2018 IL App (1st) 162680-U

No. 1-16-2680

Order filed June 8, 2018

Sixth 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 11411
	)	
EMMERITT ADAIR,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not rely on improper factors or abuse its discretion at resentencing when it sentenced defendant to 11 years in prison for robbery.

¶ 2 Following a bench trial, defendant Emmeritt Adair was convicted of armed robbery with a dangerous weapon other than a firearm (bludgeon) (720 ILCS 5/18-2(a)(1) (West 2012)), aggravated battery (720 ILCS 5/12-3.05(c) (West 2012)), aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2012)), and possession of a controlled substance (720 ILCS 570/402(c)

(West 2012)).[1] Defendant was subsequently sentenced to concurrent prison terms, including 12 years for armed robbery while armed with a bludgeon, 5 years for aggravated battery, 5 years for aggravated unlawful restraint, and 3 years for possession of a controlled substance.

¶ 3 On direct appeal, we vacated defendant's convictions for aggravated battery and aggravated unlawful restraint under the one-act, one-crime doctrine. *People v. Adair*, 2015 IL App (1st) 133666-U, ¶ 52. We reduced defendant's conviction for armed robbery with a dangerous weapon to simple robbery (720 ILCS 5/18-1(a) (West 2012)) because defendant had not been charged with this offense and it was not a lesser-included offense of armed robbery with a firearm, the offense with which defendant was charged. *Adair*, 2015 IL App (1st) 133666-U, ¶¶ 29, 52. We remanded for resentencing on defendant's robbery conviction. On remand, the circuit court sentenced defendant to 11 years in prison. *Id.*

¶ 4 On appeal from resentencing, defendant contends the court abused its discretion when it resentenced him to 11 years in prison for robbery because it improperly considered, as an aggravating factor, that defendant used a gun when he committed the offense and imposed a sentenced on the vacated aggravated battery conviction. Defendant also contends we should order correction of the mittimus to reflect only convictions for one count of robbery and one count of possession of a controlled substance.

¶ 5 In our earlier order reducing defendant's armed robbery with a dangerous weapon (bludgeon) conviction to robbery, we fully recited the evidence presented at trial. *People v.*

[1] The notice of appeal spells defendant's first name as "Emeritt." However, the parties' briefs, charging document, mittimus, transcript of proceedings, and our previous order spell his name as "Emmeritt." See *People v. Adair*, 2015 IL App (1st) 133666-U. We will therefore spell defendant's first name as "Emmeritt."

Adair, 2015 IL App (1st) 133666-U. We therefore will summarize only the facts as relevant to this appeal.

¶ 6 At trial, Gloria Harris testified that, on May 17, 2013, at about 9 a.m., she was walking on West Grenshaw in Chicago when a man, later identified as defendant, approached her and asked for change. Harris told defendant she did not have money. Defendant told Harris he had seen her money and it was a "stickup." Defendant and Harris struggled when defendant tried to take her purse and go inside her pockets. Defendant pointed a gun at Harris and threatened her, stating "he was going to shoot [her] if [she] didn't give it to him." Defendant took Harris's money and then jumped into the passenger side of a vehicle. On cross-examination, Harris testified that defendant never hit or shot at her with the gun.

¶ 7 Ellis Freeman testified that, on May 18, 2013, at about 9 a.m., when he was at his sister's residence on West Grenshaw Avenue, he heard someone yell from outside, "[h]e got a gun." Freeman looked over and saw defendant "had the lady [b]ack up against the gate" and was searching her with one hand and had a gun in his other hand. Freeman heard defendant say to the woman, "[h]urry up before I shoot you" and saw defendant stick his hand into her purse. While Freeman was calling the police, defendant walked by his sister's house and then got into the passenger side of a vehicle. Freeman saw a gun in defendant's hand, described it as a ".357 slug nose" revolver, and identified a photograph of it at trial. Freeman gave the description and license plate number of the vehicle to the police.

¶ 8 Chicago police officer Michael Reyes testified that, on May 17, 2013, at around 9 a.m., he received a radio call about an armed robbery and subsequently located the vehicle that matched the description and license plate number given over the radio. Defendant, the sole

occupant, was in the front passenger seat. When defendant got out of the vehicle, Reyes detained him and went to the vehicle, where he saw a "large caliber revolver, blue steel color with black tape on the grip" on the floor of the passenger's side. On the center console, there was a bag of suspect heroin and mail addressed to defendant. Reyes described the firearm as a .38 caliber revolver loaded with six live rounds and identified a photograph of it. Reyes testified that a .38 caliber revolver looks similar to a .357 slug revolver and, on cross-examination, he acknowledged they are different kinds of guns.

¶ 9 The State presented a stipulation between the parties that a forensic scientist would testify that the recovered suspect heroin testified positive for heroin in the amount of .3 grams.

¶ 10 The court found defendant guilty of the uncharged offense of armed robbery with a dangerous weapon other than a firearm (bludgeon), aggravated battery, aggravated unlawful restraint, and possession of a controlled substance. In doing so, the court stated, "[t]here was some question about the operability of the weapon involved. It was at the very least used as a bludgeon in this case." The court subsequently denied defendant's motion for new trial and sentenced him to concurrent prison terms: 12 years for armed robbery, 5 years for aggravated battery, 5 years for aggravated unlawful restraint, and 3 years for possession of a controlled substance.

¶ 11 On direct appeal, we affirmed defendant's conviction for possession of a controlled substance but vacated his convictions for aggravated battery and aggravated unlawful restraint under the one-act, one-crime doctrine. *Adair*, 2015 IL App (1st) 133666-U, ¶ 52. We vacated defendant's conviction for the uncharged armed robbery with a dangerous weapon (bludgeon) because it was not a lesser-included offense of armed robbery with a firearm, the offense with

which he was charged. *Id.* ¶¶ 29, 52. We remanded for resentencing on the robbery conviction. *Id.* ¶ 29.

¶ 12 On remand, at the resentencing hearing, the State argued in aggravation that defendant "approached the victim *** and demanded her money. [Defendant] reacted when she refused to hand her money over by pointing a gun at her and threatening to shoot her if she didn't give him money." The State asserted that "a firearm was used in the course of this crime" and it presented photograph of the gun to the court. The State informed the court that defendant was a Class X offender based on his criminal history.

¶ 13 In mitigation, defense counsel argued that defendant was 50 years old and had received numerous certificates in prison, including one for outstanding performance and lasting contribution to the Illinois Department of Corrections industries for meat processing. Defense counsel informed the court that defendant had the support of his mother and daughter who were present at the hearing. Defense counsel acknowledged that defendant was a Class X offender by background and, given defendant's growth and development in prison, requested the minimum sentence of six years in prison.

¶ 14 In allocution, defendant told the court he was a changed person since his last sentencing hearing and he had "tried to take a look at my life, tried to utilize the time and do something better than what I was doing prior." Defendant stated he was "not proud of what caused me to be before you in the beginning" and "I know that I still need to pay for my ill-advised actions."

¶ 15 Before the court pronounced sentence, it stated: "[t]he facts of the case speak for themselves, as does his prior criminal history. It is substantial. I will note that he's been somewhat productive since his most recent time in the penitentiary by this certificate, but it

doesn't change the facts much of what he did or who he was coming into this." The court stated, "[i]n light of the mitigation," it would modify defendant's sentence for robbery to 11 years in prison. The court then stated that defendant would be sentenced to "five years again for aggravated battery, three years for possession of controlled substance."

¶ 16 Defendant contends on appeal that the trial court abused its discretion when it resentenced him because it improperly considered as an aggravating factor that defendant used a gun when he committed the offense and it imposed a sentence on the aggravated battery conviction that we vacated in our prior order. He claims that improper factors accounted for the court's sentencing decision.

¶ 17 Defendant acknowledges he did not raise his argument that the court relied on an improper factor at the sentencing hearing or in his motion to reconsider sentence. *People v. Anaya*, 2017 IL App (1st) 150074, ¶ 50 (To preserve an alleged error for review, a defendant must object at trial and raise the claim in a posttrial motion.). He nevertheless argues that we may review the issue under the plain error doctrine. Under the plain error doctrine, we may review unpreserved error when "a clear and obvious error occurred and that (1) the evidence at the sentencing hearing was closely balanced or (2) the error was egregious so as to deny the defendant a fair sentencing hearing." *People v. Ramirez*, 2017 IL App (1st) 130022-B, ¶ 16. Before we apply the plain error analysis, we must first determine whether any error occurred. See *Ramirez*, 2017 IL App (1st) 130022-B, ¶ 16.

¶ 18 The trial court has "broad discretionary powers" when it imposes a sentence. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We give "great deference" to the trial court's sentencing decision because the trial court was in a better position to consider the relevant sentencing

factors. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We may only disturb a trial court's sentencing decision if the trial court abused its discretion. *People v. Csaszar*, 375 Ill. App. 3d 929, 948 (2007). When a defendant's sentence is within the statutory guidelines, it is "presumed proper." *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 12.

¶ 19 Here, based on defendant's criminal background, he was a Class X offender subject to a sentencing range of 6 to 30 years (730 ILCS 5/5-4.5-25(a) (West 2014)). Defendant's 11-year sentence for robbery was well within this permissible statutory range and, therefore, it is presumed proper. *Wilson*, 2016 IL App (1st) 141063, ¶ 12. Even though defendant's sentence is presumed proper, defendant argues the court's 11-year sentence for robbery was based on improper factors.

¶ 20 "[W]hen a trial court considers an improper factor in aggravation, the trial court abuses its discretion." *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. The question of whether the trial court relied on an improper factor when it imposed sentence "presents a question of law to be reviewed *de novo*." *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8.

¶ 21 When a trial court relies on an improper sentencing factor, a defendant may be entitled to a new sentencing hearing. *People v. Walker*, 2012 IL App (1st) 083655, ¶ 30. But, even if the trial court considered an improper factor, it is only necessary to remand for resentencing if the court's consideration resulted in a greater sentence. *Walker*, 2012 IL App (1st) 083655, ¶ 30. "In determining whether the trial court improperly imposed a sentence, this court will not focus on isolated statements but instead will consider the entire record." *Walker*, 2012 IL App (1st) 083655, ¶ 30. We defer to the trial court's sentencing decisions and presume the court "considered only appropriate factors in sentencing, unless the record affirmatively shows

otherwise." *People v. Quintana*, 332 Ill. App. 3d 96, 109, 772 (2002). It is the defendant's burden "to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009).

¶ 22 Defendant has not met his burden of affirmatively establishing that the court's 11-year sentence for robbery was based on improper factors. From our review of the resentencing hearing, we find nothing to show that the court relied on, or considered, the fact that the robbery involved a gun. We recognize that the State included comments about a gun in its arguments. However, when the court imposed its sentence, it never made any comments relating to the State's argument that defendant used a gun or to suggest that it gave any weight to this fact. Because defendant has not met his burden of establishing that the court relied on the gun as an aggravating when it resentenced defendant, we need not address the parties arguments regarding whether it would have been improper had the record demonstrated the court had done so.

¶ 23 We also recognize that, at conclusion of the resentencing hearing, the trial court orally stated defendant was sentenced to "five years again for aggravated battery, three years for possession of controlled substance." However, based on our review of the resentencing hearing, there is nothing to indicate that the trial court improperly considered the vacated aggravated battery conviction when determining defendant's sentence for robbery. The record reveals the court was well aware that the purpose of the resentencing hearing was to impose a new sentence for robbery, not any other convictions. At the beginning of the hearing, the court stated, "[t]he Appellate Court *** sent it back for resentencing on robbery. I believe he's X mandatory on the robbery as well; is that right? Both the prosecutor and defense counsel responded, "Yes, Judge." Further, during the hearing, the parties did not make any references or comments about the

aggravated battery conviction and, when the court discussed its reasoning for its sentence for robbery, it never commented on the aggravated battery conviction. Accordingly, defendant has failed to affirmatively show that the court improperly considered the vacated aggravated battery conviction when determining his sentence for robbery.

¶ 24 In sum, the record does not show that the court's sentencing decision was based on improper factors. The record contains no indication that the trial court otherwise abused its discretion in imposing a sentence of 11 years in prison for robbery. Because the court did not err at resentencing, there can be no plain error.

¶ 25 Defendant argues, in the alternative, that his trial counsel provided ineffective assistance because he failed to object to and raise in his post-sentencing motion his claim that the court improperly considered the gun as an aggravating factor. We review ineffective assistance of counsel claims under the standard provided in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326 (2011). Under this standard, a defendant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. Our review on this issue is *de novo*. *People v. Campbell*, 2014 IL App (1st) 112926, ¶ 38. We may resolve an ineffective assistance of counsel claim based only on the prejudice prong. *People v. Patterson*, 2014 IL 115102, ¶ 81.

¶ 26 Having already found that the court did not rely on improper factors when it resentenced defendant for robbery, defendant cannot establish prejudice for his counsel's failure to raise at the resentencing hearing and in his motion to reconsider sentence his claim that the court's 11-year sentence for robbery was based on improper factors, including the gun and the vacated aggravated battery conviction.

¶ 27 We note that defendant argues the court improperly imposed a sentence on the vacated aggravated battery conviction. We agree. In our prior order, we vacated defendant's convictions for aggravated battery and aggravated unlawful restraint. *Adair,* 2015 IL App (1st) 133666-U, ¶ 52. At the conclusion of the resentencing hearing, the court stated defendant would be sentenced to "five years again for aggravated battery." Because we had vacated the aggravated battery conviction, the court erred at resentencing when it imposed a sentence on the vacated conviction. We therefore vacate defendant's sentence for aggravated battery imposed at resentencing and, as discussed below, order correction of the mittimus.

¶ 28 Defendant contends, and the State correctly concedes, that we should order correction of the mittimus to reflect only convictions for one count of robbery and one count of possession of a controlled substance. In our prior order, as previously discussed, we vacated defendant's convictions for aggravated battery and aggravated unlawful restraint and affirmed his conviction for possession of a controlled substance. *Adair,* 2015 IL App (1st) 133666-U, ¶¶ 42, 52. We also reduced defendant's conviction for aggravated battery with a weapon to simple robbery (720 ILCS 5/18-1(a) (West 2012)). *Adair,* 2015 IL App (1st) 133666-U, ¶¶ 29, 52. The mittimus however inaccurately reflects that defendant was convicted of "armed robbery/no firearm" and "agg battery/public place." Because we may correct the mittimus without remanding to the trial court (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)), we correct the mittimus to reflect convictions for one count of robbery and one count of possession of a controlled substance.

¶ 29 For the reasons explained above, we affirm the judgment of the circuit court and order the mittimus corrected.

¶ 30 Affirmed in part; vacated in part; mittimus corrected.