2022 IL App (4th) 210629-U

NO. 4-21-0629

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 29, 2022
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KELLY T. LONG, Defendant-Appellant.	)	Appeal from the Circuit Court of Woodford County No. 20CF1 Honorable Charles M. Feeney III, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Knecht and Justice Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, concluding that the trial court did not impose an excessive sentence or abuse its discretion.

¶ 2 In August 2020, the State charged defendant, Kelly T. Long, with possession of methamphetamine (720 ILCS 646/60(a)(b)(1) (West 2020)). In April 2021, the trial court conducted a bench trial and found defendant guilty of that offense. In August 2021, the court sentenced defendant to an extended term of eight years in prison.

¶ 3 Defendant appeals, arguing only that his extended-term sentence of eight years in prison for possession of methamphetamine is excessive and constitutes an abuse of the trial court's discretion. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A. The Bench Trial

¶ 6 In April 2021, the trial court conducted defendant's bench trial. The charge against defendant arose from a December 2019 stop of an automobile for traffic law violations. Three people were in the car, including defendant in the front passenger seat. Because the deputy who stopped the vehicle smelled cannabis when he went to the driver's side window, all occupants of the vehicle were directed to leave it and sit inside separate squad cars that had arrived at the scene.

¶ 7 A search of the car revealed suspected crack cocaine and ecstasy in small bags in the front passenger door handle. The deputy arrested defendant because he was the only one within reach of the door handle in which the drugs were found. After arriving at the county jail, defendant stated that he should have just "swallowed" the drugs because, based on his experience, doing so "wouldn't have hurt him."

¶ 8 The parties stipulated that a lab analysis determined that the substance taken from the car was methamphetamine. (We note that defendant was originally charged in January 2020 with possession of a controlled substance (MDMA), but the State dismissed that charge after receiving the lab results and charged defendant by information with possession of methamphetamine.) Defendant did not testify, and the defense did not present any witnesses. The trial court found defendant guilty, ordered a presentence investigation report (PSI), and scheduled a sentencing hearing.

¶ 9 B. The Sentencing Hearing

¶ 10 At defendant's initial date for sentencing in June 2021, he appeared in court in such a state that the trial court ordered that he be tested for drugs. Because defendant tested positive for alcohol, cannabis, cocaine, methamphetamine, and amphetamines, the court found that defendant was not in an appropriate condition for sentencing and continued the sentencing hearing to a later date.

¶ 11 At defendant's August 2021 sentencing hearing, the trial court noted that it had received the PSI and determined that (1) both counsel had received it and (2) neither counsel had any additions or corrections.

¶ 12 The State presented no additional evidence. Defendant presented the trial court with a group exhibit that outlined 74 courses that he had completed while in custody in Woodford County, which consisted of over 128 hours of education and 326 lessons completed, including drug treatment classes and anger management classes.

¶ 13 Defendant also spoke in allocution, apologizing to the court for being late to the initial sentencing hearing, as well as for his condition on that day. Defendant explained that he had a 13-year-old son and had just "started being back in his life." He told the court he was under a lot of pressure and there were "just a lot of things going on in his life" at the time he committed the offense. Defendant also stated he had taken some substance abuse classes and was still "trying to not let the pressures make [him] want to do drugs again" so he could be in his family's life.

¶ 14 In recommending a sentence to the court, the State discussed the criminal history of defendant, who was 44 years old, and termed it "abysmal." The prosecutor then stated the following:

> "He has at least eight prior felonies, 15 misdemeanors, multiple petitions to revoke. He has at least two previous charges for failures to return from a furlough. It's clear he has trouble abiding by social norms and staying out of trouble. There really isn't any terribly significant period of time where he is not in trouble if you don't account for times he is incarcerated. So[,] in that regard[,] he is a menace to society."

¶ 15 The prosecutor also pointed out that defendant (1) had come to court so intoxicated for the initial sentencing hearing that it had to be delayed and (2) had been sentenced to prison on

multiple occasions. The prosecutor recommended a sentence of five years in prison.

¶ 16 In response, defense counsel emphasized that defendant's conduct neither caused nor threatened serious physical harm to anyone and defendant did not contemplate that his conduct would cause or threaten serious harm to anyone. Counsel acknowledged that defendant "does have a prior history" but argued that (1) defendant had admitted his addiction and (2) only a small amount of a controlled substance was involved in this case.

¶ 17 Defense counsel ultimately recommended that, given his client's substantial mitigating circumstances, the trial court should impose a sentence of probation, taking into account that defendant had already been in custody for over two months. Counsel argued that doing so would enable defendant to pursue strict drug treatment obligations and assist him in his efforts at sobriety "and being there for his family."

¶ 18 The trial court then reviewed the evidence before it, mentioned the PSI, and discussed the various factors in aggravation and mitigation. The court noted that the most significant factor by far was defendant's prior criminal history. The court mentioned that since 1996, defendant had eight prior felony convictions, the current conviction being his ninth. Defendant also had 15 misdemeanor convictions. The court explained that defendant had a history of (1) failing to comply with probation orders, (2) behaving in ways that led to his probations being terminated unsatisfactorily, and (3) in multiple instances, "conduct[ing] himself in a way to thwart justice." Reviewing defendant's record, the court concluded that it was very difficult to find defendant would be likely to obey any order the court would give.

¶ 19 The trial court added that since 2001, defendant had had six separate prison sentences "and yet this has not had any impact, or minimal impact at best, on him conforming his conduct to the requirements of the law." The court also noted that defendant committed the offense

for which he was to be sentenced a mere eight days after his most recent release from custody.

¶ 20 The trial court concluded its sentencing by stating the following:

> "He is extended-term eligible. This is a Class 3 felony. So the court can sentence him up to 10 years in prison. How much, is the question, should society continue to put up with an individual who refuses to conform their conduct to the requirement of the law? The court is going to sentence the defendant to eight years in the Illinois Department of Corrections."

¶ 21 Defendant filed a motion to reconsider his sentence, which the trial court denied. This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 Defendant appeals, arguing only that his extended-term prison sentence of eight years is excessive and constitutes an abuse of the trial court's discretion. We disagree and affirm.

¶ 24 A. The Applicable Law

¶ 25 "All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. "The trial court has broad discretionary powers when selecting an appropriate sentence." *People v. Garcia*, 2018 IL App (4th) 170339, ¶ 37, 99 N.E.3d 571. "The trial court's sentence must be based upon the particular circumstances of the case, including (1) the defendant's history, character, and rehabilitative potential; (2) the seriousness of the offense; (3) the need to protect society; and (4) the need for punishment and deterrence." *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 102, 126 N.E.3d 703.

¶ 26 The Unified Code of Corrections (Unified Code) (730 ILCS 5/1-1-1 *et seq.* (West 2020)) sets forth mitigating and aggravating factors that the trial court must consider when

determining an appropriate sentence. See *People v. Musgrave*, 2019 IL App (4th) 100708, ¶ 54, 141 N.E.3d 320. A defendant's "history of prior delinquency or criminal activity" and the need "to deter others from committing the same crime" are aggravating factors. 730 ILCS 5/5-5-3.2(a)(3), (7) (West 2020). It is a mitigating factor if a "defendant's criminal conduct neither caused nor threatened serious physical harm to another." *Id.* § 5-5-3.1(a)(1).

¶ 27 "Under the Unified Code, drug addiction is not an explicit factor in mitigation or aggravation." *Sturgeon*, 2019 IL App (4th) 170035, ¶ 105; see also 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2020). Accordingly, "the trial court is not required to view drug addiction as a mitigating factor." *Sturgeon*, 2019 IL App (4th) 170035, ¶ 105; see also *People v. Madej*, 177 Ill. 2d 116, 139, 685 N.E.2d 908, 920 (1997). "Instead, a history of substance abuse is a 'double-edged sword' that the trial court may view as a mitigating or aggravating factor." *Sturgeon*, 2019 IL App (4th) 170035, ¶ 105 (quoting *People v. Mertz*, 218 Ill. 2d 1, 83, 842 N.E.2d 618, 662 (2005)). To that point, "the court could have properly concluded that defendant's drug addiction lessened his rehabilitative potential, increased the seriousness of the offense, increased the need to protect society, and increased the need for deterrence." *Id.* ¶ 108.

¶ 28 "The weight to be given to any *proper* factor *** is left to the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (Emphasis in original.) *Id.* ¶ 104. The appellate court may not substitute its judgment for that of the trial court merely because it might have weighed those factors differently. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 11, 65 N.E.3d 419. Further, a reviewing court presumes that a sentence imposed within the statutory range provided by the legislature is proper. *People v. Charleston*, 2018 IL App (1st) 161323, ¶ 16, 138 N.E.3d 743.

¶ 29 A trial court's sentence is an abuse of discretion only if it is greatly at odds with the

spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *People v. Geiger*, 2012 IL 113181, ¶ 27, 978 N.E.2d 1061. The trial court's sentence is entitled to "great deference because the trial court is in the best position to consider the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age." *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 15, 82 N.E.3d 693.

¶ 30 B. This Case

¶ 31 Defendant argues that his extended-term eight-year prison sentence for possession of methamphetamine is excessive and constitutes an abuse of the trial court's discretion. Specifically, defendant argues that "[b]ecause such a lengthy term is disproportionate to the severity of the offense and harms rather than helps [defendant's] chance of being restored to useful citizenship, this [c]ourt should reduce his sentence, or remand for resentencing." In support of this claim, defendant also emphasizes that the sentence the court imposed was "three years beyond what the State believed was justified."

¶ 32 On this record, we reject all of defendant's arguments and conclude that the trial court did not abuse its discretion by imposing the eight-year extended-term prison sentence.

¶ 33 In *People v. Klein*, 2022 IL App (4th) 200599, this court addressed the defendant's claim that his sentence was disproportionate to the nature of the offense of which he was convicted. *Id.* ¶¶ 40-45. The defendant in *Klein* made arguments similar to those made by defendant in this case. *Id.* ¶¶ 40-41. We rejected the defendant's arguments in *Klein* (*id.* ¶¶ 44-45), as we do here.

¶ 34 We note that in the present case, the trial court (the same trial court that sentenced the defendant in *Klein*) considered all of the aggravating and mitigating factors at defendant's sentencing hearing and defendant makes no claim on appeal that the court's consideration of those factors was improper.

¶ 35 What this court wrote in *Klein* is also applicable to defendant's arguments on appeal in this case: "Whether a lengthy prison sentence is the best thing for defendant and his addiction is *** not the question before us." *Id.* ¶ 45. Instead, the question before us is whether the trial court's imposition of an extended-term sentence on the record in this case constituted an abuse of discretion. We conclude it does not.

¶ 36 We agree with the State's characterization of defendant's criminal history as "abysmal" and find no error in the trial court's determination that defendant's rehabilitative potential was significantly outweighed by the need to protect society from defendant.

¶ 37 C. This Court Will Not Consider Defendant's Citation to Materials Not in the Record

¶ 38 In support of defendant's claim that the trial court's extended-term eight-year sentence was excessive and an abuse of its discretion, defendant's brief cites various articles, studies, and cases that purport to show why imposing prison sentences upon nonviolent criminals is not good policy, even when, as here, a defendant's record of criminality is "abysmal." Defendant concedes none of the articles or information he argues to this court were ever presented to the trial court at sentencing but urges this court to consider that material nonetheless.

¶ 39 We emphatically—again—disagree and reject defendant's contention.

¶ 40 We say "again" because in *Klein*, we addressed this same contention at length and "emphatically reject[ed]" all of these same claims. (Another similarity with *Klein* is that defendant here even cites the same article, Roger K. Przybylski, *Correctional and Sentencing Reform for Drug Offenders*, that the defendant in *Klein* cited, which this court declined to consider. *Klein*, 2022 IL App (4th) 200599, ¶¶ 47, 52.) Because *Klein* is such a recent case, it had not yet been published when defendant wrote his initial brief to this court. However, in defendant's reply brief,

he did refer to *Klein*, as well as other decisions of this court reaching a similar result—namely, *In re R.M.*, 2022 IL App (4th) 210426, ¶ 46; *People v. Kuehner*, 2022 IL App (4th) 200325, ¶¶ 119-32; and *People v. Aquisto*, 2022 IL App (4th) 200081, ¶ 92. Defendant asks this court to reconsider our refusal to consider any secondary source that was not presented to the court below, and we once more emphatically reject that request.

¶ 41 Without repeating everything we wrote in *Klein* (which we now reaffirm) rejecting the same request the defendant in that case made, we will simply emphasize one portion of the basis for our rejection: defendant is asking this court, at least in part, to second-guess the trial court's sentencing discretion based upon matters never presented to the trial court at the sentencing hearing. As was the case in *Klein*, we will not reverse a trial court's decision—particularly one addressed to the trial court's discretion—based on evidence or an argument the trial court never heard.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's judgment.

¶ 44 Affirmed.