2014 IL App (3d) 130160-U

Order filed November 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 9th Judicial Circuit, Knox County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0160
v.	)	Circuit No. 11-CF-328
	)	
DONALD R. MURRAY,	)	Honorable Scott Shipplett,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Presiding Justice Lytton and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion by sentencing defendant to 15 years' imprisonment for possession of a controlled substance with intent to deliver. Defendant is entitled to a $1,470 reduction to his $2,000 drug assessment.

¶ 2 Defendant pled guilty to one count of unlawful possession of a controlled substance with intent to deliver 1 to 15 grams of heroin, a Class 1 felony. The court sentenced defendant to 15 years' incarceration. Defendant appeals, arguing his sentence was excessive. In addition, defendant argues his drug assessment should be reduced by $1,470 to reflect application of the

$5-per-day pretrial custody credit. We affirm defendant's sentence and amend the mittimus to reflect a $1,470 credit against his drug assessment.

¶ 3 BACKGROUND

¶ 4 On July 29, 2011, the State charged defendant with five counts of drug-related offenses. At a hearing on May 30, 2012, the State presented the following factual basis for defendant's guilty plea.

¶ 5 On or about January 15, 2009, defendant was at a party at the home of his friend, Benjamin Fritz. The party continued through the evening of January 16, and into the early morning hours of January 17, 2009. The forensic report indicated Fritz's death on January 17, 2009, was caused by morphine and cocaine toxicity. According to the State's forensic evidence, Daniel Hall also died on January 17, 2009, as a result of the consumption of morphine, a metabolite of heroin, methamphetamine, and ethanol toxicity.

¶ 6 Janelle Brown and Stephanie Simpson would testify they observed defendant sell one bag of heroin to Fritz for $100. In addition, Simpson saw Fritz cut heroin into two lines because a friend at the party, Daniel Hall, wanted a line. Instead of snorting one line, Hall snorted an entire pile of heroin.

¶ 7 Greg Thurman would testify defendant had two small Ziploc baggies and overheard defendant telling Fritz the eight bags contained raw heroin. Thurman overheard Fritz ask for some heroin, and defendant told Fritz it was $20 for a line. Fritz gave defendant $20 and then later gave defendant $100 for a bag of one gram of heroin.

¶ 8 Defense counsel agreed the State would be able to prove defendant was at the party, sold the heroin, and intended to deliver heroin at the party. Defendant pled guilty to one count of unlawful possession of a controlled substance with intent to deliver 1 to 15 grams of heroin, a

Class 1 felony (720 ILCS 570/401(c)(1) (West 2008)). The court ordered a presentence investigation report be prepared and set the matter for sentencing.

¶ 9 On November 14, 2012, the court conducted a sentencing hearing. The State introduced the forensic pathology reports, which established heroin contributed to the deaths of Fritz and Hall. The forensic report for Hall indicated Hall collapsed and died on the bathroom floor at the party. The forensic report indicated Fritz collapsed at the party and was taken to the emergency room for treatment, where he subsequently died on January 17, 2009. The State called Knox County Sheriff's Sergeant Jason Landers who testified he learned, during his investigation, defendant brought heroin to Fritz's home, where several witnesses observed defendant sell two bags of heroin to Fritz and saw Hall and Fritz ingest the heroin.

¶ 10 Jesse Page testified, on behalf of the State, that he was at the party at Fritz's house and observed defendant with two bags of drugs, which Page assumed to be heroin based on defendant's statement to Fritz to "be careful" because "one's pure." Page bought ten Xanax pills from defendant and observed Janelle Brown, Stephanie Simpson, and Joey Gorman using heroin. Other than defendant, Page did not know of anyone else who brought heroin to the party.

¶ 11 The defense did not present any witnesses in mitigation. The presentence investigation report (PSI) revealed defendant's mother signed custody of defendant over to defendant's grandparents when he was six years old due to his parents' drug problems. Defendant lived with his grandparents until he reached the age of 18, and his father died in 2011 from an overdose. Defendant fathered a son, born in November 2010, who was in the custody of the child's mother. Prior to his arrest, defendant saw his son everyday and purchased essentials for his son.

¶ 12 Defendant graduated from high school in 2006 and completed six credit hours of computer classes at Carl Sandburg College. Defendant worked at Sam's Club as a cart pusher

from February 2008 until November 2011, when he broke his hand and could no longer work. Defendant reported he drank the "occasional beer" and was a drug addict. Defendant began smoking cannabis at the age of 14, and continued to smoke every day until his arrest. Defendant began using cocaine when he was 15 years old, using heavily between the ages of 18 and 20. From the age of 20, defendant abused Vicodin three to four times each week, before switching to everyday heroin use until his arrest. Defendant sold heroin and Vicodin to support his drug habit and relied on drugs to cope. Defendant was hospitalized for one day due to a heroin overdose in 2009. Defendant did not have any prior convictions.

¶ 13 The State argued four factors in aggravation: deterrence, defendant's history of criminal activity, defendant's receipt of compensation for the offense, and defendant's conduct caused or threatened serious harm. The State argued defendant was aware the heroin could cause harm because he warned Fritz to "be careful." The State requested the court to sentence defendant to 12 years' incarceration.

¶ 14 Defense counsel argued in mitigation that defendant did not have any prior convictions. Counsel argued the offense carried a presumption of probation and defendant was eligible for drug court as well. Counsel acknowledged defendant's conduct contributed to the deaths of Fritz and Hall because defendant made the drug available to them at the party. Defense counsel requested the court to sentence defendant to the maximum probation term of four years with six months in the county jail. Defendant made a statement in allocution and informed the court he had been friends with Hall and Fritz for years. Defendant also stated he had a lot of time to think about his actions and how he affected the families involved, and indicated he was sorry.

¶ 15 When sentencing defendant, the court considered the forensic findings establishing the causes of death for Fritz and Hall were drug-related. The trial judge stated he was "convinced

that [defendant] brought the cocaine that was – made its way into their bloodstream" and contributed to their deaths. Consequently, the court believed the presumption of probation was overcome, noting it would be a "gross disservice" to the citizens of the county and State to believe that "if you deliver cocaine at a party or pay and people die" you can be sentenced to probation.

¶ 16 The court found deterrence, the serious harm caused by defendant's conduct, and defendant's history of criminal activity in aggravation. The court specifically stated it would not consider defendant's receipt of compensation in aggravation.

¶ 17 The court found "no factors in mitigation at all." The court noted defendant's PSI indicated defendant was aware or should have been aware of the dangers of heroin since he suffered from a heroin overdose in 2009 and because he warned Fritz to "be careful" with the drug. The court concluded defendant's conduct "directly resulted in their overdose and death[s]."

¶ 18 The court stated it was "outraged," rejected the State's recommendation of 12 years' incarceration, and sentenced defendant to 15 years' incarceration. When defense counsel inquired whether defendant was required to serve 50% or 75% of his sentence, the State indicated defendant was required to serve 75%. The court commented, "I don't care how much it is. I'm giving him the max," and the court's judgment indicated defendant was required to serve 75% of his sentence. In addition, the trial court imposed a $2,000 drug assessment and $100 lab fee against defendant.

¶ 19 On November 27, 2012, defendant filed a motion to reconsider his sentence arguing he should be required to serve only 50% of his sentence and his sentence was excessive. The court conducted a hearing on defendant's motion on March 6, 2013. James Brockman, defendant's

uncle, testified on defendant's behalf. Brockman testified defendant told him he was remorseful for his actions and defendant was registered for drug counseling and education classes in prison.

¶ 20 After hearing arguments, the judge commented that he would have liked to require defendant to serve his entire sentence, and the judge was "disappointed" he could only sentence defendant to 15 years' incarceration. The trial judge also clarified that his "off-the-cuff remark" at defendant's sentencing hearing that he wanted defendant to serve 100% of his sentence was directed toward the legislature rather than defendant. The court indicated the same factors in mitigation and aggravation still applied.

¶ 21 The court also stated, "I always like to look at sentences and say, Well, let me leave some room at the top end because what if somebody comes in worse? I can't think of anything worse unless maybe he killed three people. I guess that'd be worse than killing two. But once you start killing or contributing to the deaths – because he didn't kill them. I mean, they took the coke – the heroin and cocaine on their own. But [defendant] supplied it." The court affirmed defendant's sentence, but corrected the judgment to show defendant would be required to serve 50% of his sentence. Defendant timely appeals.

¶ 22 ANALYSIS

¶ 23 On appeal, defendant contends the trial court improperly failed to consider his lack of criminal record, his rehabilitative potential, his social environment, his struggle with drug addiction, and his remorse, in mitigation. Defendant also alleges the court considered certain improper factors in aggravation, resulting in an excessive sentence. The State responds the trial court appropriately considered, and rejected, the statutory mitigating factors and did not consider any improper aggravating factors when it imposed defendant's 15-year sentence. The State

concedes defendant is entitled to a $1,470 reduction in his drug assessment for time spent in pretrial custody.

¶ 24 It is well-settled that the trial court has broad discretionary powers when imposing a sentence and the court's sentencing decision is entitled to great deference. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The trial judge is in a superior position to evaluate and weigh various factors including defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age, and a reviewing court should not substitute its judgment for that of the trial court merely because it would have weighed the sentencing factors differently. *Id.* at 213. Therefore, when a trial court imposes a sentence within the statutory range, the appellate court will not disturb the sentence absent an abuse of discretion. *People v. Coleman*, 166 Ill. 2d 247, 258 (1995). Here, defendant's 15-year sentence is within the applicable statutory limits ranging from probation to 15 years' incarceration. 730 ILCS 5/5-4.5-30 (West 2008).

¶ 25 A court is not required to give greater weight to mitigating factors in comparison to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude the maximum sentence. *People v. Jones*, 2014 IL App (1st) 1520927, ¶ 55. A defendant's youth or rehabilitative potential does not outweigh other factors. *Alexander*, 239 Ill. 2d at 214. Prior drug use may be considered an aggravating factor because it is evidence of prior criminal activity. *People v. Scott*, 225 Ill. App. 3d 938, 941 (1992). The trial court can also properly consider resulting harm as factor in aggravation. 730 ILCS 5/5-5-3.2(a)(1) (West 2008).

¶ 26 In this case, defendant acknowledged the serious nature of his conduct during his guilty plea hearing. For example, defense counsel admitted the State's evidence would be sufficient to establish defendant not only possessed the heroin with intent to distribute but, in fact, actually

sold some of the heroin to other persons at the party. Further, defense counsel acknowledged during his argument requesting the court to impose a more lenient sentence, that defendant provided the heroin to Fritz and Hall, which they consumed prior to their deaths. Since the court can consider the resulting harm, we reject the defense argument that the court committed error by considering the heroin defendant possessed with intent to deliver, was eventually delivered, consumed, and contributed to two deaths.

¶ 27 There is a presumption the sentencing court considered the mitigating factors before it. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). Contrary to the defense's position, we find that the court did not fail to consider the mitigating factors when it stated there were, "no factors in mitigation at all." Based on the court's comment, we conclude the trial court contemplated the mitigating factors, but did not find they warranted leniency in this case.

¶ 28 Next, defendant alleges the trial judge made improper comments about cocaine and injected personal bias by commenting he was "outraged" and could not think of anything worse than defendant's crime. With regard to the judge's comments about cocaine, it appears the trial court simply misstated the name of the drug defendant provided to Fritz and Hall. This court should not focus on a few words or statements made by the trial court, but must consider the record as a whole. *People v. Reed*, 376 Ill. App. 3d 121, 128 (2007). When considering the entire transcript from the sentencing hearing, it is clear the court knew defendant possessed only heroin with intent to distribute and had not provided any cocaine to Fritz and Hall.

¶ 29 Defendant also claims he is entitled to a $1,470 credit against his $2,000 drug assessment fine for 294 days he spent in presentence custody. A defendant is entitled to a credit of $5 for each day spent in presentence incarceration, to be applied against any fines, including a drug assessment. 725 ILCS 5/110–14(a) (West 2008); *People v. Jones*, 223 Ill.2d 569, 592 (2006).

Although the trial court awarded defendant 295 days of presentence custody credit, the parties agree defendant is entitled to 294 days' credit. *People v. Williams*, 239 Ill. 2d 503 (2011). The State concedes defendant is entitled to a $1,470 credit against his drug assessment fine. Based on this concession, we amend the mittimus to reflect a credit of $1,470 against his $2,000 drug assessment fine.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Knox County is affirmed as modified.

¶ 32 Affirmed as modified.