2022 IL App (4th) 200514-U

NOS. 4-20-0514, 4-20-0540 cons.

FILED
March 18, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br>Plaintiff-Appellee,<br>v.<br>JACOB MASCOLO,<br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the<br>Circuit Court of<br>Livingston County<br>Nos. 18CF306<br>18CF378<br><br>Honorable<br>Jennifer H. Bauknecht,<br>Judge Presiding. |

JUSTICE DeARMOND delivered the judgment of the court.
Presiding Justice Knecht and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held*: The appellate court affirmed, finding the trial court's sentence was not excessive.

¶ 2 On June 4, 2020, defendant, Jacob Mascolo, pleaded guilty to three counts of unlawful delivery of a controlled substance, a Class 3 felony (720 ILCS 570/401(g) (West 2018)) (Livingston County case No. 18-CF-306); delivery of cannabis, a Class 4 felony (720 ILCS 550/5(c) (West 2018)) (Livingston County case No. 18-CF-378); and possession with intent to deliver cannabis, a Class 4 felony (720 ILCS 550/5(c) (West 2018)) (Livingston County case No. 18-CF-378). In August 2020, the trial court sentenced defendant to (1) three concurrent prison terms of three years' imprisonment in case No. 18-CF-306 and (2) two concurrent prison terms of two years' imprisonment in case No. 18-CF-378, to be served consecutively to his sentence in case No. 18-CF-306.

¶ 3 Defendant appeals, arguing his sentence is excessive because (1) the trial court did not give adequate weight to the evidence in mitigation and (2) the court relied, in aggravation, on a mistaken belief defendant had tested positive for an opiate while awaiting sentencing. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In October 2018, the State charged defendant by information with three counts of unlawful delivery of a controlled substance (alprazolam, tramadol, and lorazepam), a Class 3 felony (720 ILCS 570/401(g) (West 2018)) (case No. 18-CF-306). In December 2018, the State charged defendant with one count of delivery of cannabis (more than 10 grams but less than 30 grams), a Class 4 felony (720 ILCS 550/5(c) (West 2018)), and one count of possession with intent to deliver cannabis (more than 10 grams but less than 30 grams), a Class 4 felony (720 ILCS 550/5(c) (West 2018)) (case No. 18-CF-378).

¶ 6 On June 4, 2020, defendant entered an open guilty plea to all five counts. There were no agreements or promises regarding sentencing. The State's factual basis for the guilty plea showed, in case No. 18-CF-306, defendant sold to a confidential source and an inspector from the Livingston County proactive drug unit alprazolam on July 7, 2018, tramadol on July 9, 2018, and lorazepam on July 17, 2018. In case No. 18-CF-378, defendant (while released on bond in case No. 18-CF-306) sold 25 grams of cannabis to a confidential source on December 18, 2018, and during a search of defendant's residence pursuant to a search warrant, officers found an additional 25 grams of cannabis. The court accepted defendant's guilty plea, ordered a presentence investigation report (PSI), and continued the matter for a sentencing hearing.

¶ 7 On August 10, 2020, the matter proceeded to sentencing. The State recommended the court sentence defendant to an aggregate five-year prison sentence, three concurrent terms of

three years' imprisonment for case No. 18-CF-306, and two concurrent terms of two years' imprisonment for case No. 18-CF-378. The State noted the sentences in case No. 18-CF-306 and case No. 18-CF-378 were mandatory consecutive sentences. The State characterized defendant's behavior as "escalating" and expressed concern that defendant, while released on bond, reengaged in "drug dealing." The State noted defendant had 11 prior criminal cases including two felonies. He was 29 years old at sentencing and had "been in trouble most of his adult life." The State noted although defendant had "obvious use issues," he had not made an effort to engage in substance abuse treatment since 2012. The State did not believe defendant would comply with probation and that probation would deprecate the seriousness of defendant's conduct.

¶ 8 Defense counsel requested a sentence of probation, emphasizing defendant's problems with substance abuse and defendant's need for treatment.

¶ 9 Defendant exercised his right to make a statement in allocution stating he had not been in trouble since his last arrest, approximately 18 months. He acknowledged he had a "drug use" problem but did not understand how a prison sentence "would help [him] in any way."

¶ 10 In pronouncing defendant's sentence, the trial court noted the statutory presumption in favor of probation but that defendant was subject to mandatory consecutive sentencing if sentenced to the Department of Corrections. The court stated it considered "not only the evidence and information in the presentence report but the financial impact incarceration would have, the evidence offered in aggravation and mitigation, substance abuse treatment *** arguments and statement in allocution." The court pointed out there were a number of things it takes into consideration "to determine whether or not a term of probation would deprecate the serious nature of the charges and be inconsistent with the ends of justice."

The court found, "over the course of these charges pending," defendant had not made significant progress. Defendant continued to use illegal substances, had been arrested for selling cannabis while on bond in a case in which he sold prescription drugs, and had not sought treatment during the 18 months charges had been pending. Additionally, the court referenced defendant's prior criminal history and the fact that defendant appeared to have "no other visible means of support at the time that [he] committed the three separate deliveries," which demonstrated a pattern of "distributing drugs within the community." The court agreed with the State's assessment that Defendant was not likely to comply with a term of probation, "and its [*sic*] bore out by your own actions," noting at one point he was unsuccessfully terminated from probation at least once previously. Ultimately, the court determined a sentence of probation in this case would "deprecate the serious nature of the charges and be inconsistent with the ends of justice because there are strong aggravating factors, including deterrence." The court then adopted the recommendations of the State and sentenced defendant to three concurrent terms of three years' imprisonment in case No. 18-CF-306 and two concurrent terms of two years' imprisonment in case No. 18-CF-378, with the sentences in case No. 18-CF-306 to be served consecutive to the sentences in case No. 18-CF-378.

¶ 11 On September 3, 2020, defendant filed a motion to reconsider his sentence. Defendant argued his sentence was excessive because "the Court failed to consider all mitigating factors" and "the sentence was excessive in consideration of all the factors before the Court." On October 8, 2020, at the hearing on defendant's motion, the court denied the motion, stating "the aggravating factors as set forth in more detail at the sentencing hearing are stronger than the mitigating factors in this case. I do believe a sentence of probation would deprecate the serious nature of the charges and be inconsistent with the ends of justice."

¶ 12 This appeal followed. We have docketed the appeal in case No. 18-CF-306 as No. 4-20-0514 and the appeal in case No. 18-CF-378 as No. 4-20-0540. In June 2021, this court allowed defendant's motion to consolidate the appeals.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant argues his sentence is excessive because the trial court (1) failed to give adequate weight to relevant mitigating factors and (2) relied in aggravation on a mistaken belief defendant had tested positive for an opiate while awaiting sentencing.

¶ 15 A trial court has broad discretion in imposing a sentence. *People v. Patterson*, 217 Ill. 2d 407, 448, 841 N.E.2d 889, 912 (2005). "The *** 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 (1999). "It is also required to consider statutory factors in mitigation and aggravation; however, 'the court need not recite and assign a value to each factor it has considered.' " *People v. Pina*, 2019 IL App (4th) 170614, ¶ 19, 143 N.E.3d 794 (quoting *People v. McGuire*, 2017 IL App (4th) 150695, ¶ 38, 92 N.E.3d 494). "It is presumed that the trial court considered the evidence in mitigation absent any contrary indication in the record." *People v. Anderson*, 325 Ill. App. 3d 624, 637, 759 N.E.2d 83, 94 (2001).

¶ 16 "On review, the sentence imposed by the trial court will not be reversed absent an abuse of discretion." *Pina*, 2019 IL App (4th) 170614, ¶ 20. "A sentence within statutory limits will not be deemed excessive and an abuse of the court's discretion unless it is 'greatly at variance with the spirit and purpose of the law or manifestly disproportionate to the nature of the offense.' " *Pina*, 2019 IL App (4th) 170614, ¶ 20 (quoting *Fern*, 189 Ill. 2d at 54).

¶ 17 In case No. 18-CF-306, defendant pleaded guilty to three counts of unlawful delivery of a controlled substance, a Class 3 felony (720 ILCS 570/401(g) (West 2018)). In case No. 18-CF-378, defendant pleaded guilty to delivery of cannabis (720 ILCS 550/5(c) (West 2018)) and possession with intent to deliver cannabis (720 ILCS 550/5(c) (West 2018)), each a Class 4 felony. A defendant convicted of a Class 3 felony is subject to a sentencing range of two to five years in the penitentiary (730 ILCS 5/5-4.5-40(a) (West 2018)), and a defendant convicted of a Class 4 felony is subject to a sentencing range of one to three years in the penitentiary (730 ILCS 5/5-4.5-45(a) (West 2018)). Defendant's sentences were in the middle of the sentencing range possible for both the Class 3 and Class 4 felonies. In light of a total of 11 previous convictions, two of which were also felonies, along with previous opportunities at probation, we cannot conclude the trial court's sentences were excessive. Because defendant's sentence to concurrent three-year terms in case No. 18-CF-306 and concurrent two-year terms in case No. 18-CF-378 are within the permissible sentencing ranges, the sentences are presumed to be proper, and this court will not disturb the sentences absent an abuse of discretion. See *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46, 19 N.E.3d 1070.

¶ 18 Defendant argues his sentence is excessive because the trial court did not give adequate weight to certain factors in mitigation, including his (1) "struggles with mental health, childhood trauma, and addiction" and (2) "significant rehabilitative potential." The State argues defendant has forfeited his claim because he "made only a general objection" in his motion to reconsider his sentence, stating the court "failed to consider all mitigating evidence." Defendant admits he did not identify the specific "relevant mitigating evidence" in his motion but asserts he "essentially" argued at his sentencing hearing "the same issue." Alternatively, defendant seeks plain-error review. We need not decide whether defendant has forfeited his claim because,

regardless of whether we review on the merits or for plain error, we conclude no error occurred. See *People v. Thompson*, 238 Ill. 2d 598, 613, 939 N.E.2d 403, 413 (2010) (stating the first step in plain-error analysis is to determine whether error occurred).

¶ 19 While defendant argues the trial court "did not mention" his mental health or childhood trauma at sentencing, minimized the impact of his addiction, and failed to consider his rehabilitative potential, we presume the sentencing court considered the mitigating evidence before it. See *People v. Flores*, 404 Ill. App. 3d 155, 158, 935 N.E.2d 1151, 1155 (2010). "The trial court is not required to expressly indicate its consideration of all mitigating factors and what weight each factor should be assigned." *People v. Kyse*, 220 Ill. App. 3d 971, 975, 581 N.E.2d 285, 288 (1991). Instead, it is presumed a trial court considered all relevant mitigating and aggravating factors in fashioning a sentence, and that presumption will not be overcome absent explicit evidence from the record the trial court failed to consider mitigating factors. *Flores*, 404 Ill. App. 3d at 158. Our review of the record reveals no such failure.

¶ 20 Defendant made a statement in allocution admitting he had a "drug use" problem, but he had not been in trouble during the pendency of his most recent case, approximately 18 months. The trial court stated it considered the information in the PSI. According to the PSI, defendant reported using cannabis, cocaine, heroin, methamphetamine, and ecstasy. Defendant's father had died at age 45 of a heroin overdose. Defendant denied experiencing mental health problems but stated he struggled with depression. Defendant reported being sexually abused by a babysitter as a young child. He was 29 years old and had struggled to maintain employment. Defendant's criminal history dated back to 2000, first as a juvenile offender and then as an adult. As an adult, defendant had 11 prior criminal convictions. Upon conclusion of the interview for the PSI, defendant underwent a drug screen. The test yielded a positive result for alcohol,

tramadol, buprenorphine, benzodiazepine, and cannabis. Defendant provided documentation for his prescriptions for tramadol and benzodiazepine.

¶ 21 Following arguments, the trial court stated it had considered "not only the evidence and information in the presentence investigation report but the financial impact incarceration would have, the evidence offered in aggravation and mitigation, substance abuse treatment *** arguments and statement in allocution." The court found defendant's argument that he had not been in trouble for 18 months disingenuous because he had been released on bond in case No. 18-CF-306 when he committed the offenses in case No. 18-CF-378. Although defendant claimed to be doing better, he admitted ongoing use of various drugs and had not sought treatment. The court acknowledged defendant suffered from addiction but found he made matters worse by failing to participate in substance abuse treatment and selling drugs in the community, including prescription pills. Citing the seriousness of the offenses and the need for deterrence, the court determined a sentence of probation would deprecate the serious nature of the charges and be inconsistent with the ends of justice. The court then sentenced defendant to three concurrent terms of three years' imprisonment in case No. 18-CF-306 and two concurrent terms of two years' imprisonment in case No. 18-CF-378, with the sentences in case No. 18-CF-306 to be served consecutive to the sentences in case No. 18-CF-378.

¶ 22 We find no affirmative showing the trial court failed to adequately consider the mitigating factors. To the contrary, the court knew defendant attributed his conduct to drug addiction. Arguably, the fact defendant had a difficult childhood and experienced depression may have contributed to the court's sentence near the middle of the available sentencing range and not the higher end of the range. When determining the sentence, the trial court must balance the interests of society against the defendant's potential for rehabilitation; however, the court is

not required to give greater weight to that factor than to the seriousness of the crime. "In fact, the seriousness of the crime committed is considered the most important factor in fashioning an appropriate sentence." *People v. Tye*, 323 Ill. App. 3d 872, 890, 753 N.E.2d 324, 341 (2001). Defendant was eligible for an aggregate term of eight years in prison. We do not find the court abused its discretion by sentencing defendant to an aggregate term of five years in prison.

¶ 23 Defendant additionally argues his sentence is excessive because the trial court relied, in aggravation, on a mistaken belief defendant had tested positive for an opiate (buprenorphine) on July 14, 2020, while awaiting sentencing. Defendant admits he tested positive for buprenorphine but, citing WebMD, contends buprenorphine is not an opiate but "is used to treat opiod [*sic*] dependence and addiction." Defendant did not raise this issue in the trial court but asserts this court should consider the issue under the plain-error doctrine "because the basis for the argument is based on the conduct of the judge."

¶ 24 The plain-error doctrine permits a reviewing court to consider unpreserved error under the following two scenarios:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1058 (2010).

¶ 25 We begin our plain-error analysis by first determining whether any error occurred at all. See *Sargent,* 239 Ill. 2d at 189. If error did occur, this court then considers whether either

of the two prongs of the plain-error doctrine has been satisfied. *Sargent*, 239 Ill. 2d at 189-90. Under both prongs, the defendant bears the burden of persuasion. *Sargent*, 239 Ill. 2d at 190.

¶ 26 Defendant participated in an interview for the PSI. Defendant reported using cannabis, cocaine, heroin, methamphetamine, and ecstasy. Upon conclusion of the interview, defendant underwent a drug screen. The test yielded a positive result for alcohol, tramadol, buprenorphine, benzodiazepine, and cannabis. Defendant provided documentation for his prescription for tramadol and benzodiazepine, but there was no evidence he was prescribed buprenorphine by a medical professional. Defendant admitted to drinking and using cannabis and buprenorphine and signed an admission-of-use form. Defendant consumed alcohol on July 1, 2020, and used cannabis and buprenorphine on June 30, 2020.

¶ 27 At the sentencing hearing, the trial court stated it had considered the information in the PSI. The court referenced the "positive screen" for alcohol, cannabis, and buprenorphine, stating in regard to buprenorphine, "Which I believe is an opiate." The court continued, stating, "Now I understand that is not heroin, but you are still using various substances over the course of the last 18 months that you claim you are doing better." In fact, defendant had reported during his interview for the PSI that he had used cannabis, cocaine, heroin, methamphetamine, and ecstasy. He had overdosed in April 2020. Contrary to defendant's assertion, the trial court's tentative reference to buprenorphine as an opiate is insignificant. The court clarified it was defendant's use of various controlled substances over the past 18 months that was of concern, whether an opiate or any other category of controlled substance. Defendant admitted he had used buprenorphine as recently as June 30, 2020, and did not provide documentation the substance was prescribed by a medical professional. Thus, the court did not err by finding in aggravation

that defendant used various controlled substances, including buprenorphine, during the 18 months following his last arrest.

¶ 28 Accordingly, we find defendant's sentence was not excessive and the court did not abuse its discretion.

¶ 29 III. CONCLUSION

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

¶ 31 Affirmed.