2019 IL App (1st) 170766-U

No. 1-17-0766

Order filed July 26, 2019

Fifth Division

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 11197
	)	
GEORGE FOX,	)	Honorable
	)	Diane G. Cannon,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's 10-year sentence for possession of a stolen motor vehicle is affirmed where the record establishes that the trial court properly considered defendant's mitigation evidence.

¶ 2 Following a bench trial, defendant George Fox was convicted of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2014)) and sentenced to 10 years' imprisonment. On appeal, defendant argues the trial court denied him his right to a fair sentencing hearing

because it improperly applied defendant's mitigation evidence as aggravation, as shown by the trial court's remarks regarding defendants' witnesses who testified in mitigation. We affirm.[1]

¶ 3 Defendant was charged with one count of possession of a stolen motor vehicle, a Class 2 felony. At trial, the evidence showed that, on June 24, 2015, Evanjelina Arredondo's Jeep Liberty, license plate V312073, was stolen from an autobody shop when a mechanic left the keys in the car. On July 1, 2015, a Chicago police officer saw defendant approach the stolen Jeep, remove the front and rear license plates with a screwdriver, replace the rear plate with another plate, and then unlock and enter the vehicle on the driver's side. When police detained defendant in the Jeep, they recovered two different Illinois license plates, including plate number V312073, and a screwdriver. Defendant told the police he knew he should not have gotten into the Jeep.

¶ 4 The trial court found defendant guilty of possession of a stolen motor vehicle. It denied his motion and amended motion for a new trial. The case proceeded to sentencing.

¶ 5 The presentence investigation report (PSI) and criminal history report presented at sentencing showed defendant had prior convictions for possession of a controlled substance (1994, 1995, 1996, 2002), possession of a stolen motor vehicle (1999, 2008), possession of cannabis (2001), retail theft (2003, 2004, 2006), attempt possession of a controlled substance (2003), driving on a suspended/revoked license (2004, 2006), burglary (2008), criminal trespass to vehicles (2011), theft (2014), and criminal trespass to land (2015). His sentences ranged from six months conditional discharge to seven years' imprisonment, the latter imposed for the 2008 possession of a stolen motor vehicle offense.

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 6 In the PSI, defendant reported that, after age 12 when his parents split, he was raised solely by his mother, who provided a "good stable household" and supported the family by her employment. He was close to all his family members, including his father and two siblings. Defendant told the investigator he had "fathered three children with his live-in girlfriend, Tiffany Swygeert [*sic*]: Pierre, age 23, Jason, age 20, and Sharee, age 9." He stated that, before his incarceration, "he shared in the responsibilities of raising the couple's children," the children were "currently doing well," and "being raised by Ms. Swygeert [*sic*]." The assistant state's attorney informed the court that both sides reviewed the PSI, which required only one correction regarding the length of defendant's sentence for his possession of a stolen motor vehicle conviction in 1999.

¶ 7 In aggravation, the State argued defendant had 17 prior convictions, including 11 felony convictions, five of which were Class 2 or greater offenses. The State argued defendant therefore had to be sentenced as a Class X offender, with a sentencing range of 6 to 30 years. It requested a sentence of 18 years' imprisonment.

¶ 8 Defendant presented two witnesses in mitigation: his mother Bobby Fox and his live-in girlfriend Tiffany Swygert. Fox testified she had been the director of human resources for the Illinois Guardianship and Advocacy Commission for 11 years. She and those in her community had "nothing but good things" to say about defendant. In her community, defendant was known as her "helping son," because he patiently helped the elderly and they trusted him. Fox testified regarding two events she claimed spoke to defendant's character. In the first, the then 18-year old defendant performed CPR on a neighbor's toddler who had fallen into a bucket of water and saved the child's life. In the second, defendant calmed down a sexual abuse survivor who he

encountered running from the park in the Austin area of Chicago, and "made her feel safe" until the police arrived.

¶ 9 Swygert testified she had been a junior mortgage underwriter for 18 years and had been in a continuous relationship with defendant for 25 years. She testified that defendant was "standup," caring, supportive and family-oriented. When Swygert was diagnosed with lupus, defendant was there for her "continuously throughout the whole ordeal," including during her chemotherapy treatments. Swygert testified defendant was a good father to their 21-year old son, and had a good relationship with him. When the court questioned Swygert about another child, nine-year old "Sheree," she testified that she and defendant had only one living child together and another son who died at birth. Swygert did not know "if [defendant] had any outside kids." When asked by the court if learning of any other children would surprise her, Swygert said "yes."

¶ 10 In allocution, defendant stated that, since he had been in jail, he had been thinking about his life and how it had negatively affected himself, his "kids", his significant other, and his mother. In jail, he had attended a Life Skills Learning Program, and narcotics anonymous and alcoholics anonymous groups, which had helped him "deal with" the issues that "led [him] up to this point thus far." Defendant asked the court to not only look at his "rap sheet," which reflected life choices he had made and "paid for." He asserted that, upon his release, he would do everything in his power never to return to jail, would be supportive of his family, and planned to get a "legitimate job" so that he could be a productive member of society.

¶ 11 The trial court sentenced defendant to 10 years' imprisonment in the Illinois Department of Corrections. It stated it had considered all factors in aggravation and mitigation, the

presentence investigation report, the witness testimony, the completion of both programs at the jail, and a letter from jail Chaplain Robert Velez. The court addressed Fox and Swygert's testimony, stating:

> "We heard from his mother. And I don't mean to be disrespectful. How a woman could be in charge of guardianship for the State of Illinois and is the mother and guardian – sole guardian for many years of a man who has been convicted 18 times is kind of mind-boggling.
>
> His significant other has testified you mean so much to her. She sits here – again, no disrespect – unaware that he has two other grown children, a 21-year old and a 9-year old. It's beyond my comprehension how someone could be living with someone and that person is – and caring for someone is unaware of two children."

The court noted that it knew defendant's life was "not the sum and substance" of his convictions and he had served his time, but the mandatory sentence of six to 30 years "was made for a particular reason" and the legislature had determined that, after three Class 2 felony convictions, "enough is enough."

¶ 12 Defendant filed a motion to reconsider sentence, arguing that the sentence was excessive in view of his background and the nature of the offense, and that the court improperly considered in aggravation matters implicit in the offense. The court denied the motion, noting that, in view of defendant's background and nature of the offense, the sentence was not excessive as it was "not even near the mid range" for the offense. The court stated it was "giving [defendant] an opportunity to get back out into society within a relatively short period of time."

¶ 13 On appeal, defendant contends that, based upon the trial court's comments regarding mitigation witnesses Fox and Swygert, it improperly used his evidence in mitigation against him as aggravation. Specifically, he asserts the court improperly focused on the "mind boggling" idea that someone employed by the Illinois Guardianship and Advocacy Commission (Fox) could raise a child with defendant's criminal record and found it "beyond comprehension" that someone (Swygert) could live with another person and be unaware they had other children. Defendant argues the court abused its discretion when, by "disparaging" his mother and girlfriend, it ignored the mitigating nature of their testimony and used it against him. Defendant requests that we remand for a new sentencing hearing.

¶ 14 As an initial matter, defendant concedes that, while defense counsel filed a motion to reconsider sentence, counsel did not object to this specific error in the written motion or at sentencing, and therefore, this error has technically been forfeited. *See People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010) (holding that to preserve claims for appeal, a defendant must make both a contemporaneous objection and file a written postsentencing motion raising the issue). He argues, however, that the claim may be reviewed under the plain error doctrine or, alternatively, as an ineffective assistance of trial counsel claim.

¶ 15 Sentencing issues raised for the first time on appeal may be reviewed under the plain-error doctrine. Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967); *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. In the sentencing context, a reviewing court may address a forfeited claim if a clear and obvious error occurred and either (1) the evidence at the sentencing hearing was closely balanced, or (2) the error was so serious that it deprived the defendant of a fair sentencing hearing. *Hillier*, 237 Ill. 2d at 545. The initial consideration in this analysis is whether a clear and

obvious error occurred at all. *Id*. "When a defendant fails to establish plain error, the result is that the 'procedural default must be honored.' " *People v. Naylor*, 229 Ill. 2d 584, 593 (2008) (quoting *People v. Keene*, 169 Ill. 2d 1, 17 (1995)).

¶ 16 A trial court's sentencing decision is reviewed under the abuse of discretion standard of review. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). A trial court will be found to have abused its discretion where the sentence is " 'greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense.' " *Id*. (quoting *People v. Stacey*, 193 Ill. 2d 203, 210 (2000)). The trial court has broad discretion in imposing a sentence, and its sentencing decisions are afforded great deference, because the trial judge "observed the defendant and the proceedings," and is in a better position to weigh factors such as defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *Id*. at 212-13. The reviewing court " 'must not substitute its judgment for that of the trial court merely because it would have weighed these factors differently.' " *Id.* at 213 (quoting *Stacey*, 193 Ill. 2d at 209). However, we must interpret sentencing laws "in accord with common sense and reason" and not merely rubber stamp the trial court's judgment, so as to "avoid an absurd or unduly harsh sentence." *People v. Allen*, 2017 IL App (1st) 151540, ¶ 1.

¶ 17 Defendant was convicted of possession of a stolen motor vehicle, a Class 2 felony. 625 ILCS 5/4-103(a)(1), (b) (West 2014). Due to his criminal background, the court was required to sentence him as a Class X offender, with a sentencing range of 6-30 years' imprisonment. 730 ILCS 5/5-4.5-95(b) (West 2014); 730 ILCS 5/5-4.5-25(a) (West 2014). Because defendant's 10-year sentence falls within the statutory guidelines, it is presumed to be proper. *People v. Knox*, 2014 IL App (1st) 120349, ¶ 46. Further, the 10-year sentence is not disproportionate to

defendant's 12th felony conviction and 18th conviction overall. See *People v. Wilson*, 2016 IL App (1st) 141063, ¶ 13 (criminal history alone may warrant a sentence substantially above the minimum; the defendant was not deterred by previous, more lenient sentences).

¶ 18 Defendant concedes that his sentence is within the statutory guidelines, but argues that the trial court improperly impugned the integrity of Fox and Swygert and thereby was not only disrespectful but used his mitigating evidence against him in aggravation. Defendant contends the court's "verbal assault" on Fox and Swygert was "not a discussion of the evidence, nor did it reflect the consideration of any other proper matter." He asserts the court, in expressing its personal opinions regarding Fox's parenting skills and Swygert's romantic relationship, "went far astray from proper aggravating factors." Defendant argues the court's comments made it clear the court was not considering Fox's testimony regarding defendant's trustworthiness and helpfulness in the community or Swygert's testimony that defendant was caring, supportive, and family-oriented in mitigation.

¶ 19 A sentence should reflect both the seriousness of the offense and the objective of restoring the offender to useful citizenship. Ill. Const. 1970, art. I, § 11; *People v. Neasom*, 2017 IL App (1st) 143875, ¶ 48. To that end, the trial court must consider all factors in aggravation and mitigation. *People v. McWilliams*, 2015 IL App (1st) 130913, ¶ 27. The trial court is presumed to consider "all relevant factors and any mitigating evidence presented (*People v. Jackson*, 2014 IL App (1st) 123258, ¶ 48), but has no obligation to recite and assign a value to each factor (*People v. Perkins*, 408 Ill. App. 3d 752, 763 (2011)). Further, the trial court is not required to lend more weight to the mitigating factors than to the seriousness of the offense. *People v. Kelley*, 2015 IL App (1st) 132782, ¶ 94. The defendant bears the burden of making an

affirmative showing that the sentencing court did not consider the relevant factors. *Wilson*, 2016 IL App (1st) 141063, ¶ 14. For the following reasons, we find defendant has failed to meet that burden here.

¶ 20 Defendant contends that the court expressed erroneous beliefs and personal prejudices regarding the witnesses that were irrelevant, malicious, and completely inappropriate. Defendant claims the court's comments that it was "mindboggling" that Fox, who worked for the Illinois Guardianship and Advocacy Commission, was the mother of an 18-time convicted criminal and incomprehensible that Swygert was unaware that defendant had fathered two other children were inappropriate personal opinions regarding Fox's parenting skills and Swygert's romantic relationship. Another interpretation is that the court was commenting on defendant's moral character, credibility, and mentality, not that of Fox and Swygert. See *Alexander*, 239 Ill. 2d at 212-213 (trial court's sentencing decisions are entitled to great deference, as the trial judge, having observed the defendant and the proceedings, has a far better opportunity to weigh such factors as the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age). Regardless of the court's intention in making these comments, when read in context, it is clear the court did not rely upon these factors in sentencing defendant. Where the record reveals that the weight placed upon the improperly considered aggravating factor was insignificant and did not lead to a greater sentence, remandment is not required. *People v. Beals*, 162 Ill. 2d 497, 509-10 (1994); *People v. Bourke*, 96 Ill. 2d 327, 332 (1983); *People v. Randall*, 2016 IL App (1st) 143371, ¶¶ 69-71; *People v. Walker*, 392 Ill. App. 3d 277, 301 (1st Dist. 2009).

¶ 21 Further, although the trial court cannot give mitigating evidence no weight by excluding it from consideration, the court " 'may determine the weight to be given' " to that mitigating evidence. *Id.* at 252-53 (quoting *People v. Davis*, 185 Ill. 2d 317, 344 (1998)). Here, the record reflects that the trial court did consider the mitigating testimony and gave it some weight in mitigation, as demonstrated by the fact that, although the trial court emphasized defendant's extensive criminal history at sentencing, it told defendant that it knew his life was "not the sum and substance" of his prior convictions, and subsequently remarked that it was "giving [defendant] an opportunity to get back out into society within a relatively short period of time." Accordingly, defendant has not affirmatively shown that the trial court did not adequately consider the mitigating testimony in sentencing him and thus has failed to meet his burden to establish the sentence was based on improper considerations. See *Wilson*, 2016 IL App (1st) 141063, ¶ 14.

¶ 22 In sum, we find that the trial court did not abuse its discretion in imposing a 10-year prison sentence for possession of a stolen motor vehicle where it properly considered the mitigating testimony. Having found no error, there can be no plain error, and therefore, defendant's procedural default must be honored. See *Naylor*, 229 Ill. 2d at 593. Because there was no plain error, we need not address defendant's alternative argument that his defense counsel was ineffective. See *People v. Jaimes*, 2019 IL App (1st) 142736, ¶ 58 (where there is no plain error, there can be no ineffective assistance of counsel).

¶ 23 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 24 Affirmed.