2019 IL App (1st) 163048-U

No. 1-16-3048

SIXTH DIVISION
MAY 24, 2019

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. 14 CR 6792
	)	
STEFEN HART,	)	Honorable
	)	James Michael Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 15-year sentence affirmed where the trial court properly considered the nature and circumstances of defendant's residential burglary conviction in aggravation. Fines and fees order corrected.

¶ 2 Following a bench trial, defendant Stefen Hart was convicted of residential burglary and sentenced to 15 years' imprisonment. On appeal, he argues the trial court improperly considered an element inherent in residential burglary as an aggravating factor when imposing his sentence. Defendant also argues he was wrongfully charged a $5 electronic citation fee and a $5 court

system fee. We vacate the $5 electronic citation fee and $5 court system fee, and affirm the judgment of the circuit court in all other respects.

¶ 3 Defendant was charged by information with one count of residential burglary (720 ILCS 5/19-3(a) (West 2010)), arising from an incident in Chicago.

¶ 4 At trial, Cerise Spivey testified that on March 1, 2012, she held a memorial service for her deceased oldest son at her house on South Eggleston Avenue. Spivey saw defendant for the first time at that service. In April 2012, she went on a trip to Las Vegas, which had been planned for her deceased oldest son's birthday, and left the house secure, with the doors and windows locked and unbroken. When she returned on the evening of April 28, 2012, Spivey found several items were missing, namely, her televisions, leather jackets, a laptop computer, a surround sound system, and her children's games. She called the police and later noticed that the window in her bedroom was broken, and that there was blood on the interior blinds and on broken pieces of glass on the window ledge. She called the police again, and they came and collected samples of the blood. Defendant did not have permission to enter Spivey's house while she was out of town or take her possessions, and no one was staying at, or had access to, her house while she was in Las Vegas.

¶ 5 Chicago police officer Phillip Rider, an evidence technician, testified that on April 29, 2012, he arrived at the house on South Eggleston to process the scene of a residential burglary. Spivey told Rider the broken window had been repaired, and he inventoried a swab he took of the blood on the blinds. The State entered a stipulation between the parties that forensic scientists would testify the DNA recovered from the inventoried blood matched defendant's DNA.

¶ 6 The trial court found defendant guilty of residential burglary and denied his motion for new trial.

¶ 7 At the sentencing hearing, the State rested on the presentencing investigation report (PSI) received by the court. The PSI showed defendant received probation on a narcotics case in 2004 and was convicted of possession of a stolen motor vehicle in 2005, for which he was sent to Cook County boot camp. Defendant was additionally convicted of possession of a firearm as a felon in 2006, aggravated unlawful use of a weapon in 2008, unlawful use of a weapon as a felon in 2009, and battery in 2011. Defendant denied belonging to a gang. According to the PSI, defendant described his childhood as "normal" due to the care his grandmother provided him, but reported that his mother struggled with substance abuse, and that he did not know his father. Defendant additionally stated in the PSI that he left high school in 2003 due to an arrest, but obtained a high school equivalency diploma in 2005. The PSI also showed that defendant worked several jobs through a temporary employment agency, and that he intended to become a car salesperson. Defendant reported that his two children live in Iowa and Indiana with their mothers. Additionally, he stated that he has never been diagnosed with any mental health, learning, or behavioral disorders, and that he used to have a few drinks and smoke one marijuana joint on the weekends. Lastly, the PSI stated defendant "was very cooperative and answered all questions without hesitation," and that "he looks favorably upon people that are educated, employed and not incarcerated."

¶ 8 Defense counsel raised defendant's lack of a gang history or substance abuse, and he argued that defendant is "very cooperative" and "has spent a significant period of time in custody during this case." In allocution, defendant stated that he had "a kind of messed up background"

when he "was at a younger age." Since then, he stated that he had two children to whom he owed a responsibility, and that he is "not as wild as [he] used to be when [he] was young." Defendant acknowledged that neither of his two children lived with him at the time of the hearing.

¶ 9 The trial court stated:

> "Mr. Hart, residential burglary is a serious offense. It is a non-probationable offense. And it's because people should feel secure and safe in their own homes. None of us likes to get *** our car stolen or pockets picked or anything like that. People are rightly, particularly offended when somebody comes into their house, the one place where they should feel secure.
>
> You come home and you find your house has been trashed or somebody breaking a window, it's something that's very upsetting to any individual. There's a saying, a home is a person's castle. That's the one place that should be secure and that's what you invaded.
>
> I think particularly the one time you were legitimately in that home, in Ms. Spivey's home, it was a memorial service for her son that had been killed. You obviously then used that information that you gleamed [*sic*] from seeing what that lady had in her own home to choose that home to target, the residential burglary.

> As if the poor lady didn't have enough negativ[ity] going on in her life, then come home and find out that it's been ransacked."

¶ 10 The trial court observed that defendant was subject to Class X felony sentencing based on his criminal history. The court summarized this history, noting that despite having been sent to boot camp, defendant continued to receive weapon-related convictions. The court stated, "So you have got five felony convictions, three of them having weapons. I think that's problematic." The court also noted that defendant has not "changed that much at all," and that he "came from a pretty stable background" and is not living with and taking care of his two children.

¶ 11 The trial court concluded:

> "I think the residential burglary in your case, given the circumstances of how you selected the victim is very aggravating. Your criminal history is very aggravating. Even though I considered all the mitigating factors contained therein in the presentence investigation and your attorneys argued as a Class X offender, you are going to be sentenced to 15 years Illinois Department of Corrections ***."

The fines and fees order charged defendant a total of $710. Defendant filed a motion to reconsider sentence, arguing his sentence is "excessive and unwarranted," and the trial court denied the motion.

¶ 12 On appeal, defendant argues the trial court improperly considered an element inherent to his residential burglary conviction in aggravation when imposing his sentence. The State

responds that the trial court properly considered all factors in aggravation and mitigation and was permitted to consider the nature and circumstances of defendant's crime.

¶ 13 Defendant acknowledges that he forfeited the issue now on appeal, since he failed to argue that the trial court considered an improper factor at the sentencing hearing and in his postsentencing motion. See *People v. Walker*, 2012 IL App (1st) 083655, ¶ 29. Nonetheless, he invokes the plain-error doctrine, which provides "a narrow and limited exception to the general forfeiture rule." (Internal quotation marks omitted.) *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12. For the plain-error doctrine to apply in the sentencing context, "a defendant must first show that a clear or obvious error occurred." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The defendant must then show that "(1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so egregious as to deny the defendant a fair sentencing hearing." *Id.* The plain-error doctrine is not "a general saving clause" that preserves "all errors affecting substantial rights" regardless of whether they were raised before the trial court. (Internal quotation marks omitted.) *People v. Herron*, 215 Ill. 2d 167, 177 (2005). However, before considering whether there was plain error, we must consider whether the trial court made a clear or obvious error. *Hillier*, 237 Ill. 2d at 545.

¶ 14 When sentencing a defendant, a trial court must consider both "the seriousness of the offense" and "the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11; *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 61. "[T]he trial court has broad discretionary powers in imposing a sentence," and its "sentencing decision is entitled to great deference." *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). A reviewing court may disturb the sentence "only if the trial court abused its discretion in the sentence it imposed." *People v. Jones*,

168 Ill. 2d 367, 373-74 (1995). A sentence is deemed an abuse of discretion where it is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *People v. Alexander*, 239 Ill. 2d 205, 212 (2010) (quoting *Stacey*, 193 Ill. 2d at 210). When a sentence falls within statutory guidelines, it is presumed proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46.

¶ 15 Defendant was convicted of residential burglary, a Class 1 felony. 720 ILCS 5/19-3(b) (West 2010). Having already received more than two Class 2 or higher felony convictions, defendant was sentenced as a Class X offender (730 ILCS 5/5-4.5-95(b) (West 2012)), with a sentencing range between 6 and 30 years (730 ILCS 5-4.5-25(a) (West 2010)). Although defendant's 15-year sentence is within the Class X statutory range and therefore presumed proper (*Knox*, 2014 IL App (1st) 120349, ¶ 46), defendant argues the court's sentence for residential burglary was based on an improper factor.

¶ 16 The trial court's consideration of an improper factor in aggravation when imposing a sentence is an abuse of discretion. *People v. Minter*, 2015 IL App (1st) 120958, ¶ 147. The issue of whether the court considered an improper factor is a question of law reviewed *de novo*. *People v. Bowen*, 2015 IL App (1st) 132046, ¶ 49. Where a defendant claims the trial court considered an improper factor when imposing a sentence, "there is a rebuttable presumption that the sentence was proper," and the defendant bears the burden of affirmatively demonstrating an error. *People v. Burnette*, 325 Ill. App. 3d 792, 809 (2001). In determining whether the trial court considered an improper factor, the reviewing court "will not focus on isolated statements but instead will consider the entire record." *Walker*, 2012 IL App (1st) 083655, ¶ 30. Once it is determined that the trial court considered an improper factor in aggravation, the reviewing court

need not remand the case for resentencing if it is clear from the record that the weight given to the improper factor was insignificant and did not lead to a greater sentence. *People v. Beals*, 162 Ill. 2d 497, 509-10 (1994); *People v. Pearson*, 331 Ill. App. 3d 312, 320 (2002).

¶ 17 "Generally, a factor implicit in the offense for which the defendant has been convicted cannot be used as an aggravating factor in sentencing for that offense." *People v. Phelps*, 211 Ill. 2d 1, 11 (2004). Nonetheless, courts should not apply this rule rigidly because public policy requires "that a sentence be varied in accordance with the circumstances of the offense." (Internal quotation marks omitted.) *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 13. "A trial court is not required to refrain from any mention of sentencing factors that constitute elements of the offense," as "a sentencing hearing is likely the only opportunity a court has to communicate its views regarding the defendant's conduct ***." *Id.* at ¶ 15. The determination of an appropriate sentence depends upon many relevant factors, one of which is "the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant." (Internal quotation marks omitted.) *People v. Saldivar*, 113 Ill. 2d 256, 268-69, 271-272 (1986).

¶ 18 Under section 19-3(a) of the Criminal Code of 1961 (Code) (720 ILCS 5/19-3(a) (West 2010)), "[a] person commits residential burglary who knowingly and without authority enters *** the dwelling place of another, or any part thereof, with the intent to commit therein a felony or theft." Defendant essentially claims the trial court improperly considered in aggravation the fact that he entered the "dwelling place of another," as set forth in section 19-3(a) of the Code. *Id.*

¶ 19 We find the trial court did not err by considering an improper factor in imposing defendant's sentence. At trial, Spivey testified that before the residential burglary occurred, defendant had been in her house during a memorial service for her deceased son. She later went on a previously planned trip for that son's birthday and returned home to find that a window had been broken and numerous possessions had been stolen from her house. The trial court described the circumstances of defendant's offense, essentially stating that defendant used the memorial service as an opportunity to see what Spivey had in her home in order to target it. The court recognized the effect that defendant's conduct had on Spivey, as she returned to her home to "find out that it's been ransacked." The trial court did not abuse its discretion by considering the nature and circumstances of defendant's residential burglary conviction and finding that "the circumstances of how [defendant] selected the victim is very aggravating." See *Sauseda,* 2016 IL App (1st) 140134, ¶ 18 (finding the trial court properly considered the nature and circumstances of the defendant's offense in aggravation when imposing a sentence).

¶ 20 In so holding, we reject defendant's challenge to the trial court's words at the sentencing hearing describing the seriousness of residential burglary and voicing the opinion that "people should feel secure and safe in their own homes." The trial court was "not required to refrain from any mention of sentencing factors that constitute elements" of residential burglary (*Sauseda*, 2016 IL App (1st) 140134, ¶ 15), and it never expressly stated it was considering the "dwelling place" element of defendant's residential burglary offense as an aggravating factor. To the contrary, the trial court expressly considered the circumstances of how defendant selected Spivey's house as a target to be "very aggravating." The court's comment simply touched on facts already known. Namely, that not only did Spivey lose her son, but that defendant as a

mourner used the opportunity of the memorial service to plan the burglary. The rule on which defendant's appeal is based "is not meant to be applied rigidly, because sound public policy dictates that a sentence be varied in accordance with the circumstances of the offense." (Internal quotation marks omitted.) *Id.* at ¶ 13; see also *Saldivar*, 113 Ill. 2d at 268 ("[T]his court did not intend a rigid application of the rule, thereby restricting the function of a sentencing judge by forcing him to ignore factors relevant to the imposition of sentence."). Thus, we will not disturb defendant's sentence based on a select few statements when, from the entire record, it is clear the trial court's reasoning properly focused on the nature and circumstances of defendant's offense. *Walker*, 2012 IL App (1st) 083655, ¶ 30.

¶ 21 To the extent defendant claims that the trial court improperly considered his criminal history in aggravation, when the legislature already considered the factor by mandating Class X sentencing, we disagree. The trial court noted that defendant's criminal history is "very aggravating," stating defendant had "not changed that much at all," and that he continued to receive convictions involving weapons despite having gone to Cook County boot camp. Thus, the trial court properly considered in aggravation defendant's criminal history when imposing its sentence within the Class X sentencing range. *People v. Thomas*, 171 Ill. 2d 207, 227 (1996) ("[A]lthough the legislature considered the prior convictions of certain defendants in establishing their eligibility for Class X sentencing, the legislature did not intend to impede a sentencing court's discretion in fashioning an appropriate sentence, within the Class X range, by precluding consideration of their criminal history as an aggravating factor."). As noted, we must presume the trial court properly considered the factors before it, and defendant has not met his burden in showing the trial court considered an improper factor. *Burnette*, 325 Ill. App. 3d at 809.

Accordingly, no error occurred, and plain-error review is unmerited. Because the trial court did not err by considering defendant's prior convictions in aggravation or as a factor inherent to defendant's offense, we need not reach defendant's alternative argument that trial counsel was ineffective for not raising and preserving these issues in the trial court. *People v. Robinson*, 2018 IL App (1st) 153319, ¶ 28 (declining to reach a claim of ineffective assistance where the trial court was found to have not committed an error).

¶ 22 Lastly, defendant argues that the trial court wrongfully charged him a $5 electronic citation fee (705 ILCS 105/27.3e (West 2012)) and a $5 court system fee (55 ILCS 5/5-1101(a) (West 2010)). Defendant did not challenge his fines and fees in his postsentencing motion, and therefore forfeited the issue. *People v. Smith*, 2018 IL App (1st) 151402, ¶ 4. However, the State agrees that we may review the forfeited claims and thus there is no forfeiture argument. See *People v. Bridgeforth*, 2017 IL App (1st) 143637, ¶ 46.

¶ 23 We note that, on February 26, 2019, after this appeal was fully briefed, our Supreme Court adopted new Illinois Supreme Court Rule 472, which sets forth the procedure in criminal cases for correcting sentencing errors in, as relevant here, the "imposition or calculation of fines, fees, assessments, or costs." Ill. S. Ct. R. 472(a)(1) (eff. Mar. 1, 2019). Rule 472 provides that, effective March 1, 2019, the circuit court retains jurisdiction to correct these errors at any time following judgment in a criminal case, even during the pendency of an appeal. *People v. Barr*, 2019 IL App (1st) 163035, ¶¶ 5-6 (citing Ill. S. Ct. R. 472(a) (eff. Mar. 1, 2019)). "No appeal may be taken" on the ground of any of the sentencing errors enumerated in the rule unless that alleged error "has first been raised in the circuit court." Ill. S. Ct. R. 472(c) (eff. Mar. 1, 2019).

¶ 24 Defendant here did not raise his challenges to the fines and fees order in the circuit court and, instead, raises them for the first time on appeal. However, as defendant filed his notice of appeal prior to the effective date of Rule 472 and this court has found the rule applies prospectively, we will address the merits of his claims. *Barr*, 2019 IL App (1st) 163035, ¶¶ 6, 8, 15. Our review is *de novo*. *Id.* ¶ 16.

¶ 25 This court has held that the $5 electronic citation fee does not apply to felonies (*Smith*, 2018 IL App (1st) 151402, ¶ 12), and that the $5 court system fee only applies to violations of "the Illinois Vehicle Code or of similar provisions contained in county or municipal ordinances." *People v. Brown*, 388 Ill. App. 3d 104, 112 (2009). As such, the $5 electronic citation fee and $5 court system fee must be vacated. We modify the fines and fees order accordingly. *People v. Avery*, 2012 IL App (1st) 110298, ¶ 51 (noting that remand is unnecessary for correcting fines and fees).

¶ 26 For the foregoing reasons, we affirm defendant's 15-year sentence for residential burglary and vacate the $5 electronic citation fee and $5 court system fee.

¶ 27 Affirmed in part and vacated in part; fines and fees order corrected.