2019 IL App (1st) 170799-U

FIFTH DIVISION
Order filed: September 13, 2019

No. 1-17-0799

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
	)	
v.	)	No. 15 CR 6131
	)	
	)	
ANTOINE ELLIS	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's judgment is affirmed over the defendant's contention that it improperly considered a pending charge during sentencing and that his sentence was excessive.

¶ 2 Following a bench trial, the defendant, Antoine Ellis, was convicted of two counts of aggravated discharge of a firearm and sentenced to two concurrent terms of eight years' imprisonment with a two-year term of mandatory supervised release (MSR). On appeal, the

defendant contends that the trial court improperly considered a pending charge for public indecency as an aggravating factor during sentencing and that his two concurrent terms of eight years' imprisonment were excessive. For the following reasons, we affirm.

¶ 3 The defendant was charged by information with six counts of attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)), and two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2014)), for firing into a vehicle occupied by Chantel Johnson and Tynisha Hilliard.

¶ 4 At trial, Johnson testified that, on April 2, 2015, she was in the passenger seat of the vehicle Hilliard was driving. As Hilliard approached the intersection of 92nd and Dobson Street, Johnson observed the defendant point his hand toward the vehicle and then heard a gunshot. As the gunshots continued, Johnson and Hilliard "ducked down." However, Johnson resurfaced in time to see that the defendant had moved closer to the vehicle. According to Johnson, Hilliard then drove to a nearby gas station where she informed the police about the shooting and provided a description of the defendant. Five minutes later, police officers transported the defendant to the gas station, and she identified him as the shooter.

¶ 5 Hilliard testified that she observed the defendant do "something with his hand" and then she heard about five gunshots, all of which struck her vehicle. According to Hilliard, after giving the police a description of the defendant at the gas station, the officers returned with the defendant and she identified him as the shooter.

¶ 6 The trial court found the defendant guilty of all counts of attempted first-degree murder and aggravated discharge of a firearm. The defendant moved for a new trial and the trial court acquitted him on the six counts of attempted first-degree murder, but upheld the finding of guilty on the two counts of aggravated discharge of a firearm.

¶ 7 At the sentencing hearing, the trial court heard evidence in aggravation and in mitigation. The State argued in aggravation that the defendant's conduct threatened serious harm because both Johnson and Hilliard would have been seriously injured if the bullets hit them. The State also outlined the defendant's prior convictions for burglary. Finally, the State indicated that it wished to "burn" in aggravation the defendant's pending charge for public indecency and asked the trial court to consider the pending charge, to which the trial court responded "okay." The State requested a sentence "towards the higher end" of the 4 to 15-year range for a Class 1 felony. 720 ILCS 5/24-1.2(a)(2), (b) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014).

¶ 8 In mitigation, the defendant briefly apologized for the conduct related to his pending public indecency charge. Counsel for the defendant noted his close relationship with his family, especially with his mother and girlfriend. Counsel also highlighted that the defendant had a good relationship with his peers and teachers and had no history of disciplinary problems at school. Finally, counsel for the defendant argued that, because of his youth and the seriousness of the offense, the minimum sentence of four years is best to restore him "to useful citizenship."

¶ 9 The trial court sentenced the defendant to two concurrent terms of eight years' imprisonment on two counts of aggravated discharge of a firearm, stating that it "considered the evidence at trial, the gravity of the offense, the presentence investigation report, *** all evidence, information, and testimony in aggravation and mitigation, *** the potential for rehabilitation, *** the statement of the defendant, and all hearsay presented and deemed relevant and reliable." The defendant filed a motion to reconsider the sentence, which was denied. This appeal followed.

¶ 10 The defendant first contends that the trial court improperly considered his pending charge for public indecency as an aggravating factor during sentencing and, because the record does not

show how much weight was given to that pending charge, his sentence should be vacated. We disagree.

¶ 11 Initially, we note, and the defendant concedes, that he has forfeited this argument on appeal by failing to raise both a contemporaneous objection and a written postsentencing motion in regard to the trial court's consideration of the pending charge. *People v. Hillier*, 237 Ill. 2d 539, 544 (2010). Notwithstanding, he asks this court to review this argument under the plain-error doctrine. *People v. McGuire*, 2016 IL App (1st) 133410, ¶ 12. Under this narrow and limited exception to forfeiture, the defendant has the burden of proving that a clear or obvious error occurred and either (1) the evidence was "so closely balanced that the error alone threatened to tip the scales against the defendant," or (2) the consideration of the pending charge denied him a fair sentencing hearing. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007); see also *McGuire*, 2016 IL App (1st) 133410, ¶ 12. However, before invoking the plain-error exception, we must first determine whether an error actually occurred. *People v. Chapman*, 194 Ill. 2d 186, 226 (2000).

¶ 12 "Bare arrests and pending charges may not be utilized in aggravation of a sentence." *People v. Johnson*, 347 Ill. App. 3d 570, 575 (2004). However, consideration of such charges does not require remand when "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 (2008). The fact that a trial court has knowledge of other arrests before imposing a sentence does not amount to reversible error as the trial court is presumed to have recognized and disregarded incompetent evidence unless the record reflects otherwise. *Bowen*, 2015 IL App (1st) 132046, ¶ 55. "We consider the record as a whole when determining whether the trial court improperly imposed a sentence, and will not focus on isolated statements." *Id.* at ¶ 50.

¶ 13 Reviewing the record as a whole, we find no definite indication that the trial court improperly relied on the defendant's pending charge. " '[T]he record must affirmatively disclose that the arrest or charge was considered by the trial court in imposing sentence.' " *Id.* at ¶ 55 (quoting *People v. Garza*, 125 Ill. App. 3d 182, 186 (1984)).

¶ 14 In this case, the trial court acknowledged the State's request to "burn" the pending charge in aggravation. However, the trial court never affirmatively stated that the pending charge was considered in imposing the sentence. Therefore, we presume the trial court knew the law and did not improperly rely on the pending charge. See *Bowen*, 2015 IL App (1st) 132046, ¶ 55; see also *People v. Jones*, 81 Ill. App. 3d 798, 806-07 (1980) (new sentencing hearing not required where, at the sentencing hearing, the trial court stated that it reviewed the defendant's record, including the fact that he "ha[d] an extensive record though only two convictions," because the statement was too unclear to represent a "definite indication" that the trial court considered the prior arrests). Because we find the trial court committed no error, there can be no plain error to excuse the defendant's forfeiture of this issue. *People v. Williams*, 193 Ill. 2d 306, 349 (2000).

¶ 15 The defendant next contends that his sentence was excessive in light of the following: his youth; his high potential for rehabilitation; his minimal criminal background; and the fact he did not pose any greater threat of harm to the victims than normally posed by the offense. We disagree.

¶ 16 The trial court has broad discretionary powers in imposing a sentence, and a defendant's sentence will not be altered by a reviewing court absent an abuse of discretion. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). "It is the defendant's burden to affirmatively establish that the sentence was based on improper considerations." *People v. Bowen*, 2015 IL App (1st)

132046, ¶ 49. This court will not reverse a sentence unless it is clearly evident that the sentence was improperly imposed. *People v. Ward*, 113 Ill. 2d 516, 526 (1986)

¶ 17 When determining an appropriate sentence, the relevant factors to consider include "the nature of the crime, protection of the public, deterrence, and punishment, as well as the defendant's rehabilitative prospects and youth." *People v. Starnes*, 374 Ill. App. 3d 132, 143 (2007). "[T]he spirit and purpose of the law are upheld when a sentence reflects the seriousness of the offense and gives adequate consideration to the rehabilitative potential of the defendant." *People v. Heflin*, 71 Ill. 2d 525, 545 (1978). However, the court is not required to give the defendant's rehabilitative potential greater weight than it gives the seriousness of an offense. *People v. Tatum*, 181 Ill. App. 3d 821, 826 (1989). Rather, the seriousness of an offense is the most important factor a court should consider when imposing a sentence. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 55. "[A] trial court is not required to expressly outline its reasoning for sentencing, and absent some affirmative indication to the contrary (other than the sentence itself), we must presume that the trial court considered all mitigating factors on the record." *Id*. Again, the trial court has broad discretion in imposing a sentence, and a defendant's sentence will not be altered by a reviewing court absent an abuse of that discretion. *Alexander*, 239 Ill. 2d at 212.

¶ 18 The defendant has not identified anything in the record which would establish that the trial court abused its discretion in sentencing. Rather, the record expressly reflects that the trial court considered the same factors that the defendant now relies on for this appeal—his rehabilitative potential, minimal criminal background, and the gravity of the offense. The defendant is essentially requesting that this court reweigh the factors in aggravation and in mitigation, which we cannot do. *People v. Streit*, 142 Ill. 2d 13, 19 (1991).

¶ 19 Further, we find that the defendant's sentence of two concurrent terms of eight years' imprisonment—only four years above the minimum sentence permissible for a Class 1 felony—is not disproportionate to the gravity of his offense, during which he fired multiple shots, in close range, at a vehicle occupied by two individuals. 720 ILCS 5/24-1.2(a)(2), (b) (West 2014); 730 ILCS 5/5-4.5-30(a) (West 2014); See *People v. Burton*, 2015 IL App (1st) 131600, ¶ 38 (absent an abuse of discretion, a trial court's sentence within the permissible sentencing range and constitutional guidelines is presumed to be proper). Accordingly, we find that the trial court did not abuse its discretion in sentencing.

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

¶ 21 Affirmed.