2015 IL App (4th) 130445-U

NO. 4-13-0445

Order filed February 11, 2015

Modified upon denial of rehearing March 10, 2015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Douglas County
ANTONIO SUSTAITA,	)	No. 10CF14
Defendant-Appellant.	)	
	)	Honorable
	)	Michael G. Carroll,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in sentencing defendant to 24 years' imprisonment; we remand for the trial court to give an additional 20 days' sentence credit to defendant and a total of $2,075 in presentence credit against defendant's creditable fines.

¶ 2 In January 2013, a jury convicted defendant, Antonio Sustaita, of unlawful cannabis trafficking (720 ILCS 550/5.1(a) (West 2010) (5,000 grams or more)), unlawful possession with intent to deliver cannabis (720 ILCS 550/5(g) (West 2010) (more than 5,000 grams)), and unlawful possession of cannabis (720 ILCS 550/4(g) (West 2010) (more than 5,000 grams)). In February 2013, the trial court sentenced defendant to 24 years' imprisonment. Defendant appeals, arguing the sentence was excessive where the trial court placed undue weight on his criminal history and failed to consider his rehabilitative potential. We affirm but remand with directions.

¶ 3 I. BACKGROUND

¶ 4 Following a traffic stop on February 4, 2010, the State charged defendant with one count of unlawful cannabis trafficking, an enhanced Class X felony (720 ILCS 550/5.1(b) (West 2010)); one count of unlawful possession with intent to deliver cannabis, a Class X felony (720 ILCS 550/5(g) (West 2010)); and one count of unlawful possession of marijuana, a Class 1 felony (720 ILCS 550/4(g) (West 2010)).

¶ 5 During defendant's January 2013 jury trial, Illinois State Police Trooper Heather Howard testified she conducted a routine traffic stop on February 4, 2010. Trooper Howard was stationary on the median of Highway I-57 when a northbound white Ford F-150 truck approached. The truck had a crack in the windshield and an air freshener dangling from the rearview mirror, both of which Trooper Howard determined materially obstructed the driver's view, an equipment violation. Trooper Howard initiated a traffic stop and advised Moises Trevino (the driver) and defendant (the passenger) of the reason for the stop. As identification, defendant provided Trooper Howard with papers that appeared to be school transcripts from when defendant was a young child. Trevino provided Trooper Howard with a Florida driver's license and said he lived in Texas, but he was unable to provide an address. The insurance on the truck, issued only a day and a half prior to the stop, was in Trevino's name; the registration for the truck, which Trevino claimed to have owned for a year, was in someone else's name. Trooper Howard also testified to numerous other factors that aroused suspicion of criminal activity, such as defendant's nervous appearance, the contents of the car (yard-work equipment but no toolboxes, although the men claimed to be heading to a remodeling job), and the fact both men informed her they had just been stopped and searched (a means of attempting to detour Trooper Howard from searching the car again, in her opinion).

¶ 6 Trooper Howard then issued Trevino a warning for the obstructed windshield and advised Trevino he was free to leave. As Trevino turned to go, Trooper Howard asked if she could speak to him for a minute, to which he agreed. After chatting about the trip the men were on, Trooper Howard then asked Trevino for permission to have a canine officer run a free-air sniff around the truck, to which he also agreed.

¶ 7 Sergeant Chris Owen, a canine officer with the Illinois State Police, also testified at trial. After Trevino agreed, Sergeant Owen and his narcotics dog, Zocko, conducted a free-air sniff of the truck. Zocko alerted to the truck, indicating an illegal drug odor. Based on where Zocko alerted and the appearance of the undercarriage of the truck, Sergeant Owen suspected the gas tank contained contraband. A third officer on the scene, Trooper Mark Holley, used Sergeant Owen's fiber-optic scope to inspect the inside of the gas tank, revealing plastic bundles that contained a green leafy substance ultimately determined to be cannabis. Following this discovery, the two men were handcuffed, informed of their *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and transported along with the truck to a service station to further inspect the gas tank.

¶ 8 Trooper Holley testified, upon arriving at the service station, he was standing with defendant when defendant told him there might be marijuana in the gas tank. Defendant repeated this statement to Trooper Howard and told the officers the gas tank contained 70 to 80 pounds of marijuana. Defendant told Trooper Howard he and Trevino were to deliver the load to Milwaukee, Wisconsin, collect $60,000, and return the money to defendant's cousin in Texas. Once the gas tank was disassembled, 42 bundles of cannabis were recovered; photographs of the bundles and gas tank were shown to the jury.

¶ 9 The jury also heard a recording of Illinois State Police Trooper Lisa Crowder interviewing defendant approximately three hours after Trooper Howard initiated the traffic stop. On the recording, Trooper Crowder confirmed defendant knew his constitutional rights and proceeded to question defendant about the events leading to his arrest. Defendant and Trevino met Israel Garza (defendant's cousin) and Jose Castillo at an insurance company in Texas on February 2, 2010, picked up the Ford F-150 preloaded with the cannabis, picked up a cell phone to contact Garza, and headed north toward Milwaukee. Defendant stated he introduced Trevino to Garza, this was the first time he or Trevino had transported cannabis for Garza or Castillo, and Trevino would be paid $100 per pound of marijuana transported. Defendant did not know exactly how much he would be paid as the passenger. Officer Crowder testified defendant wanted to cooperate and revealed the basics of the plan in order to assist law enforcement in coordinating a sting. Trevino, however, refused to cooperate, so the sting never occurred.

¶ 10 At trial, the parties stipulated 5,426 grams of cannabis were recovered from the gas tank of the truck. The jury returned guilty verdicts on all three counts. The trial court ordered a presentence investigation report and revoked defendant's bond.

¶ 11 At sentencing, defendant moved to strike several offenses from the presentence investigation report, arguing they did not contain enough facts to be included. Defendant indicated past incidents of fighting while incarcerated were a result of defending himself and were dealt with administratively. The trial court noted the parties had the opportunity to mitigate or aggravate information within the presentence investigation report with testimony. With respect to the criminal history within the report, the judge stated he would give no weight to the charges without sufficient information.

¶ 12 The State presented evidence in aggravation detailing defendant's behavior while incarcerated in Douglas County. Courtney Loeh, a correctional officer, testified defendant engaged in disruptive behavior and was in possession of contraband, such as rope made from sheets and a pen wrapped with a dried paper towel to make it stiff. Defendant testified his cell was a four-man cell, although he was the sole occupant at the time the cell was searched and the contraband was discovered. Defendant collected various items of contraband previous inmates had left behind and put the materials outside his cell. Correctional officers never collected the contraband, so defendant placed it on an unused bunk in his cell. Defendant's testimony focused solely on his behavior while incarcerated in Douglas County and his complaints regarding the conditions of his incarceration.

¶ 13 After a brief discussion as to presentence time served, the trial court found defendant was entitled to 395 days of credit against his sentence. The State then recommended a sentence of 27 years' imprisonment, arguing the legislature intended to severely punish large-scale traffickers of cannabis and highlighting the amount of cannabis recovered from the truck (approximately 73 pounds). The State also emphasized defendant's prior history, including multiple felony driving under the influence (DUI) charges, escape and evading arrest charges, resisting arrest charges, and instances of fighting while incarcerated.

¶ 14 Defendant argued his prior history was less severe than the State made it out to be. The fleeing arrest and evading arrest charges were misdemeanors, resulting in sentences of fewer than 30 days. Defendant acknowledged the potential for harm resulting from DUI charges, but he pointed out his DUI convictions had not injured anyone. Last, defendant highlighted the increasingly prevalent opinion in favor of legalizing marijuana in this country, and he asked the court to take that changing position into account when fashioning a "reasonable" sentence.

¶ 15 The trial court sentenced defendant to 24 years' imprisonment. At a hearing on defendant's motion to reconsider the sentence, defendant's counsel argued the sentence was excessive in light of defendant's criminal history, family situation, and employment history; there was no violence or threat of harm in the charged offenses; and changing attitudes toward legalizing marijuana warranted leniency. The court took the matter under advisement and then denied the motion on May 17, 2013. The circuit clerk filed defendant's notice of appeal on May 23, 2013.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues (1) the trial court abused its discretion in sentencing him to a term of 24 years' imprisonment; and (2) he is entitled to additional days of credit against his sentence for time spent in custody. Specifically, defendant argues the trial court placed undue emphasis on his criminal history and ignored any mitigating factors, thus abusing its discretion in imposing an excessive sentence. Defendant also argues an error occurred in calculating his sentence credit and he is entitled to an additional 20 days of credit against his sentence.

¶ 19 A. Abuse of Discretion

¶ 20 The Illinois Constitution requires a trial court, in imposing sentence, to balance the defendant's rehabilitative potential with the seriousness of the offense. Ill. Const. 1970, art. 1, § 11; *People v. Bien*, 277 Ill. App. 3d 744, 756, 661 N.E.2d 511, 519 (1996). A trial court's sentencing decision is afforded substantial deference upon review. *People v. Snyder*, 2011 IL 111382, ¶ 36, 959 N.E.2d 656. A trial court must base its sentencing decision on the particular circumstances of each case and consider factors such 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 (1999). The trial court is better able to consider these factors, having observed the defendant and proceedings. *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209. A court of review must not substitute its judgment simply because it would have balanced the factors differently. *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209.

¶ 21 The parties stipulated all three convictions constituted one act and one crime, and the State elected to sentence on the cannabis-trafficking conviction. Cannabis trafficking is a nonprobational, enhanced Class X felony, providing for statutory limitations of not less than 12 years and not more than 60 years in prison. 720 ILCS 550/5.1(b) (West 2010). The State requested a 27-year sentence. Defendant did not request a specific term, asking only that the court impose a reasonable sentence in light of the specific circumstances and defendant's prior history. The trial court imposed a sentence of 24 years' imprisonment, which is within the statutory range. A sentence within the statutory range will not be deemed excessive, and will not be disturbed, 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. Crenshaw*, 2011 IL App (4th) 090908, ¶ 22, 959 N.E.2d 703; *People v. Flores*, 404 Ill. App. 3d 155, 157, 935 N.E.2d 1151, 1154 (2010).

¶ 22 The trial court expressly stated it considered the following: "Evidence adduced at trial, aggravation and mitigation, statutory factors, arguments of counsel[,] and statement in allocution by Defendant." Moreover, the court went over corrections to the presentence investigation report with defendant's counsel, indicating the court had read and considered it as corrected. Defendant argues the court failed to consider his "strong family ties" with his common-law wife, two children, and mother. Defendant further argues the court ignored his work history, another mitigating factor that indicates rehabilitative potential. Defendant received

his general equivalency diploma and earned a certificate in carpentry and construction while incarcerated. Though unemployed due to incarceration at the time of sentencing, defendant reported "previous employment as a self-contracted carpenter doing framing, remodeling, etc."

¶ 23 The presentence investigation report contained information regarding defendant's marital status, his two children, and his mother. Moreover, defendant referenced his two children during his statement in allocution, which "the [c]ourt listened carefully to." Defendant makes much of one statement the judge made at sentencing: "Court found no mitigation." However, "a trial judge's statements at sentencing may not be considered in isolation." *People v. Csaszar*, 375 Ill. App. 3d 929, 952, 874 N.E.2d 255, 275 (2007). The "no mitigation" comment was made in the course of considering *statutory* aggravating and mitigating factors, and it does not show the court ignored nonstatutory factors. Viewing the record as a whole makes clear the court had before it what little mitigating evidence existed. A court need not expressly outline every factor considered for sentencing, and without explicit evidence to the contrary, we must presume the court considered all mitigating factors in the record. *People v. Meeks*, 81 Ill. 2d 524, 534, 411 N.E.2d 9, 14 (1980); see also *People v. Nussbaum*, 251 Ill. App. 3d 779, 781, 623 N.E.2d 755, 757 (1993). There is no such evidence to the contrary here.

¶ 24 Defendant argues the trial court gave undue weight to his criminal history. The presentence investigation report, which the court considered, shows numerous convictions, including the following: DUI (1991); aggravated robbery (1995); DUI and fleeing a police officer (1996); assault causing bodily injury (1998); burglary (2000); DUI (2001); escape while arrested, DUI, and failure to stop (2002); conspiracy to enter, transport, or harbor aliens (2008); evading arrest (2010); DUI and resisting arrest (2011); and DUI (2011). A few of these convictions had little or no information, and the court properly discounted those: "I'll give no

weight to a charge that has no information. A charge that has considerable information, but lacks some detail, I'll discount that some. I'll give the most weight to those things that are fully documented." Given the number of previous convictions and the repeated instances of defendant's revoked probation due to further criminal activity, it was entirely reasonable for the court to give less weight to the evidence in favor of rehabilitative potential, "as [defendant] had not taken advantage of previous opportunities to rehabilitate himself." *People v. Starnes*, 374 Ill. App. 3d 329, 337, 871 N.E.2d 815, 822 (2007). See also *People v. Carter*, 272 Ill. App. 3d 809, 812-13, 651 N.E.2d 248, 251 (1995) ("It was also reasonable for the trial court to consider defendant's prior criminal history, his lack of success at completing probation opportunities, and his lack of remorse and failure to take full responsibility for what he had done.").

¶ 25 It is not for this court to alter the trial court's sentence absent an abuse of discretion. *Fern*, 189 Ill. 2d at 53, 723 N.E.2d at 209. The trial court considered the relevant mitigating and aggravating factors. Simply because rehabilitative and mitigating factors are present does not entitle them to greater weight than the seriousness of the offense. *People v. Coleman*, 166 Ill. 2d 247, 261, 652 N.E.2d 322, 329 (1995); *People v. Shaw*, 351 Ill. App. 3d 1087, 1093-94, 815 N.E.2d 469, 474 (2004). The court did not abuse its discretion in imposing a within-guidelines sentence of 24 years' imprisonment.

¶ 26 B. Sentence Credit

¶ 27 Defendant argues he is entitled to additional days of credit against his sentence for time served from October 6, 2010, to his release sometime in early 2011. The calculation in the presentence investigation report stated the relevant period in custody at issue ran from October 6, 2010, to February 5, 2011. However, defendant contends he was released on bond from the Douglas County jail on February 25, 2011, entitling him to an additional 20 days' credit against

his sentence and an additional $100 in presentence credit. The State concedes defendant may be entitled to additional days of credit and requests this court remand the cause for the trial court to clarify the issue.

¶ 28 The record shows defendant posted a cash bond on February 25, 2011. The presentence investigation report erroneously states the bond was posted February 5, 2011. Defendant is entitled to 20 additional days' credit. Defendant is also entitled to $100 additional credit for presentence incarceration pursuant to statute (725 ILCS 5/110-14(a) (West 2010)). Thus, defendant is entitled to a total of 415 days of sentence credit, as well as a total of $2,075 in presentence credit against his creditable fines.

¶ 29 III. CONCLUSION

¶ 30 For the reasons stated, we affirm the trial court's judgment. The case is remanded to the circuit court for the purpose of issuance of an amended sentencing judgment reflecting 415 days of presentence credit and for a total credit of $2,075 against his creditable fines. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 31 Affirmed; cause remanded with directions.