2012 IL App (4th) 100829-U

Filed 4/6/12

NO. 4-10-0829

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TYHESHA N. BANKS, Defendant-Appellant.	)	Appeal from Circuit Court of McLean County No. 09CF825 Honorable Robert L. Freitag, Judge Presiding.

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

ORDER

¶ 1 *Held*: Trial court did not abuse its discretion in sentencing defendant.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD), to withdraw as counsel on appeal because no meritorious issues can be raised in this case. For the following reasons, we agree and affirm.

¶ 3 On February 4, 2010, defendant, Tyhesha Banks, pleaded guilty to possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of a substance containing heroin) (720 ILCS 570/401(a)(1)(A) (West 2008)), a class X felony, pursuant to an open plea. On March 31, 2010, the trial court held defendant's sentencing hearing. The presentence report indicated defendant was a 31-year-old mother with a prior felony conviction for possession of a stolen vehicle and a prior misdemeanor conviction for retail theft. Defense counsel filed a sentencing memorandum asserting that the felony conviction occurred

when defendant drove a car without permission while working at a car rental agency, but returned the car undamaged and then successfully completed probation in connection with the incident. Further, defense counsel asserted defendant's conduct in the present case was induced and facilitated by a man with whom defendant had been personally involved; defendant was under financial pressure; she was very remorseful; and she had been a model prisoner in the county jail. Defense counsel recommended a sentence of eight years' imprisonment.

¶ 4 The evidence presented at the sentencing hearing established that defendant was stopped for speeding; she gave the police officer a false name; her driver's license was suspended; and a search resulted in the seizure of more than 70 grams of heroin. The State recommended a sentence of 20 years' imprisonment. The trial court sentenced defendant to 14 years' imprisonment.

¶ 5 On April 29, 2010, defense counsel filed a motion to reconsider sentence arguing the sentence was excessive. At the September 22, 2010, hearing on the motion, the trial court granted the motion and reduced the sentence to ten years' imprisonment, stating:

> "[T]he Court recognizes the defendant's role is not – she wasn't the one who was obtaining this substance and refining it and distributing it and then getting all the profit from it. She was simply the one who was, in some respects, taken advantage of and given the substance to move for the benefit of those who were actually profiting significantly from it.
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> But it does involve a very large amount of an extremely destructive drug. And so the balancing in this case was difficult

for the Court to do because of those competing interests.

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I'm going to do something today that I don't normally do and I have only done a very handful of times, and I am going to grant the motion to reconsider. Because upon reflection, I do think that perhaps the Court didn't give enough weight to some of the mitigation in this case."

¶ 6 Defendant filed a timely notice of appeal and OSAD was appointed to represent her. On August 17, 2011, OSAD moved to withdraw, including in its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). The record shows service of the motion on defendant, who is currently in prison. On its own motion, this court granted defendant leave to file additional points and authorities by September 21, 2011, which she has not done. The State did not file an appellee brief. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 7 OSAD moves for leave to withdraw as counsel on appeal because any request for review would be frivolous and without merit. We agree.

¶ 8 Pursuant to Rule 604(d), a defendant may not appeal from a judgment entered upon a plea of guilty unless (1) she files a timely motion to reconsider, if challenging only her sentence; or (2) if challenging her plea, files a timely motion to withdraw her guilty plea and vacate the judgment. 210 Ill. 2d R. 604(d) (effective July 1, 2006); *In re J.T.*, 221 Ill. 2d 338, 346, 851 N.E.2d 1, 6 (2006) ("Rule 604(d) requires that in order to appeal from a judgment

entered upon a plea of guilty, a defendant must first file in the trial court a written motion to either withdraw his guilty plea or reconsider the sentence"). Because defendant filed a motion to reconsider sentencing, only sentencing issues remain.

¶ 9 "[T]he range of sentences permissible for a particular offense is set by statute." *People v. Fern*, 189 Ill. 2d 48, 55, 723 N.E.2d 207, 210 (1999). "Within that statutory range, the trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *Fern*, 189 Ill. 2d at 55, 723 N.E.2d at 210. " '[A] sentence within statutory limits will not be deemed excessive unless it is greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *People v. Romero*, 387 Ill. App. 3d 954, 978, 901 N.E.2d 399, 419-20 (2008) (quoting *Fern*, 189 Ill. 2d at 54, 723 N.E.2d at 210).

¶ 10 Defendant pleaded guilty to possession of a controlled substance with intent to deliver (15 grams or more but less than 100 grams of a substance containing heroin), a class X felony, which means the range for a prison sentence was not less than 6 years and not more than 30 years. 720 ILCS 570/401(a)(1)(A) (West 2008).

¶ 11 A reviewing court must afford great deference to the trial court's judgment regarding sentencing because that court, having observed the defendant and the proceedings, is in a far better position to consider such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment and habits than a reviewing court, which must rely on a "cold" record. *Romero*, 387 Ill. App. 3d at 978, 901 N.E.2d at 420. "Thus, '[i]n considering the propriety of a sentence, the reviewing court must proceed with great caution and must not substitute its judgment for that of the trial court merely because it would have weighed

the factors differently' [citation], and it may not reduce a defendant's sentence unless the sentence constitutes an abuse of the trial court's discretion [citation]." *Romero*, 387 Ill. App. 3d at 978, 901 N.E.2d at 420 (quoting *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209).

¶ 12 On this record, no colorable argument can be made that the trial court abused its discretion in sentencing defendant. Defendant's sentence falls well within the statutory range and is commensurate with the seriousness of her acts.

¶ 13 For the reasons stated, we grant OSAD's motion to withdraw as counsel for defendant and affirm the trial court's judgment.

¶ 14 Affirmed.