2018 IL App (4th) 160444-U

NO. 4-16-0444

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 29, 2018
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Pike County
JEFFREY L. KINNE,	)	No. 15CF75
Defendant-Appellant.	)	
	)	Honorable
	)	Charles H.W. Burch,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: While the trial court mentioned defendant could have been subjected to a Class X sentence prior to the plea agreement in this case, the court clearly stated it was bound by the terms of the plea agreement and was sentencing defendant pursuant to the plea agreement. Defendant forfeited his argument the court improperly considered the Class X sentencing range when sentencing defendant in this case because he failed to raise the issue in his posttrial motion. Defendant cannot establish the trial court made a clear or obvious error for purposes of allowing review pursuant to the plain-error doctrine.

¶ 2 On December 14, 2015, defendant Jeffrey L. Kinne entered a partially negotiated guilty plea to the offense of failure to register as a sex offender. As part of the plea, the State agreed to an eight-year sentencing cap. On March 28, 2016, the trial court sentenced defendant to eight years in prison. On June 13, 2016, defendant filed a second amended motion to reconsider sentence, which the trial court denied. Defendant appeals, arguing he should receive a new sentencing hearing because the trial court relied on an improper factor in aggravation by

explicitly considering defendant had been subject to a Class X sentence of 6 to 30 years' imprisonment before the State agreed to lower the charge in this case from a Class 2 to a Class 3 offense. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In September 2015, the State charged defendant by information with knowingly or willfully providing false material information by a sex offender in violation of the Sex Offender Registration Act (Registration Act) (730 ILCS 150/10(a) (West 2014)). The State originally charged this offense as a Class 2 felony because defendant had previously been convicted of a violation of the Registration Act. According to the charge, defendant was extended-term eligible, subject to a Class X sentence of 6 to 30 years in prison, and the offense was nonprobationable.

¶ 5 On December 7, 2015, the trial court held a conference pursuant to Illinois Supreme Court Rule 402 (eff. July 1, 2012). The State informed the court it was trying to determine whether the underlying offense could be charged as a Class 3 felony. The State noted the Registration Act states that a second or subsequent violation of the Registration Act is a Class 2 felony. If convicted of a Class 2 felony, defendant would face a Class X sentence for lying to the police about having a Facebook page. The trial court told the parties the State could amend the charge as it wished. According to the court, "Anyway, so a simple answer to your question is, can you amend that to reflect a lesser classification charge, I would say that you have that authority and you can do it and that I will be bound upon a plea or finding of guilt to sentence in that [Class 3 sentencing] range." The State did note defendant would still be eligible for an extended term sentence, which meant defendant could be sentenced anywhere from 2 to 10 years in prison. For a Class 3 felony, the normal sentencing range is two to five years' imprisonment,

and the extended sentencing range is 5 to 10 years' imprisonment (730 ILCS 5/5-4.5-40(a) (West 2014)).

¶ 6 Defense counsel then made an argument it was her legal opinion that defendant could only be convicted of a Class 3 felony in this case, regardless of any plea agreement, based on the plain language of the statute. The trial court noted it understood defendant's argument but disagreed with her on the law. The State responded defense counsel's legal question would likely be moot in this case because the State believed the parties would reach an agreement for defendant to plead guilty to a Class 3 felony with an extended sentence. The court responded, "I think you—well, the short answer to your question, I believe you have the authority to do that and if you amend it to a lesser class offense, I'm bound to sentence in that range, so."

¶ 7 On December 14, 2015, defense counsel indicated to the trial court defendant and the State had come to an agreement in the case. The State agreed to (1) amend count I of the complaint, striking any reference to a prior Registration Act conviction, (2) not proceed on any Class X sentencing notice, and (3) cap defendant's sentence at eight years' imprisonment in exchange for defendant's guilty plea to the amended Class 3 charge. Defendant agreed he was eligible for an extended-term sentence and probation and would pay a $500 fine, court costs, and a $150 public defender reimbursement. If sentenced to prison, defendant's sentence would include a one-year period of mandatory supervised release (MSR).

¶ 8 The trial court then asked defendant if he understood he would be pleading guilty to a Class 3 felony, he would not be subject to Class X sentencing, and, if he was sentenced to prison, his sentence would be between two and eight years' imprisonment followed by one year of MSR. The court also advised defendant he would be eligible for probation or conditional discharge.

¶ 9 The trial court then allowed the State to amend the charge from a Class 2 felony to a Class 3 felony by interlineation and advised defendant:

> "Okay. [Defendant], the information has been amended on its face to reflect this is now a Class 3 felony and it has stricken the language indicating that you have previously been convicted of a violation of the Sex Offender Registration Act in Pike County, Illinois, on September the 4th, 2003. That has been removed and thus would make this a Class 3 felony, carrying with it a possible range of penalties of two to ten years[']imprisonment, plus one year of mandatory supervised release, or what used to be called [']parole,['] fine of up to $25,000, and up to 30 months of probation or conditional discharge, which as a part of that could be sentenced up to 364 days periodic imprisonment or 180 days of straight time imprisonment in the county jail.
>
> So do you believe you understand the charge you would be pleading guilty to at this point and the possible penalties associated with that? And, for the record, the charge is knowingly or willfully providing false material information by a sex offender."

Defendant responded he understood and entered his guilty plea.

¶ 10 On March 28, 2016, the trial court held a sentencing hearing in this case. At the hearing, the court told the parties:

> "All right. And just so we're all clear on the parameters on which we're operating today, this was an open plea with a—sentencing alternatives available to the court would be up to eight years[']imprisonment in the Illinois Department of Corrections, as few as two years[']imprisonment in the Department of

> Corrections, or in lieu of a Department of Corrections sentence, up to 30 months of probation, conditional discharge or any conditions that would be available to the court or that would be properly included in an order of probation, $500 fine plus costs as agreed, and $150 public defender reimbursement as likewise agreed."

The parties agreed. The State did not introduce any evidence in aggravation, and defense counsel did not introduce any evidence in mitigation. The State recommended defendant be sentenced to eight years' imprisonment, which was the maximum sentence agreed upon pursuant to the plea bargain. Defense counsel asked for 30 months' probation.

¶ 11 The trial court's explanation for its sentencing decision is approximately nine pages long. The court noted it had considered the presentence investigation report, the respective parties' arguments, and defendant's statement in allocution. In the trial court's lengthy explanation of its sentencing decision, the court made the following statement, quoted below, which forms the basis for defendant's argument in this appeal.

> "The court has before it any number of options here as to what to do with [defendant's] case. The court does note that your exposure in this matter has been limited significantly than what it was—as opposed to what it was when this case was begun.
>
> When this started, we were—you were facing the prospect of a mandatory six to 30 years[']imprisonment in the Department of Corrections and three years of parole, which is mandatory supervised release, as this was alleged to be a Class 2 felony, and because of prior history of criminality, you would have been eligible for Class X sentencing when this case was begun."

After making this statement, the court immediately noted the State exercised its discretion and amended the charge against defendant by reducing the charged offense to a Class 3 felony.

¶ 12 The court specifically noted it could sentence defendant to 30 months' probation, conditional discharge, or from two to eight years in the Department of Corrections under the plea agreement reached between defendant and the State. With regard to mitigating factors, the court found defendant's conduct neither caused nor threatened serious physical harm to another. The court also noted in mitigation that defendant's imprisonment would impose an excessive hardship on defendant's child.

¶ 13 The trial court did note this was defendant's second violation of the Registration Act. The court also stated defendant's history of criminality, which began more than 20 years earlier, was an aggravating factor. According to the court:

> "And, as I indicated, the history of criminality exhibited by [defendant] is—that it does weigh heavily on the court's mind in determining and fashioning an appropriate sentence.
>
> In light of the histories of petitions to revoke probation or terms of probation which have been ordered and have been unsuccessfully completed, there is some history of that on the part of [defendant], and combined with the timeline of events outlined in the criminal history that I just went through, I think that it is—I cannot find that he would be likely—or that he would be unlikely to commit another crime. I cannot find that he would be likely to comply with the terms of a period of probation despite what he has said here today.
>
> The court, I believe, could make a finding and will make a finding that a sentence to the Department of Corrections is necessary to deter others, necessary

to protect the public, and to sentence him to a period of probation could conceivably and would deprecate the seriousness of the offense and be inconsistent with the ends of justice."

* * *

Factoring in all I have before me here today, weighing all mitigating and aggravating factors and taking into account the significance and the seriousness of the offense, and having considered the available alternatives in terms of sentencing, it will be the judgment of the court and sentence of the court and I am going to adopt the recommendation of the state and will impose a sentence, the maximum that's allowed under the cap, that being eight years[']imprisonment in the Illinois Department of Corrections ***."

¶ 14 The trial court admonished defendant if he wanted to appeal he "would need to file in the trial court *** within 30 days of today's date, a written motion asking that you be allowed to withdraw your plea of guilty or to vacate the judgment and sentence," or if he objected to the sentence alone, he could file a motion to reconsider his sentence.

¶ 15 On June 13, 2016, defendant filed his second amended motion to reconsider sentence, arguing his sentence was excessive and the court failed to consider statutory mitigating factors. On the same day, the trial court held a hearing on defendant's motion to reconsider sentence. Defense counsel noted defendant was not seeking to vacate his guilty plea at that time. The court denied the motion to reconsider sentence.

¶ 16 The trial court noted it had considered the relevant factors in mitigation. The court further stated:

"The parameters that I was operating on, on the date of sentence, was an

open plea situation to a Class 3 felony, failure to register or failure to comply with the conditions of the Sex Offender Registration Act. Range of penalties could have been up to 30 months of probation or conditional discharge or, in the alternative, two to eight years[’] imprisonment in the department of corrections followed by a one year period of mandatory supervised release. And this was an open plea, that that charge was amended from the original. What was originally filed as a Class 2 felony second or subsequent violation of the Sex Offender Registration Act which would have—you know, as to the original charge Mr. Kinne would have been eligible for sentencing as a Class X felon or within the Class X sentencing range. It would have been required had there not been any amendment. That is what was negotiated. The [S]tate in their discretion saw fit to amend the charge and that is certainly within their discretion. So the court was operating in those bounds on the date of sentence."

Later, during the same hearing, the court again stated:

"Generally, as I believe I noted that date and will continue to tell you, [defendant], that each case stands on its own and is judged individually. I did that in your case. I will also tell you though that often times there is a notion or a philosophy that is employed that suggests that sentencing and punishment for the commission of crimes is generally progressive in nature. In light of the more criminal history that you accumulate, generally the sentences get more severe the more that you accumulate.

However, the court was bound by certain constrictions in this case with a maximum possible department of corrections sentence of eight years, minimum of

two years, or the possibility of probation. Coming back around, I did consider probation as a sentence. I did pay particular attention to the primary aggravating factor in the court's mind which was the significant period or history of criminality on the part of [defendant]."

¶ 17 This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant asks this court to remand this case to the trial court for a new sentencing hearing because the trial court failed to provide him with the benefit of his partially negotiated plea bargain and violated his constitutional right to a fair sentencing hearing. According to defendant, the trial court relied on an improper factor in aggravation—a Class X sentencing range of 6 to 30 years in prison for which defendant was eligible before the State agreed to reduce the charged offense from a Class 2 felony to a Class 3 felony—when sentencing defendant. Defendant contends it is impossible to tell from the record whether the trial court's alleged error led to a longer prison sentence for defendant than what defendant would have otherwise received. As a result, defendant argues this court should vacate his sentence and remand the case for a new sentencing hearing.

¶ 20 A. Illinois Supreme Court Rule 604(d)

¶ 21 The State argues defendant forfeited any issues with regard to his sentence pursuant to Illinois Supreme Court Rule 604(d) (eff. Mar. 8, 2016) because defendant failed to file a motion to withdraw his partially negotiated guilty plea. Rule 604(d) states in relevant part:

"No appeal shall be taken upon a negotiated plea of guilty challenging the sentence as excessive unless the defendant, within 30 days of the imposition of sentence, files a motion to withdraw the plea of guilty and vacate the judgment.

> For purposes of this rule, a negotiated plea of guilty is one in which the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending." Ill. S. Ct. R. 604(d) (eff. Mar. 8, 2016).

Defendant argues his failure to file a motion to withdraw his guilty plea does not bar him from raising this issue on appeal because he is not arguing his sentence is excessive. Instead, defendant is arguing his sentence was improper. Pursuant to this court's opinion in *People v. Johnson*, 2017 IL App (4th) 160920, 87 N.E.3d 1073, we agree this issue is not barred by Rule 604(d). In *Johnson*, this court stated:

> "When a defendant challenges his sentence based upon the trial court's reliance on an improper sentencing factor, he is asserting his constitutional right to a fair sentencing hearing was violated. The mere fact a defendant agrees to a negotiated plea does not mean he has agreed to give up his right to be fairly sentenced in accordance with the laws of the State of Illinois. To say excessive-sentence and improper-sentence challenges are the same is to diminish the statutory and constitutional protections in place to ensure defendants are fairly and justly sentenced." *Johnson*, 2017 IL App (4th) 160920, ¶ 31, 87 N.E.3d 1073.

Rule 604(d) expressly limits its application to excessive-sentence challenges and says nothing about improper-sentence challenges. *Johnson*, 2017 IL App (4th) 160920, ¶ 32, 87 N.E.3d 1073.

¶ 22 B. Defendant's Sentence

¶ 23 Even though defendant can proceed with his argument without filing a motion to withdraw his partially negotiated guilty plea, we still must determine whether we should consider

his argument because he forfeited this specific issue by not raising it in his posttrial motion. Defendant asks us to review this issue pursuant to the plain-error doctrine.

¶ 24 "The plain-error doctrine permits a reviewing court to by-pass normal rules of forfeiture and consider '[p]lain errors or defects affecting substantial rights *** although they were not brought to the attention of the trial court.' " *People v. Eppinger*, 2013 IL 114121, ¶ 18, 984 N.E.2d 475 (quoting Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967)). When determining whether we can review a forfeited issue pursuant to the plain-error doctrine, we first must determine whether a clear or obvious error occurred. *People v. Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d 675.

¶ 25 Our supreme court has stated, "A sentence based on improper factors will not be affirmed unless the reviewing court can determine from the record that the weight placed on the improperly considered aggravating factor was so insignificant that it did not lead to a greater sentence." *People v. Heider*, 231 Ill. 2d 1, 21, 896 N.E.2d 239, 251 (2008). After reviewing the record in this case, defendant cannot establish the trial court made a clear or obvious error by mentioning the fact defendant was eligible for a Class X sentence between 6 and 30 years in prison prior to the State's decision to amend the charge against defendant.

¶ 26 Contrary to defendant's argument, the fact the trial court mentioned the sentence defendant faced prior to the plea agreement does not mean the court relied in any way on the Class X sentencing range when sentencing defendant. The court made clear it understood its sentencing decision was bound by the terms of the plea agreement between defendant and the State. Further, the trial court's sentence was within the parameters of the plea agreement.

¶ 27 Defendant's reliance on *People v. Owens*, 377 Ill. App. 3d 302, 878 N.E.2d 1189 (2007), and *People v. Carmichael*, 343 Ill. App. 3d 855, 799 N.E.2d 401 (2003), is misplaced because the trial courts in those cases clearly applied improper sentencing ranges when

sentencing the respective defendants. In *Owens*, the trial court found defendant was eligible to be sentenced as a Class X offender and imposed a Class X sentence. *Owens*, 377 Ill. App. 3d at 302, 878 N.E.2d at 1190. The appellate court found the trial court erred in finding defendant was eligible for a Class X sentence. *Owens*, 377 Ill. App. 3d at 305, 878 N.E.2d at 1192. In *Carmichael*, the trial court improperly enhanced the defendant's conviction from a Class 3 to a Class 2 felony and sentenced defendant as a Class 2 felon. *Carmichael*, 343 Ill. App. 3d at 858, 861, 799 N.E.2d at 404, 407.

¶ 28 In this case, the trial court made clear it was sentencing defendant within the parameters of his plea agreement with the State. As a result, defendant received the benefit of his plea bargain with the State.

¶ 29 The State conceded in its brief defendant is entitled to a remand for strict compliance with Rule 604(d). This was a partially negotiated plea. As a result, the trial court clearly erred in informing defendant he could file either a motion to withdraw his guilty plea or a motion to reconsider his sentence. However, in response to the State's concession, defendant states "the only remedy that [defendant] seeks, and the only just remedy here, is that the promise that he not be sentenced under a 6 to 30 Class X sentencing range be fulfilled." We have considered defendant's argument on this issue and found the trial court did not make a clear or obvious error in sentencing defendant. Therefore, defendant is not entitled to the only remedy he seeks in this case.

¶ 30 Defendant specifically noted in his reply brief he did not want this case remanded so he could have the ability to file a motion to withdraw his guilty plea. According to defendant's reply brief:

"Where [defendant] only seeks a fair sentencing and does not wish to withdraw

> his plea, remanding for a proper admonishment would be an unnecessary waste of time and resources, given neither party seeks to change the terms of the plea agreement. [Citation.] [Defendant] solely requests that this Court vacate his sentence and remand this matter for a new sentencing hearing."

We agree with defendant a remand in this case would be a waste of judicial resources because defendant does not wish to withdraw his guilty plea. We accept defendant's waiver of his right for this case to be remanded for strict compliance with Rule 604(d).

¶ 31 III. CONCLUSION

¶ 32 For the reasons stated above, we affirm defendant's conviction and sentence in this case. 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(a) (West 2016).

¶ 33 Affirmed.