2018 IL App (4th) 160286-U

NO. 4-16-0286

FILED
August 3, 2018
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
BENJAMIN JAMES BARTLETT,	)	No. 15CF902
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed defendant's sentence, finding it was not excessive. The court did, however, reduce defendant's controlled-substances fine to $1000.

¶ 2 In April 2015, a jury found defendant, Benjamin James Bartlett, guilty of delivery of a controlled substance. The trial court sentenced him to nine years in prison and imposed a $3000 fine.

¶ 3 On appeal, defendant argues the trial court erred in (1) imposing a nine-year sentence and (2) fining him $3000 for a Class 2 felony. We affirm as modified.

¶ 4 I. BACKGROUND

¶ 5 In July 2015, a grand jury indicted defendant on one count of unlawful delivery of a controlled substance, a Class 2 felony (720 ILCS 570/401(d)(i) (West 2014)), alleging he knowingly and unlawfully delivered to a Bloomington Police Department confidential source

less than one gram of a substance containing cocaine, a controlled substance. The bill of indictment indicated defendant was eligible for an extended-term sentence due to his prior record. Defendant pleaded not guilty.

¶ 6 Defendant's jury trial commenced in February 2016. Bloomington police detective Kevin Raisbeck testified he participated in a surveillance operation on April 23, 2015, involving Georgiana Burton, a confidential source with the police department. He observed Burton meet with defendant in an alley, and they stopped, talked, "hugged each other and then parted ways."

¶ 7 Burton, age 31, testified she has had a drug problem since she was a teenager, and her drugs of choice include crack cocaine, heroin, and methamphetamine. She was convicted of aggravated battery of a police officer and "had to do time in jail." She became a police informant in 2015. She met with Detective Manuel Hernandez on April 20, 2015, and he asked her the names of people from whom she could buy drugs. She gave him the name of defendant, whom she had known for approximately 23 years, and said he could supply crack cocaine. On April 23, 2015, Burton again met with Hernandez to set up a controlled drug buy. After Burton called defendant early in the day asking to buy crack cocaine, she called him again later to say she had $100 to buy. Defendant told her to meet at a convenience store, and she went with Detective Hernandez in an undercover vehicle. Defendant then called and told her to meet him in a nearby alley. When they met, they hugged, Burton gave him the money, and defendant put the drugs in her left pocket. They then went their "separate ways," and Burton returned to Hernandez's vehicle. Burton handed him "two bags of crack."

¶ 8 On cross-examination, Burton testified she began working with the vice unit because she needed money and "didn't feel like being a drug dealer" and "didn't want to be a

prostitute." She stated she bought drugs on multiple occasions and received payment from the police for doing so.

¶ 9 Detective Hernandez testified he searched Burton before she met with defendant and then drove her to the location. After receiving a call from defendant, Burton walked to an alley behind a bar. Hernandez stated Burton did not meet with anyone else before meeting with defendant. Hernandez observed Burton and defendant hug each other and then saw defendant place "something in the front left pocket of her jeans." Burton returned to the vehicle and handed the drugs to Hernandez. He identified exhibit No. 1 as the drugs purchased from defendant.

¶ 10 Hernandez testified he met with defendant on May 12, 2015, after defendant had been arrested for delivery of a controlled substance. After receiving his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), defendant agreed to talk with Hernandez. Defendant initially denied selling drugs, but he later admitted selling drugs to Burton. Defendant stated he sold Burton "half a gram" of crack in exchange for $100. Hernandez stated defendant had been a confidential source for the police department and he would make drug buys.

¶ 11 The parties stipulated exhibit No. 1 was a substance containing cocaine and it weighed, without packaging, 0.4 grams. Following closing arguments, the jury found defendant guilty.

¶ 12 In April 2016, the trial court conducted the sentencing hearing. Detective Hernandez testified defendant had once worked as a police informant. Hernandez found him to be "very cooperative" and helpful. Defendant worked on three drug cases as an informant, including two that resulted in felony convictions. Hernandez stated defendant was again willing to cooperate even though he had been found guilty.

¶ 13 Defendant testified he cooperated with Hernandez on three drug buys. Defendant stated he has unresolved substance-abuse issues and hoped to receive treatment in prison.

¶ 14 The State noted defendant's criminal history would normally require a "double digit sentence," but defendant had cooperated with police and the "vice units in this county cannot function without individuals like [defendant] that are willing to work with them." Notwithstanding defendant's prior record, the State argued, in part, as follows:

> "[H]e deserves significant consideration for going with the two other people who got convicted and also with an individual who has multiple felony convictions for selling drugs for literally years in this county and is willing to follow through, do the right thing and go after somebody who's clearly, without question, a bigger fish than he is. Let's not forget this was a low weight cocaine deal and I think was clear was for habit type of thing it would appear, at least from my perspective. And the Court should consider those significant mitigating factors when fashioning a sentence."

The State did not offer a specific sentence recommendation.

¶ 15 Defense counsel noted defendant had a 2002 burglary conviction when he was 17 years old and a conviction for manufacture and delivery of narcotics. Counsel noted defendant's cooperation with police and asked for a sentence of six years in prison. In his statement of allocution, defendant told the trial court he was "definitely remorseful" for committing the offense.

¶ 16 The trial court stated defendant was 31 years old and had six felony convictions, including four drug felonies. He also had 15 traffic convictions, 4 misdemeanor convictions, and

a conviction for driving under the influence. Considering defendant's criminal history, the court believed any sentence not in double digits would be a "significant reduction from what would ordinarily occur" with a similarly situated individual. The court sentenced defendant to nine years in prison. The court's supplemental sentencing order required defendant to pay various fines, including a $3000 controlled-substances fine (720 ILCS 570/411.2(a) (West 2014)). The court then admonished defendant with respect to his rights on appeal.

> "You do have the right to appeal the judgment and sentence of this court. In order to appeal the judgment, including your sentence, you would need to file a Notice of Appeal within 30 days of today's date with the clerk of the circuit court. *** If you seek to challenge the sentence or any aspect of your sentencing hearing, prior to taking an appeal, you must file in the trial court within 30 days from today's date a written motion asking me to reconsider the sentence imposed or any challenge to your sentencing hearing. This motion must be in writing and must set out all the reasons that you are challenging the sentence or the sentencing hearing. Anything that you failed to put in your motion will be waived or forfeited for all time.
>
> In order to preserve your right to appeal your sentence or the sentencing hearing, you must file a Notice of Appeal with the clerk of the circuit court within 30 days of the entry of any order disposing of a motion to reconsider."

¶ 17 After affirmatively answering he understood his rights, defendants stated, "I would like that." Following defendant's vague answer, the trial court stated as follows:

> "Well, there's [*sic*] several things that you have as far as options that I just explained. You can't have them all. And I talked about a sentencing hearing. If you challenge the sentencing hearing and ask me to reconsider the sentence, that's one option. You also have the right to try to appeal or have the clerk file a Notice of Appeal on your behalf with regard to the judgment entered against you by a verdict of your peers, that being the jury. So why don't you take a moment to talk with [defense counsel] while you're still here. I understand that you want to make an election, but I'm not sure what, technically, you are asking to do yet."

¶ 18 After talking with his counsel, defendant informed the trial court he wanted to "appeal the verdict." The court then confirmed that defendant wanted to appeal the guilty verdict and no aspect of his sentence as follows: "Okay. Not the sentence but you want to appeal the verdict?" Defendant indicated that was correct. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 A. Defendant's Nine-Year Sentence

¶ 21 Defendant argues the trial court abused its discretion in imposing a 9-year sentence, claiming he was a cooperating police informant and sold less than half a gram of crack cocaine to a fellow addict he had known for 23 years. The State, however, argues defendant has not only waived this argument but also forfeited it. While defendant acknowledges he failed to file a postsentencing motion to preserve the issue for appellate review, he argues we may

overlook this failure because the trial court incorrectly admonished him on his appellate rights under Illinois Supreme Court Rule 605(a) (eff. Oct. 1, 2001).

¶ 22 "A defendant forfeits the appeal of a sentencing issue when he fails to (1) timely object during the sentencing hearing and (2) has failed to raise the issue in a postsentencing motion." *People v. Kitch*, 392 Ill. App. 3d 108, 118, 915 N.E.2d 29, 37 (2009). However, "appellate courts may consider sentencing issues that have not been properly preserved because of inadequate Rule 605(a) admonishments." *People v. Medina*, 221 Ill. 2d 394, 412-13, 851 N.E.2d 1220, 1230 (2006). Further, even if the admonishments proved adequate, we may choose to address an issue, notwithstanding forfeiture, in the interest of maintaining a sound and uniform body of precedent. *People v. Wendt*, 163 Ill. 2d 346, 351, 645 N.E.2d 179, 181 (1994) (stating "a reviewing court may consider issues not properly preserved for review to achieve a just result and for the maintenance of a sound and uniform body of precedent"); see also *People v. Blakely*, 357 Ill. App. 3d 477, 480, 829 N.E.2d 430, 433 (2005).

¶ 23 In *Medina*, 221 Ill. 2d at 407, 851 N.E.2d at 1227, our supreme court pointed out how Rule 605 requires a trial court "admonish a defendant regarding his right to appeal and advise him of the steps necessary to perfect an appeal." Although the initial admonishment was consistent with the language of Rule 605(a), the trial court's good-faith attempt to assist defendant in understanding exactly what he wished to do could be considered somewhat confusing. The court stated defendant had several options but he could not "have them all." As one option, the court stated defendant could challenge the sentencing hearing. As another option, defendant could challenge the judgment entered by the jury. The court's admonishments could have confused defendant, since he could have challenged both the verdict and the sentence

on appeal. For this reason, we will excuse his forfeiture and his waiver and consider his claims on the merits.

¶ 24 Initially, we note that, although defendant contends he may have been confused by the trial court's attempts to ascertain exactly what he sought to appeal, he now argues in his brief nothing more than the fact he might have filed a motion to reconsider sentence, without identifying what errors the court made at sentencing. Instead, he reiterates the facts presented at sentencing and seeks a do-over. "[T]he purpose of a motion to reconsider sentence is not to conduct a new sentencing hearing, but rather to bring to the circuit court's attention changes in the law, errors in the court's previous application of existing law, and newly discovered evidence that was not available at the time of the hearing." *Medina*, 221 Ill. 2d at 413, 851 N.E.2d at 1230-31. Defendant argues the trial court's imperfect admonishments deprived him of the opportunity to file a motion to reconsider sentence, which would not have complied with the purposes of such a motion anyway. Just as the supreme court found in *People v. Henderson*, 217 Ill. 2d 449, 469, 841 N.E.2d 872, 882 (2005), defendant here "was neither prejudiced nor denied real justice as a result of the incomplete admonishments he received."

¶ 25 The Illinois Constitution mandates "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. " 'In determining an appropriate sentence, a defendant's history, character, and rehabilitative potential, along with the seriousness of the offense, the need to protect society, and the need for deterrence and punishment, must be equally weighed.' " *People v. Hestand*, 362 Ill. App. 3d 272, 281, 838 N.E.2d 318, 326 (2005) (quoting *People v. Hernandez*, 319 Ill. App. 3d 520, 529, 745 N.E.2d 673, 681 (2001)). However, "the seriousness of an offense is considered the most important factor in determining a sentence."

People v. Jackson, 2014 IL App (1st) 123258, ¶ 53, 23 N.E.3d 430.

¶ 26 With excessive-sentence claims, this court has explained appellate review of a defendant's sentence as follows:

> "A trial court's sentencing determination must be based on the particular circumstances of each case, including factors such as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. [Citations.] Generally, the trial court is in a better position than a court of review to determine an appropriate sentence based upon the particular facts and circumstances of each individual case. [Citation.] Thus, the trial court is the proper forum for the determination of a defendant's sentence, and the trial court's decisions in regard to sentencing are entitled to great deference and weight. [Citation.] Absent an abuse of discretion by the trial court, a sentence may not be altered upon review." (Internal quotation marks omitted.) *People v. Price*, 2011 IL App (4th) 100311, ¶ 36, 958 N.E.2d 341 (quoting *People v. Hensley*, 354 Ill. App. 3d 224, 234-35, 819 N.E.2d 1274, 1284 (2004), quoting *People v. Kennedy*, 336 Ill. App. 3d 425, 433, 782 N.E.2d 864, 871 (2002)).

An abuse of discretion will not be found unless the court's sentencing decision is "arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Etherton*, 2017 IL App (5th) 140427, ¶ 26, 82 N.E.3d 693. Also, an abuse of

discretion will be found "where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212, 940 N.E.2d 1062, 1066 (2010) (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 27 In the case *sub judice*, the jury found defendant guilty of the offense of unlawful delivery of a controlled substance, a Class 2 felony (720 ILCS 570/401(d)(i) (West 2014)). Because of his criminal history, defendant faced a mandatory Class X sentence. A Class X offender is subject to a sentencing range of 6 to 30 years in prison. 730 ILCS 5/5-3.5-25(a) (West 2014). When a sentence falls within the statutory range of sentences possible for a particular offense, it is presumed not to be arbitrary. *People v. Moore*, 41 Ill. App. 3d 3, 4, 353 N.E.2d 191, 192 (1976). Instead, as indicated, we must find it to be at odds with the purpose and spirit of the law or manifestly disproportionate to the nature of the offense in order to consider it an abuse of discretion. *People v. Weiser*, 2013 IL App (5th) 120055, ¶ 33, 993 N.E.2d 614. As the trial court's nine-year sentence falls within the relevant sentencing range, we will not disturb the sentence absent an abuse of discretion.

¶ 28 The presentence report indicates defendant received probation for a 2002 burglary conviction in De Witt County, but his probation was revoked for delivery of cannabis and he received a five-year sentence in 2004. He received probation in McLean County in 2003 for the offense of aggravated battery, but his probation was revoked and he was resentenced to two years in prison in 2004. He also received a five-year sentence in 2004 for the offense of manufacture or delivery of cannabis and a three-year sentence in 2006 for the offense of manufacture or delivery of narcotics. He received a four-year sentence in 2011 for the subsequent offense of possession of cannabis between 30 and 500 grams. When not in prison,

defendant committed a handful of traffic offenses and other misdemeanors, including disorderly conduct, drug possession, and driving under the influence.

¶ 29 At the sentencing hearing, the trial court stated it considered the presentence report, the statutory factors in aggravation and mitigation, and defendant's statement in allocution. The court was well aware of defendant's cooperation with the police and, noting defendant's criminal record, stated a sentence less than double digits would not ordinarily occur with a similarly situated individual. The court's 9-year sentence was only 3 years above the minimum but 21 years under the maximum. Defendant contends any sentence above the statutory minimum "arbitrarily diminished [his] immense efforts and may unwittingly degrade the rule of law by discouraging prospective informants." On the contrary, considering defendant was subject to extended-term sentencing and could have, without his cooperation, received a sentence 21 years higher, it is more reasonable to conclude anyone in defendant's position would recognize the significant benefit he received. But for his cooperation, defendant's sentence may well have been substantially higher, and the court recognized this. Undoubtedly, defendant did too, but it is easy to minimize the benefit when one is not the person who will actually have to do the time. Moreover, while defendant contends his offense was "primarily driven by drug addiction," " '[s]imply because the defendant views his drug abuse history as mitigating does not require the sentence to do so.' " *People v. Madej*, 177 Ill. 2d 116, 138, 685 N.E.2d 908, 919 (1997) (quoting *People v. Shatner*, 174 Ill. 2d 133, 159, 673 N.E.2d 258, 270 (1996)). The court's nine-year sentence was not " 'greatly at variance with the spirit and purpose of the law,' " nor was it " 'manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 215, 940 N.E.2d at 1067 (quoting *Stacey*, 193 Ill. 2d at 210, 737 N.E.2d at 629). Thus, we find no abuse of discretion.

¶ 30 B. Defendant's Controlled-Substances Fine

¶ 31 Defendant argues his controlled-substances fine should be reduced from $3000 to $1000 because he was convicted of a Class 2 felony, not a Class X felony. As we again excuse defendant's forfeiture and waiver, we agree his fine must be reduced.

¶ 32 Section 411.2(a) of the Illinois Controlled Substances Act (Act) (720 ILCS 570/411.2(a) (West 2014)) provides as follows:

> "(a) Every person convicted of a violation of this Act, and every person placed on probation, conditional discharge, supervision or probation under Section 410 of this Act, shall be assessed for each offense a sum fixed at:
>
> (1) $3,000 for a Class X felony;
>
> (2) $2,000 for a Class 1 felony;
>
> (3) $1,000 for a Class 2 felony;
>
> (4) $500 for a Class 3 or Class 4 felony;
>
> (5) $300 for a Class A misdemeanor;
>
> (6) $200 for a Class B or Class C misdemeanor."

In this case, the jury convicted defendant of delivery of less than one gram of a substance containing cocaine, which is a Class 2 felony offense. The trial court should have imposed a $1000 fine, not a $3000 fine. Thus, we reduce the controlled-substances fine to $1000.

¶ 33 III. CONCLUSION

¶ 34 For the reasons stated, we affirm defendant's conviction and sentence but reduce his controlled-substances fine to $1000. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 35 Affirmed as modified.