2016 IL App (4th) 141032-U

NO. 4-14-1032

FILED
December 6, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from |
| Plaintiff-Appellee, | ) | Circuit Court of |
| v. | ) | McLean County |
| DAMIEN M. HANSBROUGH, | ) | No. 12CF470 |
| Defendant-Appellant. | ) | |
| | ) | Honorable |
| | ) | Scott Daniel Drazewski, |
| | ) | Judge Presiding. |

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The record is insufficient to decide defendant's ineffective-assistance-of-counsel claim alleging counsel improperly failed to file a suppression motion.

(2) The trial court did not abuse its discretion when sentencing defendant by stating it had a sentencing policy, which was based largely upon deterrence.

¶ 2 Defendant, Damien M. Hansbrough, appeals his November 2014 conviction and sentence of two concurrent 10-year prison terms for two counts of unlawful delivery of a controlled substance within 1,000 feet of a public park in violation of section 407(b)(2) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/407(b)(2) (West 2012)). On appeal, defendant first argues trial counsel was ineffective for failing to seek suppression of defendant's

custodial statements given after an incomplete *Miranda* warning (see *Miranda v. Arizona*, 384 U.S. 436 (1966)). Defendant also argues the trial court abused its discretion in imposing defendant's sentence by relying on the court's personal sentencing policy rather than the statutory sentencing guidelines. Defendant concedes he forfeited the sentencing issue but asserts we should review it for plain error because (1) the evidence at sentencing was closely balanced and (2) the trial court's sentencing policy deprived him of a fair sentencing hearing. Alternatively, defendant argues we may consider his sentencing argument due to trial counsel's ineffectiveness in failing to raise this issue in his posttrial motion to reconsider.

¶ 3 The State argues both of defendant's ineffective-assistance-of-counsel claims are better suited for a postconviction petition, but the State also maintains defendant received effective trial counsel. The State further argues defendant's sentencing argument is not properly before this court because defendant (1) forfeited the argument by failing to raise it in his posttrial motion to reconsider and (2) has not made the requisite showing for a plain-error analysis. Alternatively, the State argues the trial court did not abuse its discretion when sentencing defendant. We affirm.

¶ 4 I. BACKGROUND

¶ 5 Following two controlled buys, defendant was indicted in May 2012 with multiple counts of unlawful delivery of a controlled substance, the substance being cocaine. While in custody, defendant was questioned by Detective Todd McClusky who, at the outset of the interview, informed defendant (1) he had the right to remain silent; (2) he had the right to an attorney; and (3) if he was unable to afford an attorney, one would be provided to him. During the interview, defendant orally waived his fifth amendment rights and proceeded to give

statements consistent with the controlled buys. However, he denied delivering cocaine during the controlled buys, maintaining that he delivered cannabis. Prior to trial, the State dismissed two counts of the indictment against defendant. Ultimately, the State went to trial on two counts of unlawful delivery of a controlled substance (cocaine), a class two felony (720 ILCS 570/401(d) (West 2012)), and two counts of unlawful delivery of a controlled substance within 1,000 feet of a public park, a Class 1 felony (720 ILCS 570/407(b)(2) (West 2012)).

¶ 6 In September 2014, the case proceeded to a bench trial. During trial, the State presented testimony from law enforcement officers involved in the controlled buy as well confidential source, Lisa Hibbard, who purchased the cocaine from defendant during the controlled buys. Detective McClusky gave testimony outlining defendant's custodial statements. The State admitted, without objection, a digital video disc of defendant's custodial interrogation as well as a transcript of the same. The trial court found defendant guilty of all counts but merged the Class 2 felony unlawful delivery of a controlled substance counts with the Class 1 felony counts of unlawful delivery of a controlled substance with 1,000 feet of a public park (720 ILCS 570/407(b)(2) (West 2012)).

¶ 7 In November 2014, the trial court sentenced defendant to concurrent 10-year prison terms on each count of the Class 1 felony of unlawful delivery of a controlled substance within 1,000 feet of a public park (720 ILCS 570/407(b)(2) (West 2012)). During the sentencing hearing, the court indicated that when a defendant has a prior conviction for a similar crime, the court has a policy of imposing a longer sentence than the prior sentence. The court also noted several factors in mitigation and aggravation, including defendant's prior criminal history, his struggles with addiction, and the need for individual and community deterrence.

¶ 8 Following the sentencing hearing, defense counsel filed a motion to reconsider alleging (1) the trial court failed to consider mitigating factors, (2) the court placed undue weight on aggravating factors, and (3) the sentence was excessive and an abuse of discretion. The court denied defendant's motion to reconsider.

¶ 9 This appeal followed.

¶ 10 II. ANALYSIS

¶ 11 On appeal, defendant argues his trial counsel was ineffective for failing to seek suppression of statements allegedly obtained in violation of defendant's fifth amendment rights. Defendant also argues the trial court abused its discretion when sentencing him by employing its own sentencing policy and disregarding the statutory sentencing guidelines.

¶ 12 A. Standard of Review

¶ 13 We review *de novo* claims of ineffective assistance of counsel in cases where, as here, the trial court has made no factual determinations relating to trial counsel's effectiveness. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶ 25, 960 N.E.2d 27.

¶ 14 We review a trial court's sentencing decision for an abuse of discretion. *People v. Jones*, 168 Ill. 2d 367, 373-74, 659 N.E.2d 1306, 1308 (1995). Trial courts are granted " 'wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation.' " *People v. Roberts*, 338 Ill. App. 3d 245, 251, 788 N.E.2d 782, 787 (2d Dist. 2003). A sentence within the statutory guidelines is excessive only when the sentence imposed is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Fern*, 189 Ill.2d 48, 53-54, 723 N.E.2d 207, 209-10 (1999).

¶ 15 B. Defendant's Custodial Statements

¶ 16 Defendant argues his trial counsel was ineffective for failing to seek suppression of defendant's custodial statements. The United States Supreme Court has interpreted the fifth amendment to require four admonitions prior to a custodial interrogation: (1) the right to remain silent; (2) any statement made may be used against the suspect in a court of law; (3) the right to an attorney; and (4) if the suspect cannot afford an attorney, one will be provided. *Miranda*, 384 U.S. at 467-70; see also U.S. Const. amend V. While there are no "magic words" that must be recited in order to comport with the fifth amendment, all four of these rights must be conveyed to a suspect prior to a custodial interrogation. *Florida v. Powell*, 559 U.S. 50, 60 (2010).

¶ 17 Additionally, the sixth amendment guarantees criminal defendants effective assistance of counsel. U.S. Const. amend VI. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, a different result would have been reached. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Our supreme court has noted that when 'an ineffectiveness claim is based on counsel's failure to file a suppression motion, in order to establish prejudice under *Strickland*, the defendant demonstrate that the unargued suppression motion is meritorious, and a reasonable probability exists that the outcome would have been different had the evidence been suppressed.' " *People v. Fellers*, 2016 IL App (4th) 140486, ¶ 33 (quoting *People v. Henderson*, 2013 IL 114040, ¶ 15, 989 N.E.2d 192).

¶ 18 Defendants claiming ineffective assistance of counsel must overcome a strong presumption that counsel's conduct was reasonable and effective. *Strickland*, 466 U.S. at 689.

Our supreme court has "made it clear that a reviewing court will be highly deferential to trial counsel on matters of trial strategy, making every effort to evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344, 864 N.E.2d 196, 216 (2007). Where "consideration of matters outside of the record is required in order to adjudicate the issues presented for review, the defendant's contentions are more appropriately addressed in proceedings on a petition for post-conviction relief." *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990).

¶ 19 Expounding on the *Kunze* holding, our court recently suggested cases raising ineffective-assistance-of-counsel claims on direct appeal be divided into one of three categories. *People v. Veach*, 2016 IL App (4th) 130888, ¶ 72, 50 N.E.3d 87. Category A cases are those cases where the record on appeal is insufficient to resolve the defendant's ineffective-assistance-of-counsel claims. *Id.* at ¶ 74. Category B cases are those which include groundless ineffective-assistance-of-counsel claims. *Id.* at ¶ 82. Finally, category C cases are cases where the record does contain sufficient evidence for the court to resolve the defendant's ineffective-assistance-of-counsel claim because the alleged error was egregious or obvious. *Id.* at ¶ 85. In reference to Category A cases, this court held:

> "[T]he prudent and judicious course for an appellate court dealing with a defendant's claim of ineffective assistance of counsel on direct appeal is almost always to (1) decline to address the issue (while explaining its reason for doing so), (2) affirm the trial court's judgment, and (3) indicate that the defendant may raise the ineffective-assistance-of-counsel claim in a postconviction

petition." *Id.* at ¶ 75.

¶ 20 Defendant claims trial counsel was ineffective for failing to seek suppression of his custodial statements. The State argues it is possible this decision was one of trial strategy, which our courts are reluctant to deem erroneous. However, these possibilities are merely speculative because the record before us is devoid of any information relating to trial counsel's decision not to seek suppression of these statements. We are unable to conduct a meaningful review because the lack of information prevents us from determining whether the decision not to seek suppression was an error or strategy. If we cannot first determine whether an error actually occurred, we cannot conduct the ineffective-assistance analysis outlined in *Strickland*. Accordingly, we conclude this claim is a category A claim and decline to address it on direct appeal. As noted by the State and our decision in *Veach*, this claim is better suited for a postconviction petition, which defendant may file in accordance with the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2014)).

¶ 21 C. Defendant's Sentence

¶ 22 Defendant argues the trial court abused its discretion by adhering to its personal sentencing policy, either ignoring or misunderstanding the statutory sentencing guidelines. Defendant concedes this issue was not properly preserved, and was thus forfeited, but nonetheless asserts we should review the court's sentencing for plain error. Alternatively, he argues his trial counsel was ineffective for failing to include this issue in his posttrial motion to reconsider.

¶ 23 The plain-error doctrine is a limited exception to forfeiture, which should only be invoked when the essential fairness of a proceeding has been undermined. *People v. Rathbone*,

345 Ill. App. 3d 305, 311, 802 N.E.2d 333, 338-39 (2003). " 'The plain error rule may be invoked if the evidence at a sentencing hearing was closely balanced[ ] or if the error was so egregious as to deprive the defendant of a fair sentencing hearing.' " *People v. Baker*, 341 Ill. App. 3d 1083, 1090, 794 N.E.2d 353, 359 (2003) (quoting *People v. Hall*, 195 Ill. 2d 1, 18, 743 N.E.2d 126, 136 (2000)).

¶ 24 Whether we review this case for plain error or for ineffective assistance of counsel, we begin by determining whether an error actually occurred. See *People v. Sargent*, 239 Ill. 2d 166, 189, 940 N.E.2d 1045, 1059 (2010) ("[the] court typically undertakes plain-error analysis by first determining whether error occurred at all"); *People v. Mahaffey*, 194 Ill. 2d 154, 173, 742 N.E.2d 251, 262 (2000) (noting ineffective assistance of counsel cannot be established where no error occurred), *overruled on other grounds by People v. Wrice*, 2012 IL 111860, ¶ 75, 962 N.E.2d 934.

¶ 25 A trial court has "wide latitude in sentencing a defendant, so long as it neither ignores relevant mitigating factors nor considers improper factors in aggravation." *Roberts*, 338 Ill. App. 3d at 251, 788 N.E.2d at 787. Unlawful delivery of a controlled substance within 1,000 feet of a public park is a Class 1 felony. 720 ILCS 570/407(b)(2) (West 2012). Here, in addition to being convicted under multiple counts under the Act, defendant has a prior conviction under the Act, rendering the applicable statutory sentencing range 4 to 30 years in prison. See 730 ILCS 5/5-4.5-30 (West 2012) ("The sentence of imprisonment [for a Class 1 felony] shall be a determinate sentence of not less than 4 years and not more than 15 years."); 720 ILCS 570/408(a) (West 2012) ("Any person convicted of a second or subsequent offense under this Act may be sentenced to imprisonment for a term up to twice the maximum term otherwise

authorized, fined an amount up to twice that otherwise authorized, or both."). The court sentenced defendant to concurrent 10-year prison terms on each of the two counts of unlawful delivery, a sentence well within the statutory sentencing guidelines.

¶ 26 Defendant assigns error to the trial court's statement that it had a personal policy of imposing a longer sentence for subsequent convictions than the sentence previously imposed for prior convictions. According to defendant, he "actually faced a minimum sentence of six years" due to his prior conviction and six-year sentence. Defendant asserts this policy prevented the trial judge from considering a lesser sentence, an otherwise plausible possibility based on the facts. In sum, defendant argues the trial court's policy constituted an improper aggravating factor. However, we find defendant misconstrues the import of the court's statement. The court related:

> "[Y]ou still need to pay your debt to society that being for committing in essence your fifth and sixth felony convictions. And we don't go backwards -- when I say 'we,' I don't go backwards as far as giving a lesser sentence than someone received earlier. It may not work that way. In fact, I wish that sometimes it would work better than it does, that being that an individual who was meant to be punished for previous behavior so it would serve as a deterrent from them committing crimes in the future, that it doesn't. But what that means from my perspective is that the consequences need to be more severe so that way the learning component in essence might be better instilled within you. In

> addition, there's also a deterrent effect that needs to occur with respect to society."

Immediately before the remarks in question, the court noted defendant's extensive prior history and the need to fashion, for each individual, a sentence based on the unique position of that person. Putting the trial court's statements into context, the court simply explained why it concluded defendant deserved a longer sentence than what he previously received for a similar conviction, the main reasons being prior history as well as individual and community deterrence. Prior criminal history and the need for deterrence are proper aggravating factors pursuant to sections 5-5-3.2(a)(3) and (7) of the Unified Code of Corrections (730 ILCS 5/5-5-3.2(a)(3), (7) (West 2012)).

¶ 27 The trial court did not misunderstand or ignore the statutory sentencing guidelines in this case. Indeed, the court properly noted the sentencing range for defendant's crimes was 4 to 30 years in prison. After noting this range, the court conducted a thoughtful consideration of the presentence investigation report and the aggravating and mitigating factors present in this case. While it is true the court indicated it had a personal sentencing policy, that policy, as applied to defendant's case, was based on proper aggravating factors, and we do not find that the policy itself had any effect on defendant's sentence. Rather, the need for deterrence and defendant's prior criminal history were the factors affecting his sentence. Accordingly, we conclude no error occurred. Because no error occurred regarding defendant's sentencing, his plain-error and ineffective-assistance-of-counsel claims fail.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment. 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 (West 2014).

¶ 30 Affirmed.