2018 IL App (4th) 170788-U

NO. 4-17-0788

FILED
November 21, 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
ROBERT WILL LAVERT HOCKER,	)	No. 14CF120
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Holder White and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding defendant forfeited his argument that the trial court improperly considered an aggravating factor at sentencing.

¶ 2 In March 2015, defendant, Robert Will Lavert Hocker, pleaded guilty to two counts of criminal sexual assault. The trial court sentenced him to 20 years in prison. Defendant filed a motion to reconsider the sentence, which the court denied.

¶ 3 On appeal, defendant argues the trial court erred by improperly using a factor inherent in the offense to increase his sentence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2014, a grand jury indicted defendant on three counts of criminal sexual assault (counts I, II, and III) (720 ILCS 5/11-1.20(a)(3) (West 2014)), alleging he knowingly committed an act of sexual penetration with B.S., a person under 18 years of age, the

act involved defendant's penis and B.S.'s vagina, and defendant was a family member of B.S. The State alleged the offenses took place between November 7, 2005, and November 7, 2006.

¶ 6 In March 2015, defendant agreed to enter a blind plea of guilty to counts I and II in exchange for the State's dismissal of count III. Among other admonishments, the trial court admonished defendant he was eligible for an extended-term sentence of up to 30 years in prison on each count and each count would be served consecutive to one another. The State presented a factual basis as follows:

> "Your Honor, if this matter were to proceed to hearing, the State would present evidence that this investigation originally began when the defendant was serving time in the Department of Corrections and communication was intercepted that he had fathered a child with his stepdaughter, the victim in this case. Thereafter, an interview was done of the victim, that she had disclosed a number of instances in which the defendant had had sex with her, with his penis and her vagina. The defendant was interviewed and admitted that that had happened on more than one occasion. And additionally the evidence would be that a DNA [(deoxyribonucleic acid)] test did confirm that the product of those sexual relationships was the victim's child."

The State added the victim was under 18 at all times during the charged contact. The court found defendant's guilty plea to be knowing and voluntary.

¶ 7 At the sentencing hearing, the State offered a jail recording of defendant and Isaac Freeman as evidence in aggravation. During their conversation, Freeman talked about how he is

a religious person, believes that when a girl begins menstruating she becomes a woman, and American laws have been imposed upon that biblical fact. Defendant agreed and said white people do not understand children this age being with men in the black community. In asking for a sentence of 15 years on each count for a total of 30 years in prison, the State argued several factors in aggravation were present, including the fact defendant caused harm, his history of delinquency, he held a position of trust, and the need to deter others.

¶ 8 Defense counsel asked for a sentence of eight years in prison. Along with considering the victim impact statement, the trial judge noted defendant's acceptance of responsibility, his guilty plea allowed the victim and other family members to not have to testify, and his age of 46 years to be factors in mitigation. In considering factors in aggravation, the judge stated, in part, as follows:

> "As far as the factors in aggravation, I concur that the appropriate factors in aggravation by way of the statute would be that your conduct caused serious harm, that you do have a history of prior delinquency and criminal activity, that a sentence is necessary to deter others from committing the same type of crime, and that you held a position of trust, that being as a family member, to the victim. Not only was she under the age of 18 years but this was also an offense specifically provided for under the statute that is a factor in aggravation as well.
>
> * * *
>
> This is your seventh felony conviction, you've been to prison a couple of times, but the last time you were in prison for a Class X

> you served eight years, which is actually at the lower end
> obviously of a 6 to 30 [year prison] term. So I don't think
> necessarily that the maximum term, albeit not extended term of 15,
> is appropriate to go from the lowest all the way up to the highest,
> but the lowest is clearly not appropriate either."

The judge concluded a sentence of 10 years on each count for a total of 20 years in prison was appropriate.

¶ 9 In May 2015, defense counsel filed a motion to reconsider, arguing the sentence was excessive. Counsel also filed a motion to withdraw defendant's guilty plea and certificates pursuant to Illinois Supreme Court Rule 604(d) (eff. Dec. 11, 2014). At the August 2015 hearing, defendant withdrew the motion to withdraw and elected to proceed only on the motion to reconsider his sentence. The trial court denied the motion. Defendant appealed, and this court entered an order in August 2017 allowing defendant's agreed motion for summary remand to allow for defense counsel's compliance with Rule 604(d).

¶ 10 In September 2017, defense counsel filed a motion to reconsider, arguing the sentence was excessive and defendant had rehabilitative potential. Counsel also filed a motion to withdraw defendant's guilty plea and a certificate pursuant to Illinois Supreme Court Rule 604(d) (eff. July 1, 2017). Defendant later withdrew the motion to withdraw.

¶ 11 At the October 2017 hearing on the motion to reconsider, defense counsel presented a letter from defendant's prison counselor indicating defendant was working his way through sex-offender treatment. Over the State's objection, the trial court considered the letter regarding defendant's rehabilitative potential. While it was pleased with defendant's progress in prison, the court denied the motion. This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant argues the trial court erred by improperly using the fact that the victim was under 18 years of age as a factor in aggravation during sentencing. We disagree.

¶ 14 Initially, we note defendant failed to object at sentencing or raise the issue in his motion to reconsider his sentence. Thus, the issue is forfeited on appeal. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review). In his reply brief, however, defendant argues the issue should be addressed as a matter of plain error.

¶ 15 "[S]entencing errors raised for the first time on appeal are reviewable as plain error if (1) the evidence was closely balanced or (2) the error was sufficiently grave that it deprived the defendant of a fair sentencing hearing." *People v. Ahlers*, 402 Ill. App. 3d 726, 734, 931 N.E.2d 1249, 1256 (2010). Under both prongs of the plain-error analysis, the burden of persuasion remains with the defendant. *People v. Wilmington*, 2013 IL 112938, ¶ 43, 983 N.E.2d 1015. As the first step in the analysis, we must determine "whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49, 89 N.E.3d 675; *People v. Eppinger*, 2013 IL 114121, ¶ 19, 984 N.E.2d 475. "If error did occur, we then consider whether either prong of the plain-error doctrine has been satisfied." *People v. Sykes*, 2012 IL App (4th) 111110, ¶ 31, 972 N.E.2d 1272. "[T]he plain error rule is not a general savings clause for any alleged error, but instead is designed to address *serious injustices*." (Emphasis in original.) *People v. Williams*, 299 Ill. App. 3d 791, 796, 701 N.E.2d 1186, 1189 (1998).

¶ 16 The question of whether the trial court relied on an improper factor in imposing the defendant's sentence presents a question of law, which we review *de novo*. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 8, 973 N.E.2d 459. "It is well established that a factor

inherent in the offense should not be considered as a factor in aggravation at sentencing." *People v. Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. Thus, a single factor cannot be used both as an element of the offense and as a basis for imposing a harsher sentence than would have been imposed without it. *People v. Phelps*, 211 Ill. 2d 1, 11-12, 809 N.E.2d 1214, 1220 (2004). "There is a strong presumption that the trial court based its sentencing determination on proper legal reasoning, and a court of review should consider the record as a whole, rather than focusing on a few words or statements by the trial court." *Canizalez-Cardena*, 2012 IL App (4th) 110720, ¶ 22, 979 N.E.2d 1014. The defendant has the burden "to affirmatively establish that the sentence was based on improper considerations." *People v. Dowding*, 388 Ill. App. 3d 936, 943, 904 N.E.2d 1022, 1028 (2009).

¶ 17 Generally, where "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." *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18, 973 N.E.2d 459. "However, where 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, remandment is not required." *People v. Bourke*, 96 Ill. 2d 327, 332, 449 N.E.2d 1338, 1340 (1983). When making this determination, courts have considered: "(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." *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18, 973 N.E.2d 459.

¶ 18 In the case *sub judice*, defendant was charged with criminal sexual assault, a Class 1 felony, in that he knowingly committed an act of sexual penetration with B.S., who was

under 18 years of age, the act involved his penis and her vagina, and defendant was a family member of B.S. 720 ILCS 5/11-1.20(a), (b)(1) (West 2014). A defendant convicted of a Class 1 felony is subject to a sentence of 4 to 15 years in prison. 730 ILCS 5/5-4.5-30(a) (West 2014). The sentencing range for an extended-term Class 1 felony is 15 to 30 years in prison. 730 ILCS 5/5-4.5-30(a) (West 2014).

¶ 19 Defendant takes issue with the following comments made by the trial judge at the sentencing hearing:

> "But, you know, 8 to 60 years is a pretty wide range for these particular offenses, so clearly the Court has and will consider the factors in aggravation and mitigation that I have identified so far. As far as the factors in aggravation, I concur that the appropriate factors in aggravation by way of the statute would be that your conduct caused serious harm, that you do have a history of prior delinquency and criminal activity, that a sentence is necessary to deter others from committing the same type of crime, and that you held a position of trust, that being as a family member, to the victim. *Not only was she under the age of 18 years but this was also an offense specifically provided for under the statute that is a factor in aggravation as well.*" (Emphasis added.)

¶ 20 In arguing the trial court improperly considered the age of the victim as an aggravating factor at sentencing, defendant relies, in part, on our supreme court's decision in *People v. White*, 114 Ill. 2d 61, 499 N.E.2d 467 (1986). In that case, a jury found the defendant guilty of aggravated battery of a child, aggravated battery, and battery. *White*, 114 Ill. 2d at 63,

499 N.E.2d at 468. The trial judge sentenced the defendant to concurrent terms of four years in prison for aggravated battery of a child and aggravated battery. *White*, 114 Ill. 2d at 63-64, 499 N.E.2d at 468. In imposing the sentence, the judge remarked, in part, as follows:

> "The aggravating factors in the case are severe. There are basically four. One, your conduct caused serious physical and emotional harm to another. Second, you have a history of prior criminal activity, albeit a very minor one. Third, and of primary importance in my opinion, is the need to deter, which is probably evident in this type of offense to a degree found in no other. And finally, the fact that the victim in this case was under the age of 12 years, which makes you eligible for extended term sentence; and I would make that finding." *White*, 114 Ill. 2d at 64-65, 499 N.E.2d at 468.

¶ 21 On appeal, the defendant argued the trial judge improperly considered as an aggravating factor that the victim was a child in sentencing him for aggravated battery of a child, which required the victim to be under the age of 13. *White*, 114 Ill. 2d at 65, 499 N.E.2d at 469. The supreme court agreed, noting the legislature, in establishing the offense of aggravated battery of a child separate from aggravated battery, had "already made the youth of the victim an element of the offense." *White*, 114 Ill. 2d at 66, 499 N.E.2d at 469. The court held "because a necessary element of a conviction for aggravated battery of a child is that the victim is less than 13 years of age, the general fact that the victim is a child under the age of 13 years should not be considered as an aggravating factor in sentencing for this offense." *White*, 114 Ill. 2d at 66, 499 N.E.2d at 469.

¶ 22 Although the supreme court found the trial judge improperly considered the victim's age as an aggravating factor, the court held remand was not required. *White*, 114 Ill. 2d at 67, 499 N.E.2d at 470. The court noted the defendant's four-year sentence was one year above the minimum sentence for a Class 2 felony; the trial judge recited three other aggravating factors, stressing the importance of the need to deter others; and the judge highlighted the severity of the beating. *White*, 114 Ill. 2d at 67, 499 N.E.2d at 469-70. After reviewing the record, the supreme court concluded "the weight placed by the trial judge on the improperly considered factor was insignificant, and did not result in a greater sentence upon the defendant." *White*, 114 Ill. 2d at 67-68, 499 N.E.2d at 470.

¶ 23 In this case, we find the trial court did not improperly consider the victim's age as an aggravating factor. At the sentencing hearing, the court noted several aggravating factors, including the serious harm inflicted, defendant's prior criminal history, and the need to deter others. The court also mentioned defendant's position of trust, which is a statutory factor in aggravation, in relation to a victim under the age of 18. 730 ILCS 5/5-5-3.2(a)(14) (West 2014). The fact the victim was under the age of 18 was merely a prerequisite to application of the statutory aggravating factor pertaining to the position of trust. When taken in context and in conjunction with later statements by the court, it is even more evident the relevant portion of section 3.2(a)(14) was the position of trust held by defendant. The court, in explaining its sentence, noted "the impact that [defendant's] behavior has had upon a multitude of people and will continue to have upon a multitude of people," which included the child he fathered by his own stepdaughter. The court also noted how, in the telephone conversation introduced by the State, defendant sought to justify or minimize the nature of his conduct, namely impregnating his stepdaughter. Both comments were elaborative of the violation of trust in their relationship and

made no mention of the victim's age. As we find no error, we hold defendant to his forfeiture of this issue.

¶ 24 Even if the trial court had improperly considered the victim's age in aggravation, we find remandment is not required. See *White*, 114 Ill. 2d at 67, 499 N.E.2d at 470; *Bourke*, 96 Ill. 2d at 332, 449 N.E.2d at 1340. Here, the court's reference to the victim's age was made in passing and was not considered as an aggravating factor. Instead, the court focused on four aggravating factors—the serious harm caused, defendant's criminal history, the need to deter others, and defendant's position of trust. See *People v. Scott*, 2015 IL App (4th) 130222, ¶ 55, 25 N.E.3d 1257 (finding the trial court's consideration of a number of aggravating factors supported the conclusion that remand was unnecessary). The court's cumulative sentence of 20 years was well below the maximum of 60 years that defendant faced. Moreover, each 10-year sentence was only 2 years above what defendant had asked for. Further, defendant's sentence must be considered in light of the court's comments that this was his seventh felony conviction and he had already been sentenced to prison "a couple of times before." Defendant speculates perhaps his sentence might have been shorter had the court not "improperly" considered the victim's age as an aggravating factor or had trial counsel merely brought that to the court's attention. This is a somewhat tortured view of the realities facing the court at sentencing. Instead, the court, probably in response to defendant's request for an eight-year sentence, noted the last time defendant had been sentenced for a Class X felony, he served eight years, and that a sentence at the lower end of the range would not be appropriate. In light of defendant's prior criminal history, coupled with the fact he was being sentenced on two separate Class 1 felonies wherein he impregnated his 15-year-old stepdaughter, a sentence of only two years above that requested by defendant hardly leads us to infer a "reasonable possibility" exists that his sentence

might have been less had trial counsel pointed out what defendant contends was improper consideration of the victim's age. Thus, the record does not indicate the victim's age resulted in a sentence greater than that which would have been imposed had the age not been mentioned.

¶ 25 III. CONCLUSION

¶ 26 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.

¶ 27 Affirmed.