2017 IL App (1st) 143334-U

No. 1-14-3334

Third Division

May 10, 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. 13 C5 50022
	)	
MARCUS MOORE,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: We affirm defendant's sentence where the trial court did not improperly consider a pending charge in aggravation and did not abuse its discretion in sentencing defendant.

¶ 2 Following a bench trial, defendant Marcus Moore was convicted of aggravated battery of a merchant (720 ILCS 5/12-3.05(d)(9) (West 2012)) and received an extended-term sentence of nine years' imprisonment. On appeal, he argues the trial court at sentencing both improperly

considered a pending charge as a factor in aggravation and abused its discretion in sentencing him to an extended-term sentence of nine years in prison. We affirm.

¶ 3 Defendant was charged by information with one count of aggravated battery to a merchant and one count of retail theft stemming from events occurring on December 19, 2012, in Oak Lawn, Illinois. We briefly state the facts presented at trial as defendant does not challenge the sufficiency of the evidence supporting his conviction.

¶ 4 At trial, Robert Biegun testified that, on December 19, 2012, around 9:45 p.m., he was working as a loss prevention employee at the K-Mart store in Oak Lawn. He saw a woman and defendant enter the store carrying a white bag. The two began selecting items in the infants department, the men's clothing department, and the toy department. Biegun saw defendant grab a toy and put it into the bag he was carrying before walking towards the front of the store. Biegun stopped defendant near the door and asked what was inside the bag. Defendant removed pajamas and items from his waistband but refused to come back inside the store.

¶ 5 Defendant then struck Biegun in the face, right under his right eye, causing a "large cut" above his eyebrow. Biegun bent over to pick up his glasses from the floor and, when he looked up, defendant and the woman were running towards the parking lot. Biegun called 911 and provided a description of car used by the two to flee. The police arrived at the K-Mart and took Biegun to where the police had detained two people. He identified defendant as the person who had hit him in the face.

¶ 6 Oak Lawn police officer Marshall testified that, on December 19, 2012, he received a dispatch alerting him of a retail theft with a battery. Marshall began looking for the vehicle described in the dispatch and, after discovering one matching the description, pulled it over.

Inside the vehicle were a woman and defendant, whom he identified in court. Biegun identified defendant as the person who punched him in the face. Defendant was transported to the Oak Lawn police station where he received his *Miranda* warnings. Defendant told Marshall and Detective Kumke that he took merchandise from the K-Mart and hit Biegun as he was "pulling away."

¶ 7 Defendant testified that, on December 19, 2012, he went inside K-Mart with a friend to do some Christmas shopping. He entered the store with a bag from a store he had previously visited. When he was leaving, Biegun approached him and asked if he stole anything from the store. Defendant responded that he did not, but Biegun tried to grab the bag. Biegun then tried to grab defendant, but defendant ran out of the store, went to the car, and drove away. Defendant denied striking Biegun.

¶ 8 The court found defendant guilty of aggravated battery of a merchant but not guilty of retail theft. The trial court denied defendant's written motion for a new trial and proceeded to sentencing.

¶ 9 In aggravation, the State argued that defendant's conduct caused or threatened serious harm by punching someone in the face, causing a laceration. It noted defendant's prior criminal history, which included convictions for armed robbery and aggravated battery to a police officer for which he received six years and three years, respectively, in the Illinois Department of Corrections (IDOC). He also had another aggravated battery to a police officer, for which he received four years' imprisonment in the IDOC, consecutive to his previous three-year sentence. Based on his criminal history and the violent nature of the present offense, the State argued the

minimum sentence is not appropriate and asked the trial court to "sentence [defendant] appropriately."

¶ 10 In mitigation, defense counsel noted that while harm was done, the incident was not of "a serious nature or permanent nature" and that, when the victim testified, no mark was visible. Counsel also highlighted defendant's family background as "horrific" as defendant went "to foster homes to foster homes." He emphasized that defendant wanted to be educated and employed when he got out and asked the court to "consider the minimum."

¶ 11 In allocution, defendant stated he had "learned his lesson being locked up" and that he just wanted to get back to his family and two children. He further stated he did not know that the man was a security officer because he was wearing regular clothes and had no badge. Defendant stated that he "never mean [*sic*] to do anything wrong."

¶ 12 The trial court imposed an extended-term sentence of nine years' imprisonment in the IDOC based on defendant's criminal history and the factors in aggravation and mitigation. The court stated it had considered the presentence investigation report (PSI), which indicated defendant had a 2008 Class X conviction for armed robbery, for which he received six years in the IDOC, and two 2010 aggravated battery to a police officer convictions, for which he received consecutive prison terms of three and four years in the IDOC.

¶ 13 The court further stated,

> "You have several juvenile convictions here. Also, um, some minor cases there. Looks like he still has a pending case before Judge Gaugh[a]n. Is that an aggravated battery to a police officer? Seems to me –
>
> [DEFENSE COUNSEL]: Not a police officer.

[THE COURT]: That's not a police officer?

[DEFENSE COUNSEL]: No.

[THE COURT]: All right. Well, it's an aggravated battery then. All right. Defendant has an extensive criminal history."

¶ 14 The court then noted it had taken into account in mitigation defendant's childhood. It then recited the factors relevant in imposing an extended-term sentence and, finding defendant qualified for an extended term, sentenced him to nine years' imprisonment.

¶ 15 Defendant filed a written motion to reconsider sentence, which the trial court denied. Defendant filed a timely notice of appeal.

¶ 16 On appeal, defendant argues the trial court improperly considered his pending charge of aggravated battery in fashioning an extended-term sentence of nine years' imprisonment. Defendant concedes he did not preserve this issue for appeal by raising it in the trial court but argues we should review this claim of error under the plain-error doctrine or, alternatively, as an ineffective assistance of counsel claim. Defendant further argues the trial court abused its discretion in imposing sentence where it failed to adequately consider the seriousness of the offense and other mitigating factors.

¶ 17 To preserve a sentencing issue for appeal, a defendant must raise the issue in the trial court, including through a written motion to reconsider sentence. *People v. Sharp*, 2015 IL App (1st) 130438, ¶ 132. Here, defendant filed a motion to reconsider sentence but failed to raise therein his specific challenge to the trial court's consideration of a pending charge. The issue is therefore forfeited on appeal. See *People v. Ballard*, 206 Ill. 2d 151, 192 (2002). However,

sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11.

¶ 18 In order to obtain relief under the plain-error doctrine with respect to sentencing, the defendant must 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). Defendant contends both prongs apply, arguing the evidence in mitigation and aggravation at sentencing was closely balanced and the error was 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.

¶ 19 Defendant argues the trial court improperly considered his pending charge of aggravated battery as a basis for imposing an extended-term sentence of nine years' imprisonment. The trial court may not consider pending charges and bare arrests in aggravation when determining a sentence to impose. *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). A trial court abuses its discretion when it considers an improper factor in aggravation. *People v. Minter*, 2015 IL App (1st) 120598, ¶ 147. However, "where the trial court appears to place minimal emphasis upon an improper factor, a new sentencing hearing is not required." *Id.* ¶ 152. "It is the defendant's burden to affirmatively establish that the sentence was based on improper considerations." *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49.

¶ 20 We find there is no indication the trial court considered defendant's pending charge of aggravated battery when it imposed sentence. Rather, the trial court merely mentioned defendant's pending aggravated battery charge when summarizing the facts contained in the PSI. See *People v. Gomez*, 247 Ill. App. 3d 68, 74 (1993) (finding "the record indicates that the circuit

court merely mentioned [the defendant's prior arrests] while considering [the defendant's] criminal history" rather than relying on them in imposing sentence). While the trial court did inquire about the pending aggravated battery charge, defendant cannot show the trial court based its sentence on this pending charge.

¶ 21 Further, the record indicates the trial court considered other factors, including his troubled childhood, before imposing sentence. See *People v. Andrews*, 2013 IL App (1st) 121623, ¶ 15 ("a reviewing court determining whether a sentence is properly imposed should not focus on a few words or sentences of the trial court, but should consider the record as a whole"). Moreover, the trial court never stated that it was considering or relying on the pending charge in imposing sentence. See *Gomez*, 247 Ill. App. 3d at 74.

¶ 22 Defendant relies on *People v. Minter*, 2015 IL App (1st) 120958, and *People v. Johnson*, 347 Ill. App. 3d 570 (2004), for the proposition that a case must be remanded for resentencing when the trial court improperly considers a pending charge or bare arrest in imposing sentence. However, in both *Minter* and *Johnson*, each defendant had minimal, if any, felony convictions. See *Minter*, 2015 IL App (1st) 120958, ¶ 153 (the defendant had no felony adult convictions); *Johnson*, 347 Ill. App. 3d at 576 (the defendant had only one felony adult conviction). Moreover, in each of those cases, the trial court made specific comments which indicated, in light of the defendants' minimal felony convictions, that it was placing weight on the pending charges or bare arrests. See *Minter*, 2015 IL App (1st) 120958, ¶ 153 (the trial court twice noted the pending charges and stated they "did not 'go well for' defendant"); *Johnson*, 347 Ill. App. 3d at 573, 576 (the trial court stated to the defendant "there was a situation that occurred in Arkansas, a sexual assault offense. This is what you related to the investigator of this presentence investigation

report. Somewhere along the line you lost your humanity"). The courts in *Minter* and *Johnson* therefore determined the trial courts relied on improper considerations and remanded for resentencing. See *Minter*, 2015 IL App (1st) 120958, ¶ 153; *Johnson*, 347 Ill. App. 3d at 576, 578.

¶ 23 Contrary to *Minter* and *Johnson*, defendant had three prior felony convictions, which included two aggravated battery to a police officer convictions and one armed robbery conviction, making his criminal history "extensive." Moreover, the trial court's brief inquiry into the pending aggravated battery charge was minimal and does not indicate it placed weight on the charge in sentencing defendant.

¶ 24 Lastly, defendant argues that trial court sentenced defendant to a "near-maximum extended term sentence" based on the improper consideration of defendant's pending charge. In support, defendant cites several cases where the appellate court remanded for resentencing because it could not determine how much weight was placed on the consideration of an improper factor. However, having determined that the trial court did not improperly consider defendant's pending charge in sentencing him, we need not address his argument that his sentence would be lower if the court did not improperly consider this charge.

¶ 25 Defendant contends that any forfeiture was the result of ineffective assistance of counsel because "reasonable counsel would have been aware" that pending charges "are not a proper factor in aggravation." A defendant has a constitutional right to the effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). In order to establish ineffective assistance of counsel, the defendant must show both that (1) counsel's representation was deficient and (2) that deficiency prejudiced the defendant. *People v. Petrenko*, 237 Ill. 2d

490, 496 (2010) (citing *Strickland*, 466 U.S. at 694). Having already determined that the trial court did not improperly consider his pending charge, we find defendant cannot establish the requisite prejudice, and therefore cannot succeed on his ineffective assistance of counsel claim. See *Sauseda*, 2016 IL App (1st) 140134, ¶ 23.

¶ 26 Defendant next argues the trial court abused its discretion in sentencing him where it failed to adequately consider the seriousness of the offense and other mitigating factors.

¶ 27 The trial court has broad discretion in imposing a sentence, and a reviewing court will not alter that sentence absent an abuse of discretion. *People v. Stacey*, 193 Ill. 2d 203, 209-10. 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." *Id.* at 210 (citing *People v. Fern*, 189 Ill. 2d 48, 54 (1999)). Because of its personal observation of defendant and the proceedings, the trial court is in the superior position to determine an appropriate sentence. *People v. Alexander*, 239 Ill. 2d 205, 212-13 (2010). "The trial court is thus far better suited to balance the need to protect society against the rehabilitative potential of the defendant." *People v. Peoples*, 2015 IL App (1st) 121717, ¶ 111.

¶ 28 We find the trial court did not abuse its discretion in imposing an extended-term sentence of nine years' imprisonment. Aggravated battery to a merchant is a Class 3 felony punishable by 2 to 5 years' imprisonment. 720 ILCS 5/12-3.05(h) (West 2012); 730 ILCS 5/5-4.5-40(a) (West 2012). However, the court may, as it did here, impose an extended-term sentence punishable by a prison term between 5 and 10 years when the defendant has a previous conviction for the same or greater class felony within the preceding 10 years. 730 ILCS 5/5-5-3.2(b)(1) (West 2012); 730 ILCS 5/5-8-2(a) (West 2012); 730 ILCS 5/5-4.5-40(a) (West 2012). Defendant had a 2008

conviction for Class X felony armed robbery, which is within 10 years of his present Class 3 conviction, making him eligible to receive an extended-term sentence. See 730 ILCS 5/5-5-3.2(b)(1) (West 2012). Defendant's extended-term sentence of nine years' imprisonment for a Class 3 conviction is within the statutorily-provided range and we therefore presume it is proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 47; see 730 ILCS 5/5-4.5-40(a) (West 2012).

¶ 29 Defendant argues the trial court failed to adequately consider the seriousness of the offense where a "near maximum extended-term sentence" was imposed for "in essence, a garden variety instance of the charged crime, aggravated battery of a merchant." This argument is unconvincing. A sentence must reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. 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, the trial court heard the evidence presented at trial, which showed defendant punched a K-Mart employee in the face, causing a laceration, after being confronted about stealing from the store. Given the violence defendant displayed, the trial court adequately considered the seriousness of the offense, and defendant cannot make an affirmative showing the trial court did not consider this factor. *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38.

¶ 30 Further, the record indicates that the trial court, when imposing sentence, placed great weight on defendant's criminal history. Criminal history alone may warrant a sentence substantially above the minimum. *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009). Defendant had a 2008 Class X conviction for armed robbery, for which he received six years in the IDOC, and two 2010 aggravated battery to a police officer convictions, for which he received

consecutive prison terms of three and four years in the IDOC. In light of defendant's history of violence, we cannot say the trial court abused its discretion in imposing an extended-term sentence of nine years' imprisonment, especially when he "was not deterred by previous, more lenient sentences." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13.

¶ 31 Defendant urges us to rely on *People v. Stacey*, 193 Ill. 2d 203 (2000), for the proposition that "imposition of a near-maximum term in an already-enhanced statutory sentencing range is an abuse of discretion" where the defendant in *Stacey* had his sentence reduced to the minimum. We decline defendant's request, "as our supreme court has rejected an approach that compares sentences between defendants in unrelated cases." *People v. Brown*, 2017 IL App (1st) 142877, ¶ 62; accord *Fern*, 189 Ill. 2d at 56.

¶ 32 We also reject defendant's argument that the trial court failed to adequately consider his youth and childhood. Specifically, he argues he was only 21 at the time of the offense and "was just years removed from a childhood so turbulent that he was somehow left with a surname different from that of the two people he knew as his parents." While the PSI does indicate he was taken from his mother's home because of a "possible neglect charge," it also states that he described his relationship with his parents as being "good." The defendant "must make an affirmative showing the sentencing court did not consider the relevant factors." *Burton*, 2015 IL App (1st) 131600, ¶ 38. Defendant cannot meet this burden as the trial court explicitly stated, "I have taken into account in mitigation that's set forth there, his childhood, et cetera." As the trial court adequately considered his childhood in mitigation, we will not reweigh this sentencing factor. See *Alexander*, 239 Ill. 2d at 212-13.

¶ 33 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 34 Affirmed.