2017 IL App (1st) 14-2791-U

Nos. 1-14-2791 and 1-15-2233, Consolidated

April 20, 2017

Fourth Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 13 CR 14793
	)	
CHANDOR SMITH,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's sentences for possession of a controlled substance with intent to deliver and possession of cannabis affirmed over his claim that the trial court improperly relied on unreliable double hearsay in imposing his sentences. We order defendant's mittimus corrected to reflect the correct credit for days spent in presentence incarceration.

¶ 2 Following a jury trial, defendant Chandor Smith was found guilty of two counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401(a)(2)(A), (a)(1)(A) (West 2012)) and one count of possession of cannabis (720 ILCS 550/4(c) (West 2012)). The

court sentenced defendant to concurrent sentences of 10 years' imprisonment for each conviction for possession with intent to deliver, 3 years' imprisonment for the possession of cannabis conviction, and 3 years of mandatory supervised release (MSR). On appeal, defendant contends that, in imposing sentence, the trial court improperly relied upon double hearsay when the State recited the facts surrounding one of defendant's previous convictions in aggravation. Defendant also contends that he is entitled to additional credit for days spent in presentence incarceration. For the following reasons, we affirm defendant's sentence and order the mittimus corrected.

¶ 3 Defendant was charged with two counts of possession of a controlled substance with intent to deliver and possession of cannabis. The evidence at trial showed that on June 26, 2013, police were executing a search warrant on a first floor apartment belonging to Brian McMillan.[1] Police surrounded the residence and as they entered the front door, officers waiting in the backyard caught defendant fleeing through the back of the residence. Defendant was carrying a freezer bag containing multiple bags of heroin, cocaine, and cannabis. Officers arrested defendant, searched him, and recovered additional heroin in his pocket and $350. Defendant denied carrying drugs that day.

¶ 4 The jury found defendant guilty of all counts. At defendant's sentencing hearing, the State referred to defendant's PSI and noted this was defendant's second Class X felony and that he had several prior convictions. The court asked the State for details regarding one of defendant's prior convictions. The following colloquy ensued.

> "THE COURT: I have a question on this 1998 conviction that Judge Egan gave him 15 years for attempt first degree murder. What was that about?

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[1] McMillan, defendant's co-defendant, was also charged with various drug-related offenses. McMillan pled guilty prior to trial and is not a party to this appeal.

> [THE STATE]: The facts?
>
> THE COURT: Yes.
>
> [THE STATE]: Judge, I thought I had a fact sheet at one point, but can I have a moment to get one. It will take me a second. Judge, that particular case, the defendant intervened in a fight that was occurring on the street. He shot the victim who was 22 years old in the head and shoulder, and that was it.
>
> THE COURT: Okay."

¶ 5 After hearing from defense counsel in mitigation, defendant spoke in allocution, contending that the drugs recovered did not belong to him. The court thereafter sentenced defendant to concurrent sentences of 10 years for each possession with intent to deliver conviction, 3 years for the possession of cannabis conviction, and 3 years of MSR. The court stated, "[t]here is some aggravation based on [defendant's] criminal history," when explaining why the sentence was higher than the statutory minimum of six years. Defendant was granted credit for 139 days of presentence incarceration.

¶ 6 After being admonished of his right to appeal, defendant asked the court about the 10-year sentence. The following colloquy ensued.

> "THE COURT: You know, I could have given you up to 30 [years]. And the fact is you shot somebody before in the head and got 15 years on that case. And after you were done with that, you went to jail for 15 months on a drug case before. And before you shot somebody, you had 30 months probation. So this is your fourth felony.
>
> THE DEFENDANT: 30 months –
>
> THE COURT: Yes, it is, 1996, Judge Moran.

THE DEFENDANT: It was a misdemeanor.

THE COURT: You are right. That was reduced to a misdemeanor. You are correct, the more I look at it. You had some juvenile probations, too."

¶ 7 The court denied defense counsel's motion to reconsider sentence, and defendant subsequently filed a notice of appeal for case no. 1-14-2791. On May 8, 2015, defendant filed a motion for order *nunc pro tunc* requesting that the trial court amend his mittimus to correct the presentence incarceration credit to which he was entitled. The trial court denied his motion on June 8, 2015. On August 13, 2015, defendant filed a late notice of appeal of the trial court's denial of his motion for order *nunc pro tunc* in case no. 1-15-2233, which this court allowed on August 20, 2015. This court consolidated defendant's appeals in cases 1-14-2791 and 1-15-2233.

¶ 8 On appeal, defendant first maintains that the trial court improperly relied upon unsubstantiated double hearsay in imposing his sentence when the State gave the court facts surrounding his prior attempted murder conviction from a "fact sheet." Defendant acknowledges that his trial counsel failed to preserve this claim of sentencing error because he did not object at the sentencing hearing or raise this issue in a postsentencing motion. However, defendant asks that we review his claim for plain error. Alternatively, defendant argues that trial counsel's failure to preserve the sentencing issue for appeal constitutes ineffective assistance of counsel.

¶ 9 The plain-error doctrine is a narrow and limited exception. *People v. Bannister,* 232 Ill. 2d 52, 65 (2008). To obtain relief under this rule, a defendant must first show that a clear or obvious error occurred. *People v. Piatkowski,* 225 Ill. 2d 551, 565 (2007). In the sentencing context, a 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). Under both prongs of the plain-error doctrine, the defendant has the burden of persuasion. *People v. Naylor,* 229 Ill. 2d 584, 593 (2008); *People v. Herron,* 215 Ill. 2d 167, 187 (2005).

¶ 10 "It is well settled that a trial judge's sentencing decisions are entitled to great deference and will not be altered on appeal absent an abuse of discretion." *People v. Jackson,* 375 Ill. App. 3d 796, 800 (2007). In general, "we will not disturb sentences that fall within the statutory guidelines unless they are 'greatly disproportionate' to the nature of the offenses of which the defendant has been convicted." *People v. Bailey*, 409 Ill. App. 3d 574, 591 (2011) (quoting *People v. Johnson*, 347 Ill. App. 3d 570, 574 (2004)).

¶ 11 In this case, defendant's sentences of 10 years' imprisonment for the Class X felonies of possession of a controlled substance with intent to deliver, are well within the statutorily prescribed range of 6 to 30 years for Class X felonies (730 ILCS 5/5-4.5-25(a) (West 2012)). Because his sentences were within the applicable range, the burden is on defendant to establish that the alleged improper sentencing considerations led to a greater sentence. See *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 12 The ordinary rules of evidence are relaxed during sentencing hearings. *People v. Bouyer,* 329 Ill. App. 3d 156, 163 (2002). The only requirement for admission of evidence in a sentencing hearing is that the evidence must be reliable and relevant as determined by the trial court within its sound discretion. *People v. Harris,* 375 Ill. App. 3d 398, 409 (2007). "The source and type of admissible information is virtually without limits." *People v. Varghese,* 391 Ill. App. 3d 866, 873 (2009). A court " 'may search anywhere, within reasonable bounds, for other facts which tend to aggravate or mitigate the offense.' " *People v. La Pointe,* 88 Ill. 2d 482, 495

(1981) (quoting *People v. Adkins,* 41 Ill. 2d 297, 301 (1968)). Courts may consider hearsay information at sentencing. *People v. Spicer*, 379 Ill. 3d 441, 466 (2007). Further, uncorroborated double hearsay is not inherently unreliable at sentencing, but "where our supreme court has approved the admission of double hearsay, at least some parts *** have been corroborated by other evidence." *People v. Williams*, 272 Ill. App. 3d 868, 878 (1995). When potential consideration of improper sentencing factors is at issue, "the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21 (2008). "[T]he question of whether a court relied on an improper factor in imposing a sentence ultimately presents a question of law to be reviewed *de novo.*" *People v. Abdelhadi*, 2012 IL App (2d), 111053, ¶ 8.

¶ 13 Here, the "fact sheet" that the State relied on is not contained in the record, and therefore, we are unable to assess its reliability. However, we note that defendant never objected to the State's factual recitation of his prior conviction at sentencing or otherwise gave any indication that it was incorrect, even after being afforded the opportunity to speak, which he exercised. Moreover, it is clear from the record defendant cannot show that the weight placed on the brief factual recitation was significant enough to lead to a greater sentence, given his criminal history. The record reflects that although the trial court requested facts surrounding defendant's prior attempted murder conviction, it also mentioned defendant's prior drug convictions and juvenile probations on the record, noting that he had multiple prior felonies. In fact, the trial court stated, before imposing sentence, that "[t]here is some aggravation based on [defendant's] criminal history," and did not specifically mention any one prior conviction or the facts from the prior

attempted murder conviction. Additionally, the trial court only mentioned the prior attempted murder conviction a second time, after already imposing sentence, because defendant inquired about the length of his sentence. Thus, given the lack of impact on sentencing, and in light of a review of the record as a whole, we cannot say that a clear or obvious error occurred when the State gave the court factual information from a "fact sheet" at sentencing. *Piatkowski,* 225 Ill. 2d at 565.

¶ 14 Defendant alternatively argues that trial counsel was ineffective for failing to object to the trial court's alleged error in relying on the State's version of the facts of his prior conviction. To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance "was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala,* 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington,* 466 U.S. 668, 694 (1984)). As already discussed, defendant failed to show that a clear or obvious error occurred in light of his criminal history and the record as a whole, and therefore defendant cannot demonstrate that he was prejudiced by counsel's failure to object. Because defendant was not prejudiced, we need not determine the reasonableness of counsel's actions. See *People v. Tolefree,* 2011 IL App (1st) 100689, ¶ 19.

¶ 15 Defendant next contends, the State concedes, and we agree, that his mittimus does not correctly reflect the number of days of presentence credit to which he is entitled. Defendant was awarded 139 days of credit; however, the record shows that he is entitled to 162 days. Pursuant to Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967), we order the clerk of the circuit court to correct defendant's mittimus to reflect 162 days of credit.

¶ 16 Accordingly, we affirm the judgment of the circuit court of Cook County, but we order the mittimus corrected to reflect 162 days of presentence credit.

¶ 17 Affirmed; mittimus corrected.