

2019 IL App (1st) 160699-U

No. 1-16-0699

Order filed February 26, 2019

Second Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 15 CR 6367
)	
TYRONE GIBSON,)	Honorable
)	Mauricio Araujo,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's eight-year sentence for delivery of a controlled substance within 1000 feet of a park is vacated and the case remanded for resentencing where the trial court erred in considering a factor implicit in the offense—the fact that defendant received compensation for committing the offense—as an aggravating factor at sentencing.

¶ 2 Following a bench trial, defendant, Tyrone Gibson, was found guilty of delivery of a controlled substance (heroin) within 1000 feet of a park (720 ILCS 570/407(b)(1) (West 2016)) and sentenced to eight years' imprisonment. Gibson appeals arguing that the trial court erred in

considering an improper aggravating factor at sentencing. We agree, vacate Gibson's sentence, and remand for resentencing.

¶ 3 Gibson was charged, by indictment, with delivery of a controlled substance within 1000 feet of a park and delivery of a controlled substance. Gibson waived his right to a jury, and the case proceeded to a bench trial. Gibson does not challenge the sufficiency of the evidence to sustain his conviction, and therefore we recite only the facts relating to his claim of sentencing error.

¶ 4 The evidence at Gibson's trial established that he accepted \$40 in prerecorded funds from an undercover officer in exchange for heroin. The transaction occurred less than 700 feet from a public park.

¶ 5 At sentencing, Gibson's presentence investigation report was introduced. The State offered in aggravation that Gibson had a criminal history that includes two felony drug convictions, along with two traffic violations and four misdemeanor convictions. Additionally, the State addressed another case pending before the trial court that involved Gibson. The State opted to *nolle prosequi* that case in order to use it in aggravation. That case involved another heroin transaction between Gibson and an undercover police officer. Based on his criminal history and the non-elected matter, the State recommended a sentence of ten years' imprisonment.

¶ 6 In mitigation, defense counsel noted that Gibson had a five-year-old child and was expecting another child in a few months. Gibson had graduated high school and was in his third year of college. He also was working prior to these charges. Counsel requested probation, even though it was outside the statutory range, in order for Gibson to financially support his children.

¶ 7 In allocution, Gibson denied that he sold heroin to an undercover officer and asked the court for leniency because he had a five-year-old child to support and another baby due soon.

¶ 8 In announcing sentence, the court stated that it had considered “the factual basis, the presentence investigation report, the history, character and attitude of the defendant, the evidence and arguments and statement of allocution presented, *** [the] statutory matters in aggravation and mitigation, and *** the circumstances of the offense.” The court specifically stated that in mitigation, Gibson’s conduct did not cause physical harm, his character and attitude indicated that he was unlikely to reoffend, and incarceration would cause hardship on his dependents. The court then pointed out that Gibson had a history of criminal activity and stated “[i]n aggravation, received compensation for committing the offense? Yes.” Ultimately, the court merged the counts and sentenced Gibson to eight years’ imprisonment for delivery of a controlled substance within 1000 feet of a park. Gibson filed a motion to reconsider sentence, which did not raise the sentencing error he now pursues on appeal. Gibson’s motion to reconsider his sentence was denied and he timely appealed.

¶ 9 Here, Gibson contends that the trial court improperly considered his receipt of compensation as an aggravating factor during sentencing, and as such, his sentence should be vacated and remanded for a new sentencing hearing without consideration of that factor.

¶ 10 Gibson acknowledges that he failed to preserve this issue for review by not raising it contemporaneously at sentencing or in his written postsentencing motion. See *People v. Thompson*, 238 Ill. 2d 598, 611 (2010). One of the reasons for requiring that defendant first raise the issue at sentencing or in a postsentencing motion is that it affords the trial court an opportunity to review defendant’s claim of sentencing error and save the delay and expense

inherent in appeal if the claim is meritorious. *People v. Heider*, 231 Ill. 2d 1, 18 (2008). There is also nothing in the record to suggest that trial counsel was prevented from objecting during the sentencing hearing or from raising the issue in a written postsentencing motion. Failure to preserve causes a defendant to forfeit his argument on appeal. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010).

¶ 11 That said, Gibson challenges his sentence as plain error. Forfeited claims related to sentencing may be reviewed for plain error. *People v. Nowells*, 2013 IL App (1st) 113209, ¶ 18 (citing *Hillier*, 237 Ill. 2d at 544). The plain error doctrine is both narrow and limited in scope (*Hillier*, 237 Ill. 2d at 545), and it is “not a general savings clause for all trial errors” (*People v. Scott*, 2015 IL App (4th) 130222, ¶ 41). The plain error doctrine allows a reviewing court to consider an unpreserved sentencing error when a clear or obvious error occurred and (1) the evidence at the sentencing hearing was closely balanced or (2) that error was so egregious as to deny the defendant a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Id.* A reviewing court conducting plain error analysis must first determine whether an error occurred, as “[w]ithout reversible error, there can be no plain error.” *People v. McGee*, 398 Ill. App. 3d 789, 794 (2010).

¶ 12 The question of whether a court relied on an improper factor in imposing a sentence is a question of law that we review *de novo*. *People v. Chaney*, 379 Ill. App. 3d 524, 527 (2008); see also *People v. Phelps*, 211 Ill. 2d 1, 12 (2004). If we find that the court improperly relied on the fact that Gibson received compensation as an aggravating factor, we will consider whether remand is required.

¶ 13 In determining an appropriate sentence, the trial court must weigh both aggravating and mitigating factors. See 730 ILCS 5/5-5-3.1, 3.2 (West 2014). When such factors have been presented for the trial court’s consideration, it is presumed, absent some contrary indication, that they have been considered. *People v. Brantley*, 2014 IL App (1st) 112633, ¶ 100. A trial court is not required to recite or assign a value to each factor in mitigation and aggravation that forms part of the record on appeal. *Id.*

¶ 14 However, a trial court may not consider a factor implicit in the offense as an aggravating factor in sentencing. *Phelps*, 211 Ill. 2d at 12. This is because a single factor cannot be used both as an element of an offense and as a basis for imposing a “ ‘harsher sentence than might otherwise have been imposed.’ ” *Id.* (quoting *People v. Gonzalez*, 151 Ill. 2d 79, 83-84 (1992)). Such dual use of a single factor is referred to as “double enhancement.” *Gonzalez*, 151 Ill. 2d at 85. The prohibition against double enhancements is based on the reasoning that, in setting the appropriate range of punishment for a criminal offense, the legislature necessarily considered the factors inherent in the offense. *Phelps*, 211 Ill. 2d at 12. The defendant bears the burden of establishing that a sentence was based on an improper aggravating factor. *People v. Abdelhadi*, 2012 IL App (2d) 111053, ¶ 9.

¶ 15 Illinois courts have held that compensation is an implicit factor in most drug transactions as “few drug deliveries are made as gifts,” and thus, the receipt of compensation should not be considered as an aggravating factor at sentencing. *People v. McCain*, 248 Ill. App. 3d 844, 851 (1993); see also *People v. Johnson*, 2017 IL App (4th) 160920, ¶¶ 46-47; *People v. M.I.D.*, 324 Ill. App. 3d 156, 159-60 (2001). Furthermore, it is apparent that the trial court did, in fact, rely on Gibson’s receipt of compensation because, as noted, the court specifically mentioned it and

noted that it was an aggravating factor. Accordingly, Gibson has demonstrated that an error occurred during his sentencing hearing.

¶ 16 That said, we must now determine whether either of the plain error prongs has been satisfied here. Gibson argues that remand for a new sentencing hearing is required under either prong because an error during sentencing affects a defendant's fundamental right to liberty and the evidence at his sentencing hearing was closely balanced. Although it is true that reliance on improper sentencing factors affects a defendant's fundamental right to liberty, which implicates second prong plain error, (*People v. Haley*, 2011 IL App (1st) 093585, ¶ 62), we find it is more appropriate to consider this case under the first prong (see *Johnson*, 2017 IL App (2d) 141241, ¶ 53 n.1 (highlighting the uncertainty in determining which prong is at issue in these cases)). See also *People v. Rathbone*, 345 Ill. App. 3d 305, 311 (2003) (stating that "it is not a sufficient argument for plain error review to simply state that because sentencing affects the defendant's fundamental right to liberty, any error committed at that stage is reviewable as plain error").

¶ 17 Having found error, we consider whether the evidence at Gibson's sentencing hearing was closely balanced. The trial court enumerated the factors specifically considered in mitigation and aggravation with little additional commentary. In mitigation, the court considered three factors, namely the lack of physical harm caused, Gibson's character and attitude suggesting he was unlikely to reoffend, and the hardship incarceration would cause Gibson's dependents. In aggravation, the court considered two factors: Gibson's criminal history and the compensation received for the offense. Although Gibson's criminal history is not minimal, the court made no further remarks regarding his previous criminal activity other than noting that it existed.

Particularly in light of the court's finding in mitigation that Gibson was not likely to reoffend, we find that the evidence at Gibson's sentencing hearing was closely balanced.

¶ 18 The consideration of an improper factor is not automatically cause for remand if the record demonstrates that the weight placed upon that factor was so insignificant that it did not lead to a greater sentence. *Heider*, 231 Ill. 2d at 21. In determining whether the trial court afforded the improper factor significant weight, we 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." *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 18. "[I]f the reviewing court is unable to determine the weight given to an improperly considered factor, the cause must be remanded for resentencing." (Internal quotations omitted.) *Walker*, 392 Ill. App. 3d at 302; see also *People v. Johnson*, 347 Ill. App. 3d 570, 576 (2004).

¶ 19 The record shows that the court briefly, but expressly, mentioned two factors in aggravation. Neither of those factors were either emphasized or downplayed. See *Johnson*, 2017 IL App (4th) 160920, ¶ 50 (remanding for resentencing where the trial court "did not make any dismissive or emphatic comments" and "simply enumerate[ed] [the factors] among other aggravating factors"). Additionally, the improper factor was not simply a general comment made in passing at sentencing. See *People v. Rios*, 318 Ill. App. 3d 354, 368 (2000) (finding that the trial court's mention of the "tragic impact" on the victim and the victim's family did not indicate that the court considered the victim's death in aggravation). There is no indication of how much weight each factor was given or whether the sentence would have been less had Gibson's receipt of compensation not been considered.

¶ 20 Gibson's conviction, as a Class X felony, had a corresponding statutory penalty range of six to thirty years' imprisonment, and the trial court sentenced him to eight years' imprisonment. Although the sentence was only two years above the statutory minimum, it is impossible to determine whether the sentence would have been shorter had Gibson's receipt of compensation not been considered. See *Abdelhadi*, 2012 IL App (2d) 111053, ¶ 19 (remanding for a new hearing even though the sentence was substantially below the maximum because the reviewing court could not discern how much weight was placed on compensation as an aggravating factor). Because it is unclear how much weight was given to the fact of compensation, we must vacate the sentence and remand for a new sentencing hearing. See *Walker*, 392 Ill. App. 3d at 301-03 (holding that a new hearing was necessary because the reviewing court could not determine that the consideration given to an improper factor was insignificant).

¶ 21 Vacated and remanded.