2016 IL App (3d) 140569-U

Order filed October 28, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
	)	Kankakee County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-14-0569
v.	)	Circuit No. 12-CF-489
	)	
ERIK C. THOMAS,	)	Honorable
	)	Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The court's consideration of two police reports during the resentencing hearing was not error.

¶ 2 Defendant, Erik C. Thomas, appeals from the revocation of his probation and resentence. Defendant argues the trial court committed reversible error during the resentencing hearing when, in finding factors in aggravation, it conducted its own investigation by searching through the State's discovery packet and relying on two police reports which were hearsay statements. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by indictment with possession of a stolen firearm (720 ILCS 5/24-3.8(a) (West 2012)). Defendant agreed to enter a negotiated plea of guilty in exchange for a sentence of two years' probation. On December 21, 2012, the matter proceeded to a plea hearing. The court admonished defendant as to the consequences of his plea, and defendant indicated that he was voluntarily entering the plea. Before accepting the plea, the court inquired:

"Do you remember possessing this firearm?

THE DEFENDANT: Uh-uh.

THE COURT: A Taurus .38?

THE DEFENDANT: No."

Following this exchange, the State provided the factual basis for the plea. The State said the police stopped the vehicle defendant was driving for a traffic violation. An officer noticed that there were two handguns located between the driver and passenger seat cushions. One of the handguns was identified as stolen. The State believed the vehicle was registered to defendant, but it was not certain of this fact. Defendant was in the vehicle at the time the weapons were recovered. Thereafter, the following exchange occurred:

"THE COURT: All right. I'll find a factual basis if you wish to plead guilty. Is that what you wish to do?

THE DEFENDANT: Yeah. Yeah."

The court then entered a judgment of conviction and imposed a sentence of two years' probation.

¶ 5 On June 17, 2013, the State filed a petition to revoke probation. The petition was amended three times. The third amended petition alleged defendant: (1) failed to report to probation on four dates; (2) failed to complete 10 job searches per week; (3) had been charged

with obstructing identification in case No. 13-CM-1021; (4) had been charged with driving on a suspended license in case No. 13-TR-10651; and (5) had been unsuccessfully discharged from substance abuse treatment. Defendant admitted the second allegation, and the State dismissed the remaining allegations. The court accepted defendant's admission and continued the case for resentencing.

¶ 6 At the sentencing hearing, the State did not present any evidence in aggravation. In mitigation, defendant testified that he did not have a juvenile record, the present offense was his only felony conviction, he had a general education diploma from Kankakee Community College, he studied business management at a community college until he had to withdraw because he had a child, he had shared parenting time and paid $600 to $700 in voluntary child support, and he was employed as a barber. Defendant acknowledged that he had smoked marijuana as recently as a few months before the hearing and that he could benefit from drug treatment. Defendant said he previously failed to complete a drug treatment program because he had to miss classes to take care of his son. Defendant stated that he would be compliant with any drug treatment program or other terms of probation, if he were placed back on probation. Defendant also asked the court to consider a sentence of "boot camp." In allocution, defendant said he could complete a substance abuse rehabilitation program, and his prior failure to complete a similar program was due to his lack of transportation, which had been resolved.

¶ 7 The court observed that defendant was being sentenced for the offense of possession of a stolen firearm, and it asked the State to "give [it] the proffer again as to the circumstances of this case." The State explained that defendant was in a vehicle with Alonzo Williams when the police conducted a traffic stop. Defendant, who was driving the vehicle, stopped in front of a residence and fled on foot. A police officer apprehended defendant before he was able to enter the

residence. Two handguns were observed between the driver and front passenger seat cushions. One of the weapons was stolen. The court then posed the following questions to the State:

"Did [defendant] give a statement?

[Counsel for the State]: He refused to give a statement, Judge.

THE DEFENDANT: I was already outside the car.

THE COURT: Did the other person give a statement?

THE DEFENDANT: There was no running up in–I was outside the car and they searched me first, and I had my ID–they took my ID off of me. The passenger was still in there.

THE COURT: Mr.–we're gonna have to keep your voice down a little bit. Okay?

[Counsel for the State]: Other occupant denied any knowledge of the firearms also, Judge.

THE COURT: So where were the firearms found?

[Counsel for the State]: One–according to the reports, Judge, one was protruding up from between the driver's and front passenger's seat cushions, two of them. So I'm picturing affectively in the center console.

[Defense Counsel]: Your Honor the defendant would like to make a statement regarding the factual basis.

THE COURT: Yeah. I mean I'm trying to understand the crime that he pled guilty to. So two guns are in the center and the State charged the driver but not the passenger?

[Counsel for the State]: Judge, I'm assuming we did not charge the passenger. I do not have that information in front of me.

THE COURT: Uh-huh. Yeah. [Defense counsel] what would your client like to say?

THE DEFENDANT: Actually I wanted to say that address that I was out in front of, I actually stayed there. That is the mother of my child's home, and I was not in the car. I was actually outside of the car. The police officer KAMEG they actually searched me before they went to the car. I was actually outside of the car. The police officer–the KAMEG, they actually searched me before they went to the car. The passenger was still in the car. They searched me outside of my home on the parking–on the sidewalk is where they searched me at and it was nothing on me. They let me go. They told me to stand right there. They went to the car where the passenger was at, they pulled him out and that's when they found two guns and it was a[n] older model car so I don't believe there is a center console.

THE COURT: Well what about this Taurus 38 revolver? You pled guilty to possessing it.

THE DEFENDANT: I actually was just trying to get home to my son. I had a newborn son, and I just pled guilty to it because I didn't want to sit in Jerome Combs Detention Center any longer.

THE COURT: Well whose car was that?

THE DEFENDANT: It was his car. I never owned that car.

THE COURT: Who is he? Who he?

THE DEFENDANT: The passenger.

THE COURT: Who is that?

THE DEFENDANT: Alonzo Williams.

THE COURT: You didn't give a statement to the police though?

THE DEFENDANT: No. I just seen my lawyer because they had got one from him already, but they were trying to act like it was my gun. I'm like I didn't know nothing about no gun. It's not my car.

THE COURT: Could I see the 412, [Counsel for the State]–

[Counsel for the State]: Yes.

THE COURT: –if you don't mind? What date did this plea take place on?

[Counsel for the State]: December 21st, 2012."

The court found "it difficult to believe [it] would have even accepted the plea if that's what [defendant] said on the date of the plea of guilty." The court called a recess so that it could listen to the recording of the plea hearing.

¶ 8 When the proceedings resumed, the court said:

> "unfortunately I wasn't able to get the information I was looking for. *** At the time of the plea I asked the defendant if he had the weapon in his possession. He said no. I asked for the State to give a factual basis. [Counsel for the State] gave a factual basis. [Counsel for the State], do you have your 412?"

In response, the State provided the court with two police reports. The court read the reports into the record. The first report stated defendant's vehicle was stopped for failing to signal. The vehicle parked in a nearby driveway and defendant fled toward a residence. An officer escorted defendant to the rear of the vehicle and another officer directed Williams to exit the vehicle. As

Williams exited the passenger seat, an officer saw the butt end of two handguns protruding from between the driver and passenger's seat cushions. The second report documented defendant's telephone call from the Jerome Combs detention center to an unnamed female. Defendant told the female that he had "an intimate knowledge of the firearms found in the vehicle including the fact that one of the firearms was stolen."

¶ 9 After reviewing the two police reports, the court ruled:

> "[t]aking into consideration the evidence at the sentencing hearing, the nature of the offense, the need–the factors in aggravation and mitigation which include certainly the need to deter others from committing similar crimes and that–that is illegal possession and use of firearms, the–taking into consideration as well the defendant's performance while on probation and his potential for rehabilitation, I'm gonna find that it would be–it's necessary for the protection of the public and that it would deprecate the seriousness of the offense and be inconsistent with the ends of justice for the defendant to receive another term of probation.
>
> So [defendant] you are sentenced to the Department of Corrections for violation of–following your violation of probation for a period of–a four year sentence."

¶ 10 Defendant filed a motion to reconsider sentence, in which he argued that the sentence was excessive because this was his only felony conviction and he did not have a juvenile record. The motion also contended that the court failed to fully consider the factors in mitigation including restoration to useful citizenship.

¶ 11 At the hearing on the motion, the court stated the main basis for defendant's sentence was defendant's inability to follow through with the terms of probation and defendant's failure to

accept responsibility. Defendant attempted to explain his position, and the court said "you pled guilty and the police reports reflect that the police officers saw you pull away in the vehicle as the driver." Defendant said that he did not own the vehicle and he was standing on the sidewalk when the search uncovered the gun. In spite of defendant's statements, the court found "a lack of acceptance of responsibility" and denied the motion to reconsider sentence. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant's sole argument is "[t]he trial court committed reversible error at sentencing when, in finding factors in aggravation, it conducted its own investigation by searching through the State's discovery packet and thereafter relied on unreliable hearsay, in the form of two police reports, contained in that discovery." Defendant acknowledges that he forfeited appellate review, but he contends that the forfeiture rule should apply less rigidly because the court's conduct caused the error (*People v. Taylor*, 357 Ill. App. 3d 642, 647 (2005)) or reversal is warranted under either prong of the plain error doctrine (*People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7). Upon review, we conclude that reversal is not warranted as the trial court's consideration of the police reports was not error.

¶ 14 When an issue has been forfeited, it can only be reviewed for plain error. *People v. Belknap*, 2014 IL 117094, ¶ 48. In the alternative, defendant argues that the forfeiture bar should be relaxed because of the practical difficulties involved in objecting to the court's own error. *Taylor*, 357 Ill. App. 3d at 647. Both analyses begin with a determination of whether the court erred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010); *Taylor*, 357 Ill. App. 3d at 647.

¶ 15 Defendant first contends that the court improperly conducted a private investigation when it requested information from the State that was not before the court. A sentencing determination made by the court based upon its private investigation that is untested by cross-examination or

any of the rules of evidence constitutes a denial of due process of law. *People v. Dameron*, 196 Ill. 2d 156, 172 (2001).

¶ 16 The instant case was called for a resentencing hearing after defendant admitted to violating a term of his probation. The court asked the State to recite the factual basis for the plea, and then it inquired if defendant had made a statement. At that point, defendant explained that he did not possess the firearm and he was outside of the car when the police arrived. The court appeared confused by defendant's statement, likely because defendant had pled guilty to possession of a stolen firearm and had not sought to withdraw his plea. The court inquired further by seeking review of the plea transcript and two police reports regarding the incident.

¶ 17 While the court's actions constituted an investigation, it did not rise to the level an impermissible private investigation. First, both parties were present and had an opportunity to object to the court's review of the police reports. Second, the police reports were contained in the State's discovery which, based on the record, were part of the pretrial disclosures mandated by Illinois Supreme Court Rule 412 (eff. Mar. 1, 2001). Finally, the contents of the investigation were not independent or unrelated to the case. Rather, they pertained directly to the charged offense and factual basis for the plea agreement.

¶ 18 We find that the instant investigation is distinct from an impermissible private investigation. For example, in *Dameron*, 196 Ill. 2d at 172-74, 177-78, during the sentencing hearing, the judge commented extensively on the book *All God's Children, the Bosket Family and The American Tradition of Violence* and his father's judicial experience in imposing a death penalty sentence in 1966. Our supreme court observed that the judge's discussion of the book and references to his father constituted nearly half of the sentencing comments. *Id.* at 179. The

supreme court held that the trial court may search within reasonable bounds for facts relative to aggravation and mitigation, but the judge's search exceeded such bounds and was improper. *Id.*

¶ 19 This court reached a similar conclusion in *People v. Cervantes*, 2014 IL App (3d) 120745, ¶ 46, where, during sentencing, the trial court conducted an off-the-record inquiry. During the sentencing hearing, the trial court left the bench to review life expectancy tables that had not been introduced into evidence by either party. *Id.* When the proceedings resumed, the trial court stated "[w]hat I looked up was life expectancy tables. I'm going to sentence [defendant] to what his life expectancy is expected to be." *Id.* The trial court then imposed a sentence that was commensurate with defendant's life expectancy. *Id.* On review, this court held that the trial court's actions constituted a private investigation and denied defendant due process of law. *Id.* ¶ 47.

¶ 20 Unlike the above-discussed cases, the investigation at issue occurred on the record and was limited to a review of the two police reports that had been disclosed to the parties during the pretrial proceedings. The trial court also read the two police reports into the record and the two police reports were largely consistent with the factual basis for the plea. Therefore, we find that the trial court's investigation was conducted within the reasonable bounds of the facts relevant to the factors in aggravation and mitigation. See *Dameron*, 196 Ill. 2d at 179.

¶ 21 In disagreeing with our conclusion, defendant argues that the court further erred in considering the two police reports during the sentencing hearing because the reports were impermissible hearsay evidence. However, it is well settled that the ordinary rules of evidence are relaxed at the sentencing hearing. *People v. Harris*, 375 Ill. App. 3d 398, 408 (2007) (citing *People v. Jett*, 294 Ill. App. 3d 822, 830 (1998)). In making its sentencing pronouncement, the court may consider various sources and types of information and is allowed to search

" 'anywhere within reasonable bounds for other facts which may serve to aggravate or mitigate the offense.' " *Id.* (quoting *People v. Moore*, 250 Ill. App. 3d 906, 919 (1993)). The only requirement is that the evidence must be deemed reliable and relevant. *Id.* at 409. Hearsay evidence " 'may be found to be relevant, reliable, and admissible when it is corroborated by other evidence.' " *Id.* (quoting *Jett*, 294 Ill. App. 3d at 830). A sentence will only be reversed where a defendant shows that he has been prejudiced by the material considered by the trial court in conducting its inquiry. *Id.*

¶ 22 The two police reports considered by the court during sentencing were hearsay statements. See *People v. Shinohara*, 375 Ill. App. 3d 85, 113 (2007) (police reports are hearsay and generally inadmissible as substantive evidence). Despite the hearsay classification, these reports were reliable and relevant evidence of the underlying offense, to which defendant pled guilty. Moreover, defendant suffered no prejudice from the court's review of the police reports as they were part of the pretrial Rule 412 disclosure. See, *e.g.*, *People v. Thomas*, 111 Ill. App. 3d 451, 453 (1983) (finding court's consideration of police reports during sentencing was not reversible error where defendant did not suffer prejudice because the reports were disclosed during the discovery process). Although we do not condone the practice of considering hearsay evidence that is untested by cross-examination in the sentencing context, we find that it did not prejudice defendant.

¶ 23 CONCLUSION

¶ 24 In summary, the court did not err in considering the police reports during the sentencing hearing. Having found no error, there is no need to apply a relaxed forfeiture rule and we need not conduct further plain error analysis.

¶ 25 The judgment of the circuit court of Kankakee County is affirmed.

¶ 26 Affirmed.