2018 IL App (2d) 160103-U
No. 2-16-0103
Order filed July 27, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. EPIGMENIO MELECIO, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 81-CF-272 Honorable Joseph G. McGraw, Judge, Presiding.

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

ORDER

¶ 1 *Held*: (1) The trial court properly denied defendant's motion to vacate his conviction under section 115-4.1(e), as the evidence showed that defendant knew that he was required to be present at trial, the court was entitled to reject his claim that his attorney forced him to leave the country, and he did not corroborate his claims of mental-health issues and treatment; (2) the trial court did not improperly rely on the victim's death, an inherent factor in aggravation at sentencing, as the court mentioned it only in passing and properly focused on the nature and circumstances of the offense.

¶ 2 Defendant, Epigmenio Melecio, appeals from an order denying his motion to vacate his conviction of murder (Ill. Rev. Stat. 1981, ch. 38 ¶ 9-1), filed under section 115-4.1(e) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-4.1(e) (West 2010)). Defendant

was convicted *in absentia* and contends that the trial court abused its discretion when it determined that he failed to prove that his absence from trial was not his fault and was due to circumstances beyond his control. He also contends that the trial court improperly considered a factor inherent in the offense in aggravation at sentencing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged in March 1981. On June 12, 1981, defendant was released on bond and, by September 1981, he stopped appearing in court. The State moved for trial *in absentia*, and defendant's counsel, Genaro Lara, moved to dismiss, arguing that defendant was not competent to stand trial and that the State failed to show that defendant was willfully avoiding trial. Lara informed the court that defendant was in Mexico receiving psychiatric treatment. The trial court denied the motion to dismiss and set a date for trial.

¶ 5 Defendant was tried *in absentia*. During trial, Lara continued to express concern about defendant's mental functioning, his fitness to stand trial, and his willfulness in avoiding trial. On September 22, 1982, a jury found defendant guilty. Lara moved to vacate the verdict, arguing that the State failed to prove that defendant willfully avoided trial. Counsel argued that defendant was not competent and did not have the capacity to form a willful intent to avoid trial. The court found that the State had met its burden of showing that defendant was willfully avoiding trial. The court noted that defendant was aware of his trial date, he was in Mexico, and the State had told the court that it unsuccessfully attempted to have him extradited. Thus, the court denied the motion.

¶ 6 At sentencing, the State asked the trial court to consider the viciousness of the crime in that defendant repeatedly stabbed the victim, who was doing nothing wrong at the time. The court read through the statutory factors in aggravation and mitigation, stating whether each

applied. In regard to the mitigating factor applicable where the defendant's conduct neither caused nor threatened serious harm, the court stated, "It didn't. He killed [the victim]." In regard to the factor applicable where the defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm, the court stated, "Certainly, when you take a knife and stab him numerous times, that would indicate he contemplated his conduct would do serious physical harm." The court found defendant's mental capacity and lack of a criminal record factors in mitigation. In reading the factors in aggravation, the court addressed whether defendant inflicted serious bodily harm to another, stating, "He did." As to other aggravators, the court noted the need for deterrence. Ultimately, the court stated that the crime was committed in a manner that would require more than the minimum sentence. The court discussed the particularly vicious nature of the attack, stressing that defendant repeatedly stabbed the victim, who was unarmed and acting peaceably. It then sentenced defendant to 35 years' incarceration. Lara filed a posttrial motion for reimbursement of legal fees. His appeal of that order was dismissed.

¶ 7 In April 2010, defendant appeared and moved to vacate the verdict and sentence, arguing that he was never advised that he could be tried and sentenced in his absence. He also sought an evidentiary hearing under section 115-4.1(e) on whether his absence at trial was without his fault and due to circumstances beyond his control, which he contended was different from the initial showing that he was willfully absent. The trial court denied the motion, declining to hold an evidentiary hearing. We reversed and remanded for a hearing and also modified the mittimus to reflect 1160 days' credit for time defendant spent in custody. *People v. Melecio*, 2013 IL App (2d) 120214-U.

¶ 8 On remand, defendant was represented by new counsel. He testified in Spanish through an interpreter that he was 57 years old and was born on a small farm in Mexico. He came to Chicago in 1974, but was deported in 1977 or 1978. He later returned and worked as a tool-maker in Rockford. When he was charged with murder, he was represented by Lara, whom he met through his family. Defendant stated that he knew that he had to appear for every court date. He said that he came to court dates but was given an interpreter for only three dates, did not understand everything that happened in court, and was unable to communicate to the judge that he needed an interpreter. However, the record shows that he had an interpreter at numerous court appearances and that he spoke Spanish with Lara.

¶ 9 In October 1981, defendant went to Mexico. Lara took him to the airport and ordered him to leave. Lara told him that he would fix the problem and had arranged for everything. Defendant did not want to leave, but he trusted Lara and was not in his right mind. He was out of control, did not sleep, heard voices, and talked to those voices. Defendant believed that he had paid Lara in full and that Lara used defendant's money to buy the plane ticket to Mexico.

¶ 10 Once in Mexico, defendant's mother took him to a doctor for psychiatric treatment. He also spent time in an inpatient facility. He did not recall the doctor's name, but said that Lara had all of the information about his treatment and that Lara communicated with his mother by phone and letter. He also took medications, but could not recall what they were. In addition, for 10 years, a neurologist, Cosme Contreras, also treated defendant for nervousness, sleeping problems, and epilepsy. Defendant stopped that treatment when he started feeling better. During that time, defendant went to school and worked in Mexico. He was arrested by Mexican authorities in November 2008, when he applied for paperwork to come to the United States to work.

¶ 11 On cross-examination, defendant acknowledged that he did not tell anyone that he left the United States against his will. He also acknowledged that he knew that he had a murder case in Rockford and knew that he was required to come to every court date as a condition of his bond. He did not tell his sisters in Mexico that he had a murder case or that Lara sent him to Mexico. The court asked defendant's counsel whether he attempted to contact any of the doctors in Mexico. Counsel stated that his investigator tried calling clinics and hospitals in Mexico but could not verify defendant's treatment. Counsel also was unable to locate Contreras and Lara. Counsel spoke to some of defendant's family members who were unable to verify his treatment.

¶ 12 The State expressed a desire to locate Lara to find out what he remembered, but stated that it did not want to delay the proceedings and that, even if the court believed defendant's testimony that Lara told him to leave the country, defendant did not show that his absence was without fault and due to circumstances beyond his control. The State noted that Lara's motion for reimbursement of legal fees countered defendant's claim that he had paid Lara in full. The State also noted that an interpreter was present in court on more dates than defendant stated.

¶ 13 The trial court observed that there was no evidence to corroborate defendant's claims about his mental state. The court further found that his testimony that Lara sent him away against his will lacked credibility. Thus, the court denied the motion to vacate. Defendant appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant first contends that the trial court erred by denying his motion to vacate his conviction. He argues that he sufficiently proved that his absence from trial was not his fault and was caused by circumstances beyond his control.

¶ 16 "A defendant who is tried and sentenced *in absentia* is entitled to a new proceeding if he establishes that his failure to appear was both not his fault and caused by circumstances beyond his control." *People v. Reyna*, 289 Ill. App. 3d 835, 838 (1997); see 725 ILCS 5/115-4.1(e) (West 2010). "The trial court's denial of a new trial to a defendant convicted *in absentia* will not be reversed unless a manifest abuse of discretion is shown." *Reyna*, 289 Ill. App. 3d at 838. An abuse of discretion occurs when the court's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). When a defendant testifies that he voluntarily left the jurisdiction, had a fear of incarceration, and suffered from extreme stress or mental illness, but no doctor or psychologist testifies at the hearing, the court does not abuse its discretion in determining that the absence was not the defendant's fault or due to circumstance beyond his control. See *People v. Hayes*, 159 Ill. App. 3d 1048, 1051-52 (1987).

¶ 17 Here, defendant specifically stated that he knew that he had a criminal case pending and that he was required to attend all court proceedings. Although he testified about mental-health issues and treatment, he provided no evidence to corroborate his testimony or to show that he was unable to return for trial. Meanwhile, the court was entitled to reject his claim that his attorney forced him to leave the country. Under these circumstances, we cannot find that the court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would take the same view. Accordingly, the court did not err in denying the motion to vacate.

¶ 18 Defendant next argues that the trial court improperly used a factor inherent in the offense in aggravation at sentencing. The State contends that we should not reach the issue where defendant failed to include it in his initial notice of appeal, the issue does not implicate fundamental fairness, and defendant forfeited the issue by failing to raise it in his first appeal

from the denial of his motion to vacate. In the alternative, the State contends that the court did not unduly focus on a factor inherent in the offense in aggravation.

¶ 19 Generally, in criminal cases, a trial court loses subject-matter jurisdiction of the case 30 days after it imposes the defendant's sentence. *People v. Flaugher*, 396 Ill. App. 3d 673, 680 (2009). However, section 115-4.1(g) provides an exception, stating that a defendant whose motion for a new trial or new sentencing hearing under section 115-4.1(e) has been denied may file a notice of appeal and that "[s]uch notice may also include a request for review of the judgment and sentence not vacated by the trial court." 725 ILCS 5/115-4.1(g) (West 2010). Our supreme court has characterized section 115-4.1(e) as a collateral remedy that a defendant who has been convicted *in absentia* may use to secure review of his conviction. *People v. Partee*, 125 Ill. 2d 24, 31-38 (1988). It is analogous to an action for relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) or section 122-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/122-1 (West 2010)), and will support an appeal separate from a direct appeal of the underlying judgment. *People v. Pontillo*, 267 Ill. App. 3d 27, 33 (1994).

¶ 20 The State argues that defendant forfeited the matter by failing to raise it in his appeal from the first denial of his motion to vacate. Defendant initially appealed when the court denied him an evidentiary hearing. He further raised a sentencing issue in regard to credit for time spent in custody, but did not raise any additional sentencing issues. In cases involving section 115-4.1(e), doctrines of estoppel, *res judicata*, waiver, and law of the case are available to preclude a defendant from taking two bites out of the same appellate apple. *Partee*, 125 Ill. 2d at 36-37. Thus, the State's forfeiture argument is compelling. (Of course, defendant also forfeited the issue by failing to raise it at trial.) However, it is well established that, in the interest of justice, a reviewing court may consider all questions that affect a party's substantial rights. This question

does. *People v. Martin*, 119 Ill. 2d 453, 458 (1988), see also *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 7 (applying plain error). Here, forfeiture aside, defendant's argument fails on the merits.

¶ 21 Imposition of a sentence is normally within a trial court's discretion, and there is a strong presumption that the trial court based its determination on proper legal reasoning. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8. Thus, the trial court's sentencing decision is reviewed with great deference. *Id*. "The presumption is overcome only by an affirmative showing that the sentence imposed varies greatly from the purpose and spirit of the law or manifestly violates constitutional guidelines." *Id*. "Nonetheless, 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*." *Id*.

¶ 22 "Although the trial court has broad discretion when imposing a sentence, it may not consider a factor implicit in the offense as an aggravating factor in sentencing." *Id*. ¶ 9. Thus, "a single factor cannot be used both as an element of an offense and as a basis for imposing a 'harsher sentence than might otherwise have been imposed.' " *Id*. (quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992)). Dual use of a single factor is generally referred to as "double enhancement." *Id*. "The prohibition against double enhancements is based on the rationale that 'the legislature obviously has already considered such a fact when setting the range of penalties and it would be improper to consider it once again as a justification for imposing a greater penalty.' (Internal quotation marks omitted.)" *Id.* (quoting *People v. James*, 255 Ill. App. 3d 516, 532 (1993)). "The defendant bears the burden of establishing that a sentence was based on improper considerations." *Id.* It is improper in a murder case for the court to rely in aggravation or the fact that the defendant's conduct caused serious harm to the victim. See *People v. Saldivar*, 113 Ill. 2d 256, 271 (1986).

¶ 23 "In determining whether the trial court based the sentence on proper aggravating and mitigating factors, a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *People v. Dowding*, 388 Ill. App. 3d 936, 943 (2009). "In determining the exact length of a particular sentence within the sentencing range for a given crime, the trial court may consider as an aggravating factor the degree of harm caused to a victim, even where serious bodily harm is arguably implicit in the offense of which the defendant is convicted." *Id.* (citing *Saldivar*, 113 Ill. 2d at 269). "The trial court may also consider the manner in which the victim's death was brought about, as well as the seriousness, nature, and circumstances of the offense, including the nature and extent of each element of the offense." (Emphasis omitted.) *Id.* "However, the trial court may not consider the end result, *i.e.*, the victim's death, as a factor in aggravation where death is implicit in the offense." (Emphasis omitted.) *Id.* Thus, "not every mention of an impermissible factor necessitates remandment for a new hearing." *People v. Jordan*, 247 Ill. App. 3d 75, 95 (1993). " '[I]t is unrealistic to suggest that the judge in sentencing the defendant must avoid mentioning the fact that someone had died or risk committing reversible error.' " *Id.* (quoting *People v. Green*, 209 Ill. App. 3d 233, 248 (1991)). "The key inquiry is whether the court attached any meaningful significance to the impermissible factor while deciding the extent of the appropriate sentence." *Id.*

¶ 24 Error has been found when the State argued that a factor inherent in the offense should be considered in aggravation and the trial court's recitation of that factor mirrored the State's argument. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 12; *Dowding*, 388 Ill. App. 3d at 944. In those instances, the mirroring showed that the trial court did not merely mention the improper factor and instead actually considered it as a factor in aggravation. *Id.* However, when a court

made only a passing reference to an improper factor and stressed proper factors in aggravation, error has not been found. See, *e.g.*, *People v. Harmon*, 2015 IL app (1st) 122345, ¶¶ 129-131; *Jordan*, 247 Ill. App. 3d at 96.

¶ 25 Here, the court, in reading the statutory factors in aggravation, merely mentioned that defendant inflicted serious bodily harm to another, stating, "He did." All other mentions of the victim's death were in relation to the lack of mitigating factors. The State never requested that the court rely on that factor in aggravation, and the court never specifically stated that it did so. Instead, when elaborating on the basis for the sentence, the court made clear that it was permissibly considering the vicious nature and circumstances of the offense, which involved multiple stab wounds to a person who was unarmed and acting peaceably. There is nothing to suggest that the court unduly focused on the improper factor. Thus, the mere mention of it, without more, does not entitle defendant to a new sentencing hearing.

¶ 26 III. CONCLUSION

¶ 27 The trial court did not err in denying defendant's motion to vacate his conviction, and defendant is not entitled to a new sentencing hearing. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 28 Affirmed.