2016 IL App (1st) 141609-U

SECOND DIVISION
August 30, 2016

No. 1-14-1609

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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.	)	Nos. 12 CR 17019
	)	12 CR 17020
	)	12 CR 17021
	)	
MARK URRUTIA,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Neville and Simon concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's sentence of consecutive prison terms is affirmed where he forfeited the argument on appeal and the plain-error doctrine does not apply; and forfeiture aside, the trial court did not abuse its discretion in imposing consecutive sentences.

¶ 2 Following a bench trial, defendant Mark Urrutia was convicted of one count of violation of an order of protection (720 ILCS 5/12-3.4(a) (West 2012)) in each of three consolidated cases. The trial court sentenced him to two extended-term sentences of four years' imprisonment and

one maximum extended-term sentence of six years' imprisonment, all sentences to run consecutively. On appeal, defendant argues it was an abuse of discretion to order his sentences be served consecutively where the record did not support the finding that consecutive sentencing was needed to protect the public. We affirm.

¶ 3 Defendant's charges stemmed from three separate occasions involving his contact with his ex-girlfriend, Adriane Valentin. In case number 12 CR 17019, defendant was charged by information with two counts of violation of an order of protection based on acts occurring on August 18, 2012. In case number 12 CR 17020, defendant was charged by information with two counts of violation of an order of protection based on acts that occurred on June 2, 2012. In the final case, number 12 CR 17021, defendant was charged by information with one count of aggravated stalking and two counts of stalking based on acts that occurred between June 2, 2012 and August 20, 2012, and two counts of violation of an order of protection based on events that occurred on August 20, 2012. The State moved to consolidate the prosecutions, which the trial court allowed. Prior to trial, the trial court allowed, in part, the State's motion to admit proof of other crimes.

¶ 4 Valentin testified that she first met defendant in 1995 and the two dated until 2000. She testified that, in 2002, after a court date in which she attempted to renew an order of protection against defendant, she argued with defendant, and he hit her in the face. Valentin pressed charges and defendant pleaded guilty to misdemeanor domestic battery and violation of an order of protection.

¶ 5 Valentin testified that on October 20, 2003, while she was working in the basement of a property she owned, defendant entered the basement without her permission. He looked at her with a blank stare, causing her to become scared. When one of Valentin's tenants exited a nearby

bathroom, defendant left Valentin's property. Defendant again pleaded guilty to violation of an order of protection for this incident.

¶ 6 Two days after defendant had entered Valentin's basement, he again entered the basement, this time through a window. Valentin alerted Rueben Cabrera, whom she was with. When Cabrera approached defendant, defendant struck him with a flashlight. Defendant pleaded guilty to home invasion and violation of an order of protection.

¶ 7 On February 17, 2008, while Valentin was at her job as a high school counselor, defendant telephoned her and asked her what she had done for Valentine's Day. Valentin called the police and defendant subsequently pleaded guilty to violation of an order of protection for the call. On October 19, 2009, again while Valentin was at her job as a high school counselor, defendant called her three times and asked her what she had done for Sweetest Day. Defendant subsequently pleaded guilty to violation of an order of protection.

¶ 8 Valentin testified that following this incident, she received on March 18, 2010, another order of protection. The order of protection was subsequently admitted into evidence. The record shows this order, number 09 CR 22357, was active during the events leading to the charges at bar.

¶ 9 Valentin testified that, on June 2, 2012, she drove to Los Comales restaurant to pick up dinner on her way home from working at her consignment shop on 18th Street. When Valentin exited the restaurant and was crossing the street, she observed defendant quickly drive his car to a parking spot behind Valentin's car. Defendant told her that he did not kick down the door of her apartment, that he did not want any trouble, and that he had "just" told her mother he still loved Valentin. Valentin reminded him that she had an order of protection against him, to which defendant replied, "you can't change me." She called the police the next day.

¶ 10 On August 18, 2012, Valentin and her employee, Mannie Verduzco, were getting into her car in front of her consignment shop when she saw defendant approaching in his car, "really, really slow." Valentin stated that defendant made eye contact with her as he drove past her car, and his face was "spiteful." Valentin called the police.

¶ 11 On August 20, 2012, Valentin was at home when Hector Pedroza arrived unexpectedly. Pedroza told her defendant had called him three times, asking him to tell Valentin that defendant "don't want no trouble" and wanting to know what she was going to do. When Valentin saw defendant on the two prior occasions that year, she "fear[ed] for [her] life" and thought she "was going to die." Hearing his message from Pedroza, she felt helpless.

¶ 12 Valentin admitted that, while defendant was incarcerated, she wrote him letters, visited him every other weekend or every three weeks, and accepted over 500 collect phone calls from defendant. She explained that she was afraid of retaliation by defendant when he was released. When defendant was released from prison, she went with others to pick him up and visited him while he was on house arrest. Valentin had traveled with a group, including defendant, to Puerto Rico in 2002, and had helped defendant sell real estate for years. Valentin stated that there were a few times where she did not show up to court to pursue charges against defendant.

¶ 13 Rueben Cabrera, a former boyfriend of Valentin, testified that he was staying the night with Valentin on October 22, 2003, when Valentin awoke him because someone had entered the house through a window. Cabrera then saw defendant walking toward him with a flashlight. Defendant lunged at Cabrera, hit him in the head with the flashlight, and the two began to fight.

¶ 14 Hector Pedroza testified that he had known the defendant his entire life and that he knew Valentin because she lived across the street from Pedroza's mother. On August 20, 2012, defendant called Pedroza "about three times," asking him to tell Valentin that defendant "didn't

want no problems, no trouble." Pedroza later went to Valentin's home and relayed that message to her.

¶ 15 Mannie Verduzco testified that he had known Valentin for three years and used to work at her consignment shop located at 1734 West 18th Street in Chicago. On the night of August 18, 2012, Verduzco and Valentin closed the consignment shop around 10 p.m. and proceeded to her car that was parked on 18th Street. Verduzco entered the front passenger side of the west-facing vehicle and Valentin got into the driver's seat. While they were still parked, defendant approached in his vehicle, heading east on 18th Street at a slow rate of speed. As defendant slowly passed, he stared at Valentin with an "upset" facial expression, but he did not stop his vehicle.

¶ 16 Defense witness Rosemarie Sierra testified that defendant is the father of her son and would come to her house to reconnect with his son. She stated further that Los Comales restaurant on 18th Street is near her house.

¶ 17 Defendant's nephew Rene Salazar testified that defendant lived with Salazar's mother while on house arrest following his release from prison. He saw that Valentin visited defendant there four to five times, staying for several hours. Salazar stated Valentin never appeared afraid of defendant.

¶ 18 Defendant's sister Catherine Aguilar testified that, while defendant was on house arrest, Valentin visited him in Aguilar's home. While defendant and Valentin were dating, Aguilar observed marks on defendant's body, which defendant said were caused by Valentin. Aguilar testified that defendant had earned his associate's degree, was getting closer to his son, and had started ignoring Valentin. Valentin had asked her to put a phone line in Aguilar's name so Valentine could continue to call defendant while he was in prison.

¶ 19 Defendant testified that he dated Valentin from 1995 to 2000. From 2000 to 2003, the two sold real estate together. Valentin contacted him despite having orders of protection against him. At times, she would get physical with him, but he did not leave her because of the "real estate deals" and her promises that she would no longer call the police. Defendant admitted pleading guilty in 2005 to home invasion. While in prison on that conviction, Valentin sent him letters, visited him, and spoke with him on the phone daily. Defendant admitted making phone calls to Valentin in 2008 and 2009, resulting in his pleading guilty to violation of an order of protection and more prison time.

¶ 20 On June 2, 2012, defendant was on his way to see his son when he pulled into a parking spot by Los Comales. As he was looking for his wallet, he heard Valentin say to him "I knew I'd see you tonight." Defendant responded, "I don't want no trouble," and then left the area. On August 18, 2012, defendant was leaving a block party on 18th Street and driving to his son's house when he saw Valentin. He denied intentionally going to the area to see her or knowing she owned a business in that area. His first reaction when he saw Valentin on both occasions was to "get the hell away from her." Defendant admitted to pleading guilty to violations of orders of protection and home invasion.

¶ 21 The trial court found defendant guilty of two counts of violating an order of protection in each of the three cases, but not guilty of the stalking charges. It denied defendant's motion to reconsider ruling, and proceeded to sentencing.

¶ 22 In aggravation, the State presented a victim impact statement from Valentin and reminded the court of the extensive criminal history of defendant. It asked for the maximum extended-term sentence for each conviction, as well as a finding that consecutive sentences were necessary to protect the public.

¶ 23 In mitigation, defendant argued that a minimum sentence was warranted as no violence had occurred. He offered a letter from "Sgt. Liboy," who referred to defendant as a "model citizen among our pretrial detainees." Defendant then allocuted explaining his history with Valentin and his attempts to turn his life around despite her efforts to "sabotage" him.

¶ 24 The trial court merged the convictions in each case. It sentenced defendant to extended-terms of four years' imprisonment in case numbers 12 CR 17019 and 12 CR 17020, and to the maximum extended-term sentence of six years' imprisonment in case number 12 CR 17021. The trial court ordered all sentences to run consecutively, noting the need to "protect the public."

¶ 25 The trial court denied defendant's written motion to reconsider sentence, and defendant filed a timely notice of appeal.

¶ 26 On appeal, defendant does not challenge his conviction. Instead, he argues the trial court abused its discretion in imposing consecutive terms of imprisonment where the record did not establish that consecutive terms were necessary to protect the public. He asks that we order his sentences to run concurrently.

¶ 27 As a threshold matter, the State contends that defendant has forfeited his argument on appeal by not raising the issue in the trial court. Defendant responds that, to the extent he did not raise the specific argument in his written motion to reconsider sentence or orally in support of that motion, we should review his argument under the plain-error doctrine.

¶ 28 In order to preserve a sentencing issue for appeal, the defendant must raise the issues in the trial court, including through a written motion to reconsider sentence. *People v. Heider,* 231 Ill. 2d 1, 14-15 (2008). This requirement "allows the trial court an opportunity to review a defendant's claim of sentencing error and save the delay and expense inherent in appeal if the claim is meritorious." *Heider,* 231 Ill. 2d at 18.

¶ 29 Defendant filed and argued a motion to reconsider sentence but failed to raise therein his specific challenge to the imposition of consecutive sentences. As defendant did not raise the issue orally or through written motion in the trial court, it is forfeited on appeal. See *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010).

¶ 30 However, sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain-error doctrine is a narrow and limited exception to the rules of forfeiture. *People v. Bannister,* 232 Ill. 2d 52, 65 (2008). In order to obtain relief under this doctrine, the defendant must first show an obvious error occurred. *Hillier*, 237 Ill. 2d at 545. Next, in the sentencing context, a defendant must show "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* When a defendant fails to establish plain error, that procedural default must be honored. *Bannister,* 232 Ill. 2d at 65.

¶ 31 Defendant urges us to proceed under the first prong, that is, the evidence in mitigation and aggravation at sentencing was closely balanced. Before we reach that prong, however, we must first determine whether error occurred at all. *People v. Sargent,* 239 Ill. 2d 166, 189 (2010). "This requires a ' "substantive look" ' at the issue." *People v. Naylor,* 229 Ill. 2d 584, 593 (2008) (quoting *People v. Johnson,* 208 Ill. 2d 53, 64 (2003)).

¶ 32 The Uniform Code of Corrections allows for both mandatory and permissive consecutive sentencing terms. See 730 ILCS 5/5-8-4(c), (d) (West 2012). A violation of an order of protection conviction is a Class 4 felony where, as here, the defendant has a prior conviction for violating an order of protection. 720 ILCS 5/12-3.4(d) (West 2012). A Class 4 felony is punishable by one to three years' imprisonment or a maximum six years' imprisonment if the court imposes an extended-term sentence. 730 ILCS 5/5-4.5-45(a) (West 2012). The sentences

can be concurrent or consecutive. 730 ILCS 5/5-4.5-45(g) (West 2012). Therefore, the issue here concerns permissive consecutive sentencing.

¶ 33 As relevant here, the trial court is empowered to impose permissive consecutive terms:

> "If, having regard to the nature and circumstances of the offense and the history and character of the defendant, it is the opinion of the court that consecutive sentences are required to protect the public from further criminal conduct by the defendant, the basis for which the court shall set forth in the record." 730 ILCS 5/5-8-4(c)(1) (West 2012).

¶ 34 Although consecutive sentences are to be given sparingly, the trial court has wide discretion in determining whether to impose a consecutive sentence, and a reviewing court should not interfere with that decision unless there has been an abuse of discretion. *People v. Buckner,* 2013 IL App (2d) 130083, ¶ 36. The court need not recite the specific statutory language when determining that consecutive sentences are warranted. *People v. Hicks,* 101 Ill. 2d 366, 375 (1984). However, the record must show the court is "of the opinion that a consecutive term is necessary for the protection of the public." *Id.*

¶ 35 After reviewing the record, we find that the trial court did not abuse its discretion in imposing consecutive sentences. In sentencing defendant, the trial court specifically stated, "consecutive sentencing is required to protect the public." It found defendant to be a danger to the public based on his prior and ongoing conduct with respect to Valentin and other individuals. This finding has ample support in the record, which shows defendant has numerous convictions, including convictions for violent offenses and repeated unlawful contact with Valentin. Defendant received one year court supervision in 1986 for unlawful use of a weapon. In 1988,

defendant was sentenced to 30 months probation for aggravated battery. A few years later, in 1991, defendant was sentenced to six years' imprisonment for battery. In 2000, he was sentenced to 18 months probation for misdemeanor violation of an order of protection. Defendant was sentenced to 24 months' conditional discharge in 2003 for misdemeanor domestic battery when he hit Valentin in the face. Again in 2003, he was sentenced to 100 days in the Cook County Department of Corrections for another misdemeanor violation of an order of protection.

¶ 36 Later, in August 2003, defendant received 60 days in the Cook County Department of Corrections for misdemeanor violation of an order of protection. Defendant pleaded guilty in 2005 to violating two orders of protection, for which he was sentenced to an extended-term of six years' imprisonment on each count. This sentence was concurrent with an eight year sentence for home invasion, which arose when he entered Valentin's house in 2003 and struck Cabrera in the head with a flashlight. Defendant again pleaded guilty to violation of an order of protection for calling Valentin in 2008 asking her what she did for Valentine's Day and received 240 days in the Cook County Department of Corrections. He was given an extended-term four year sentence for another violation of an order of protection with respect to Valentin, when he called her in 2009 asking about Sweetest Day.

¶ 37 The trial court stated it considered the evidence presented at trial, the presentence investigation report, factors in aggravation and mitigation and then concluded consecutive sentences were necessary to protect the public. It told defendant at sentencing:

> "Sir, this has to stop. This back and forth between the two of you has to stop. It is not going to end. It is serious, and it could be serious, deadly, sir. Looking at your background, the number of cases, Order of Protection and violations, with this person, even if

> the Court were to credit that she was responsible or partly to blame for some of it, the order is on you, and you know and knew the consequences. It would seem that a prudent person would have made sure that they have absolutely no contact with her whatsoever, and you don't get to try to change up the way that you do, to try to be more subtle and nonobvious with their violation. They are violations nonetheless. *** And what I heard is not accidental. It's just not coincidental. *** [Y]ou knew what you were doing and you knew how you were trying to calculate to do it, to attempt to avoid getting in trouble. It's got to stop, and the Court believes that consecutive sentencing is required to protect the public."

¶ 38 "Because the trial court is in the best position to consider a defendant's credibility, demeanor, general moral character, mentality, social environment, and habits, the trial court's decision to impose consecutive, rather than concurrent, sentences for multiple crimes will not be reversed on appeal absent an abuse of discretion." *People v. King*, 384 Ill. App. 3d 601, 613 (2008). Here, the trial court considered the number of prior convictions, the possible "deadly" consequences of defendant's interactions with Valentin and all factors in aggravation and mitigation before determining that the sentences would be served consecutively in order to protect the public. We find no abuse of discretion in sentencing defendant to consecutive terms of imprisonment.

¶ 39 In arguing that consecutive sentences are not warranted to protect the public, defendant points out that the three violations for which the consecutive sentences were imposed occurred

on a "main road," on a "busy road," and through defendant's friend, Pedroza, and none involved violence or threats. This argument is unpersuasive. Defendant had previously hit Valentin and hit Cabrera. As the trial court found, if defendant had continued his interactions with Valentin, the results could be "deadly" for Valentin or any member of the public unfortunate enough to encounter defendant, as Cabrera had, while with Valentin.

¶ 40 Defendant cites to several cases involving "far more serious crimes than those at issue here" where the consecutive sentences imposed were later overturned. See generally *People v. O'Neal,* 125 Ill. 2d 291, 301 (1988) (rape and aggravated kidnapping sentences consecutive to murder overturned); *People v. Rucker,* 260 Ill. App. 3d 659, 664 (1994) (armed robbery consecutive sentence overturned); *People v. Brown,* 258 Ill. App. 3d 544, 554 (1994) (aggravated criminal sexual abuse consecutive to aggravated criminal sexual assault and armed robbery sentence overturned); *People v. Berry,* 175 Ill. App. 3d 420, 431(1988) (voluntary manslaughter consecutive to theft sentence overturned); *People v. Gray,* 121 Ill. App. 3d 867, 873 (1984) (involuntary manslaughter and obstructing justice consecutive to concealment of homicidal death sentence overturned). The State responds that defendant is engaging in a comparative sentencing argument, which is impermissible. See *People v. Fern,* 189 Ill. 2d 48, 54-55 (1999). Defendant replies that *Fern* only addressed the propriety of comparing sentences across cases where the claim is that the sentence is excessive and here, he is not arguing his sentence is excessive, but rather it was not warranted to protect the public. We reject defendant's argument as he is clearly engaging in comparative sentencing.

¶ 41 As an initial matter, the sentencing statute does not specify that only certain "serious crimes" can result in permissive consecutive sentences. Rather, it provides that permissive consecutive sentences are allowed when there is a need to "protect the public." See 730 ILCS

5/5-8-4(c)(1) (West 2012). Further, in all the cases defendant cites, the facts presented, as well as the factors in aggravation and mitigation, differ from those in the case at bar. There is, therefore, no basis for comparing one sentence to another. As our supreme court explained, "such an analysis does not comport with our sentencing scheme's goal of individualized sentencing and would unduly interfere with the sentencing discretion vested in our trial courts." *Fern,* 189 Ill. 2d at 55. A comparative sentencing argument in the context of consecutive sentencing is impermissible. *Buckner,* 2013 IL App (2d) 130083, ¶ 43.

¶ 42 Defendant's argument that the need for consecutive sentencing is more obvious when violent offenses are involved fails for the same reasons. As discussed, the statute simply states that permissive consecutive sentences are warranted when there is a need to protect the public from the defendant and makes no mention of specific offenses. See 730 ILCS 5/5-8-4(c)(1) (West 2012). Indeed, we have affirmed consecutive sentences when the underlying offense is not a violent crime. See, *e.g., People v. Hemphill,* 259, Ill. App. 3d 474, 477-79 (1994) (affirming consecutive sentences for theft convictions); *Buckner,* 2013 IL App (2d) 130083, ¶ 44 (affirming consecutive sentences for theft and wire fraud convictions). Accordingly, we find that the trial court did not abuse its discretion in imposing consecutive sentences where the record reflected a need to protect the public. Having found no error, there can be no plain error and defendant's argument is forfeited. See *People v. Williams,* 193 Ill. 2d 306, 349 (2000).

¶ 43 Defendant contends that, to the extent we determine his argument has been forfeited on appeal, any forfeiture was the result of ineffective assistance of counsel. Specifically, he argues any forfeiture is "due to trial counsel's ineffectiveness, where she failed to include the issue in the written motion to reconsider sentence" and we should reach the merits of his claim that the imposition of consecutive sentences was unwarranted.

¶ 44 A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington,* 466 U.S. 668, 685-86 (1984). In order to establish that counsel is ineffective, a defendant must show both that 1) counsel's representation was deficient and 2) that deficiency prejudiced the defendant. *People v. Petrenko,* 237 Ill. 2d 490, 496 (2010). Having already determined that no error occurred in sentencing defendant to consecutive terms, we find defendant cannot establish the requisite prejudice, and thus cannot succeed on his ineffective assistance of counsel claim. See *People v. Caffey,* 205 Ill. 2d 52, 106 (2001).

¶ 45 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 46 Affirmed.