

2018 IL App (2d) 160138-U
No. 2-16-0138
Order filed September 13, 2018

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

| | | |
|-------------------------|---|-------------------------------|
| THE PEOPLE OF THE STATE |) | Appeal from the Circuit Court |
| OF ILLINOIS, |) | of Du Page County. |
| |) | |
| Plaintiff-Appellee, |) | |
| |) | |
| v. |) | No. 15-CF-1218 |
| |) | |
| BRANDON T. SER VOSS, |) | Honorable |
| |) | George J. Bakalis, |
| Defendant-Appellant. |) | Judge, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in applying the aggravating factor that defendant was obliged by his position to prevent theft, as his mere status as a trusted employee did not so oblige him; as we could not say that the error did not affect the sentence, we remanded the cause for resentencing.
- ¶ 2 Defendant, Brandon T. Ser Voss, appeals from the judgment of the circuit court of Du Page County sentencing him to concurrent eight-year terms of imprisonment on his convictions of theft of more than \$100,000 (720 ILCS 5/16-1(a)(1)(A), (b)(6) (West 2012)) and participating in a continuing financial crimes enterprise (720 ILCS 5/17-10.6(h)(3), (j)(3) (West

2012)). Because the trial court considered an improper statutory aggravating factor, we vacate the sentences and remand.

¶ 3

I. BACKGROUND

¶ 4 Defendant pled guilty to both offenses. The factual basis for the plea established that defendant had been employed by Filter Services. As part of his employment, defendant was given two credit cards to charge business-related expenses. However, defendant used the credit cards to obtain \$278,703 in cash advances for his personal use. He then deposited the proceeds into his own bank account or a church bank account to which he had access. Defendant would then withdraw funds from the church account and deposit them into his own account. Defendant used the money for car payments, air travel, family vacations, rental cars, and his gym membership. He also used some of the money to pay for legal fees and restitution related to his two criminal cases in Colorado.

¶ 5 The following additional facts were established at defendant's sentencing. According to the presentence investigation report (PSR), defendant had been convicted in both state and federal courts in Colorado of being involved in a scheme to steal insurance premiums from an insurance agency where he worked. He was ordered to pay over \$350,000 in restitution in the federal prosecution.

¶ 6 Several letters were submitted for sentencing purposes. Gerald Gradek, the owner of Filter Services, stated that his son Jeffrey hired defendant. Defendant started as a clerk but by 2008 he was responsible for doing inventory and paying bills. Defendant would also handle dispatches and inventory problems when Gerald and Jeffrey were not available. Every two weeks, defendant would give the bills to Gerald, along with supporting documentation, for

approval. Gerald described defendant as an “integral part of the organization” whom he considered loyal and dependable.

¶ 7 In December 2012, Gerald contacted his bank to discuss “mileage” accumulated on the business credit cards. When the banker reviewed the charges, Gerald learned that they were not valid. The banker advised Gerald that defendant had made those charges. When Gerald tried to contact defendant, who was on vacation, defendant did not respond. Gerald then contacted the business accountant and told him that there was a problem.

¶ 8 Brian Labat, a pastor at defendant’s then-church, submitted a letter in which he stated that defendant and his family had attended the church for about 10 years. According to Labat, defendant, who was a church trustee and youth ministry coordinator, had oversight of several checking accounts at the church. After Labat learned that defendant was involved in the theft at Filter Services, he discovered that defendant had been using the church bank account to launder the stolen funds.

¶ 9 At the sentencing hearing, Philip Bridges, the pastor at defendant’s new church in Wisconsin, testified that defendant, defendant’s wife, and their two children had joined the church about a year and a half earlier. Bridges was aware of defendant’s criminal conduct and counseled him in that regard. According to Bridges, defendant was very involved in the church and was a “reformed, changed man.” Defendant’s wife was a music director at the church, and, because defendant was incarcerated, both she and the children were living in converted office space at the church.

¶ 10 In allocution, defendant apologized for his conduct. He described himself as a broken man whose true character included integrity and honesty.

¶ 11 In imposing sentence, the trial court stated that it had considered the PSR, the aggravating and mitigating factors, and defendant's allocution. The court added that defendant was a person "of faith" and that there was "certainly *** another side to *** defendant."

¶ 12 In considering the aggravating factors, the trial court considered whether defendant "by the duties of his office or position, was *** obliged to prevent the particular offense." The court applied that factor, as it found that defendant was a trusted employee and had an obligation not to betray that trust. The trial court further found that defendant had a criminal history, having committed a very similar offense in Colorado. The court also found that a lengthy sentence was necessary to deter others.

¶ 13 In mitigation, the trial court found that defendant did not cause or contemplate any physical harm. The court also found that defendant's incarceration would cause extensive hardship to defendant's family. The court commented that defendant had "a lot of good attributes" apart from his criminality.

¶ 14 The applicable sentencing range was 4 to 15 years in prison. See 720 ILCS 5/17-10.6(h), (j)(3) (West 2012); 730 ILCS 5/5-4.5-30(a) (West 2012). After weighing both the mitigating and aggravating factors, the court sentenced defendant to concurrent eight-year terms of imprisonment and ordered him to pay \$278,703 in restitution.

¶ 15 Defendant filed a motion to reconsider, contending, among other things, that the trial court erred in applying the aggravating factor that defendant was obliged by his position to prevent the offense. In denying the motion to reconsider, the trial court explained that part of defendant's obligation was to deal with the payment of bills, he was entrusted with credit cards, and he "certainly was in a position of trust and he violated [that] trust." Defendant then filed a timely notice of appeal.

¶ 16

II. ANALYSIS

¶ 17 On appeal, defendant contends that the trial court erred in applying the aggravating factor under section 5-5-3.2(a)(4) of the Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2(a)(4) (West 2012)). The State responds that section 5-5-3.2(a)(4) was properly applied, as the evidence showed that defendant's duties directly related to preventing financial fraud. Alternatively, the State asserts that, even if the court erred, the error was harmless in light of the other sentencing factors.

¶ 18 It is well established that a trial court has wide latitude in sentencing, so long as it neither ignores relevant mitigating factors nor considers improper aggravating factors. *People v. Watt*, 2013 IL App (2d) 120183, ¶ 49. Accordingly, we ordinarily will not disturb a sentence absent an abuse of discretion. *Watt*, 2013 IL App (2d) 120183, ¶ 49. However, when the issue is whether the court relied on an improper sentencing factor, our review is *de novo*. *People v. Morrow*, 2014 IL App (2d) 130718, ¶ 14. We presume that the court applied proper legal reasoning, and the defendant bears the burden to affirmatively establish that the sentence was based on improper considerations. *People v. Dowding*, 388 Ill. App. 3d 936, 942-43 (2009). In determining whether the court based the sentence on an improper factor, we consider the record as whole, rather than focus on a few words or statements of the court. *Dowding*, 388 Ill. App. 3d at 943.

¶ 19 When the trial court considers an improper factor, the case must be remanded, unless it appears from the record that the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18. In determining whether the trial court has accorded significant weight to an improper factor such that remand is required, we should consider (1) whether the trial court made any dismissive or

emphatic comments in referring to the factor and (2) whether the sentence was substantially less than the maximum sentence allowed. *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18.

¶ 20 In this case, the trial court clearly applied section 5-5-3.2(a)(4). That was error.

¶ 21 Section 5-5-3.2(a)(4) provides that a trial court may consider, as a reason to impose a more severe sentence, that a defendant “by the duties of his office or by his position, was obliged to prevent the particular offense committed or to bring the offenders committing it to justice.” 730 ILCS 5/5-3.2(a)(4) (West 2012). Here, there was no evidence that defendant’s position at Filter Services obliged him to prevent the offense or bring anyone to justice for having committed such an offense. Although he was given increased responsibilities by the owner and was a trusted employee, those facts alone did not oblige him to prevent such an offense or bring any offenders to justice. If we were to hold that defendant was obliged to prevent theft merely because he was a trusted employee, then any trusted employee who stole from his employer would be subject to the aggravating factor in section 5-5-3.2(a)(4). That is too broad a reading of section 5-5-3.2(a)(4).

¶ 22 Although we do not find any case that directly addresses the application of section 5-5-3.2(a)(4) to facts similar to those here, *People v. Myers*, 292 Ill. App. 3d 757 (1997), supports our conclusion. In *Myers*, the defendant was an employee who knew that his manager was stealing cash and property from the business. *Myers*, 292 Ill. App. 3d at 758. The manager offered the defendant a VCR if the defendant would set fire to the store to cover up the thefts. *Myers*, 292 Ill. App. 3d at 758. The defendant was convicted of aggravated arson. *Myers*, 292 Ill. App. 3d at 758.

¶ 23 At his sentencing, the trial court found that, because of the duties of his position, the defendant was obliged to prevent the offense or bring offenders to justice. *Myers*, 292 Ill. App.

3d at 759. In holding that the trial court erred in applying that aggravating factor, the appellate court commented that the factor inherently required some “substantive indicia of responsibility” and that none were present in the case. *Myers*, 292 Ill. App. 3d at 760. The court added that the defendant had no managerial or supervisory authority or any assigned duty to guard the business or otherwise provide security. *Myers*, 292 Ill. App. 3d at 760.

¶ 24 Here, as in *Myers*, there was no evidence that defendant had any managerial or supervisory authority, or was otherwise assigned, to prevent thefts from Filter Services. Thus, the evidence did not support the application of section 5-5-3.2(a)(4).¹

¶ 25 That leaves the issue of whether the weight placed on the improper factor was so insignificant that it did not lead to a greater sentence. It was not.

¶ 26 In sentencing defendant, the trial court stated that it was applying the aggravating factor. In denying the motion to reconsider, the court reiterated that it had considered the factor. Its repeated references to the improper factor, particularly in rejecting defendant’s argument that the factor did not apply, show that the court placed significant weight on it. Further, the court did not make any dismissive comments indicating that the court gave it little if any weight. Although the court also considered in aggravation that defendant had committed a similar offense in Colorado and that there was a need to deter others, the record does not indicate that the court gave more weight to either of those two factors than to the improper factor. Because

¹ The State moved to file a surreply brief. We now grant that motion. In the surreply, the State concedes that section 5-5-3.2(a)(14) of the Code (730 ILCS 5/5-5-3.2(a)(14) (West 2012)), which applies when the defendant had “a position of trust,” does not apply, as defendant did not commit any of the offenses enumerated therein. We agree.

the record does not show that the improper factor did not lead to a greater sentence, we must remand for resentencing. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 19.

¶ 27

III. CONCLUSION

¶ 28 For the reasons stated, we vacate the judgment of the circuit court of Du Page County sentencing defendant to concurrent eight-year terms of imprisonment and remand for further proceedings.

¶ 29 Vacated and remanded.