2018 IL App (4th) 160424-U

NO. 4-16-0424

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 28, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DIEGO R. CHRISTMON,	)	No. 15CF881
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas J. Difanis,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Turner and Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court did not abuse its discretion in sentencing defendant to 40 years in prison.

¶ 2 In March 2016, a jury convicted defendant, Diego R. Christmon, of attempt (first degree murder). The trial court subsequently sentenced him to 40 years' imprisonment.

¶ 3 Defendant appeals, asserting his 40-year sentence was excessive. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In June 2015, the State charged defendant with attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)), alleging defendant took a substantial step toward the commission of first degree murder in that without lawful justification and with the intent to kill Lawrence Brown, defendant discharged a firearm that proximately caused great bodily harm to Brown.

¶ 6 A. Trial

¶ 7 In March 2016, defendant's jury trial commenced. We have summarized only the evidence necessary for the disposition of this appeal.

¶ 8 Lawrence Brown testified he was present at 1310 Hedge Road in Champaign, Illinois, on May 23, 2015. Beginning early that day, approximately 15 people gathered on the driveway drinking and smoking. Defendant walked over from his great-grandmother's house next door. According to Brown, defendant was present most of the day. Brown had known defendant for more than two years. He joked with defendant. Defendant appeared upset in response to Brown's remarks and left in a green pickup truck, stating he would be back. Brown testified defendant returned to Hedge Road approximately 15 to 20 minutes later. Defendant walked across the yard and to the side of his great-grandmother's house, and Brown followed. Brown testified he did not have a gun or any other weapon and did not have anything in his hand. As Brown walked around the corner of the house, defendant began shooting at him. The first shot struck Brown in the back. Brown turned and attempted to walk back toward the front of the house. Brown felt two more shots hit his leg, and then he lost consciousness. Brown confirmed the shooting took place at approximately 6:30 p.m. Brown was shot a total of four times and has suffered long-term injuries as a result of the incident. On cross-examination, Brown testified he followed defendant to the side of defendant's great-grandmother's house because two individuals on the driveway next door told Brown defendant had a gun.

¶ 9 Shawnda Dean testified she knew both Brown and defendant and was present at the Hedge Road gathering on May 23, 2015. Those individuals present were talking, listening to music, and drinking. Almost everyone was joking around, including Brown and defendant. At some point, defendant left the area in a pickup truck, returning after approximately 20 to 30

minutes. Defendant called for Brown to walk around to the back of the house. Dean watched as Brown walked around the corner of the house, still joking around. She heard multiple sounds she described as "tinging." When she looked up, Brown was walking toward Dean and the others with blood running down his pants. Defendant appeared from around the corner of the house, shot Brown in the head, and Brown collapsed. As Dean ran toward Brown, defendant got into his truck, lit a cigarette, and drove off.

¶ 10 Tanisha Baity and Lakeeshin Picket testified similarly to Dean as to the chronology of events and their observations on May 23, 2015. Wesley Christmon, defendant's great-uncle, denied hearing another shot after Brown fell to the ground and denied seeing defendant shoot Brown in the head or shoulder. He also denied describing the gun defendant was holding to a detective, explaining he was drunk when the officer interviewed him

¶ 11 Anna Pierce testified she is defendant's great-grandmother. On May 23, 2015, defendant came to her house at 1308 Hedge Road with his infant daughter. Pierce testified she sat on the front porch visiting with a friend and her son. She heard Brown joking with defendant. At some point, defendant left Hedge Road in his truck. The baby's diaper bag was in the truck. When Pierce realized defendant left with the diaper bag, Pierce called defendant asking him to bring the baby's diaper bag back. When defendant got back, he walked around to the side of Pierce's house. Pierce watched as Brown walked across the front yard. Brown stopped to pull a stake from the yard. Pierce used the stakes to keep people from walking in an area of newly planted grass. The stake was tied to other stakes and Brown could not pull the stake loose. Brown threw the stake down. Just as Brown got around the corner of the house, Pierce heard shots. She saw Brown stagger back around the corner and fall to his side. Pierce saw defendant

come from the side of the house and shoot Brown while he lay on his back. Then defendant got into his truck and drove away.

¶ 12 While conducting the investigation, officers discovered multiple .9-millimeter gun casings in the vicinity of 1308 Hedge Road. Officers did not locate a gun on the property or in the vehicle defendant drove. Officers located defendant on June 17, 2015, and placed defendant under arrest. At the time of his arrest, defendant possessed no weapons.

¶ 13 Smooth William Rivers testified he was present at 1308 Hedge Road on May 23, 2015. Defendant arrived at approximately 3 or 4 p.m. Defendant's infant daughter was in defendant's truck. He and defendant drove to defendant's house to get his daughter's diaper bag. When he and defendant returned to 1308 Hedge Road, there were "a bunch" of people outside. Rivers testified "a confrontation broke out" involving Brown and defendant. He and defendant walked to the back of 1308 Hedge Road and smoked near a shed.

¶ 14 Rivers attempted to calm defendant down. The two were at the shed for approximately five minutes before Rivers heard footsteps. He saw Brown approaching the shed with a shiny, foreign object in his right hand. Brown's right arm was extended. Rivers went back into the shed, shut the door, and smoked. Then Rivers heard multiple gunshots. When Rivers left the shed, he saw Brown on the ground. He did not see defendant.

¶ 15 Defendant testified he arrived at his great-grandmother's "mid-afternoon" on May 23, 2015. His mother walked to the truck and took his infant daughter to see defendant's great-grandmother. Defendant walked next door to see what was going on there. Defendant testified "there was a lot of talking and stuff, joking." According to defendant, Brown "turned his jokes and threats toward me." Brown joked about defendant being his son. Defendant's grandmother interrupted, telling defendant his infant daughter needed changed. When defendant looked in his

truck, the diaper bag was not there. He and Rivers drove to his apartment to get the diaper bag. They brought the diaper bag back to his great-grandmother and then went into the backyard to smoke. Defendant heard a noise and looked up to see Brown reaching down, grabbing something. Defendant ran toward Brown and pushed him forward, while grabbing a gun from the ground. When Brown appeared to be coming toward defendant, defendant "stepped back and shot." Defendant testified he was frightened and wanted to protect himself.

¶ 16 Following closing arguments, the jury received instructions regarding the charged offense of attempt (first degree murder) and self-defense. Following deliberations, the jury found defendant guilty of attempt (first degree murder).

¶ 17 B. Sentencing

¶ 18 On May 2, 2016, the trial court proceeded to sentencing, where the following evidence was considered.

¶ 19 The presentence report indicated the 25-year-old defendant had nine traffic violations between 2006 and 2012, with three violations of driving on a suspended license. In March 2010, defendant was convicted of the Class 3 felony of aggravated battery, for which he was sentenced to probation (Champaign County case No. 09-CF-1634). Defendant violated his probation and was resentenced to an additional term of probation; however, he was unsuccessfully discharged from probation in November 2014.

¶ 20 The presentence report also noted defendant had never married. He had four children, two residing in foster care. Defendant was never court-ordered to pay child support. His parents were never married, and he was raised by his maternal grandmother. He reported having a good relationship with his parents, maternal grandmother, and two older siblings. In recent years, his father had experienced health problems, and defendant helped care for him.

Defendant graduated from Champaign Central High School, receiving special education services all through his school years. He aspired to study culinary arts.

¶ 21 Defendant reported he last worked as a cook for three or four months in the spring of 2015. He had previously suffered a gunshot wound to his leg in March 2014 and experienced numbness and stiffness in his leg. Defendant reported using cannabis daily. He began using cannabis as a teenager and smoked two to three blunts daily.

¶ 22 The State presented the following evidence in aggravation. Champaign County Sheriff's Deputy Chad Carlson testified that in January 2015 he observed a green Chevy pickup truck fail to stop at a stop sign. Carlson initiated a traffic stop of the vehicle. He identified defendant as the driver of the pickup truck. Carlson requested a canine officer to come to the scene. The dog alerted to the presence of illegal contraband. Officers conducted a search of the vehicle and found a loaded revolver handgun on the floorboard of defendant's truck. Carlson then arrested defendant.

¶ 23 Detective Sergeant David Griffet testified on March 29, 2014, officers responded to a report of shots fired in the Bristol Park neighborhood and Bellefontaine Street. A single victim had suffered a gunshot wound to the leg. Griffet identified the victim as defendant. He interviewed defendant on March 31, 2014. Defendant refused to name the shooter or anyone else present at the party where he had been shot. Griffet also testified regarding an incident on November 14, 2012. However, the trial court found "nothing in that testimony that indicates where the information came from." Therefore, the trial court stated it would not consider the testimony regarding the incident on November 14, 2012.

¶ 24 Defendant sent the trial court a letter prior to sentencing, which was submitted in mitigation. Defendant apologized for his actions on May 23, 2015, and requested he be given "a

second chance to be back with my children and family again." Defendant also presented a letter from the truant interventionist and student advocate at Champaign Central High School who believed defendant "had the potential to do great things with his life and have a positive impact on his family and community."

¶ 25 In imposing sentence, the trial court said it considered the presentence report, the evidence presented in aggravation and mitigation, the statutory factors in mitigation and aggravation, and "the circumstances surrounding the offense." The court identified as nonstatutory mitigating factors defendant's young age, graduation from high school, and ability to secure "marginal minimum wage employment off and on." The court found no further factors in mitigation applicable to defendant. In aggravation, the trial court noted defendant's criminal history. The court also discussed, twice, the need to deter individuals from committing such crimes in the future. In particular, the court found defendant "did everything he could to kill Mr. Brown—didn't accomplish it—but shooting this individual four times certainly says something about—says more about the young man's character." The trial court imposed a sentence of 40 years' imprisonment, which included a 25-year firearm enhancement.

¶ 26 Also on May 2, 2016, defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 27 This appeal followed.

¶ 28 II. ANALYSIS

¶ 29 On appeal, defendant argues his 40-year sentence was excessive. We disagree.

¶ 30 In determining an appropriate sentence, the trial court must consider "the defendant's personal history, including his age, demeanor, habits, mentality, credibility, criminal history, general moral character, social environment, and education." *People v. Maldonado*, 240

Ill. App. 3d 470, 486, 608 N.E.2d 499, 509 (1992). It is not the role of this court to substitute its judgment for that of the trial court merely because we would have reached a different conclusion. *People v. Alexander*, 239 Ill. 2d 205, 213, 940 N.E.2d 1062, 1066 (2010). Rather, we review the trial court's sentence for an abuse of discretion. *Alexander*, 239 Ill. 2d at 212. "A sentence will be deemed an abuse of discretion where the sentence is 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Alexander*, 239 Ill. 2d at 212 (quoting *People v. Stacey*, 193 Ill. 2d 203, 210, 737 N.E.2d 626, 629 (2000)).

¶ 31 An attempt (first degree murder) conviction is a Class X felony (720 ILCS 5/8-4(c)(1) (West 2014)), and carries with it a sentencing range of 6 to 30 years' imprisonment, a range which is also subject to additional firearm enhancements (720 ILCS 5/8-4(c)(1)(D) (West 2014)). In this instance, defendant received a 15-year sentence with a 25-year firearm enhancement, for a cumulative sentence of 40 years' imprisonment.

¶ 32 Defendant asserts the trial court failed to give adequate consideration to mitigating factors that demonstrated his rehabilitative potential. See *People v. Brown*, 243 Ill. App. 3d 170, 176, 612 N.E.2d 14, 19 (1993) (the trial court abused its discretion in sentencing the defendant to 45 years' imprisonment without adequately considering the defendant's rehabilitative potential). Defendant first argues his young age of 24 at the time he committed the offense supports a lesser sentence. In support, defendant relies on cases such as *Graham v. Florida*, 560 U.S. 48 (2010) (holding juveniles cannot face mandatory life sentences), and *Miller v. Alabama*, 567 U.S. 460 (2012) (holding juveniles cannot be subject to capital punishment). Defendant's reliance on these sources is unpersuasive as defendant was not a juvenile at the time he committed this offense, nor did he receive a mandatory life sentence. Moreover, "a defendant's youth does not necessarily outweigh the other relevant factors [citation]." *People v.*

Garibay, 366 Ill. App. 3d 1103, 1109, 853 N.E.2d 893, 898 (2006). Defendant's youth and rehabilitative potential are but two factors the court considers in imposing sentence.

¶ 33 Similarly, defendant argues his graduation from high school and strong family ties support a finding that he could be rehabilitated. In support, defendant relies on *People v. Juarez*, 278 Ill. App. 3d 286, 662 N.E.2d 567 (1996). In *Juarez*, the reviewing court found a defendant's sentence for aggravated discharge of a firearm excessive because the trial court, with no explanation, imposed a sentence of one year less than the maximum sentence allowed on a 31-year-old defendant who lacked any significant prior criminal history, was a successful and respected artist in the community, was a devoted father to an eight-year-old daughter, and caused no injuries to the victims. The appellate court determined the trial court failed to adequately consider the defendant's evidence in mitigation and his rehabilitative potential. *Juarez*, 278 Ill. App. 3d at 294-95, 662 N.E.2d 567, 573-74. Unlike *Juarez*, here, the trial court specified the mitigating and aggravating factors that led to its sentence, expressly considered defendant's evidence in mitigation, and seriously considered his rehabilitative potential. As such, we are not persuaded by defendant's reliance on *Juarez*.

¶ 34 Defendant next argues the trial court imposed an excessive sentence when it failed to apply statutory mitigating factors presented at sentencing. The State maintains defendant has forfeited this argument on appeal because he failed to include the argument in a written postsentencing motion. *People v. Reed*, 177 Ill. 2d 389, 390, 686 N.E.2d 584 (1977). In reply, defendant seeks plain-error review on the claim if this court finds it forfeited.

¶ 35 "[F]orfeiture is the failure to make the timely assertion of the right ***." *People v. Blair*, 215 Ill. 2d 427, 444 n.2, 831 N.E.2d 604, 615 n.2 (2005) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)). "Forfeiture applies to issues that could have been raised but

were not ***." *People v. Phipps*, 238 Ill. 2d 54, 62, 933 N.E.2d 1186, 1191 (2010). A defendant must file a written postsentencing motion in the trial court to preserve sentencing issues for appellate review. *People v. Rathbone*, 345 Ill. App. 3d 305, 310, 802 N.E.2d 333, 337 (2003). The trial court is entitled to the opportunity to correct a sentencing error, thereby avoiding the delay and expense of an appeal. *People v. Heider*, 231 Ill. 2d 1, 18, 896 N.E.2d 239, 249 (2008). In addition, litigants are not allowed to assert on appeal an objection different than the one asserted below. *Heider*, 231 Ill. 2d at 18.

¶ 36 Defendant argues his actions "out of fear for his own life" could be seen as mitigation under subsections (a)(3) and (4) of the Unified Code of Corrections (730 ILCS 5/5-5-3.1(a)(3), (4) (West 2014)). He contends the trial court should have found defendant acted in self-defense, thereby excusing or justifying his criminal conduct. 730 ILCS 5/5-5-3.1(a)(3), (4) (West 2014). A review of defendant's motion to reconsider sentence reveals an absence of any complaint that the court failed to consider applicable statutory factors in mitigation.

¶ 37 Defendant argues pursuant to *Heider*, "[t]he minor variation in wording between the argument made below and the argument now advanced on appeal is not sufficient to support a finding of forfeiture ***." *Heider* is of no help to defendant. In *Heider*, the majority of the supreme court found the defendant raised, in his postsentencing motion, the same issue he raised on appeal. *Heider*, 231 Ill. 2d at 18. Thus, there was no forfeiture. *Heider*, 231 Ill. 2d at 18. Such is not the case here. Although defendant stated in his letter to the trial court, "I cho[]se the wrong way to defend myself from what [I] felt was harm and a *** bad situation[] ***," and to the probation officer, "I am about to lose my life trying to protect my life," defendant did not argue at sentencing he acted in self-defense thereby mitigating his actions and failed to include in his postsentencing motion any claim the court failed to apply, or improperly applied statutory

factors in mitigation, specifically defendant's claim he acted in self-defense. Thus, we find defendant has forfeited this issue. Given our finding of forfeiture, we next determine whether plain-error review is appropriate.

¶ 38 Generally, the first step in plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565, 870 N.E.2d 403, 410-11 (2007). Thus, we first examine whether the court committed a clear or obvious error in its determination and utilization of mitigating factors. The applicable standard of review with respect to a claim of excessive sentencing is whether the trial court abused its discretion. *People v. O'Neal*, 125 Ill. 2d 291, 297-98, 531 N.E.2d 366, 368 (1988). "Generally, where, as here, a sentence imposed by the trial court is within the statutory limits permitted for the felony of which defendant was convicted [citation], we will not disturb the sentence absent an abuse of discretion by the court." *People v. Calhoun*, 404 Ill. App. 3d 362, 385, 935 N.E.2d 663, 683 (2010). An abuse of discretion occurs when no reasonable person would agree with the sentence imposed. *Alexander*, 239 Ill. 2d at 212.

¶ 39 In particular, defendant argues he "acted out of fear for [his] own life, having been verbally mocked by Brown and then physically confronted by the physically much-larger Brown, who quickly approached [him] and dropped what turned out to be a gun; [defendant] believed [he] had to snatch the gun and shoot Brown to prevent Brown from shooting [him]." According to defendant, "[t]his [] should have served as mitigation."

¶ 40 In crafting an appropriate sentence, a trial court must consider all applicable statutory factors in aggravation and mitigation. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27, 26 N.E.3d 488. Factors in mitigation include whether "[t]he defendant acted under a strong provocation" or whether "[t]here were substantial grounds tending to excuse or justify

*** defendant's criminal conduct, though failing to establish a defense." 730 ILCS 5/5-5-3.1(a)(3), (4) (West 2014). The trial court is required to consider any relevant mitigating factors. *People v. Ryan*, 336 Ill. App. 3d 268, 274, 783 N.E.2d 187, 192 (2003). Yet, "[t]he sentencing court need not accept the defendant's allegations regarding mitigating matters at face value in the presence of evidence to the contrary." *People v. Matzker*, 115 Ill. App. 3d 70, 75, 450 N.E.2d 395, 399 (1983).

¶ 41 The trial court stated it considered the presentence report, the evidence presented in aggravation and mitigation, the statutory factors in mitigation and aggravation, and "the circumstances surrounding the offense." The court believed defendant "did everything he could to kill Mr. Brown *** [by] shooting this individual four times ***." Clearly, the court did not find defendant's statements that he acted in self-defense were supported by the evidence and rejected them. See 730 ILCS 5/5-5-3.1(a)(3), (4) (West 2014). The court has wide latitude in fashioning a sentence and may reject a defendant's arguments if they are not supported by any actual evidence. *Matzker*, 115 Ill. App. 3d at 75. The court found the evidence did not substantiate defendant's claims he was afraid, provoked, justified, or that his actions were excused. By doing so, the court, as is within its discretion, rejected defendant's arguments. Thus, the court did not abuse its discretion by finding there were no statutory factors in mitigation applicable to defendant's case. Having decided the court did not fail to apply applicable statutory mitigating factors, we find no error upon which to conduct plain-error review.

¶ 42 Accordingly, we conclude the trial court's imposition of a 40-year sentence (a 15-year sentence plus a 25-year firearm enhancement) was not an abuse of discretion.

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the trial court's judgment. As part of our judgment, we grant the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 45

¶ 46 Affirmed.