2016 IL App (1st) 142253-U

FOURTH DIVISION
November 17, 2016

No. 1-14-2253

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. 04 CR 17327
	)	
DAMEN TOY,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Howse concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's sentence following a resentencing hearing affirmed where his claim that the trial court failed to consider the less severe nature of one of the offenses is forfeited, not reviewable as plain error, and not the result of ineffective assistance of counsel.

¶ 2 This court remanded this case to the trial court to resentence defendant Damen Toy on his two convictions for aggravated criminal sexual assault with a firearm. *People v. Toy*, 2013 IL App (1st) 120580. Following a hearing, the trial court resentenced defendant to consecutive

terms of 30 years' imprisonment on each count. On appeal, defendant contends that the trial court erred when it failed to consider as mitigation that the conviction on Count 6 was less severe in nature than Count 3, as it had done during the original sentencing hearing. We affirm.

¶ 3 Following a 2007 jury trial, at which defendant appeared *pro se*, defendant was convicted of two counts of aggravated criminal sexual assault with a firearm and two counts of attempted armed robbery. The aggravated criminal sexual assault conviction under Count 3 was for contact between defendant's penis and the victim's vagina, and the conviction under Count 6 was for contact between his penis and her anus. A detailed discussion of the evidence presented at trial appears in this court's previous opinion affirming those convictions on direct appeal. See *People v. Toy*, 407 Ill. App. 3d 272 (2011). Here, we will discuss the facts as necessary to address the issue raised in this appeal.

¶ 4 In the early morning hours of June 27, 2004, B.H. and Paul Watkins-Lash were sitting on the porch of B.H.'s house when defendant approached them and asked for a cigarette, which Watkins-Lash gave him. Defendant left, but returned a short time later with a gun, demanded their money, and threatened to kill Watkins-Lash. When they told defendant that they did not have any money, he searched their pockets. Defendant then told Watkins-Lash to stay on the porch or he would shoot him. Defendant grabbed B.H. by her wrist, took her into the gangway, turned her to face her house with her arms up, and removed her pants. Defendant then inserted his penis into B.H.'s vagina, and also touched his penis to her anus, but did not enter it. During the sexual assault, B.H. felt something in the back of her head and assumed it was the gun because defendant was threatening to kill her. Watkins-Lash then entered the gangway, saw

defendant sexually assaulting B.H., and yelled at him. Defendant stopped the assault, and when B.H. tried to tackle him, he struck her and ran away. A key recovered from B.H.'s yard unlocked the door of defendant's apartment building, and clothing defendant wore during the assault, including a Cubs hat, Bulls breakaway pants and a blue windbreaker, were recovered from garbage cans between the crime scene and defendant's residence.

¶ 5 At the original sentencing hearing, the State presented testimony from several witnesses regarding two other cases in which defendant had been charged. Eric Stubbings testified that on February 25, 2004, he was walking home in the Lakeview neighborhood when a man began walking with him and asked for a cigarette. Stubbings gave him a cigarette, and the man continued walking and talking with him. When they reached Stubbings' home, the man asked for another cigarette, and Stubbings tossed him the rest of his pack. The man then displayed a gun, dropped the cigarette he was smoking to the ground, and demanded Stubbings' wallet. Stubbings was unable to identify his assailant, but DNA recovered from the cigarette the man had smoked and dropped to the ground matched defendant's DNA.

¶ 6 For the second case, Chicago police detective Leonard Muscolino testified that a burglary occurred at the Bailiwick Theater at 1229 West Belmont Avenue on April 24, 2003, during which money was stolen from the cash register. A fingerprint and blood recovered from the cash register matched defendant's fingerprint and DNA.

¶ 7 The State also presented three certified statements of prior convictions for defendant for aggravated battery, possession of a controlled substance, and forgery. In addition, the State

presented a victim impact statement from B.H. Defendant did not present any evidence in mitigation, and in allocution he maintained his innocence.

¶ 8 The trial court found that, based on the evidence presented at the hearing, defendant had committed the burglary at the Bailiwick Theater and the armed robbery of Stubbings. The court further found that defendant was "clearly a violent person," and that it was likely that he would commit similar offenses if released. The court then sentenced defendant to consecutive prison terms of 45 years and 30 years for the two counts of aggravated criminal sexual assault. Each of these sentences included a 15-year sentencing enhancement because the jury found that defendant was armed with a firearm during the offenses. The court explained that the sentence was less for the count involving the anal contact because defendant did not ultimately complete that act. The court also imposed concurrent terms of 10 years' imprisonment for each count of attempted armed robbery, and a consecutive term of 6 months' imprisonment for contempt of court, for an aggregate sentence of 75 years and 6 months' imprisonment. After the sentence was imposed, the State pointed out that defendant had one case pending, which was another aggravated criminal sexual assault in case number 05 CR 16844. On direct appeal, this court affirmed defendant's convictions and sentences. *Toy*, 407 Ill. App. 3d 272.

¶ 9 In November 2011, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) which was summarily dismissed by the circuit court. On appeal, defendant asserted for the first time that his sentences for aggravated criminal sexual assault, which included the 15-year firearm sentencing enhancements, violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11)

because armed violence based on a sexual assault consisted of identical elements, but the offenses had different penalties. This court found that, in light of our supreme court's holding in *People v. Hauschild*, 226 Ill. 2d 63 (2007), which was followed by this court in *People v. Hampton*, 406 Ill. App. 3d 925 (2010), defendant's 15-year sentencing enhancements violated the proportionate penalties clause and were unconstitutional. *Toy*, 2013 IL App (1st) 120580, ¶ 29. Rather than remand the case to the circuit court for second-stage postconviction proceedings, this court invoked its supervisory authority under Supreme Court Rule 615(b)(2) (eff. Aug. 27, 1999) and reversed the dismissal of defendant's postconviction petition, granted the petition on the issue raised on appeal, vacated his sentences for aggravated criminal sexual assault, and remanded the case for resentencing on those two counts. *Id*. at ¶ 30.

¶ 10 At the July 9, 2014, resentencing hearing, the parties stipulated to the testimony presented at the original sentencing hearing regarding the armed robbery of Stubbing and burglary of the Bailiwick Theater. The State noted that it had also presented certifications of defendant's three prior convictions for aggravated battery, possession of a controlled substance and forgery, and a victim impact statement from B.H.

¶ 11 The State then informed the court that since the original sentencing hearing, defendant pled guilty to another aggravated criminal sexual assault against another victim in case number 05 CR 16844, which occurred in the Lakeview neighborhood on March 9, 2004, three months before he assaulted B.H. The State explained that defendant was charged in the unrelated case after this case because he was not known to be the perpetrator until DNA testing was completed. The State asked the court to consider the additional conviction as aggravation for resentencing.

¶ 12 When the court asked defense counsel for any evidence and argument in mitigation, she stated "Mr. Toy does not wish for me to submit anything to the Court." Defendant confirmed that counsel's statement was correct, and he declined to make a statement in allocution.

¶ 13 The court stated that it reviewed the transcript from the original sentencing hearing and had a very strong recollection of the facts from trial. The court then noted that there was new evidence in aggravation that defendant had committed an additional aggravated criminal sexual assault against a different victim. The court stated "I hope that any reviewing court please take note of my original statement with respect to why I sentenced the defendant to the lengthy term that I did. Mr. Toy is a predator." It further stated that defendant "prowled the streets of Lakeview taking what he wanted from people by way of property, using a weapon, using violence against people." The court also stated that it was very important to note the nature of how defendant went about his "business of being a predator," which was "clearly demonstrated by his planning that went into his criminal behavior," including wearing clothing that he was able to remove and discard as he fled the scene to avoid matching a description of the offender.

¶ 14 The court further stated:

> "There is no doubt as one would reflect over his history here of what he would do if he were to be released from custody. He is a man that decided the rules don't apply to him and he needs to be locked up for the rest of his life quite frankly. He needs to be taken away from being a predator to citizens out there.
>
> I feel a little sad though because I know that there's probably going to be inmates in the Illinois Department of Corrections that Mr. Toy will probably victimize just like he

victimized [B.H.] here and the other people in the aggravated battery conviction from 1988, the 2012 conviction for criminal – aggravated criminal sexual assault, the battery conviction from 1995.

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And he is just a very aggressive, extraordinarily dangerous predator who cannot be in any kind of civilized society and probably should be in some type of isolation at the Department of Corrections.

I know they can't do that with every particular inmate, but this is a dangerous man. Hopefully no one else will suffer from Mr. Toy's behavior because even inmates don't deserve to be victims while they are in the Department of Corrections of any type of abuse.

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When I originally sentenced Mr. Toy, after considering everything I could in aggravation and mitigation, I sentenced Mr. Toy to the maximum amount that I could for the criminal sexual assault of the victim here with the vaginal penetration. And then at that time the law as it existed mandated the sentencing enhancement for the gun. He was sentenced to a total of 45 years in the Illinois Department of Corrections on Count 3.

On Count 6, which was the anal penetration of the same victim, I sentenced him to a period of consecutive 30 years in the Illinois Department of Corrections. I did not add on the 15 year enhancement over and above that. I came to 30 years based on that

being the maximum for the crime that he committed, which already included the fact that he used the weapon to commit the criminal sexual assault.

And I didn't choose to add on yet another 15 years. I basically sentenced him to the maximum penalty because I didn't feel it was appropriate to add on the 15 year enhancement on both charges, even though the law as it existed at that time said that that's what should have been done."

The trial court then resentenced defendant to consecutive terms of 30 years' imprisonment on the two aggravated criminal sexual assault convictions. The court noted that defendant was also sentenced to concurrent terms of 10 years' imprisonment on the two attempted armed robbery convictions.

¶ 15 The State then directed the court's attention to the transcript from the original sentencing hearing where the court had explained that the sentence for the conviction involving the anal contact (Count 6) would be less because defendant did not ultimately complete that act. The trial court then explained:

"The difference being there – There was a difference noted at the time as to why I sentenced him, but I was taking into very much consideration at the same time the fact that he had already received 45 years on Count 3. And since that time he has now been convicted of yet another criminal sexual assault.

So although the reasoning is a little bit different, I can assure you that the benefit that Mr. Toy received by not receiving the maximum penalty as it existed in 2007 in

Count 6 had a great deal to do with the fact that he had received this enhanced sentence on Count 3."

The trial court then admonished defendant that if he wished to appeal his new sentence, he would first have to file a motion to reconsider the sentence specifying the grounds for reconsideration, and that any grounds not specified would be waived. Trial counsel filed a motion to reconsider sentence *instanter* alleging that the sentence was excessive in view of defendant's background and the nature of his participation in the offense, that the court improperly considered matters in aggravation that are implicit in the offense, and that the sentence improperly penalized defendant for exercising his right to trial. Counsel did not present any argument, and the trial court denied the motion.

¶ 16 On appeal, defendant contends that the trial court erred at the resentencing hearing when it failed to consider as mitigation that the conviction on Count 6, the anal contact, was less severe in nature than Count 3, the vaginal penetration, as it had done during the original sentencing hearing. Defendant argues that the seriousness of the offense is the most important factor for the court to consider at sentencing. He also argues that the trial court improperly speculated that he may cause harm to other inmates in prison. Defendant further claims that the additional aggravating evidence that he was convicted of another criminal sexual assault did not justify increasing his base sentence on Count 6 from 15 to 30 years. Defendant asks this court to again remand his case for another resentencing hearing before a different trial court judge.

¶ 17 Defendant acknowledges that he did not properly preserve this issue for appeal because he did not specifically raise the issue in his motion to reconsider his sentence. He argues,

however, that this court should consider his claim under both prongs of the plain error doctrine, and alternatively, that trial counsel rendered ineffective assistance when she failed to raise the issue in his postsentencing motion.

¶ 18 The State responds that defendant forfeited review of this issue because it was not raised in his motion to reconsider his sentence. The State further argues that the issue cannot be reviewed under the plain error doctrine because no error occurred where the court gave proper consideration to all of the evidence in aggravation and mitigation, including the additional conviction for aggravated criminal sexual assault, and imposed a sentence within the statutory range. The State also asserts that this court need not address defendant's claim that counsel rendered ineffective assistance where he cannot satisfy the requirements for plain error, and the outcome would be the same under either plain error review or an ineffective assistance of counsel analysis.

¶ 19 It is well settled that in order to preserve a sentencing error for review, both a contemporaneous objection during the sentencing hearing and a written postsentencing motion raising the issue are required. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Here, the record shows that defendant made no objection at any time during the resentencing hearing. Furthermore, although defendant filed a motion to reconsider his sentence, that motion did not raise the issue he now raises before this court. Consequently, we find that defendant failed to preserve his issue for appeal, and therefore, it is forfeited. *Id*. at 544-45.

¶ 20 Defendant argues, however, that his claim may be reviewed under both prongs of the plain error doctrine. The plain error doctrine is a limited and narrow exception to the forfeiture

rule which can only be invoked after defendant first demonstrates that a clear or obvious error occurred. *Id*. at 545. Thereafter, defendant must show that the evidence at the sentencing hearing was closely balanced, or that the error was so egregious that he was denied a fair sentencing hearing. *Id*. The burden of persuasion is on defendant, and if he fails to meet that burden, the procedural default will be honored. *Id*.

¶ 21 Aggravated criminal sexual assault, as charged in this case, is a Class X felony with a non-extended sentencing range of 6 to 30 years' imprisonment. 720 ILCS 5/12-14(a)(8) (West 2006); 730 ILCS 5/5-4.5-25(a) (West 2014). The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the statutory range it will not be disturbed on review absent an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74 (1995). An abuse of discretion exists where a sentence is at great variance with the spirit and purpose of the law, or is manifestly disproportionate to the nature of the offense. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010).

¶ 22 The Illinois Constitution mandates that criminal penalties be determined according to the seriousness of the offense, and with the objective of restoring the offender to useful citizenship. Ill. Const.1970, art. I, § 11; *People v. Ligon*, 2016 IL 118023, ¶ 10. In light of these objectives, "[t]he trial court is charged with fashioning a sentence based upon the particular circumstances of the individual case, including the nature of the offense and the character of the defendant." *People v. Fern*, 189 Ill. 2d 48, 55 (1999). The court's sentencing decision is entitled to great deference because, having observed the defendant and the proceedings, it had the opportunity to weigh defendant's demeanor, credibility, general moral character, mentality, habits, social

environment and age. *Alexander*, 239 Ill. 2d at 213. "The sentencing judge is to consider 'all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding.' " *Fern*, 189 Ill. 2d at 55, quoting *People v Barrow*, 133 Ill. 2d 226, 281 (1989).

¶ 23 Here, we find no error by the trial court in sentencing defendant to a term of 30 years' imprisonment for Count 6, which falls within the statutory range. The record shows that in imposing the new term during resentencing, the trial court placed great emphasis on its determination that defendant was "a very aggressive, extraordinarily dangerous predator who cannot be in any kind of civilized society," and who needed to be "locked up for the rest of his life." The court found that defendant "prowled the streets of Lakeview taking what he wanted from people by way of property, using a weapon, using violence against people." The court pointed out that defendant had been convicted of several violent offenses, including aggravated criminal sexual assault, aggravated battery and battery. The record further shows that the court had reviewed the transcript from the original sentencing hearing, that it had a very strong recollection of the facts from trial, and that it considered that there was new evidence in aggravation that defendant had been convicted of an additional aggravated criminal sexual assault against another victim. We therefore find that the record shows that the trial court gave proper consideration to the nature of the offense and defendant's character as constitutionally required when it concluded that the maximum term of 30 years' imprisonment was the appropriate sentence for Count 6.

¶ 24 We find no merit in defendant's argument that the court erred because it did not consider that Count 6 was less severe in nature than Count 3, as it had noted during the original sentencing hearing. The record shows that immediately after the new sentence was imposed, the prosecutor directed the court's attention to the transcript from the original hearing where the court had made the comment. The trial court then explicitly explained its rationale for the difference in its consideration between the two hearings:

> "There was a difference noted at the time as to why I sentenced him, but I was taking into very much consideration at the same time the fact that he had already received 45 years on Count 3. And since that time he has now been convicted of yet another criminal sexual assault.
>
> So although the reasoning is a little bit different, I can assure you that the benefit that Mr. Toy received by not receiving the maximum penalty as it existed in 2007 in Count 6 had a great deal to do with the fact that he had received this enhanced sentence on Count 3."

The record thus shows that the trial court was aware of the fact that it originally considered that Count 6 was less severe than Count 3, but that it also had considered at that time that defendant was being sentenced to 45 years' imprisonment on Count 3, and did not believe that it was appropriate to sentence him to 45 years' imprisonment on both charges. The court also pointed out that since the original sentencing hearing, defendant had been convicted of another criminal sexual assault. We find that the considerations made by the trial court were properly based on the factors in aggravation and mitigation, and were not erroneous.

¶ 25 Furthermore, we find no error in the court's comments that defendant may victimize fellow inmates in prison. When read in context, the record shows that these comments were not factors that the court used to determine the length of defendant's sentence. Instead, the comments were reflections on defendant's dangerous and violent character, and the court suggested that, because defendant was a "dangerous predator," he should probably be detained "in some type of isolation" in prison for the protection of the other inmates.

¶ 26 The record therefore shows that the trial court properly based defendant's sentence on its consideration of the seriousness of the offenses, the factors in aggravation and mitigation, defendant's violent criminal history, and most significantly, his "extraordinarily dangerous" character. The trial court went to great lengths to articulate and explain its reasoning as to why the 30-year sentence was appropriate for Count 6. Accordingly, we find no abuse of discretion by the trial court.

¶ 27 This court will not reweigh the sentencing factors or substitute our judgment for that of the trial court (*Alexander*, 239 Ill. 2d at 213), and based on the record before us, we cannot say that the sentence imposed by the court is excessive, manifestly disproportionate to the nature of the offense, or that it departs significantly from the intent and purpose of the law. *Fern*, 189 Ill. 2d at 56. Since no error occurred, we conclude that the plain error doctrine does not apply and we honor defendant's forfeiture of this issue. *Hillier*, 237 Ill. 2d at 545-46.

¶ 28 In addition, we find no merit in defendant's alternative argument that counsel rendered ineffective assistance when she failed to preserve this issue for appeal by failing to include it in defendant's motion to reconsider sentence. Claims of ineffective assistance of counsel are

evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of counsel, defendant must demonstrate that counsel's representation was deficient, and as a result, he suffered prejudice. *Strickland*, 466 U.S. at 687. Specifically, defendant must show that counsel's performance was objectively unreasonable, and that there is a reasonable probability that the outcome of the proceeding would have been different if not for counsel's error. *People v. Henderson*, 2013 IL 114040, ¶ 11. If defendant cannot prove that he suffered prejudice, this court need not determine whether counsel's performance was deficient. *Graham*, 206 Ill. 2d at 476.

¶ 29 As we have already determined above, the sentencing challenge raised by defendant is without merit. Consequently, counsel's failure to preserve the issue for appeal did not prejudice defendant, and thus, counsel did not render ineffective assistance. See *People v. Coleman*, 158 Ill. 2d 319, 349 (1994) (defendant was not denied effective assistance of counsel where the issues counsel failed to preserve for appeal were without merit and did not prejudice defendant).

¶ 30 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 31 Affirmed.