2011 IL App (4th) 100255-U

Filed 10/05/2011

NO. 4-10-0255

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
ROBERT H. TIMM,	)	No. 09CF4
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held:* (1) We vacate the conviction on the second count of unlawful possession of contraband in a penal institution under the one-act, one-crime rule as based on a single physical act.

(2) The trial court did not abuse its discretion in considering the potential for harm to others as a factor in aggravation at sentencing, and we affirm the sentence on the remaining conviction.

¶ 2 In December 2009, a jury found defendant, Robert H. Timm, guilty of two counts of unlawful possession of contraband inside a penal institution. 720 ILCS 5/31A-1.1(b) (West 2008). In February 2010, the trial court sentenced defendant to concurrent terms of 18 years' imprisonment on each conviction, to be followed by three years of mandatory supervised release (MSR). Defendant appeals, arguing (1) one of his convictions must be vacated, as they both arise out of a single physical act; and (2) the trial court aggravated his sentence based on an

unsupported belief he would have caused serious harm. We affirm in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In January 2009, defendant was charged by information with two counts of possession of contraband inside a penal institution. 720 ILCS 5/31A-1.1(b) (West 2008). Count one alleged defendant knowingly and without authority possessed a sharpened metal rod, a tool to defeat security mechanisms under the definition of contraband. See 720 ILCS 5/31A-1.1(c)(2)(ix) (West 2008). Count II alleged defendant knowingly and without authority possessed a sharpened metal rod, a weapon under the definition of contraband. See 720 ILCS 5/31A-1.1(c)(2)(v) (West 2008). Only two witnesses, both corrections officers at Pontiac Correctional Center, testified during defendant's December 2010 jury trial. They testified, in pertinent part, as follows.

¶ 5 Sergeant Allen Morrison testified while making his rounds he saw another inmate, Lewis Clark, pushing a piece of rolled-up yellow paper along the floor. Defendant was reeling the piece of paper toward his cell, using a piece of cloth tied to the paper. Morrison confiscated the piece of paper, which contained writings between Clark and defendant, as well as a sharpened three-inch-long metal rod, found inside the piece of paper. The writing in the note indicated defendant planned to use the metal rod to force the lock on his and Clark's cell doors, as well as the locks on other doors, in an attempt to escape. However, Morrison stated he had previously seen similar sharpened metal rods, which he called a shank, approximately 25 times in his career, and they were typically used as weapons to inflict bodily harm.

¶ 6 Officer Karl Webber was next to testify. Webber worked in the internal affairs

unit and interviewed defendant regarding the items Morrison confiscated. Defendant admitted sharpening the metal rod by rubbing it against the floor, and he told Webber he and Clark had planned on using it to escape. Webber further testified defendant admitted writing parts of the confiscated note. Webber also testified he had seen similar metal rods used as weapons before, but it could have been used to try to pick the lock on a cell door. He was unsure whether defendant would have been able to successfully unlock his door using the metal rod in question. Weber testified typically a metal rod with one sharpened end would be considered a weapon.

¶ 7 At the close of Webber's testimony, the State rested its case. Defendant did not offer any evidence on his own behalf and, after closing arguments, the jury began deliberations. After deliberating, the jury returned guilty verdicts on both counts. The trial judge set the matter for sentencing and ordered a presentencing investigation report (PSI).

¶ 8 At sentencing, the State informed the trial court defendant was subject to Class X sentencing on the Class 1 felony convictions, due to his prior convictions for criminal sexual assault and burglary. See 730 ILCS 5/5-5-3(c)(8) (West 2008). The State then requested concurrent 12-year sentences based on the seriousness of the offense, the threat of serious harm to others posed by an attempted escape by an armed inmate, and defendant's violent criminal history, which included numerous citations for assault and other infractions while in prison. Defense counsel requested a minimum six-year term of imprisonment on each charge. Counsel argued defendant's mental instability was a factor in mitigation and pointed to several instances where defendant had been hospitalized for various psychiatric reasons. Defendant declined the opportunity to make a statement on his own behalf.

¶ 9 The trial court acknowledged the seriousness of the offense and went on to state

deterrence was an important factor. When it came to the planned escape, the court stated:

> "I think it's pretty obvious that had the Defendant had the opportunity, he would have tried to escape. He would have had the shank; and if he needed to, he would have used this shank to cause serious harm, which is another very strong factor in aggravation. So deterrence is a strong factor.
>
> The fact that the Defendant's conduct potentially threatened serious harm to other individuals I believe is a strong factor."

While the court acknowledged the case presented some mitigating factors, it concluded the aggravating factors far outweighed them. In sentencing defendant, the court stated a higher sentence than the one requested by the State was necessary because of the serious nature of the offense and the potential for harm to others. The court sentenced defendant to concurrent 18-year prison sentences to be followed by three years' MSR.

¶ 10 Defendant filed a motion to reconsider his sentence, arguing, *inter alia*, the trial court had placed too much emphasis on the possibility of harm to others when in fact no one had been injured. In March 2010, the court denied defendant's motion, citing the factors in aggravation it had previously discussed at the sentencing hearing. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, defendant argues (1) one of his convictions must be vacated pursuant to the one-act, one-crime rule; and (2) the trial court abused its discretion in finding he would have used the shank to inflict bodily harm if his escape attempt was interrupted, where no testimony or evidence was introduced on the subject.

¶ 13 A. The One-Act, One-Crime Rule

¶ 14 Defendant first argues one of his two convictions for possession of contraband inside a penal institution must be vacated as they both arise out of the same physical act. The State concedes error, and we agree.

¶ 15 We note defendant failed to raise the one-act, one-crime issue prior to appeal. Generally, this would result in forfeiture. However, "an alleged one-act, one-crime violation and the potential for a surplus conviction and sentence affects the integrity of the judicial process, thus satisfying the second prong of the plain error rule" and allowing the issue to be raised on appeal. *People v. Harvey*, 211 Ill. 2d 368, 389, 813 N.E.2d 181, 194 (2004). In *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977), the supreme court stated: "Prejudice results to the defendant *** in those instances where more than one offense is carved from the same physical act." Review under the one-act, one-crime rule requires the court to determine whether the multiple convictions arise out of separate acts or a single physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186, 661 N.E.2d 305, 307 (1996). "Multiple convictions are improper if they are based on precisely the same physical act." *Id.*

¶ 16 In the case *sub judice*, defendant was convicted of (1) one count of possession of contraband inside a penal institution for possessing, without authority, a tool designed to defeat security mechanisms and (2) one count of possession of contraband inside a penal institution for possessing, without authority, a weapon. However, as the State concedes, defendant only committed a single act of possessing a sharpened metal rod. Though the metal rod fits multiple definitions of contraband under section 31A of the Criminal Code of 1961 (720 ILCS 5/31A-1.1(c)(2)(v), (c)(2)(ix) (West 2008)), the fact remains defendant was not in possession of

multiple items of contraband. Defendant committed the single physical act of possessing a sharpened metal rod; thus, he can only be convicted of one count of possession of contraband inside a penal institution. At the State's suggestion, we vacate defendant's conviction on count II for possessing a weapon inside a penal institution.

¶ 17 B. Defendant's Sentence

¶ 18 Defendant also argues the trial court abused its discretion when it considered the potential for harm to others as a factor in aggravation at sentencing based on its conclusion defendant would have used the metal rod as a weapon if anyone had interrupted his escape attempt. We disagree.

¶ 19 The imposition of a sentence is a matter of judicial discretion for the trial court, and this court may not disturb the trial court's sentencing determination absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977). A trial court's ruling constitutes an abuse of discretion when it is " 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' " *People v. Sutherland*, 223 Ill. 2d 187, 272-73, 860 N.E.2d 178, 233 (2006) (quoting *People v. Hall*, 195 Ill. 2d 1, 20, 743 N.E.2d 126, 138 (2000)). Moreover, sentences imposed within the statutory guidelines are presumed to be proper and will not be overturned unless the sentence substantially departs from the spirit and purpose of the law and the nature of the offense. *People v. Hauschild*, 226 Ill. 2d 63, 90, 871 N.E.2d 1, 16 (2007).

¶ 20 The Unified Code of Corrections permits the trial court to consider certain statutory factors in aggravation and mitigation when imposing a sentence of imprisonment. 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2008). In addition to the statutory factors, the court may consider

nonstatutory factors in aggravation and mitigation. *People v. Csaszar*, 375 Ill. App. 3d 929, 948, 874 N.E.2d 255, 271 (2007). Those nonstatutory factors include, for example, the defendant's credibility, general moral character, mentality, social environment, habits, and age. *Perruquet*, 68 Ill. 2d at 154, 368 N.E.2d at 884. Because the trial court has observed defendant throughout the proceedings, this court is highly deferential to its factual determinations at sentencing. *Perruquet*, 68 Ill. 2d at 154, 368 N.E.2d at 884.

¶ 21 Defendant takes issue with the trial court's statement to the effect he would have used the sharpened metal rod to inflict injury upon others if they interfered with his attempted escape, which the court found to be a "strong factor in aggravation." Defendant argues the court's statement was speculative and resulted in an unfair increase in his sentence. In support of his argument, defendant cites *People v. Dempsey*, 242 Ill. App. 3d 568, 610 N.E.2d 208 (1993), and *People v. Zapata*, 347 Ill. App. 3d 956, 808 N.E.2d 1064 (2004). However, we find both cases to be distinguishable from the present case.

¶ 22 *Dempsey*, 347 Ill. App. 3d at 598, 610 N.E.2d at 227, involved the trial court's consideration of a nonstatutory factor in aggravation. The trial court in *Dempsey* made statements related to the defendant's status as an individual infected with the human immunodeficiency virus (HIV) that showed an unfounded fear and prejudice based on speculation and conjecture. *Id.* Nor were the court's statements supported by any evidence in the record. *Id.* The issue in *Zapata*, 347 Ill. App. 3d at 965-66, 808 N.E.2d at 1072-73, involved erroneous statements by the trial court regarding gang violence. Again, no evidence in the record supported the court's statements relating to gang activity. *Id.* In remanding for resentencing, the appellate court found the defendant's alleged gang membership was "the

dominant factor in the determination of [the] defendant's sentence" and consideration of this factor was improper where no evidence in the record supported the trial court's finding. *Zapata*, 347 Ill. App. 3d at 966, 808 N.E.2d at 1073.

¶ 23 Defendant's case is clearly distinguishable. Unlike *Dempsey*, this case involves consideration of a factor allowed by statute. See 730 ILCS 5/5-5-3.2(a)(1) (West 2008) (potential harm to others can be considered as a factor in aggravation). Testimony by both Morrison and Webber showed the metal rod confiscated from defendant was considered a weapon and could be used to inflict serious physical harm. This evidence in the record supported the trial court's finding. This is in stark contrast to both *Dempsey* and *Zapata*, where the reviewing courts focused on the lack of corroborating evidence in the record in vacating the sentences imposed by the trial courts.

¶ 24 The trial court could reasonably infer the possibility of violence in connection with an attempted escape from a maximum security prison, especially where defendant possessed a dangerous weapon. See *United States v. Franklin*, 302 F.3d 722, 723-24 (7th Cir. 2002) (the crime of escape always involves the potential risk of injury to others and is categorized as a violent felony for sentencing purposes under the federal armed-career-criminal enhancement statute). It is not necessary actual injury occur. The statute allows for the threat of serious harm to be considered by the court in sentencing. The 18-year sentence imposed by the court in this case is well within the statutory limit of 6 to 30 years for a Class X felony (730 ILCS 5/5-8-1(a)(3) (West 2008)) and was not based on improper speculation. We affirm the court's judgment as to defendant's sentence on count I.

¶ 25 III. CONCLUSION

¶ 26 For the foregoing reasons, we vacate the defendant's conviction on count II and affirm the sentence on count I. We remand for issuance of an amended sentencing judgment. Because the State has in part successfully defended a portion of the judgment, we grant the State its statutory assessment of $50 as costs of this appeal.

¶ 27 Affirmed in part, vacated in part, and cause remanded with directions.