2017 IL App (1st) 150916-U

No. 1-15-0916

Order filed September 7, 2017

Fourth Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 14 CR 8624 |
| | ) | |
| ERIC STALLWORTH, | ) | Honorable |
| | ) | Charles P. Burns, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's sentence affirmed as the trial court did not abuse its discretion in sentencing him to seven years' imprisonment.

¶ 2 Following a bench trial, defendant Eric Stallworth was convicted of burglary (720 ILCS 5/19-1(a) (West 2014)) and sentenced to a term of seven years' imprisonment. On appeal, defendant argues that the trial court abused its discretion in imposing a sentence of seven years' imprisonment. For the following reasons, we affirm.

¶ 3 After a separate but simultaneous bench trial with codefendants Weldon Wiley and Charles Johnson, defendant was convicted of burglary (720 ILCS 5/19-1(a) (West 2014)) for entering, on or about May 5, 2014, a building at 11733 South LaFayette Avenue, owned by William Jones, without authority and with the intent to commit theft therein.

¶ 4 At trial, Juan Lugo and Kevin Cowan testified that, on May 5, 2014, they lived at 11730 South State Street. At 2 p.m. that day, they were in the backyard and observed three men, identified at trial as defendants, taking property out of the house across the alley. The house had been boarded up due to a fire but boards had been removed and defendants were entering the property and bringing out ductwork, downspouts, a sink, cabinets, and other items and placing them in a truck in the alley. Chicago police sergeant Dennis Smith testified that he responded to a reported theft in the alley behind 11733 South LaFayette and observed three men, identified at trial as defendants, carrying items to a pickup truck. Lugo and Cowan identified defendants as the men entering and removing things from the house and putting them in the truck. Defendants were placed into custody. William Jones, the owner of 11733 South LaFayette Avenue, testified that he was notified of a possible break-in. He met with police and identified his property from photographs of items in the back of a truck. He again identified his property from photographs at trial. Williams did not know defendants or give them permission to enter his property.

¶ 5 The trial court found defendant guilty of burglary. Defendant filed a motion and a supplemental motion asking the court to reconsider its guilty finding, which it denied before proceeding to sentencing.

¶ 6 Defendant's presentence investigation report (PSI) reflected that he was 45 years old at the time of the offense. He reported that he had a good relationship with his parents, was

unmarried but in a 5-year relationship, and had a 24-year-old son from a prior relationship. Defendant graduated from high school and joined the Army, eventually being honorably discharged. He subsequently completed one year of college and still hoped to further his education at the time. Defendant also reported that he was employed as a porter for a car dealership, had a lawn care business, and had not used alcohol or illegal drugs in five years. Defendant's criminal history was comprised of four felonies and two misdemeanors, with sentences ranging from six months' conditional discharge to four years' imprisonment. He also had probation violations in 2010 and 2012, for which he was sentenced to 60 days' and four years' imprisonment, respectively. Defendant's most recent felony conviction was in 2012 for retail theft, for which he received a two-year prison term.

¶ 7 At defendant's sentencing hearing, the State asked that the court sentence him to "a substantial" sentence in the Class X range, emphasizing defendant's "extensive" criminal history. The burglary was a Class 2 offense (720 ILCS 5/19-1(b) (West 2014)), but defendant's prior convictions mandated a Class X sentence (730 ILCS 5/5-4.5-95(a)(1) (West 2014)). In mitigation, defense counsel noted defendant's one year of college, employment as a porter at a car dealership, lawn care business, five-year romantic relationship, and his service record. Defendant gave a brief statement in allocution declaring his innocence.

¶ 8 Prior to handing down its sentence, the trial court told defendants that it had a "strong suspicion that you're committing a lot of these crimes because you may have other issues that you're dealing with that you may be trying to get money to support some type of vices." It noted that defendants were "a little bit older" but were "creatures of [their] own past experiences" and "all Class X felons." It stated:

> "I believe, Mr. Wiley, you have stayed clean the longest of the three, but I see that Mr. Stallworth has been to the penitentiary as recently as 2012, and that Mr. Johnson has been in the penitentiary as recently as 2013.
>
> Gentleman, I'm going to, while all of you have different aggravation and mitigation, and particularly when I first looked at the sheet, I would be more inclined to give Mr. Wiley a longer sentence than the other two individuals. *** [H]e's got one crime that was 30 careers [*sic*] ago and he has not been charged with any felonies that he's gone to the penitentiary in the last six years.
>
> I'm going to sentence the three of you to seven years Illinois Department of Corrections."

¶ 9 This timely appeal followed.

¶ 10 On appeal, defendant argues that the trial court erred at sentencing by failing to consider mitigating factors reflecting his rehabilitative potential. He also argues that he was denied a fair sentencing hearing because the court considered an improper aggravating factor. We address each issue in turn.

¶ 11 Defendant first argues that his seven-year sentence was excessive because the trial court failed to consider mitigating evidence. Specifically, he asserts it did not consider his education, employment, relationship status, and military service as evidence of his rehabilitative potential. Defendant concedes that he did not preserve this issue by filing a motion to reconsider sentence in the trial court but asserts we can consider the issue under the plain error doctrine.

¶ 12 Generally, a sentencing issue is forfeited unless the defendant both objects to the error at the sentencing hearing and raises the objection in a postsentencing motion. *People v. Nowells*,

2013 IL App (1st) 113209, ¶ 18. However, forfeited claims related to sentencing may be reviewed for plain error. *Id.* (citing *People v. Hillier*, 237 Ill. 2d 539, 544 (2010)). The plain error doctrine allows a reviewing court to consider unpreserved error when a clear or obvious error occurred and (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant or (2) the error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Nowells*, 2013 IL App (1st) 113209, ¶ 18. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id.* ¶ 19. A reviewing court conducting plain error analysis must first determine whether an error occurred because, absent error, there can be no plain error. *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 13 The Illinois Constitution mandates that "penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. 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 absent an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). 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 (2000) (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. It is presumed

that, when mitigating evidence is presented to the trial court, the court considered it absent some indication to the contrary, other than the sentence itself. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 14 As noted above, the first step of plain error review is determining whether any error occurred. *Thompson*, 238 Ill. 2d at 613. Here, there was no error because defendant's seven-year sentence was not an abuse of discretion. Due to his background, defendant was sentenced as a Class X offender, which carries a sentencing range of 6 to 30 years. 730 ILCS 5/5-4.5-25(a) (West 2014); 730 ILCS 5/5-4.5-95(b) (West 2014). The seven-year sentence falls within this statutory range and, therefore, we presume it is proper. *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 15 Defendant's claim that his seven-year sentence was excessive because the trial court failed to consider mitigating factors is belied by the record. Defendant's PSI set forth his education, work history, relationship status, and military service and his defense counsel argued these factors in mitigation. Further, the record shows that the court was aware of the nonviolent nature of the offense and defendant's prior convictions. As the mitigating evidence was presented to the court, we presume that the trial court considered that evidence, absent some indication to the contrary, other than the sentence itself. *Sauseda*, 2016 IL App (1st) 140134, ¶ 19.

¶ 16 Defendant has presented no contrary evidence. He argues that, in sentencing the three defendants to the same seven-year term, "the court's comments reveal its focus was solely on comparing the defendants' respective criminal backgrounds instead of focusing on [defendant's] individual rehabilitation, as it was required to do." We disagree. The court explicitly noted that

the defendants "all *** have different aggravation and mitigation," demonstrating it did consider the mitigation factors applicable to defendant. Further, a trial court is not required to recite each factor and the weight it is given at a sentencing hearing. *Wilson*, 2016 IL App (1st) 141063, ¶ 11. Therefore, the court's failure to enumerate what mitigation factors it considered in no way demonstrated that it did not consider these factors. Defendant thus presents no evidence that the court's considerations of mitigating and aggravating factors was limited to those it addressed in its brief comments comparing the defendant's criminal histories.

¶ 17 Defendant also argues that the trial court did not afford the proper weight to the mitigating factors. We disagree. The court is not required to give greater weight to mitigating factors than to aggravating factors such as criminal history or the seriousness of the offense, nor does the presence of mitigating factors require a minimum sentence or preclude a maximum sentence. *Alexander*, 239 Ill. 2d at 214; *People v. Flores*, 404 Ill. App. 3d 155, 158 (2010). The court considered defendant's criminal background, which was comprised of, in relevant part, four felonies, two misdemeanors, and two violations of probation. Specifically, it noted that defendant had "been to the penitentiary as recently as 2012," referring either to defendant's July 2012 two-year sentence for retail theft or his July 2012 four-year sentence for violating the probation he received for a 2011 conviction for the manufacture/delivery of cocaine. The instant offense occurred in May 2014, not even two years later. Defendant's criminal history alone warranted a sentence above the minimum required. See *People v. Evangelista*, 393 Ill. App. 3d 395, 399 (2009) (finding a defendant's criminal history "alone" would warrant a sentence "substantially above the minimum"). Moreover, despite receiving conditional discharge and more lenient prison sentences for his prior convictions, defendant continued to reoffend and was

clearly "not deterred by previous, more lenient sentences." *Wilson*, 2016 IL App (1st) 141063, ¶ 13. Defendant's seven-year sentence, one year above the minimum, is therefore not disproportionate to his history of convictions.

¶ 18 The trial court did not abuse its discretion in sentencing defendant to a term of seven years' imprisonment. Accordingly, as the court did not err, we find no plain error here. *McGee*, 398 Ill. App. 3d at 794 ("Without reversible error, there can be no plain error.").

¶ 19 Defendant also argues that he was denied a fair sentencing hearing when the trial court considered an improper factor during sentencing. Specifically, he argues that the court improperly relied on its own speculation that defendant committed the burglary offense to fund "some type of vices." Defendant acknowledges that this issue has been forfeited, as it was not raised in a posttrial motion (*People v. Walker*, 2012 IL App (1st) 083655, ¶ 29), and seeks review under plain error. Alternatively, defendant argues his trial counsel was ineffective for failing to preserve the issue for appeal by objecting at trial and filing a motion to reconsider sentence.

¶ 20 As explained previously, to establish plain error in a sentencing context, a defendant must show that the court committed a clear and obvious error and 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. *Hillier*, 237 Ill. 2d at 545. To establish ineffective assistance of counsel, defendant must demonstrate that his counsel's performance was fundamentally deficient and, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Edwards*, 195 Ill. 2d 142, 162-63 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

¶ 21 We are mindful that the trial court has broad discretionary powers to fashion an appropriate sentence within the statutory limits prescribed by the legislature. *People v. Arze*, 2016 IL App (1st) 131959, ¶ 120 (citing *Fern*, 189 Ill. 2d 48, 53 (1999)). A court is not bound by the usual rules of evidence in determining a sentence, but may search anywhere within reasonable bounds for other facts which may serve to aggravate or mitigate the offense. *Id.* But when a trial court considers an improper factor in aggravation, the court abuses its discretion. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. 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.

¶ 22 Defendant asserts that the trial court abused its discretion by relying on facts not in evidence and its own speculation when it mentioned its "suspicion" that defendant's motive for "a lot of these crimes" was "to get money to support some type of vices." A court may properly refer to the nature and circumstances of an offense at sentencing. See *People v. Sanders*, 2016 IL App (3d) 130511, ¶ 13. Further, the trial court's comments on defendant's possible motivation for committing the burglary were made in the context of its concern that defendant had "other issues" that he was dealing with and also in explaining that defendant's Class X status resulted from his "own past experiences," which included his prior convictions for drug-related offenses. Nothing in the court's comments shows its remarks were anything other than a summation of its concern that defendant may have underlying issues not disclosed in his PSI and how the case came before the court for Class X sentencing, let alone that the court considered or relied on defendant's suspected "vices" in sentencing him.

¶ 23 Accordingly, defendant has failed to affirmatively show that the trial court's discussion of defendant's possible vice-related motive was improper. Because there was no error, there can be no plain error to excuse defendant's forfeiture of this issue. See *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 24 Because there was no error, defendant also cannot demonstrate that his counsel was ineffective for failing to object at trial or raise this claim in a posttrial motion. As the trial court did not err, there is no reasonable probability that defendant's sentence would have been different had counsel raised the issue below. Defendant suffered no prejudice from his counsel's alleged deficient performance and his claim of ineffective assistance of counsel must fail. *People v. Patterson*, 217 Ill. 2d 407, 438 (2005).

¶ 25 In sum, because there is no plain error and counsel was not ineffective, defendant's challenge to his sentence on the basis of the court's statement is forfeited

¶ 26 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.