

No. 1-12-3377

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 100
)	
ANTHONY HENRY,)	Honorable
)	William J. Kunkle,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

O R D E R

¶ 1 *Held:* We affirm the judgment where defendant was provided a fair sentencing hearing, and amend the mittimus.

¶ 2 Following a bench trial, defendant Anthony Henry was convicted of aggravated battery with a firearm and sentenced to 12 years' imprisonment. On appeal, defendant seeks a new sentencing hearing, contending that he was denied a fair hearing where the trial court considered

his refusal to admit guilt against him, and relied on his prior conviction for aggravated unlawful use of a weapon (AUUW). Defendant also contends that the mittimus should be amended to reflect the recodified statutory citation for aggravated battery with a firearm. We affirm the judgment and amend the mittimus.

¶ 3 At trial, the evidence showed that on November 23, 2009, 50-year-old Tommie Wilson was in the backyard of the building he lives in and manages at 7129 South East End Avenue in Chicago. While Wilson was doing yard work, defendant shot him in his left leg. Defendant was arrested two days later and Wilson identified him as the shooter after a show-up. Defendant, however, testified that he heard seven or eight gunshots as he was walking home, and ducked behind a car that was parked in front of 7132 South East End Avenue. According to defendant, he did not shoot Wilson.

¶ 4 At the sentencing hearing, the State argued in aggravation that, at the time defendant committed the instant offense, he was on probation for a Class 4 AUUW (08 CR 1377201), to which he pled guilty. The State also argued that defendant shot the victim in order to "show him who was boss" because Wilson had previously asked defendant not to loiter in front of the building. Furthermore, defendant had a child he had never met, quit his job, and shot an innocent victim who did nothing against him. The State recommended a sentence close to the maximum of 30 years in prison.

¶ 5 In mitigation, defense counsel argued that defendant was 22 years old, had only one other felony conviction, and had a close relationship with his grandfather. Defendant had a ninth grade education and was in special education classes. Counsel also indicated that defendant's lack of contact with his child was due to his incarceration, he was working until he was incarcerated, and that he had a job waiting for him upon release. Defendant suffered from medical issues such as

seizures and depression, and had prior issues with alcohol and marijuana. Counsel declared that defendant continued to maintain his innocence at the time of sentencing, and requested the minimum sentence of six years in prison.

¶ 6 In allocution, defendant stated, "Sorry for my actions. I have a child I'm trying to get back in my family. My grandfather, I have nothing else for my son. I want to apologize to everybody, that's it."

¶ 7 Following arguments in aggravation and mitigation, the trial court sentenced defendant to 12 years' imprisonment. In doing so, the court stated:

"I've reviewed the pretrial investigation report ***[.]*** I agree there is some possible foundation here for rehabilitation, but the seriousness of the offense and particularly the existence of the commission of this weapon offense while already on probation for a weapon offense weighs very heavily in determining the appropriate sentence in this matter.

As to the facts, this entirely innocent victim who in no way provoked or warranted the senseless act and while the defendant argues that he has some basis for rehabilitation, he is also arguing that he is innocent of the offense for which he was found guilty.

Considering all those things, particularly the seriousness of the offense, the sentence will be twelve years in the Illinois Department of Corrections."

¶ 8 After the sentencing hearing, defendant filed a motion to reconsider his sentence, contending that it was excessive in light of his background. He also maintained that the court

improperly considered in aggravation matters that were implicit in the offense, and he was improperly penalized for exercising his right to trial. The trial court denied the motion.

¶ 9 On appeal, defendant contends that the trial court relied on improper factors in aggravation during his sentencing hearing. He first maintains that the court improperly considered his refusal to admit guilt as an aggravating factor.

¶ 10 Initially we note that although defendant filed a postsentencing motion alleging that his sentence was excessive, he failed to argue that the trial court improperly considered his refusal to admit guilt as an aggravating factor at sentencing. He thus forfeited this issue. See *People v. Bass*, 220 Ill. App. 3d 230, 239 (1991) (the failure to raise an issue with any specificity in a posttrial motion forfeits the issue).

¶ 11 A reviewing court may bypass normal forfeiture principles and consider unpreserved claims of error in specific circumstances under the plain error rule. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10. In the sentencing context, a defendant must show either that the evidence at sentencing was closely balanced, or the error was so serious as to deny the defendant a fair sentencing hearing. *Id.* The first step of plain error review is to determine whether any error occurred. *Id.* Defendant bears the burden of persuasion in a plain error analysis. *Id.*

¶ 12 Defendant was subject to a sentence of 6 to 30 years in prison for the Class X offense of aggravated battery with a firearm. 720 ILCS 5/12-4.2(a)(1)(b) (West 2008), now codified at 720 ILCS 5/12-3.05(h) (West 2012); 730 ILCS 5/5-8-1(a)(3) (West 2008), now codified at 730 ILCS 5/5-4.5-25(a) (West 2012). A trial court cannot impose a more severe sentence simply "because a defendant refuses to abandon [a] claim of innocence." *People v. Byrd*, 139 Ill. App. 3d 859, 866 (1986), citing *People v. Speed*, 129 Ill. App. 3d 348, 349 (1984). However, reliance on an improper factor in aggravation does not necessarily warrant any relief where the record

demonstrates that the weight placed on the improperly considered factor did not result in a "harsher sentence than might otherwise have been imposed." *People v. Freeman*, 404 Ill. App. 3d 978, 996-97 (2010), citing *People v. Phelps*, 211 Ill. 2d 1, 11-12 (2004). Therefore, if it appears from the record that the weight placed on the improperly considered factor was so insignificant that it did not result in a greater sentence, we need not remand for resentencing. *Freeman*, 404 Ill. App. 3d at 996.

¶ 13 Here, defendant failed to satisfy his burden to establish plain error. Defendant alleged that he was denied a fair sentencing hearing because the court considered his refusal to admit guilt where it stated, "while the defendant argues that he has some basis for rehabilitation, he is also arguing that he is innocent of the offense for which he was found guilty." However, the record shows that the weight, if any, placed on this factor was so insignificant that it did not result in a harsher sentence. *Freeman*, 404 Ill. App. 3d at 996-97. In viewing the court's comments in their totality (*People v. Ward*, 101 Ill. 2d 443, 454 (1984)), its explanation for the sentence imposed was based on the seriousness of the offense and the fact that defendant was on probation when it occurred. The court specifically stated, "I agree there is some possible foundation here for rehabilitation, but the seriousness of the offense and particularly the existence of the commission of this weapon offense while already on probation for a weapon offense weighs very heavily in determining the appropriate sentence in this matter." The court also stated that the innocent victim in no way provoked or warranted defendant's senseless act, and found that a 12-year sentence was warranted particularly because of the seriousness of the offense. Moreover, the court's challenged statement was appropriate commentary on defendant's potential for rehabilitation where defense counsel argued in mitigation that defendant maintained his innocence at the time of sentencing. If the trial court committed any error here, such error did

not rise to the level of plain error and defendant's procedural default of his sentencing challenge must stand. *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 14 In reaching this conclusion, we find *Byrd* and *Speed*, relied on by defendant, distinguishable from the case at bar where the reviewing courts in those cases found that the trial courts improperly considered the defendants' denial of guilt as an aggravating factor at sentencing. See *Byrd*, 139 Ill. App. 3d at 866 (where the trial court stated that when it compared the defendant who continued to deny his involvement to the codefendant who admitted his crime, he found that there was very little sign of redemption); *Speed*, 129 Ill. App. 3d at 351 (where the trial court stated, "I thought perhaps a ten year sentence might be appropriate, but when Mr. Speed said he did not commit the crime which he stands charged and convicted again tilted the scale the other way"). Unlike those cases, the trial court's statement here cannot be interpreted to mean that defendant would have received a lighter sentence had he admitted his guilt. Rather, our review of the record shows that the trial court's comment was an insignificant factor in the court's decision to sentence him to 12 years where its focus was on the seriousness of the offense.

¶ 15 Defendant also contends that this matter should be remanded for a new sentencing hearing because the trial court improperly considered his prior 2008 Class 4 conviction for AUUW because the Class 4 form was declared unconstitutional in *People v. Aguilar*, 2013 IL 112116. As pointed out by the State, this court recently rejected a similar argument in *People v. Ware*, 2014 IL App (1st) 120485, ¶¶ 33-36, in which we held that we did not have jurisdiction to review whether the prior AUUW convictions were now void, and that resentencing was unnecessary where the prior convictions were not elements of the charged offenses and had not served as the basis for any statutory enhancement.

¶ 16 Here, as in *Ware*, this court does not have jurisdiction to review defendant's prior felony conviction for AUUW where the notice of appeal is limited to his conviction for aggravated battery with a firearm. Therefore, if defendant wishes to challenge his prior conviction for AUUW, he must file appropriate pleadings. *Id.*, ¶ 34. Moreover, we need not remand the case for resentencing where defendant's prior AUUW conviction was not an element of the charged offense and did not serve as a basis for any statutory enhancement or extended-term sentence. *Id.*, ¶ 35.

¶ 17 Defendant asserts in his reply brief, however, that we should follow this court's decision in *People v. Dunmore*, 2013 IL App (1st) 121170, and that *Dunmore* is in conflict with *Ware* on this issue. We disagree. In *Dunmore*, we held that since defendant's underlying conviction was void pursuant to *Aguilar*, the order of probation based on that conviction was void as was a sentence imposed after revocation of probation. *Id.*, ¶ 9. The procedural posture of *Dunmore* differs from this case. In *Dunmore*, the probation based on the void prior AUUW conviction was the subject of the appeal. *Id.*, ¶ 6. Here, the trial court merely noted defendant's probation status as one of multiple aggravating factors it considered at sentencing. Furthermore, *Ware* and *Dunmore* are not in conflict with each other on this issue. As pointed out by defendant in his reply brief, the court in *Ware* used the *Dunmore* decision as support for its holding. Specifically, in a parenthetical, the *Ware* court noted that *Dunmore* found that although it had authority to vacate the AAUW conviction based on *Aguilar* on appeal from a revocation of the sentence of probation imposed on that AUUW conviction, it did not have jurisdiction to consider the State's request to remand the matter so it could reinstate *nol-prossed* charges. *Ware*, 2014 IL App (1st) 120485, ¶ 35. Therefore, we follow *Ware*'s holding that we need not remand the case for

resentencing where defendant's prior AUUW conviction was not an element of the charged offense and did not serve as a basis for any statutory enhancement or extended-term sentence.

¶ 18 We also find *United States v. Tucker*, 404 U.S. 443 (1972), and *People v. Fischer*, 100 Ill. App. 3d 195 (1981), relied on by defendant, distinguishable from the case at bar. In *Tucker*, 404 U.S. at 444, the court sentenced the defendant to 25 years in prison based, in part, on his criminal history involving three felonies. However, two of those convictions were vacated in a collateral proceeding before he initiated the litigation that attacked his current sentence. *Id.* at 444-46. Here, in contrast defendant never had his prior AUUW conviction overturned, and never even collaterally attacked that prior conviction as unconstitutional. In *Fischer*, 100 Ill. App. 3d at 199, the defendant asserted that the trial court relied on an improper factor in sentencing him to seven years' imprisonment for voluntary manslaughter. The defendant pointed out that, at the sentencing hearing, the court heard that the defendant had a prior conviction for possession of marijuana, and that the statute under which the defendant had previously been convicted was later declared unconstitutional. *Id.* at 199-200. The *Fischer* court held that the sentencing court improperly relied on the marijuana conviction, thus abusing its discretion. *Id.* at 200. *Fischer*, however, is distinguishable where the trial court knew at the time of sentencing that the statute had been declared unconstitutional, and yet still relied on the void conviction in sentencing. *Id.* Here, our supreme court did not issue its decision in *Aguilar* until after defendant was sentenced in 2012. We continue to follow *Ware's* detailed analysis and holding on this issue.

¶ 19 Lastly, defendant maintains that the mittimus includes an incorrect statutory citation for defendant's conviction and, therefore, must be corrected. The mittimus states that defendant was convicted of aggravated battery with a firearm and cites to section 12-4.2 of the Criminal Code of 1961. 720 ILCS 5/12-4.2 (West 2008)(entitled aggravated battery with a firearm). In fact,

section 12-4.2 was in effect in 2009 when the crime occurred, when defendant was arrested, and when the indictment issued. Accordingly, the statutory citation in the mittimus corresponds to the charge for which he was convicted.

¶ 20 Defendant, however, directs attention to Public Act 96-1551 which became effective July 1, 2011, and which amended and reorganized a significant portion of the Criminal Code of 1961. In particular, Public Act 96-1551 repealed section 12-4.2 and incorporated it into the aggravated battery statute as aggravated battery based on use of a firearm in section 12-3.05(e)(1) of the Criminal Code of 2012 (720 ILCS 5/12-3.05(e)(1) (West 2012)).

¶ 21 Defendant submits that the new statute citation in the 2012 Criminal Code (section 12-3.05(e)(1)) must be on his mittimus rather than the citation in the 1961 Criminal Code (section 12-4.2). We do not agree. It is well established that a charged offense remains valid where, as here, it was committed before the effective date of the legislation repealing the section under the general savings clause of section 4 of the Statute on Statutes (5 ILCS 70/4 (West 2012)). Nevertheless, the State does not contest the modification of the mittimus. Although we do not consider the statutory citation in defendant's mittimus as *incorrect*, we will grant defendant's request to amend it to reflect the citation for the recodified section defining aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)).

¶ 22 We affirm the judgment of the circuit court in all other respects.

¶ 23 Affirmed; mittimus amended.