police officer should be held to a higher standard or receive a harsher penalty." We disagree. We have noted that "[a] police officer is always obligated to attempt to prevent the commission of crime in his presence, and any action taken by him toward that end, even in his official off-duty hours, falls within the performance of his duties as a police officer." (Internal quotation marks omitted.) *Harroun v. Addison Police Pension Board*, 372 Ill. App. 3d 260, 264 (2007). Had defendant observed another motorist driving under the influence of alcohol, he would have had a duty to intervene. Accordingly, section 5-5-3.2(a)(4) applies here.

¶ 15 Defendant also argues that the trial court improperly relied on section 5-5-3.2(a)(6) of the Code (730 ILCS 5/5-5-3.2(a)(6) (West 2012)), under which it is a factor in aggravation that "the defendant utilized his professional reputation or position in the community to commit the offense or to afford him an easier means of committing it." Addressing defendant, the trial court remarked, "for the most part I don't find [section 5-5-3.2(a)(6)] applicable, but to the point at least you tried to use your position as a Rockford police officer to somehow better the situation. I treat it for that purpose." Defendant acknowledges that, at the scene of the accident, he

identified himself as a police officer. It was reasonable to infer that he did so in order to obtain lenient treatment or escape responsibility entirely. Defendant argues, however, that because the collision had already occurred, "[t]here was nothing about the fact that he was a police officer that was used to 'afford him an easier means of committing' an aggravated DUI." Assuming, for the sake of argument, that defendant is correct, "reliance on an improper factor in aggravation does not necessarily require remand where such weight is so insignificant that it did not lead to a greater sentence." *People v. Carter*, 344 Ill. App. 3d 663, 673 (2003), *aff'd in part and rev'd in part on other grounds*, 213 Ill. 2d 295 (2004). The trial court's remarks indicate that it attached minimal weight to the aggravating factor in question.

¶ 16 In a related argument, defendant contends that the trial court erroneously concluded that, because defendant was a police officer, it was necessary to impose a lengthy sentence in order to deter civilians from committing the same offense. The argument is based on the trial court's remark that "we do have individuals out there who do change their attitudes on how sentences are imposed and we expect a lot more out of our law enforcement." In reviewing a sentencing decision we consider the record as a whole, rather than isolated remarks made by the trial court in passing. *Harmon*, 2015 IL App (1st) 122345, ¶ 124. Here, the record shows that the trial court thoughtfully examined the relevant factors in aggravation and mitigation.

¶ 17 For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 18 Affirmed.