2018 IL App (2d) 151200-U
No. 2-15-1200
Order filed May 14, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHARLES ANDERSON TERRY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 15-CF-184 Honorable Robert A. Miller, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective at sentencing: although counsel did not object when the trial court erroneously stated that defendant had been imprisoned for all the years of his previous sentences, the court's comments as a whole showed that it was concerned with defendant's criminal history as reflected by the number and length of those sentences, not by how much of them he had actually served.

¶ 2 Following a jury trial, defendant, Charles Anderson Terry, was convicted of unlawful delivery of 1 gram or more but less than 15 grams of heroin (720 ILCS 570/401(c)(1) (West 2014)) and sentenced to 20 years in prison. Defendant timely appealed and argues that defense counsel provide ineffective assistance during sentencing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The following relevant evidence was presented at defendant's jury trial. Carol Stream police officer Gregory Walker testified that he worked as a special agent for the Du Page Metropolitan Enforcement Group, which specialized in narcotics investigations. In January 2015, Walker had arranged, via text messaging, to purchase heroin from defendant on four separate occasions. (Defendant was charged with the fourth transaction; evidence of the first three transactions was admitted for the limited purpose of establishing defendant's knowledge and lack of an innocent state of mind.) The drug transactions occurred in the parking lot of a CVS pharmacy in Elmhurst. Walker was wearing an audio-recording device, and additional officers were present to conduct surveillance. The audio recordings were played for the jury.

¶ 5 Walker first met with defendant on January 13, 2015, and gave him $160 in prerecorded funds in exchange for a number of clear plastic baggies, each containing a gray or brown chunky substance later determined to be heroin. On January 20, Walker met with defendant and gave him $500 in prerecorded funds in exchange for six grams of heroin. On January 27, Walker met with defendant and again gave him $500 in prerecorded funds in exchange for six grams of heroin. After completing the third transaction, Walker asked defendant if he could purchase 20 grams of heroin. Defendant told Walker to contact him one day before he wanted the heroin.

¶ 6 On January 28, 2015, Walker contacted defendant and told him that he wanted to purchase the heroin the next day. The parties agreed that Walker would purchase 24 grams of heroin for $1800. Walker and defendant met on January 29. Walker gave defendant the agreed-upon amount in prerecorded funds in exchange for what was later determined to be 11.294 grams of heroin. During the transaction, defendant told Walker that he would be getting a "new batch" of heroin soon and that he would give some of it to Walker "to try out to see which batch

[Walker] liked better." After leaving the scene, defendant was arrested and found to be in possession of the prerecorded funds used by Walker to purchase the heroin.

¶ 7 The jury found defendant guilty of unlawful delivery of 1 gram or more but less than 14 grams of heroin, and the matter was set for a sentencing hearing.

¶ 8 We note that defendant's offense is a Class 1 felony. 720 ILCS 570/401(c) (West 2014). However, because defendant had multiple prior felony convictions, he was subject to a Class X sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-4.5-25(a), 5-4.5-95(b) (West 2014).

¶ 9 A presentence investigation report (PSI) was prepared, and it revealed that defendant had an extensive criminal history. According to the PSI, defendant's first known arrest was in 1972 for theft. In 1974, at the age of 19, defendant was arrested and charged with aggravated kidnapping, rape, and robbery. Following a trial on those charges in 1975, he was sentenced as follows: "Minimum sentence—six years Illinois Department of Corrections [(DOC)]; maximum sentence—18 years [DOC]." Defendant was "[r]eceived by [DOC]" on October 31, 1975. (The PSI also indicated that, in 1976, defendant was sentenced on two counts of theft to a minimum sentence of three years and a maximum sentence of nine years.) The PSI indicated that there was no information available as to when defendant was paroled from DOC.

¶ 10 The State presented the testimony of attorney Edna Selan Epstein, who had prosecuted defendant in his trial for aggravated kidnapping, rape, and robbery. According to Epstein, defendant and three codefendants abducted a 40-year-old mother of three in downtown Chicago during the early morning hours. They drove her to an abandoned building where three of the men held her down as the fourth man raped her. The men had taken the victim's engagement ring, watch, and keys. Someone heard the victim screaming and called the police. The police arrived and all four men were arrested. At least one of the stolen items was found in defendant's

possession. The victim was examined at the hospital, and sperm was found in her vagina. The victim had bruises on her body, and clumps of hair had been pulled from her head. The victim identified all four men in a lineup. She described defendant as the ringleader, although he was not the individual who had sexually assaulted her.

¶ 11 Epstein identified a copy of a letter that she had sent to DOC after the trial. The letter included defendant's "rap sheet," which was a recitation of defendant's criminal history that had been prepared by the Chicago Police Department (criminal history report). According to Epstein, at the time of trial, defendant had a juvenile history and had been arrested for at least one other rape, possibly two. (The criminal history report indicated that, in 1972, defendant had been charged with rape, which had later been reduced to battery.) The victim reported to Epstein that, during the preliminary-hearing phase of the proceedings, defendant "had boasted that he had beaten these raps before and he was going to beat this one, also."

¶ 12 Although the PSI indicated that there was no information available as to when defendant was paroled from DOC after being sentenced in 1975 to the indeterminate 6-to-18-year term, the PSI indicated that defendant was arrested in February 1983 for unlawful possession of cannabis. Defendant was arrested seven times in the 1980s for a variety of offenses, including unlawful use of a weapon, possession of cannabis, and manufacture and delivery of a controlled substance. Those arrests did not result in convictions. In 1991, defendant received a sentence of one year of probation for battery. In 1992, defendant was convicted of the manufacture and delivery of a controlled substance and unlawful use of a weapon. He was sentenced to a 10-year prison term and a 5-year prison term, to be served concurrently. He was paroled in 1995 and discharged in 1997. In 2003, defendant was charged with unlawful possession of a controlled substance, and in 2004 he was charged with unlawful possession of a controlled substance with intent to deliver.

He was ultimately convicted and sentenced to consecutive prison terms of 3 years and 6½ years. Defendant was paroled in 2008 and discharged in 2010. In 2011, defendant was charged with unlawful possession of a controlled substance and unlawful possession of cannabis. Those charges were later dismissed. In 2012, defendant was questioned regarding an alleged criminal sexual assault of his girlfriend's four-year-old granddaughter but was released without charges. During the sentencing hearing, the trial court watched a video interview of the child.

¶ 13 The State asked that defendant be given a sentence between 25 and 30 years, arguing that defendant had been committing crimes for over 45 years, including violent offenses and drug offenses, and had never shown remorse. In discussing defendant's criminal history, the State specifically advised the court that the sentence in the rape case testified to by Epstein was "between 6 and 18 years" in prison. In response, defense counsel asked that defendant be given the minimum sentence of six years, arguing that defendant suffered from hearing loss, type 2 diabetes, and congestive heart failure and that he had a support network in place.

¶ 14 Defendant made the following statement:

> "Sir, regardless as to the jury's finding as well as the prosecutor's ambushing tactics assassinating my character, I am innocent and that your Honor take into consideration that the crime that I'm here for is one that has not taken a life and, therefore, your Honor, do not take my life away from me with the imposed sentence, with the sentence imposed on me today.
>
> And lastly, that I would like to—I would like to give thanks to my defense counselors for their efforts in this matter.
>
> That is all."

¶ 15 The trial court sentenced defendant to 20 years. In so doing, the court first rejected defendant's claim of innocence, noting that the evidence was overwhelming. The court stated: "You are on audio tape. I could hear your voice on the tape. You spoke the same way on the tape as you speak in court. You couldn't understand what the people were saying because of your hearing impairments on the tape. Clearly, it was you that was selling the drugs to the undercover agents." The court emphasized defendant's lack of remorse, stating: "[T]he fact that you are still claiming innocence in light of the fact of overwhelming evidence is something that I could take into consideration with regard to lack of remorse." The court then addressed defendant's criminal history and character, stating as follows:

> "Now, there has been evidence that has been presented regarding the Rape charge for which you were convicted in 1975. I am not here to sentence you for that Rape charge. So whatever the facts were in that Rape charge that I have heard today, that's not something that I'm sentencing you for.
>
> But that is something I do take into consideration when I sentence you for the drug charge. The drug charge is a Class-X sentencing. That means six to thirty years. You know that very well. You have been to the Department of Corrections more than once. You are familiar with the sentencing guidelines. And so I might start out at six, which is the minimum and which is what your defense counsel said I should consider. But then I have to decide, should I move up from six? And if I do move up from six, are there reasons I should bring it back down. It's factors in aggravation that bring it up and factors in mitigation that might bring it back down.
>
> Sir, it appears you are 61 years of age. I say it appears because there are different dates of birth. But it looks like your actual date of birth would make you 61 years of age.

> Clearly, if you were going to be rehabilitated, if you were going to change your life around so that you were no longer breaking the law and you were a law abiding citizen, that would have taken place decades ago. You aren't young and malleable. That means you aren't subjected to a personality change where we can modify your behavior at age 61. You are who you are at this point and that's who you are going to be if I give you six years or seven years or eight years or thirty years. You are going to be the same person.
>
> I don't believe that there will be any rehabilitation that will occur if I put you in a penitentiary. I believe that what will happen if I put you in a penitentiary is the public will be safe from being victimized from your continued criminal behavior. And, sir, you are a career criminal. You are someone who has committed criminal act after criminal act. *You have been in the penitentiary eighteen years, plus three, plus ten, plus five, plus three, plus six.* Sir, you've been in the penitentiary longer than most adults have been alive.
>
> I have no doubt that should you not be sent to the penitentiary for an extended period of time, that you will simply recommit more offenses. I don't go backwards in time. You've had eighteen years before and then you have had multiple other offenses to the Department of Corrections." (Emphasis added.)

After admonishing defendant concerning his right to appeal, the court made some final comments. First, the court stated that, in sentencing defendant, it did not consider the videotaped interview of the four-year-old child. Next, the court stated:

> "And as far as the Rape charge was concerned in which he was sentenced to eighteen years, as I said before, I took that into consideration as far as his history is

concerned. I am not placing undue influence on it. I'm using that as a benchmark, as that's how he started his criminal career with an eighteen-year sentence because of that act and given opportunities to turn his life around, you chose not to do so.

The twenty-year sentence is based on his criminal, the objective evaluation of his criminal history and past sentences to the Department of Corrections."

¶ 16 Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that defense counsel provided ineffective assistance by failing to object to the trial court's incorrect conclusions about defendant's criminal history, which, according to defendant, the trial court relied on in imposing a 20-year prison sentence. Specifically, defendant argues that the trial court incorrectly concluded that defendant had been "in the penitentiary eighteen years, plus three, plus ten, plus five, plus three, plus six," when the 18-year sentence was actually an indeterminate sentence of 6 years to 18 years. Defendant further argues that the court incorrectly stated that defendant had been in prison "plus ten, plus five" years when those sentences, imposed in 1992, ran concurrently rather than consecutively. According to defendant, counsel's failure to object to "these incorrect and unsupported conclusions" during the sentencing hearing constituted ineffective assistance of counsel.

¶ 19 When a defendant claims ineffective assistance of counsel, he must prove that (1) defense counsel's performance fell below an objective standard of reasonableness and (2) the defendant suffered prejudice as a result of defense counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). The second prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* at 694. To establish prejudice in a sentencing context, the defendant must show a "reasonable probability" that the trial court would have imposed a lesser sentence if his counsel had not erred. *People v. Steidl*, 177 Ill. 2d 239, 257 (1997). If an ineffectiveness claim can be disposed of on the ground of insufficient prejudice, then that course should be taken, and the court does not need to consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. The State argues that defendant cannot establish either prong under *Strickland*.[1]

¶ 20 We find that defendant's ineffective-assistance-of-counsel claim fails because defendant cannot establish that he was prejudiced by counsel's failure to correct the trial court when it stated that defendant had "been in the penitentiary eighteen years, plus three, plus ten, plus five, plus three, plus six." When viewed as a whole (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")), the court's comments reveal that it was concerned with the totality of defendant's criminal history, which, as the PSI revealed, included numerous arrests, convictions, and prison sentences.

[1] The State includes only one paragraph at the end of its brief to respond to defendant's ineffective-assistance-of-counsel argument. The majority of its brief is devoted to its argument that defendant must establish plain error and cannot do so. However, defendant does not make a plain-error argument in his initial brief. Although defendant argues that the trial court erred by relying on "incorrect and unsupported conclusions about [defendant's] criminal history," he does so within the context of his argument that counsel was unreasonable for not objecting when the court did so. As defendant is expressly raising an ineffective-assistance-of-counsel argument, that is the argument we consider.

The court noted that defendant was a "career criminal," having "committed criminal act after criminal act." The court emphasized defendant's lack of rehabilitation despite his numerous prison sentences. The court also noted defendant's lack of remorse. The court concluded that an "extended" prison term was necessary to protect the public "from being victimized from [defendant's] continued criminal behavior." The court then imposed a 20-year term, which, though certainly lengthy, is only two years above the midpoint of the applicable sentencing range. In sum, to the extent that the court was concerned with defendant's "past sentences to the Department of Corrections," it was concerned only with the number and length[2] of those sentences—not with how much of those sentences he had actually served. The number and length of those sentences would not have changed, even if counsel had clarified that defendant did not serve the maximum of his indeterminate sentence and served his five-year sentence concurrently. Thus, we cannot say that there is a reasonable probability that, had counsel raised those points, defendant's sentence would have been different. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice").

¶ 21 III. CONCLUSION

¶ 22 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

[2] For these purposes, we see no error in the trial court's reference to defendant's indeterminate 6-to-18-year sentence as an 18-year sentence, despite the fact that defendant was paroled before serving the maximum, just as we see no error in the trial court's reference to defendant's determinate 10-year sentence as a 10-year sentence, despite the fact that defendant was likewise paroled before serving 10 years.

¶ 23 Affirmed.