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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09-CF-3027
	)	
SHAUN J. RAMIREZ,	)	Honorable
	)	Thomas E. Mueller,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices McLaren and Hudson concurred in the judgment.

**ORDER**

*Held:* By not contemporaneously objecting, defendant forfeited his argument that the trial court erred at sentencing by relying on its personal knowledge of his gang membership; in any event, any such error did not affect defendant's sentence, as the court noted the issue only in response to defendant's statement in allocution and went on to impose an appropriate sentence notwithstanding defendant's substantial criminal history.

¶1 Following a jury trial, defendant, Shaun J. Ramirez, was convicted of escape (720 ILCS 5/31-6(a) (West 2008)). The trial court sentenced him to four years' imprisonment. Defendant appeals,

contending that the trial court erred by relying on its “personal experience” with defendant’s alleged gang membership in sentencing him. We affirm.

¶ 2 On October 23, 2009, defendant was on mandatory supervised release (MSR) for a robbery conviction. As a condition of MSR, he was subject to electronic monitoring. He was allowed to leave home to go to work, after which he was to return home by the shortest reasonable route.

¶ 3 Defendant worked at a car wash in Aurora. On October 23, he was arrested approximately six blocks from what would have been the shortest route home. At the time, he was with another man, who proved to be a gang member. Thus, he was charged with escape and having unlawful contact with a gang member (720 ILCS 5/25-1.1(a)(4) (West 2008)).

¶ 4 One month later, while housed in the Kane County jail awaiting trial, defendant punched another inmate. He was charged with aggravated battery as a result of that incident. Defendant wrote a letter to the trial judge in which he asked to be transferred to another facility because he was being threatened by other inmates, apparently because he was going to testify against one of them for allegedly shooting at him.

¶ 5 Defendant pleaded guilty to unlawful contact with a gang member, but later moved to withdraw his plea. After a trial, he was found guilty of escape. He subsequently pleaded guilty to aggravated battery.

¶ 6 In allocution, defendant thanked the judge for moving him away from the Kane County jail, where his life was being threatened. The trial court responded that

“it wouldn’t take a rocket scientist to figure out they are all gang bangers. This Court has personal experience with all of them mostly in juvenile court, including Mr. Ramirez, and I just want the record clear, I’m glad that Mr. Ramirez thinks that I was reaching out for his

safety and that's why I ordered that he be housed in Kendall County. I was more concerned with the safety of the employees at the Kane County Jail. It's enough of a hell hole over there, and when you get gang members on a pod that decide they're going to act like animals against one another, no employee should have to deal with that, and that really was the motivating factor for this court in ordering that Mr. Ramirez be housed in Kendall County where I knew that he was less apt to engage in further criminal thuggery with other opposing gang members. \*\*\* You've been a gang member all of your life as far as I can tell.”

¶ 7 The trial court at first stated that it would impose concurrent seven-year prison terms. Upon being informed that the terms had to be consecutive, the court imposed consecutive four-year terms. Defendant moved to reconsider the sentence, arguing, *inter alia*, that the trial court relied on information not in the record concerning defendant's gang membership. The trial court denied the motion and defendant timely appeals.

¶ 8 Defendant argues that the trial court erred by basing its sentence in part on the court's “personal experience” with defendant's alleged gang membership. Defendant contends that nothing in the record, including the presentence report, shows that he was a gang member, such that the court's reliance on its alleged personal knowledge of this fact was improper.

¶ 9 Defendant further contends that the court's personal knowledge likely affected the sentence it imposed. Defendant contends that his violation of the escape statute was “technical,” in that, while returning home from work, he merely strayed a few blocks from the shortest route. Thus, he contends, the trial court's personal knowledge of his gang membership must have played a role in the sentencing decision, and he should receive a new sentencing hearing before a different judge.

¶ 10 Generally, where a sentence is within the statutory limits, we may not disturb it absent an abuse of discretion. *People v. Vasquez*, 2012 IL App (2d) 101132, ¶ 68. Nevertheless, “where a trial court relies upon an improper factor in sentencing and a court of review cannot ascertain from the record whether the consideration of that factor affected the sentence, the cause must be remanded for resentencing.” *People v. Glenn*, 363 Ill. App. 3d 170, 180 (2006). Moreover, a “ ‘determination made by the trial judge based upon a private investigation by the court or based upon private knowledge of the court, untested by cross-examination, or any of the rules of evidence constitutes a denial of due process.’ ” *People v. Dameron*, 196 Ill. 2d 156, 171-72 (2001) (quoting *People v. Wallenberg*, 24 Ill. 2d 350, 354 (1962)).

¶ 11 Initially, we note that defendant did not contemporaneously object to the trial court’s comments, so that he forfeited the issue. See *People v. Enoch*, 122 Ill. 2d 176, 186-88 (1988) (both an objection at trial and a written posttrial motion are necessary to preserve an alleged error for review). Defendant contends that he preserved the issue by including it in his motion to reconsider the sentence, but argues that the issue is not subject to forfeiture in any event. He cites *Dameron*, where the court stated that “ ‘[a]pplication of the waiver rule \*\*\* is less rigid where the basis for the objection is the circuit judge’s conduct.’ ” *Dameron*, 196 Ill. 2d at 171 (quoting *People v. Davis*, 185 Ill. 2d 317, 343 (1998)).

¶ 12 *Dameron*, however, did not hold that forfeiture was never appropriate in cases such as this one, only that its application was “less rigid.” This is not an appropriate case to overlook the forfeiture, for the simple reason that the information about which the trial court applied its personal experience was also within defendant’s personal knowledge. Put more simply, defendant knew whether he was in a gang or not. If he was not, he could simply have said so and likely prevented

the alleged error. Moreover, although defendant raised the issue in general terms in his postsentencing motion, he never specifically denied being in a gang. Even in his appellate brief, defendant does not deny gang membership. Under the circumstances, defendant's failure to object or correct the judge's understanding can be viewed as a tacit judicial admission that the judge was correct. See *People v. Soto*, 342 Ill. App. 3d 1005, 1013 (2003); Illinois Rules of Evidence 8.01(4)9.

¶ 13 In *People v. Feldman*, 409 Ill. App. 3d 1124 (2011), the defendant entered a negotiated plea of guilty to possession of a controlled substance (prescription medications). During the factual basis the defendant did not object when asked by the trial court. Less than a month later, defendant filed a motion to withdraw the plea, claiming for the first time that he "believes he can verify he had a prescription for the pills found in his possession." *Id.* at 1125. The trial court denied the defendant's motion to withdraw his plea. In affirming the trial court, the Fifth District noted:

¶ 14 "A judicial admission is binding upon the party making it and may not be controverted by other evidence. *Renshaw v. Black*, 299 Ill. App. 3d 412, 418, 233 Ill. Dec. 703, 701 N.E.2d 553 (1998). If the fact admitted to is a concrete fact within the peculiar knowledge of the individual who admits it, an opposing party is entitled to hold the individual to the fact, and the individual may not have the benefit of other evidence that might tend to falsify the admission unless the court finds that the individual has provided a reasonable explanation of it due to mistake." *Huber v. Black & White Cab Company*, 18 Ill. App. 3d 186, 190-91, 151 N.E.2d 641 (1958)."

¶ 15 It was defendant who brought up the subject of his move to another jail to await trial when he, during allocution, thanked the trial court. The court in response explained his reasons for granting defendant's request for a move which, as already explained, involved gang activity and the

judge's observation that defendant was a gang member all of his life as far as the trial court could tell. Whether defendant was a gang member was a fact within his peculiar knowledge. Both defendant and his attorney had ample opportunity to correct or contest the trial court's opinion that defendant was a gang member. Clearly, the trial court could have considered defendant's misconduct in jail as an aggravating factor in its determination of defendant's propensity towards violence and his potential for rehabilitation. *People v. Westbrook*, 202 Ill. App. 3d 836 (1992).

¶ 16 Defendant takes a few words out of context and argues that the trial court improperly considered "matters outside the record." We do not appreciate this sort of gamesmanship. Defendant brought up the subject. When he failed to contest the trial court's opinion, the State was not required to produce evidence of defendant's gang membership or activities. See *Lossman v. Lossman*, 274 Ill. App. 3d 1 (1995) (a judicial admission makes it unnecessary for an opposing party to introduce evidence in support thereof). Furthermore, defendant has failed to allege that there is even the slightest probability of a different result were further proceedings to be held.

¶ 17 In any event, the record demonstrates that the trial court gave insignificant weight, if any, to defendant's alleged gang membership. Where a trial court relies on an improper factor in sentencing, we must reverse unless we can conclude from the record that the weight placed on the improper factor was so insignificant that it did not increase the defendant's sentence. *People v. Whitney*, 297 Ill. App. 3d 965, 971 (1998). We focus not on a few words or statements of the trial court, but on the entire record. *People v. Fetter*, 227 Ill. App. 3d 1003, 1010 (1992).

¶ 18 We do not believe that the trial court's comments can be said to have resulted in an inappropriate sentence based upon our review of the entire record. In imposing the sentence, the

trial court extensively discussed defendant's history of juvenile delinquency adjudications—which led to three separate trips to the juvenile Department of Corrections—and adult criminal conduct—which included at least eight felony convictions. In denying defendant's motion to reconsider the sentence, the court emphasized that the sentence—which was in the bottom half of the applicable sentencing range—was appropriate in light of defendant's “significant” criminal history and was the only appropriate alternative in light of “the factors in aggravation and mitigation.” Thus, we conclude that the sentence was based on proper factors and that the allegedly improper factor did not affect it.

¶ 19 The cases on which defendant relies are distinguishable. In *People v. Ross*, 303 Ill. App. 3d 966 (1999), the error was not that the trial court relied on information outside the record, but that the court's recollection of evidence in the record was incorrect. The court erroneously stated that the motive for the offense was gang rivalry when the evidence showed that the defendant and the victim belonged to allied gangs and agreed to fight despite that affiliation. *Id.* at 985. In *People v. Zapata*, 347 Ill. App. 3d 956 (2004), the trial court's remarks evidencing its distaste for gang violence were the “dominant factor” in fixing the defendant's sentence, although there was no evidence that the murder in question was gang related. *Id.* at 966. Here, as noted, the court's remarks were isolated and not made in conjunction with imposing the sentence. Instead, defendant's criminal history was the overriding factor in the court's sentencing decision.

¶ 20 Accordingly, the judgment of the circuit court of Kane County is affirmed.

¶ 21 Affirmed.