2018 IL App (4th) 170377-U

NO. 4-17-0377

FILED
March 27, 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
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
JASON C. COLLINS,	)	No. 13CF280
Defendant-Appellant.	)	
	)	Honorable
	)	Robert M. Travers,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's judgment, concluding (1) any error in the court's consideration of a factor inherent in the offense as an aggravating factor was harmless, (2) the court did not err by giving a mitigating factor little weight, and (3) the court did not err by ordering defendant to pay restitution to the City of Pontiac for out-of-pocket expenses incurred as a result of defendant's conduct.

¶ 2 In November 2013, the State charged defendant, Jason C. Collins, with one count of reckless homicide, two counts of aggravated driving under the influence of alcohol (DUI), and two counts of DUI. In August 2014, defendant pleaded guilty to all five counts. In December 2014, the trial court, after merging the sentences on all five counts, sentenced defendant to 12 years' imprisonment on one of the aggravated DUI charges (625 ILCS 5/11-501(a)(1) (West 2012)). Following a remand from this court for proper admonishments pursuant to Illinois

Supreme Court Rule 605(b) (eff. Oct. 1, 2001), defendant filed a motion to reconsider his sentence and to correct his sentence. In May 2017, the trial court denied defendant's motion.

¶ 3 Defendant appeals, arguing the trial court erred by (1) considering a factor inherent in the offense as an aggravating factor and to cancel out a statutory mitigating factor, and (2) improperly ordering defendant to pay $500 in restitution to the city of Pontiac. For the following reasons, we affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In November 2013, the State charged defendant with (1) reckless homicide (count I) (720 ILCS 5/9-3(a) (West 2012)); (2) aggravated DUI (count II) (625 ILCS 5/11-501(a)(1) (West 2012)); (3) aggravated DUI (count III) (625 ILCS 5/11-501(a)(2) (West 2012)); (4) DUI (count IV) (625 ILCS 5/11-501(a)(1) (West 2012)); and (5) DUI (count V) (625 ILCS 5/11-501(a)(2) (West 2012)). The charges stemmed from an incident in which defendant, while traveling north on interstate 55 in his pickup truck, struck a stationary Pontiac police vehicle. The collision caused the death of canine Officer Draco, and Officer Casey Kohlmeier was later pronounced dead at the emergency room. Defendant was questioned and admitted drinking at an establishment in Bloomington prior to driving his vehicle north on Interstate 55. Blood, breath, and urine samples showed defendant had a blood-alcohol content in excess of 0.08. In August 2014, defendant pleaded guilty to all five counts.

¶ 6 A. Sentencing

¶ 7 In December 2014, the matter proceeded to sentencing. Prior to the hearing, the State filed a presentence investigation report (PSI), which showed defendant's prior criminal history included a 2008 New Jersey case involving a misdemeanor DUI charge and an assault-by-auto felony charge. The supplemental PSI showed defendant pleaded guilty to the assault-by-

auto and DUI charges and was sentenced to 90 days in county jail, 3 years' probation, alcohol treatment, 100 hours of community service, and various fines. The PSI also indicated defendant's driving privileges in South Carolina had been suspended on four separate occasions for (1) a cannabis violation, (2) failure to pay a traffic ticket, (3) driving while his license was suspended, and (4) a DUI charge. Defendant further reported having a New Jersey driver's license which was suspended for 12 months as a result of his first DUI.

¶ 8 The PSI further included a statement regarding restitution, which indicated "the only out of pocket expense to the City of Pontiac was a $500 insurance deductible. The City is self-insured, managed by the Illinois Municipal Risk Management Association." The loss and replacement cost of the canine officer was not covered by insurance, but significant donations from the community allowed the police department to replace the canine and all needed equipment. The PSI indicated no restitution was requested for those costs or for payment of property damage and medical claims.

¶ 9 At the sentencing hearing, the parties agreed all five counts would merge into count II. As evidence in aggravation, the State presented three victim-impact statements from Officer Kohlmeier's loved ones. The State argued defendant's actions caused or threatened serious harm, noting "not only did he cause the death of Casey Kohlmeier, but he also caused the death of Officer Draco, the K-9 officer." Although Draco was a canine and not a human, the State urged the court to consider this as a nonstatutory factor in aggravation. The State further argued defendant's history of prior criminal conduct as a factor in aggravation. In particular, the State noted defendant's prior DUI conviction where he caused a collision that broke the other driver's arm. The State further noted defendant had completed his probation in the prior DUI case just eight months before committing the offense in the present case. Finally, the State noted

the need for deterrence and asked for the maximum allowable sentence of 14 years' imprisonment.

¶ 10 Defendant presented numerous character letters as evidence in mitigation. Defendant also provided a written substance-abuse evaluation from a mental-health professional diagnosing him with alcoholism. The report noted defendant was not diagnosed as an alcoholic following his prior DUI and described prior treatment defendant received as inadequate. Defense counsel argued a lengthy term of imprisonment would take defendant away from his young children and requested a community-based sentence or, alternatively, a minimum three-year sentence.

¶ 11 Following defendant's statement in allocution, the trial court began by addressing the factors in mitigation as follows:

> "As far as factors in mitigation, I find one. The imprisonment of the defendant will entail excessive hardship on his dependents. Defendant's Group Exhibit Number 1, the packet of materials [that] ha[s] been submitted contains information from his family and from his children, and it is heartbreaking. But one thing that [defendant] has that we don't have for the rest of the individuals involved in this case is he knows that he is going to see those kids again. No matter what I do, you are going to have contact with them. You are going to be involved in their lives."

The court then turned to factors in aggravation, stating, "I find that the defendant's conduct caused the death of Officer Kohlmeier." The court also discussed defendant's prior criminal history, specifically addressing at length defendant's 2008 DUI in New Jersey, where he hit

another vehicle head on when he was driving in the wrong lane and caused the other driver serious injuries, including a broken arm. The court characterized the prior DUI as a "stunning wake-up call" that gave defendant the opportunity to "contemplate what his conduct had caused and what it could have caused." As a final aggravating factor, the court found a sentence of imprisonment was necessary to deter others from committing the same offense. The court found no extraordinary circumstances requiring probation and further found probation would deprecate the seriousness of the offense. Finally, the court noted the offenses would merge into the aggravated DUI charge in count II, and it sentenced defendant to 12 years' imprisonment with 2 years' mandatory supervised release. The court also imposed restitution in the amount of $500 to the City of Pontiac.

¶ 12 B. Appeal and Remand

¶ 13 In December 2014, defendant filed a motion to reconsider and correct sentence, which the trial court, in pertinent part, denied. In April 2015, defendant filed a notice of appeal, and this court docketed the case as No. 4-15-0330. In January 2017, this court entered an order allowing defendant's agreed motion for summary remand for proper admonishments under Illinois Supreme Court Rule 605(b) (eff. Oct. 1, 2001) and strict compliance with Rule 604(d) (eff. Feb. 6, 2013). *People v. Collins*, No. 4-15-0330 (Jan. 23, 2017) (agreed order summarily remanding).

¶ 14 C. Motion to Reconsider

¶ 15 Following remand from this court, defendant filed a new motion to reconsider his sentence and to correct his sentence. The motion, in part, argued the trial court erred by improperly (1) considering the underlying fatality as a factor in aggravation, (2) relying on the

fatality to disregard a factor in mitigation, and (3) ordering defendant to pay $500 in restitution to the City of Pontiac.

¶ 16 Following argument on the motion to reconsider, the trial court turned first to the claim it improperly considered the underlying fatality as a factor in aggravation. The court stated as follows:

> "The record is what it is. I'm not going to attempt to put any spin on it. I've been in your situations before sitting in those chairs, under the same facts; and that's why we have a record, not so that we can come back and put some spin on it later on. I would advise you that it's difficult to engage in a sentencing in a case of this type without mentioning death, okay, without mentioning the death of the individual who is the prime point in the hearing itself. In this particular instance, I can assure you that the [c]ourt did not double up on this particular factor despite the statement in the record. And I believe, and let's look at it as a whole, I think that's apparent from the sentence itself. Okay? It may very well have been a much greater sentence if in fact the [c]ourt had done what is claimed in this particular point of the motion."

As to whether the court improperly relied on the fatality to disregard a factor in mitigation, the court stated its belief that it was proper to discuss the strength of a mitigating factor in relation to the other factors in aggravation and mitigation. The court also addressed defendant's argument that the sentence was excessive, and it noted defense "counsel did an excellent job in producing

mitigation evidence." The court specifically stated the mitigation evidence affected the sentence imposed.

¶ 17 Finally, the trial court addressed defendant's claim that the court improperly ordered him to pay $500 in restitution to the City of Pontiac. The court recalled asking a question regarding restitution stated "I was concerned at that point if there was going to be restitution requested in relation to the dog that was killed ***. I thought there was going to be more restitution evidence presented than was actually presented. I think a response was made explaining why there was no additional restitution prayed for and possibly it was covered by insurance." Thus, the court denied defendant's motion to reconsider his sentence.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant argues the trial court erred by (1) considering a factor inherent in the offense as an aggravating factor and to cancel out a statutory mitigating factor, and (2) improperly ordering defendant to pay $500 in restitution to the city of Pontiac. We address these arguments in turn.

¶ 21 A. Factor Inherent in the Offense

¶ 22 Generally, the imposition of a sentence is within the sound discretion of the trial court. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459. Accordingly, "there is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, such that the trial court's sentencing decision is reviewed with great deference." *Id.* "The trial court's determination will not be disturbed absent a showing of abuse of discretion [citations], or unless the trial judge relied on improper factors in imposing the sentence [citation]." *People v. Morgan*, 306 Ill. App. 3d 616, 633, 713 N.E.2d 1203 (1999).

¶ 23 In determining an appropriate sentence, the trial court may consider the seriousness, nature, and circumstances of the offense, including the nature and extent of the elements of the offense. *People v. Saldivar*, 113 Ill. 2d 256, 271-72, 497 N.E.2d 1138 (1986). However, "it is well established that a factor inherent in the offense should not be considered as a factor in aggravation at sentencing." *People v. Dowding*, 388 Ill. App. 3d 936, 942, 904 N.E.2d 1022 (2009). It is improper for the court to consider the victim's death as an aggravating factor where death is implicit in the offense. *Id.* at 944. "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 (2008).

¶ 24 Defendant contends the trial court improperly considered Officer Kohlmeier's death in aggravation where death was implicit in the offense of aggravated DUI for which he was being sentenced. Defendant pleaded guilty to aggravated DUI. A person is guilty of aggravated DUI if "the person, in committing a [DUI under 625 ILCS 5/11-501(a) (West 2012)], was involved in a motor vehicle *** accident that resulted in the death of another person, when the violation of subsection (a) was a proximate cause of the death." 625 ILCS 5/11-501(d)(1)(F) (West 2012). The charge was elevated to a Class 2 felony based on Officer Kohlmeier's death. (625 ILCS 5/11-501(d)(2(G) (West 2012)), which mandates a term of imprisonment not less than 3 nor more than 14 years.

¶ 25 In the instant case, the trial court stated, "In relation to factors in aggravation, I find that the defendant's conduct caused the death of Officer Kohlmeier." The court explicitly stated it was considering Officer Kohlmeier's death as an aggravating factor and that fatality was

inherent in the offense of aggravated DUI. See *Dowding*, 388 Ill. App. 3d at 944. Moreover, the State appears to concede the trial court erred in considering the fatality in aggravation.

¶ 26 Having determined the trial court improperly considered the fatality as an aggravating factor, we must now consider whether remand is required. "When a trial court considers an improper factor in aggravation, the case must be remanded unless it appears from the record that the weight placed upon the improper factor was so insignificant that it did not lead to a greater sentence." *Id.* at 945. In determining whether the court afforded an improper factor significant weight such that remand would be required, this court may consider "(1) whether the trial court made any dismissive or emphatic comments in reciting its consideration of the improper factor; and (2) whether the sentence received was substantially less than the maximum sentence permissible by statute." *Id.*

¶ 27 Here, unlike in *Dowding*, defendant filed a motion to reconsider raising this issue. The trial court acknowledged its statement in regard to Officer Kohlmeier's death and noted it was "difficult to engage in a sentencing in a case of this type without mentioning death." The judge further stated, "I can assure you that the [c]ourt did not double up on this particular factor despite the statement in the record," and "[i]t may very well have been a much greater sentence if in fact the [c]ourt had" improperly considered the fatality. These statements suggest the trial court did not rely heavily on the fatality in reaching its sentencing determination. Additionally, at the sentencing hearing the court mentioned the death only in passing and devoted a substantial portion of its discussion to defendant's prior DUI, which also involved serious bodily injury. The court noted the prior DUI served as "a stunning wake-up call" that made defendant aware of the possible consequences of his conduct. The record further shows defendant completed his probation associated with the prior DUI just eight months before committing the offense at issue

in this case. The court also noted a sentence of imprisonment was necessary to deter others from committing this offense. The significant discussion regarding these proper aggravating factors, coupled with the court's comments made at the hearing on the motion to reconsider, show the court did not place substantial weight on the fatality such that remand is required. *People v. McCain*, 248 Ill. App. 3d 844, 853, 617 N.E.2d 1294 (1993) ("[I]f it can be determined 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, remand is not required."). Here, the sentence was imposed in large part due to defendant's prior DUI and the need for deterrence. Accordingly, we conclude any improper consideration of a factor inherent in the offense was harmless, and we affirm the judgment of the trial court.

¶ 28 Defendant further contends the trial court improperly used an element inherent in the offense to accord little or no weight to a statutory mitigating factor. In support, defendant points to the following statement by the trial court: "The imprisonment of the defendant will entail excessive hardship on his dependents. *** But one thing that [defendant] has that we don't have for the rest of the individuals involved in this case is he knows that he is going to see those kids again." Defendant contends this statement "canceled out" the mitigating factor that defendant's imprisonment would entail excessive hardship on his dependents.

¶ 29 As noted above, the trial court has wide latitude in sentencing and we will disturb a sentencing determination only if the court abuses its discretion. *Morgan*, 306 Ill. App. 3d at 633. A court may not ignore relevant mitigating factors, but "[t]he weight attributed to such factors depends on the circumstances of a given case. [Citation.] A trial court is in the best position to take into account such factors as the defendant's credibility, demeanor, general moral

character, mentality, social environment, habits, and age." *People v. Roberts*, 338 Ill. App. 3d 245, 251, 788 N.E.2d 782 (2003).

¶ 30 At the hearing on the motion to reconsider the sentence, the trial court noted the impact of the mitigating factor was "lessened by the facts." The court further stated defense "counsel did an excellent job in producing mitigation evidence," and specifically stated the mitigation evidence affected the sentence imposed. The court did not ignore the mitigating evidence and did not err by giving it little weight. *People v. Harmon*, 2015 IL App (1st) 122345, ¶ 123, 49 N.E.3d 470 ("Because the most important sentencing factor is the seriousness of the offense, the court is not required to give greater weight to mitigating factors than to the seriousness of the offense, nor does the presence of mitigating factors either require a minimum sentence or preclude a maximum sentence."). We find no error in the weight the court gave to the relevant mitigating factor.

¶ 31 Finally, defendant claims the trial court's errors cumulatively denied him a fair sentencing hearing. However, we find only one harmless error, which renders the issue moot. *People v. Medley*, 111 Ill. App. 3d 444, 450, 444 N.E.2d 269 (1983) ("The doctrine of cumulative error cannot be applied when there is only one error. Therefore, the issue of cumulative error in this case is moot.").

¶ 32 B. Restitution

¶ 33 Defendant contends the City of Pontiac, as a matter of law, is not entitled to restitution. Alternatively, defendant contends the restitution order should be vacated because it was entered without any evidentiary support.

¶ 34 Defendant first argues the City of Pontiac is not considered a "victim" under the restitution statute (730 ILCS 5/5-5-6(b) (West 2012)). In support, defendant relies on *People v.*

Derengoski, 247 Ill. App. 3d 751, 754, 617 N.E.2d 882 (1993). We find *Derengoski* distinguishable. In that case, the defendants challenged restitution awards to reimburse the Champaign County police department for expenses incurred in effectuating the arrests of the defendants. *Id.* "[W]here public money is expended in pursuit of solving crimes, the expenditure is part of the investigatory agency's normal operating costs and the agency is not considered a 'victim' for purposes of restitution." *Id.* at 754-55. In this case, the PSI indicated a $500 restitution award for the City of Pontiac for an insurance deductible, presumably for the patrol vehicle involved in the collision. Accordingly, the restitution order in this case was not to reimburse a governmental agency for its ongoing, normal duties.

¶ 35 The State points to *People v. Ford*, 2016 IL App (3d) 130650, ¶¶ 24-30, 49 N.E.3d 954, in support of its argument that the restitution award was proper. In *Ford*, the defendant challenged an order requiring he pay restitution for damage caused when he accelerated his vehicle into a van owned by the Peoria Multi-County Narcotics Enforcement Group (MEG). *Id.* ¶ 1. There, as here, the defendant argued the Peoria MEG unit was not a "victim" eligible to receive restitution. *Id.* ¶ 24. The appellate court acknowledged "there is no *per se* rule prohibiting a law enforcement agency from receiving restitution. [Citation.] It is at least plausible that, if a person commits criminal damage to property by destroying a police department squad car, then the department may be compensated for the loss." (Internal quotation marks omitted.) *Id.* ¶ 29. Because the restitution covered the cost of repairing the law enforcement vehicle damaged as a result of the defendant's criminal conduct, rather than reimbursing the Peoria MEG unit for normal costs associated with investigating crime, the court held the Peoria MEG unit was entitled to restitution. *Id.* ¶ 30.

¶ 36 We find *Ford* persuasive, and follow its reasoning. Here, the restitution was not ordered to reimburse the City of Pontiac for normal costs of investigating crime. Instead, the $500 was for an insurance deductible for the patrol car defendant collided with in the course of committing a DUI. Accordingly, we find the City of Pontiac was entitled to restitution for its out-of-pocket expenses incurred as a result of defendant's conduct. See *People v. Danenberger*, 364 Ill. App. 3d 936, 944, 848 N.E.2d 637 (2006).

¶ 37 As to defendant's alternative argument, this court has previously held "that evidence *in addition to information contained in the presentence report* is not required," in the absence of a specific claim the PSI is inaccurate. (Emphasis in original.) *People v. Powell*, 199 Ill. App. 3d 291, 295, 556 N.E.2d 896 (1990). Because the $500 restitution order was adequately supported by the PSI, additional evidence was not necessary to support the order.

¶ 38 III. CONCLUSION

¶ 39 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 2016).

¶ 40 Affirmed.