2011 IL App (4th) 100626-U

Filed 11/14/11

NO. 4-10-0626

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
ALBERT TILLMAN,	)	No. 09CF215
Defendant-Appellant.	)	
	)	Honorable
	)	April Troemper,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly exercised its discretion in sentencing defendant. The trial court considered defendant's potential for rehabilitation among other mitigating factors, balanced these against aggravating factors, and sentenced defendant at the lower end of the range allowed by statute. Defendant's sentence is not excessive.

¶ 2 In April 2009, the State charged defendant, Albert Tillman, with retail theft in excess of $150. In June 2010, he entered an open plea of guilty. In July 2010, the trial court sentenced him to four years in prison, plus one year's mandatory supervised release (MSR). At the same time, the court sentenced defendant to a consecutive one-year prison term, with one year's MSR on an unrelated retail-theft charge. In July 2010, defendant filed a motion to reconsider sentence, which the trial court denied in August 2010 after a hearing. Defendant appeals, arguing his four-year sentence is excessive because the trial court failed to adequately consider his rehabilitative potential. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In April 2009, defendant was charged with one count of retail theft in Sangamon County case No. 09-CF-215 (Tractor Supply theft). 720 ILCS 5/16A-3(a) (West 2008). This count alleged "defendant knowingly took possession of certain merchandise, a pole saw, having a total value in excess of $150.00, with the intention of depriving the merchant, Tractor Supply Store, permanently of the possession of such merchandise, without paying the full retail value." See 720 ILCS 5/16A-3(a) (West 2008). At the time of his arrest, defendant was out on bond on an unrelated retail-theft offense in Sangamon County case No. 09-CF-387 (Shop N Save theft), for the theft of a bottle of alcohol under $150 from Shop N Save. Based on his prior record, defendant was eligible for an extended-term sentence.

¶ 5 In December 2009, defendant entered a negotiated guilty plea on case Nos. 09-CF-215 and 09-CF-387. On both counts, he pleaded guilty to two years in prison to be served consecutively, one year's mandatory supervised release, and court costs. In addition, a third charge for retail theft, Sangamon County case No. 09-CF-381, was dismissed pursuant to the plea agreement.

¶ 6 Shortly thereafter, defendant filed a *pro se* motion to withdraw his plea, arguing ineffective assistance of counsel. At a February 10, 2010, hearing on the motion, at which defendant was represented by new counsel, the trial court explained the potential ranges of sentences that could be imposed if defendant were to withdraw his plea. Due to the defendant being eligible for an extended-term sentence, No. 09-CF-215 carried a potential sentence of 2 to 10 years while case Nos. 09-CF-387 and 09-CF-381 each carried potential sentences of 1 to 6 years. Although these offenses were eligible for probation, because of his criminal history,

defendant was informed the sentence he would receive if convicted of all three offenses would be in the range of 4 to 24 years in prison.

¶ 7 The trial court held defendant's original counsel did nothing wrong, but it exercised its discretion, vacated the pleas of guilty in case Nos. 09-CF-215 and 09-CF-387, and reinstated case No. 09-CF-381. On February 16, 2010, after allowing defendant some time to consider the potential penalties, defendant again advised the court he still wished to withdraw his guilty pleas and go to trial. In April 2010, a jury convicted defendant in No. 09-CF-387. In June 2010, defendant entered an open guilty plea in No. 09-CF-215 and No. 09-CF-381 was dismissed.

¶ 8 At sentencing in July 2010, the State informed the trial court that No. 09-CF-215 was a Class 3 felony and No. 09-CF-387 was a Class 4 felony. Defendant was required to serve the sentences consecutively because the offenses were committed at different times. Also, because he was out on bond in No. 09-CF-387 when he committed the offense in No. 09-CF-215, defendant was eligible for an extended term in this case. The State recommended a sentence of two to five years in No. 09-CF-215 and three to four years in No. 09-CF-387, with no allowance for probation on either. The State also requested no further penalty on an additional Sangamon County charge of retail theft, case No. 99-CM-1651, and suggested any sentence for No. 99-CM-1651 run concurrently with the other sentences. Defense counsel argued for the court to grant defendant placement in the Treatment Alternatives for Safer Communities (TASC) program, but if the court determined TASC was inappropriate, to sentence defendant to the minimum prison sentences applicable in these cases, which was two years in No. 09-CF-215 and one year in No. 09-CF-387.

¶ 9 The presentence investigation report showed defendant has a lengthy criminal history dating back to 1974. Defendant was convicted or sentenced to supervision on four prior retail-theft charges dating back to 1992 in Sangamon County. Defendant has been convicted of or sentenced to supervision for driving while license suspended 24 times, dating from 1995 through 2009 in Sangamon and Will Counties. On two recent occasions, defendant's conditional discharge was terminated unsuccessfully. Further, defendant's convictions also include the following: possession of a controlled substance in Cook County in 1983; soliciting for a juvenile prostitute, indecent liberties with a child, juvenile pimping, and pandering in Cook County in 1984, for which he served 12 years in prison; obstructing a peace officer in 1996, failure to register as a sex offender in 1997 (probation later was terminated unsuccessfully for violating the conditions of his work release), violation of an order of protection in 1997, and two counts of escape in 1998, all in Sangamon County; and direct criminal contempt in 2007 in Will County. Based on defendant's criminal history, the probation officer who conducted the presentence investigation stated "it is unlikely that any community based program would be of benefit to [defendant]."

¶ 10 A TASC case manager testified she met with defendant in May 2010 to evaluate him. She testified defendant informed her he was using crack cocaine, alcohol, and Vicodin daily, and then began snorting heroin two to three times per week. She stated there was a nexus between defendant's drug use and criminal behavior, because defendant told her he committed the retail-theft crimes to support his habit. When asked for a recommendation if TASC was ordered by the court, she responded residential treatment would be recommended if defendant was allowed to remain in the community.

¶ 11 Defendant provided the trial court with two documents in mitigation. The first, defendant's exhibit No. 1, was a letter from his Bible-study group indicating defendant initiated and led the Bible-study group, was a generous giving man, and would be a positive role model if given the chance. The second, defendant's exhibit No. 2, was a letter from the members of his Alcoholics Anonymous (AA) Group, stating defendant declared his ongoing sobriety and they felt he could be a positive influence in the community. Defendant also made a statement to the court, proclaiming the events leading up to his need for incarceration had been a wake-up call. He stated he had been attending college for the past several years working on obtaining his master's degree. Additionally, he informed the court his health problems were a burden on taxpayers as he had been rushed to the emergency room three times in the last year due to problems with his hip and further would be unable to receive a hip replacement if imprisoned. Defendant also stated he would continue attending AA meetings and running his Bible-study group twice a day if allowed to do so through the TASC program.

¶ 12 Prior to sentencing, the trial court "considered the evidence at trial in [No.] 09-CF-387 and the factual basis in [No.] 09-CF-215, the pre-sentence investigation reports, [and] the financial impact of incarceration. The Court *** also considered factors in aggravation and mitigation, as well as the nature and circumstances of the offense, the history, character and condition of the offender." The trial court found "that imprisonment [was] necessary for the protection of the public and that probation or conditional discharge would deprecate the seriousness of the offense and would be inconsistent with the ends of justice." The trial court sentenced defendant to four years in prison plus one year's MSR in No. 09-CF-215, with credit for 281 days' served. (We note the docket entry for July 2, 2010, erroneously lists defendant's

sentence as five years in prison but the docket entry is trumped by the judge's pronouncement of a four-year consecutive prison term and the written judgment order so reflecting.) In No. 09-CF-387, the court sentenced defendant to a consecutive one-year prison term, plus one year's MSR, with credit for 252 days. In No. 99-CM-1651, the court sentenced defendant to 180 days, with credit for time served.

¶ 13 In July 2010, defendant filed a motion to reconsider his sentence, arguing the sentences for the felony charges were excessive in light of the mitigating evidence presented, specifically the TASC information. In August 2010, after reviewing defendant's history and all other factors, the trial court denied the motion. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues his sentence is excessive and his four-year sentence in No. 09-CF-215 should be reduced to the minimum two-year sentence. Specifically, defendant contends this court should reduce his sentence because defendant (1) did not cause physical harm; (2) had a drug-abuse problem which contributed to the offense; (3) was taking steps to better himself and maintain sobriety, which evidenced his rehabilitative potential; and (4) was relatively old and in failing health, which constituted a burden on taxpayers and deprived him of receiving a hip replacement.

¶ 16 A. Standard of Review

¶ 17 A trial court has broad discretionary powers in determining an appropriate sentence for a defendant. *People v. Jones*, 168 Ill. 2d 367, 373, 659 N.E.2d 1306, 1308 (1995). The trial court is better able to assess the credibility of witnesses and to weigh evidence presented during the sentencing hearing. *Jones*, 168 Ill. 2d at 373, 659 N.E.2d at 1308 (citing

People v. Younger, 112 Ill. 2d 422, 427, 494 N.E.2d 145, 147 (1986)). "The trial court must base its sentencing determination on the particular circumstances of each case, considering such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Fern*, 189 Ill. 2d 48, 53, 723 N.E.2d 207, 209 (citing *People v. Streit*, 142 Ill. 2d 13, 19, 566 N.E.2d 1351, 1353 (1991); *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882, 884 (1977)).

¶ 18 Where the sentence imposed by the trial court falls within the statutory range permissible for the offense, a reviewing court will disturb the sentence only if the trial court abused its discretion. *Jones*, 168 Ill. 2d at 373-74, 659 N.E.2d at 1308. An abuse of discretion exists where the sentence imposed is "greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense." *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210. The spirit and purpose of the law are upheld when the sentence imposed reflects the seriousness of the offense and adequate consideration to the defendant's rehabilitative potential. *People v. Murphy*, 72 Ill. 2d 421, 439, 381 N.E.2d 677, 686 (1978).

¶ 19 B. Defendant's Sentence Was Not Excessive

¶ 20 Defendant first argues no physical injury resulted from his actions of taking the pole saw from an outside display area at Tractor Supply, which should weigh in favor of minimizing his sentence. See 730 ILCS 5/5-5-3.1(a)(1) (West 2008). This is one factor in mitigation, but it is not determinative. Defendant has a lengthy criminal history, dating back to 1974, and includes 36 known misdemeanor and felony convictions, not including the three cases pending at time of sentencing. See 730 ILCS 5/5-5-3.2(a)(3) (West 2008) (a history of prior criminal activity should be weighed in favor of imposing a term of imprisonment or may be

considered as a reason to impose a more severe sentence). The nonextended range for this Class 3 felony is 1 to 5 years, and the extended-term range is 2 to 10 years, although the offense is also probationable.

¶ 21 Defendant next asserts the trial court failed to properly consider his drug-abuse problem as a mitigating factor, placing a lot of emphasis on the TASC investigation. Defendant claimed he committed theft from Tractor Supply, as well as the theft from Shop N Save, to support his drug addiction. Defendant argues, "[t]he TASC case manager testified that [defendant] was eligible for TASC and could benefit 'to a certain extent' from residential treatment." Defendant has, however, misconstrued the record. The actual testimony was as follows:

> "Q. And do you also then make that determination of whether *a person* can benefit from TASC and treatment? (Emphasis added.)
>
> A. To a certain extent, yes.
>
> Q. All right. And at least, as best you can, did you determine whether he would be eligible for TASC?
>
> A. By statute, he is eligible.
>
> Q. Okay, then as far as that is concerned, what would, assuming TASC were entertained by the Court, what would the recommendation be as far as services for him?
>
> A. If he is in the community, we recommend residential treatment."

The case manager did not testify as to whether she believed defendant would benefit from treatment, only that he was eligible for TASC by statute. Eligibility for TASC by statute does

not necessarily indicate TASC is an appropriate sentence. Defendant's presentence investigation report states, "[b]ased on defendant's history within the criminal justice system, it is unlikely that any community based corrections program would be of benefit to him."

¶ 22 Defendant next asserts his rehabilitative potential is apparent but the trial court disregarded it. Prior to sentencing, defendant declared he had taken steps to address his addiction and to act as a mentor to others seeking sobriety. At his sentencing hearing, defendant introduced two letters in mitigation to show his rehabilitative potential, one written and signed by members of his Bible-study group and the other by members of AA. He also gave a moving statement in allocation, which referred to his volunteer work during Hurricane Katrina cleanup, his attempt to obtain his master's degree and hopes for a Ph.D., and his failing health. All of this was considered by the trial court. After sentencing defendant, the court addressed defendant as follows:

> "Mr. Tillman, with regard to you remarks, I do want to respond to you on those, and I do appreciate the letters that I received from your Bible study group and your AA group and your well-written and spoken words about your personal experience to Katrina. I know that has to have a personal meaning to you as well and some things many of us can't appreciate or understand, so I know this is your personal Katrina, and I do understand that this does have an impact on you.
>
> I do encourage you to stay active in a Bible study group or whatever you can in the Department of Corrections, because I do

> believe God has blessed you with certain talents and an ability to be a good role model for others, while you're incarcerated and also, I know you have aspirations to continue your education. You seem to be a very bright man. I know you can accomplish that as well. While you do that, I also encourage you to do the drug and alcohol counseling while you are serving your time, and I do believe when you get out, you are going to be an excellent role model for others."

The trial court clearly considered defendant's rehabilitative potential during the sentencing phase.

¶ 23 Defendant contends a lesser sentence would adequately punish him while still recognizing his rehabilitative potential. Defendant urges us to apply *People v. Kosanovich*, 69 Ill. App. 3d 748, 752, 387 N.E.2d 1061, 1064 (1979), to this case. In *Kosanovich*, the defendant was sentenced to 10 years for armed robbery, which at the time of conviction was punishable by a minimum term of "4 years unless the court, having regard to the nature and circumstances of the offense and the history and character of the defendant, sets a higher minimum term" (Ill. Rev. Stat. 1975, ch. 38, par. 1005-8-1(c)(2)). On appeal, the First District found the 10-year sentence imposed was excessive, an abuse of discretion, and served "no useful purpose to society," noting defendant's "relatively young age, her need for health care, her potential for rehabilitation, and the circumstances surrounding this offense" as mitigating factors. *Kosanovich*, 69 Ill. App. 3d at 752, 387 N.E.2d at 1064.

¶ 24 Cross-case comparative sentencing is not a valid basis for challenging a sentence,

as "such an analysis does not comport with our sentencing scheme's goal of individualized sentencing and would unduly interfere with the sentencing discretion vested in our trial courts." *Fern*, 189 Ill. 2d at 55, 723 N.E.2d at 210. Within the statutory range permissible, trial courts must fashion "a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *Id*. At sentencing, the judge "should 'consider all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.' " *Id. (*quoting *People v. Barrow*, 133 Ill. 2d 226, 281, 548 N.E.2d 240, 265); see also *People v. Terneus*, 239 Ill. App. 3d 669, 675-78, 607 N.E.2d 568, 572-74 (1992) (rejecting the "comb-the-books" approach to sentencing challenges).

¶ 25 Unlike in *Kosanovich*, defendant was given a sentence on the lower end of the statutory range. Defendant was eligible for an extended-term sentence in No. 09-CF-215 and faced a sentence ranging from 2 to 10 years. Defendant argues since two years is considered adequate punishment by the legislature (see 730 ILCS 5/5-8-2(a)(5)(West 2008)), the four-year sentence he received is excessive. While a two-year sentence may be appropriate in some cases, it does not necessarily follow that the minimum sentence is required in defendant's case. Defendant was 58 years old at the time of sentencing and has a long criminal history. Defendant's conditional discharge was terminated unsuccessfully on a 2007 Will County offense and a 2008 Sangamon County offense, and he violated his probation in 1999. While a majority of the offenses on his record are misdemeanors, he has serious felony convictions as well. Defendant has exhibited a pattern of disregard for the law going back 35 years and has not been *rehabilitated* yet.

¶ 26 Last, defendant argues his advanced age renders this sentence a significant portion of his remaining life span. Defendant was 58 years old at the time of sentencing. Although defendant may have health problems, *i.e.*, be in need of a hip replacement, he cannot establish the trial court was required to reduce his sentence because of his age and health issues. See *People v. Pippen*, 324 Ill. App. 3d 649, 653, 756 N.E.2d 474, 478 (2001). Age and health do not insulate a defendant from imprisonment. The trial court was entitled to give greater weight to protecting the public and deprecating the seriousness of the offense, and to sentence defendant to a term that stops his crime spree. He received less than the maximum nonextended term for committing this latest crime while free on bond for committing another retail theft.

¶ 27 Defendant does have some mitigating factors in his favor, including no physical harm resulted from the crime, he has no history of violence, and he has drug addiction and health issues. The trial court considered all of this at the sentencing stage. The court was aware defendant began leading a Bible-study group and attending AA meetings once incarcerated and was making a good-faith effort to remain sober. However, the four-year sentence imposed for the Class 3 felony where defendant was facing up to 10 years' imprisonment reflects the seriousness of the offense and the trial judge adequately considered any mitigating factors.

¶ 28 Defendant's sentence falls within the statutory range permissible for the offense and upholds the spirit and purpose of the law. The trial court did not abuse its discretion and we will not disturb the sentence.

¶ 29 III. CONCLUSION

¶ 30 We affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed.