2017 IL App (1st) 142844-U

No. 1-14-2844

THIRD DIVISION
March 15, 2017

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. 12 CR 12295
	)	
VICTOR PEREZ,	)	Honorable
	)	Arthur F. Hill Jr.,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Presiding Fitzgerald Smith and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm defendant's conviction and sentence and vacate the improperly-assessed DNA fee.

¶ 2 Following a bench trial, defendant Victor Perez was convicted of, *inter alia*, unlawful use of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2012)) and sentenced to six years' imprisonment. On appeal, he argues the evidence was insufficient to prove him guilty beyond a reasonable doubt, the trial court abused its discretion in sentencing him, and that the DNA fee

was incorrectly assessed. We affirm defendant's conviction and sentence and vacate the DNA fee.

¶ 3 Defendant was charged by information with one count of unlawful use or possession of a weapon by a felon (UUWF) and three counts of aggravated unlawful use of a weapon stemming from acts occurring on June 16, 2012, in Chicago. At trial the following evidence was presented.

¶ 4 Gary Frear testified that, on June 16, 2012, around 6:43 p.m., he was working as a Chicago police officer with Officer Rodriguez patrolling the area of 1230 North Maplewood Avenue in Chicago, on the day of the Puerto Rican Festival. Frear saw a man, identified in court as defendant, standing next to a van talking to its occupants. Defendant was holding his waistband and, after looking at Frear, began to walk towards a residence. Frear exited his vehicle and followed defendant, who after not being able to enter the residence, hopped a wrought-iron fence to the house next door. Through the fence, Frear saw defendant go down a gangway towards an alley. As defendant approached the alley, he removed "what appeared to be a firearm from his waistband." Defendant threw the firearm into a wood pile by a garbage can in the gangway, hopped the fence at the end of the gangway, and fled northbound in the alley.

¶ 5 Frear "paralleled up Maplewood" about four or five houses and then proceeded through an open gangway towards the alley. As he was about to reach the alley, he ran into defendant at the mouth of the gangway and placed him into custody. Frear then returned to the area where he saw defendant hop the fence into the alley and went to the wood pile in the gangway where he saw defendant discard the firearm. There, he recovered a loaded, IMI brand Uzi firearm. Frear inventoried the weapon and processed defendant at the police station. He found defendant did not live at the address of the residence he attempted to enter.

¶ 6 On cross-examination, Frear testified that he did not recall if defendant threw or placed the firearm on the wood pile. He admitted that the police report prepared from the incident indicated defendant placed the gun on the wood pile. Frear further testified that he could not tell if the object defendant discarded was a weapon or if it just appeared to be a weapon. He testified that this wood pile was located about four or five feet from the alley, in the gangway. Frear stated that he witnessed people gathering at one of the residences on the block. He further testified that there were unmarked units in addition to his partner's vehicle in the alley.

¶ 7 On redirect examination, Frear stated that it was daylight out and could see defendant despite there being a fence. Frear further testified that approximately two minutes passed from the time he saw defendant drop the firearm and when he recovered it.

¶ 8 The State introduced a certified copy of defendant's conviction for burglary in case number 02 CR 1475403. It further introduced a certification from the Illinois State Police indicating that defendant had not been issued a Firearm Ownership Identification Card as of July 25, 2012. The State rested its case, and defendant made a motion for a directed finding, which the court denied.

¶ 9 Defense witness Carl Crawford testified that he had lived at 1301 North Maplewood for eight years and had known defendant from the neighborhood for five or six years. On June 16, 2012, around 6:43 p.m., Crawford was coming down the alley just west of Maplewood heading to his home after purchasing a six pack of beer from the store. He noticed defendant walking at a normal pace out of a gangway. A police officer came up from behind defendant from the same gangway and "[slammed] his face against the telephone pole and put handcuffs on him." Crawford kept walking and stopped about six houses away, noticing police officers entering the alley from both directions. After defendant was handcuffed, Crawford observed police officers

looking through and behind garbage cans for about 30 or 40 minutes. Crawford testified that there were four or five officers in the alley, but he did not see them recover anything or go near a wood pile by the alley. He remembered this day because it was the same day as the Puerto Rican Parade and it was crowded.

¶ 10 On cross-examination, Crawford stated that he was out in the alley for "a good 30, 40 minutes" but admitted that he did not look at a watch. He testified that "it seemed like a long time." He admitted that he did not see any police officers "go to any sort of wood pile."

¶ 11 The trial court found defendant guilty on all counts. It recalled the evidence adduced at trial and noted that Crawford "wasn't trying to scam anybody." It further found that Crawford "came here and told the truth as he remembered it," but that his testimony "did not impact directly in any substantial way Officer Frear's testimony" or "[impeach] Officer Frear to any great degree."

¶ 12 After defendant's written motion for a new trial was denied, the court proceeded to sentencing. In aggravation, the State mentioned that defendant had a 2009 Class 2 felony for UUWF for which he received three years' imprisonment. It also noted defendant had a 2002 Class 2 felony conviction for burglary and a 2001 Class 4 felony conviction for possession of a controlled substance. The presentence investigation report also indicated defendant had a 2007 misdemeanor domestic battery conviction for which probation was terminated unsatisfactorily, resulting in 270 days in the Cook County Department of Corrections.

¶ 13 The State further noted that, as the underlying felony to enhance the present UUWF charge to a Class 2 offense was the Class 2 burglary conviction, it could not be used to make him Class X by background, because that would be a double enhancement. However, the State argued that, based on defendant's criminal history, the court should consider an "extendable

range" because defendant received the minimum sentence for his prior UUWF conviction. It acknowledged the present case was "not a crime of violence" but that "the possession of such a weapon certainly leads to many violent acts."

¶ 14 In mitigation, defense counsel, after reciting some of the testimony, argued that defendant's guilt in the case "was a more closely decided question than overwhelming." Counsel further noted that defendant had a "long-time girlfriend," had four children, including a one-year-old, and maintained close communications with his brother and sister. Counsel told the court that, at the age of four years' old, defendant "witness[ed] his mother after being violently abused by his father shoot his father." Defense counsel stated that defendant had employment that he would be able to return to upon completion of his incarceration. Counsel noted defendant was "forthright" with the "PSI officer" and asked for a sentence "at or near the bottom" of the sentencing range.

¶ 15 The trial court sentenced defendant to six years' imprisonment on the UUWF count, merging the aggravated unlawful use of a weapon counts into it. The court stated that it had read the presentence investigation and "heard arguments of counsel." It also recalled the facts of the case. It concluded, "[t]he Court does not think that an extended term sentence is necessary. However, I do think that there should be a substantial sentence to not deprecate the seriousness of this offense."

¶ 16 After defendant's written motion to reconsider sentence was denied, he filed a timely notice of appeal.

¶ 17 On appeal, defendant argues (1) the evidence was insufficient to prove him guilty beyond a reasonable doubt of UUWF, (2) the trial court abused its discretion in sentencing him, and (3) the DNA fee was improperly assessed.

¶ 18 Defendant first argues the State's failure to present the gun at trial renders the evidence insufficient to find him guilty beyond a reasonable doubt of possessing an actual firearm. He also argues that the evidence is insufficient to prove him guilty beyond a reasonable doubt of UUWF because Officer Frear's "vague testimony" is contradicted by the testimony of Crawford.

¶ 19 The standard of review when challenging the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *People v. Brown,* 2013 IL 114196, ¶ 48. "A reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses." *People v. Siguenza-Brito,* 235 Ill. 2d 213, 224-25 (2009). In a bench trial, the trial judge, as the trier of fact, is tasked with determining the credibility of witnesses, weighing the evidence and any inferences derived, and resolving any conflicts in the evidence. *Id.* at 228. A conviction will not be reversed unless "the evidence is so improbable, unsatisfactory, or inconclusive that it creates a reasonable doubt of the defendant's guilt." *In re Q.P.*, 2015 IL 118569, ¶ 24.

¶ 20 To sustain a conviction for UUWF, the State must prove defendant (1) has a prior felony conviction and (2) knowingly possessed a firearm. *People v. Hill,* 2012 IL App (1st) 102028, ¶ 40; 720 ILCS 5/24-1.1(a) (West 2012). Possession of a firearm may be actual or constructive. *People v. Fernandez,* 2016 IL App (1st) 141667, ¶ 18.

¶ 21 Defendant does not challenge the evidence that he has a prior felony conviction. Rather, he argues the State cannot establish he knowingly possessed a firearm. He first contends that the State's failure to produce the firearm at trial rendered the "State's proof fatally compromised." We disagree.

¶ 22 Frear testified that he observed defendant holding his waistband while talking to occupants of a van. After following him, Frear then witnessed defendant remove "what appeared to be a firearm from his waistband." At this point, it was daylight out, and Frear was able to see defendant through a wrought-iron fence. Frear saw defendant throw the item in a wood pile. Two minutes later, Frear recovered a loaded, IMI brand Uzi firearm from that wood pile. Because the trial court could reasonably infer that the firearm defendant "appeared" to have was the same IMI brand Uzi firearm Frear recovered two minutes later, Frear's testimony was sufficient to establish that defendant knowingly possessed a firearm. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60 ("[a] trier of fact is not required to disregard inferences which flow normally from the evidence before it, nor must the trier of fact search out all possible explanations consistent with innocence, and raise those explanations to a level of reasonable doubt"). Additionally, the trial court noted that Frear's testimony was not impeached "to any great degree." As Frear testified that he recovered the weapon, inventoried it, and described it in detail at trial, the State was not required to introduce the gun as corroborating physical evidence at trial. *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 56 ("the failure of the State to introduce a weapon at trial does not impair an officer's credibility or raise a reasonable doubt of defendant's guilt"); *People v. Herron*, 2012 IL App (1st) 090663, ¶ 23. The absence of the gun at trial does not raise a reasonable doubt as to defendant's guilt. *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 56.

¶ 23 We also disagree with defendant that because the trial court found Crawford to be credible, and his testimony directly conflicts with Frear's testimony, the evidence is insufficient to support defendant's conviction. Specifically, defendant asserts "the testimonies of the two men directly conflicted-and if [Crawford] was truthful, then Frear was lying." Crawford testified that he was in the alley when he noticed defendant walking at a normal pace out of a gangway

when a police officer came up from behind defendant from the same gangway, grabbed him by the neck and slammed him into a pole. Crawford then observed police officers looking through garbage cans in the alley for about 30 or 40 minutes but did not see the officers recover anything or go near a wood pile.

¶ 24 This account of the incident does not directly conflict with Frear's account. The trial court found, "[Crawford] saw [defendant] coming out of the gangway into the alley. Ostensibly, from Officer Frear's standpoint the gun had already been planted, placed, or thrown. This could be the moment where the defendant was coming into a gangway the same one that Officer Frear was trying to exit to get to the alley." In effect, Crawford's testimony arguably corroborates Frear's testimony that he and defendant encountered each other at the mouth of the gangway into the alley. Further, as Frear did not testify that defendant was running or how Frear arrested him, Crawford's testimony that defendant was walking and the officer slammed defendant into a pole is not contradictory. The fact that Crawford saw officers searching the alley and not a wood pile does not contradict Frear's testimony that he found the gun in the wood pile. Because Frear testified the wood pile was in the first gangway, not in the alley, Crawford could not have seen Frear retrieve the gun from the wood pile. Accordingly, each witness's testimony is not so contradictory as to render the evidence insufficient to sustain defendant's conviction. *Siguenza-Brito,* 235 Ill. 2d at 228 ("[a] reviewing court will not reverse a conviction simply because the evidence is contradictory [citation] or because the defendant claims that a witness was not credible").

¶ 25 Additionally, the trial court noted Crawford's testimony "did not impact directly in any substantial way Officer Frear's testimony." As the trial judge is tasked with determining the credibility of the witnesses and resolving any conflicts in the evidentiary record, we cannot say

its determination was " 'so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of defendant's guilt.' " *People v. Burnett,* 2016 IL App (1st) 141033, ¶ 40 (quoting *People v. Evans,* 209 Ill. 2d 194, 209 (2004)).

¶ 26 Viewing the evidence in the light most favorable to the State, we find the evidence was sufficient to show defendant knowingly possessed a firearm and thus was guilty beyond a reasonable doubt of UUWF.

¶ 27 Defendant argues his sentence is excessive and the trial court abused its discretion where the State misrepresented the applicable sentencing range, the State argued an element of the offense in aggravation, and the seriousness of the offense and defendant's background do not warrant the sentence imposed. He asks that we reduce his sentence to the statutory minimum three-year sentence.

¶ 28 The trial court has broad discretion in imposing an appropriate sentence, and where, as here, that sentence falls within the range provided by statute, it will not be altered by a reviewing court absent an abuse of discretion. *People v. Lavelle,* 396 Ill. App. 3d 372, 385-86 (2009). An abuse of discretion occurs where the sentence is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey,* 193 Ill. 2d 203, 210 (citing *People v. Fern,* 189 Ill. 2d 48, 54 (1999)). The trial court is in the superior position to determine an appropriate sentence because of its personal observation of defendant and the proceedings. *People v. Alexander,* 239 Ill. 2d 205, 212-13 (2010). It must weigh the relevant sentencing factors, which include the defendant's demeanor, credibility, age, social environment, moral character and mentality. *Id.* at 213.

¶ 29 We find the trial court did not abuse its discretion in imposing a six-year prison sentence. As charged here, because of defendant's prior conviction of a forcible felony for burglary (No.

02 CR 14754), UUWF is a Class 2 felony with a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (West 2012); see 720 ILCS 5/2-8 (West 2012) (defining burglary as a forcible felony). The six-year sentence falls within this statutory range and we therefore presume it is proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 47.

¶ 30 Defendant argues the facts of the offense and his background do not warrant the prison sentence imposed. The seriousness of the offense, and not mitigating evidence, is the most important sentencing factor. *People v. Decatur*, 2015 IL App (1st) 130231, ¶ 12. Here, defendant contends that he disposed of the gun "evincing his desire to avoid harming others" and that the prosecutor admitted at the sentencing hearing that the offense did not involve violence. However, Officer Frear and Crawford both testified that, on the day of the incident, the Puerto Rican Festival was ongoing. Crawford testified that the area was therefore crowded. Frear further testified that there was a gathering of people at a nearby residence. Given the number of people in the immediate area, we reject defendant's characterization that he was trying to avoid harm to others by placing an unattended and loaded IMI brand Uzi firearm on a wood pile four or five feet from an alley. Further, in imposing sentence, the trial court stated "there should be a substantial sentence to not deprecate the seriousness of this offense." The trial court was therefore fully aware of the seriousness of the offense and, consequently, defendant has not shown the trial court did not adequately consider this factor. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38 (the defendant "must make an affirmative showing the sentencing court did not consider the relevant factors").

¶ 31 Further, defendant argues his criminal background does not justify a six-year sentence, which constitutes a "doubling of the only [Department of Corrections] term ever given to him." Defendant has three prior felony convictions, including a previous Class 2 UUWF conviction,

and one misdemeanor domestic battery conviction. Criminal history alone may warrant a sentence substantially over the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). The six-year sentence is not disproportionate to defendant's fourth felony conviction and second Class 2 UUWF conviction. Moreover, defendant was "not deterred by previous, more lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13.

¶ 32 Defendant next argues the State "urged the weapon as an aggravator" and the trial court "unequivocally misapprehended the appropriate sentencing range." The State responds that defendant forfeited these arguments as he failed to raise them in his written motion to reconsider sentence. Defendant, in his reply brief, argues that the plain-error doctrine should apply.

¶ 33 Defendant did not include these specific arguments in his motion to reconsider sentence and thus, they are forfeited on appeal. See *People v. Bannister*, 232 Ill. 2d 52, 76 (2008). However, sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. Because defendant argues for plain error in his reply brief, that is sufficient to allow us to review both issues under the plain-error doctrine. *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 11.

¶ 34 In order to obtain relief under the plain-error doctrine, defendant must first show an obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d at 551, 565 (2007). In the sentencing context, defendant must next show "(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. Hillier*, 237 Ill. 2d 539, 545 (2010). When a defendant fails to establish plain error, that procedural default must be honored. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 35 Defendant contends the second prong applies, that is the errors were so egregious as to deny defendant a fair sentencing hearing. However, we must first determine whether any error occurred at all. *People v. Banks*, 2016 IL App (1st) 131009, ¶ 71. "This requires a ' "substantive look" ' at the issue raised." *Id.* (quoting *People v. Johnson*, 208 Ill. 2d 53, 64 (2003)).

¶ 36 Defendant argues the State improperly "urged the weapon as an aggravator," as possession of the firearm is an element of the UUWF offense. Specifically, at sentencing, the State argued "the possession of such a weapon certainly leads to many violent acts." It is true the trial court may not consider a factor inherent in the offense as a factor in aggravation at sentencing. *People v. Csaszar*, 375 Ill. App. 3d 929, 951 (2007). However, there exists a strong presumption the court based its sentence on proper legal reasoning. *People v. Bowman*, 357 Ill. App. 3d 290, 304-05 (2005). Further, there is no indication here that the trial court considered the existence of the firearm as a factor in aggravation. The court merely stated it "heard arguments of counsel," but not that it adopted the State's arguments in imposing sentence. In sum, defendant has not shown the trial court based its sentence on improper considerations. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49 ("[i]t is the defendant's burden to affirmatively establish that the sentence was based on improper considerations").

¶ 37 Defendant next argues the State urged a "non-existent extended range sentence in aggravation" and that the trial court "unequivocally misapprehended the appropriate sentencing range." In support, defendant points to the State's argument in aggravation that defendant should be sentenced to an extended term and the trial court's subsequent comment that it "does not think that an extended term sentence is necessary." Defendant argues that the court's comment shows the court misapprehended the applicable sentencing range, as an extended-term sentence (730

ILCS 5/5-4.5-35(a) (West 2012)) is inapplicable to defendant's offense. We disagree with defendant that the trial court misapprehended the applicable sentencing range.

¶ 38 Pursuant to the general sentencing statute, Class 2 felonies are punishable by 3 to 7 years' imprisonment, or 7 to 14 years if the trial court imposes an extended-term sentence. 730 ILCS 5/5-4.5-35 (a) (West 2012). However, a term of imprisonment may be "specifically provided in the statute defining the offense." See 730 ILCS 5/5-4.5-15(a)(4) (West 2012). Such is the case here.

¶ 39 Pursuant to the UUWF statute, as charged here, because defendant was previously convicted of burglary, a forcible felony (720 ILCS 5/2-8 (West 2012)), his penalty for UUWF is enhanced from a Class 3 felony to a Class 2 felony, with a sentencing range of 3 to 14 years. 720 ILCS 5/24-1.1(e) (West 2012); see *People v. Kelly,* 347 Ill. App. 3d 163, 167 (2004). In his brief on appeal, defendant acknowledges this was a Class 2 UUWF offense punishable by 3 to 14 years' imprisonment. The court sentenced defendant to a six-year term, which is within the statutory sentencing range and thus presumed proper. *Knox,* 2014 IL App (1st) 120349, ¶ 47.

¶ 40 Even if, as defendant asserts, the State was incorrect in urging a non-existent extended-term sentence for a Class 2 UUWF, the trial court explicitly rejected this argument, stating it "does not think that an extended term sentence is necessary." The record shows the trial court therefore did not contemplate or impose a sentence greater than what was defined by the UUWF statute. Instead, the court found "there should be a substantial sentence to not deprecate the seriousness of this offense," and to that end sentenced defendant to six years, three years above the statutory minimum and eight years below the statutory maximum. Defendant did not object to the State's assertion that an extended-term sentence applied. The court was therefore denied

the opportunity to explain its sentencing decision and, on this record, any argument that the court applied an incorrect sentencing range is pure speculation.

¶ 41 We find the trial court did not consider a factor inherent in the offense as a factor in aggravation and did not misapprehend the appropriate sentencing range. Having found no error, there can be no plain error and defendant's arguments are forfeited. See *Hillier*, 237 Ill. 2d at 549.

¶ 42 Defendant lastly argues the $250 DNA fee was improperly assessed as he was previously convicted of a felony and thus, his DNA profile is already in the Illinois State Police database. See 730 ILCS 5/5-4-3(j) (West 2012). We may modify a fines and fees order without remand per Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999). The standard of review of the propriety of the trial court's imposition of fines and fees is de novo. *Bowen*, 2015 IL App (1st) 132046, ¶ 60.

¶ 43 The State correctly concedes this fee is improper and should be vacated. The fee is only required when a defendant is not currently in the DNA database. *People v. Marshall*, 242 Ill. 2d 285, 303 (2011). Defendant was previously convicted of a felony offense in 2002 for burglary, and we therefore presume this fee has already been imposed. See *People v. Leach*, 2011 IL App (1st) 090339, ¶ 38. Accordingly, we vacate this improperly-assessed $250 DNA fee.

¶ 44 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County and modify the fines and fees order.

¶ 45 Affirmed as modified.