2017 IL App (1st) 142952-U

No. 1-14-2952

April 20, 2017

Fourth Division

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 19551
	)	
JASON STRICKLAND,	)	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*: The State presented sufficient evidence to sustain defendant's conviction of possession of contraband in a penal institution. The trial court did not commit plain error because it did not consider, as aggravating factors at sentencing, a charge of which defendant was acquitted, a pending charge, or an element inherent in the underlying offense. The mittimus will be corrected to reflect the statutory term of mandatory supervised release.

¶ 2 Following a bench trial, defendant Jason Strickland was convicted of possessing contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2012)). Defendant argues on

appeal that the evidence presented at trial was insufficient to prove him guilty of possession of contraband in a penal institution beyond a reasonable doubt; and the trial court committed plain error by considering, as aggravating factors at sentencing, prior offenses of which he had either been acquitted or not yet been convicted and conduct inherent in the offense. He lastly argues the mittimus should be corrected. For the following reasons, we affirm the trial court's judgment, but order the mittimus be corrected.

¶ 3 The State charged defendant by information with the possession of contraband in a penal institution (720 ILCS 5/31A-1.1(b) (West 2012)) in that "he possessed an item of contraband, to wit: cannabis, in a penal institution, to wit: Cook County Department of Corrections [(DOC)]." Defendant waived his right to a jury. On April 21, 2014, the trial court conducted a bench trial. The following evidence was adduced at trial.

¶ 4 Officer Zuniga testified that, on September 10, 2013, he was employed by the Cook County sheriff's department in the DOC. He was working as a corrections officer for the sheriff that day. He was in uniform and his shift began at 3 p.m. He was assigned to a team including 10 officers and a number of supervisors to conduct a search of "Division 9 on Tier 2D." Tier 2D contained "twenty-two cells with two inmates per cell" and had "an upper and lower tier." Zuniga and his partner, Officer Schultz, were tasked with searching "cell 2192" on the first floor of the tier, which was occupied by defendant, "a detainee." Upon entering the tier, Zuniga and the other officers walked into the recreation room and ordered all the detainees there to go to the wall.

¶ 5 Zuniga then went straight to defendant's cell. The cell was comprised of "a double bunk, one on top of the other with a toilet, a table and a sink." The door to defendant's cell was locked. The officers unlocked it and entered the cell. Sitting on the lower bunk, defendant was the only person present in the cell. There was a sheet hung up at the end of defendant's bunk, obstructing Zuniga's

view of the area around defendant's feet. Defendant was sitting with his hands in the waistband of his pants, in the groin area.

¶ 6 Zuniga ordered defendant off the bunk and up against the wall to be searched. Defendant complied, placing his hands on the wall. Upon doing so, he "dropped a plastic bag with little white-like rolled up cigarettes" from the front of his waistband. Zuniga picked up the bag, placed defendant in handcuffs, and escorted him out of the cell.

¶ 7 Zuniga and Schultz took defendant to a private room to be strip searched, a room which was "on the same level [as the second tier]. Just off the tier." Defendant was walking normally. In the room, Zuniga uncuffed defendant and instructed him to remove his clothing. Defendant complied "after several verbal instructions" to do so. Zuniga then instructed defendant to face the wall and spread his legs.

¶ 8 Zuniga noticed a "white string hanging from [defendant's] genital area." Zuniga helped defendant spread his legs further after defendant refused and "a green cloth or pouch fell from his groin area." Zuniga picked up the six-inch pouch and handed it to "the director." Defendant was then allowed to put his clothes back on.

¶ 9 After Zuniga's testimony, the parties stipulated to the chain of custody of the bags recovered from defendant. The parties further stipulated to the testimony of Gina Romano, a forensic scientist at the Northeastern Illinois Regional Crime Laboratory. Romano would testify that the bags tested positive for cannabis and had a combined weight of approximately 30 grams.

¶ 10 After the State rested, defendant entered a 21-minute videotape showing defendant's search into evidence.[1] The trial court watched the videotape. At the conclusion of the trial, it found defendant guilty of possession of contraband in a penal institution. The trial court denied

[1] The videotape is not part of the record defendant submitted on appeal.

defendant's motion for a new trial and sentenced defendant to ten years' imprisonment on September 4, 2014. This appeal followed.

¶ 11 On appeal, defendant argues that (1) the evidence presented at trial was insufficient to prove him guilty of possession of contraband in a penal institution beyond a reasonable doubt; and (2) the trial court improperly considered, as aggravating factors at sentencing, (a) charges of which he was not convicted and (b) an element inherent in the underlying offense. He also asks that we correct the mittimus to reflect the statutory term of mandatory supervised release (MSR). We address each issue in turn.

¶ 12 Defendant argues that the evidence does not support a finding beyond a reasonable doubt that he was guilty of possession of contraband in a penal institution because there was no evidence he was in a penal institution at the time of the offense. The State disagrees.

¶ 13 As a preliminary matter, defendant asserts the standard of review on appeal is *de novo*, as the facts in this case are undisputed. The State responds that the standard of review for sufficiency of the evidence claims is whether any rational trier of fact could have found the elements of the offense beyond a reasonable doubt.

¶ 14 Generally, we view a challenge to the sufficiency of the evidence on an element of the charged offense in the light most favorable to the prosecution and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Amigon*, 239 Ill. 2d 71, 77 (2010). A reviewing court will not overturn the decision of the trier of fact unless it concludes that no rational trier of fact could have found the requisite elements of the offense proven beyond a reasonable doubt. *Id.* However, where the facts are uncontested and the question is whether the facts were sufficient to prove the elements of the offense, this is a question we review *de novo*. See *People v. Smith*, 191 Ill. 2d 408, 411 (2000).

¶ 15 Here, defendant does not challenge the trial court's interpretation of the law. Rather, defendant challenges the inference the trial court drew from the evidence, *i.e.*, that he was in a penal institution when he possessed the cannabis. Inferences to be drawn from the evidence are factual questions for the trier of fact. See *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). Accordingly, we agree with the State that the issue is not a question of law and, therefore, the standard of review on appeal is whether any rational trier of fact could have found that the requisite elements of the offense were proven beyond a reasonable doubt.

¶ 16 Defendant was convicted under section 31A-1.1(b) of the Criminal Code (Code), which provides: a "person commits possessing contraband in a penal institution when he or she knowingly possesses contraband in a penal institution, regardless of the intent with which he or she possesses it." 720 ILCS 5/31A-1.1(b) (West 2012). "Contraband" includes cannabis, possession of which in a penal institution is a Class 3 felony. 720 ILCS 5/31A-1.1(d)(2) (West 2012). The Code defines "penal institution" as:

> "[A]ny penitentiary, State farm, reformatory, prison, jail, house of correction, police detention area, half-way house or other institution or place for the incarceration or custody of persons under sentence for offenses awaiting trial or sentence for offenses, under arrest for an offense, a violation of probation, a violation of parole, or a violation of mandatory supervised release, or awaiting a bail setting hearing or preliminary hearing; provided that where the place for incarceration or custody is housed within another public building this Article shall not apply to that part of the building unrelated to the incarceration or custody of persons." 720 ILCS 5/31A-0.1 (West Supp. 2013).

Defendant does not challenge the finding that he possessed cannabis, *i.e.* contraband, only that the possession occurred in a penal institution.

¶ 17 We reject defendant's assertion that "[t]he State failed to provide any evidence *** of where Tier 2D was located or that it was in a Cook County [DOC] facility, let alone sufficient evidence *** that Tier 2D was a penal institution on the [date in question]." More specifically, the record in this case belies defendant's assertion that "[t]he State did not present evidence to show that Tier 2D was under the direction of a warden, that guards were present, that there were inmates present who were not there voluntarily." Zuniga testified he had been employed by the DOC for 12 years and, that day, was working the afternoon shift as a corrections officer and searching cells with ten other officers and their supervisors. He testified he was assigned to Tier 2D which had 22 "cells" and identified defendant as a "detainee" kept in a locked cell. Given that defendant was detained in a locked cell subject to search by corrections officers when the cannabis was found, we find the evidence ample for a rational trier of fact to conclude the location of the offense was a place of incarceration or custody, *i.e.*, a penal institution.

¶ 18 Defendant argues, however, that the location element in this case is analogous to the location element reviewed in *People v. Boykin*, 2013 IL App (1st) 112696. In *Boykin*, the court found the State had failed to prove that the defendant delivered a controlled substance within 1,000 feet of a school, as required by the statute in that case. *Id.* ¶ 1 (citing 720 ILCS 570/407(b)(2) (West 2008)). In *Boykin*, two police officers testified that the defendant was adjacent to 'Our Lady of Peace' school when he delivered drugs. *Id.* ¶¶ 2-3. The *Boykin* court, however, found there was insufficient evidence that defendant was in fact near a school, explaining as follows:

> "[T]here was no evidence presented to show how those officers had personal knowledge of the operation of that building. The officers did not testify that they lived in the area or that they regularly patrolled the neighborhood, so as to allow an inference that they had personal knowledge as to whether the school was in operation on the date of the offense." *Id.* ¶15.

¶ 19 We find *Boykin* is inapposite to the case *sub judice*. *Boykin* dealt with a situation where the witnesses were explicit as to the physical location of the offense (near a school building) but did not testify they were familiar enough with the location to speak to the use of the location (actually being used as a school). Here, Zuniga, although not explicit as to the specific location, did testify regarding his extensive experience as a corrections officer and provided detailed descriptions of the location itself, demonstrating it was a penal institution. Unlike the two officers in *Boykin*, Zuniga's testimony established he was extremely familiar with the location and its use and was sufficient to show the offense took place in a location defined by statute. Thus, we find *Boykin* to be inapplicable in this case.

¶ 20 Additionally, defendant has failed to provide us with the video recording of the search of defendant, which the trial court viewed and considered at trial. The court specifically noted that it saw "the videotape that was taken by the sheriffs at the time of the search of cell block" and that the videotape corroborated Zuniga's version of the search of defendant. Defendant, as appellant, bears the burden of providing a sufficiently complete record to support a claim of error. *People v. House*, 2015 IL App (1st) 110580, ¶ 57. In the absence of a complete record on appeal, we will presume that the order entered by the circuit court was in conformity with law and had a sufficient factual basis and any doubts arising from the incompleteness of the record

will be resolved against the appellant. *Id.* Accordingly, we presume the videotape supported the court's finding that the offense in question occurred in a penal institution.

¶ 21 In light of the forgoing, we find the evidence at trial was sufficient to convict defendant of possession of contraband in a penal institution.

¶ 22 Defendant next contends that the trial court erred when it improperly considered, as aggravating factors at sentencing, a charge of which he was acquitted, another of which he was not yet convicted, and an element inherent in the underlying offense.

¶ 23 Defendant was convicted of one count of possession of contraband in a penal institution, a Class 3 felony. 720 ILCS 5/31A-1.1(d)(2) (West 2012). Defendant had a prior conviction of armed habitual criminal in Cook County case 07 CR 6901 and was therefore eligible for extended term sentencing. 730 ILCS 5/5-8-2 (West 2012); 730 ILCS 5/5-5-3.2 (West 2012). An extended Class 3 felony has a sentencing range of between 5 and 10 years' imprisonment. 730 ILCS 5/5-4.5-40(a) (West 2012). The trial court sentenced defendant to 10 years' imprisonment, which is within the mandated sentencing range and therefore is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 24 The record shows that the trial court had, some months earlier, acquitted defendant of a possession of contraband in a penal institution charge in Cook County Case 12 CR 6251. It also shows defendant was awaiting retrial on a murder charge, his original trial having resulted in a hung jury. The record further shows defendant pled guilty to armed habitual criminal six months earlier and was sentenced to 15 years' imprisonment. His presentence investigation report (PSI) showed a 2002 conviction for manufacturing and delivering a controlled substance (720 ILCS 570/401(d) (West 2002)) for which he received 2 years probation and a 2002 conviction for the same offense after he violated probation for which he received 3 years' imprisonment. It showed

a 2004 unlawful use of a weapon conviction for which he was sentenced to two years' imprisonment and a 2008 reckless driving conviction for which he was sentenced to 12 months conditional discharge.

¶ 25 The State argued in aggravation at sentencing that defendant had a criminal history, noting the court had given defendant "the reasonable benefit of the doubt on a similar case." It argued that defendant had shown an inability to be rehabilitated, "noting, in fact, this crime arose within his custody while pending on a murder case." Defense counsel argued in mitigation that defendant had been employed, completed his GED, and had a strong familial background. Counsel also noted that defendant's conviction in this case was nonviolent and that defendant suffered from a drug problem. Defendant allocuted, telling the court that he had been in denial in regard to a drug problem he had been struggling with for 16 years and asked that the court recommend him for treatment.

¶ 26 The trial court then sentenced defendant to the maximum term, explaining:

> "The problem is that this happened while in custody. There were two matters that happened while in custody. One involved a weapon. One involved marijuana. All while awaiting retrial - -
>
> * * *
>
> Excuse me. I misspoke. One involved marijuana [in Cook County case 12 CR 6256] and the second involved marijuana. Repeated misconduct. We had the [conviction under] the Armed Habitual Criminal Act as well. All this while we have the specter of a murder case [in Cook County case 09 CR 18784-03] that's still hanging over you where you had a hung jury. ***.
>
> I'm going to sentence him to ten years in the penitentiary ***."

¶ 27 Defendant argues that the trial court's comments show it improperly considered his prior acquittal of possession of contraband in a penal institution, his pending murder charge, and an element of the offense (that the possession occurred while he was in custody) as aggravating factors. The State responds that the court's comments were a passing comment about defendant's actions in this case, and did not reveal that the court considered any improper factors in sentencing. Specifically, the State asserts that "the trial court's comments were directed at responding to the defendant's attempt during his statement in allocution to blame his current situation on his drug addiction." It argues that the court recognized the case arose, not from defendant's addiction, but as a result of his "[r]epeated misconduct."

¶ 28 In imposing a sentence, the trial court must balance the relevant factors, including the nature of the offense, the protection of the public, and the defendant's rehabilitative potential. *People v. Alexander*, 239 Ill. 2d 205, 213. The trial court has a superior opportunity to evaluate and weigh a defendant's credibility, demeanor, character, mental capacity, social environment, and habits. *People v. Snyder*, 2011 IL 111382, ¶ 36. The court does not need to expressly outline its reasoning for sentencing, and we presume that the court considered all mitigating factors on the record absent some affirmative indication to the contrary other than the sentence itself. *People v. Powell*, 2013 IL App (1st) 111654, ¶ 32; *People v. Brewer*, 2013 IL App (1st) 072821, ¶ 55. Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214; *Brewer*, 2013 IL App (1st) 072821, ¶ 57.

¶ 29 Although the imposition of sentence is generally a matter of judicial discretion (*People v. Perruquet*, 68 Ill. 2d 149, 154 (1977)), "the 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). It is the defendant's burden to affirmatively establish that the sentence was based on improper considerations (*People v. Conley*, 118 Ill. App. 3d 122, 133 (1983)), and we will not reverse a sentence imposed by a trial court unless it is clearly evident the sentence was improperly imposed (*People v. Ward*, 113 Ill. 2d 516, 526 (1986)).

¶ 30 Defendant concedes that he failed to preserve the issues regarding improper sentencing for appeal, but he asserts they can be considered as plain error. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error doctrine allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). Specifically, in the sentencing context, a defendant must 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. Hillier*, 237 Ill. 2d 539, 545 (2010). However, before we can determine whether an error fits under either of the above categories, we must first determine whether a clear and obvious error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). Pursuant to the plain error doctrine, a "defendant has the burden of persuasion and, if he fails to meet his burden, his procedural default will be honored." *People v. Johnson*, 2015 IL App (1st) 133663, ¶ 12 (citing *Hillier*, 237 Ill. 2d at 545).

¶ 31 A trial court commits error in sentencing a defendant when it considers bare arrests or pending charges as factors in aggravation of a sentence. *People v. Johnson*, 347 Ill. App. 3d 570,

575 (2004). However, the mere mention of an improper factor in passing does not mean that the court relied on that factor in determining the appropriate sentence. *People v. Beals*, 162 Ill. 2d 497, 509-10 (1994). A court may refer to the nature and circumstances of an offense at sentencing. *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. The trial court is presumed to have recognized and disregarded incompetent evidence unless the record reveals the contrary. *People v. Shumate*, 94 Ill. App. 3d 478, 488 (1981). Accordingly, "the record must affirmatively disclose that the arrest or charge was considered by the trial court in imposing sentence." *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984).

¶ 32 First, defendant argues that the trial court committed clear and obvious error because it considered defendant's prior acquittal for possession of contraband in a penal institution. We find no support in the record for this contention. Although, as defendant points out, the trial court commented on defendant's prior acquittal for possession of contraband in a penal institution, its comments were a response to defendant's statement in allocution in which he blamed his addiction to cannabis for his conviction. Nothing in the court's comments shows its remarks were anything other than a summation of how the case came before the court on sentencing, let alone that the court considered or relied on the acquittal in sentencing. A court may properly refer to the nature and circumstances of an offense at sentencing. See *Sanders*, 2016 IL App (3d) 130511, ¶ 13. Accordingly, defendant has failed to affirmatively show that the trial court improperly relied on defendant's prior acquittal for possession of contraband in a penal institution as an aggravating factor at sentencing. He has thus failed to show a clear and obvious error and his argument is forfeited.

¶ 33 Defendant also argues that the trial court committed a clear and obvious error when it considered his pending murder charge at sentencing. This claim is likewise forfeited.

¶ 34 At sentencing, after the court mentioned defendant's prior acquittal for possession of contraband in a penal institution and his conviction for armed habitual criminal, it commented that defendant committed his current offense "while we have the specter of a murder case that's still hanging over you where you had a hung jury." As with its comments regarding the acquittal, the court mentioned the pending charge in response to defendant's statement in allocution and in reciting the nature and circumstances of the offense. See *Sanders*, 2016 IL App (3d) 130511, ¶ 13. Nothing in the court's remarks demonstrates that it considered the pending charge in aggravation. Accordingly, defendant has not shown that the court committed clear and obvious error by mentioning defendant's pending murder charge at sentencing and his argument is forfeited.

¶ 35 Defendant further argues that the trial court committed clear and obvious error when it considered conduct inherent in the offense as an aggravating factor. Specifically, he asserts the court's statement that "[t]he problem is that this [conviction] happened while [defendant was] in custody" demonstrates it improperly considered the fact that the offense occurred in a penal institution both as an element of the offense and as a factor in aggravation. This claim is also forfeited.

¶ 36 Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing. *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). In other words, a single factor cannot be used both as an element of an offense and as a basis for imposing a "harsher sentence than might otherwise have been imposed." *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992). Such dual use of a single factor is often referred to as "double enhancement." *Id.* at 85. The prohibition against double enhancements is based on the rationale that "the legislature obviously has already considered

such a fact when setting the range of penalties and it would be improper to consider it once again as a justification for imposing a greater penalty." (Internal quotation marks omitted.) *People v. James*, 255 Ill. App. 3d 516, 532 (1993). The defendant bears the burden of establishing that a sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 37 Here, the court's mention of defendant's custodial status was again a response to defendant's statement in allocution and a description of the nature of the case, *i.e.*, defendant's presence in a penal institution when he committed the offense. The trial court was merely responding to defendant's statement in allocution, in which defendant placed the blame for this offense on his problem with drug addiction. The court essentially told defendant that his drug addiction did not absolve him of committing the offense in this case. It then recited the circumstances of the offense, which occurred, as the court noted, while defendant was in custody on a murder charge. Again, a court may refer to the nature and circumstances of an offense at sentencing. See *Sanders*, 2016 IL App (3d) 130511, ¶ 13. Moreover, defendant specifically raised this argument in his motion to reconsider his sentence, which the court denied. As the court explained at its hearing on the motion, the PSI and other facts before the court were the basis for defendant's sentence. Accordingly, defendant has not demonstrated that the court commited clear and obvious error by mentioning defendant's pending murder charge at sentencing. This argument is forfeited.

¶ 38 In sum, as the trial court did not commit clear and obvious error by mentioning defendant's prior acquittal for possession of contraband in a penal institution, his pending murder charge, or an element inherent to his conviction, plain-error review does not apply in this case.

Therefore, defendant's claims that the trial court considered improper factors at sentencing are forfeited.

¶ 39 Finally, defendant argues his mittimus should be corrected because the MSR term for a Class 3 felony, such as possession of contraband in a penal institution, is one year (720 ILCS 5/31A-1.1(d)(2) (West 2012); 730 ILCS 5/5-8-1(d)(3) (West 2012)); but, the trial court imposed a three-year term. The State responds, without citation to authority, that the trial court properly sentenced defendant to three years MSR because he was already subject to a three-year term of MSR for the armed habitual criminal conviction for which he was serving a 15 year term of imprisonment.

¶ 40 The question of whether a criminal defendant's mittimus should be corrected is a purely legal issue, subject to *de novo* review. *People v. Jones*, 397 Ill. App. 3d 651, 656 (2009). This court has the authority under Illinois Supreme Court Rule 615(b)(1) (eff. Jan. 1, 1967) to order the clerk of the circuit court to issue a corrected mittimus. A review of the applicable sentencing statute in effect at the time when the crimes were committed supports defendant's assertion that a one year MSR term applies to his Class 3 offense. See 730 ILCS 5/5-8-1(d)(3) (West 2012). Accordingly, we direct the circuit court to amend the mittimus to reflect the MSR term of one year.

¶ 41 Based on the foregoing, we affirm the judgment of the circuit court of Cook County and order that the mittimus be corrected.

¶ 42 Affirmed; mittimus corrected.