2016 IL App (1st) 141612-U

FIRST DIVISION
MAY 16, 2016

No. 1-14-1612

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. 13 CR 8843
	)	
STEVEN JONES,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** Defendant's sentence for the Class X felony, of being an armed habitual criminal, affirmed over claim that the sentence was excessive in light of mitigating factors; mittimus corrected.

¶ 2 Following a bench trial, defendant, Steven Jones, was found guilty of the Class X felony, of being an armed habitual criminal, and sentenced to seven years' imprisonment with three years of mandatory supervised release. On appeal, defendant contends that his sentence is excessive. Defendant concedes that he failed to preserve his claim of sentencing error but argues that it

constitutes both first and second prong plain error. Defendant also contests certain charges in the order assessing fines, fees, and costs.

¶ 3 The events giving rise to the charges occurred on April 23, 2013, at about 10:30 p.m., in the area of the 107th block of South Hoxie Avenue. Defendant was charged with one count of being an armed habitual criminal, four counts of aggravated unlawful use of a weapon, and one count unlawful use of a weapon by a felon. The State dismissed two of the aggravated unlawful use of a weapon charges and proceeded to trial on the remaining counts.

¶ 4 At trial, Chicago police officer McDermott testified that he was on patrol with his partner, Officer McHale, on the day in question. He rode in the passenger seat of an unmarked vehicle with a municipal license plate. As they drove southbound at about 10 to 15 miles per-hour, Officer McDermott noticed two people on foot when defendant "broke away from the other individual and went into a gangway[.]" Officer McDermott exited the vehicle and followed defendant. He used his flashlight, and saw defendant stop at the end of the gangway where a chain-link fence, backed by bushes, blocked his path. Officer McDermott observed defendant gripping a dark-colored object, in a manner consistent with a pistol, and then throw it over the fence, where it lodged in the bushes. Defendant then surrendered and complied with instructions to exit the gangway.

¶ 5 Officer McDermott further testified that when Officer McHale joined him, he entered the yard through a gate and recovered a .32 caliber semiautomatic firearm from the bushes in which the object landed. It was loaded with seven live rounds. Defendant was taken to the Fourth District police station, where he was given his *Miranda* warnings. He told the police officers

that he needed the gun for protection because he "gets f***ed with with GD's in the Trumbull Park homes, which is the little CHA building back there." On cross-examination, Officer McDermott testified that the homeowner came out of the residence after he recovered the gun, but that he had not entered the house himself.

¶ 6 It was stipulated through a certification from the Illinois State Police that, as of June 11, 2013, defendant had not been issued a FOID card. The State introduced certified copies of defendant's two prior convictions: for robbery on June 19, 2009, under case number 09 CR-10326-01, and robbery on April 21, 2010, under case number 09 CR-1779102-02. Finally, the parties stipulated that defendant's birthday was October 26, 1987. Defendant then moved for a directed finding, which the court denied.

¶ 7 Defendant testified that on the night in question, he was walking home from the gas station with his friend, Dominique Anderson. When he saw the officers, he continued walking, Dominique ran, and defendant just stayed there. One of the officers grabbed him, and the other officer shined his light into the yard, and the residence, prompting an individual to come out of his house. Defendant testified that he could not see the officers search the yard because he was in the car, but that he did see an officer go through the house to access the yard, and the search lasted for 10 or 15 minutes. One of the officers had a gun in his hand when he emerged from inside the house. Defendant denied ever holding or throwing a gun, or throwing any kind of dark object in the gangway. He further testified that he did not have a relationship with the resident of the house.

¶ 8 The trial court noted that the witnesses' testimony conflicted and then "found the defendant's story a little absurd to the point of ridiculousness." The court further found that "the officer testified in a very credible manner. There [was] nothing that shock[ed] the conscience of common sense from the officer's testimony." The court found defendant guilty on the armed habitual criminal charge. 720 ILCS 5/24-1.7(a)(1) (West Supp. 2013). The court ordered a presentence investigation report ("PSI") and set the case for sentencing and posttrial motions on April 10, 2014. On that date, the court denied defendant's motion for a new trial, and the State requested a 15-year sentence.

¶ 9 In mitigation, defense counsel stated that defendant was 25 years old, had three children, and experienced difficulties during his developmental years. Specifically, counsel asked the court to consider that defendant was placed in an abusive foster care situation after his mother's care was deemed insufficient. Counsel noted that although defendant's neighborhood was "gang infested" he had been employed at a grocery store and a temporary agency. Counsel argued that defendant generally tried to be a family man although he had "a few complications with the law[.]" Counsel noted that defendant lived with the mother of two of his children and most enjoyed spending time with all his children. Counsel believed that defendant was angry about his choices because he could not be there for his family and children while incarcerated for his crime. Finally, counsel noted that defendant suffered from asthma and hypertension and then requested the minimum sentence.

¶ 10 In allocution, defendant stated that he did not believe his statement would change the outcome, and explained that the only reason he went to trial was to try to return home to his

family and children. He acknowledged that he "hurt some people through this case." He stated that everybody warned him to watch the company he kept, and then apologized to his mother for, at times, failing to follow the advice.

¶ 11 Before announcing sentence, the following exchange occurred, in relevant part, between the court and defendant:

> "THE COURT: Do you understand that society doesn't want people who have been convicted of two different robberies walking around with a gun?
>
> THE DEFENDANT: I understand that.
>
> THE COURT: And one of the things that they tried to teach you in boot camp, especially Cook County boot camp, is because they have some good programs down there is to make you aware of the consequences of your actions."

In announcing sentence, the court stated:

> "THE COURT: If you don't walk the walk, it doesn't mean anything. It's nothing but air. I would hope that you listen to what you are saying. You act the way you are trying to ask me to consider your situation. You are still a young man. You've got kids. I know it effects all of them. This is a very serious offense, and you haven't been to the Department of Corrections before. I think the sentence of 15 years would be excessive in your case."

¶ 12 The court then sentenced defendant to seven years in the Illinois Department of Corrections with three years of mandatory supervised release. The court ordered "fees and costs" and gave defendant credit for 353 days spent in presentence custody. Defendant did not file a post-sentencing motion.

¶ 13 On appeal, defendant contends that the trial court abused its discretion in failing to impose the statutory minimum sentence because his previous convictions did not result in incarceration, and the severity of the offense did not outweigh the mitigating evidence that he desired to improve himself, was abused as a child, and showed potential for rehabilitation. Defendant concedes that he did not preserve his sentencing error claim for review, but he maintains that the trial court's error may be reviewed under both first and second prong plain error. The State responds that the additional year was not excessive because, "[r]egardless of his childhood, defendant, a 25 year-old, two-time convicted robber failed to avail himself to previously offered court services designed to prevent him from continuing along a path of criminal behavior, and, instead, chose to arm himself with a loaded firearm while on a public way at night."

¶ 14 To preserve a claim of sentencing error, defendant must object at the time of sentencing and file written post-sentencing motion in the trial court within 30 days of sentencing. Ill. S. Ct. Rule 605(a)(3)(C) (eff. Oct. 1, 2001). By failing to file a post-sentence motion, defendant waived issues concerning his sentence. Consequently, we may review defendant's claim only if it falls within the limited scope of the plain-error exception to forfeiture provided in Illinois Supreme Court Rule 615(a). *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 15 As a prerequisite to relief under the plain-error exception, defendant must first show that a clear or obvious error occurred. *Id.* at 545. Defendant must then show, either, that (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. *People v. Hall*, 195 Ill. 2d 1, 18 (2000). Defendant has the burden of persuasion under both prongs of the plain-error exception, and the procedural default will be honored unless the defendant satisfies this burden. *Hillier*, 237 Ill. 2d at 545. However, if no error occurred, we do not need to determine whether plain-error review is available to defendant. *People v. Gutman*, 2011 IL 110338, ¶ 11. In this case, we hold that the court did not abuse its discretion in imposing the sentence, thus, we do not reach defendant's plain-error claim. *Id.*

¶ 16 Defendant was convicted of the Class X felony of being an armed habitual criminal (720 ILCS 5/5-4.5-25(a) (West Supp. 2013)) which carries a sentencing range of 6 to 30 years. 720 ILCS 5/24-1.7(b) (West Supp. 2013). When the sentence falls within the prescribed statutory limits, it will not be disturbed unless it is greatly at variance with the purpose and spirit of the law or is manifestly disproportionate to the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). The trial court is in a superior position to weigh factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). Consequently, we must not reweigh the factors considered by the trial court. *Id*.

¶ 17 Here, the evidence at trial established that defendant possessed a loaded semiautomatic firearm on a public way after twice being convicted of robbery. The mitigating evidence,

including defendant's age and childhood history, was presented to the court in the PSI and argued by counsel at the sentencing hearing. In announcing sentence, the court acknowledged that defendant had children, was still a young man, and had not been to the Department of Corrections. The court rejected the State's 15-year sentencing recommendation and imposed a term one year above the statutory minimum. Considering the factors in aggravation and mitigation, we cannot say that defendant's sentence was greatly at variance with the purpose and spirit of the law or manifestly disproportionate to the offense. We therefore find that the court did not abuse its discretion in sentencing defendant to seven years in the Illinois Department of Corrections.

¶ 18 Defendant, nevertheless, argues that a sentence closer to the six-year minimum offered the greatest balance to the mitigating evidence that he desired to improve himself, was abused as a child, and showed potential for rehabilitation. Defendant's argument amounts to a request that we substitute our judgment for that of the trial court, re-balance the factors, and independently conclude his sentence was excessive, which is not our function. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). While we may have imposed a different sentence that is not the criteria by which we must judge the trial court's action in this case. To do so would run afoul of established Illinois law. Furthermore, the mere presence of some mitigating factors does not necessarily warrant a minimum sentence. *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). The record reflects that the court relied on the mitigating evidence in determining sentence. Accordingly, the court's imposition of the seven-year sentence was neither an abuse of discretion nor clearly erroneous.

¶ 19 Next, defendant maintains that because nothing about the specific nature of this offense distinguishes it from the factors the legislature had already considered in classifying it as a Class X felony, the trial court could not consider those same factors in aggravation. However, the Illinois Supreme court has held that, "while the *fact* of a defendant's prior convictions determines his eligibility for a Class X sentence, it is the *nature and circumstances* of these prior convictions which, along with other factors in aggravation and mitigation, determine the exact length of that sentence." (Emphasis in original) *People v. Thomas*, 171 Ill. 2d 207, 227-28 (1996).

¶ 20 Furthermore, the trial court is not required to refrain from any mention of factors that constitute elements of an offense. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 50. In determining whether the trial court improperly imposed a sentence, reviewing courts consider the record as a whole and should not focus on isolated statements. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. In addition, the court need not detail precisely, for the record, the process by which it determines a sentence. *People v. Evans*, 373 Ill. App. 3d 948, 968 (2007). We find that the trial court in this case, was merely commenting on the evidence presented at trial and did not err in this respect. See *Bowen*, 2015 IL App (1st) 132046, ¶ 52 (finding that the trial court did not err in mentioning conduct that was inherent in the offense at his sentencing hearing because, viewed in context, the court was commenting on the nature and circumstances of the offence).

¶ 21 Accordingly, the court did not abuse its discretion, and we affirm the sentence imposed by the circuit court of Cook County.

¶ 22 Defendant next contends that certain charges assessed against him are "fines" and not "fees", thus, they should be offset by his presentence custody credit. "The propriety of a trial

court's imposition of fines and fees raises a question of statutory interpretation, which we review *de novo.*" *In re Estate of Dierkes*, 191 Ill. 2d 326, 330 (2000). "The central characteristic that separates a fee from a fine is that a 'fee' is intended to reimburse the state for a cost incurred in the defendant's prosecution, whereas a 'fine' is punitive in nature, and is part of the punishment for a conviction." *Bowen*, 2015 IL App (1st) 132046, ¶ 63.

¶ 23 Defendant contends, the State concedes, and we agree that the $15 State police operations assistance assessment (705 ILCS 105/27.3a-1.5) (West Supp. 2013)), and the $50 court system assessment (55 ILCS 5/5-1101(c)(1) (West Supp. 2013)) are fines. *People v. Millsap*, 2012 IL App (4th) 110668, ¶31; *People v. Smith*, 2013 IL App (2d) 120691, ¶¶ 21, 22. As such, defendant's presentence custody credit may satisfy these fines in the amount of $65.

¶ 24 Defendant also maintains that the $2 Public Defender automation fee (55 ILCS 5/3-4012 (West Supp. 2013)), and the $2 State's Attorney automation fee (55 ILCS 5/4-2002.1(c) (West Supp. 2013)), are fines because they do not compensate the State for prosecution of any particular defendant. The State argues that they are both fees intended to compensate the State for expenses that the State incurred as a result of defendant's prosecution. This court has held that the Public Defender and State's Attorney automation charges are both fees. *Bowen*, 2015 IL App (1st) 132046, ¶¶ 63, 65. We therefore find that the fees were properly assessed and are not subject to defendant's presentence credit.

¶ 25 Accordingly, pursuant to Illinois Supreme Court Rule 615(b)(1), and our authority to correct a mittimus (*People v. Rivera*, 378 Ill. App. 3d 896, 900 (2008)), we direct the clerk of the circuit court to correct the order issued by the trial court in this case, assessing fines, fees, and

costs to reflect that defendant's presentence custody credit satisfies the $15 State police operations and the $50 court system fines. We affirm the judgment of the circuit court of Cook County in all other respects.

¶ 26 Affirmed; fines and fees order corrected.