2017 IL App (4th) 160222-U

NO. 4-16-0222

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
February 6, 2017
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
RICHARD J. LAWUARY,	)	No. 11CF728
Defendant-Appellant.	)	
	)	Honorable
	)	Peter C. Cavanagh,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Turner and Justice Pope concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, concluding defendant's forfeited sentencing claim did not warrant plain-error review.

¶ 2 In November 2012, defendant, Richard J. Lawuary, pleaded guilty to aggravated battery, and the trial court sentenced him to probation. In January 2013, the State filed a petition to revoke probation. In April 2013, the court revoked defendant's probation. In June 2013, the court resentenced him to 6 1/2 years in prison. Defendant appealed, and this court affirmed the judgment revoking defendant's probation but remanded for resentencing because the trial court improperly considered dismissed charges as aggravating factors at sentencing. *People v. Lawuary*, 2015 IL App (4th) 130713-U. On remand, the court again resentenced defendant to 6 1/2 years in prison.

¶ 3 Defendant appeals, arguing the trial court erred by resentencing him to 6 1/2 years

in prison despite the absence of the improper aggravating factors previously considered by the court. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 A detailed recitation of the factual background in this case is set forth in our order affirming defendant's revocation of probation. See *Lawuary*, 2015 IL App (4th) 130713-U. We discuss only those facts necessary for an understanding of this appeal. In August 2011, the State charged defendant by information with two counts of aggravated battery (720 ILCS 5/12-3.05(d)(4) (West 2010)) and one count of possession of a controlled substance (720 ILCS 570/402(c) (West 2010)). Counts I and II alleged on August 14, 2011, defendant committed the offense of aggravated battery against Officer Andrew Zander (count I) and Officer Jason Sloman (count II) by digging his fingernails into the wrist of Officer Zander and kicking Officer Sloman. Count III alleged defendant had in his possession less than 15 grams of a substance containing cocaine.

¶ 6 In November 2012, defendant pleaded guilty to one count of aggravated battery, a Class 2 felony, in exchange for the dismissal of the remaining charges and a charge of possession of a controlled substance in an unrelated case (Sangamon County case No. 11-CF-491). The State's factual basis indicated defendant dug his fingernails into the wrist of Officer Zander, causing him to bleed from his wound. In accordance with the plea agreement, the trial court sentenced defendant to 2 years' probation and 136 days in jail, with credit for time served.

¶ 7 In February 2013, the State filed an amended petition to revoke probation, alleging defendant committed battery on November 20, 2012, and unlawful possession of a weapon by a felon and obstruction of justice on January 30, 2013, in violation of the conditions of his probation. In April 2013, at the hearing to revoke defendant's probation, Springfield police de-

tective Michael Flynn testified he conducted an investigation of a shooting on January 30, 2013, near the intersection of 19th Street and Kansas Street. Multiple witnesses identified defendant as an individual present at the shooting and a single witness reported that following the shooting, defendant hid a Glock handgun in her home. Flynn interviewed defendant, who denied being present at the scene of the shooting.

¶ 8 The trial court found the State met its burden of proof by a preponderance of the evidence. The court revoked defendant's probation. In June 2013, the court resentenced defendant to 6 1/2 years in prison. In July 2013, defendant filed a motion to reconsider his sentence, which the court denied.

¶ 9 On direct appeal, this court affirmed the trial court's judgment granting the State's petition to revoke probation. *Lawuary*, 2015 IL App (4th) 130713-U, ¶ 41. However, we found the court's reliance on defendant's driving record (the majority of which consisted of dismissed charges) constituted reversible error. *Lawuary*, 2015 IL App (4th) 130713-U, ¶ 49. Accordingly, this court reversed defendant's sentence and remanded for a new sentencing hearing. *Lawuary*, 2015 IL App (4th) 130713-U, ¶ 49.

¶ 10 On remand, the trial court again resentenced defendant to 6 1/2 years in prison. After resentencing, the trial court admonished defendant on his right to appeal his sentence. Defendant did not file a postsentencing motion. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 Defendant appeals, arguing the trial court erred by resentencing him to 6 1/2 years in prison despite the absence of the dismissed traffic violations as aggravating factors previously considered by the court. The State responds defendant has forfeited this issue by failing to raise the issue in a postsentencing motion. We agree with the State. The record is clear defendant did

not object to his sentence during his resentencing hearing and did not file a postsentencing motion. Accordingly, defendant has forfeited his claim. See *People v. Hillier*, 237 Ill. 2d 539, 544, 931 N.E.2d 1184, 1187 (2010) (holding "that, to preserve a claim of sentencing error, both a contemporaneous objection and a written postsentencing motion raising the issue are required"). However, defendant asks this court to review his contentions under the plain-error doctrine (Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)).

¶ 13 To obtain relief under the plain-error doctrine, the defendant must first show a clear or obvious error occurred. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. In the sentencing context, a defendant must then demonstrate either "(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, 931 N.E.2d at 1187. Under both prongs, the defendant bears the burden of persuasion. *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1187. "If the defendant fails to meet his burden, the procedural default will be honored." *Hillier*, 237 Ill. 2d at 545, 931 N.E.2d at 1188. We begin by determining whether an error occurred.

¶ 14 The Illinois Constitution mandates "[a]ll 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. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)).

¶ 15 A trial court has broad discretion in imposing a sentence. *People v. Chester*, 409 Ill. App. 3d 442, 450, 949 N.E.2d 1111, 1118 (2011). A reviewing court gives great deference to

the sentencing court's decision because the trial judge is generally in a better position to weigh these factors in fashioning a sentence. *People v. Brunner*, 2012 IL App (4th) 100708, ¶ 40, 976 N.E.2d 27. The sentencing range for a Class 2 felony is not less than three years nor more than seven years in prison. 730 ILCS 5/5-4.5-35(a) (West 2010).

¶ 16 "After revoking a sentence of probation, the trial judge may resentence a defendant to any sentence that would have been appropriate for the original offense." *People v. Risley*, 359 Ill. App. 3d 918, 920, 834 N.E.2d 981, 983 (2005). When resentencing a defendant after a revocation of probation, the sentencing court may consider the defendant's conduct on probation. *People v. Rathbone*, 345 Ill. App. 3d 305, 312, 802 N.E.2d 333, 339 (2003). The trial court's decision as to the appropriate sentence will not be overturned on appeal "unless the trial court abused its discretion and the sentence was manifestly disproportionate to the nature of the case." *People v. Thrasher*, 383 Ill. App. 3d 363, 371, 890 N.E.2d 715, 722 (2008).

¶ 17 Defendant argues it was error for the trial court to impose the same sentence on remand in the absence of the dismissed traffic violations as aggravating factors previously considered by the court. We disagree. The Unified Code of Corrections (Unified Code) does include a prohibition against imposing a more severe sentence on remand after a sentence has been set aside, except under very limited circumstances. 730 ILCS 5/5-5-4 (West 2012). However, nothing in the Unified Code mandates a lower sentence on remand. " '[W]hen a sentence is vacated on appeal and the cause is remanded for a new sentencing hearing, that action should not be construed as a mandate to the trial judge to impose a lesser sentence on remand.' " *People v. Raya*, 267 Ill. App. 3d 705, 709, 642 N.E.2d 923, 926 (1994) (quoting *People v. Flanery*, 243 Ill. App. 3d 759, 761, 612 N.E.2d 903, 904 (1993)). The trial court did not err in imposing the same sentence on remand. The trial court indicated it considered the evidence in aggravation and mit-

igation; defendant's criminal history; and the arguments of counsel. The State detailed defendant's criminal history and noted defendant was 21 years of age when sentenced to probation and had never held a job. The State recommended a sentence of 6 1/2 years in prison. Defense counsel argued defendant made "several poor choices," but most of the cases listed in the presentence report had been dismissed. Defense counsel recommended a sentence of three years in prison. Ultimately, the trial court found a lesser sentence "would deprecate the seriousness of the [d]efendant's conduct."

¶ 18 Defendant cites two voluntary manslaughter cases where the reviewing courts reduced sentences imposed by the trial courts. This case is distinguishable from *People v. Willis*, 231 Ill. App. 3d 1056, 597 N.E.2d 672 (1992), and *People v. McCumber*, 148 Ill. App. 3d 19, 499 N.E.2d 139 (1986). In *Willis*, the trial court noted the initial stabbing was under strong provocation and in self-defense. The defendant stabbed the victim 10 more times, and 4 of them were in the back while the victim was begging and pleading for his life. The defendant, an honorably discharged veteran, offered additional mitigating evidence at his resentencing hearing relevant to his conduct since the commission of his crime. The First District Appellate Court found the evidence (counseling, continued schooling, and steady employment) indicative of defendant's strong potential for rehabilitation and reduced defendant's sentence pursuant to Illinois Supreme Court Rule 615(b)(4) (eff. Jan. 1, 1967). *Willis*, 231 Ill. App. 3d at 1060-61, 597 N.E.2d at 675. In *McCumber*, the trial court found the sole statutory factor in aggravation was the need to deter others from committing the same crime. *McCumber*, 148 Ill. App. 3d at 23, 499 N.E.2d at 142. The trial court noted the second shooting of the victim, the dismemberment and disposal of the body, and the defendant's attitude after the crime justified the sentence imposed. *McCumber*, 148 Ill. App. 3d at 23, 499 N.E.2d at 142. The Third District Appellate Court found deterrence

was not an applicable factor. *McCumber*, 148 Ill. App. 3d at 24, 499 N.E.2d at 142. Further, the appellate court concluded the trial court failed to give adequate weight to the history and character of the defendant and the defendant's strong potential for rehabilitation. *McCumber*, 148 Ill. App. 3d at 23-24, 499 N.E.2d at 142 ("The defendant has an unblemished record and is, in fact, a model prisoner at the correctional institution where she is incarcerated."). The appellate court reduced defendant's sentence pursuant to Rule 615(b)(4) to seven years. The court engaged in a comparison of the prison sentences imposed in eight voluntary manslaughter cases in the Third District in 1985, as well as how much time 49 other defendants serving sentences on voluntary manslaughter, released in 1985, served. We disagree with the *McCumber* approach. See *People v. Terneus*, 239 Ill. App. 3d 669, 678, 607 N.E.2d 568, 574 (1992) (refusing to apply a comparative sentencing analysis in considering the excessiveness of a sentence).

¶ 19 Here, defendant's conduct on probation, where defendant has been charged with unlawful possession of a weapon by a felon and obstruction of justice, evinces his poor rehabilitative potential. See *People v. Young*, 138 Ill. App. 3d 130, 140, 485 N.E.2d 443, 449 (1985) ("Conduct which leads to revocation of probation has been regarded as a 'breach' of the court's trust, or as otherwise causing the court to lose confidence in the defendant's rehabilitative potential."). Defendant's presentence report shows he pleaded guilty to (1) misdemeanor driving under the influence of drugs; (2) misdemeanor driving under the influence of drugs; (3) misdemeanor driving on a revoked license; and (4) misdemeanor fleeing or attempting to elude. This court need not substitute its own judgment for that of the trial court in a case where the trial court did not exceed its discretion. Defendant pleaded guilty to aggravated battery, a Class 2 felony (720 ILCS 5/12-3.05(d)(4), (h) (West 2010)). A defendant convicted of a Class 2 felony is subject to a sentencing range of three to seven years in prison. 730 ILCS 5/5-4.5-35(a) (West 2010). The

trial court's 6 1/2 year sentence for aggravated battery was within the relevant sentencing range. The trial court did not abuse its discretion.

¶ 20 We find the trial court did not abuse its discretion in sentencing defendant. Since we have found no error with defendant's sentence, defendant cannot establish plain error or ineffective assistance of counsel based on defense counsel's failure to file a motion to reconsider defendant's sentence.

¶ 21 III. CONCLUSION

¶ 22 We affirm defendant's sentence. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 23 Affirmed.