2016 IL App (3d) 140810-U

Order filed October 6, 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,	)	
v.	)	Appeal No. 3-14-0810 Circuit No. 14-CF-175
PIERRE T. MILLER,	)	Honorable Clark E. Erickson,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held*: The court did not err when it imposed defendant's extended-term prison sentence.

¶ 2 Defendant, Pierre T. Miller, appeals his six-year prison sentence. Defendant argues the court abused its discretion in imposing the sentence because it improperly relied on its own beliefs concerning the prosecution of domestic violence cases and assumed information was missing from the presentence investigation report (PSI). We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by amended information with domestic battery (720 ILCS 5/12-3.2(a)(2) (West 2014)). The domestic battery was charged as a Class 4 felony due to defendant's 2006 conviction for domestic battery in case No. 05-CM-871. Prior to trial, the court granted the State's motion to offer evidence of defendant's commission of other offenses of domestic violence. 725 ILCS 5/115-7.4 (West 2014). The case proceeded to a bench trial.

¶ 5 The evidence at trial established that, on April 26, 2014, Howard Boone was awoken by loud talking in an alley near his home. Boone saw a man and a woman arguing over a cellular phone. Boone called the police. Thereafter, Boone saw the woman walk toward a house and the man followed. The woman was standing on the front steps of the house when the man "sat her on the ground." The man let go of the woman and she ran to her car. The man leaned into the car for a moment, and then the car drove away and the man walked off.

¶ 6 Officer Jason Burse spoke with Boone and Erica C.—the woman Boone had seen in the alley. Burse located defendant, and when Burse called out to defendant, defendant fled. Burse gave chase and found defendant sitting in the corner of a basement of a nearby house.

¶ 7 Officer Emerson Rushing testified that, on April 27, 2011, he was dispatched to a residence on a report of domestic violence. As Rushing approached the residence, he heard a woman, whom he later identified as Erica, crying. Rushing saw defendant grab Erica by her throat and push her against a wall. Rushing observed bruises on Erica's arm. Erica did not sign a criminal complaint.

¶ 8 Erica testified that, on April 26, 2014, defendant flagged her down while she was driving in her car with her son—Erica and defendant had two children together. Defendant indicated that he wanted to see his son, and Erica and defendant talked for a few minutes. When Erica's boyfriend called, defendant "went crazy" and grabbed her cellular phone. Erica and defendant

struggled over the phone for several minutes. Eventually, Erica went to a nearby house to get help. The house was locked, and Erica returned to her car. Erica tried to leave, but defendant took her car keys. After exchanging a few more words, defendant threw the keys and phone into the car and walked away. Erica said defendant did not hit her during the incident, but she wrestled with him over the keys and phone. Erica also testified that defendant had restrained her.

¶ 9 The defense admitted into evidence an April 26, 2014, social media conversation that occurred between Erica and defendant. In the messages, defendant said he wanted to see his son. Erica stated that she needed to purchase a white shirt, and defendant said he would pay for the shirt if Erica picked him up. Erica's reply indicated that she was on her way to get defendant, but Erica testified that she never intended to pick defendant up.

¶ 10 Defendant testified that, on April 26, 2014, he contacted Erica via social media and arranged for Erica to pick him up. Defendant and Erica went to three different stores, and on their way back to defendant's house, Erica became grouchy and told defendant to get out of the car. Erica pulled into an alley where she and defendant got into a fight over defendant's cellular phone. Erica threw defendant's phone out of the car. Defendant thought Erica was angry with defendant because another woman had called him. Erica threatened to call the police if defendant did not get out of the car. Defendant took Erica's phone and got out of the car. Erica ran to a nearby house. Defendant approached Erica and tried to kiss her. Defendant lost his balance as he tried to kiss Erica on the step, and defendant sat "her off the stairs." Erica walked back to her car where she tried to hit defendant as he returned her phone. Defendant said he did not hit or grab Erica.

¶ 11 The court found defendant guilty of domestic battery. Prior to the sentencing hearing, the probation office prepared a PSI. The PSI documented that defendant had three prior felony

convictions and nine misdemeanor charges that resulted in a conviction or conditional discharge. Four of the prior convictions were for domestic battery. The report also stated, in August 2006, defendant was referred to an anger management program. In October 2006, defendant was terminated due to his failure to pass the behavioral criteria.

¶ 12 During the sentencing hearing, defendant stated in allocution that his five children were in Department of Children and Family Services custody, his parents required his assistance due to health issues, he assisted in caring for his 90-year-old grandmother, and he let many people down. Defendant asked the court for leniency so that he did not "get lost in the system."

¶ 13 Before pronouncing the sentence, the court observed that the charge was not based on the infliction of harm, but the event "was significant enough to cause that private citizen to call the police." The court characterized the atmosphere surrounding the event as "threatening" and "menacing." The court further discussed the evidence of the 2011 domestic violence incident before it noted:

> "that whole incident goes a long ways to explaining why domestic violence cases are so difficult to prosecute because the victims are very much caught in the middle between the abuser and the fear of–the fears that go along with police involvement whether it's losing financial support, whether it's fear of further retribution, further batteries being committed down the line, whether it's out of some kind of hope that, gee, maybe you're gonna change but–and that's why the State's Attorney has maybe like a 10 percent conviction rate on bench trials because victims typically don't show up and often times they'll show up and recant the testimony and say, no, that didn't happen. So it's hard to prove them sometimes. It's very difficult to prove in most cases that domestic violence

> actually occurred. It wasn't–but it wasn't that difficult in this case for me to find that you committed domestic battery."

¶ 14 In aggravation, the court noted that defendant's criminal record included nine misdemeanor and four felony convictions. The court found that an extended-term sentence was necessary due to defendant's criminal history. The court found no factors in mitigation. The court sentenced defendant to six years' imprisonment. The court then observed

> "I don't think I've got a complete history here on you–on your history all you have is–all we have on you is your parents were not married at the time of your birth but eventually they were married. They're still living together, and that's about it, and then you went on to be employed as a forklift driver. I have a funny feeling there's something else there."

The court thought something in defendant's childhood occurred, possibly an exposure to domestic violence in the home that explained defendant's situation. Defendant disagreed, and the court speculated that it had a "very incomplete social history. There's something that happened to you when you were very young, and you need to work it out." Defendant replied that he had a great life as a child. The court concluded that the "law requires a sentence of six years in this case."

¶ 15 Defendant filed a motion to reconsider sentence in which he argued his sentence was excessive; and the sentence included facts from a previous case, which defendant had already been punished for. The court denied the motion. Defendant appeals.

¶ 16 ANALYSIS

¶ 17 Defendant argues his sentence must be reversed because the trial court considered the following improper factors: (1) the court's views concerning the prosecution of domestic

violence cases; and (2) it speculated that information was missing from the PSI regarding defendant's childhood. Defendant acknowledges that he did not properly preserve this issue, but argues that it is reversible plain error as the error affects his fundamental right to liberty and implicates due process concerns. The State argues the court did not err, and if we find error, it is not reversible plain error because the second prong of plain error review, which requires reversal where the error affected the fairness of the trial and challenged the integrity of the judicial process, only applies to the six structural errors described in *Neder v. United States*, 527 U.S. 1, 8 (1999). We find the court did not err as the record indicates the statements at issue were not an impermissible part of the court's sentencing calculus.

¶ 18 We begin by addressing the inaccuracy in the State's plain error argument. In *People v. Clark*, 2016 IL 118845, ¶ 46, our supreme court stated "we did not restrict plain error to the types of structural error that have been recognized by the Supreme Court." Therefore, contrary to the State's assertion, the second prong of the plain error doctrine is not limited to the six structural errors discussed in *Neder*. See, *e.g.*, *People v. Sanders*, 2016 IL App (3d) 130511 (holding trial court's consideration of an improper aggravating factor was reversible under the second prong of plain error).

¶ 19 Turning to the merits, we must first determine whether the court erred in sentencing defendant before we apply the second prong of the plain error analysis. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Generally, the trial court has broad discretion in sentencing a defendant. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). We presume the court's sentence is valid so long as it neither ignores relevant factors in mitigation nor considers improper factors in aggravation. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. We review *de novo* the issue of

whether the trial court based its sentence on an improper aggravating or mitigating factor. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14.

¶ 20 Defendant was charged with domestic battery, which the amended information charged as a Class 4 felony due to defendant's 2006 domestic battery conviction. The sentencing range for a Class 4 Felony is one to three years imprisonment. 730 ILCS 5/5-4.5-45(a) (West 2014). However, defendant was eligible for an extended-term sentence due to his history of criminal activity. 730 ILCS 5/5-8-2(a), 5-5-3.2(a)(3) (West 2014). The extended term sentence range was three to six years' incarceration. 730 ILCS 5/5-4.5-45(a) (West 2014). Thus, defendant's six-year prison sentence fell within the applicable sentence range and is presumptively valid. See *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12.

¶ 21 Prior to pronouncing defendant's sentence, the court reviewed the evidence from the trial. This evidence included defendant's dispute with Erica, which prompted a private citizen to call the police, and defendant's flight from the police. The court also discussed the April 27, 2011, incident of domestic violence. Thereafter, the court briefly discussed the difficulties inherent in the prosecution of domestic violence cases.

¶ 22 Defendant argues the court improperly considered its own views regarding the prosecution of domestic violence cases while sentencing defendant.[1] This discussion, which defendant argues is improper, was derived from the facts of this case. Specifically, they were made in connection with Erica's decision not to sign a criminal complaint after the 2011 incident. Evidence of this prior incident was admitted pursuant to section 115-7.4 of the Code of

[1]In making this argument, defendant contends that the court misconstrued Boone's testimony and found the testimony of Erica credible in spite of contradicting evidence. Defendant's arguments essentially attack the sufficiency of the evidence and the court's credibility findings. However, defendant does not challenge the court's finding of guilt. Therefore, we reject this argument as it is irrelevant to the sentence issue and defendant does not contest the sufficiency of the evidence.

Criminal Procedure of 1963, which permits the consideration of evidence of a defendant's prior offenses of domestic violence. 725 ILCS 5/115-7.4 (West 2014). These comments also related to the aggravating factor of defendant's prior criminal history which included four prior domestic battery convictions. See 730 ILCS 5/5-5-3.2(a)(3) (West 2014). Therefore, we find that this comment did not form an improper part of the court's sentencing decision.

¶ 23 Defendant also argues that the court improperly speculated about an omission in defendant's PSI. We find that the comments were not error. First, we observe that the comments were not part of the court's sentence determination as the court pronounced defendant's sentence before it conjectured that something was missing from the PSI. Second, if the court considered the potentially missing information about defendant's childhood in its sentencing decision, this information would be a factor in mitigation as it explains defendant's behavior. See 730 ILCS 5/5-5-3.1(a)(5) (West 2014). Therefore, the court's consideration of this potentially missing information from defendant's PSI was not error.

¶ 24 In summation, the court did not err when it: reviewed and commented on the trial evidence, which included facts related to defendant's prior domestic violence offense, and speculated that information was missing from the PSI. Finding no error, we need not address the second prong of the plain error analysis.

¶ 25 CONCLUSION

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

¶ 27 Affirmed.