2013 IL App (4th) 120684-U

NO. 4-12-0684

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
December 12, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
MICHAEL J. HOGAN,	)	No. 10CF189
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

PRESIDING JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court did not abuse its discretion in sentencing defendant to the maximum term of imprisonment based upon the applicable factors in aggravation and mitigation.

(2) Defendant was entitled to an additional 47 days of sentencing credit for time spent in custody in two foreign states related to the charges in this case.

¶ 2 Defendant, Michael J. Hogan, files this direct appeal, claiming (1) his sentence is excessive because the trial court failed to consider his potential for rehabilitation, and (2) he is entitled to additional sentencing credit. We conclude the court did not abuse its discretion in sentencing defendant, given the applicable factors in aggravation and mitigation. We further conclude defendant is entitled to the additional sentencing credit as requested. Accordingly, we affirm the court's judgment as modified in part, vacate in part, and remand with directions.

¶ 3 I. BACKGROUND

¶ 4 In July 2010, defendant's landlord entered defendant's residence and noticed what he believed to be cannabis plants throughout the home. After the execution of a search warrant of the premises, police seized between 2,000 grams and 5,000 grams of cannabis. The State charged defendant with unlawful production of cannabis, a Class 2 felony (count I) (720 ILCS 550/8(d) (West 2010)), unlawful manufacture of cannabis, a Class 1 felony (count II) (720 ILCS 550/5(f) (West 2010)), and possession of a controlled substance, a Class 4 felony (count III) (720 ILCS 570/402(c) (West 2010)).

¶ 5 In February 2012, in an open plea agreement, defendant pleaded guilty to counts II and III in exchange for the State's dismissal of count I. As an open plea, the parties had reached no agreement as to sentencing. The trial court advised defendant he would be facing a potential range of punishment on count II, a Class 1 felony, of 4 to 15 years in prison and, on count III, a Class 4 felony, a potential range of punishment of probation to 6 years in prison, as an extended term. Defendant stated (1) he understood all of the court's admonishments regarding his rights and the waiver of those rights, and (2) he was pleading guilty by his own free will. The court accepted defendant's plea, finding it knowingly and voluntarily entered and ordered the preparation of a presentence investigation report (PSI).

¶ 6 On April 24, 2012, the trial court conducted defendant's sentencing hearing. First, defendant's counsel advised the court of some corrections to the PSI. On defendant's criminal history, the PSI indicated that in January 2007, defendant was convicted of "purchase/possession/control of marijuana," a Class 2 felony, and "manufacturing marijuana," a Class 3 felony in the State of Georgia. Defendant claimed these convictions were misdemeanors,

not felonies. He also claimed the conviction in October 2007 for possession of a controlled substance (lysergic acid diethylamide) (LSD) from Cook County was actually a Class 4 felony conviction for possession of marijuana, not LSD as indicated. The court accepted the PSI.

¶ 7 The State called Billie Jo Henson from the Livingston County probation department, who had prepared the PSI. Henson said he was not aware of the error as alleged by defendant regarding his Georgia convictions when he interviewed defendant. He attempted to clarify the discrepancy with Georgia officials, but he received no response. The Cook County discrepancy as described by defendant was indeed verified and the error changed in open court. Defendant presented no evidence in mitigation. However, in a statement of allocution, defendant admitted he had "a drug problem," he apologized for his crimes, and indicated he was "throw[ing himself] to the mercy of the court here in the hopes that maybe [the court] [would] show [him] just a little bit of kindness."

¶ 8 Defendant's PSI indicated he had been convicted of multiple drug offenses beginning in 2000. Those convictions were set forth as follows: (1) in November 2000, in McLean County, defendant was convicted of possession of drug paraphernalia and cannabis and sentenced to 18 months' conditional discharge; (2) in July 2001, in Livingston County, defendant was convicted of possession of cannabis, fleeing and eluding police, and driving while suspended and sentenced to 30 days in jail; (3) in January 2002, in McLean County, defendant was convicted of manufacturing/distributing a look-alike substance (LSD) and sentenced to 30 months' probation, for which, upon revocation, he was resentenced to three years in prison; (4) in January 2002, in Livingston County, defendant was convicted of possession of cannabis and driving while suspended, with no indication of a sentence other than fines and costs; (5) in

September 2004, in Cook County, defendant was convicted of possession of a controlled substance (LSD) and sentenced to four years in prison; (6) in January 2007, in Fulton County, Georgia, defendant was convicted of "purchase/possession/control of marijuana" and "manufacturing marijuana" with no indication of a sentence; (7) in May 2007, in Cook County, defendant was convicted of possession of cannabis and sentenced to two days in jail; (8) in August 2007, in Cook County, defendant was convicted of possession of more than 900 grams of LSD, and sentenced to four years in prison; and (9) in October 2007, in Cook County, defendant was convicted of possession of cannabis and sentenced to one year in prison. The PSI also indicated defendant had active warrants and pending cases in Indiana, Utah, Colorado, and South Dakota resulting from drug-related arrests.

¶ 9 In pronouncing defendant's sentence, the trial court noted defendant's "poor" criminal history and his apparent drug problem, while also commenting on the distinction between a user and a dealer. The court stated: "So I think there's evidence in here that in addition to a drug problem, the defendant is contributing to the problem." The court also noted "there [were] warrants all over the country for him[.]" The court commented that "defendant is really taking advantage of the system and just has no regard for the laws, especially when it comes to drugs. So the bottom line is [defendant's] record is a strong factor in aggravation." The court also noted deterrence as an additional "strong factor in aggravation." The court stated:

> "My job is to make sure that I impose a sentence that I think properly considers all the factors that I'm required to consider. Kindness unfortunately is not one of the factors that I'm to consider; and I don't think it would be appropriate to simply say,

> 'well, he's got young kids so I should cut him some slack.' Your kids are young; but they are also not babies; and you made a conscious decision to engage in this conduct knowing the potential result."

The court accepted the State's recommendation and imposed a term of 15 years in prison plus a 2-year term of mandatory supervisory release on count II. The court also imposed a concurrent three-year prison term on count III. The court ordered defendant to pay a $214 VCVA fine, a "$20/court" child advocacy fee, a $2,000 drug assessment fine, a $100 drug trauma fund fine, a $5 DUI spinal cord injury fee, a $100 crime lab fee, and a $10 arrestee medical expense fee. The court awarded defendant sentencing credit of 352 days for time spent in pretrial custody and $1,760 in fine credit for those days, but denied defendant credit for 47 days in custody in Colorado and California.

¶ 10 In May 2012, defendant filed a timely motion to withdraw his guilty plea and vacate the judgment, claiming (1) his sentence was excessive and (2) the trial court failed to consider certain factors in mitigation. He also filed a motion to reconsider his sentence, citing the same bases. Defendant's counsel filed a Rule 604(d) certificate. See Ill. S. Ct. R. 604(d) (eff. July 1, 2006). After a hearing, the court denied defendant his requested relief. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 In this appeal, defendant renews the claims presented in his postsentencing motions and requests this court reduce his sentences to terms more reflective of defendant's circumstances or, in the alternative, remand for resentencing. He insists the trial court abused its

discretion in sentencing him to the maximum term of 15 years on count II. He acknowledges his "significant criminal history of drug-possession and other drug-related felonies," but, he argues, his prior convictions were the result of a drug addiction. He further claims the court failed to consider his admission of guilt and expression of remorse. He admits he has a problem with drugs but, he claims his addiction, coupled with his prior education, successful work history, and familial support, make him a good candidate for rehabilitation. He contends he cannot be rehabilitated by serving an excessive term in prison.

¶ 13 The trial court is given broad discretion in sentencing (*People v. Perruquet*, 68 Ill. 2d 149, 153 (1977)), and a sentence within the statutory prescribed amounts will not be disturbed absent an abuse of discretion (*People v. Coleman*, 166 Ill. 2d 247, 258 (1995)). An abuse of discretion occurs when it appears the sentence is excessive and not justified under any reasonable view of the record. *People v. Smith*, 214 Ill. App. 3d 327, 338 (1991).

¶ 14 Courts are not required to give a defendant's rehabilitative potential or other factors in mitigation greater weight than the seriousness of the offense. *Coleman*, 166 Ill. 2d at 261. When mitigating factors are presented, the trial court is presumed to have considered them. *People v. Pippen*, 324 Ill. App. 3d 649, 652 (2001). "The existence of mitigating factors does not require the trial court to reduce a sentence from the maximum allowed." *Pippen*, 324 Ill. App. 3d at 652.

¶ 15 It is apparent from the record the trial court considered several factors in mitigation prior to imposing the maximum terms. Defendant's counsel reminded the court defendant had admitted his guilt. Defendant himself admitted to the court he had a drug problem and he told the court he was remorseful for his conduct. Nevertheless, the court found

defendant's (1) extensive drug-related history, (2) apparent lack of respect for the court system, (3) status as a dealer and manufacturer, and (4) regular course of conduct of using drugs, outweighed the factors in mitigation. The court emphasized that defendant's record and deterrence were "strong factors" in aggravation.

¶ 16 Our review of the record indicates the trial court properly considered all factors in aggravation and mitigation, the particular circumstances of defendant's case, the information included in the PSI, defendant's statement in allocution, and the arguments and recommendations of counsel. We conclude the court imposed a sentence within the prescribed range of punishment and, in our view, did not abuse its discretion in doing so.

¶ 17 Defendant also contends the trial court erred in failing to award him sentencing and monetary credit for time served in Colorado and California. He claims the court failed to award him credit for the 11 days he spent in custody in Colorado and the 36 days he spent in custody in California on the arrest warrant in this case. He seeks sentencing credit as well as monetary credit in the amount of $5 per day for the additional 47 days. The State concedes error and we accept the State's concession. Indeed, a defendant is entitled to sentencing credit for time spent confined in a foreign state *if* the confinement is a result of Illinois process and not for a crime committed in that foreign state. *People v. Evans*, 391 Ill. App. 3d 470, 472-73 (2009). Defendant was incarcerated in Colorado and California as a result of the charges in this case, and therefore, he is entitled to the corresponding credit.

¶ 18 III. CONCLUSION

¶ 19 For the foregoing reasons, we affirm the trial court's judgment and remand with directions to amend the sentencing judgment to reflect an additional 47 days of sentencing credit

and $235 additional credit against creditable fines. We note imposition of the child advocacy center fee on both counts violates this court's holding in *People v. Alghadi*, 2011 IL App (4th) 10012, ¶ 22, so we vacate one $20 child advocacy center fee. As the State successfully defended part of the appeal, we award it $50 against defendant as costs of this appeal.

¶ 20 Affirmed as modified in part, vacated in part, and cause remanded with directions.